

Rapid Research Report

Can undocumented immigrants pursue protection under the ADA?

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Executive Summary and Definitions

This report will examine how a lack of legal immigration status could impact an individual's ability to pursue protection under the Americans with Disabilities Act (ADA).¹ Broadly, immigration status does not legally influence a person's ability to pursue protection under the ADA because the ADA applies to anyone within the jurisdiction of the United States (U.S.).² Nevertheless, undocumented individuals without a legal immigration status may be less likely to pursue protection under the ADA due to a fear of law enforcement apprehension, retaliation, deportation, or other consequences.³


This report will use the term "immigrant" to refer to people who are not citizens of the U.S. via either birth or naturalization. While the term "immigrant" implies that a person has permanently immigrated, this report will use "immigrant" to refer to both individuals who seek to stay in the U.S. permanently and to those who are in the U.S. temporarily and wish to return to their country of origin (otherwise called migrants).⁴ The term "immigration status" will be used to refer to any legal permission for an individual to reside in the U.S., including U.S. citizenship, permanent residency (also known as a green card), student visas, and work visas, among other permissions.⁵ The term "undocumented" will be used to refer

to individuals who reside in the U.S. but do not have a legal immigration status.⁶

In the context of this report, the use of the terms “immigration status” and “undocumented” is not intended to categorize individuals as “legal” or “illegal” immigrants. Instead, the report uses these terms to draw a distinction between individuals who enjoy the privileges associated with a legal immigration status and those who do not. This report will discuss immigration status and the ADA broadly and briefly discuss issues that are relevant to the six states that the Rocky Mountain ADA Center serves, namely: Colorado, Utah, Wyoming, Montana, North Dakota, and South Dakota.⁷

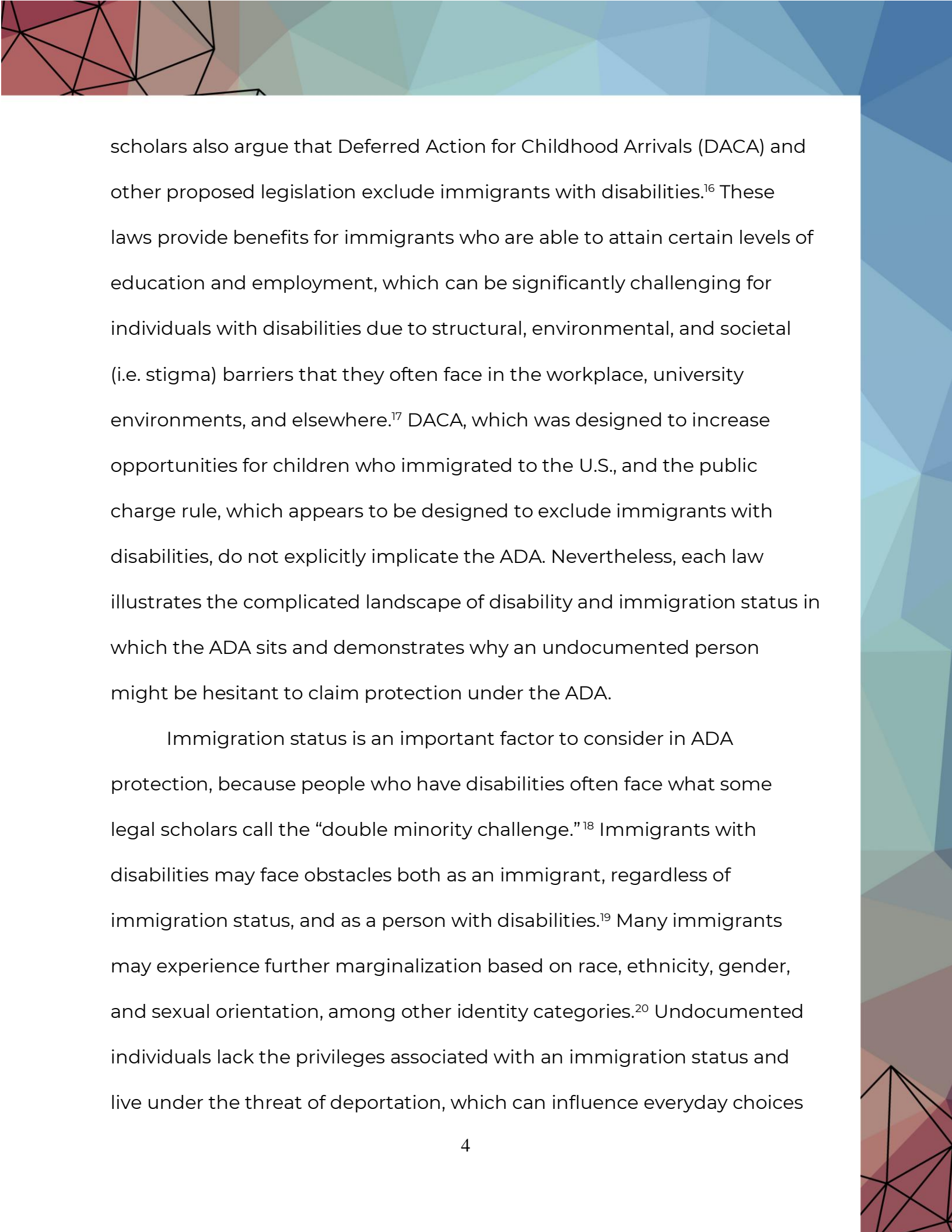
Introduction

Immigration has occupied an important place in the history of the U.S. since the country’s inception. Due to the economic prosperity and the narrative of the “American Dream” in the U.S., individuals from other countries often aim to reside and work in the U.S.⁸ However, legal pathways to immigration status can be challenging, if not impossible, to obtain.⁹ Therefore, many immigrants enter the U.S. without a visa or other legal permission to be in the country, or they may overstay a valid visa after entering the U.S. with authorization.¹⁰ Over the last several years, the question of immigration status has become an increasingly controversial




topic and members of all political parties debate who should be allowed to enter and stay in the country and how government resources should be allocated among citizens and non-citizens in the U.S.¹¹

Just as immigration holds a place in the story of the U.S., disability holds a place in the country's story of immigration. Disability studies scholar Katherine Perez argues that the U.S. immigration system has always placed value on people based on race and ability.¹² Indeed, the Immigration Act of 1882, which is largely understood as the first major piece of immigration law in the U.S., used derogatory language to exclude people with disabilities from entering the country. The act is no longer good law, but it stated that anyone labeled as “lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge” would be prohibited from entering the U.S.¹³ While this language was written over 130 years ago and is now inappropriate in disability conversations, it demonstrates the foundation upon which disability and immigration law rest. Furthermore, such language is not entirely removed from the U.S. rhetoric regarding these issues in the present day. For example, in 2018, the Department of Homeland Security proposed an administrative rule, colloquially referred to as the “public charge” rule, that specified disability as a factor that weighs negatively when seeking immigration status.¹⁴ The rule went into effect in 2022, and categorizes people with disabilities as a “public charge” on public systems who should not be entitled to an immigration status.¹⁵ Some



scholars also argue that Deferred Action for Childhood Arrivals (DACA) and other proposed legislation exclude immigrants with disabilities.¹⁶ These laws provide benefits for immigrants who are able to attain certain levels of education and employment, which can be significantly challenging for individuals with disabilities due to structural, environmental, and societal (i.e. stigma) barriers that they often face in the workplace, university environments, and elsewhere.¹⁷ DACA, which was designed to increase opportunities for children who immigrated to the U.S., and the public charge rule, which appears to be designed to exclude immigrants with disabilities, do not explicitly implicate the ADA. Nevertheless, each law illustrates the complicated landscape of disability and immigration status in which the ADA sits and demonstrates why an undocumented person might be hesitant to claim protection under the ADA.

Immigration status is an important factor to consider in ADA protection, because people who have disabilities often face what some legal scholars call the “double minority challenge.”¹⁸ Immigrants with disabilities may face obstacles both as an immigrant, regardless of immigration status, and as a person with disabilities.¹⁹ Many immigrants may experience further marginalization based on race, ethnicity, gender, and sexual orientation, among other identity categories.²⁰ Undocumented individuals lack the privileges associated with an immigration status and live under the threat of deportation, which can influence everyday choices



including those related to disability rights under the ADA. Individuals with an immigration status typically enjoy a series of privileges including work permission, a social security number, healthcare coverage, and other benefits. Without these privileges, everyday life can be difficult to navigate. Even with an immigration status, some individuals may not always be eligible for all privileges, as the 2017 Executive Order 13769, colloquially referred to as the “Muslim Ban” illustrated.²¹ Executive Order 13769 prohibited immigration from seven countries in which many citizens practice Islam.²² Initially, representatives of President Trump stated that the order would inhibit U.S. green card holders from these seven countries from entering.²³ Eventually, the administration clarified and stated that green card holders (those with permanent residency in the U.S.) would be subject to additional inspections.²⁴ The confusion surrounding this order illustrates the precarity that many immigrants feel, regardless of immigration status.

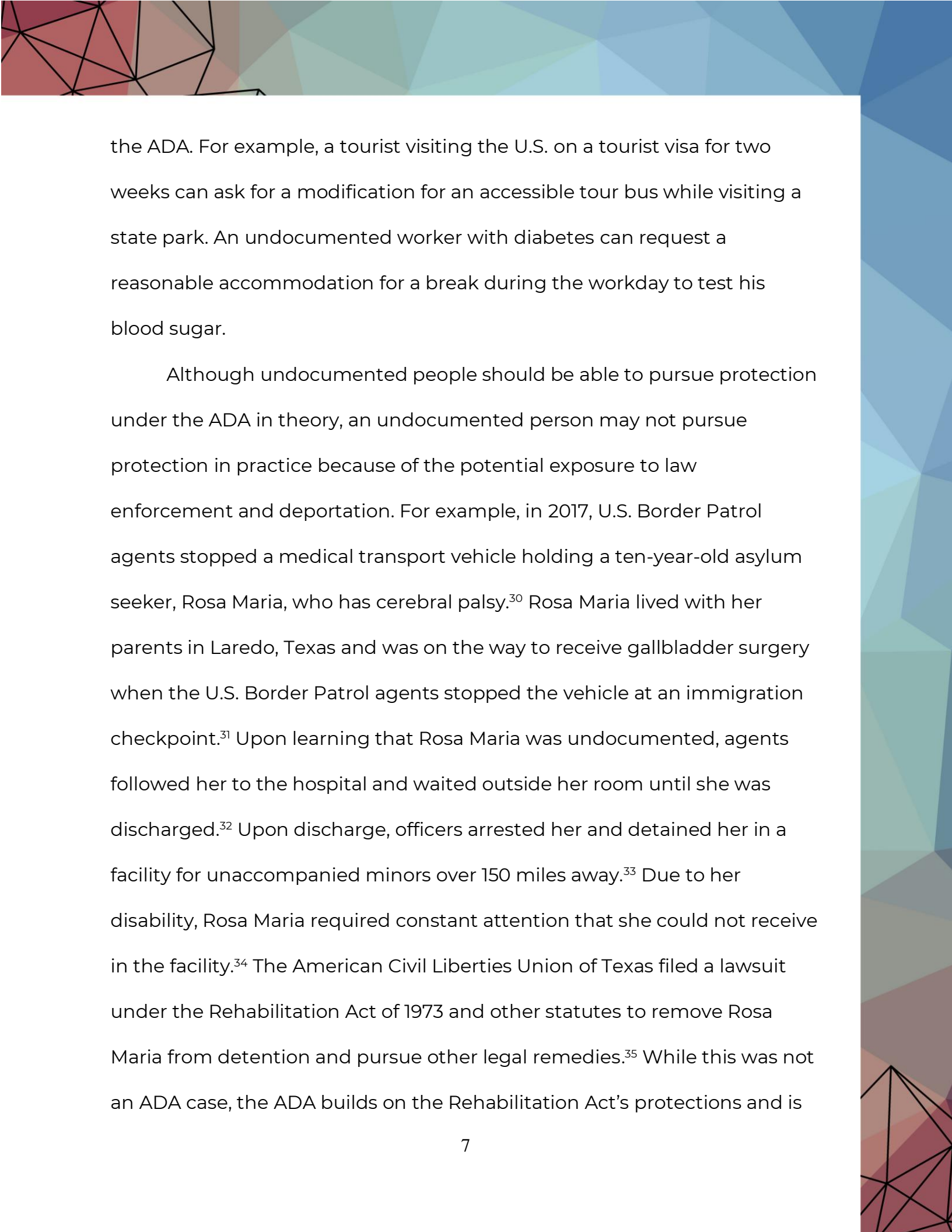
In many states, a routine traffic stop or a medical visit could reveal an undocumented person’s lack of immigration status and potentially expose that person to contact with Immigration Customs Enforcement (ICE) or Customs and Border Protection (CBP), as discussed below.²⁵ Under certain data-sharing programs, ICE can collaborate with state and local law enforcement to obtain information about undocumented immigrants.²⁶ Such programs, including Secure Communities (enacted in 2008, replaced in 2014), the Priority Enforcement Program (enacted in 2014, still in

existence) and section 287(g) of the Immigration Nationality Act, can all expose undocumented immigrants to greater risk of interaction with law enforcement and greater risk of deportation as a result.²⁷ Programs that allow local law enforcement to communicate with ICE and CBP make it even less likely for an undocumented immigrant with disabilities to seek protection under the ADA. For example, if an individual asserted a right under the ADA that eventually required a court appearance, an undocumented person may be less likely to appear in court based on the possible presence of law enforcement and therefore possible exposure to deportation.

Immigration Status and the ADA


Apprehension as an Obstacle to Protection

Passed in 1990, the ADA broadly prohibits discrimination based on disability in employment, public services, transportation, public accommodations, and telecommunication services. The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities...; a record of such an impairment; or being regarded as having such an impairment.”²⁸ The ADA applies to anyone within the jurisdiction of the U.S. and an individual’s immigration status should not impact their relationship to the ADA.²⁹ Practically speaking, this means that anyone that is present in the U.S. can assert protection under



the ADA. For example, a tourist visiting the U.S. on a tourist visa for two weeks can ask for a modification for an accessible tour bus while visiting a state park. An undocumented worker with diabetes can request a reasonable accommodation for a break during the workday to test his blood sugar.

Although undocumented people should be able to pursue protection under the ADA in theory, an undocumented person may not pursue protection in practice because of the potential exposure to law enforcement and deportation. For example, in 2017, U.S. Border Patrol agents stopped a medical transport vehicle holding a ten-year-old asylum seeker, Rosa Maria, who has cerebral palsy.³⁰ Rosa Maria lived with her parents in Laredo, Texas and was on the way to receive gallbladder surgery when the U.S. Border Patrol agents stopped the vehicle at an immigration checkpoint.³¹ Upon learning that Rosa Maria was undocumented, agents followed her to the hospital and waited outside her room until she was discharged.³² Upon discharge, officers arrested her and detained her in a facility for unaccompanied minors over 150 miles away.³³ Due to her disability, Rosa Maria required constant attention that she could not receive in the facility.³⁴ The American Civil Liberties Union of Texas filed a lawsuit under the Rehabilitation Act of 1973 and other statutes to remove Rosa Maria from detention and pursue other legal remedies.³⁵ While this was not an ADA case, the ADA builds on the Rehabilitation Act's protections and is



closely related to the Rehabilitation Act by offering similar protections.³⁶ Furthermore, the case reveals the potential exposure of undocumented immigrants during everyday activities and illuminates the potential risk undocumented people face in seeking disability protections.

If undocumented people did not face the threat of potential exposure, they might engage with the ADA in any number of ways. An undocumented front desk receptionist with a back impairment could request an accommodation for a chair or standing desk at work. An undocumented college student at a private university with a learning disability might ask for a modification for extra time to complete her exams or assignments. An undocumented resident who is Deaf could request a sign language interpreter in English or her native language. Many courts have recognized post-traumatic stress disorder (PTSD) as a disability under the ADA.³⁷ For some people, PTSD can impact an individual's ability to focus due to flashbacks and triggers, like smells and sounds, that bring back the memory of trauma.³⁸ As a result, in the context of employment, an asylum seeker with PTSD could request an isolated and quiet workplace as an accommodation under the ADA.³⁹ However, because of the risk of disclosure, immigrants with disabilities are probably less likely to pursue protection under the ADA. Furthermore, there are few extensive resources that detail an undocumented person's rights under disability law.⁴⁰

The Need for ADA Protection

Undocumented people may arrive in the U.S. with a disability and be more likely to develop a disability after arriving, both of which demonstrate the need for ADA protections.⁴¹ Professionals posit that a higher percentage of people who migrate have disabilities due to the increased likelihood that they are fleeing persecution, torture, and trauma.⁴² Such persecution may indeed be the result of targeted mistreatment based on disability or disabilities that individuals experienced during a harsh or challenging migration journey.⁴³ After arrival, undocumented people may be at a higher risk of developing or worsening a disability after entering the U.S.⁴⁴ Studies show that undocumented people often work in particularly physically demanding areas that expose them to more occupational risks and injuries on the job, which increases chances of acquiring a disability.⁴⁵

Furthermore, although not all people with disabilities require medical care, studies have shown that people with disabilities typically use healthcare at higher rates than people without disabilities.⁴⁶ Because of the exposure concerns discussed above, undocumented immigrants are less likely to have health insurance and less likely or ineligible to receive public benefits.⁴⁷ As a result, undocumented immigrants with disabilities may lack the necessary care for their disability, further exacerbating their symptoms and further necessitating reasonable accommodations in the context of employment or modifications by public accommodations under the ADA.

However, based on all of the above, an undocumented person is legally entitled to claim protection under the ADA but practically less likely to do so.

Specific Concerns in Immigrant Detention

The context of immigrant detention presents a variety of issues under the ADA.⁴⁸ In recent years, the U.S. has detained exponentially high numbers of undocumented immigrants in immigrant detention facilities across the country.⁴⁹ Stories from across the country detail poor treatment of people in detention, including those with disabilities.⁵⁰ Detainees in detention centers that the federal government owns, operates, or funds typically must make disability rights claims under Section 504 of the Rehabilitation Act; however, if a private entity, state government, or local government detains the individual, the ADA may apply.⁵¹ For example, in 2019, a class of 15 plaintiffs, brought a class-action lawsuit under Section 504 of the Rehabilitation Act and the U.S. Constitution, alleging that the federal government failed to adequately monitor ICE facilities.⁵² Plaintiffs alleged that this failure to monitor resulted in discriminatory conditions for detainees with disabilities, particularly those who were susceptible to Covid-19.⁵³

Plaintiffs did not file this case under the ADA, but the complaint alleged several failures under the ADA, potentially in part because of the variety of detention centers involved for the group of plaintiffs in the class.

The complaint alleged that detention center staff failed to allow a blind detainee to meet with the ADA coordinator in a privately-owned and operated detention center.⁵⁴ The complaint also alleges that staff failed to provide an ASL interpreter for a deaf detainee during his medical intake and failed to provide a discussion about reasonable modifications for detainees with disabilities.⁵⁵ This case, *Fraihat v. U.S. Immigration and Customs Enforcement*, is coincidentally tied to the Rocky Mountain region, because two plaintiffs in the case were being held within detention facilities in Aurora (an ICE facility) and Teller County, Colorado (a state jail) at the time of the suit.⁵⁶

In 2020, a federal district court issued a preliminary injunction in favor of the plaintiffs.⁵⁷ The injunction required ICE staff to review the custody of detainees with certain disabilities and Covid-19 risk factors, representing a temporary win for detainees with disabilities under Section 504 of the Rehabilitation Act that could have been persuasive for detainees seeking protection under the ADA.⁵⁸ However, in 2021, the Ninth Circuit Court of Appeals reversed the injunction, concluding that plaintiffs were unlikely to succeed on their Rehabilitation Act and Constitutional claims.⁵⁹ As of the publication of this paper, the Ninth Circuit Court of Appeals has not issued a mandate based on this decision, so detainees with disabilities can still theoretically request a custody review to see if they are eligible for release based on certain risk factors or disabilities.⁶⁰

Risks In Pursuing Protection – Regional Variation

An undocumented person's willingness to interact with the ADA may depend largely on the regional culture in which that person lives and their personal risk tolerance. An undocumented individual that lives in a state or municipality with strong protections for undocumented immigrants may be more likely to assert her rights under the ADA, whereas a person that lives in a state that is more hostile towards immigrants would be far less likely. The Rocky Mountain region is politically diverse and protections for undocumented individuals can vary by state and even municipality. Colorado is the only Rocky Mountain state that has a law that prohibits collaboration between local law enforcement and ICE. Other Rocky Mountain states, including Wyoming, Utah, Montana, North Dakota, and South Dakota allow the collaboration, to varying degrees, which can expose undocumented people to the risk of deportation. This exposure likely further discourages undocumented immigrants from pursuing any kind of protection under the ADA. Based on potential exposure in daily life alone, many undocumented people refrain from pursuing legal protection in any

context because of further exposure, including presence in a courtroom with law enforcement present.⁶¹

Colorado, Utah, and Wyoming

Broadly speaking, Colorado provides more protection for immigrants who seek to assert rights under the ADA and other laws.⁶² Denver has declared itself a sanctuary city and offers certain municipal services to immigrants.⁶³ Between 2019 and 2023, Governor Jared Polis signed two bills that prohibited local authorities from collaborating with ICE on immigration matters.⁶⁴ However, in April 2024, Douglas County and El Paso County, both located in Colorado, sued the City and County of Denver seeking permission to allow local law enforcement to communicate with U.S. Immigration and Customs Enforcement regarding undocumented immigrants.⁶⁵ As of the publication of this report, this case is still pending.⁶⁶ Furthermore, the Teller County Jail has a 287(g) agreement on file for jail enforcement, meaning Teller County can and does hold immigrants until they can be processed into a larger ICE detention facility.⁶⁷

In Utah and Wyoming, the situation is more complex, and these states do not have explicit laws protecting against this collaboration, putting undocumented immigrants who seek ADA protection at a higher risk.⁶⁸ In Utah, several counties ended their collaboration with ICE, and a 2023 internal memo from ICE designated Utah as a sanctuary state, implying that Utah offers political support to undocumented immigrants.⁶⁹


However, local sheriffs vehemently disagreed with this statement and the larger rhetoric seems to be in favor of collaboration with ICE to apprehend undocumented immigrants.⁷⁰ In Wyoming, Sweetwater County has a 287(g) Warrant Service Officer Agreement on file, meaning that state and local law enforcement can execute ICE warrants and hold immigrants in local jails on behalf of ICE.⁷¹

Montana, North Dakota, and South Dakota

In Montana, Gallatin County and Flathead County have 287(g) Warrant Service Officer Agreements on file.⁷² However, activists in Montana specially advocated for an end to ICE collaboration with local law enforcement.⁷³ North and South Dakota do not have 287(g) agreements on file; however, the rhetoric in these states mirrors that of Utah, Montana, and Wyoming, meaning immigrants with disabilities in these states may be at a higher risk of apprehension if they assert their rights under the ADA. In Montana there are several accounts of ICE impersonating local police to detain immigrants.⁷⁴


Areas Of Improvement and Conclusion

Based on the risks above, many undocumented immigrants with disabilities are not enjoying the protections afforded to them under the ADA. To allow undocumented people to access and use the ADA more comfortably, federal, state, and local governments can consider several



measures. Measures to provide more information about an undocumented person's rights under the ADA would fit squarely within federal priorities to include people with disabilities in communities. In 2021 and 2023, President Biden issued Executive Orders that required federal agencies to affirmatively support people in several groups, including people with disabilities, in accessing agency services and programs.⁷⁵ Similarly, the U.S. Department of Justice listed equal access to justice as a key priority in its 2022-2026 Strategic Plan.⁷⁶ At the international level, in 2007, the United Nations ratified the Convention on the Rights of People with Disabilities, which was modeled in part on the ADA.⁷⁷ This treaty, to which the U.S. has signed but not yet ratified, requires countries to take all necessary measures to protect people with disabilities in humanitarian emergencies and other situations of risk.⁷⁸

First, federal, state, and local governments need a strong ADA compliance authority to monitor the immigration system and disability rights for undocumented people.⁷⁹ Second, to promote ADA protection, government agencies like the Equal Employment Opportunity Commission, state civil rights offices, and non-profits that work with undocumented immigrants might consider developing “know your rights” trainings and materials that provide information on an undocumented person's rights under the ADA, including the ability to ask for reasonable accommodations/modifications.⁸⁰ All materials should be developed in



English and the languages that immigrant populations speak to ensure that all immigrants have access regardless of English proficiency.⁸¹ Similarly, governments at all levels can pursue stronger enforcement of workplace rights and protections so that undocumented workers are less likely to experience workplace injuries that create or worsen a disability.⁸²

Third, governments at any level can create protection mechanisms to ensure that undocumented people who pursue protection under the ADA will not experience retaliation or exposure to immigration enforcement authorities. For example, a state could adopt a law that does not allow an employer to ask for immigration status documentation if an employee requests a reasonable accommodation under the ADA.

Broadly speaking, the intersection of disability law and immigration law leaves much to be desired. As discussed throughout this report, undocumented immigrants are often legally protected under the ADA and similar federal regulations.⁸³ However, because there are so few resources regarding undocumented immigrant rights, many individuals are not aware of these protections and do not exercise them for fear of deportation. Several agencies also lack formal policies to illuminate ADA protections or protections under other laws, like Section 504 of the Rehabilitation Act of 1973.⁸⁴ For example, as of July 2023, the Executive Office for Immigration Review, the federal agency that regulates immigration court proceedings, does not have any formal disability policy for requesting accommodations

under Section 504 of the Rehabilitation Act, the applicable disability law for federal agencies.⁸⁵ Many businesses, doctors, and non-federal governmental agencies, which are subject to the ADA, also lack formal disability policies but interact directly with undocumented populations. Resources regarding undocumented immigrant rights under these laws, and others, would help further the purpose of the ADA to ensure that people with disabilities enjoy the same rights as everyone else in their communities.

Works Cited

¹ Throughout this report, “ADA” refers to both the original statute, passed in 1990, and the amendments, passed in 2008. The amendments are often referred to as the ADA Amendments Act (ADAAA), but the Amendments and original statute will be referred to as ADA throughout the report for continuity unless the report is specifically discussing the ADAAA. See Americans with Disabilities Act, 42 U.S.C. §12101 (1990), As Amended.

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³ See Paola Echave and Dulce Gonzalez, “Being an Immigrant with Disabilities: Characteristics of a population facing multiple structural challenges”, *Urban Institute*, (2022), 1 (citing Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas D. Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, and Jason Perelshteyn. 2009; see also “Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities.” Los Angeles: UCLA Institute for Research on Labor and Employment).

⁴ See Echave and Gonzalez, 2022 at 2.

⁵ Boundless, *Immigration Glossary*, <https://www.boundless.com/immigration-resources/immigration-glossary/> (accessed June 3, 2024); International Organization for Migration (IOM), *Glossary on Migration No. 34*, 2019, https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf (accessed June 4, 2024); see also Esperanza United, *Knowledge Base: What is Immigration Status?*, <https://esperanzaunited.org/en/knowledge-base/content-type/what-is-immigration-status/> (accessed June 4, 2024).

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¹⁰ Immigrants Rising.

¹¹ See J. Baxter Oliphant and Andy Cerda, *Republicans and Democrats have different top priorities for U.S. immigration policy*, Pew Research Center, September 8, 2022, <https://www.pewresearch.org/short-reads/2022/09/08/republicans-and-democrats-have-different-top-priorities-for-u-s-immigration-policy/> (accessed June 4, 2024).

¹² Naqui, 2021.

¹³ *Id.*

¹⁴ Elena Hung and Katherine Perez, *Trump's New Wall to Keep Out the Disabled*, Nov. 29, 2018, <https://www.nytimes.com/2018/11/29/opinion/trumps-disability-public-charge.html> (accessed June 4, 2024).

¹⁵ *Id.*; see Federal Register, *Notice of Proposed Rulemaking: Inadmissibility on Public Charge Grounds*, October 10, 2018, <https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds> (accessed June 4, 2024); Federal Register, *Final Rule: Inadmissibility on Public Charge Grounds*, August 14, 2019, <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds> (accessed June 4, 2024); United States Citizenship and Immigration Services (USCIS), *Archive: Public Charge*, Dec. 19, 2011, <https://www.uscis.gov/archive/public-charge-0> (accessed June 4, 2024). Despite the Department of Homeland Security's language around immigrants as "public charges" in this final rule, many immigrants are unable to receive public benefits, like SNAP or CHIP, because of limitations under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Further, immigrants with disabilities may be eligible for SSI, but the eligibility requirements are complex and can be hard to meet. See Echave and Gonzalez, 2022 at 2-4.

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¹⁸ Echave and Gonzalez, 2022 at 3 (citing Bill Hughes, *Impairment on the Move: The Disabled Incomer and Other Invalidating Intersections*, Disability and Society, 2017, Vol 4, Iss 32: 467–82, <https://doi.org/10.1080/09687599.2017.1298991> (accessed June 4, 2024); Gillian A. King, Victoria M. Esses, and Nassisse Solomon, *Immigrant and Refugee Families Raising Children with Disabling Conditions: A Review of the International Literature on Service Access, Service Utilization, and Service Care Experiences*, US Immigration and Education: Cultural and Policy Issues across the Lifespan, 2013, New York: Springer.

¹⁹ *Id.*

²⁰ *Id.* at 15.

²¹ ACLU Washington, *Timeline of Muslim the Ban*, <https://www.aclu-wa.org/pages/timeline-muslim-ban> (accessed June 4, 2024).

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²⁴ *Id.*

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³⁰ ACLU, *Government Releases 10-Year-Old Rosa Maria Hernandez After ACLU Files Lawsuit*, Nov. 3, 2017, <https://www.aclu.org/press-releases/government-releases-10-year-old-rosa-maria-hernandez-after-aclu-files-lawsuit> (accessed June 4, 2024); see also Kaelyn Forde and Geneva Sands, *Mom fights to have 10-year-old daughter with cerebral palsy released from immigration detention*, ABC News, Oct. 26, 2017, <https://abcnews.go.com/US/mom-fights-10-year-daughter-cerebral-palsy-released/story?id=50734923> (accessed Nov. 3, 2017).

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⁴² Human Rights First, 2023 at 15; see also Karen McVeigh, One billion people disabled, first global report finds, *The Guardian*, June 9, 2011, <https://www.theguardian.com/society/2011/jun/09/billion-people-disabled-report> (accessed June 4, 2024).

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