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Cover Page Footnote

J.D. Candidate at Loyola Law School, Los Angeles, 2018. The author would like to thank Professor Daniel Martin and the Loyola of Los Angeles Entertainment Law Review editorial staff for their assistance with this article. He also wishes to express his appreciation to Gavin Class, an offensive lineman whose grit is in keeping with the tradition of that most important position.

FOURTH CIRCUIT FUMBLES THE BALL: SPIRIT OF DISABILITY RIGHTS COMPROMISED IN THE WAKE OF *CLASS V. TOWSON UNIVERSITY*

*Dave Peterson**

The Fourth Circuit’s recent decision in *Class v. Towson University* threatens the rights guaranteed to disabled persons under the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 (“Rehab Act”). The Acts demand that disabled persons not be excluded from activities based on unsubstantiated paternalistic concerns, and, where exclusion occurs, the Acts entrust courts to evaluate whether exclusion was warranted in light of the best available objective evidence. This Comment argues that by deferring to the speculative fears and subjective judgment of Towson University—the very entity accused of violating the ADA and Rehab Act in *Class v. Towson*—the Fourth Circuit abandoned its duties and rendered an improper decision.

This Comment begins with a critique of the Fourth Circuit’s reasoning in *Class v. Towson* and demonstrates that the factual record was devoid of evidence supporting the court’s decision to exclude Gavin Class—a disabled athlete—from Towson’s football team. This Comment continues by arguing that the Fourth Circuit employed an incorrect standard of analysis when determining that Class’s disqualification did not violate the ADA or Rehab Act. The conclusion of this Comment implores the legal community to reject the Fourth Circuit’s holding and reaffirm disabled persons’ right to live free from paternalistic authorities.

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I. INTRODUCTION

This Comment addresses the plight of Gavin Class (“Class”), a Division I college football player who was excluded from National Collegiate Athletic Association (NCAA) competition following an incident that left him disabled.¹ The issue is whether Towson University (“Towson”) violated the Rehabilitation Act of 1973 (“Rehab Act”) and the Americans with Disabilities Act of 1990 (ADA) when it prevented Class from returning to the football field.² The District Court for the District of Maryland found for Class, but the Fourth Circuit Court of Appeals reversed in favor of Towson.³ This Comment asserts that the Fourth Circuit applied flawed reasoning and reached an incorrect decision.⁴ In finding that Towson was justified in excluding Class, the Court deferred to the “subjective good faith” judgment of Towson’s physicians rather than independently analyzing the facts to determine whether the university’s action was substantially justified and “objectively reasonable.”⁵ In doing so, the Court discounted considerable medical evidence favoring Class’ return and undercut the spirit of the ADA and the Rehab Act, while also making it impossible for disabled athletes to challenge paternalistic decisions denying them the right of inclusion.⁶

Part II of this Comment begins with an examination of *Class v. Towson*, where the factual narrative is explored. Part III then discusses the nature of a discrimination action brought under the ADA and Rehab Act. Part IV shows that Class should have prevailed in his claim against Towson. Finally, Part V concludes by summarizing the Fourth Circuit’s

1. See *Class v. Towson Univ.*, 806 F.3d 236 (4th Cir. 2015).

2. *Id.* at 239.

3. *Class v. Towson Univ.*, 118 F. Supp. 3d 833, 837 (D. Md. 2015), *rev’d*, *Class* 806 F.3d 236; *Class*, 806 F.3d at 239.

4. See Eldon L. Ham, *How 4th Circ. Failed to Clarify Athlete Disability Rights*, LAW 360 (Jan. 3, 2016, 9:00 AM), <http://www.law360.com/articles/738601/how-4th-circ-failed-to-clarify-athlete-disability-rights> [https://perma.cc/FEZ4-8SMJ].

5. *Class*, 806 F.3d at 257 (Wynn, J., dissenting).

6. *Id.* at 253–59 (Wynn, J., dissenting); see also Peter M. Spingola, Knapp v. Northwestern University: *The Seventh Circuit Slam Dunks the Rights of the Disabled*, 73 CHI-KENT L. REV 709, 730 (1998).

errors and recommending how the judiciary should resolve similar cases in the future.

II. BACKGROUND

Gavin Class, a starting offensive lineman for the Division I Towson University Tigers football team, collapsed due to exertional heatstroke during a team practice in August 2013.⁷ The heatstroke pushed Class to the brink of death: he was in a coma for nine days, suffered multi-organ failure, received chemotherapy, and required a liver transplant amongst numerous additional procedures.⁸

Facing an arduous recovery, Class set out to be the first liver transplant recipient to play Division I college football.⁹ He told ESPN reporters, “I don’t want to give up. I’m doing this to send a message and be an inspiration.”¹⁰ As a testament to his determination, Class resumed training with Towson’s strength coach in October 2014. At that time, the university also enlisted the advisory services of specialists at the Korey Stringer Institute (the “Institute”)—the nation’s leading research center studying heatstroke and heat illness.¹¹ After conducting a conditioning test in February 2015, specialists at the Institute concluded that Class was fit to practice in mild weather, provided that he took appropriate precautions.¹²

Despite this conclusion, Towson’s Head Team Physician, Dr. Kari Kindschi, prohibited Class’ return because she felt that he could not safely return to practice or game play.¹³ Notably, despite being an accomplished, board-certified sports medicine practitioner, Kindschi had no expertise in heatstroke or heat-related illnesses,¹⁴ and her decision to block Class’

7. *Class v. Towson Univ.*, 806 F.3d 236, 238 (4th Cir. 2015).

8. *Id.* at 239.

9. ESPN Edit Operations, *Outside the Lines: Gavin Class*, VIMEO (2015), <https://vimeo.com/141587564> [http://perma.cc/N7TC-SLGV]; see *Class* 806 F.3d at 239, 252.

10. ESPN Edit Operations, *supra* note 9.

11. *Class v. Towson Univ.*, 118 F. Supp. 3d 833, 838–39 (D. Md.), *rev’d*, *Class*, 806 F.3d 236.

12. *Class*, 806 F.3d at 240.

13. *Id.*

14. See *Class*, 118 F. Supp. 3d at 836.

return was based solely on the speculative fear that he would suffer repeat heatstroke.¹⁵ Nevertheless, according to Towson's "Return-to-Play Policy," Kindschi had the final word in determining whether a sidelined student-athlete could return to competition.¹⁶ Unsatisfied with this result, Class petitioned the federal district court for an injunction allowing him to fully participate in the university's football program, alleging that Towson's decision violated the ADA and the Rehab Act.¹⁷

In June 2015, while awaiting the court's decision, the Institute put Class through a rigorous fitness test in conditions that mimicked a summertime football practice.¹⁸ According to the Institute's Chief Operating Officer, Dr. Douglas Casa,¹⁹ Class' results were "stellar" and overall Class did "exceptionally well" in demonstrating his ability to properly thermoregulate.²⁰ Consequently, Casa, in concert with Dr. William Hutson²¹ and Dr. Rolf Barth,²² co-directors of liver transplantation at the University of Maryland Medical Center, concluded that there was

15. ESPN Edit Operations, *supra* note 9 ("[She was] afraid that he would suffer another heatstroke, but [she] had no proof. She was basing her decision on fear. That was her exact words 'I'm basing my decision on fear.'"); *see Class*, 118 F. Supp. 3d at 842.

16. *Class*, 806 F.3d at 241.

17. *Id.* at 242.

18. *Class*, 118 F. Supp. 3d at 840.

19. Transcript of Record at 81–86, *Class*, 806 F.3d 236 (No. 1:15-cv-01544-RDB) (Dr. Casa's qualifications include having treated 185 exertional heatstrokes, authored over 175 peer-reviewed publications and two books related to heat and hydration issues in sports, and having served as a "heat consultant" for the National Football League, United States military, and professional soccer organizations. Dr. Casa has also conducted over forty field research studies and sixty lab research studies related to heatstroke and heat illness and is a Fellow of the American College of Sports Medicine and the National Athletic Trainers' Association (NATA). In 2008, he was recognized as the "Outstanding Researcher" by the Profession of Athletic Training); *see also* Brief of Appellee at 53, *Class*, 806 F.3d 236 (No. 1:15-cv-01544-RDB) (In 2013, NATA recognized Dr. Casa as its "Most Distinguished Athletic Trainer").

20. *Class*, 118 F. Supp. 3d at 840; ESPN Edit Operations, *supra* note 9.

21. *Class*, 118 F. Supp. 3d at 838 (Dr. Hutson was Class' primary physician and co-director of liver transplantation at The University of Maryland Medical Center at The University of Maryland Medical Center); Transcript of Record, *supra* note 19, at 9.

22. ESPN Edit Operations, *supra* note 9 (Dr. Bath was co-director of liver transplantation at the University of Maryland Medical Center).

absolutely no reason why Class should not be on the field.²³ The sole caveat to Class' return was that Towson must monitor him as directed by the Institute and the University of Maryland's transplant team.²⁴ This included having an on-site team trainer track Class' internal temperature during football activities through use of the CorTemp system.²⁵ To use CorTemp, Class had to "ingest a small electronic device that would track his internal body temperature and communicate the readings through low-frequency radio waves to a nearby handheld monitor."²⁶ Dr. Casa recommended that a team trainer take readings from the monitor by positioning himself or herself behind Class for three to five seconds every five to ten minutes during football activities.²⁷ By executing this plan, Towson "could [e]nsure that Class could cease activity before he reached a level where he was in danger of a reoccurrence of heatstroke or heat illness."²⁸

Still, despite the Institute having medically cleared Class, Kindschi held fast to her belief that allowing Class to return to the field would threaten his safety.²⁹ Thus, she continued to deny him reinstatement.³⁰ Kindschi also claimed that implementing CorTemp was an unreasonable accommodation because it required team trainers to operate beyond the scope of their jobs,³¹ even though Class offered to absolve Towson of any and all liability.³² Speaking for Towson, Kindschi reasoned that Class was

23. *Id.*

24. *Id.*; see Transcript of Record, *supra* note 19, at 19–22.

25. *Class*, 118 F. Supp. 3d at 841–42.

26. *Class*, 806 F.3d at 243.

27. *Class*, 806 F.3d at 243; *Class*, 118 F. Supp. 3d at 841.

28. *Class*, 118 F. Supp. 3d at 840–41.

29. See *id.* at 842.

30. See *id.*

31. *Id.* at 843.

32. *Class*, 118 F. Supp. 3d at 844 n.8 ("Nor is there any risk of increased liability for the University because Class has indicated that he is willing to sign a waiver before participating."); Memorandum in Support of Motion for Preliminary Injunction at 21, *Class*, 806 F.3d 236 (No. 1:15-cv-01544-RDB) ("Gavin has made clear to Towson that he is willing to sign a binding

not “otherwise qualified” to play football, and thus the university’s decision to exclude him from the team did not violate the ADA or the Rehab Act.³³

Following a one-day bench trial in which the medical evidence was considered, the district court rejected Towson’s argument and issued an injunction that prevented the university from excluding Class from competition.³⁴ The court found that Class’ proposed accommodations, namely CorTemp, were reasonable and would allow him to safely return to competition.³⁵ Unhappy with this result, Towson appealed to the Fourth Circuit Court of Appeals, which reversed the district court in a two-to-one panel decision.³⁶ The Fourth Circuit’s majority opinion noted that courts were “particularly ill-equipped”³⁷ to evaluate a patient’s medical history, positing that the court’s job was not to “agree or disagree with Dr. Kindschi’s opinion or to weigh whether her evaluation [was] more persuasive than [the Institute’s].”³⁸ Instead, the majority held that courts should defer to a university’s decision to exclude a disabled athlete where the decision was reached in good faith and in accordance with the university’s internal policies.³⁹ Because Towson satisfied these criteria, the Fourth Circuit held that the university could rightfully prevent Class’ return to the football field.⁴⁰

waiver of any liability on behalf of Towson in the event that he suffers another heat stroke or related medical issues while participating in the Towson football program.”).

33. See *Class*, 806 F.3d at 243.

34. *Class*, 118 F. Supp. 3d at 851.

35. *Id.* at 848; Jonathan R. Mook, *Circuit Courts Address Who Is “Qualified” under the ADA*, 2016 LAB. & EMP. EMERGING ISSUES 7426 (May 12, 2016); see Transcript of Record, *supra* note 19, at 20–21 (other non-contested accommodations included a Kevlar pad to protect Class’ liver and a continued regimen of immunosuppressive medications).

36. Mook, *supra* note 35.

37. *Class*, 806 F.3d at 251 (quoting *Bd. of Curators of the Univ. of Mo. v. Horwitz*, 435 U.S. 78, 92 (1978)).

38. *Id.* at 249.

39. See *id.* at 247–49.

40. *Id.* at 251.

III. EXAMINATION OF APPLICABLE LAW

A. *Purposes of the Rehab Act and the ADA*

In seeking an injunction against Towson, Class alleged that the school's decision to exclude him from the football program amounted to a violation of section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990.⁴¹ Although these Acts apply to different entities, their purposes are identical, and plaintiffs frequently invoke them together.⁴² By enacting the Rehab Act, Congress sought to ensure that a person's disability "in no way diminishes [that person's] right to . . . enjoy self-determination; make choices; . . . and enjoy full inclusion and integration in the . . . social . . . [and] cultural . . . mainstream . . ."⁴³ Similarly, the ADA was enacted seventeen years later "to [further] provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . ."⁴⁴ Taken together, both Acts "require[] that remote or minimal risk [to a disabled person's safety] not be used to legitimize discrimination [i.e., exclusion from certain activities]."⁴⁵ They also "prohibit[] authorities from deciding without significant medical support that certain activities are too risky for a disabled person [because] [d]ecisions of this sort cannot rest on paternalistic concerns."⁴⁶

41. *Class v. Towson Univ.*, 806 F.3d 236, 251 (4th Cir. 2015).

42. See Matthew J. Mitten, *Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics*, 8 MARQ. SPORTS L.J. 189, 194 (1998) (citations omitted) ("A claim [under the ADA] requires proof of essentially the same elements as a Rehabilitation Act claim except that, instead of showing that the defendant receives federal funds, the athlete must prove that the defendant is covered by the ADA's 'public entity' or 'public accommodation' provisions.").

43. Rehabilitation Act of 1973, 29 U.S.C. § 701(a)(3).

44. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(1).

45. *Knapp v. Nw. Univ.*, 942 F. Supp. 1191, 1197 (N.D. Ill.), *rev'd*, *Knapp v. Nw. Univ.*, 101 F.3d 473 (7th Cir. 1996); *accord* 42 U.S.C. § 12101.

46. *Knapp* 101 F.3d at 485–86; see Maureen A. Weston, *The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities*, 50 ST. LOUIS U. L.J. 137, 163 (2005) ("The federal disability laws provide athletes with disabilities a vital mechanism to ensure that decisions regarding their rights to participate in athletics are thoughtfully considered, medically justified, and not disregarded simply upon notions of undue administrative burdens, false notions of competitive advantage, or paternalism.").

B. *Elements of a Discrimination Action Brought Under the ADA or Rehab Act*

To prevail on [a] claim for discrimination under the Rehab Act [and the ADA], [a plaintiff] must prove that: (1) he [or she] is disabled as defined by the [Acts]; (2) he [or she] is otherwise qualified for the position sought; (3) he [or she] has been excluded from the position solely because of his or her disability; and (4) the position exists as part of a program or activity receiving federal financial assistance.⁴⁷

In considering the first element, the Fourth Circuit agreed with the district court's finding that complications from Class' heatstroke rendered him disabled under the Acts.⁴⁸ The court also held that the third and fourth elements were satisfied because Towson was a public university and openly admitted to excluding Class from its football team solely because of his disability.⁴⁹ That left only the second element at issue: Was Gavin Class "otherwise qualified" to return to the field as a member of the Towson Tigers football team?⁵⁰

1. Defining What It Means to Be "Otherwise Qualified"

A disabled person is otherwise qualified for a position if that person, with or without reasonable accommodations, can perform the essential functions of, and/or meet the essential eligibility requirements for that position.⁵¹ An accommodation is reasonable unless: (1) it would impose undue financial or administrative burdens on the program or entity sponsoring the position; (2) implementation would fundamentally alter the

47. *Knapp*, 101 F.3d at 478; *accord* *Class v. Towson Univ.*, 118 F. Supp. 3d 833, 845 (D. Md.), *rev'd*, *Class v. Towson Univ.*, 806 F.3d 236 (4th Cir. 2015) (noting that under the ADA (4) the position exists as part of a program or activity sponsored by a public entity).

48. *Class* 118 F. Supp. 3d at 846; *see also* 42 U.S.C. § 12102(4) (Under the ADA, "[t]he definition of 'disability' . . . shall be construed in favor of broad coverage of individuals An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.").

49. *See Class*, 118 F. Supp. 3d at 847.

50. *Class*, 806 F.3d at 239.

51. *See* 42 U.S.C. §§ 12101, 12111(8), 12131(2).

nature of the position; or (3) it is highly unlikely that the accommodation would allow the disabled person to perform the position's essential functions or meet its essential eligibility requirements.⁵² A position's functions and eligibility requirements are essential if they "bear more than a marginal relationship to the [position]."⁵³ Because both criteria are broadly construed, courts have diverged when interpreting their meaning and applying their interpretations to the adjudication of disputes.⁵⁴ An examination of the grounds for the varying interpretations is necessary to understand how the Fourth Circuit reached its flawed decision in *Class v. Towson*.

a. Determining Whether a Position's Function and/or Eligibility Requirements Are "Essential"

In cases like *Class v. Towson*, where a disabled athlete sues for the right to fully participate in an athletic program, the defendant frequently rationalizes its exclusion decision by claiming that the athlete failed to pass a physical examination "essential" to certifying eligibility.⁵⁵ For example, in *Poole v. South Plainfield Board of Education*, a New Jersey school board cited a failed physical exam as justification for its decision to enforce the exclusion of a disabled athlete from a local high school's wrestling team.⁵⁶ However, the District Court for the District of New Jersey disagreed and held that the athlete's disability rights had been violated.⁵⁷ The court found that, despite only having one kidney, nothing suggested that the disabled athlete was incapable of "pinning his adversary to the mat or meeting training requirements."⁵⁸

52. *Sch. Bd. v. Arline*, 480 U.S. 273, 287 n.17 (1987).

53. *Class*, 806 F.3d at 246 (citations omitted); see *PGA Tour v. Martin*, 532 U.S. 661, 689 (2001).

54. See generally *Pahulu v. Univ. of Kan.*, 897 F. Supp. 1387 (D. Kan. 1995); *PGA Tour*, 532 U.S. 661.

55. See generally *Poole v. S. Plainfield Bd. of Educ.*, 490 F. Supp. 948 (D. N.J. 1980); *Wright v. Colum. Univ.*, 520 F. Supp. 789, 793 (E.D. Pa. 1981); *Pahulu*, 897 F. Supp. 1387; *Knapp*, 101 F.3d 473 at 476-77.

56. *Poole*, 490 F. Supp. at 953.

57. *Id.* at 954.

58. *Id.* at 953.

Instead, the record revealed that the high school excluded the disabled wrestler because it feared the severity of an injury to his sole remaining kidney.⁵⁹ Acting on this fear, the school required the athlete to pass a physical exam constructed so that the absence of a kidney was, in and of itself, grounds for withholding a passing grade.⁶⁰ While the court was sympathetic to the school's safety concerns, it reminded the school board that "[l]ife has risks. The purpose of [the Rehab Act], however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them."⁶¹ To compete on the wrestling team, the disabled athlete only needed to demonstrate the requisite level of skill and conditioning.⁶² It was *not* essential that he pass an arbitrary physical exam that did not measure his ability to compete.⁶³

In *PGA Tour v. Martin*, the Supreme Court held that a disabled golfer could ride in a cart during competition.⁶⁴ In so holding, the Court stated that the Professional Golf Association's (PGA) mandate to walk the golf course was "not an essential attribute of the game [of golf] itself."⁶⁵ In a seven-to-two decision, the majority agreed with the Ninth Circuit Court of Appeals' assertion that walking is incidental to golf, whereas "the essence of [golf] has always been shotmaking."⁶⁶ The Court reasoned that although the walking rule may appear to affect shotmaking by introducing an element of fatigue, expert medical opinion showed that any such effect was negligible.⁶⁷

59. *Id.* at 953.

60. *Id.*

61. *Id.* at 953–54.

62. *See id.* at 953.

63. *See id.* at 953–54.

64. *PGA Tour*, 532 U.S. at 663–64.

65. *Id.* at 685; *cf.* *Kuketz v. Petronelli*, 821 N.E.2d 473, 479–80 (Mass. 2005) (illustrating a rule that is integral to a sport's composition and holding that a disabled racquetball player's request to allow two bounces before returning the ball was unreasonable because the essence of racquetball was hitting a moving ball before the second bounce).

66. *PGA Tour*, 532 U.S. at 683.

67. *Id.*

Yet, despite the strong precedent set by *Poole*, *Martin*, and other such cases,⁶⁸ “two rogue court decisions”⁶⁹ stand as “outliers”⁷⁰ in their interpretation of what constitutes an essential function or an eligibility requirement.⁷¹ In the first such case, *Pahulu v. University of Kansas*, the District Court for the District of Kansas stated that it was “unwilling to substitute its judgment” for that of the University of Kansas (KU).⁷² Accordingly, it held that medical clearance by a team physician could remain an essential eligibility requirement at KU.⁷³ In stark contrast to the process employed by the court in *Martin*, the Chief Judge in *Pahulu* did not evaluate medical evidence that questioned the merit of KU’s clearance policy.⁷⁴ Instead, the court disregarded the standard of scrutiny set forth in *Poole* and determined that KU’s policy was rational and should therefore be upheld despite its conservative guidelines.⁷⁵

Similarly, in *Knapp v. Northwestern University*, the Seventh Circuit Court of Appeals reversed a district court decision granting Nicholas Knapp an injunction against Northwestern University (NU) in his quest to play college basketball despite suffering from a heart condition.⁷⁶ As in *Pahulu*, the Seventh Circuit declined to examine whether NU’s medical clearance policy was marginally related to determining whether Knapp could fulfill the duties of an NU basketball player.⁷⁷ Instead, citing *Pahulu*,

68. See generally *Wright*, 520 F. Supp. 789; *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979); Robert E. Shepherd, Jr., *Why Can't Johnny Read or Play? The Participation Rights of Handicapped Student-Athletes*, 1 SETON HALL J. SPORT L. 163, 170–71 (1991).

69. Eldon L. Ham, *Disabled Athletes: A Last Vestige of Court Tolerated Discrimination?*, 8 SETON HALL J. SPORT L. 741, 741 (1998).

70. See Eldon L. Ham, *How 4th Circ. Failed to Clarify Athlete Disability Rights*, LAW 360 (Jan. 3, 2016, 9:00 AM), <http://www.law360.com/articles/738601/how-4th-circ-failed-to-clarify-athlete-disability-rights> [<https://perma.cc/AE7W-YMXT>].

71. See generally Mitten, *supra* note 42, at 194–204 (discussing eligibility requirements).

72. *Pahulu*, 897 F. Supp. at 1394.

73. *Id.*

74. See *id.*

75. *Id.*

76. *Knapp*, 101 F.3d at 485.

77. *Id.* at 484–85.

it held that because NU's policy was rationally devised, NU's determination that Knapp's failure to satisfy the university's clearance policy rendered him ineligible for competition should be given deference.⁷⁸

b. Determining Whether an Accommodation Is Reasonable

As stated earlier, an accommodation is reasonable unless: (1) it would impose undue financial or administrative burdens on the program or entity sponsoring the position sought; (2) its implementation would fundamentally alter the nature of the position and/or sponsoring entity; or (3) it is highly unlikely that the accommodation would allow the disabled person to perform the position's essential functions or meet its essential eligibility requirements.⁷⁹

i. Undue Financial or Administrative Burden

To determine whether an accommodation imposes undue financial or administrative burdens on a sponsoring program or entity, courts must consider: (1) the cost of the accommodation; (2) the overall financial resources of the sponsor; (3) the overall manpower of the sponsor; and (4) the impact of such accommodation on the sponsor's general operation.⁸⁰ The onus is on the sponsor to prove that the proposed accommodation would cause such an unacceptable encumbrance, and consistent with the spirit of the ADA and the Rehab Act, it is very difficult for sponsors to do so.⁸¹ For example, football programs have been unable to successfully argue that testing diabetic players' blood-sugar levels and administering insulin shots during competition imposes a burden substantial enough to render such accommodations unreasonable.⁸²

78. *See id.* at 485.

79. *Sch. Bd.*, 480 U.S. at 287 n.17.

80. 42 U.S.C. § 12111(10)(B).

81. *See* David Harger, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act: Reducing the Effect of Ambiguity on Small Businesses*, 41 U. KAN. L. REV. 783, 785-90 (1993).

82. *See generally Class*, 118 F. Supp. 3d at 843.

ii. Fundamental Alteration

An accommodation is also unreasonable if it forces a sponsor to “lower or . . . effect substantial modifications [to its participation] standards [related to the position sought].”⁸³ The Supreme Court endorsed this principle in *Southeastern Community College v. Davis*.⁸⁴ There, a deaf nursing school applicant claimed that Southeastern Community College (SCC) violated the Rehab Act by refusing her proposed accommodation—excusal from clinical courses.⁸⁵ In considering this case, the Supreme Court found that SCC’s customary goal of teaching students how to communicate with patients could only be achieved through clinical learning.⁸⁶ Moreover, implementation of an accommodation that devalued a clinical curriculum would require SCC to significantly alter standards central to its mission.⁸⁷ Therefore, the deaf applicant’s proposed accommodation was unreasonable and SCC did not violate the Rehab Act by refusing its implementation.⁸⁸

On the other hand, in *Martin*, the Supreme Court held that requiring the PGA to allow use of a golf cart did not compel the PGA to lower or substantially modify its participation standards.⁸⁹ The Court reasoned that “the use of carts is not itself inconsistent with the fundamental character of the game of golf.”⁹⁰ According to the Court, “Congress intended that an entity like the PGA . . . carefully weigh the purpose, as well as the letter, of the [challenged] rule before determining that no accommodation would be tolerable.”⁹¹ Unlike in *Davis*, where clinical learning was inextricably tied to SCC’s standards and objectives, the “walking rule” in *Martin* was a mere

83. *Wright*, 520 F. Supp. at 793 (citing *Se. Cmty. Coll.*, 442 U.S. at 413).

84. *Se. Cmty. Coll.*, 442 U.S. at 413.

85. *Id.* at 401–02.

86. *Id.* at 409–10.

87. *See id.* at 413.

88. *See id.* at 413–14.

89. *PGA Tour*, 532 U.S. at 683–85.

90. *Id.* at 683.

91. *Id.* at 691.

formality unrelated to a golfer's skill and not essential to the game's construction.⁹²

The decision-making process employed by the Court in *Martin* echoed an approach previously adopted by the District Court for the Middle District of Florida in *Johnson v. Florida High School Activities*.⁹³ In that case, the court sought to determine whether waiver of an age requirement would fundamentally alter a high school football program.⁹⁴ The court stated that "the relationship between the age requirement and its purposes must be such that waiving the age requirement . . . would necessarily undermine the purposes of the requirement."⁹⁵ After resolving that the requirement's purpose was to protect player safety and promote fair competition, the court considered the attributes of the waiver-seeking player to determine whether allowing his participation would frustrate that purpose.⁹⁶

The court concluded that the player was neither physically imposing nor exceptionally skilled, so his inclusion on the football team would therefore not compromise player safety or fair competition.⁹⁷ Consequently, accommodating the player by waiving age restrictions was reasonable and would not substantially modify the football program's participation standards.⁹⁸ The court's message was clear: "if a rule can be modified without doing violence to its essential purposes . . . , it [cannot] be 'essential' to the nature of the program or activity to refuse to modify the rule."⁹⁹

92. *Id.* at 683–85.

93. *Johnson v. Fla. High Sch. Activities*, 899 F. Supp. 579, 585 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 585–86; *see also* *Ganden v. NCAA*, No. 96 C 6953, 1996 WL 680000, at *15 (N.D. Ill. Nov. 21, 1996); *Sandison v. Mich. High Sch. Athletic Ass'n*, 863 F. Supp. 483, 490 (E.D. Mich. 1994) (holding that waiving an age requirement was reasonable because the requirement's purpose, to ensure safety and promote fair competition, would not be compromised since the petitioning athlete did not play a contact sport and was not exceptionally skilled).

99. *Johnson*, 899 F. Supp. at 585 (quoting *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 932–33 (8th Cir. 1994) (Arnold, R.S., dissenting)); *see* *Weston*, *supra* note

Similarly, in *Wright v. Columbia University*, the District Court for the Eastern District of Pennsylvania found that waiving Columbia University's (CU) medical clearance policy did not fundamentally alter the school's football program.¹⁰⁰ There, CU's decision to exclude a disabled player was held to violate the Rehab Act even though the player's lack of sight in one eye disqualified him under the university's clearance policy.¹⁰¹ Despite the player's disability, the court found him to be sufficiently talented and decided that his inclusion on the football team would not require CU to lower its participation standards.¹⁰² Implicit in the court's reasoning was the idea that CU's clearance policy was not paramount to preserving the integrity of CU's football program.¹⁰³ Consequently, the policy did not trump the player's disability rights.¹⁰⁴ In fact, as later held by the Court of Appeals for the Second Circuit, the ADA and the Rehab Act preempt inconsistent institutional bylaws when necessary to effectuate the Acts' reasonable accommodation provisions.¹⁰⁵ Therefore, a university's desire to execute an internal policy does not excuse it from compliance with the ADA and the Rehab Act when the two mandates conflict.¹⁰⁶

iii. Inadequate Accommodation

In cases like *Class v. Towson*, universities frequently argue that a disabled athlete's proposed accommodation is unreasonable because it

46, at 163 (“[S]porting organizations should be prepared to explain the purpose of their eligibility requirements and rules of competition, to articulate the connection between the requirements and purpose, and to evaluate on an individual basis whether modification of such rules can be made without undermining this legitimate purpose or fundamentally altering the nature of the game.”).

100. *Wright*, 520 F. Supp. at 793–94.

101. *Id.* at 795; *see also* Shepherd, *supra* note 68, at 170–71 (noting cases wherein relief was granted to visually impaired athletes barred from competition by their respective universities).

102. *Wright*, 520 F. Supp. at 793.

103. *See id.*

104. *See id.*

105. *Mary Jo. C. v. N.Y. State & Local Retirement Sys.*, 707 F.3d 144, 163 (2d Cir. 2013).

106. *Class*, 118 F. Supp. 3d at 849; *see* Brief of Appellee at 15, *Class v. Towson Univ.*, 806 F.3d 236 (4th Cir. 2015) (No. 1:15-cv-01544-RDB).

would not enable the athlete to meet essential eligibility requirements or perform functions necessary for full participation in team activities.¹⁰⁷ Frequently, the crux of this argument is that the proposed accommodation cannot eliminate direct threats to the disabled athlete's safety.¹⁰⁸

The ADA defines a "direct threat" as "a significant risk to the health or safety of [a disabled athlete] that cannot be eliminated [or reduced] by reasonable accommodation."¹⁰⁹ Accordingly, a university does not violate the ADA or the Rehab Act when its decision to exclude a disabled athlete is based on an accurate conclusion that the athlete's participation will directly threaten the athlete's safety.¹¹⁰ However, federal regulations regarding enforcement of the ADA and the Rehab Act state:

In determining whether an individual poses a direct threat to [his or her] health or safety . . . , a public entity must make an individualized assessment, *based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence*, to ascertain: the nature, duration, and severity of the risk; [and] the probability that the potential injury will actually occur.¹¹¹

In assessing the abovementioned factors, a university should consider recommendations from medical experts who have direct knowledge of the disabled athlete as well as the opinions of specialists who have expertise in dealing with the athlete's disability.¹¹² Only after such a detailed inquiry is

107. See generally *Class*, 118 F. Supp. 3d 833; *Wright*, 520 F. Supp. 789; *Knapp*, 942 F. Supp. 1191; *Poole*, 490 F. Supp. 948; *Pahulu*, 897 F. Supp. 1387.

108. See *Pahulu*, 897 F. Supp. at 1389; *Class*, 806 F.3d at 241–42; *Knapp*, 101 F.3d at 477–78.

109. 42 U.S.C. § 12111(3); see also 29 C.F.R. § 1630.2(r) (2017); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) (holding that under the ADA, the direct threat defense applies to the direct threat to others and to the individual him/herself).

110. See 42 U.S.C. § 12113(a)–(b); 29 C.F.R. § 1630.15(b)(2).

111. 28 C.F.R. § 35.139(b) (2017) (emphasis added); 29 C.F.R. § 1630.2(r) ("In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm"); see also *Chevron U.S.A.*, 536 U.S. at 86 (2002); *Bragdon v. Abbott*, 524 U.S. 622, 649 (1998).

112. Jonathan R. Mook, *Circuit Courts Address Who Is "Qualified" under the ADA*, 2016 LAB. & EMP. EMERGING ISSUES 7426 (May 12, 2016) (citing 29 C.F.R. App. § 1630.2(r)).

conducted might an institution be justified in excluding an athlete under the direct threat provision.¹¹³ Furthermore, exclusion remains unlawful if this inquiry reveals that risks posed by the disabled athlete's participation are speculative or remote.¹¹⁴ The Court of Appeals for the Ninth Circuit clarified this point, stating: "Any [dis]qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act [or the ADA] is not to be circumvented easily, since almost all handicapped persons are at a greater risk . . . [of injury] . . ." ¹¹⁵ Thus, "an elevated risk of injury, without more, is [in]sufficient to justify the refusal to hire an otherwise qualified handicapped person."¹¹⁶

Alone, findings of elevated risk are insufficient to justify exclusion because they do not satisfy the "likelihood of substantial harm" standard mandated by the ADA and the Rehab Act.¹¹⁷ That is not to say that such findings will not compel a team physician to recommend exclusion or give universities a rational basis for barring a disabled athlete from competition.¹¹⁸ However, the ADA and the Rehab Act "require[] more than merely a rational basis for discriminating against a handicapped athlete."¹¹⁹ Renowned sports law attorney Eldon L. Ham best articulated this concept as follows:

113. Peter M. Spingola, *Knapp v. Northwestern University: The Seventh Circuit Slam Dunks the Rights of the Disabled*, 73 CHL-KENT L. REV. 709, 720 (1998) (citing *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991)) ("An individual is not qualified . . . if there is a genuine substantial risk that he or she could be injured or could injure others.").

114. *Id.* ("[E]xclusion decisions based upon fears of remote or minimal medical risks violate the letter and spirit of the Rehabilitation Act.").

115. *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 622 (9th Cir. 1982).

116. *Mantoletto v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985).

117. Ham, *supra* note 69, at 744 (citing *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418, 425 (E.D. Pa. 1982)) ("Mere possibilities, even if the perceived harm could be substantial, are not strong enough, for the statute, and the majority of evolving interpretations stick to the literal requirement that such harm be 'likely.'").

118. See Matthew J. Mitten, *Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision?*, 71 NEB. L. REV. 987, 1019 (1992).

119. *Id.* (first citing *Jacobson v. Delta Airlines*, 742 F.2d 1202, 1206 (9th Cir. 1984), *cert. denied* 471 U.S. 1062 (1985); then citing *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1383 (10th Cir. 1981); and then citing *Casey v. Lewis*, 773 F. Supp. 1365, 1371 (D. Ariz. 1991)).

[A team] physician's careful opinion may . . . [be] sound medically, but the physician's job is not to interpret statutes. The physician's term "extremely high risk" is not the same as an objective legal test which relies upon "likelihood." For example, if an individual hypothetically increases the already remote chance of quadriplegia . . . by an incremental amount [of] twenty-five percent by playing football, this may be too much additional risk from a sound medical point of view. However, from a legal . . . vantage, the resultant risk is still nil. Therefore, although both medical and legal risks are fundamentally sound for their own purposes, they are not the same.¹²⁰

Employing this line of reasoning, the court in *Poole* refused to dismiss the disabled wrestler's complaint despite the school having found that participation in team activities posed a direct threat to the wrestler's safety.¹²¹ In so holding, the court listened to competing medical testimony and concluded that the school had not adequately considered the best available objective evidence—the opinion of medical experts with direct knowledge of the wrestler's disability.¹²² Because those experts determined that the risks posed by participation were grave but remote,¹²³ a likelihood of substantial harm was not established, and his exclusion was not justified under the ADA or the Rehab Act.¹²⁴

One year after *Poole*, the *Wright* court issued a similar verdict. There, the court found the risk of harm to be minimal where a renowned ophthalmologist testified that playing football did not increase the likelihood of the visually impaired player suffering a significant eye injury.¹²⁵ Consequently, Columbia's exclusion decision, although "laudably evidencing [its] concern for its students," ultimately served to

120. Ham, *supra* note 69, at 746.

121. See *Poole*, 490 F. Supp. at 954; see also *Wright*, 520 F. Supp. at 793 (citing *Suemnick v. Mich. High Sch. Athletic Ass'n*, No. 4-70592 (E.D. Mich. 1974) (oral decision)).

122. See *Poole*, 490 F. Supp. at 954.

123. See *id.* at 953.

124. See *id.* at 954.

125. *Wright*, 520 F. Supp. at 793.

“derogate from the rights secured to plaintiff under [the Rehab Act].”¹²⁶ The university attempted to protect the disabled athlete, but by disregarding reliable medical evidence in favor of its own inexpert deliberations, it achieved the opposite effect.¹²⁷

A third federal court case, *Grube v. Bethlehem Area School District*, aligned with the opinions in *Poole* and *Wright* to form a triumvirate of cases critiquing “direct threat defenses.”¹²⁸ Encountering a fact pattern almost identical to that in *Poole*, the court in *Grube* evaluated expert medical testimony and found that the plaintiff, an athlete with only one kidney, should be allowed to compete under the Rehab Act.¹²⁹ The court reasoned that although the defendant’s fear of catastrophic injury was subjectively reasonable, the weight of medical evidence exposed the risk of such injury to be remote.¹³⁰ Moreover, the plaintiff made a well-reasoned decision to compete, and endorsing his right to self-determination was in keeping with the spirit of the Rehab Act.¹³¹

Taken alone, however, the right to self-determination does not prevent an exclusion decision rooted in objective medical evidence.¹³² For example, the United States District Court for the Southern District of Ohio upheld a school’s decision to exclude a disabled football player where doctors with direct knowledge of the player’s heart condition unanimously agreed that it was too dangerous for him to compete.¹³³ The player’s talent, emotional pleas, and citation of mitigating data were outweighed by the doctors’ objective prognoses.¹³⁴ Without any expert testimony challenging

126. *Id.* at 794.

127. *See id.*

128. *See Mitten, supra* note 118, at 1017–018; *Grube*, 550 F. Supp. 418.

129. *Grube*, 550 F. Supp. at 421–24.

130. *Id.* at 424, 425.

131. *See id.* at 422.

132. *See* Matthew J. Mitten, *Sports Participation by “Handicapped” Athletes*, 10 ENT. & SPORTS L. 15, 20 (1992).

133. Mitten, *supra* note 118, at 1015 (citations omitted).

134. *Id.* at 1014–015 (citations omitted); Matthew J. Mitten, *Enhanced Risk of Harm to One’s Self as a Justification for Exclusion from Athletics*, 8 MARQ. SPORTS L.J. 189, 199–200 (1998) (citations omitted).

these unfavorable medical assessments, the court was prudent in concluding that allowing the athlete to compete would invite a high risk of injury and substantial likelihood of significant harm.¹³⁵ Consequently, the school's exclusion decision did not violate the ADA or the Rehab Act.¹³⁶

IV. ANALYSIS: *CLASS V. TOWSON UNIVERSITY*

In *Class v. Towson University*, the Court of Appeals for the Fourth Circuit improperly reversed the district court's decision and upheld Towson's action to prohibit Class from competing as a member of the university's football team.¹³⁷ In so doing, the court incorrectly determined that medical clearance by Towson's physician, Dr. Kari Kindschi, was an essential eligibility requirement.¹³⁸ It also misconstrued case law and ignored relevant facts in finding Class' proposed accommodation, the CorTemp system, unreasonable.¹³⁹ Worst of all, by deferring to Kindschi's "subjective good-faith" judgment, the Fourth Circuit skirted its responsibility to weigh medical evidence and determine whether the university's decision to exclude Class was "objectively reasonable."¹⁴⁰

135. Mitten, *supra* note 118, at 1015 (citations omitted); *see also* Mitten, *supra* note 134, at 200.

136. Mitten, *supra* note 118, at 1015 (citations omitted); *see also* Mitten, *supra* note 134, at 200.

137. *See generally* *Class v. Towson Univ.*, 806 F.3d 236, 252–59 (4th Cir. 2015) (Wynn, J., dissenting); Appellee's Petition for Panel Rehearing or Rehearing En Banc at 13, *Class v. Towson Univ.*, 806 F.3d 236 (No. 1:15-cv-01544-RDB); Eldon L. Ham, *How 4th Circ. Failed to Clarify Athlete Disability Rights*, LAW 360 (Jan. 3, 2016, 9:00 AM), <http://www.law360.com/articles/738601/how-4th-circ-failed-to-clarify-athlete-disability-rights> [https://perma.cc/AE7W-YMXT].

138. *Class*, 806 F.3d at 253–54 (Wynn, J., dissenting); Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 9–11; *see* Ham, *supra* note 137.

139. *Class*, 806 F.3d at 257–59 (Wynn, J., dissenting); Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 9–11; *see* Ham, *supra* note 137.

140. *Class*, 806 F.3d at 255–56 (Wynn, J., dissenting); Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 9–11; *see* Ham, *supra* note 137.

A. *Satisfaction of Towson’s Return-to-Play Policy and/or Medical Clearance by Dr. Kindschi Was Not an Essential Eligibility Requirement*

By requiring Kindschi’s clearance for eligibility, the Fourth Circuit implied that Towson had been sued over a non-controversial safety precaution.¹⁴¹ The court did not view Towson’s demand for in-house medical clearance as discrimination in disguise.¹⁴² Instead, it held that Towson had the authority to determine that Kindschi’s approval was necessary to certify eligibility for the football team.¹⁴³

The Fourth Circuit’s analysis was misguided.¹⁴⁴ Instead of quickly washing its hands of the essential eligibility requirement issue, the Fourth Circuit should have recognized that the facts in *Class v. Towson* mimicked those in *Poole*. As discussed in section (B)(1)(a) of Part III, the *Poole* court held that passing a school-administered physical exam was not essential to participation on the school wrestling team because the exam had nothing to do with the wrestler’s ability to compete.¹⁴⁵

Like the exam in *Poole*, the requirement of Kindschi’s clearance set an arbitrary standard based on the unfounded concern over future injury.¹⁴⁶ Even Judge Niemeyer, the author of the Fourth Circuit’s majority opinion, conceded that this standard was simply “based on [Kindschi’s] feelings, not on any medical or scientific evidence.”¹⁴⁷ In order to be considered an essential eligibility requirement under the ADA and the Rehab Act, Kindschi’s clearance must have (1) set a tangible benchmark of performance that (2) reflected directly on an athlete’s ability to compete at

141. *Class*, 806 F.3d at 246.

142. *Id.* at 248.

143. *See id.* at 247.

144. *See generally id.* at 252–59 (Wynn, J., dissenting); Appellee’s Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137; Ham, *supra* note 137.

145. *Poole v. S. Plainfield Bd. of Educ.*, 490 F. Supp. 948, 953–54 (D. N.J. 1980).

146. *See generally Class v. Towson Univ.*, 118 F. Supp. 3d 833, 842–43 (D. Md.), *rev’d*, *Class*, 806 F.3d; Appellee’s Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 7; Ham, *supra* note 137.

147. *Class*, 806 F.3d at 247; *see also* Brief of Appellee at 15, *Class v. Towson Univ.*, 806 F.3d 236 (4th Cir. 2015) (No. 1:15-cv-01544-RDB).

the requisite level.¹⁴⁸ Had the Fourth Circuit followed this directive, it would have discovered that neither criterion was satisfied.

First, it is obvious that Kindschi's clearance set no tangible benchmark of performance. Kindschi extended clearance when she felt an athlete was physically capable of performing; what lead her to that "feeling" is unknown.¹⁴⁹ Consequently, players like Gavin Class were presumably unsure how they might demonstrate their readiness to compete. The Fourth Circuit should have recognized this confusion and held that requiring Kindschi's clearance set an untenable standard, and thus could not be upheld as an essential eligibility requirement.

Additionally, the requirement of Kindschi's clearance failed the second criterion because her clearance was not based on whether Class could compete at a level on par with his teammates. To prove otherwise, Kindschi would have to show that she refused to clear Class because, even with the implementation of CorTemp, medical evidence suggested that complications from his heatstroke rendered him unable to keep up with the team. However, as mentioned previously, the record is devoid of such evidence.¹⁵⁰ Judge Wynn highlighted this point in his dissenting opinion: "Dr. Kindschi did not point to any medical evidence supporting her decision"¹⁵¹ In fact, "Towson offered no testimony from anyone with expertise in heat stroke . . . [because] [Kindschi] was aware of no medical research that supported her [decision to exclude Class from competition]."¹⁵²

The facts demonstrate that Class was capable of matching the skill and intensity of his teammates.¹⁵³ For example, both Dr. Casa and Dr.

148. See *Poole*, 490 F. Supp. at 953.

149. See *Class*, 806 F.3d at 247.

150. See Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 6–8; see *Class*, 118 F. Supp. 3d at 841–43.

151. *Class*, 806 F.3d at 258 (Wynn, J., dissenting).

152. Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 7; see *Class*, 118 F. Supp. 3d at 841–43; Brief of Appellee, *supra* note 147, at 22–23 ("Towson . . . has offered no legitimate, non-discriminatory reason not to follow the June 2015 [Korey Stringer Institute] report's recommendations (for which Towson paid), reflecting that Class aced a rigorous testing regimen designed to mimic the physical intensity of a football lineman.").

153. See generally *Class*, 806 F.3d at 252; Ham, *supra* note 137; ESPN Edit Operations, *Outside the Lines: Gavin Class*, VIMEO (2015), <https://vimeo.com/141587564> [<http://perma.cc/N7TC-SLGV>].

Barth categorically confirmed that there was no medical reason why Class should not be able to play football.¹⁵⁴ Moreover, Judge Wynn noted that the Fourth Circuit’s majority opinion “ben[t] key aspects of the factual record” and “mischaracterize[d] the results of heat-tolerance testing” to support its holding in favor of Towson.¹⁵⁵ An impartial assessment of the facts would have revealed that requiring Kindschi’s clearance set an arbitrary standard unrelated to Class’ ability to run, block, or perform any other function integral to competing on the same level as his teammates. Simply put, obtaining Kindschi’s clearance was not an essential eligibility requirement, and Towson’s insistence otherwise constituted the type of paternalistic behavior outlawed by the Rehab Act and the ADA.¹⁵⁶

B. Implementation of the CorTemp System Was a Reasonable Accommodation

In determining whether implementation of the CorTemp System was a reasonable accommodation, the Fourth Circuit correctly rejected Towson’s claim that implementation would saddle the university with undue financial or administrative burdens.¹⁵⁷ However, the court subsequently erred when it found that CorTemp was nonetheless unreasonable because its implementation would fundamentally alter Towson’s football program without eliminating direct threats to Class’ safety.¹⁵⁸

1. Implementation of the CorTemp System Would Not Have Fundamentally Altered Towson’s Football Program

In analyzing the “fundamental alteration” issue, the Fourth Circuit found that implementation of CorTemp was unreasonable because it would change the nature of Towson football by “impinging on the . . . discretion” of Dr. Kindschi and her staff.¹⁵⁹ This sanctification of Kindschi’s judgment

154. ESPN Edit Operations, *supra* note 153.

155. *Class*, 806 F.3d at 257 (Wynn, J., dissenting).

156. *See id.* at 256–57 (Wynn, J., dissenting); *see also* Ham, *supra* note 137.

157. *Class*, 806 F.3d at 248–49.

158. *See id.* at 257–58 (Wynn, J., dissenting); *see also* Ham, *supra* note 137.

159. *Class*, 806 F.3d at 252.

was flawed in and of itself and will be fully addressed below.¹⁶⁰ For now, it is sufficient to state that the Fourth Circuit's finding incorrectly assumes that challenging Kindschi's discretion necessarily equates to forcing Towson to substantially modify the standards of its football program.¹⁶¹

The court erred in determining that preserving Kindschi's medical authority was a fundamental goal of Towson football.¹⁶² Unlike in *Davis*, where ordering a change in curriculum would have frustrated the nursing school's mission and substantially modified its standards, here undermining Kindschi's discretion would have had little effect on Towson's football team.¹⁶³ The Fourth Circuit would have reached this conclusion by following the precedent set forth in *Johnson* and *Martin*, where the purpose of a program's rule was examined to determine whether undermining that rule would fundamentally alter the program's nature.¹⁶⁴ Had it followed this approach, the court would have found that Towson's rule—giving Kindschi ultimate authority to clear athletes—was enacted to comply with a NCAA regulation mandating that: a team “physician's ethical and professional imperative to care for the best interests of student-athletes trumps other university concerns or motivations.”¹⁶⁵ The purpose of that regulation was to take decision-making power away from coaches, whose jobs made them more likely to sacrifice an injured player's health if rushing that player back to action might improve on-field results.¹⁶⁶

In *Class v. Towson*, however, there was no evidence that this purpose would be left unfulfilled if Kindschi was stripped of her final say regarding

160. See Timothy G. Church & James R. Neumeister, *University Control of Student-Athletes with Disabilities Under the Americans with Disabilities Act and the Rehabilitation Act*, 25 J. C. & U. L. 105, 174–75 (1998).

161. See Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 9–11.

162. *Id.*

163. Ham, *supra* note 137.

164. See *id.*

165. *Class*, 806 F.3d at 248–49; see also Church & Neumeister, *supra* note 160, at 173 (citing NCAA, 1997-98 NCAA DIVISION I MANUAL Const. art. 2.2.3 (1997)).

166. Eldon L. Ham, *Disabled Athletes: A Last Vestige of Court Tolerated Discrimination?*, 8 SETON HALL J. SPORT L. 741, 762 (1998); see Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 155 (1992).

medical clearance.¹⁶⁷ Nothing in the record suggested that the coaching staff intended to put Class back on the field prematurely. Moreover, Kindschi's judgment went against Class' best interests, considering heatstroke experts declared that Class was "physically able to return to [the team]," and could "withstand the rigors of collegiate level football."¹⁶⁸ The heatstroke experts' certification that Class could safely return to competition ensured compliance with NCAA mandates for the protection of student-athletes. This compliance satisfied the *underlying purpose* of Towson's rule, which gave Kindschi the authority to clear athletes for competition. Thus, there was no need to discount expert medical opinion in favor of Kindschi's speculative determinations.

Dr. Casa and his colleagues determined that allowing Class to play—with the aid of CorTemp—would not have forced Towson to substantially lower its standards for safe participation.¹⁶⁹ Hence, there was no risk that the university's football program would be fundamentally altered. Recalling *Martin*, it is apparent that "[i]f an exemption from walking doesn't fundamentally alter professional golf, it is inconceivable that CorTemp monitoring fundamentally alters [Towson] football."¹⁷⁰ Therefore, by upholding Kindschi's decision, the Fourth Circuit did not protect the integrity or constitution of Towson football, but instead violated Class' disability rights and robbed him of his ability to make an inspirational comeback.¹⁷¹

2. Implementation of the CorTemp System Would Have Eliminated the Direct Threat to Gavin Class' Safety

The Fourth Circuit twisted facts to fashion support for its finding that implementation of CorTemp did not eliminate direct threats to Gavin Class' safety.¹⁷² Regrettably, the court subsequently relied on this finding

167. See generally *Class*, 806 F.3d 236; *Class*, 118 F. Supp. 3d at 848; Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 9–11.

168. See *Class*, 118 F. Supp. 3d at 848.

169. See *Class*, 806 F.3d at 258 (Wynn, J., dissenting); see also *Class*, 118 F. Supp. 3d at 848–49.

170. Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 10.

171. See *Ham*, *supra* note 137.

172. See *Class*, 806 F.3d at 257–58 (Wynn, J., dissenting).

to incorrectly conclude that implementation of CorTemp was unreasonable.¹⁷³ In doing so, it wrongfully validated Dr. Kindschi's conjecture and disregarded the evidentiary baseline for establishing a direct threat: objective medical evidence demonstrating a likelihood of substantial harm.¹⁷⁴

A grounded interpretation of the record would have revealed that Class' risk of repeat heatstroke was remote.¹⁷⁵ However, by misconstruing facts, the Fourth Circuit made that risk appear imminent.¹⁷⁶ Three pages of the court's majority opinion were spent challenging the CorTemp thermoregulation tests that Class underwent at the Korey Singer Institute.¹⁷⁷ The majority meticulously critiqued the testing conditions as well as CorTemp's monitoring capabilities.¹⁷⁸ It even digressed into a discussion on human digestion and how an unpredictable digestive process might affect the efficacy of CorTemp.¹⁷⁹ Ultimately, the court decided that CorTemp "could not ensure Class would not suffer from another heatstroke while playing,"¹⁸⁰ and thus "the heatstroke risk really ha[d] not been demonstrably abated."¹⁸¹ This analysis was colored by the court's fear that "Class may be at an increased risk of a reoccurrence of heat stroke as a result of his original injury."¹⁸²

173. See Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 8–9.

174. See 28 C.F.R. § 35.139(b) (2017); see also *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002).

175. See Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 6–9; see also *Class*, 806 F.3d at 257–58 (Wynn, J., dissenting).

176. See Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 6–8, 7 n.3; see also *Class*, 806 F.3d at 257–58 (Wynn, J., dissenting).

177. *Class*, 806 F.3d at 248–51.

178. *Id.*

179. *Id.* at 250.

180. *Id.* at 251.

181. *Id.* at 249.

182. *Id.*

Unfortunately, the Fourth Circuit's extensive critique yielded the wrong legal conclusion.¹⁸³ The court's fatal flaw was that its discussion about inadequate testing, unstable digestive processes, and increased risk of repeat heatstroke was mere speculation.¹⁸⁴ Its assertion that CorTemp could not eliminate direct threats to Class' safety was not supported by the best, most current medical evidence, as required by the ADA and the Rehab Act.¹⁸⁵ Moreover, while the court's concerns were worth noting, they did not suggest a likelihood of substantial harm.¹⁸⁶ Therefore, they did not justify excluding Class from competition because, as discussed earlier, "[a] mere elevation of risk, without more, is insufficient to find that a disabled individual [faces a direct threat and therefore] is not 'otherwise qualified' [to compete]."¹⁸⁷

Had the Fourth Circuit followed the trail of objective medical evidence, it likely would not have held in favor of Kindschi and Towson. The record was rife with scientifically verifiable answers for every question that the court contemplated. For example, the court was worried that CorTemp would not alert trainers in time for them to remove Class from competition should his body overheat.¹⁸⁸ However, Dr. Casa had already addressed this concern by explaining that heatstroke cannot come on suddenly since internal body temperature generally will not rise more than one degree per ten minutes.¹⁸⁹ Consequently, if team trainers properly

183. See Ham, *supra* note 137; see also ESPN Edit Operations, *supra* note 153.

184. See *Class*, 806 F.3d at 258 (Wynn, J., dissenting).

185. 28 C.F.R. § 35.139(b); see also *Chevron U.S.A.*, 536 U.S. at 86.

186. Ham, *supra* note 166, at 744 (citing *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418, 425 (E.D. Pa. 1982)) ("Mere possibilities, even if the perceived harm could be substantial, are not strong enough, for the statute, and the majority of evolving interpretations stick to the literal requirement that such harm be 'likely.'").

187. Peter M. Spingola, Knapp v. Northwestern University: *The Seventh Circuit Slam Dunks the Rights of the Disabled*, 73 CHI.-KENT L. REV 709, 720 (1998) (paraphrasing *Mantolite v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985)).

188. *Class*, 806 F.3d at 251.

189. Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 8; Transcript of Record at 104–06., *Class*, 806 F.3d 236 (No. 1:15-cv-01544-RDB).

monitored Class' CorTemp readings, "it [would be] impossible for Class even to approach the heatstroke 'danger zone.'"¹⁹⁰

Objective medical evidence proved overwhelmingly that "the 'cascade of consequences' . . . feared [by the Fourth Circuit] could arise only by ignoring [telltale] warning signs [and CorTemp alerts]."¹⁹¹ In fact, "[i]f [Class] us[ed] the [CorTemp] system . . . , [he] would be the safest person on the football field because he[] [would be] the one person who then could not overheat during practice."¹⁹² Although many of Dr. Casa's studies did not include people with a history of heatstroke,¹⁹³ the court seemingly ignored the dispositive fact that "there [was] no evidence in the record that anyone ha[d] ever suffered heatstroke while being monitored with the CorTemp system, which is used by numerous universities and NFL teams."¹⁹⁴ Had the Fourth Circuit resisted its paternalistic urge to insulate Class, it would have accepted these facts and resolved that the implementation of CorTemp eliminated any direct threat to Class' safety. Instead, the majority was paralyzed by fear and rendered a decision that violated Class' disability rights.

C. The Fourth Circuit Applied the Wrong Standards of Analysis in Determining that Towson's Decision to Exclude Class Was Reasonable

While the Fourth Circuit's mischaracterization of the record is inexcusable, it committed its most egregious error by determining that courts need not adjudicate competing interpretations of medical evidence when evaluating a university's decision to exclude a disabled athlete.¹⁹⁵ The court stated:

[T]he standard for assessing Dr. Kindschi's judgment not to clear Class for return to football under Towson University's

190. Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 8 (citation omitted).

191. *Id.* (citation omitted).

192. *Class*, 806 F.3d at 258 (Wynn, J., dissenting).

193. *See* Transcript of Record, *supra* note 189, at 121.

194. *Class*, 806 F.3d at 258 (Wynn, J., dissenting).

195. *See id.* at 251.

Return-to-Play Policy is not whether we share that judgment or whether she had a better judgment than some other doctor. Rather, the standard is whether her judgment was reasonable¹⁹⁶ And in resolving this question, we give the Team Physician’s decision—and derivatively, Towson University’s decision—a measure of deference. . . .¹⁹⁷ Stated otherwise, in evaluating reasonableness, we must determine whether the Team Physician’s decision and, derivatively, Towson University’s decision . . . was a good-faith application of its policy to protect the health and safety of student-athletes.¹⁹⁸

The court thus declared itself to be Kindschi’s defender: her decisions were to be respected if they related to the goal of ensuring Class’ safety. Likewise, where Kindschi’s judgment reflected a good-faith concern for Class’ welfare, it was to be shielded from the onslaught of damning medical evidence. Under *Knapp*, so said the Fourth Circuit, courts presiding over athlete disability cases were auditors of subjective intent, not triers of fact.¹⁹⁹

However, this reasoning was an affront to the purpose of the ADA and “the Rehabilitation Act: ‘to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them.’”²⁰⁰ Far from recommending deference to a university accused of violating an athlete’s disability rights, the Acts demand that courts initiate a de novo review of the university’s judgment in light of the best available objective medical evidence.²⁰¹ The court must act as an unbiased fact-finder because:

196. *Id.*

197. *Id.* at 247 (citations omitted).

198. *Id.*

199. *See Id.* at 251.

200. Dana A. Rice, *Seventh Circuit Misses Jumper: Fails to Protect Disabled Student Athletes* *Knapp v. Northwestern University*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 84, 85 (2003) (quoting *Poole*, 490 F. Supp. at 953–54).

201. *See Spingola, supra* note 187, at 740–41 (“[T]he Supreme Court, as stated above, has required courts to make an independent assessment as to the legitimacy of a [university’s] concerns. The *Arline* court squarely placed the responsibility for making an individualized inquiry, making findings of fact, and giving appropriate weight to the competing concerns of

[D]eferring to one party's [judgment] contradicts the intent of the ADA, the Rehabilitation Act, and the ideal process of justice, where parties argue and judges judge. If these Acts have any teeth, a court, *not the excluding party*, must fairly determine whether exclusion [of a disabled athlete] is warranted.²⁰² In recognition of this, Congress specifically named colleges and universities as possible violators of the ADA and Rehabilitation Act.²⁰³ Therefore, *Congress most likely did not intend courts to defer to a college or university's own judgment.*²⁰⁴ Though it may be difficult to adjudicate a battle between [competing medical opinions], it simply is bad policy for a court to defer to one party's reasoning in a proceeding. . . .²⁰⁵ Rather, determinations are to be made *based on an objective view*, presumably one which would take into account views of both parties.²⁰⁶

The presiding district court judge in *Knapp* appreciated these principles:

I must consider the testimony of all experts who testified and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts.²⁰⁷

[universities] and disabled individuals on the courts, not on [universities] seeking to bar disabled persons from participation in their services or programs.”).

202. Church & Neumeister, *supra* note 160, at 175 (emphasis added) (citing *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1247–48 (D. Or. 1998)).

203. *Id.* (citing 42 U.S.C. §§ 12131(1)(B), 12181(7)(J) (1994); 29 U.S.C. § 794(b)(2)(A) (1998)).

204. *Id.* (emphasis added).

205. *Id.* (citing *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1119–20 (S.D.N.Y. 1997)).

206. *Id.* (citing 28 C.F.R. pt. 36, app. B at 623 (1998)).

207. *Knapp v. Nw. Univ.*, 942 F. Supp. 1191, 1197 (N.D. Ill.), *rev'd*, *Knapp v. Nw. Univ.*, 101 F.3d 473 (7th Cir. 1996).

However, when *Knapp* reached the Seventh Circuit, the bench became infected by “an extraordinary ‘in loco parentis’ mindset” which facilitated the court’s counterintuitive conclusion that defendants were owed deference in disability rights cases.²⁰⁸ Employing this faulty reasoning, the Seventh Circuit refused to weigh competing medical evidence and upheld NU’s decision to exclude Nicholas Knapp from competition.²⁰⁹ Universities, said the court, are best situated to make medical determinations regarding disabled athletes.²¹⁰ Should those determinations be litigated, a court’s only job is to ensure that the accused university was motivated by a concern for student-athlete welfare.²¹¹ Furthermore, because courts were in an inferior position to make medical determinations, the judiciary need not concern itself with evidence exposing universities’ concerns to be speculative or paternalistic.²¹²

This radically unsound thinking created a circuit split²¹³ by ignoring the ADA and the Rehab Act’s mandate for substantive review of a university’s decision to exclude a disabled athlete.²¹⁴ Moreover, by inexplicably shielding Northwestern’s judgment from judicial scrutiny, the Seventh Circuit “create[d] an irrebutable presumption” in favor of universities accused of violating an athlete’s disability rights.²¹⁵ Under *Knapp*, courts could overturn a university’s exclusion decision only in the exceedingly rare case where that decision was made in subjective bad

208. Ham, *supra* note 166, at 743.

209. *Knapp*, 101 F.3d at 484–85.

210. *Id.* at 484.

211. *See id.* at 484–85.

212. *See id.*

213. Regarding the “otherwise qualified” issue: the Seventh Circuit in *Knapp*, 101 F.3d 473, and the Fourth Circuit in *Class*, 806 F.3d 236, delivered holdings that conflicted with those issued in *Wood v. Omaha Sch. Dist.*, 985 F.2d 437 (8th Cir. 1993) and *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981).

214. *See Spingola, supra* note 187, at 730; *Sch. Bd. v. Arline*, 480 U.S. 273, 287 (1987).

215. *See Spingola, supra* note 187, at 730. *See generally* Brief of Appellee, *supra* note 147, at 45 (“Towson’s argument that Class is not otherwise qualified because the team doctor did not clear him to play is a tautology.”).

faith.²¹⁶ Therefore, as a practical matter, athletes like Class could not win in the Seventh Circuit.²¹⁷

Sadly, by following this bad precedent, the Fourth Circuit in *Class v. Towson* discounted a large catalog of contrary case law²¹⁸ and evaded its congressionally imposed duty to objectively analyze evidence when determining whether Towson's decision to exclude Class was lawful.²¹⁹ The court should have conducted an impartial review of the record and decided that the medical opinions of heatstroke experts were more persuasive than Dr. Kindschi's paternalistic presumptions. Instead, the majority punted and delivered a deferring opinion that bound Class to the will of Towson—the very entity accused of violating his rights.

V. CONCLUSION

Congressional mandates set forth in the ADA and Rehab Act require the legal community to reject the Fourth Circuit's holding in *Class v. Towson*. The majority opinion is clever, but polluted by the “Hank Gathers Effect,”²²⁰ a phenomenon where fear of catastrophic injury precipitates the suppression of a disabled athlete's rights.²²¹ While this Comment does not

216. See Appellee's Petition for Panel Rehearing or Rehearing En Banc, *supra* note 137, at 12.

217. See generally *id.*

218. See generally *Arline*, 480 U.S. at 287; *PGA Tour v. Martin*, 532 U.S. 661 (2001); *Bragdon v. Abbott*, 524 U.S. 622 (1998).

219. See *Church & Neumeister*, *supra* note 160, at 175.

220. Eldon L. Ham, *How 4th Circ. Failed to Clarify Athlete Disability Rights*, LAW 360 (Jan. 3, 2016, 9:00 AM), <http://www.law360.com/articles/738601/how-4th-circ-failed-to-clarify-athlete-disability-rights> [<https://perma.cc/FEZA-8SMJ>].

221. See Ham, *supra* note 166 at 760–62 (1998) (suggesting that the highly publicized incident where Loyola Marymount University basketball star Hank Gathers died on the court has led to an undercurrent of paternalism in subsequent disability rights cases). Recalling Gathers' untimely death and Loyola Marymount's resulting public relations nightmare, universities have improperly decided that violating the ADA and the Rehab Act is sometimes necessary to prevent similar tragedy and protect the university's reputation. However, these universities neglect to consider that Gathers' death was, in large part, caused by Loyola Marymount's failure to adhere to the initial prescribed dosage of Gathers' medication (the accommodation)—which would have allowed Gathers to safely compete despite his heart condition. Furthermore, to improve on-court results, Loyola Marymount's coaching staff had rushed Gathers back to competition despite unmistakable evidence that his return was premature. See *id.*

suggest that the court should be condemned for attempting to ensure Class' safety, it does ask the reader to evaluate the record and conclude that the court's concerns were not supported by substantial medical evidence. Therefore, such concerns did not justify the Fourth Circuit's delivery of an opinion that spurned the ADA and the Rehab Act by implying that certain activities were too risky for a disabled person.

The Fourth Circuit was consumed by thoughts of an improbable development—that Class' return would result in tragedy—a fascination that ultimately led the court to fixate on a sliver of distorted precedent despite overwhelmingly contradictory case law.²²² Had the court resisted the emotional pull of this doomsday scenario, it would have held that Class was “otherwise qualified” to compete. Instead, the court's focus on fear drove it away from the law and plunged it into a meandering rationalization of its decision to abdicate authority in favor of Kindschi's subjective judgment.

Courts must learn from the Fourth Circuit's mistakes if the integrity of federal disability law is to be upheld. The sad result of *Class v. Towson* should show courts that disabled athletes need protection, not from themselves, but from paternalistic universities keen on disregarding the ADA and the Rehab Act when compliance is inconvenient. Most importantly, when evaluating a university's exclusion decision, courts should recall Class' denied dream²²³ and demand that the decision be supported by the best available objective medical evidence, not merely by subjective guesswork.

222. The court should have considered that, because Class was willing to sign a liability waiver, Towson would be insulated from legal consequences in the extremely unlikely event that Class' return resulted in catastrophic injury. Class' waiver would be binding because he had equal bargaining power and was sufficiently informed about the risks of returning to play. See Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 142–43, 210 (1992).

223. Despite being denied of his dreams to return to Division I football, Class—as a testament to his character and physical well-being—is now a top competitor in the World Transplant Games where he won five medals in 2016. See *Gavin Class Overcomes Incredible Odds and Returns to Competitive Athletics*, CBS BALT. (June 30, 2016, 8:53 AM), <http://baltimore.cbslocal.com/2016/06/30/former-towson-football-player-gavin-class-overcomes-incredible-odds-and-returns-to-competitive-athletics> [https://perma.cc/67TA-998T]; see also Jake Lourim, *Towson's Gavin Class Recovers from End of Football Journey to Find 'Enlightening' Opportunity at Transplant Games*, BALT. SUN (June 26, 2016), <http://www.baltimoresun.com/sports/outdoors/bs-sp-outdoors-gavin-class-transplant-games-0626-20160624-story.html> [http://archive.is/DpxTB].