

# Water, Water Everywhere, but Not a Straw to Drink: How the Americans with Disabilities Act Serves as a Limitation on Plastic Straw Bans

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*ABSTRACT: Congress passed the Americans with Disabilities Act (“ADA”) to ensure that individuals with disabilities have access to society. This revolutionary piece of legislation implemented standards for which places of public accommodation must conform their business practices to. As a result, places of public accommodation are required to provide auxiliary aids to individuals who request them. This Note will first examine the background that has led to plastic straws being banned or removed from places of public accommodation. This Note will then discuss the negative consequences that banning plastic straws has on individuals with disabilities. These consequences can lead to the de facto exclusion of individuals with disabilities from public life, which is what the Americans with Disabilities Act sought to prevent. To avoid exclusion, this Note argues that plastic straws are the only type of straw that can serve as an auxiliary aid. Therefore, in order to comply with the ADA places of public accommodation must provide plastic straws. This ensures that individuals with disabilities can fully and equally enjoy their beverages. Finally, this Note will examine the impact this classification has on current actions being taken and propose simple steps to ensure that companies and government actors do not subject themselves to litigation that they can easily avoid.*

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## I. INTRODUCTION

What if you were told that a nine-year-old boy and a turtle could be the reason you might be fined for providing someone with a plastic straw? Now imagine, that you are an individual with a disability who requires these straws

to be able to drink. This predicament is one that is taking the nation by storm and affecting more and more individuals living with disabilities every day. Individuals with disabilities are finding an increasing number of restaurants, cafes, and even entire cities where they have to bring their own plastic straw in order to be able to consume a beverage. This is something that able-bodied people do not even think twice about.

In response to a “study” finding a shockingly high number of straws used and a YouTube video featuring a turtle, private companies and local governments across the country are increasingly banning plastic straws.<sup>1</sup> One potential barrier to this is the American with Disabilities Act (“ADA”). The ADA is designed to protect individuals with disabilities and ensure their access to American life.<sup>2</sup> One of the primary ways the ADA achieves this is by requiring places to provide auxiliary aids. Auxiliary aids are items that help an individual be able to have access to and enjoy a good or service.

This Note argues that plastic straws should be considered auxiliary aids and all-encompassing distribution bans are incompatible with the ADA. This Note will describe how plastic straw bans initially came into public spotlight. Then, it will discuss the tension between the desire to protect the environment and the need of plastic straws by some in the disability community. Next, it explains how protecting the distribution of plastic straws is consistent with the intent, plain language, and caselaw of the ADA. Finally, this Note will provide a guide for how public and private actors can satiate their environmental ideals regarding plastic straws in an ADA compliant manner.

## II. THE PATH TO PLASTIC STRAW BANS AND THE CONCERNS THAT ACCOMPANY THEM

Plastic straw bans exist for a reason. The next five Sections of this Note break down what gave rise to the popular straw-ban movement. First, Section II.A discusses how plastic has become so ubiquitous in our daily lives. Second, Section II.B considers the impact plastic has had on our environment. Third, Section II.C examines the plastic straw movement and the circumstances that helped the movement gain broader attraction and appeal. Fourth, Section II.D reviews several of the actions taken against the usage of plastic straws. Fifth, Section II.E discusses the concerns raised by the disability community in response to these actions.

### A. PLASTIC’S METEORIC ASCENSION TO A UBIQUITOUS ITEM IN HUMAN LIFE

In most modern civilizations, it is impossible for an individual to go a single hour, let alone an entire day, without being exposed to plastic. However, this has not always been the case. Before plastic was invented in the late nineteenth century, many items such as combs, piano keys, and a variety

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1. See *infra* Sections II.C–D.

2. See *infra* Part IV.

of other trinkets were made from elephant ivory.<sup>3</sup> In the mid-1800s, the elephant population became endangered, making the staple material for production of many items increasingly scarce and expensive.<sup>4</sup> Therefore, companies sought a replacement for the now costly and less readily available ivory.<sup>5</sup> John Hyatt, an amateur inventor took up the challenge and produced a new material made from cellulose in plants.<sup>6</sup> Ironically enough, plastics were created as a response to both business needs and environmental protection concerns.<sup>7</sup> However, the plastic revolution did not really accelerate until the early twentieth century when scientists discovered they could use petroleum and its gas byproducts as bases for creating plastics.<sup>8</sup>

Plastic has become even more ubiquitous in our daily lives as plastic production has increased twentyfold from the mid-twentieth century.<sup>9</sup> As of 2014, more than “311 million [metric] ton[s]” of plastic was produced (i.e., plastic equivalent to more than 900 Empire State Buildings).<sup>10</sup> Plastic production is expected to continue to grow, “doubl[ing] again in 20 years and almost quadrupl[ing] by 2050.”<sup>11</sup> In total, since the creation of plastic, society has produced 9.2 billion tons of it.<sup>12</sup>

### B. THE ENVIRONMENTAL IMPACT OF PLASTIC

This Section addresses the current process for discarding plastic and the resulting environmental and ecological impacts.

#### 1. The Magnitude of Plastics in Nature

Plastic often winds up discarded. Since its creation, “6.9 billion tons [of plastic] have become waste [a]nd of that waste . . . 6.3 billion tons never made it to a recycling bin.”<sup>13</sup> The Environmental Protection Agency (“EPA”) estimated that in 2014 alone Americans discarded over 33 million tons of

3. Laura Parker, *We Made Plastic. We Depend on It. Now We're Drowning in It.*, NAT'L GEOGRAPHIC: PLANET OR PLASTIC?, <https://www.nationalgeographic.com/magazine/2018/06/plastic-planet-waste-pollution-trash-crisis> [<https://perma.cc/F4UD-S57J>].

4. *See id.* (describing the environment that gave rise to the usage of plastic for common everyday items).

5. *See id.* (“[A] billiards company in New York City offered a \$10,000 reward to anyone who could come with an alternative [to ivory for their billiard balls].”).

6. *Id.*

7. *See id.* (describing how this new material would “eliminate the need ‘to ransack the Earth in pursuit of substances which are constantly growing scarcer’” (misquoting SUSAN FREINKEL, *PLASTIC: A TOXIC LOVE STORY* 17 (2011))).

8. *See id.* (describing how petroleum began to be used in the creation of polymers).

9. ELLEN MACARTHUR FOUND., *THE NEW PLASTICS ECONOMY: RETHINKING THE FUTURE OF PLASTICS* 24 (2016) [hereinafter *THE NEW PLASTICS ECONOMY*].

10. *Id.* at 17.

11. *Id.* at 24.

12. Parker, *supra* note 3.

13. *See id.* (summarizing numbers from “scientists who crunched [them] in 2017”).

plastics.<sup>14</sup> Discarded plastic often has wound up in our world's oceans with "[s]ome scientists estimat[ing] there are 7.5 million plastic straws polluting U.S. shorelines."<sup>15</sup> Currently, plastic flows into the oceans at a rate that would be the equivalent "to dumping the contents of one garbage truck into the ocean every minute."<sup>16</sup> By 2030, the rate will increase to two truckloads per minute, and by 2050 it will double to four truckloads per minute.<sup>17</sup>

## 2. The Environmental Impact of Plastics on Animals and Humans

Plastics are becoming just as prevalent in our oceans as fish and by 2050 the world's oceans will have more plastic than fish.<sup>18</sup> Plastic is affecting all areas of marine life, including our ocean's shorelines. Hawaii's biggest island has beaches whose sand is made up of nearly 15 percent microplastics.<sup>19</sup>

Plastic poses serious threats to wildlife as "ocean plastic is estimated to kill millions of marine animals every year."<sup>20</sup> One study showed that 693 species of marine organisms have encountered marine debris.<sup>21</sup> Ocean plastics accounted for 92 percent of these encounters.<sup>22</sup> Perhaps, even more troubling is "that at least 17 percent of species affected by entanglement and ingestion were listed as threatened or near threatened."<sup>23</sup> Oftentimes, animals confuse plastic for food because of the plastic's size and color. The consumption of plastic leads to malnutrition.<sup>24</sup> These encounters are not limited to aquatic marine animals. In fact, nearly 90 percent of seabirds have

14. See Patrick McGreevy, *California Lawmakers Vote to Restrict Use of Plastic Straws, Keeping State in National Spotlight on Environment*, L.A. TIMES (Aug. 23, 2018, 12:45 PM), <http://www.latimes.com/politics/la-pol-ca-plastic-straw-limits-california-20180823-story.html> [<https://perma.cc/DC42-7N2V>] (reporting estimates from the United States EPA).

15. Alix Langone, *No One Knew How Many Plastic Straws Americans Use Every Day. Then a 9-Year-Old Kid Did the Math*, MONEY (July 23, 2018), <http://money.com/money/5343736/%20how-many-plastic-straws-used-every-day> [<https://perma.cc/X869-C5ND>] (estimating that globally there are "437 million to 8.3 billion plastic straws on shorelines").

16. See THE NEW PLASTICS ECONOMY, *supra* note 9, at 17 (estimating that "[e]ach year, at least 8 million [metric] tonnes of plastics leak into the ocean").

17. *Id.*

18. UN Declares War on Ocean Plastic, UNITED NATIONS REG'L INFO. CTR. FOR W. EUROPE (Feb. 23, 2017, 5:00 PM), <https://www.unric.org/en/latest-un-buzz/30487-un-declares-war-on-ocean-plastic> [<https://perma.cc/MTT8-Y3HZ>].

19. Parker, *supra* note 3. Microplastics are broken down pieces of plastic or microbeads that are commonly used in health and beauty products that pass through water filtration systems. *What are Microplastics?*, NAT'L OCEAN SERV., <https://oceanservice.noaa.gov/facts/microplastics.html> [<https://perma.cc/94MP-FWXJ>].

20. Parker, *supra* note 3.

21. See S.C. Gall & R.C. Thompson, *The Impact of Debris on Marine Life*, 92 MARINE POLLUTION BULL. 170, 172 (2015) (describing the results of a study that examined original publications and found that 340 reported encounters).

22. *Id.*

23. *Id.*

24. *The Great Pacific Garbage Patch*, OCEAN CLEANUP, <https://www.theoceancleanup.com/great-pacific-garbage-patch.html> [<https://perma.cc/RK2P-J4UK>].

consumed plastic, up from under five percent in the 1960s, skyrocketing alongside the production of plastic.<sup>25</sup> Moreover, the chemicals that coat plastic find their way into humans when marine animals are consumed as a source of nutrition.<sup>26</sup> For marine animals, encounters with and eating plastic are not isolated occasions. Scientists have found that turtles around the Great Pacific Garbage Patch (“GPGP”) have 74 percent of their diet composed of ocean plastics.<sup>27</sup> The cumulative effects of plastics in the world’s oceans and shorelines pose a serious threat to both the life and prosperity of these ecosystems. These effects are projected to worsen unless action is taken by the global community.

### C. THE MOVEMENT TO BAN PLASTIC STRAWS

This Section addresses some of the circumstances that enflamed the plastic straw movement. While the plastic straw movement is not new, this Section will discuss the circumstances that helped the movement gain traction. Together, a YouTube video and a teenager’s “study” added fuel to the fire of a movement that was already gaining steam amidst the environmentalist movement’s rise. Yet, some argue that this movement has less to do with plastic straws and more to do with plastics in general.

#### 1. The Video that Galvanized the World

On August 10, 2015, a video that would alter the course of the modern anti-plastic environmental movement was posted to YouTube.<sup>28</sup> In this video, Christine Figgner, a marine biologist, recorded members of her crew removing a plastic straw from a sea turtle’s nose.<sup>29</sup> The turtle is seen bleeding and in pain as the team removes the straw.<sup>30</sup> This video is credited with “galvaniz[ing] a larger movement” into taking aim at plastic straws.<sup>31</sup> The video evoked strong emotions, creating a lasting impact on the 35 million

25. Sophia Rosenbaum, *She Recorded That Heartbreaking Turtle Video. Here’s What She Wants Companies Like Starbucks to Know About Plastic Straws*, TIME (July 17, 2018), <http://time.com/5339037/turtle-video-plastic-straw-ban> [<https://perma.cc/3DgY-57C6>]; see also Parker, *supra* note 3 (describing how oil revolutionized plastic production allowing it to be made more efficiently and cheaper than it previously was).

26. See *The Great Pacific Garbage Patch*, *supra* note 24 (“These chemicals that affected the plastic feeders could then be present within the human as well.”).

27. *Id.* The GPGP is a collection of plastic that due to the oceans’ currents have collected into a massive “patch” of floating garbage.

28. Sea Turtle Biologist, *Sea Turtle with Straw Up its Nostril: “NO” TO PLASTIC STRAWS*, YOUTUBE (Aug. 10, 2015), <https://www.youtube.com/watch?v=4wH878t78bw> [<https://perma.cc/EKY7-RJZL>]; see Rosenbaum, *supra* note 25 (describing how the video served as a catalyst for the straw ban movement).

29. See Sea Turtle Biologist, *supra* note 28.

30. *Id.*

31. Rosenbaum, *supra* note 25.

people who have watched it.<sup>32</sup> Figgenger says she is happy the video “fueled the movement that already existed” to “eliminate plastic straws from our day-to-day lives.”<sup>33</sup> The video gave activists a sympathetic face to rally support behind rather than relying on just numbers.<sup>34</sup> The video has since served as the catalyst for strengthened activism that has led to governments and businesses taking steps to either reduce or eliminate the presence of plastic straws.<sup>35</sup>

## 2. The Number that Got People Thinking

In 2011, a nine-year-old boy named “Milo Cress had a question: How many plastic straws do Americans use every day?”<sup>36</sup> Milo started his research by calling and asking manufacturers of straws in the United States “for estimates of how many single-use plastic straws Americans use every day.”<sup>37</sup> Through his research, Milo estimated that “about 500 million straws—including clear plastic straws, bendy straws, straws on juice boxes, cocktail straws and plastic drink stirrers,” are used by Americans every day.<sup>38</sup> Publications like the *Wall Street Journal*, the *Washington Post*, and even the National Park Service have cited Cress’s 500 million figure.<sup>39</sup> Cress’ findings motivated him to create a campaign called “Be Straw Free” in 2011, which served as an origin for the movement against plastic straws.<sup>40</sup> Some dispute Cress’ findings, as a recent study conducted by a marketing analysis firm estimates that only about 172 million straws are used each day in America, not the 500 million supported by Cress.<sup>41</sup> Moreover, while critics attack Cress’ figure as “less-than-verified,” Cress and activists believe it still illustrates that too many straws are used.<sup>42</sup>

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.* (explaining how the video added fuel to the movement). *See generally* Section II.D (describing the actions taken by various governments and businesses against plastic straws).

36. Langone, *supra* note 15.

37. *Id.*

38. *Id.*

39. *Id.*; *see also* Corinne Ramey & Bob Tita, *The Summer of Plastic-Straw Bans: How We Got There*, WALL ST. J. (Aug. 7, 2018, 4:36 PM), <https://www.wsj.com/articles/the-summer-of-plastic-straw-bans-how-we-got-there-1533634200> [<https://perma.cc/FC3U-PRCW>] (“The figure, which has been cited by the National Park Service.”).

40. Alex Connor, *That Anti-Straw Movement? It’s All Based on One 9-Year-Old’s Suspect Statistic*, USA TODAY, <https://www.usatoday.com/story/news/2018/07/18/anti-straw-movement-based-unverified-statistic-500-million-day/750563002> [<https://perma.cc/5FBS-Y5KD>] (last updated July 18, 2018, 3:48 PM).

41. McGreevy, *supra* note 14 (citing a study conducted by “Technomic, a marketing analysis firm that watches the food industry”).

42. *See* Connor, *supra* note 40 (describing support of Cress by organizations like Eco-Cycle and Cress’s own acknowledgement that the figure is not perfect, but it was chosen as the middle ground of what the manufacturers were answering).

### 3. Plastic Straws as the Gateway to Reducing Total Plastic Consumption

Adam Minter, an opinion columnist who often writes about recycling and similar matters, contends that plastic straw bans ignore the real plastic problem.<sup>43</sup> Minter contends, using numbers cited earlier in this piece, that “if all [plastic] straws were suddenly washed into the sea, they’d account for about .03 percent of the” plastic that enters the ocean each year.<sup>44</sup> Proponents of straw bans do not entirely disagree, but contend “that ditching [plastic straws] is a good first step and a way to start a conversation about waste and ocean conservation.”<sup>45</sup>

Moreover, activists still contend that plastic straws can be problematic, labeling plastic straws as “gateway plastic[s].”<sup>46</sup> Gateway plastics are items that allow individuals to become comfortable with using single-use plastics.<sup>47</sup> Dianna Cohen, CEO of the Plastic Pollution Coalition, has called plastic straws “the tip of the iceberg” that serve as a gateway to combatting the single-use plastic culture.<sup>48</sup> In the same vein as Cohen, Dune Ives, the Lonely Whale’s executive director, admits that the movement is not about plastic straws, rather “[i]t’s about pointing out how prevalent single-use plastics are in our lives.”<sup>49</sup> Thus, since plastic straws are viewed as a “gateway” it is only natural that they also serve as the “gateway” for action to reduce the usage of plastic.

#### D. ACTIONS TAKEN TO REMOVE PLASTIC STRAWS

The straw-ban movement has been building since the release of the Youtube video and Cress’s study on straw usage. The positive momentum has manifested into a degree of “success” for the movement. This Section

43. See generally Adam Minter, *Plastic Straws Aren’t the Problem*, BLOOMBERG OP. (June 7, 2018, 4:00 PM), <https://www.bloomberg.com/view/articles/2018-06-07/plastic-straws-aren-t-the-problem> [<https://perma.cc/N365-HUHA>] (arguing that fishing nets are a more severe threat to ocean wildlife than plastic straws).

44. *Id.*

45. Associated Press, *Seattle Plastic Straw Ban Goes into Effect in Effort to Reduce Marine Pollution*, NBC NEWS (July 2, 2018, 3:48 PM), <https://www.nbcnews.com/science/environment/%20seattle-plastic-straw-ban-goes-effect-effort-reduce-marine-pollution-n888426> [<https://perma.cc/FB2B-6LRY>]; see also Valerie Richardson, *Plastic Straw Bans Won’t Save Oceans: ‘We’re Trading a Lot for Nothing.’* WASH. TIMES (July 12, 2018), <https://www.washingtontimes.com/news/2018/jul/12/plastic-straw-bans-wont-save-oceans-alarm-disabled> [<https://perma.cc/5BBP-87VH>] (“Banning plastic straws won’t save the oceans. But we should do it anyway.” (quoting Radhika Viswanathan, *Why Starbucks, Disney, and the EU Are All Shunning Plastic Straws*, VOX, <https://www.vox.com/2018/6/25/17488336/plastic-straw-ban-ocean-pollution> [<https://perma.cc/53RR-E5N6>] (last updated Dec. 21, 2018, 3:39 PM))).

46. See Langone, *supra* note 15.

47. *Id.*

48. Zlati Meyer, *Big Food-Service Outfit Banning Plastic Straws at More than 1,000 U.S. Eateries*, USA TODAY, <https://www.usatoday.com/story/money/2018/05/31/plastic-straws-banned-eateries/657172002> [<https://perma.cc/66EX-BKQH>] (last updated June 3, 2018, 12:43 PM).

49. See Richardson, *supra* note 45 (quoting an interview done with Vox).

examines the ever-increasing actions taken to reduce plastic straw usage.<sup>50</sup> First, Section II.D.1 discusses steps the public sector has taken, with institutions internationally, federally, and locally taking a multitude of actions. Second, Section II.D.2 analyzes actions taken by private companies.

### 1. Public Sector Action Against Plastic Straws

Plastic straw bans have steadily picked up momentum in the United States amongst local governments.<sup>51</sup> California became the first state to impose a partial ban on plastic straws in September 2018 when Governor Jerry Brown signed Assembly Bill 1884 into law.<sup>52</sup> The ban only applies to full-service restaurants.<sup>53</sup> Restaurants that do not comply with the ban after two warnings would be fined \$25 a day with a cap of \$300 annually.<sup>54</sup> However, the California law allows restaurants to provide a single-use plastic straw to customers upon request.<sup>55</sup> Governor Brown called forcing customers to request a plastic straw “a very small step” that would hopefully deter them from doing so.<sup>56</sup> Governor Brown said the goal is to “eventually eliminate single-use plastics” and hopefully no longer provide for any customer, regardless of need, a plastic straw.<sup>57</sup>

The California law follows on the heels of cities across the country that have implemented various degrees of straw bans.<sup>58</sup> Not all straw bans are implemented in the same manner. Some cities, like Ashbury Park, New Jersey, and Carmel-By-The-Sea, California have bans similar to California that require plastic straws to be requested.<sup>59</sup> However, there are cities that take steps that are far more extreme and potentially more harmful than the actions of California or Ashbury Park. The City of Los Angeles, which already requires straws to be requested, and Del Mar, California want to go even further than

50. This Section is a survey of various actions. This is a dynamic and growing movement in which actors who are acting against plastic straws emerge continuously.

51. By definition, some of the actions taken by governments are not bans of plastic straws. Rather, they aim to reduce the use of plastic straws. I use the word “ban” to be consistent with the writing on the subject. As will be discussed later, the plan that I advocate as the best way to reduce plastic, while also being receptive to the disability community, is not a true ban.

52. Jeff Daniels, *California Governor Signs Bill to Reduce Plastic Straw Use, Cut Waste ‘Choking Our Planet,’* CNBC, <https://www.cnbc.com/2018/09/20/california-gov-jerry-brown-signs-bill-to-reduce-plastic-straw-use.html> [<https://perma.cc/W56T-39BF>] (last updated Sept. 21, 2018, 9:54 AM) (noting, however, that the legislation did not take effect until January 2019).

53. CAL. CODE REGS. tit. Ch. 5-2, § 42270 (2019).

54. *Id.* § 42271.

55. *Id.*

56. Daniels, *supra* note 52.

57. *Id.*

58. See McGreevy, *supra* note 14 (showing a table provided by the California Public Interest Research Group with bans by cities placed in two different columns).

59. See *id.* (citing from a table provided by the California Public Interest Research Group); see also City Food Packaging Requirements, CITY OF CARMEL-BY-THE-SEA, CAL., <https://ci.carmel.ca.us/post/city-food-packaging-requirements> [<https://perma.cc/M5JV-YWEP>].

the law passed by California and its own ordinance.<sup>60</sup> Del Mar wants to completely ban plastics in a similar manner to Malibu, Surfside, and Fort Myers.<sup>61</sup> Los Angeles' proposal would also apply to fast food chains, which are currently exempt from the California law, thus massively increasing its reach and applicability.<sup>62</sup> Los Angeles has the "goal of phasing out single-use plastic straws altogether by 2021."<sup>63</sup>

Seattle, in a public notice and summary of new requirements, announced that plastic straws would no longer be exempted from a 2008 city ordinance.<sup>64</sup> This action made Seattle the first major city in the United States to ban single-use plastic straws.<sup>65</sup> However, the "decision to provide plastic straws if needed is up to businesses."<sup>66</sup> Seattle Public Utilities included a caveat that said "[a]ccommodations for people with disabilities provided upon request."<sup>67</sup> Yet, this caveat is buried in smaller text, located beneath even the contact information for Seattle Public Utilities, and is in a lighter colored ink.<sup>68</sup>

Cities like Malibu, California have passed bans that provide for *no exemptions*.<sup>69</sup> Thus, if an individual were to need a plastic straw to be able to consume a beverage, they would have to bring their own plastic straws or use an alternative straw provided by the restaurants and cafes. Two other cities that have taken such action are Surfside, Florida and Fort Myers Beach, Florida.<sup>70</sup> All of these cities expressly forbid the distribution of plastic straws

60. Lexy Brodt, *Del Mar Bans Plastic Straws*, COAST NEWS GROUP (Mar. 13, 2019), <https://www.thecoastnews.com/del-mar-bans-plastic-straws> [https://perma.cc/QFQ5-G2M9]; Jeff Daniels, *Los Angeles Moves Forward on Plan Banning Plastic Straws, Going Further than California State Law*, CNBC, <https://www.cnbc.com/2018/12/04/los-angeles-considers-outright-ban-on-plastic-straws.html> [https://perma.cc/72MY-5MKB] (last updated Dec. 5, 2018, 10:46 AM).

61. Brodt, *supra* note 60.

62. Daniels, *supra* note 60.

63. Tony Arranaga, *Los Angeles City Council Unanimously Approves Straws on Request Ordinance*, CITY L.A. (Mar. 1, 2019), <https://cd13.lacity.org/news/los-angeles-city-council-unanimously-approves-straws-request-ordinance> [https://perma.cc/G5PD-HPRR].

64. Letter from Seattle Public Utilities to Customers, Food Service Businesses in the Seattle Area, *available at* <http://www.seattle.gov/Documents/Departments/SPU/Services/Recycling/EnglishSPUFlyer-LetterStrawsandUtensilsAM.pdf> [https://perma.cc/8MGF-U8MY] [hereinafter Seattle Public Utilities].

65. Associated Press, *supra* note 45.

66. Ayana Archie & Dalila-Johari Paul, *Why Banning Plastic Straws Upsets People with Disabilities*, CNN: HEALTH, <https://www.cnn.com/2018/07/11/health/plastic-straw-bans-disabled-trnd/index.html> [https://perma.cc/BJU5-FQ6B] (last updated July 11, 2018, 8:14 PM).

67. Seattle Public Utilities, *supra* note 64.

68. *Id.*

69. *See* MALIBU, CAL., CODE § 9.24.045 (2018) ("No restaurant, including fast food restaurants, beverage provider, or vendor shall use, provide, distribute, or sell plastic beverage straws, plastic stirrers, or plastic cutlery." The ordinance provides that alternative types of straws are allowed, but only upon request.).

70. SURFSIDE, FLA., CODE § 34-11 (2018) ("A plastic straw shall not be used, sold, or distributed in any commercial establishment or at any town facility or town property or by any

and do not provide for exemptions for those with disabilities.<sup>71</sup> These bans are not just limited to public buildings but extend to every entity within the city limits.<sup>72</sup> This creates an incoherent policy that has the potential to create non-uniform practices amongst businesses.

San Francisco also implemented a ban “that will prohibit the city’s restaurants, bars and retailers from providing customers with plastic items—such as straws.”<sup>73</sup> However, SF Environment, a department of the city and county, announced plans to revisit the ban to “strengthen the existing provision” of the city’s exemption for those with disabilities.<sup>74</sup> Thus, the city of San Francisco created a period of limbo where it was unclear whether those with disabilities would be exempt and be able to request a plastic straw.

## 2. Private Sector Action Against Plastic Straws

A multitude of major companies are also beginning to implement their own measures against plastic straws. Starbucks recently announced that by 2020 its green straws will be a relic of the past.<sup>75</sup> However, Starbucks is switching to a new lid that will require a significant amount of plastic, but contends the lid will be easier to recycle.<sup>76</sup> Starbucks has said that customers can still use straws, but they will be made from a different material.<sup>77</sup>

Along with “Starbucks, The Walt Disney Co. and McDonald’s have also announced that they will ban plastic straws.”<sup>78</sup> Hyatt Hotels is taking a less drastic route by making straws available only upon request.<sup>79</sup> However, Bon Appetit, a major food service provider on college campuses, has announced

special event permittee.”); Fort Myers Beach, Fl., Ordinance 17-13 (Nov. 6, 2017) (“[N]o person shall distribute plastic straws within the Town.”).

71. See MALIBU, CAL., CODE § 9.24.045; see also SURFSIDE, FLA., CODE § 34-11; Fort Myers Beach, Fla., Ordinance 17-13.

72. See MALIBU, CAL., CODE § 9.24.045; see also SURFSIDE, FLA., CODE § 34-11; Fort Myers Beach, Fla., Ordinance 17-13.

73. Trisha Thadani, *No More Slurping Through Plastic Straws in San Francisco*, S.F. CHRONICLE, <https://www.sfchronicle.com/politics/article/No-more-slurping-through-plastic-straws-in-San-13102063.php> [<https://perma.cc/8QNY-2RP3>] (last updated July 24, 2018, 6:13 PM).

74. *The Plastic, Toxics, and Litter Reduction Ordinance Will Eliminate Sources of Litter While Making the San Francisco Dining Experience More Environmentally Friendly.*, SF ENV’T, <http://stage.sfenvironment.org/news/update/the-plastic-and-litter-reduction-ordinance-will-eliminate-sources-of-litter-while-making-the-san-francisco-dining-experience-more> [<https://perma.cc/DWU9-36NF>].

75. Stephen Loiaconi, *Pushback Against Plastic Straw Bans from Disability Rights Groups*, WJLA (July 30, 2018), <https://wjla.com/news/nation-world/pushback-against-plastic-straw-bans-from-disability-rights-groups> [<https://perma.cc/88E3-F7BT>].

76. *Id.*

77. Archie & Paul, *supra* note 66.

78. Aris Folley, *People Who Violate Plastic Straw Ban Could Face Jail Time in California City*, HILL (July 26, 2018, 10:33 AM), <https://thehill.com/homenews/state-watch/398965-people-who-violate-plastic-straw-ban-could-face-jail-time-in-california> [<https://perma.cc/KWL6-W5VC>].

79. Gina Martinez, *‘Disabled People Are Not Part of the Conversation.’ Advocates Speak Out Against Plastic Straw Bans*, TIME (July 12, 2018), <http://time.com/5335955/plastic-straws-disabled> [<https://perma.cc/7XGJ-GXDT>].

they will eliminate the use of plastic straws “at all of its more than 1,000 locations in 33 states.”<sup>80</sup> Instead, the company “will offer paper straws to diners who have physical challenges or ‘strongly feel the need’ for one.”<sup>81</sup> As time passes, more companies are taking action to reduce or eliminate their usage of plastic straws altogether.

### E. THE AMERICANS WITH DISABILITIES ACT

Before the ADA, no federal law prohibited private sector discrimination against people with disabilities, absent a federal grant or contract.<sup>82</sup> Thus, “[t]he ADA was borne out of the ideals encompassed in the Civil Rights Act of 1964 . . . that all people should be treated equally and fairly.”<sup>83</sup> The ADA is a comprehensive piece of legislation that encompasses employment relations, public services (i.e., public transportation), telecommunications, and various miscellaneous topics.<sup>84</sup> However, this Note will focus on Title III of the ADA, which involves public accommodations. This provision of the ADA can be traced back to the public accommodation provisions of the Civil Rights Act.<sup>85</sup> This Section addresses the background of the ADA and how Courts have interpreted the ADA to give it effect. Section II.E.1 discusses the background of the ADA. Section II.E.2 discusses how the courts have interpreted applicable provisions of the ADA.

#### 1. Background of the ADA and Applicable Provisions

In developing the ADA, Congress’ research “paint[ed] a sobering picture of an isolated and secluded population of individuals with disabilities” who were absent from public accommodations.<sup>86</sup> As a result, “Congress concluded that there was a ‘compelling need’ . . . to integrate them ‘into the economic and social mainstream of American life.’”<sup>87</sup> This culminated with Congress

80. Meyer, *supra* note 48.

81. *Id.*

82. Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RIGHTS EDUC. & DEF. FUND, <https://dredf.org/about-us/publications/the-history-of-the-ada> [https://perma.cc/M6NT-7HTG].

83. *Sharing the Dream: Is the ADA Accommodating All?*, U.S. COMM’N CIVIL RIGHTS, <https://www.usccr.gov/pubs/ada/ch1.htm> [https://perma.cc/SN8L-SH7W] [hereinafter *Sharing the Dream*] (footnote omitted).

84. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

85. *Id.* §§ 12181–12186. This Note has a limited focus concerning only public accommodations in Title III. This is due to the fact that a majority of the complaints involving plastic straw bans, discussed in Section II.D, involve the disability community’s ability to enjoy public places such as coffee shops, restaurants, etc. It would be an interesting question whether the companies must provide plastic straws to their workers who request them. However, that is outside the scope of this paper. *See also Sharing the Dream, supra* note 83 (“Title III provisions can be traced to the public accommodations provisions of the Civil Rights Act of 1964.”).

86. S. REP. NO. 101-116, at 10 (1989).

87. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quoting S. REP. NO. 101-116, at 20; H.R. REP. NO. 101-485, pt. 2, at 50 (1990)).

passing the ADA in 1990.<sup>88</sup> On the day of the signing of the ADA, President Bush proclaimed it to be “another ‘independence day’ . . . [as] every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>89</sup> President Bush continued on to say that the ADA will assist in “remov[ing] the physical barriers we have created and the social barriers that we have accepted” and that in doing so “America welcomes into the mainstream of life all of our fellow citizens with disabilities.”<sup>90</sup>

In order to ensure access to the mainstream of public life, the ADA had to have provisions for public accommodations. The ADA provides a long list of what entities qualify as a public accommodation, including “restaurant[s], bar[s], or other establishment[s] serving food or drink.”<sup>91</sup>

The disability community’s ability to not only physically access, but also participate in the activities of public accommodations, is key to fulfilling the integration that Congress sought. For Title III, Congress established that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public

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88. 42 U.S.C. §§ 12101–12213.

89. President George Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act, [https://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html) [<https://perma.cc/DJ2L-ZV7U>].

90. *Id.*

91. 42 U.S.C. § 12181(7)(B). Public accommodations also include:

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor; . . .
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

*Id.* § 12181(7)(A), (C)–(L); *PGA Tour*, 532 U.S. at 662 (“[T]he legislative history indicates [these categories] should be construed liberally to afford people with disabilities equal access.”).

accommodation.”<sup>92</sup> Congress provided five definitions of discrimination in the ADA.<sup>93</sup> The most pertinent definition for this Note being when there is

a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of *auxiliary aids and services*, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden . . . .<sup>94</sup>

Pursuant to Congressional direction in another part of the statute,<sup>95</sup> the Attorney General promulgated a regulation to better define auxiliary aids and services.<sup>96</sup> The Attorney General explained that interpreters, readers, “[a]cquisition or modification of equipment or devices; and . . . [o]ther similar services and actions” are examples of auxiliary aids and services.<sup>97</sup> The Attorney General provided a catch-all category and thus did not provide an exhaustive list of examples. Further, the Ninth Circuit has held that to advance the purpose of the ADA’s language, this passage should not be construed narrowly.<sup>98</sup> Thus, the contours of what qualifies and what does not qualify as an auxiliary aid are not clearly defined, which has led to an evolving understanding of the term.

## 2. Court Interpretations of ADA Provisions

No case has been brought yet regarding plastic straws and their status as an auxiliary aid. In fact, very few court cases have even dealt with the definition of auxiliary aids under the ADA and the Attorney General’s regulation guidance. However, the three circuits that have—the Third, the Fourth, and the Ninth—all approach the definition of auxiliary aids liberally, in terms of what the public accommodation needs to provide.<sup>99</sup> The Ninth Circuit

92. 42 U.S.C. § 12182(a).

93. *Id.* § 12182(b)(2)(A).

94. *Id.* § 12182(b)(2)(A)(iii) (emphasis added).

95. *See id.* § 12186.

96. Auxiliary Aids and Services, 28 C.F.R. § 36.303 (2011).

97. *Id.* § 36.303(b)(1)–(4).

98. *See Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1012 (9th Cir. 2017) (stating that the “[Ninth Circuit] construe[s] the language of the ADA broadly to advance its remedial purpose” (quoting *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014))).

99. Liberal is not meant in context of political ideology or judicial philosophy, rather meaning more generous. *See generally McGann v. Cinemark USA, Inc.*, 873 F.3d 218 (3d Cir. 2017) (holding that a movie theatre was required to provide a tactile interpreter to a man who is considered deaf-blind); *Feldman v. Pro Football, Inc.*, 419 F. App’x 381 (4th Cir. 2011) (holding that the operator of a pro football stadium violated the ADA because they failed to provide auxiliary aids beyond assistive listening devices to ensure proper enjoyment of the game); *Arizona ex rel. Goddard v. Harkins Amusement Enters.*, 603 F.3d 666 (9th Cir. 2010) (holding that movie

required that a movie theatre provide closed captioning for those who are deaf.<sup>100</sup>

The Third Circuit, in *McCann v. Cinemark*, held that a movie theatre had to provide a tactile interpreter to a man who was deaf-blind.<sup>101</sup> Thus, the Third Circuit went beyond the Ninth Circuit and required an auxiliary aid that provided even greater access. The court held that by denying the customer the interpreter, the owner “excluded him from or denied him [owner’s] services.”<sup>102</sup> The Fourth Circuit, took a similar approach in *Feldman v. Pro Football*, by holding that the operator of a pro football stadium violated the ADA because they failed to provide auxiliary aids beyond assistive learning devices.<sup>103</sup> Here, the Fourth Circuit stressed that the auxiliary aid needs to provide full and equal enjoyment of the good or service provided.<sup>104</sup> As such, the operator of the football stadium needed to include access to music lyrics, play-by-play, and public address announcements that the other able bodied fans had access to.<sup>105</sup>

### III. THE DISABILITY COMMUNITY AND THE DESIRE TO PROTECT THE ENVIRONMENT

The movement to ban plastic straws is not met with universal support and faces opposition from an important constituency. As plastic straw bans are implemented, the disability community is becoming concerned and disheartened.<sup>106</sup> Katherine Carroll, a policy analyst at the Center for Disability Rights, said this concern is due to bans being implemented “without the input of [the disability community’s] daily life experience.”<sup>107</sup> Some feel that the bans fail to take into consideration how single-use plastic straws have become a “tool” that individuals with disabilities, like those who suffer from muscular dystrophy rely on.<sup>108</sup>

Some members of the disability community “feel erased” by the attitudes of some in the straw ban movement.<sup>109</sup> This is because to some in the disability

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theaters have to provide closed captioning and descriptive narration devices because these qualify as auxiliary aids).

100. See *Goddard*, 603 F.3d at 670.

101. See *McCann*, 873 F.3d at 230.

102. *Id.*

103. See *Feldman*, 419 F. App’x at 391.

104. See *id.*

105. *Id.* at 391–93.

106. See *infra* Section III.A (articulating the concerns expressed by activists for members of the disability community).

107. Martinez, *supra* note 79.

108. See Erin Vallely, *Grasping at Straws: The Ableism of the Straw Ban*, CTR. DISABILITY RIGHTS: BLOG, <http://cdmns.org/blog/disability-dialogue/grasping-at-straws-the-ableism-of-the-straw-ban> [<https://perma.cc/9CND-XULA>].

109. See Alice Wong, *The Last Straw: I Need Plastic Straws. Banning Them Puts a Serious Burden on People with Disabilities*, EATER (July 19, 2018, 10:04 AM), <https://www.eater.com/2018/7/19/>

community, plastic is “an essential part of [their] health and wellness.”<sup>110</sup> This Part addresses how the banning of plastic straws can be harmful for those with disabilities. Specifically, Section III.A addresses how plastic straws are the only type of straw that effectively works for individuals with disabilities. Then Section III.B discusses the failure of rollouts of even partial bans.

#### A. OTHER TYPES OF STRAWS JUST DO NOT COMPARE

The disability community has argued that the alternatives offered by governments and companies are inadequate for those with disabilities.<sup>111</sup> Section III.A.1 addresses the benefits of plastic straws. Section III.A.2 addresses the downfalls of other types of straws by pointing out flaws with paper, metal/glass, and food-based alternatives.

##### 1. Plastic Straws Provide Vital Benefits to Individuals with Disabilities

Attributes of plastic straws (cheap, flexible, and the ability to be used for drinking cold as well as hot drinks) “are vital for independent living” for some with disabilities.<sup>112</sup> Dianne Laurine, who is 75 years old and has lived with mobility issues her whole life, remembers a time when plastic straws were made of paper and credits the advent of plastic straws with changing her life.<sup>113</sup> This is because as Disability Rights Washington, a disability advocacy group, has said, “[o]ther types of straws simply do not offer the combination of strength, flexibility, and safety that plastic straws do.”<sup>114</sup> Eryn Star, president of an advocacy group called Diversability, said that, “[b]efore plastic straws were invented, a lot of disabled folks with a disability would eat and drink without a traditional tool—they actually aspirated and the food and drink was getting into their lungs, . . . [s]o when plastic straws were invented, it was the first time a lot of folks could eat and drink without risk of death.”<sup>115</sup>

In a letter to Seattle, Disability Rights Washington contended that plastic straw bans could turn routine trips, something as simple as going to get fast

17586742/plastic-straw-ban-disabilities [https://perma.cc/J2KD-CGXW] (explaining how comments made by Lonely Whale Foundation executive director Dune Ives when he said, “[p]lastic straws are social tools and props, the perfect conversation starter,” have impacted the author).

110. *Id.*

111. See Martinez, *supra* note 79.

112. Imogen Calderwood, *There’s a Problem with Outright Banning Plastic Straws*, GLOB. CITIZEN (July 31, 2018), <https://www.globalcitizen.org/en/content/plastic-straw-ban-crackdown-disabilities> [https://perma.cc/3Y7V-KBTC].

113. Melissa Hellmann, *Straw Ban Leaves Disabled Community Feeling High and Dry*, SEATTLE WEEKLY (July 11, 2018, 1:30 AM), <https://www.seattleweekly.com/news/straw-ban-leaves-disabled-community-feeling-high-and-dry> [https://perma.cc/62P9-Y4GL].

114. Archie & Paul, *supra* note 66.

115. Irene Corona Avila, *Bon Appétit to Ban Plastic Straws from General Use by October*, ALBION PLEIAD (Feb. 13, 2019), <https://www.albionpleiad.com/2019/02/bon-appetit-to-ban-plastic-straws-from-general-use-by-october> [https://perma.cc/A3Z6-NZR9].

food, into something that requires planning and supplies.<sup>116</sup> This would be a failure in equity.<sup>117</sup> For members of the disability community, going somewhere without a straw could turn into an exhausting, trying experience.<sup>118</sup> This is due to the fact that for “many individuals with mobility and strength issues, [it can be difficult or impossible to] lift cups high enough to drink for them.”<sup>119</sup> At the core, plastic straws provide access and advocates say “it is difficult and harmful to take [something that provides access] away from a marginalized community that depends on it.”<sup>120</sup>

## 2. Popular Alternatives Pose Serious Health Risks

Not only do these other types of straws lack certain benefits that plastic straws have, they also have a myriad of health risks. One popular alternative<sup>121</sup> to plastic straws are biodegradable paper straws.<sup>122</sup> However, some with disabilities may take longer to drink, causing paper straws to become soggy or disintegrate, “increasing the risk of choking.”<sup>123</sup> Most paper straw alternatives “can’t cope with hot liquids” and are not flexible.<sup>124</sup> As a result, the straw begins to break down leaving chunks of paper in the drink. This can cause an individual to choke and potentially aspirate the liquid into their lungs and as a result this means that the individual is denied meaningful access to the good.

Another popular alternative are reusable straws, especially metal or glass straws.<sup>125</sup> However, these “straws pose injury risks, especially for those with tremors, spastic episodes, and temperature sensitivity conditions.”<sup>126</sup> These individuals face a higher potential of biting down on a solid object and suffering oral injury. For example, if a tremor leads to a strong bite of a glass straw, shards of glass could then be in the individual’s mouth. Metal straws pose a similar threat to an individual’s teeth or piercing their mouth. Furthermore, any reusable straw will need to be sterilized after every use and some individuals with disabilities do not “have the ability to wash, store[,] and

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116. Archie & Paul, *supra* note 66.

117. *See id.*

118. *See id.* (telling the story of Daniel Gilbert who went to a bar that had no plastic straws and that he “had to manage, but it took a lot of effort . . . [and] was really exhausting”).

119. Valley, *supra* note 108.

120. Wong, *supra* note 109.

121. There are a multitude of alternatives for plastic straws. This conversation will concern the more popular straw alternatives, rather than provide information regarding the disability community’s concern with each possible alternative.

122. Martinez, *supra* note 79.

123. *Id.*

124. Calderwood, *supra* note 112.

125. *Id.*

126. Valley, *supra* note 108.

bring them.”<sup>127</sup> So for those suffering from these conditions, these reusable straws do not provide meaningful access to the beverage.

There is also trepidation with food-based straws as there can be potential food allergies to various types of straws.<sup>128</sup> For example, if someone has a gluten allergy then they would be unwilling to drink from a wheat or pasta straw, which is a popular food-based alternative. Thus, an individual with a disability would be required to call ahead or look up the composition of a straw provided wherever they go just to be able to drink. This could not be reasonably considered to be “meaningful access.” Activists have become concerned about this potential issue. So, activists called local restaurants in Seattle and discovered that stores “were unaware of the composition of the compostable straws . . . and therefore couldn’t guard their customers against allergic reactions.”<sup>129</sup> This would result in individuals having to forgo visiting that place of public accommodation because even the establishment itself is unaware of what their straws are made of.

#### B. EVEN PARTIAL BAN ROLLOUTS HAVE PROVEN PROBLEMATIC

The rollout for many local governments has been problematic. Take for example Seattle, the first major city to implement a plastic straw ban. The Seattle Public Utilities, in its roll out of the ban, instructed local businesses to use up their supply of plastic straws and failed to mention exceptions for those with disabilities in its guidance letter to businesses.<sup>130</sup> When it is not made abundantly clear that plastic straws *must* and not just *may* be provided to those with disabilities, it can have the same effect as a complete ban with no exceptions. There are also issues with cities like San Francisco, who promise to later address concerns from those with disabilities.<sup>131</sup> This has the potential to leave individuals with disabilities in limbo and force them to wait for their concerns to be heard and addressed.

The desire to reduce plastic from the environment is a noble cause that certainly has merit. There is no question that those who advocate to ban plastic straws do not do so in a manner to exclude individuals with disabilities from public life. However, the sad reality is that the disability community has become an unintended victim to the various actions taken to reduce the usage of plastic straws. Sharon Shapiro-Lacks, who has cerebral palsy, says that the

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127. Ed Wiley Autism Acceptance Lending Library, *How Do Plastic Straw Bans Hurt Disabled People?*, FACEBOOK (July 1, 2018), <https://www.facebook.com/EdWileyAutismAcceptance/photos/a.695327333852731/1982517378467047/?type=3&theater> [<https://perma.cc/6MgR-AAFT>].

128. Hellmann, *supra* note 113.

129. *Id.*

130. *Id.*

131. *New Ordinance Tackles Plastic Waste and Litter, Makes Dining in San Francisco More Eco-Friendly*, SF ENV'T, <https://sfenvironment.org/news/update/the-plastic-and-litter-reduction-ordinance-will-eliminate-sources-of-litter-while-making-the-san-francisco-dining-experience-more> [<https://perma.cc/896U-2LV2>].

absence of “plastic straws can cause many people with disabilities like myself not to be able to eat or drink in a restaurant, [or] a caf[é].”<sup>132</sup> This rings eerily similar to what Congress sought to remedy with the ADA: the “sobering picture of an isolated and secluded population of individuals with disabilities” who were absent from public life.<sup>133</sup>

#### IV. PLASTIC STRAWS AND THE AMERICANS WITH DISABILITIES ACT

Congress provided the means to ensure that individuals with disabilities are included in public life with the passage of the ADA. However, the ADA has yet to serve as a core tenant of the arguments against efforts to reduce and eliminate plastic straws.<sup>134</sup> This Note contends that the ADA provides those in the disability community with a powerful vehicle in which to ensure that plastic straws are provided to them. In doing so, the disability community can continue to remain active in the public sphere and will not become further isolated by this new movement. This Part addresses how plastic straws are the only type of straws that fully provide enjoyment of beverages as auxiliary aids in a legal context. As a result, the ADA not only protects the distribution of but mandates that plastic straws be provided at public accommodations. This alleviates the problems surrounding current partial bans as it is clear that public accommodations *must* provide plastic straws. Individuals with disabilities should not have to worry about the availability of plastic straws when they venture out into public. First, Section IV.A discusses how banning plastic straws falls within the meaning of discrimination provided by the ADA.<sup>135</sup> Second, Section IV.B discusses how, as a result of this classification, plastic straws are subject to protection by the ADA.<sup>136</sup> Third, Section IV.C examines the effect of this understanding on adverse actions taken against plastic straws.<sup>137</sup>

##### A. BANNING PLASTIC STRAWS FALLS WITHIN THE MEANING OF DISCRIMINATION UNDER THE ADA

To have an argument, the disability community needs plastic straws to fall under the category of auxiliary aids and services. As discussed earlier, the

132. Molly Enking, *Disability Rights Groups Voice Issues with Starbucks' Plastic Straw Ban as Company Responds*, PBS NEWS HOUR, <https://www.pbs.org/newshour/health/disability-rights-groups-voice-issues-with-starbucks-plastic-straw-ban-as-company-responds> [<https://perma.cc/FQC8-Q6VN>] (last updated July 18, 2018, 5:49 PM).

133. S. REP. NO. 101-116, at 10–11 (1989) (quoting The National Council on Disability's findings in a Lou Harris poll).

134. *See supra* Part III (discussing the concerns raised by major disability rights organizations and individuals). This was current as of November 3, 2018 through the research I have conducted. This is not to say that no one has attempted to make a similar argument. But this type of argument has not been proclaimed so far.

135. *See infra* Section IV.A.

136. *See infra* Section IV.B.

137. *See infra* Section IV.C.

Attorney General provided a catch-all category of “[o]ther similar services and actions” which should be read broadly to effectuate the purpose of the ADA.<sup>138</sup> Coupling the regulation with the ADA’s definition, the disability community would need plastic straws to be considered auxiliary aids in order to make a claim under the ADA.<sup>139</sup>

To better understand the Attorney General’s clarifying regulations, we turn to caselaw.<sup>140</sup> First, Section IV.A.1 examines court precedent relating to auxiliary aids and services and finds that plastic straws qualify under these regulations. Since plastic straws fit within the understanding of auxiliary aids, the public accommodation can only prevail if it shows that providing straws is either an undue burden or would fundamentally alter the good offered. Second, Section IV.A.2 discusses how neither of these two exceptions in the ADA are likely to be met. Third, Section IV.A.3 addresses how two regulations should be read in harmony to effectuate the purpose of the ADA and require that plastic straws be provided.

### 1. Turning to Case Law to Understand “Auxiliary Aids and Services”

Three circuits have heard cases involving the use of auditory and visual aids and whether they qualify as auxiliary aids. Each time, the circuits held that those aids qualified as auxiliary aids and thus are required by the public accommodation to be provided.<sup>141</sup> In these cases, the aids effectively communicated aural or visual content to those with disabilities, which qualified them as auxiliary aids.<sup>142</sup> As noted previously, the Attorney General’s regulations provide for two broader categories of “acquisition or modification of equipment or devices” and “other similar services and actions.”<sup>143</sup> Paired with a broad reading of the ADA in order to properly effectuate its purpose,<sup>144</sup> these categories give ample room for the disability community to make an argument that plastic straws serve the same purpose as the auxiliary aids discussed in the three circuit court cases.

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138. 28 C.F.R. § 36.303 (2018); *see also* Karczewski v. DCH Mission Valley LLC, 862 F.3d 1006, 1012 (9th Cir. 2017) (“We construe the language of the ADA broadly to advance its remedial purpose.” (quoting *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014))).

139. *See generally* 42 U.S.C. § 12182 (2012); 28 C.F.R. § 36.303 (combining the various criteria of the definitions that would lead to a violation of the general rule of Title III of the ADA for purposes of this case). This is not laying forward the cause of action requirements to bring suit of the ADA, rather assuming other requirements are met, what must the disability community show for the parts most likely to be at issue and litigated.

140. This Note will not discuss *Chevron* deference. While *Chevron* deference is discussed briefly in some of the cases mentioned later within, it is being left for another eager student to write about.

141. *See supra* note 99 and accompanying text.

142. *See* 28 C.F.R. § 36.303(b)(1), (2) (listing as examples devices that are “effective methods of making aurally [or visually] delivered materials available to individuals who are deaf or hard of hearing [or are blind or have low vision]”).

143. *Id.* § 36.303(b)(3), (4).

144. *See* Karczewski v. DCH Mission Valley LLC, 862 F.3d 1006, 1012 (9th Cir. 2017).

In Title III of the ADA, Congress wanted to ensure that individuals with disabilities were able to *fully and equally* enjoy the goods and services.<sup>145</sup> Thus, it is not sufficient under the ADA for an auxiliary good to simply provide access. The services being provided through these auxiliary aids need to allow the individuals with disabilities to *fully and equally enjoy* the entertainment that the public accommodation is offering. The court in *Feldman* provided an example of an auxiliary aid that failed to provide full and equal enjoyment when the assisted listening device offered did not relay the music and entertainment aural content of a football game experience.<sup>146</sup> Individuals who required such devices would only be able to fully and equally enjoy the game through their auxiliary aid once that content was provided.

There is certainly a compelling case to be made that, without plastic straws to consume the beverages, individuals with disabilities are unable to fully and equally enjoy the public accommodation and what it offers. Plastic straws are currently the only type of straw that provide the flexibility and duration needed for individuals with disabilities to consume beverages without fearing setbacks.<sup>147</sup> To fully enjoy a beverage, individuals with disabilities need to be able to not worry that each time they drink from a straw they will be injured.<sup>148</sup> It is not enough that other types of straws may provide for, at base, the consumption of a beverage. The straw must provide *full* enjoyment of the good or service that the public accommodation is offering.<sup>149</sup> While the experience does not need to be identical,<sup>150</sup> non-plastic straws provide various hazards or limitations that impede full enjoyment of the beverage being provided.

Admittedly, any type of straw can provide “access” to the beverage. However, they do not provide full and equal access in the way that plastic straws do. As discussed earlier, these alternatives present a myriad of issues.<sup>151</sup> Metal and glass straws, fail to provide the flexibility of plastic straws and can present serious health concerns for individuals with tremors or muscle spasms. Metal straws also are heat conductors, which make them less than ideal for consuming hot beverages as it could lead to burns. Plant and food-based straws are not reliable to provide full and equal enjoyment due to allergic reactions for various individuals. Finally, paper straws disintegrate in

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145. 42 U.S.C. § 12182 (2012) (emphasis added).

146. *Id.*

147. *See supra* Part III.

148. *See supra* Part III (discussing how alternatives to plastic straws do not provide the same degree of access as plastic straws do).

149. *See generally* *Feldman v. Pro Football, Inc.*, 419 F. App'x 381 (4th Cir. 2011) (holding that a football stadium had to provide access to more than just game related aural content; the stadium must provide access to song lyrics).

150. *Id.* at 392.

151. *See supra* Part III.

liquids which can lead to choking hazards, especially if the porous seal has been broken via biting or bending.

Plastic straws, however, are substantially similar to the manner in which the aural and visual devices provide full enjoyment of good/service. In many cases, the individual would not be able to consume the beverage or struggle in the absence of a plastic straw.<sup>152</sup> Plastic straws made available upon request would mirror the auxiliary aids in the cases that are made available to customers upon request. As of now, the circuit courts that have litigated this issue agree providing a strong legal foundation for an argument to be made by the disability community.

Thus, the separating quality between individuals who could enjoy the public accommodation and those who could not is the ability to consume the beverage despite the absence of a plastic straw. Here, the disability is the impediment to the ability to consume beverages freely. Plastic straws, and plastic straws alone, are the auxiliary aid that provides the full and equal enjoyment of the beverage. Therefore, by failing to provide plastic straws, places of public accommodation are discriminating against individuals with disabilities who may need them. This means that places of public accommodation are prohibited from not supplying plastic straws. Rather, Title III of the ADA and the regulations require, at the very least, that public accommodations have plastic straws readily available upon request so as to not discriminate against the disability community.

## 2. The Exemptions

I will first address whether providing plastic straws would be an undue burden. The ADA is not requiring public accommodations to do anything new in providing plastic straws. Rather, public accommodations already provide, or have provided plastic straws to their customers freely. It is this very behavior that the actions being taken by public and private entities are trying to prevent.<sup>153</sup> Further, some of the legally permissible actions taken by these entities, actually provide that plastic straws will be less of a burden on resources than they currently are, as they allow for straws to be provided upon request only.<sup>154</sup> As such, it is clear that in the vast majority of situations, requiring public accommodations to have plastic straws is a continuation of current voluntary practice or restoration of a recently ceased voluntary practice.<sup>155</sup> The key point here is that a public accommodation is highly

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152. See *supra* Part III.

153. See *supra* Section II.D (describing the actions taken to reduce or eliminate the use of plastic straws in their respective areas).

154. See *infra* Part V.

155. There is certainly a situation of an institution that has made a practice of not providing plastic straws. I contend that being required to order them would not result in an undue burden as plastic straws are known for being quite cheap. Further, I do not wish to address a potential cost-benefit analysis regarding the undue burden.

unlikely to be able to claim that providing plastic straws to its customers would constitute an undue burden.

Secondly, the public accommodation would prevail when the auxiliary aid fundamentally alters the good or service.<sup>156</sup> So, the question is whether plastic straws fundamentally alter the nature of the good, in this case, a beverage. Plastic straws are used as a tool to consume the beverage. Should this issue ever proceed to court, it would be difficult to argue that providing a plastic straw would “fundamentally” alter the beverage. In *PGA Tour, Inc. v. Martin*, a professional golfer with a disability requested to use a golf cart throughout a competition, due to his inability to walk a full eighteen-hole round; but the PGA denied the golfer’s request.<sup>157</sup> Both situations (i.e., *PGA* and *Straw Bans*) involve the setting of a public accommodation. As the Court mentions, golf courses are places of public accommodation,<sup>158</sup> just as restaurants, bars, and coffee shops are by statute.<sup>159</sup> At golf courses, one plays golf, just like one consumes beverages in our broad category of public accommodation. Here, the Court ruled that playing golf is not fundamentally altered by riding a golf cart between shots, despite the fact that the walking requirement induces fatigue.<sup>160</sup> One could argue that the golf cart alters the game by not inducing the same fatigue for the golfer with a disability. Yet, the court still found that it did not rise to the level of *fundamentally* altering the game of golf and thereby held that the PGA was required to allow the golfer to use the cart.<sup>161</sup> Plastic straws alter the underlying good to an even smaller degree. Plastic straws do not alter the taste, experience, or underlying quality of the beverage being consumed. Following *PGA*, it is unlikely that the public accommodation would be able to successfully contend that that they would be exempt under this provision.

### 3. Competing Regulations

One hurdle the Courts have experienced is with how to read two regulations, 28 C.F.R. section 36.303 and 28 C.F.R. section 36.307, that were issued under the ADA in unison.<sup>162</sup> The latter regulation says that a public accommodation does not need “to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with

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156. 42 U.S.C. § 12182 (2012).

157. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 668–69 (2001) (describing the conditions of the individual and his request to use a golf cart).

158. *Id.* at 677.

159. 42 U.S.C. § 12182.

160. *PGA Tour*, 532 U.S. at 668.

161. *Id.* at 677, 681.

162. *See generally* McGann v. Cinemark USA, Inc., 873 F.3d 218 (3d Cir. 2017) (discussing how to apply section 36.307 in light of the auxiliary aids rule); *see also* *Arizona ex rel. Goddard v. Harkins Amusement Enters.*, 603 F.3d 666, 671–72 (9th Cir. 2010) (discussing how the regulations interact).

disabilities.”<sup>163</sup> At first glance, this regulation would preclude public accommodations from being required to provide plastic straws. However, this is an incorrect reading. The Ninth Circuit in *McGann* makes a compelling argument as to why, stating that “the auxiliary aids and services requirement would be ‘effectively eliminated’ if limited by the ‘special goods and services’ rule.”<sup>164</sup> This is because any auxiliary good or service, by definition, is an additional service, for the individual with a disability, above what the public accommodation normally offers, typically requiring some degree of acquisition of items.<sup>165</sup> This means that if the public accommodation has to alter its inventory to provide that auxiliary good or service, they would not have to do it. The reading of these regulations in such a manner would be counter to our canons of interpretation. The disability community will be able to argue that the Court has long held against reading statutes that would lead to absurd results.<sup>166</sup> The interpretation of 28 C.F.R. section 36.307 as restricting section 36.303 would thus lead to an absurd result of absolving any auxiliary aid or service that the company would not voluntarily provide. At which point, the Attorney General simply could have said that much in his promulgated rules.

In order to give effect to both regulations, we need to read the regulations differently than previous courts and parties.<sup>167</sup> 28 C.F.R. section 36.307 is concerned with the underlying goods being offered, such as not requiring a bookstore to sell braille versions of books.<sup>168</sup> Stated another way, 28 C.F.R. section 36.307 is concerned with requiring public accommodations to alter the goods they provide rather than an item facilitating enjoyment of the good—an auxiliary aid. Plastic straws are not a good that is being offered in the public accommodations for the enjoyment of its customers. Nor are they a specialty good that would be ordered solely for individuals with disabilities, as a brailled book would be. Instead, plastic straws facilitate the enjoyment of the beverage (the good) that the public accommodation is

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163. Accessible or Special Goods, 28 C.F.R. § 36.307 (2018).

164. *McGann*, 873 F.3d at 228 (quoting *Goddard*, 603 F.3d at 672).

165. *See id.* (“Unless already provided voluntarily, auxiliary aids and services would never be required, because ‘[b]y its very definition, an auxiliary aid or service is an additional or different service that establishments *must* offer the disabled.’” (alteration in original) (quoting *Goddard*, 603 F.3d at 672)).

166. *See Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 736 F.3d 198, 209 (2d Cir. 2013) (stating that judges should “interpret statutes to give effect, if possible, to every clause and word”); *see also* *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 543 (1940) (warning courts against construing statutes that would lead to “absurd results”).

167. *See McGann*, 873 F.3d at 228 (overruling the district court which interpreted the regulations in a conflicting manner); *see also Goddard*, 603 F.3d at 673–75 (declining a party’s argument that devices that facilitated aural communication constituted a special good).

168. *See* 28 C.F.R. § 36.307(c) (2000) (“Examples of accessible or special goods include items such as Brailled versions of books . . .”); *see also McGann*, 873 F.3d at 228 (“Our case law and 28 C.F.R. § 36.307(a) instruct that a bookstore may not need to offer Brailled versions of books, if doing so would require altering the mix of goods provided.”).

providing. Plastic straws avoid any potential conflict between the two regulations together, as functionally, they are inconsistent with the examples provided in 28 C.F.R. section 36.307.<sup>169</sup> This is best illustrated by one example in the regulation. The regulation provides that “special foods to meet particular dietary needs” would be a special good.<sup>170</sup> This would be a specialty good because it effects the inventory of the underlying product, food. Plastic straws do not affect the inventory of the various beverages, they only assist in consuming them.

*B. PLASTIC STRAWS FALL WITHIN THE PROTECTION OF THE ADA*

The disability community is not demanding or requesting special drinks be made and offered at public accommodations like specialty goods. In effect, the disability community is simply asking that they be able to consume the various drinks offered. Thus, they are asking for the public accommodation to provide plastic straws in a manner consistent with our understanding of auxiliary aids—the acquisition of plastic straws by public accommodations would fit within the categories provided in the Attorney General’s regulations.

Qualifying plastic straws as auxiliary aids allows the disability community to argue that the absence of plastic straws qualifies as discrimination. Plastic straws, and not alternative straws, are the auxiliary aid that provides for full enjoyment of goods in public accommodations for individuals with disabilities. The absence of plastic straws is counter to the intent to integrate the disability community into society and violates Title III of the ADA.

Private companies who take actions to eliminate plastic straws entirely, isolate individuals from their establishments. As more companies begin to ban plastic straws from their establishments,<sup>171</sup> the list of places that individuals with disabilities can both access and enjoy fully is shrinking. Yet these actions open these companies up for litigation under the ADA. Plastic straws should be considered, in light of caselaw and interpretive meaning, auxiliary aids that public accommodations should provide. These places of public accommodation are unlikely to find refuge in either of the two exemptions.<sup>172</sup> Thus, the disability community will be able to effectively argue that they are being discriminated against in accordance with one of the three definitions provided by Congress. Ultimately, this discrimination violates Title III of the ADA’s general rule by prohibiting those with disabilities from fully enjoying the good offered by the public accommodation.<sup>173</sup>

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169. See 28 C.F.R. § 36.307(c).

170. *Id.*

171. See *supra* Section II.D.2 (describing various actions taken by private companies).

172. See *supra* Section IV.A (describing the low probability of either exemption being upheld due to factual and case-law considerations).

173. See *supra* Part IV.

Local governments and even states that take similar approaches, by completely banning the distribution of plastic straws within their domain, are even further isolating the disability community. While not isolating them directly from their own establishments, under these ordinances/laws, governments are effectively isolating individuals with disabilities from a multitude of public accommodations. In doing so, they are preventing individuals with disabilities from fully enjoying all aspects of social life in which drinking of any kind occurs. The disability community has a strong argument that this not only violates the ADA's intent, but that the ADA preempts these local laws rendering them void. The ADA would completely preempt these laws if it mandates plastic straws be offered as auxiliary aids. In these instances, the federal statute will rule, and rather than banning plastic straws it will require them to be made available. Undoubtedly, there will still remain a desire among governments and companies to reduce the usage of plastic straws.

C. *THE EFFECT OF PLASTIC STRAWS BEING AUXILIARY AIDS ON  
PLASTIC STRAW BANS*

While the ADA would prohibit complete bans on plastic straws,<sup>174</sup> companies and governments can still act to reduce the use of plastic straws. As discussed earlier, treating plastic straws as auxiliary aids means that unless a successful argument can be made for an exemption, the ADA is going to mandate the providing of plastic straws in public accommodations.<sup>175</sup> Due to this understanding of the relationship between plastic straws and the ADA, certain cities and companies should have their actions either struck down or found to be illegal.

Straw bans have different degrees of severity in which the private and public sector acts.<sup>176</sup> Actions fall along a spectrum from the absolute banning of plastic straws to not taking any action against plastic straws. The question then, in light of the understanding of plastic straws and the ADA, is to what degree can private and public entities act before running afoul of the ADA.<sup>177</sup>

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174. See *supra* Part IV.

175. See *generally supra* Part IV (describing how plastic straws fall within the protection of the ADA as an auxiliary aid that public accommodations must provide so that individuals with disabilities can have full enjoyment of the good or service provided).

176. See *supra* Section II.D. Again, in being consistent with the literature regarding plastic straws I use the label "straw ban" generally. Not all actions would effectuate a ban in the most literal sense of the word.

177. First and foremost, as a matter of public policy, I contend that entities acting do not do so unilaterally. Actors should include the disability community when considering taking actions to ensure a more inclusive process. This would help to ensure that an already marginalized group, at the very least, feels as if they are being heard. A broader dialogue can help remedy the growing strife amongst the disability community. See *generally supra* Section II.D (describing the disability community's reactions).

The first general category falls on one end of the spectrum, in which actors completely ban plastic straws and provide no accommodations for those with disabilities. These are the bans from cities like Malibu, California; Surfside, Florida; and Fort Myers, Florida.<sup>178</sup> Private companies—such as Starbucks, The Walt Disney Co., and McDonalds—would be ill advised to follow through with actions that mirror these cities.<sup>179</sup> This more extreme version of the straw bans, by private and public actors alike, is in conflict with current case law’s understanding of auxiliary aids and their placement.<sup>180</sup> These city ordinances prohibit public accommodations from providing an auxiliary aid that the ADA would require them to provide.<sup>181</sup> Thus, these ordinances conflict with and are preempted by the federal statute, the ADA.<sup>182</sup>

The steps taken by private actors actually make for a simpler legal analysis. As places of public accommodation, as defined by the ADA, these companies are required to provide auxiliary aids unless doing so would present an undue burden or fundamentally alter the good/service.<sup>183</sup> For reasons discussed previously, the companies are unlikely to find success in arguing either of these exemptions.<sup>184</sup> In the end, this category of straw bans fails to reduce plastic straw usage in a legally sound manner.

However, there is a category that bans plastic straws to a lesser degree. This category also removes plastic straws from being readily available, but it provides that they may be made available upon request. Cities like Narbeth, Pennsylvania and San Francisco, California are two cities that have a straw ban that would fall within the contours of this category.<sup>185</sup> The San Francisco sponsoring Supervisor, Katy Tang, in an email, stated that the intent of the original ordinance was to include a provision allowing those with disabilities to request plastic straws.<sup>186</sup> In fact, Ms. Tang even asserted that because of the

178. See *supra* notes 69–70 and accompanying text.

179. See Folley, *supra* note 78.

180. See generally *supra* Part IV (explaining how plastic straws qualify as auxiliary aids and are protected under the ADA).

181. Compare the ordinances mentioned in *supra* notes 69–70, with Section IV.B.

182. U.S. CONST. art. VI, cl. 2.

183. See 42 U.S.C. § 12181 (2012) (providing the definition of public accommodation); *id.* § 12182(b)(2)(A) (providing for the exemptions to providing auxiliary goods or services).

184. See *supra* Section IV.A.2 (explaining the difficulty qualifying for this exemption).

185. See Vinny Vella, *How a Main Line Town Became The First in Pa. to Ban Plastic Straws*, PHILA. INQUIRER (Oct. 27, 2018), <http://www.philly.com/philly/news/pennsylvania/plastic-straw-ban-narbeth-pennsylvania-20181027.html> [<https://perma.cc/UGG9-Eg4Q>] (“The ordinance [in Narberth] . . . outright bans the distribution of plastic drinking straws, unless requested by a disabled customer.”); see also Thadani, *supra* note 73 (explaining how San Francisco is implementing a ban “that will prohibit the city’s restaurants, bars and retailers from providing customers with plastic items—such as straws”).

186. RJ Joseph, *Straw Ban or Straw Man? Why Plastic Straw Bans Aren’t the Answer*, SPRUDGE (Aug. 6, 2018), <https://sprudge.com/straw-ban-or-straw-man-why-plastic-straw-bans-arent-the-answer-135315.html> [<https://perma.cc/NTU8-4DJF>] (“The intent behind our originally [sic] included a clause regarding the disabilities community is that restaurants/retailers would

ADA's broadness, all places of accommodation should provide plastic straws.<sup>187</sup> As mentioned earlier, California passed statewide legislation that would fall within this category.<sup>188</sup> Some private actors—such as Starbucks, American Airlines, and Hyatt Hotels—have committed to working towards inclusion or providing plastic straws upon request.<sup>189</sup> Straw bans like these are best suited to reduce plastic straw usage in a legal and respectful manner.

When made available upon request, plastic straws are treated akin to other auxiliary aids.<sup>190</sup> Most auxiliary aids are not provided openly for individuals to take freely. Rather, as seen in the cases, they are aids that are requested by the customer in the public accommodation.<sup>191</sup> So long as plastic straws are readily furnished upon the individual's request, the public accommodations will be in line with what our current understanding of the ADA. The states and cities that choose to enact legislation similar to the actions described before, will not run afoul of the ADA's intent and purpose. In fact, future legislation should reflect the efforts of San Francisco, as expressed by Supervisor Tang. The ADA requires providing plastic straws as auxiliary aids.<sup>192</sup> Local legislation should clearly reflect this understanding, so that public accommodations are not confused. For example, the City of Seattle, to ensure compliance with the ADA, should have expressly stated that exceptions are made for individuals with disabilities.<sup>193</sup> By expressly affirming this understanding of the ADA in legislation, local governments can remedy the concerns of some in the disability community who feel that businesses may still not provide plastic straws unless required.<sup>194</sup> These provisions also have the potential to drastically reduce the amount of plastic straws used. If plastic straws are only made available upon request, many individuals will become accustomed to not using one for every beverage they consume at a public accommodation—although, concerns still remain as to whether this is truly a noble cause or effective cause.<sup>195</sup> Regardless, this category of plastic straw bans achieves the purpose of reducing the use of plastic straws and does not violate

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indeed need to have some plastic straws on hand for those who request them due to [sic] a medical reason.”).

187. *Id.*

188. CAL. CODE REGS. tit. Ch. 5.2, § 42271 (2019) (“A full-service restaurant shall not provide a single-use plastic straw to a consumer *unless requested* by the consumer.” (emphasis added)).

189. Martinez, *supra* note 79 (“Starbucks told TIME that the company ‘intends to focus on inclusive design to ensure that all customers will be able to enjoy their Starbucks beverages.’ An American Airlines representative said the carrier plans to keep a small number of plastic straws and sticks on hand for passengers who may need them. Hyatt . . . in a press release said that ‘straws and picks will be available on request only.’”).

190. *See supra* Section IV.A.1 (defining and explaining auxiliary aids).

191. *See supra* note 99 and accompanying text.

192. *See supra* Section IV.B (analyzing how the ADA requires plastic straws as auxiliary aids).

193. *See supra* notes 65–68 and accompanying text.

194. Valley, *supra* note 108.

195. Minter, *supra* note 43.

the ADA. Private and public actors alike would be wise to follow this model of straw bans in the future.<sup>196</sup>

## V. CONCLUSION

The concern of plastic's environmental impact is well founded. However, it is imperative that those who seek to find inroads in to reducing plastic in our society do so in a responsible manner. It is not only morally right, but legally required, to ensure that these actions do not leave behind a historically marginalized section of the American population.

The ADA's legislative purpose, statutory text, and the resulting caselaw have created a robust legal regime in the United States. This regime makes clear that plastic straws qualify as auxiliary aids. At this time, other forms of straws simply do meet the muster of providing meaningful access to the goods being offered for some with disabilities. Congress made it clear those living with disabilities are included in our society. Plastic straws provide are but one of the many aids to this inclusion. In fact, plastic straws are often cheaper and alter the good/service far less than many of the other aids the legal regime has mandated be provided.

Private and public actors would be wise to proceed with a more inclusive approach when evaluating the merits and crafting their own policies regarding plastic straws. Should they choose a heavily restrictive approach, those living with disabilities, who are affected by these bans, have a strong case to make in court that they are being discriminated against by these policies. Further, the Federal Government can and should support the disability community by enforcing the ADA.

In the end, the legal regime born from the ADA and its progeny provides strong footing for a legal challenge. People, regardless of any disability, should be able to enjoy places of public accommodation. Their trip to a restaurant or coffee shop should not be a stressful or burdensome experience. Rather, it should be as routine for an individual living with a disability as someone who does not. Every individual should be able to sit back, enjoy their beverage, and should they request one, use a plastic straw to have just a sip.

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196. That is, of course, should a party decide to enact such a policy.