



April 1, 2021

Republican Members of the
South Carolina General Assembly
1105 Pendleton Street
Columbia, SC 29201

Dear Republican Members:

I write as one member of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. I write to express my concern regarding South Carolina Senate Joint Resolution No. 533, titled “A Joint Resolution to Prohibit the Use of Section 14(c) of the Fair Labor Standards Act of 1938 to Pay Subminimum Wages to Individuals with Disabilities.” The resolution was sponsored by Senators Shealy, Gambrell, and Allen and was referred to the Committee on Labor, Commerce and Industry in February 2021.

This would, in effect, abolish the special wage for severely disabled workers under Section 14(c). For the reasons I expressed in the enclosed Commissioner Statement in which I dissented from the flimsily supported report of the U.S. Commission on Civil Rights, titled, “Subminimum Wages: Impacts on the Civil Rights of People with Disabilities,” I oppose such a bill. Abolishing Section 14(c) would throw a huge number of severely disabled workers out of a job. As the U.S. Commission on Civil Rights found, the families of these individuals overwhelmingly oppose such a change in the law.¹

Additionally, I enclose the Commissioner Statement of my colleague, Peter Kirsanow, who also dissented from the Commission’s report.

Most respectfully,

A handwritten signature in black ink, appearing to read "Gail Heriot".

Gail Heriot
Commissioner

¹ See page 1 of my statement.

DISSENTING STATEMENT AND REBUTTAL OF COMMISSIONER GAIL HERIOT in Report of the U.S. Commission on Civil Rights: Subminimum Wages: Impact on the Civil Rights of People with Disabilities

In our Age of Wokeness, the moralizing tone that this report takes has become all too familiar. But it is entirely uncalled for.

The issue before us is one of practical economics, not one of morality. We all want adults with Down syndrome and other serious intellectual and developmental disabilities to have happy and fulfilling lives. As a nation we are committed to help bring that about. Where we differ is on how to achieve that goal.

Should the program created by Section 14(c) of the Fair Labor Standards Act remain in place? Or should the federal government get rid of it? Given that the program is ***optional*** for disabled persons, I view this issue as easier than most questions faced by the Commission.

Section 14(c) was adopted in 1938 at the same time as the first federal minimum wage. Back then it was believed—no doubt correctly—that a federal minimum wage would cause many disabled persons to become unemployable. An exception was thus created. A limited number of employers would be permitted to obtain certificates authorizing them to pay disabled persons something less than the minimum wage. Under current law, how much less depends upon stringent tests of each such employee’s productivity, which must be conducted every six months.

Many of these disabled persons are employed in “sheltered workshops,” while others are employed in integrated settings. If we keep Section 14(c), they will be able to continue to work for the special minimum wage. If we don’t, sheltered workshops will likely disappear, and disabled individuals will be limited to taking non-sheltered jobs that pay at least the minimum wage. To get those jobs, they will have to compete with non-disabled workers.

Overwhelmingly we are talking about individuals with Down syndrome and other serious developmental disabilities. Right now the law allows them (or their guardian) a choice. They can take a mainstream job at a higher wage if they prefer that and can find an employer willing to hire them. If they prefer sheltered employment and have a willing 14(c) employer, they can choose that.

Nobody understands the issue better than the parents of the men and women currently employed in Section 14(c) programs. They aren’t just the ones who love them best. They are the ones who know their capabilities, likes, and dislikes best. That’s why it is shocking to me that **the report waits till page 99 (by which time nearly all Members of Congress have stopped reading) to mention that 98 per cent of the members of the public who submitted comments to the Commission support the continuation of Section 14(c).**

In my thirteen years on the Commission we've never received anything like the number of comments we got with this report—9,700. Indeed, the report admits that this is the highest number the Commission has ever received. Of them, the overwhelming majority were from parents or other close family members. Almost all of them disagreed—often *vehemently*—with the Commission's conclusion on what is best for their child. It would be difficult to find an issue for which comments were more lopsided.

Some of the parents come close to begging the Commission to leave Section 14(c) in place. One mother wrote us, "There are people who think they know what is best for my son. They are wrong." She describes with honesty and compassion the difficulties of caring for an adult son with the intellectual capacity of a four-year old. Another mother describes her son as a slow worker who requires monitoring and who is prone to temper tantrums in the middle of the day. These women know their sons are not going to be earning a competitive wage. They are not interested in chasing rainbows and unicorns. For their sons, it is a sheltered workshop at less-than-minimum wage or no job at all.¹

¹ One mother that we spoke with at MVLE on March 2, 2020—Catherine Pennington, an MVLE board member—was also realistic about her son's prospects in the job market: "When he works for me around the house, he needs a lot of supervision. ... For example, if he goes to mow the lawn, when he's done, there will be tufts of grass here and there. He will not have gone to the edge of the lawn, and even when I point things out to him, he won't necessarily understand that [he] didn't quite get it right. ... Steven's never going to get faster. He's probably never going to become more thorough than he is now, so if he were to try and compete in the market with people who have no disabilities, he would not do well. ... [I]f the minimum wage were to rise significantly, or even a little bit, I expect that Steven would become unemployed." Tr. at 21.

Commissioner Kladney's Statement sounds sunny and optimistic about the ability of Down syndrome employees to work independently at Greenspring (a senior/assisted living facility that contracts with MVLE to furnish 14(c) workers). Commissioner Kladney is often a sunny and optimistic guy, and I appreciate that. But that's not what I was hearing there from people with experience. The MVLE job coach at the Greenspring site (if I can read my handwritten notes her name was Barbara) told us that these special employees tend to forget things, especially on Mondays. They have to be re-taught over and over again. We were told by another Greenspring employee that that the special employees need to be constantly helped and that a change of manager can be traumatic for them. In food preparation, they must be kept away from anything hot. These are not your average unskilled workers. Policy has to be grounded in that reality.

In this vein, I should point out the testimony of John Anton at our hearing. Mr. Anton has Down syndrome. He also is a Legislative Specialist with the Massachusetts Down Syndrome Congress. With help from a coach, he testified on behalf of the Massachusetts Down Syndrome Congress and the National Down Syndrome Society on November 15, 2019. Among other things, he related that he had had once worked in food service, but quit the job, because he didn't find it challenging. His current job allows him to lobby for legislation that would benefit those, like him, who have Down syndrome. Mr. Anton put it in terms of wanting to carry a briefcase and wear a suit. He stated:

"... I have learned how to dress professionally, develop a self-advocacy presentation, and I wanted to have a job where I could wear a suit and tie and carry a briefcase and be a professional like my dad who was a teacher.

(Transcript at 135.)

No one in his right mind would think that the U.S. Commission on Civil Rights—with its mere two days of fieldwork on this issue—has better insight than these mothers have into what is best for their sons.² It's absurd. Indeed, my

Mr. Anton was quite impressive. Insofar as his job is to model what Down syndrome employees might be able to do, I believe he is very effective. On the other hand, the fact that he can get hired by the Massachusetts Down Syndrome Congress doesn't mean that Ms. Pennington's son can get hired that way. See Margaret Snowling, Hannah Nash & Lisa Henderson, *The Development of Literacy Skills in Children with Down Syndrome: Implications for Intervention*, DSE Library (July 2, 2008) ("Reading skills are often an area of relative strength for individuals with Down syndrome. Most children with Down syndrome acquire literacy skills, although a great deal of variability exists in the level of achievement obtained.") available at <https://library.down-syndrome.org/en-us/research-practice/online/2008/development-literacy-skills-down-syndrome-implications-intervention/>.

The point is that we need to be realistic. **Anyone who argues that the solution to our problem is to find jobs for men and women with Down syndrome where they can "dress professionally" and "carry a briefcase" is being frivolous. Unrealistic policies recommendations have become surprisingly common these days. But they are unhelpful.**

² **Commissioner Kladney complains that MVLE did not allow us to see its Section 14(c) paper shredding workers on site. But he forgot to say why: Shortly before we were to see them, we were told that one of the workers had suffered from a seizure.** I have no reason to doubt that such a seizure had occurred. This unfortunately is common with Down syndrome and with some other severe disabilities. Sometimes emergency medical services have to be summoned to deal with the seizure. I don't know whether that was the case this time. But a parade of Commissioners and Commission staff members would only have been in the way. I don't recall Commissioner Kladney or anyone else suggesting otherwise.

Kladney also complains that MVLE did not "allow us to see" its day care facilities. This is nonsense. First, our entourage did get to see a rehearsal of "Everyday Oz" there at the MVLE offices, which is part of the daycare program (and was really quite a treat). "Everyday Oz" is described on the [Kennedy Center web site](#) this way:

Everyday Oz is a family-friendly performance and demonstration that partners individuals with disabilities with professional performers for an engaging show. Equal parts zany and poetic, Everyday Oz include active audience participation to reveal the many ways that we are smart, compassionate, brave, and creative ... every day!

It was extremely touching to see the professional actors and volunteer director working together with disabled individuals to make this drama come alive. We were told that they were preparing for performances in Springfield and Chantilly. Given the pandemic, I assume these performances were cancelled. But it's a shame.

Second, I spoke with April Pinch-Keeler, MVLE's president and CEO, about the accusation that MVLE "did not allow" us access to its day care facilities. She was stunned. MVLE had been repeatedly told that our group was on a very tight schedule and that we absolutely had to be able to catch a plane for Burlington, Vermont that afternoon. Bear in mind that in planning our visit MVLE had logistical concerns (the rest of the day care operations were in a different building) as well as HIPAA

colleagues on the Commission must know it's absurd. Why else bury the fact that 98% of the commenters were in favor of 14(c)?

It is elementary economics that if the price of something is increased, the quantity demanded will tend to decrease. Labor is no exception.³ This is particularly true for unskilled labor. Modern history has been unkind to unskilled workers. Where restaurants used to need armies of dishwashers, now they need only a few to operate their highly efficient dishwashing machines.⁴ Where fast food outlets used to need many cashiers, now they get by without them and take orders with tablets. It doesn't take a labor economist to tell you that the demand for unskilled labor of Down syndrome adults is not infinitely inelastic. If the price goes up, the number of jobs will go down.⁵

considerations. MVLE thought it was doing a good job of satisfying the Commission's last minute requests (or as many of them as possible) and still staying within the quick time frame we gave them.

By the way, Ms. Pinch-Keeler assured me that Commissioner Kladney is wrong to suggest that MVLE's scanning and paper shredding work site does not employ Section 14(c) workers. Some of the workers there are indeed employed pursuant to Section 14(c). Commissioner Kladney suggested that the mother we talked to who pointed to the paper-shredding operation as a reason to retain the 14(c) program must have been misinformed. But it is apparently Commissioner Kladney who is misinformed.

³ If we could raise the minimum wage without increasing unemployment, we'd have long ago set the minimum wage to \$1,000,000 an hour and made everyone rich. But it just doesn't work that way.

⁴ Commissioner Kladney reports that he was impressed with the dishwashers he saw and points out that he was once a dishwasher himself. *Exactly*. At one point in his life, Commissioner Kladney, a future distinguished trial attorney, would have been counted as among the competitors for the job of dishwasher. **If the choice is between a young David Kladney and a young man or woman with Down syndrome at the same wage, just who do you think will get the job?** This is especially so in places like Washington, D.C. (\$14/hour), Seattle (\$16.39/hour for large employers, \$15.75/hour for small employers), and Portland, Oregon (\$13.25/hour). I note for the record that the supervisor that we talked to at Greenspring ("Jason" according to my barely legible handwritten notes) told us that it also hires high school students for some of its unskilled labor requirements. I suspect that some of those high school students are future distinguished trial attorneys—much like a 17-year-old David Kladney—and pretty quick on the uptake.

Kladney also points to the individuals who were "preparing the setups for the next meal." He states that "anyone else would be fully compensated in a competitive environment" for doing these jobs. Not quite. Remember that we were at a senior/assisted living facility. A few years ago my late mother was at such a facility, where nearly all the residents had the kind of small or moderate cognitive deficits common to extreme old age. The facility was expensive and most Americans could not have easily afforded such care. The facility had the residents helping with the setups. It kept costs down, and I'm sure the families of many of the residents were grateful for that and for furnishing the residents who volunteered with something useful to do.

⁵ I am baffled by Commissioner Kladney's assertion that some of the providers "run very profitable businesses" and that "the foundation of much of that profit is the lower labor costs." **Businesses that hire Down syndrome workers tend to do so because they are trying to be good citizens, not because this will save them a bundle of money.** Kladney seems to be suggesting that MVLE is rolling in cash because it had gross revenues of \$14 million in 2017. This, of course, is not profit. It is

Even zealous advocates of terminating the so-called “subminimum wage program” admit that its elimination results in lost jobs. Vermont has eliminated sheltered workshops and Section 14(c) wages. The subcommittee had a roundtable meeting with various advocates of Vermont’s decision in Burlington, Vermont on March 3, 2020. At that meeting, I asked whether fewer individuals had jobs after Vermont’s eliminated sheltered workshops and Section 14(c) wages. It took a while to get a coherent answer. Finally, Monica Hutt, the Commissioner at the Vermont Department of Disabilities, Aging, and Independent Living told us:

I think maybe the piece that we didn’t articulate because it’s really obvious to us ... [W]e didn’t close the sheltered workshops and ... everybody that was working in the sheltered workshop went to work in the community. That would be an impossibility. ... But people’s hours were still filled. They were not just left abandoned because there wasn’t some minimum wage to keep them busy at an employment somewhere.

Transcript at 135.

She’s right, of course. It was obvious this was going to happen. Once the option of a sheltered workshop at a subminimum wage was taken away, disabled individuals were going to lose jobs in Vermont. At the time we spoke with Ms. Hutt,

gross receipts; it includes money that goes straight into the pockets of Down Syndrome workers in Section 14(c) programs. MVLE is a nonprofit.

At our November 15, 2019 hearing, Congressman Glenn Grothman testified to his high regard for the people in his district who work with and provide jobs for the severely disabled under Section 14(c) programs:

The people who work there, if you get to know them, are saints. As I understand it, before I [arrived at this briefing] some people were denigrating them a little bit. People who spend their life working with handicapped, working with people who are non-verbal, working with people who have to be toileted, are saints. They’re not doing it to make money; they are not doing it to take advantage of people

Tr. at 269.

I was very surprised when our Chair declared that she “took exception” to Grothman’s use of the word “saint” in this context. That’s when I knew the Commission was likely to produce the kind of short-sighted report that it has now produced.

If anyone thinks that hiring Down syndrome employees under Section 14(c) is a good way to get rich, I would challenge them to hire a number of Down syndrome workers and let me know how things turn out.

Apart from repealing the Section 14(c) program altogether, I can think of no better way to cause jobs for Down syndrome workers to dry up than to denigrate the employers who hire them under that program. They say no good deed goes unpunished. I used to think that was just a joke. Maybe I was naïve.

the United States was enjoying unusually low unemployment rates, so optimism may have been running unusually high, even though we all know that good times never last forever. What struck me as inappropriate throughout this investigation is how hard people try to avoid saying so plainly: ***Eliminating Section 14(c) programs will cause disabled individuals to lose their jobs.*** Ms. Hutt put it differently--that some previously employed disabled individuals “decided that they were going to retire or arrange other services”—but the point was nevertheless made plain by the time the roundtable adjourned.

Why is it okay to take away a job that a person with Down syndrome wanted and instead put him in daycare? Such a move will take money out of that person’s pocket and create the need for a larger, taxpayer-subsidized daycare/rehabilitation bureaucracy. Alas, I fear that, for some, the bureaucracy’s expansion is not a bug but a feature. Bureaucracies have a tendency to expand; one effective way to do that is to edge out one’s competition (in this case the Section 14(c) job market).⁶

I gather that for others the issue may be dressed up in the language of morality, but it is basically aesthetic. They don’t like the *look* of Down syndrome adults performing menial tasks in return for a wage that is below what any nondisabled individual would be permitted to work for. It makes them feel uncomfortable.

Generations ago it was more common for people to feel uncomfortable around the severely disabled. They wanted to keep disabled persons out of sight, because ... well ... disabled persons offended their sense of aesthetics. Today those who want to abolish sheltered workshops and Section 14(c) believe themselves to

⁶ Part of Commissioner Kladney’s Statement is devoted to suggesting that the problem with the 14(c) program is that there isn’t sufficient oversight. He calls it the “wild west.” Commissioner Kladney needn’t worry. As MVLE’s Senior Director of Program Services Michelle Lotrecchiano pointed out during our March meeting, “We are heavily regulated in this industry as I’m sure you all know.” Tr. at 16.

She was being accurate. As James Clark, MVLE’s Quality Manager, told us, “the Department of Labor oversees everything we do. An organization has to be ready at all times to get that drop-in inspection from DOL.” Tr. at 40. In addition, every two years MVLE must re-apply for 14(c) certification. To be re-certified, the Department of Labor “look[s] whether you’re using the correct techniques for measuring, time-measuring workers, whether your time studies are being completed on time, which is a requisite of every six months.” Tr. at 40. According to Mr. Clark, “they’re pretty serious audits.”

But that is just the beginning. Twice a year MVLE must also do a report to the Commonwealth of Virginia’s Department of Behavioral Health and Developmental Services to maintain its license. And in order to qualify for its contracts with state authorities, it must keep up its accreditation with the Commission on the Accreditation of Rehabilitation Services (CARF). That entails submitting to a thorough inspection from a team of experts every few years. MVLE is also an approved vendor of the federal government’s Ability One program, an authorized vendor for the Virginia Department of Rehabilitative Services and for the Virginia Department of Medical Assistance Services. It is also a recipient of United Way funding. **Put only slightly differently, there is always someone looking over MVLE’s shoulder.** The Commission is just one among many government agencies MVLE must deal with.

be a universe apart from those earlier generations. But they are the same. In both cases, it is all a matter of appearances ... of what looks good. What is actually in the best interests of the disabled individuals doesn't enter their minds.

I concur with Commissioner Kirsanow that the Commission shouldn't be judging issues based on appearances. We're supposed to do better than that.

Dissenting Statement of Commissioner Peter Kirsanow

Introduction

During my tenure on the Commission, there have been many reports with which I disagreed. In fact, it is difficult to think of a report issued by this Commission in the past eight years with which I agreed. This report stands out because it threatens to make the world worse for those least able to fend for themselves.

The report and its findings and recommendations take the tone throughout that although some people have not yet caught up with the caravan of progress and realized that competitive integrated employment is the wave of the future, the evidence favors the superiority of this approach. This is wrong.

On the one hand, the Commission has identified one qualified success in Vermont and a handful of testimonies from high-functioning people with disabilities opposing 14(c). On the other hand, the Commission has evidence indicating that people with disabilities are more likely to be employed full-time and have better wages in states with 14(c), and thousands of public comments from parents, friends, guardians, and people with disabilities urging the retention of 14(c).

The report misleads the unwary reader into thinking that it received thousands of comments in support of 14(c) and in opposition to 14(c). For example:

Moreover, reviewing thousands of public comments received—both in favor of and against 14(c)—along with expert testimony, academic medical research, as well as persons interviewed during site visits also showed that persons with disabilities benefited greatly from being in community employment settings and not being isolated.¹

The Commission heard from proponents and opponents of the program and reviewed story after story of people with a disability or disabilities who were once presumed to be only capable of working for subminimum wages in a sheltered environment, who transitioned to and excelled in competitive integrated employment. The Commission also heard and received thousands of comments, mainly from impacted parents, stating that 14(c) is needed to protect employment opportunities for people with disabilities.²

The Commission received far more public comments from parents of individuals who tried working in mainstream environments and did not thrive there.³ The “story after story” consists

¹ Report at n. 15.

² Report at p. 8 (n. 25).

³ See, e.g., Carolyn Snow, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights (“[My son] has tried traditional workplaces, but his disability prevents him from succeeding in those environments.”); Cathy Gardiner, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights (“As we have experienced working in a community based job, [our daughter] was not included socially as a peer with co-workers.”); Gail Havens, Public Comment for the Subminimum Wages Briefing before

almost exclusively of a few people who testified at the Commission’s public hearing, a tiny smattering of parents whose children transitioned away from a sheltered workshop, and some people in Vermont, most of whom never worked in a sheltered workshop. It is not until page 99 that the report divulges that **98 percent of the public comments submitted to the Commission support the continuation of 14(c).**⁴

The Commission approvingly quotes Congressman Bobby Scott, who testified:

[P]eople with disabilities should be treated like everybody else. If they can make the minimum wage, if they can get a job, they ought to be able to make the minimum wage. You ought not to be able to pay them a differentiated wage just because they have a disability. And we found that in most of the people on 14(c) could, perhaps with a little support, make a full minimum wage.⁵

In adopting Congressman Scott’s well-intentioned and optimistic view, the Commission ignores the hundreds of public comments from parents whose children cannot make the minimum wage, even with support.

The report also approvingly quotes Neil Romano, chairman of the National Council on Disabilities, who testified:

The belief that someone who choose to make less money for their work is, in and of itself, a demonstration of how certificate holders do not believe that people with disabilities are whole people capable of making even the most basic decisions beneficial to themselves.⁶

Mr. Romano misstates the issue and unfairly casts aspersions on 14(c) certificate holders. First, in many cases the person is not choosing between making a special minimum wage and making minimum wage. The person is choosing between making a special minimum wage and making no wage at all. Second, Mr. Romano asserts that, “certificate holders do not believe that people with disabilities are . . . capable of making even the most basic decisions beneficial to themselves.”

Well, in at least some of these cases, the people with disabilities at issue are, as a matter of law (and also as a matter of fact) unable to make basic decisions. This is why their parents or siblings are their legal guardians **after** they have reached the age of majority. And those guardians believe that this is the best decision for their loved one. As one guardian wrote to the Commission:

the U.S. Comm’n on Civil Rights (“[My son] tried numerous competitive jobs but his work speed, work skill, or problem-solving ability was not satisfactory for these jobs, and he was let go due to unsatisfactory performance. The was discouraging and demoralizing.”); Debbie Cole, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights (Son worked in a local grocery store one summer and for Monsanto another summer, but despite best efforts of job coach to teach “soft skills,” was unable to obtain competitive employment).

⁴ Report at p. 99 (n. 552).

⁵ Report at n. 26.

⁶ Report at n. 727.

If she [the ward] ever said [she wants to leave the workshop], I would let Vocational Rehabilitation try to find her a job because that would be her choice. However, it would have to be an informed choice. She does not understand the consequences of some choices. That is why she has a guardian in the first place.⁷

A mother wrote:

There are people who think they know what is best for my son. They are wrong. He doesn't understand, beyond a four year old, the concept of money or bills. Yes, we have focused on token economies and having him purchase things, as part of his education for 18 years. . . .

I sat in a court of law, and testified that my son was incompetent. I cried when the judge asked me if I would be comfortable with him never voting, or driving, or getting married and having a family. That day almost broke me.⁸

Mr. Romano implies that 14(c) employers have a low opinion of their employees, but he appears to exhibit a low opinion of the dedicated family members and guardians who care for people with disabilities. Yes, sometimes people cannot make decisions for themselves. That is why other people who care for them make decisions for them.

Congressman Scott and our fellow Commissioners are well-intentioned. But we do not love these disabled people more than their parents, siblings, uncles and aunts do. We do not know the abilities and limitations of these disabled people as well as their family members do. In fact, **we do not know these people at all.** If it were possible for a person working for subminimum wage to earn the full minimum wage “with a little support,” don't you think these devoted parents would have leapt at the opportunity? The truth is that these individuals are only able to make even the special minimum wage with a *lot* of support, not just a little support.

The report states:

Some have argued that persons with intellectual and developmental disabilities have the most challenges and need the most protection or “a safe, supported, and understanding atmosphere.” Census data also shows lower employment rates among this group, compared with people without intellectual and developmental disabilities. But at the Commission's briefing, Jennifer Mathis, Director of Policy and Legal Advocacy at the Bazelon Center for Mental Health Law and member of the Commission's Maryland State Advisory Committee, provided testimony to the Commission that people with intellectual and developmental disabilities will find employment success in integrated settings if provided with the right supports. Mathis further explained that:

Supported employment is founded on the belief that every person with a disability is capable of working competitively in the community if the right kind of job and

⁷ Diane Bryan, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

⁸ Allison Woerner, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

the work environment, can be found. These services help people find jobs that align with their interests and strengths.⁹

Mathis asserts that anyone can succeed in community employment with the right supports, but she never gives concrete examples of how this works for severely disabled people. Concerned parents and siblings who wrote to the Commission, on the other hand, explained why competitive integrated employment is a poor fit for their loved one. These are just a few of the comments that were submitted to the Commission and that were ignored by the report.

My sister, Alicia Rutherford, is 35 and has been a Lafayette Industries employee for the past 13 years. We tried competitive employment out of High School, and this is always an option for her. However, she was lost there, and it wasn't an environment for her to succeed.¹⁰

Andrea Condodina wrote about her son:

Every year at Stephen's ISP meeting, the option of training for competitive employment is discussed. All members in the room (me, Stephen's supports coordinator, and his managers) agree without question that Stephen is not suited for competitive employment for the following reasons:

- Does not work at a fast pace,
- Requires monitoring,
- Sometimes has temper tantrums in the middle of the work day,
- Would not be able to defend himself if exposed to any form of abuse,
- Has no sense of stranger danger so he could easily put himself in harm's way without realizing,
- Will take money and food from others (and from stores) if given the opportunity.¹¹

Rickey Williams, who is a pediatrician in addition to serving on the board of a 14(c) organization, wrote about his daughter, Sarah:

[M]y wife and I investigated options for Sarah after high school, and we looked at a number of organizations that provide services. In her last 2 years of high school, she worked at a Tucson public library, assisted by a school job coach. Sarah knows the order of the alphabet and numbers quite well, so re-shelving books seemed like reasonable work for her. After she had been there several months, we met with the librarian, who made no bones about not considering hiring Sarah because her productivity was not what would be needed to keep a job there. The personnel there did not interact much with Sarah.¹²

⁹ Report at n. 226-228.

¹⁰ Mark Rutherford, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

¹¹ Andrea Condodina, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

¹² C. Williams, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

Bernadette Rudolph wrote:

[T]he government keeps trying to send [my daughter with Down Syndrome] into the community for either work or for socializing, she does not want to leave her job at APS. Frankly, moving her for work purposes would be inappropriate, frightening and a waste of time, from both Sarah’s perspective and mine. Sarah needs constant oversight or she becomes confused. She needs structure. APS provides work she can do, given her disability, and the support she needs to get the job done.¹³

Brenda Freidel commented:

I am writing to ask that you do not eliminate 14c which would close sheltered workshops. Sheltered workshops are vital to developmentally disabled adults who are not high functioning enough to be mainstreamed into the “normal” workforce and are too high functioning for Adult Day Care. My sister is autistic with 24/7 oversight because she cannot understand any abstract concept such as money, danger, or modesty. She is also non-verbal. She is not able to work at a “mainstream” job. NO employer would hire her. Regular employment does not offer protective oversight – a sheltered workshop does. Some days my sister is extremely productive and other days she is hardly productive at all. Mainstream employers would not tolerate that but her sheltered workshop does. They work with her because they understand her up and down days, and know that her up days are far more than her down days. While a sheltered workshop needs their employees to be productive, they understand that each employee’s level of production is going to be different, and that most will never be able to complete a task at the level of productivity a person without the developmental disability can.¹⁴

Another mother wrote to us:

I am a parent of an adult with Down Syndrome. [My daughter] is 37 years old and has worked at Essex Industries in Mineville, NY, which was considered a sheltered workshop, for nearly 20 years. She has also received services for supported employment, but these jobs seldom last – either for the lack of work and transportation or due to her inability to maintain productivity.

Our area in the north country of NYS has limited opportunities for people with challenges. During this COVID shut down, [my daughter] has had limited contact with friends and has missed her work at Essex Industries.¹⁵

Legal Considerations

¹³ Bernadette Rudolph, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

¹⁴ Brenda Freidel, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

¹⁵ Email from mother of disabled individual to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, July 16, 2020.

The report claims that Section 14(c) may violate the Equal Protection Clause of the 14th Amendment. This can quickly be disposed of. 14(c) does not treat people with disabilities more harshly than people without disabilities. If a person without a disability is not productive enough to warrant the minimum wage (let us imagine a teenager who does not have the skill of his older coworkers), they aren't paid commensurate with their productivity. They are fired. 14(c) is an accommodation for people with disabilities. Instead of being fired, they are paid commensurate with their productivity.

In regard to Section 14(c) possibly violating the ADA, it is a well-established canon of statutory construction that Congress is presumed not to abrogate an existing law unless it does so explicitly. The ADA does not explicitly abrogate 14(c). If one needed any further evidence of this, simply look to the fact that bills have been introduced to abrogate 14(c).

The report's invocation of *Lane v. Brown* is also inapposite. As the Commission is well aware, that litigation occurred under the Obama Administration, when a guidance was in effect that extended the ADA's reach to define "segregation" as "congregate settings populated exclusively or primarily with individuals with disabilities;" "congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living;" or "settings that provide for daytime activities primarily with other individuals with disabilities."¹⁶ This guidance went beyond the text of the ADA and the applicable regulations. The definitions above included not a single citation to the relevant regulations – because this was, once again, a regulation masquerading as a guidance. This guidance, like many others that exceeded the statutory authority of DOJ, was rightfully withdrawn by then-Attorney General Jeff Sessions. The first draft of the Commission's report continued to cite the withdrawn guidance as though it were still authoritative, although grudgingly admitting it had been withdrawn. The final draft of the report backed away from that, and instead cites the *Lane v. Brown* settlement as if it establishes standards that should be adopted by other states. No. The efforts to extend the ADA that were at work in the *Lane v. Brown* settlement have been rightfully withdrawn. The settlement in that case is only binding upon the parties, and other states should not consider it a guide to what course they should follow.

Conflation of Physical and Intellectual Disabilities

The report suffers from often conflating physical and intellectual disabilities. This is also a problem with some of the witness testimony and public comments.¹⁷

¹⁶ *Statement of the Dep't of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, U.S. Dep't of Justice, June 22, 2011, https://www.ada.gov/olmstead/q&a_olmstead.htm.

¹⁷ See Anil Lewis, Executive Director of Blindness Initiatives, National Federation of the Blind, Written Statement for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights, Nov. 15, 2019; see also Derek Manners Testimony, *Subminimum Wages Briefing*, pp. 354-55.

For example, the report approvingly quotes Derek Manners, who spoke during the public comment period at the briefing:

My current salary, not to brag, is \$250,000 a year. My sub-minimum wage hourly rate was \$2.25 an hour. I've had the same level of vision in that job and in my current job. . . . my guidance counselor at my high school thought that because I was a person with a disability, that I would not be able to go to college, and that it was a good idea for me to get experience in the workplace. And so I was placed with a sub-minimum wage employer because she thought that's all that I would be capable of doing. I enjoyed that job. If you had polled me and asked me how I felt in that job, I would have said I felt rewarded. I would have said that I had friends there. I would have said that that \$2.25 an hour was fair and that I enjoyed my job. . . . The idea that the repeal of 14(c) is somehow a violation of civil rights for people with disabilities is laughable and ignorant. . . . When I was at Harvard Law School, I thought I would be for sure the first blind person to ever go to Harvard . . . To my surprise, there were six. . . . There were also people with other disabilities. The range of capabilities for people with disabilities is not something that you can draw from a statistic.¹⁸

Here's the thing: *Mr. Manners left the sheltered workshop!* He has excelled in his profession. If you want to leave the sheltered workshop, *there is nothing stopping you from doing so.* The same is true of Mr. Anton, an individual with Down Syndrome who testified that the work at the sheltered workshop was monotonous and did not challenge him. The people who have the capability to flourish outside the workshop can do so, and have done so. But many people who work in the workshops have tried outside employment, and it has not been a good fit, or their behavioral challenges mean that outside employment will never be a good fit.

One brother wrote:

My sister has had a learning disability with autism all her life. . . . She had several jobs in the general community that DVR helped her obtain. These were jobs that basically no one else wanted. Jobs like cleaning public restrooms, cleaning restrooms in bars, taking out garbage in restaurants. There were other jobs that were less demeaning but because of her autism she was not able to always meet the expectations made of her. She was abused by employers. She had no self-worth. She became so depressed by all the expectations being made of her that she threatened suicide. It was a life of failure after failure! No friends.¹⁹

A mother wrote:

My son has worked in a workshop for many years. Before that, he tried numerous competitive jobs but his work speed, work skill, or problem-solving ability was not

¹⁸ Report at n. 256.

¹⁹ Jeff Christie, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

satisfactory for these jobs, and he was let go due to unsatisfactory performance. This was discouraging and demoralizing.²⁰

Another mother wrote:

My adult daughter, Grace, has cognitive impairments. When she completed our special school district's program at age 21, we sought employment for her. She worked in the private sector for about 1.5 years. We struggled to find consistent full-time employment in a place that had the supervision she needed.²¹

Ricky Williams wrote:

Sarah cannot be left alone. Although she has remarkable gifts such as an uncanny memory for dates and times, try as we might, she has not learned to look both ways before crossing the street. She travels with my wife and me pretty much everywhere we go.²²

The report also approvingly quotes Dr. Julie Christensen, who wrote:

I am often asked whether it is “fair to make an employer” pay the full minimum wage when an employee is not working at 100% productivity. I have several answers to this question. Given what we now know and have available to us in 2019, I fundamentally question the notion that someone simply cannot work competitively. If someone is truly not performing at 100%, my assumption is that something is missing or out of place:

- Perhaps the individual needs better or different training.
- Maybe the correct supports have not yet been put in place to ensure the individual's success.
- Is it possible that there is a reasonable accommodation, perhaps the use of assistive or other technology, that is missing?
- At the end of the day – maybe it's just not a good job match for that individual.²³

The report also states, “Census data also show that very generally speaking, persons with intellectual or developmental disabilities may have the hardest time finding employment. However further data and testimony reviewed by the Commission indicates that when given the opportunity and support needed, the persons in this category are capable of competitive integrated employment.”²⁴ The Commission's Finding No. 3 also states:

People with intellectual and developmental disabilities who are currently earning subminimum wages under the 14(c) program *are not categorically different in*

²⁰ Gail Havens, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

²¹ Jennifer S. Quinn, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

²² C. Williams, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

²³ Report at n. 259

²⁴ Report at 450-451.

level of disability from people with intellectual and developmental disabilities currently working in competitive integrated employment. [emphasis added]²⁵

The Commission adduced no evidence supporting this assertion. In order to say that people earning 14(c) wages are not categorically different from people employed in integrated jobs, the Commission would have needed to conduct a far more in-depth study. The Commission would have needed to study the two populations in-depth. For example, in order to support this assertion, the Commission would have needed to have found representative samples of people with intellectual disabilities who are working in 14(c) employment and people with intellectual disabilities who are working in competitive integrated employment. The Commission then would have needed to study the level of the intellectual disabilities in both groups to ensure that both the average and median IQs of the two groups are comparable. The Commission then would have needed to study whether behavioral difficulties are comparable across the two groups.

The Commission did none of this.

The finding's assertion that people earning subminimum wages are not categorically different in level of disability than people working in mainstream jobs has no basis in the Commission's research. Certainly, *some* people with intellectual or developmental disabilities are capable of competitive integrated employment. But as evidenced by the many public comments we received, some people with intellectual or developmental disabilities are *not* capable of competitive integrated employment, and would be incapable no matter how many supports they received.

The report also cites a statement from a National Council on Disability report. "Research indicates that employees receiving supported employment services generate lower cumulative costs than employees receiving sheltered workshop services and that, whereas the cost-trend of supported employees shifts downward over time, the opposite is the case for people receiving sheltered workshop services."²⁶ The report on which the NCD report relies compared people who had received services from sheltered workshops before entering competitive integrated employment to people who had not received services from sheltered workshops before entering competitive integrated employment.²⁷

It is entirely possible that people who are referred to sheltered workshops before entering competitive employment become dependent on supports provided at the sheltered workshop. On the other hand, it is also possible that there is an unobserved variable that is responsible for people who started in sheltered workshops needing more services over time. Although the study attempted to match people in the two groups based on their characteristics, they could not match people based on the severity of their cognitive disability. As the author notes, this alone could account for the study's findings.²⁸ That is to say, people employed by sheltered workshops may

²⁵ Commission Finding No. 3.

²⁶ Report at n. 536.

²⁷ Robert Evert Cimera, *Does being in sheltered workshops improve the employment outcomes of supported employees with intellectual disabilities?*, 35 J. of Vocational Rehabilitation 21 (2011).

²⁸ Robert Evert Cimera, *Does being in sheltered workshops improve the employment outcomes of supported employees with intellectual disabilities?*, 35 J. of Vocational Rehabilitation 21, 25 (2011).

in the aggregate have had more serious cognitive challenges than those who were never employed by sheltered workshops, and that may explain why the former make somewhat less per hour and require more services than the latter.

The study found that people who had not been employed in sheltered workshops were more likely to have been referred to vocational rehabilitation by their secondary schools than were people who were first employed in sheltered workshops.²⁹ The study's author believes this is evidence that vocational rehabilitation is the best way for people with disabilities to eventually find competitive integrated employment. On the other hand, it is possible that the people who were not referred to vocational rehabilitation had more severe disabilities, and their high school counselors thought vocational rehabilitation was not the right fit. Because the people studied were (understandably) not matched by high school nor severity of intellectual disability, it's impossible to say.

On the other hand, the Commission received numerous public comments explaining in detail why particular disabled individuals are unable to be sufficiently productive to make minimum wage. Ernest M. Dodge, who is the President/CEO of JM Murray in Cortland, New York, which, although a non-profit, operates as a business.³⁰ Among other services, JM Murray fulfills contracts for "injection molding, liquid filling, assembly, product imaging, packaging, and distribution."³¹ JM Murray employs over 240 people, 110 of whom are people with disabilities.³² Most of the individuals with disabilities who work at JM Murray work under a 14(c) certificate, but some are as productive as workers without disabilities and are paid accordingly.³³ Mr. Dodge also writes that the prevailing pay rate at JM Murray is not the federal minimum wage, but is \$12.67 per hour, based on the wages its local for-profit competitors pay. Mr. Dodge writes:

The majority of individuals working under our 14(c) certificate were born with developmental disabilities. No matter how hard they try or how much assistance we can provide through training and adaptive work spaces and accommodations they were born with disadvantages they simply cannot overcome. Life is not fair. Time and experience on the job does not equate to greater productivity. What they do have that cannot be taken away is a desire to work and the dignity and pride of EARNING a paycheck that is threatened by the discussion to eliminate the

²⁹ Robert Evert Cимера, *Does being in sheltered workshops improve the employment outcomes of supported employees with intellectual disabilities?*, 35 J. of Vocational Rehabilitation 21, 25 (2011).

³⁰ Ernest M. Dodge, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

JM Murray was recognized in December of 2017 by New York state as one of the first approved community based integrated employers in the state as part of the Office of People with Developmental Disabilities Transformation Plan initiative. We add the word "competitive" when we describe ourselves because we do not rely on state preferred source contracts and we have no federal work. The majority of our work is derived from providing competitive pricing, expected on time shipments and meeting or exceeding quality standards that are demanded from our private for-profit customers. We don't shuffle papers or "make work". Our work component comprises almost \$9 million dollars of our almost \$21 million dollar budget and we employ over 240 people. Further separating us from most not-for profits is our annual fundraising is less than \$10,000. We operate as a business.

³¹ *Contract Manufacturing*, JM Murray, <https://www.jmmurray.com/business-division/contract-manufacturing/>.

³² Ernest M. Dodge, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

³³ *Id.*

CHOICE presented them. Of the over 100 individuals less than 7 work at efficiencies exceeding 50%. The majority of them work at less than 30%. What employer has the ability to fully compensate their employees for less than 30% efficiency?³⁴

A father and mother wrote to us and said:

Our son ... was born with Downs Syndrome and is legally blind. While he is able to perform some simple routine tasks like clearing the supper table and personal care responsibilities with good consistency, he has difficulty with tasks that involve reasonable vision and understanding of technique, such as rinsing dirty dishes and loading them in the dishwasher – for which he requires supervision to ensure the dishes are properly rinsed and positioned. There is no cure for Downs Syndrome, and [our son's] eyesight has worsened considerably, resulting in him being declared legally blind.

[Our son] entered a disabled job program just after he turned twenty and subsequently obtained a job as a bagger in a grocery store. While everyone enjoyed him for his affable personality and ability to perform his work duties, [he] was easily distracted and could not grasp the concept of limited break times, even with on-site coaching. He was subsequently let go after a few months employment. The disabled job program staff were unable to offer opportunities for his employment.

...
[Our son] has been evaluated by many experts who concur that his Downs Syndrome and limited vision make it impossible for him to hold a minimum wage paying job. [Our son] understands that. But, it does not matter, because he has a job at a workplace where he is considered an equal by his fellow employees and is often praised for his work.³⁵

Dr. Christensen is the head of APSE, an organization dedicated to promoting competitive integrated employment for people with disabilities. Based on its website, APSE primarily engages in lobbying, though the website does include a list of resources available to disabled people.³⁶ It does not appear that APSE itself engages in large-scale training of people with disabilities, though Dr. Christensen may have done this at other times in her life. There is nothing wrong with APSE being a lobbying organization, but there is no reason to privilege APSE's view that every person with a disability is capable of competitive integrated employment over that of parents and employers who deal with real people with disabilities every day. This is nothing something that is theoretical to them. Maybe the people Dr. Christensen works with can be 100% productive with the right supports, but it seems far-fetched to think that everyone can.

³⁴ Ernest M. Dodge, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

³⁵ Email from parents of disabled individual to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, July 3, 2020.

³⁶ *APSE Mission, Vision & Values*, APSE, <https://apse.org/about/mission-vision/>.

Dr. Christensen also states that people currently employed at 14(c) facilities will be harmed unless the federal government pays more for their products and services. She writes:

Federal contracts largely drive the 14(c) economy, and these contracts are awarded and funded based on an assumption of low labor costs. Were 14(c) to be eliminated without a simultaneous increased investment on the part of the Federal government for the products and services currently received under 14(c), there is a real possibility of doing harm. If the contracts cannot support the payment of the Federal minimum wage, people will likely lose their jobs and the system will collapse.³⁷

If people working under 14(c) certificates were just as productive as people who don't work under 14(c) certificates, why would the system collapse? Under 14(c), employers must engage in time trials to determine an employee's level of productivity and base the employee's wage on that. If these employees are just as productive as non-disabled workers, there should be two options: 1) They are fully as productive, and therefore their wages are already close to or at the federal minimum wage, and therefore the contracts should have already taken that into account during the bidding process; 2) If they are fully as productive and they are not working at 100% capacity due to low expectations on the part of management, they can get additional contracts so they will work at 100% capacity. It is only if the employees are truly not as productive as non-disabled employees in the same position that disaster looms, because in that case, these firms will not be competitive if they are required to pay minimum wage.

In many cases, an accommodation can be made for a physical disability, particularly given technological advances. Some accommodations can also be made that assist individuals with intellectual disabilities. However, some individuals with intellectual disabilities, as a consequence of their disability, have behavioral problems that cannot be solved with adaptive technology.

Our grandson, who has both autism and intellectual disability, has been working in a 14c sheltered workshop since finishing high school. He is a highly motivated and diligent worker. He takes pride in being able to work every day and earn a paycheck. He chose his workshop, because he wanted to work and earn money, but due to his disability, he cannot work in the community. His disability causes behavioral complications and anxiety that are incompatible with community employment. Additionally, he works at a pace that is quite slow and lacks the communication skills that are necessary for a typical job.³⁸

Darlene Borre wrote:

Some disability advocates are telling lawmakers that all people, no matter how disabled, can find integrated, competitive employment.

This simply is not true.

³⁷ Christensen Statement at 6.

³⁸ Gene and Nancy Debman, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

We are working hard with Ben's school to decrease his behavior issues (such as impulsively taking food from someone's plate or loud yelling) and increase his vocational skills (such as folding t-shirts, sorting silverware and shredding paper). Ben cannot read, write, or talk. . . .

We have been working on IEP goals for years to get Ben ready for the real world when he turns 21. In doing so, I have learned about the post-21 REAL world of employment for the disabled. Who is going to hire Ben especially when a nondisabled or more high functioning disabled person is available who can do 20x the work?

Unfortunately, if we are all being honest, the answer is no one. No one is going to hire Ben.³⁹

A sister wrote:

Dennis is the most loving person you will ever meet. He is also the most trusting person on earth. He sees total strangers as friends, someone he would want to shake hands with and strike up a conversation. He would do anything anyone asked of him. Dennis has severe cognitive impairments, but is willing to do anything he is capable of. He has very limited speech and his cognitive delay also causes his understanding of what a person may mean to be limited and possibly misunderstood.⁴⁰

The report has completely lost touch with reality by the time it approvingly quotes panelist Finn Gardiner:

The problem with sub-minimum-wage work is that it engenders stereotyping. It sends the message, as several other panelists have said, that if you are a worker with a disability, who is deemed to be somehow less productive than other members of society, then you are only worth being paid pennies on the dollar.⁴¹

Let's break that down: "a worker with a disability, who is deemed to be somehow less productive than other members of society". Does Mr. Gardiner, and the Commission, reject the objective fact that some people are more productive than others? This is the sort of thing that can literally be measured, and in order to pay subminimum wage, it *is* measured. If an average worker without a disability can pack sixty widgets in a box in an hour, and a particular person with a disability can only pack thirty widgets in a box in an hour, the person with a disability is objectively less productive.

³⁹ Darlene Borre, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights..

⁴⁰ Dorothy Deason, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

⁴¹ Report at n. 257.

Our colleagues seem to conflate “productive” with “worth”. Just because someone can only pack thirty widgets in an hour does not mean he has less intrinsic worth than someone who can pack sixty widgets in an hour.

The report does quote people who support the continuation of 14(c). It then waves away their concerns without engaging the issues. Congressman Grothman, Congressman Sensenbrenner, and Kate McSweeney testified to the importance of 14(c) in providing an opportunity for people with disabilities to work and receive a paycheck.⁴² The report replies triumphantly that the National Council on Disability says that 14(c) workplaces couldn’t survive unless they paid subminimum wage⁴³, and that former Governor Tom Ridge says there will still be Community Rehabilitation Programs to provide respite for caregivers.⁴⁴

That is exactly the problem! Many people with disabilities who work under a 14(c) certificate are not productive enough to earn minimum wage. If you have to hire twice as many people to make widgets as your competitor, and you have to pay your workers the same wage, *of course* your business is going to fail. And Community Rehabilitation Programs without work is exactly what so many parents wrote and told the Commission is not a good option for their children – glorified babysitting, day after day.

The report also assumes that no one has ever thought of this great idea of “supports” before, and no one who works under a 14(c) certificate ever tried to find a mainstream job. Again, we received many comments from people whose loved ones tried mainstream employment before settling on a 14(c) job. “[My son] tried numerous competitive jobs but his work speed, work skill, or problem-solving ability was not satisfactory for these jobs, and he was let go due to unsatisfactory performance. This was discouraging and demoralizing.”⁴⁵ Dr. Christensen stated in her testimony that people of all abilities are often let go from jobs when it is not working out, and we just look for a better fit.⁴⁶ But some people with disabilities have tried multiple mainstream jobs, and it turned out that a sheltered workshop was a better fit for them.

⁴² Report at n. 356-361.

⁴³ Report at n. 366. Nat’l Council on Disability, National Disability Employment Policy, *From the New Deal to the Real Deal: Joining the Industries of the Future*, pp. 52-53 (Oct. 2018).

Opponents of eliminating the use of 14(c) certificates frequently argue that 14(c) employers would not be able to employ the people with disabilities that they do at minimum wages or above without going out of business. Several national experts and numerous employment providers that we spoke with, reflecting upon this assertion, stated that it is an acknowledgment that, even with substantial set aside contracts and federal, state, and local funding, the workshop business model is largely unsustainable unless people are paid sub-minimum wages. Or, plainly stated, subminimum wage is not a bug of the workshop model, it is its primary feature.

⁴⁴ Report at n. 371.

There are some well-intentioned advocates that express concern that the elimination of 14(c) would severely limit opportunities for new Americans with disabilities, who may use these workshops as both a place for meaningful social intervention and a respite for caregivers. We understand these concerns, but remind them that there are other options available. 14(c) is not a funding program, it is a certificate. Federal funding will still be available to support individuals with disabilities in other ways.

⁴⁵ Gail Havens, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

⁴⁶ Christensen Statement at 4-5.

The report quotes Brian Collins from Microsoft, who says that Microsoft has successfully integrated disabled employees without resorting to 14(c) wages.⁴⁷ As James White, who is a Business Coordinator at Maryhaven Center of Hope, a 14(c) employer, pointed out in an email to us, the ADA only requires that employers make reasonable accommodations for *qualified* individuals.⁴⁸ Mr. White notes that the EEOC’s guidelines for “reasonable accommodations” states:

An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a “qualified” individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards – whether qualitative or quantitative – that are applied uniformly to employees with and without disabilities.⁴⁹

Mr. White notes in his email, “If a person’s disability doesn’t allow him or her to meet industry defined productivity standards, “with or without” reasonable accommodations[] then that person is not QUALIFIED for the job and will not be hired. . . . Therefore, those with the most significant disabilities need 14 c to provide an employment option not provided by the ADA.”⁵⁰ Responding to Mr. Collins’s testimony about Microsoft’s success employing people with disabilities, Mr. White writes, “There are corporate success stories such as Microsoft, which presented at the briefing. These initiatives are to be celebrated and congratulated. But these programs are again limited to qualified individuals, who may require reasonable accommodations, but meet essential job functions.”⁵¹

Eliminating 14(c) Will Cost Some Disabled Employees Their Jobs

The current federal minimum wage is \$7.25 an hour.⁵² The federal minimum wage is not the real minimum wage. The *real* minimum wage is zero.

Why is the real minimum wage zero? Well, an employee must be sufficiently productive to justify the payment of whatever wages she earns. The employer needs to make a profit in order to stay in business, and that is impossible if labor costs are so high that the employer can’t sell his products or services at a competitive price. To put it in simple terms, assume an employer can sell 50 widgets for \$10. The materials to make 50 widgets cost \$2. It takes a worker of average productivity one hour to make 50 widgets. If the worker makes minimum wage, that means the total cost to produce 50 widgets is \$9.25, which leaves the employer \$0.75 of profit.

⁴⁷ Report at n. 389.

⁴⁸ Email from James White to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, June 29, 2020.

⁴⁹ *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, Equal Employment Opportunity Commission, Oct. 17, 2002, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general>.

⁵⁰ Email from James White to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, June 29, 2020.

⁵¹ Email from James White to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, June 29, 2020.

⁵² *Minimum Wage*, U.S. Department of Labor, <https://www.dol.gov/general/topic/wages/minimumwage>.

Now imagine that the state raises the minimum wage to \$8.00 an hour. The employer now only breaks even when he sells his 50 widgets. This isn't sustainable. The employer has a few options. He can close down his business. He could move his business across the state line to a state that still has a \$7.25 minimum wage. He could invest in new machinery that eliminates the need for so many widget-makers (fast-food restaurants have begun doing similar things by replacing some workers with tablets that customers can use to order).⁵³ He could move his business to another country, such as Mexico or China. Or he could hire a more skilled widget-maker who produces 60 widgets per hour, which will allow him to make a profit.

The most likely outcomes for disabled people who are employed under the special minimum wage are either that their employer will simply close or that they will be replaced by more efficient workers (labor-labor substitution). Or, as economists put it, "If the minimum wage exceeds the value of a worker's output, a firm can potentially find a replacement worker whose productivity meets or exceeds the floor."⁵⁴ As a dad wrote in regard to his son who has I/DD:

That ability to pay my son a reduced rate allows you to consider hiring him for a real job at your widget factory. If Section 14(c) were to be eliminated and you were required to pay every worker \$10 per hour regardless of their ability to perform the task, from a business perspective you would not be able to consider hiring my son nor many other individuals with intellectual and developmental disabilities. (Sure you could hire one or two people with I/DD out of a sense of social responsibility, but those would be token employees. You can imagine how that would feel.)⁵⁵

Recent initiatives in major cities to raise the minimum wage to \$15 an hour give us an idea of what would happen to disabled employees who are currently working under 14(c) certificates if 14(c) was eliminated. It is, of course, not possible to predict what will happen with absolute certainty, but we can make some informed guesses.

Why does the \$15 minimum wage debate pertain to workers with disabilities? First, if 14(c) is eliminated, workers who formerly worked under a 14(c) certificate will earn the minimum wage – if they can earn any wage at all. In some jurisdictions, the minimum wage is \$15. That means that the worker has to produce at least \$35,000 worth of value annually in order to keep a job.⁵⁶ That is a tall order for an employee who is only fifty percent as productive as an average worker without disabilities. It will be hard for many 14(c) employees to be productive enough to earn the federal minimum wage of \$7.25, let alone \$15.

Second, a 14(c) worker who is now expected to earn \$7.25 an hour is in a similar position as a non-disabled worker making \$7.25 who is now expected to earn \$15.00 an hour. Both employees

⁵³ Rachel Greszler, *Would a \$15 Minimum Wage Help or Hurt Low Income Workers?*, The Heritage Foundation, Sept. 16, 2019, <https://www.heritage.org/monetary-policy/commentary/would-15-minimum-wage-help-or-hurt-low-income-workers>.

⁵⁴ Jeffrey Clemens, Lisa B. Kahn, Jonathan Meer, *Dropouts Need Not Apply? The Minimum Wage and Skill Upgrading*, NBER Working Paper 27090, May 2020, <https://www.nber.org/papers/w27090>.

⁵⁵ Joe Moore, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

⁵⁶ Rachel Greszler, *Would a \$15 Minimum Wage Help or Hurt Low Income Workers?*, The Heritage Foundation, Sept. 16, 2019, <https://www.heritage.org/monetary-policy/commentary/would-15-minimum-wage-help-or-hurt-low-income-workers>.

are faced with the necessity of dramatically increasing their productivity in order to justify an increased wage.⁵⁷

In a 2018 study published in *The American Economic Review*, economists Paul Beaudry, David Green, and Ben Sand predicted that Seattle's minimum wage hike would lead to significant job loss among workers who were then making \$10 an hour or less, and would have a smaller effect on workers making between \$10 and \$15 an hour.⁵⁸ They predicted similar, although smaller, effects on workers in Los Angeles and San Francisco.

Other research reveals that this is indeed what happened in Seattle, with the caveat that *rather than job loss*, prospective new entrants into the job market were *never hired*. A recent study examined the effects of the first two hikes of Seattle's minimum wage on the way to \$15/hour. The Washington State minimum wage remained flat throughout this period. The authors found:

Essentially all of the earnings increases accrue to the more experienced half of the low-wage workforce. The less experienced half saw larger proportionate decreases in hours worked, which we estimate to have fully offset their gain in wages, leaving no significant change in earnings. More experienced workers were also more likely to supplement their Seattle income by adding hours outside the city. Finally, conditional on being employed, both less and more experienced workers were more likely to remain employed by their baseline Seattle employer, implying an 8% reduction in labor turnover rates.

Evidence of earnings increases for workers employed at baseline appears to contrast with our earlier work suggesting that total earnings in Seattle's low-wage labor market declined after the second phase-in. Our analysis of the entry rate of new workers into Seattle's low-wage labor market reconciles the findings. As Seattle's minimum wage increased, the entry rate fell significantly behind the rate observed in outlying portions of Washington State. Overall, evidence suggests that employers responded to higher minimum wages by shifting their workforce toward more experienced workers. . . .

Seattle's minimum wage increase appears to have successfully increased the labor market income of the most experienced workers in low-wage jobs, arguably those for whom low-wage work most resembles the "dead-end" archetype. The losses in employment opportunity appear to have been concentrated among the least experienced workers, or those attempting their first entry into the labor market.⁵⁹

⁵⁷ There are some people, of course, who argue that a higher minimum wage will not lead to job loss. See Noah Smith, *A \$15 Minimum Wage Isn't So Scary*, Bloomberg, July 11, 2019, <https://www.bloomberg.com/opinion/articles/2019-07-11/-15-minimum-wage-won-t-cause-the-job-losses-predicted-in-econ-101>.

⁵⁸ Paul Beaudry, David A. Green, and Ben M. Sand, *In Search of Labor Demand*, 108 Am. Econ. Rev. 2714, 2753-2755, 2018 ("for workers below \$10 an hour in Seattle, the employment rate declines by over 10 percent in response to raising the minimum wage to \$15. Meanwhile, for the larger group with wages at or below \$15, the decline is under 7 percent."), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20141374>.

⁵⁹ Ekaterina Jardim et al., *Minimum Wages Increases and Individual Employment Trajectories*, NBER Working Paper 25182, October 2018, at 4-5, <https://www.nber.org/papers/w25182>.

Minimum wage hikes are most detrimental to those who are already at a disadvantage in the workforce, including the young, black men, and those with less formal education.⁶⁰ Minimum wage hikes also encourage employers to shift toward automation for routine jobs. Jobs that are most vulnerable to automation include manufacturing and services – both fields in which many 14(c) people are currently employed, and the fields in which they likely would seek employment if 14(c) was eliminated.⁶¹ As the authors of one study wrote, “While these adoptions [of new technology] undoubtedly lead to increased job opportunities for some workers – for which we find some evidence – it is likely that there are workers who will be displaced that do not have the skills to do the new tasks.”⁶² Even if the overall effect of minimum wage increases is small, it can have a marked effect on disadvantaged subgroups of the workforce. For example, the minimum wage provisions of the 1966 Fair Labor Standards Act had serious negative effects on both the employment levels and hours worked of black men, while white men were not seriously affected.⁶³ “In summary, even if aggregate employment responded little to the 1966 FLSA, the legislation engendered compositional changes in employment and impacted some of the more disadvantaged workers in the economy.”⁶⁴ Workers with disabilities are certainly “disadvantaged workers”. If history is any guide, minimum wage increases will have a particularly negative effect on their workforce participation and hours worked.

Anecdotally, a mother and disability advocate from Seattle wrote and shared what happened to people with disabilities in Seattle and King County, Washington, after the elimination of 14(c) in those jurisdictions.

⁶⁰ Jeffrey Clemens, Lisa B. Kahn, Jonathan Meer, *Dropouts Need Not Apply? The Minimum Wage and Skill Upgrading*, NBER Working Paper 27090, May 2020, at 14-15, <https://www.nber.org/papers/w27090>.

We find that states with statutory increases in the minimum wage see the average age increase in these occupations . . . the age effect primarily manifests through a nearly 1 percentage point drop in the young adult employment share . . . The decline in employment share for those without a high school diploma is just over half a percentage point (4 percent on a base of 17 percent), is statistically significant at the 5 percent level, and is almost exactly offset by the increase for high school and some college.

See also Martha J. Bailey, John DiNardo, and Bryan A. Stuart, *The Economic Impact of a High Minimum Wage: Evidence From the 1966 Fair Labor Standards Act*, NBER Working Paper 26926, May 2020, at 3-4, <https://www.nber.org/papers/w26926>.

⁶¹ Grace Lordan and David Neumark, *People Versus Machines: The Impact of Minimum Wages on Automatable Jobs*, NBER Working Paper 23667, Jan. 2018, at 13-14, <https://www.nber.org/papers/w23667>.

In the aggregate across all industries . . . we find that minimum wage increases cause a statistically significant reallocation of labour away from automatable tasks. We find that a 10 percent increase in the minimum wage leads to a 0.31 percentage point decrease in the share of automatable jobs done by low-skilled workers, implying an elasticity of -0.10.

When we look separately by industry, the estimated effects in construction, wholesale, retail, finance, and public administration are small, centered around zero, and not statistically significant. In contrast, the effects are larger for manufacturing, transport, and services, and significant at the 5- or 10-percent level for manufacturing and transport. For example, the estimates imply that the elasticity of the share of automatable jobs among low-skilled workers in manufacturing with respect to the minimum wage is -0.18.

⁶² Grace Lordan and David Neumark, *People Versus Machines: The Impact of Minimum Wages on Automatable Jobs*, NBER Working Paper 23667, Jan. 2018, at 25-26, <https://www.nber.org/papers/w23667>.

⁶³ Martha J. Bailey, John DiNardo, and Bryan A. Stuart, *The Economic Impact of a High National Minimum Wage: Evidence from the 1966 Fair Labor Standards Act*, NBER Working Paper No. 26926, April 2020, <https://www.nber.org/papers/w26926>.

⁶⁴ Martha J. Bailey, John DiNardo, and Bryan A. Stuart, *The Economic Impact of a High National Minimum Wage: Evidence from the 1966 Fair Labor Standards Act*, NBER Working Paper No. 26926, April 2020, at 3-4, <https://www.nber.org/papers/w26926>.

I live in Seattle and when the elimination of certificates was passed in Seattle there were 8 people working in COMMUNITY jobs – all earning between \$9.30 and \$11.50 an hour (Seattle minimum wage was \$15.00). All but the one person who only worked 6 hours a week had their job hours reduced 20-40% due to the elimination of certificates. This meant that they had much less integration and community engagement – yes, their hourly wage increased but their overall income stayed the same or decreased.

Interesting to note that not one of those 8 people was in favor of elimination of certificates. In fact, public comments sent to the Office of Labor Standards were clearly in favor of continuing to use special certificates. The elimination of certificates not only affected those 8 people but eliminated employment opportunities for others that had already arranged for employment. Jobs were lost. [emphasis in original]

In King County, Washington, the pre-vocational program was eliminated over the past 4 years. There were 142 people who had an average community engagement of 15 hours a week with their job or other activities at a facility/community center. As of August 2019 only 23 out of the 142 had any employment at all. Their average work week is only 8.75 hours a week. Yes, they are making minimum wage but the employment rate for this group went from 100% to 17% with fewer hours of engagement a week in employment. This was not the choice of those who had been employed.⁶⁵

Although one would not know this from the report, the fact that eliminating 14(c) results in lost jobs was even admitted at the roundtable in Vermont held by the subcommittee. Monica Hutt, who is the Commissioner of Vermont’s Department of Disabilities, Aging, and Independent Living said:

I think maybe the piece that we didn’t articulate because it’s really obvious to us and we aren’t see it so that you all are getting the trajectory is that we didn’t close the sheltered workshops and that everybody that was working in the sheltered workshop went to work in the community. That would be an impossibility. . . . But people’s hours were still filled. They were not just left abandoned because there wasn’t some minimum wage to keep them busy at an employment somewhere. So these community-based supports were not only about building community but about building people’s skills so that they became job ready to enter competitive employment in a different way.⁶⁶

That would be an impossibility. That is exactly what the many parents and guardians who wrote the Commission have been saying, but the majority ignored those comments. Only 40-50 people who worked in the sheltered workshop were able to move into competitive employment.⁶⁷ What

⁶⁵ Cheryl Felak, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

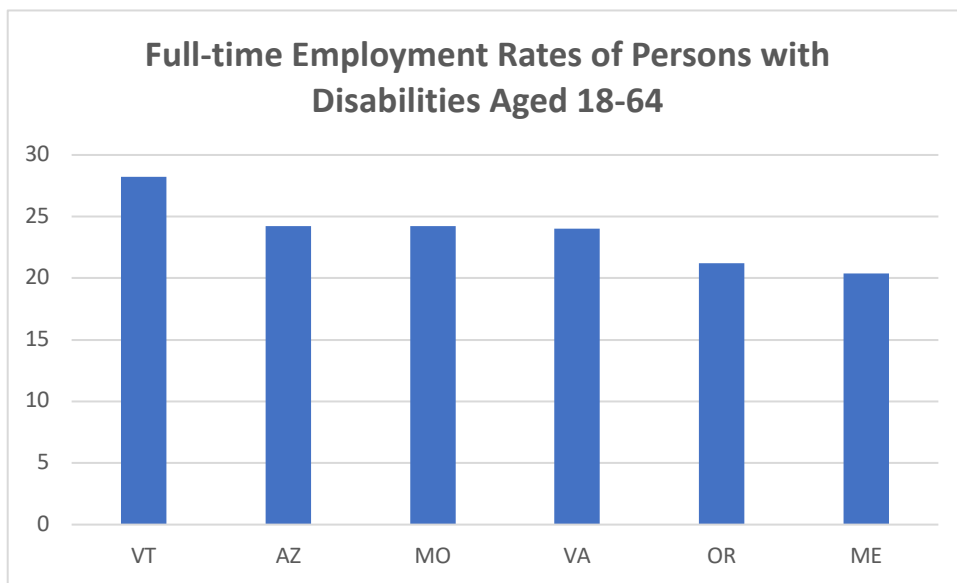
⁶⁶ Vermont Site Visit Transcript 76, 77 (March 4, 2020).

⁶⁷ Vermont Site Visit Transcript 79 (March 4, 2020).

happened to the other people who worked in the sheltered workshop? Well, “[T]hen others decided that they were going to retire or arrange other services.”⁶⁸ In other words, they lost their jobs.

States with 14(c) Have Better Outcomes for People with Disabilities

The Commission’s staff studied six states – three that allow payment of subminimum wages, and three that do not allow the payment of subminimum wages or are phasing it out. Of these six states, only one state that does not permit the payment of 14(c) wages has a higher full-time employment rate for people with disabilities than the three states that permit the payment of subminimum wages. The accompanying chart, Chart 4.1, is reproduced below.



The text accompanying the chart states:

The chart above shows that at the macro level, the state that has phased out the payment of subminimum wages completely (Vermont) has the highest employment rate for people with disabilities, but the state allowing subminimum wages (Missouri) has the same rate as states that are phasing subminimum wages out (Maine and Oregon).⁶⁹

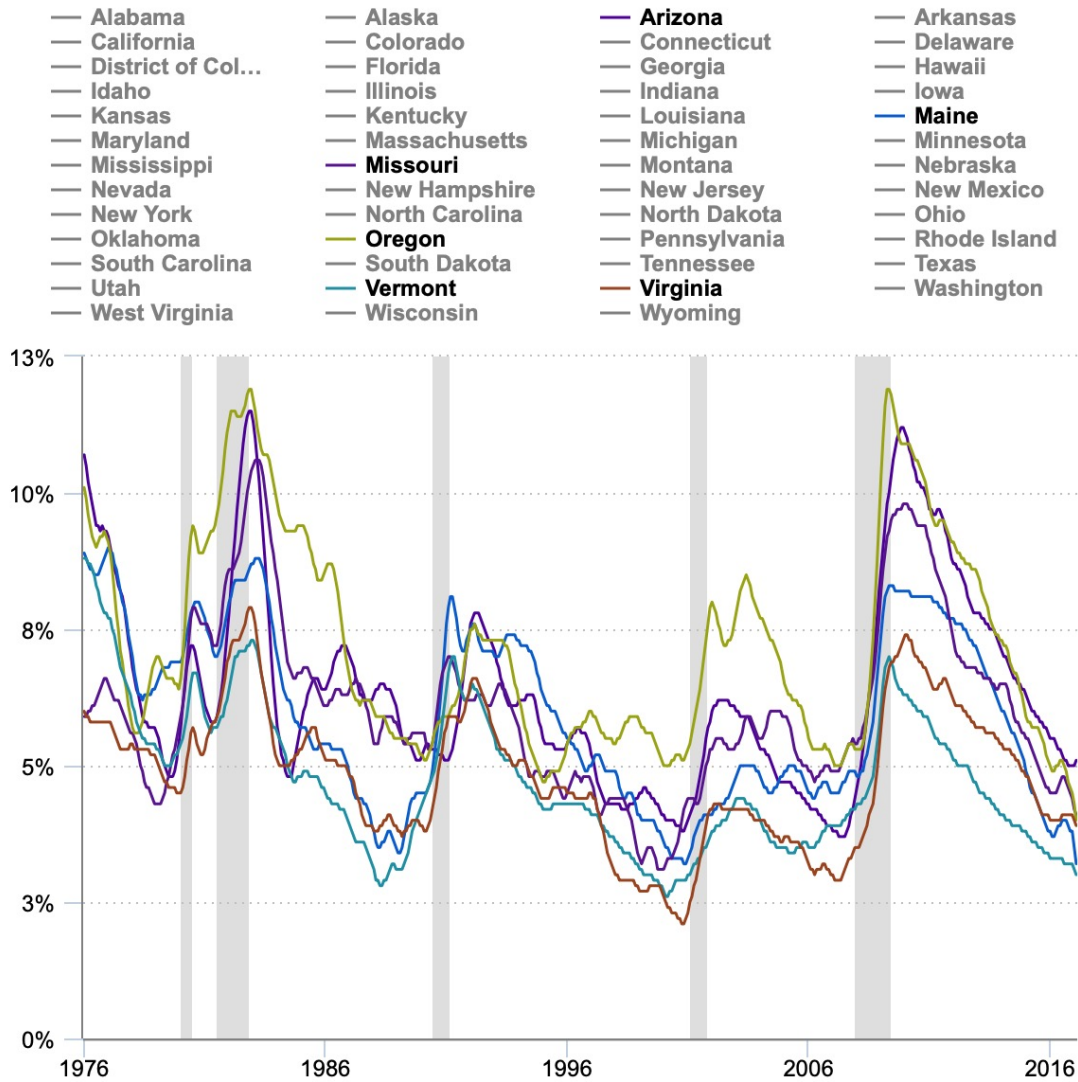
No. The chart above shows that in Vermont, 28.2% of people with disabilities have full-time employment. In Arizona, Missouri, and Virginia, all of which permit the payment of 14(c) wages, 24-24.2% of people with disabilities have full-time employment. In Oregon, only 21.2 percent of people with disabilities have a full time job, and only 20.4 percent of people with disabilities in Maine have a full time job.

⁶⁸ Vermont Site Visit Transcript 79 (March 4, 2020).

⁶⁹ Report at p. 152 (n. 820).

Furthermore, Vermont usually has a lower unemployment rate than other states, as shown in the chart below.⁷⁰

Unemployment rates by state, January 1976–February 2017, seasonally adjusted



Shaded areas represent recessions as determined by the National Bureau of Economic Research.
 Click legend items to change data display. Hover over chart to view data.
 Source: U.S. Bureau of Labor Statistics.



In 2017, Vermont’s unemployment rate dropped from 3.1% to 2.7%.⁷¹ Maine’s unemployment

⁷⁰ *The Economics Daily: Unemployment rates in Arkansas and Oregon at record lows in February 2017*, Bureau of Labor Statistics, March 31, 2017, <https://www.bls.gov/opub/ted/2017/unemployment-rates-in-arkansas-and-oregon-at-record-lows-in-february-2017.htm>.

⁷¹ *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

rate fell from 3.6% to 3.1%.⁷² Oregon’s unemployment rate hovered around 4.1% - 4.2%.⁷³ Virginia’s unemployment rate declined from 4.0% to 3.4%.⁷⁴ Arizona’s unemployment rate fell from 5.1% to 4.7%, and Missouri’s from 4.1% to 3.5%.⁷⁵

In other words, in 2017, Vermont and Maine had the lowest unemployment rates of all six states, and Oregon had a lower unemployment rate than Arizona. Yet still, Arizona, Missouri, and Virginia – the three states that permit 14(c) wages managed to have more people with disabilities in full-time work than Oregon and Maine.

A state like Vermont that has a very tight labor market is better able to find employment opportunities for people with disabilities.⁷⁶ When there are very few people available to hire, an employer is more willing to hire someone who works more slowly or needs additional assistance. Someone working at 70% may be better than no one working in that position at all. But when there are many people out of work – as is the case now – employers will want to hire the most efficient person for the job. In particular, given Oregon’s historic sharp spikes in unemployment (see the chart above), workers with disabilities will be at a real disadvantage, especially because their rate of employment had already dropped sharply between 2016 and 2017.⁷⁷

It is also worth noting that the employment rate for people with disabilities in general, and cognitive disabilities in particular, increased across five of the six states from 2016-2017. This is likely due to the nationwide strong economy in those years. Aside from Vermont, the states that permit the payment of 14(c) wages saw greater increases in the employment of people with disabilities and people with cognitive disabilities than did states that prohibit or are phasing out 14(c) wages. Nonetheless, the report states, “It is not clear whether reducing subminimum wage programs correlates with better employment rates.”⁷⁸ Actually, it seems clear that reducing

⁷² *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

⁷³ *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

⁷⁴ *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

⁷⁵ *Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (data extracted July 7, 2020), <https://data.bls.gov/pdq/SurveyOutputServlet>.

⁷⁶ Furthermore, Vermont is also unique in that the state does not require people with disabilities to work and provides sufficient funds to support people if they do not wish to work. Most states do not have that luxury. *See* Transcript at 235-236.

COMMISSIONER KLADNEY: I think you said 47 percent of people have found –

DR. DAGUE: Yes.

COMMISSIONER KLADNEY: - competitive integrated employment.

DR. DAGUE: Right.

COMMISSIONER KLADNEY: So, that would leave 53 percent that have not, is that correct?

DR. DAGUE: Yes.

COMMISSIONER KLADNEY: So, what do those folks do?

DR. DAGUE: Well, some of them are looking for work. Some are choosing not to work. We’re sort of more of an Employment First state, the policy and philosophy, more than policy, so we don’t require people to work, so if people choose not work, that is up to them. Others are choosing community-based services rather than employment.

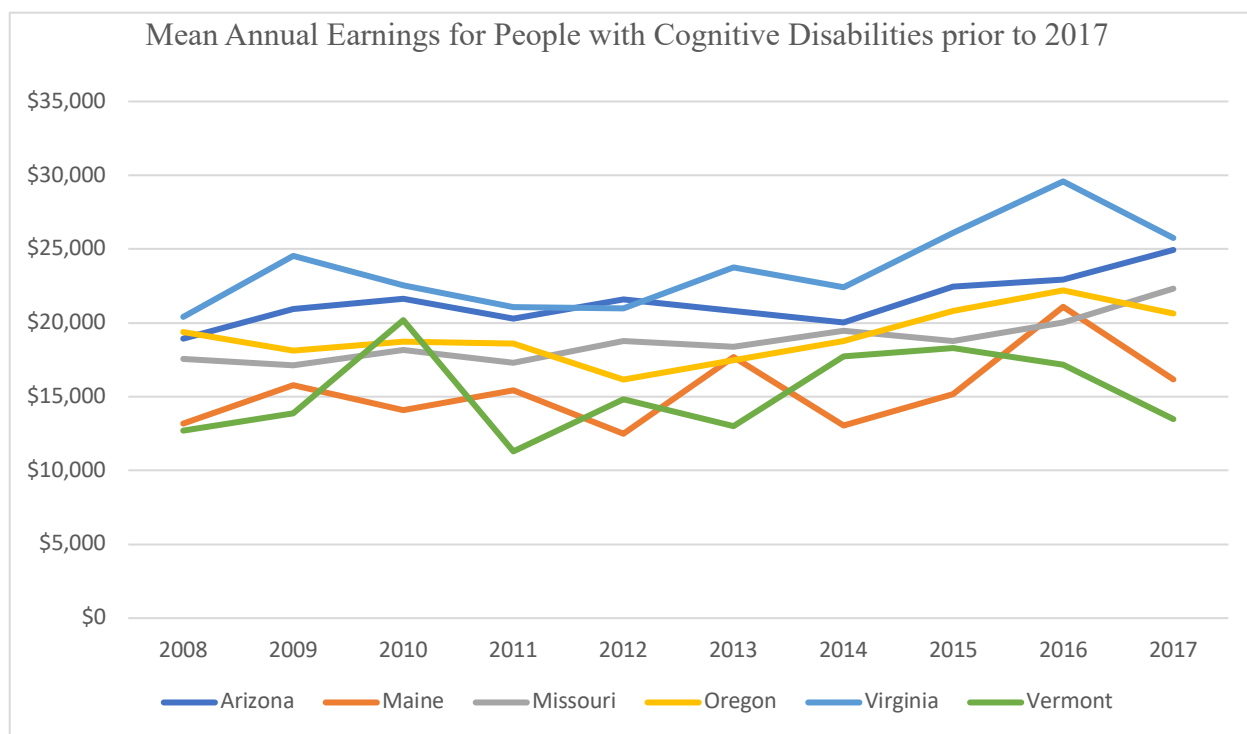
⁷⁷ Report at Table 4.1 (n. 821) (showing that employment rates for all individuals with disabilities declined from 40.1% to 37.0%, and for individuals with cognitive disabilities from 32.5% to 29.8%).

⁷⁸ Report at n. 822.

subminimum wage programs correlates with poorer employment rates. The relevant table from the report, Table 4.1, is below.

State	Disability	2016	2017
Arizona	All	35.1%	36.9%
	Cognitive	25.1%	27.1%
Maine	All	32.4%	32.9%
	Cognitive	23.3%	24.1%
Missouri	All	34.2%	35.9%
	Cognitive	24.9%	28.7%
Oregon	All	40.1%	37.0%
	Cognitive	32.5%	29.8%
Vermont	All	41.4%	45.9%
	Cognitive	24.4%	41.3%
Virginia	All	39.5%	41.3%
	Cognitive	27.3%	29.5%

It is also worth noting that the report found that employees with cognitive disabilities in Virginia and Arizona (which permit the payment of 14(c) wages) had the highest annual mean earnings *every year* since 2008 (with the exception of 2008 itself, in which Oregon barely beat out Arizona). Vermont and Maine, which have ended 14(c), overall have the lowest annual mean earnings for employees with cognitive disabilities. The chart from the report is reproduced below.



Nevertheless, the Commission writes:

The Commission’s research corroborates that Oregon is a good model for coming into compliance with civil rights prohibitions against segregation of persons with disabilities. The Oregon and Vermont experiences also show that transition from sheltered workshops to competitive integrated employment may also be accomplished by concurrently eliminating subminimum wages.⁷⁹

It is a mystery how Oregon can be considered as a good model for anything involving employment of individuals with disabilities when it has had declines in employment and has lower wages than Arizona and Virginia.

What Does “Competitive Integrated Employment” Really Mean?

The purpose of this report is to promote “competitive integrated employment” instead of employment at a special minimum wage or in a sheltered workshop. What does “competitive integrated employment” look like in reality? We have already seen that even the people involved in making competitive integrated employment a reality in Vermont admit that not everyone who was in the sheltered workshop was able to move to a mainstream work environment. What is competitive integrated employment like for people who can move to a mainstream work environment?

Well, let’s first look at the testimony of Neil Romano, approvingly quoted by the report. Mr. Romano testified:

⁷⁹ Report at n. 1303.

At [the National Organization on Disability], we love our executive director, Carol Glazer, and her son Jacob, severely disabled. But he has meaningful part-time employment. Thanks to a person-centered planning model, Jacob works part-time, above minimum wage, at the NBA store in New York City. Medicaid pays for his job coach in the store.

He also volunteers in integrated settings the rest of his time, takes weekly classes in art, music, cooking, fitness, self-improvement.⁸⁰

In short: 1) Jacob Glazer only works part-time; 2) Essentially, there is a second person there to help him with his job – two people are being paid for doing one job (it’s just that one is being paid by Medicaid rather than Nike); and 3) He has to fill the rest of his time with other things. And this is what Romano considers a success story!

Although Romano did not specify how many hours per week Jacob Glazer works, Cheryl Felak, a mother whose son works in the community, wrote to the Commission, warning about the consequences of eliminating special minimum wages. Ms. Felak wrote:

My son needs 1:1 support in order to keep his job and is only able to work 9 hours a week. He makes a little more than minimum wage and has had his job for 4 years. The cost of his job coach last month was \$3078 – that is to provide the support for my son to work 36 hours a month. My son will ALWAYS need this support – it’s not a matter of “learning the ropes” and then being on his own with someone just keeping an eye out for him.

It’s terrific that my son is able to work and there is funding for support. This is a concern that we all have when our loved ones are forced into “community” settings – how is the support going to be funded and sustained. This is a very real question that needs to be addressed prior to making ideological changes to real life concerns for real people.⁸¹

Donna Binek noted in her comment to the Commission that the only community-based jobs available to her daughter were for 8-12 hours per week, and usually nights and weekends.⁸² In contrast, Lafayette Industries, the sheltered workshop where Carli Binek has now worked for twelve years, offers a full workday, Monday-Friday, and even has paid time off.

Similarly, the report notes that one of the individuals interviewed by Commission staff in Vermont, C.B., works only one day per week at one integrated job, and three three-hour shifts per week at another integrated job. C.B. indicated that he preferred his current jobs to working in the sheltered workshop.⁸³ That is great! But other people with disabilities might prefer a full workday, even if it is at a sheltered workshop.

⁸⁰ Report at n. 780.

⁸¹ Cheryl Felak, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

⁸² Donna Binek, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

⁸³ Report at n. 1183-1187.

The lack of hours and jobs is something disability advocates like those at the briefing are aware of, but are careful not to mention. Here are some provisions from the settlement agreement in *Lane*:

9. DHS [Oregon Department of Human Services] shall adopt a rule requiring community development disabilities programs (“CDDPs”) and support services brokerages to encourage individuals in the Sheltered Workshop Target Population to choose options other than sheltered employment.
 - a. If appropriate for the individual, these options shall include non-facility-based employment and integrated day options and community inclusion services, provided in settings other than Sheltered Workshops.
 - b. Integrated day options include, but are not limited to, services that include regular opportunities for community-based recreational, social, educational, cultural, and athletic activities, including community volunteer activities and training activities, as well as other regularly-occurring non-facility based activities of a person’s choosing that are provided in settings with allow individuals with disabilities to interact with individuals without disabilities in a community proceeding to the fullest extent possible for the individual.⁸⁴

Please remember that this litigation began when eight individuals sued, alleging that they wanted to pursue competitive integrated employment and were not being provided with appropriate supports. Then in the settlement, “more support to pursue competitive integrated employment” morphs into an effort to push people out of sheltered workshops and into competitive employment and “day programs.” The witnesses who testified at our briefing were well aware that many people with disabilities will be unable to find full-time work if the sheltered workshops are closed down, and some will not be able to find work at all. They know this because they made provisions for it in the settlement and required organizations that run sheltered workshops to push their clients toward day programs. Yet Alison Barkoff, who was formerly at DOJ, spoke glowingly of lawsuits brought by DOJ during the Obama Administration to end sheltered workshops, saying, “These lawsuits have given thousands of people the opportunity to work in competitive integrated employment.”⁸⁵ Maybe so. Those lawsuits have also given many people the opportunity not to work at all.

The report elevates “inclusion” and “integration” over every other concern. Of course people with disabilities who can and want to work in integrated workplaces should be able to do so. The Commission report, however, takes the position that integration is a mandate, not an option. This seems to have been the position of the Obama-era Department of Justice, but as was so often the case in those days, DOJ went beyond the law to enforce its own policy preferences.

As Bret Whitmore, the father of a woman with disabilities, wrote of his daughter:

⁸⁴ Settlement Agreement, *Lane v. Brown*, No. 3:12-cv-00138, § 9 (D. Ore. 2013), https://www.ada.gov/olmstead/documents/lane_sa.pdf.

⁸⁵ Alison Barkoff, Transcript at p. 41.

Some of the most harmful situations in her life occurred when others – well-meaning though they may have been – attempted to impose their untested ideas and one-size-fits-all notions upon her, assuming they knew best. These supposedly well-educated people, saturated with academics but lacking the two elements most essential in dealing with our kids: PRACTICAL EXPERIENCE & COMPASSION, exposed Gwyn to repeated ridicule and bullying from inconsiderate classmates, and misjudgments and constant guinea-pig experimentation by inadequately trained teachers and staff, to the point that some mornings she was afraid to return to class. What these do-gooders neglected to understand: in their quest to “improve society” by mainstreaming and inclusion, they never asked Gwyn (nor us) first. She neither wanted to [nor] benefited from their unwanted changes, and they only made things worse for her.⁸⁶

The do-gooders did not stop making Gwyn’s life worse after she left school. In an email to me, Mr. Whitmore explained that due to a constant drive for “integration,” Gwyn and some of her coworkers were separated from the larger group of individuals with whom she had worked for nearly ten years. In her time at her original facility, she had progressed to being an office clerk, a “job she dearly loved”. Yet because the authorities considered the situation insufficiently integrated, she and her team had to move locations three times. Furthermore, Mr. Whitmore wrote:

It needs to be noted that under the new rules imposed by CMS and the changed WIOA [Workforce Innovation and Opportunities Act], while it lends the ‘appearance’ of inclusiveness to force the disabled into integrated community settings, in their previous center-based employment, these citizens – working where they CHOSE to work – they had the option of working up to 40 hours per week if they wished or were capable. After the forced changes, however, these same employees had their work hours cut to half or less, sometimes no more than two-hours per day a couple days per week, because in their new community-based employment setting, the new bosses had to work extra hard to carve out a whole gamut of new job titles for disabled persons they had never had on their workforce before, and with such a government-imposed influx of less-than-skilled employees, they simply did not have enough work available for everyone.⁸⁷

There is a happy ending, of sorts, for Gwyn. After being dragged from pillar to post to comply with “integration” mandates, she and her team work at a large commercial laundry facility. Yet still, after three different moves, she works at a laundry facility, instead of doing the office work she enjoyed so much.

Even if *Olmstead* is a correct interpretation of the ADA, it does not require integration at all costs. Rather, Justice Ginsburg wrote, placement of individuals in community setting may be required when “the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affect individual, and the placement can be reasonably accommodated, taking into account the

⁸⁶ Bret Whitmore, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

⁸⁷ Email from Bret Whitmore to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, June 23, 2020.

resources available to the State and the needs of others with mental disabilities.”⁸⁸ Nothing in this holding suggests that States are required to close sheltered workshops when such action is opposed by people with disabilities or their guardians, who represent their interests.

Justice Ginsburg continued:

Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, *the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities*, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, *the District Court must consider*, in view of the resources available to the State, not only *the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably*. (emphasis added)⁸⁹

It seems as though the Commission simply assumes that it is preferable to spend time among those without disabilities than among those with disabilities. Those of us who do not have disabilities, particularly cognitive or behavioral disabilities, may well prefer to spend time among those who are similarly situated. Likewise, those who do have cognitive or behavioral disabilities may prefer to spend time among those who have similar disabilities – their own peers. Justice Ginsburg wrote in *Olmstead*, “We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for those unable to handle or benefit from community settings.”⁹⁰ Once again, the Commission mostly ignored the many family members who testified and commented as to why an “integrated” setting is not good for their children.

The report quotes Linda Hau, the mother of a man who works at a 14(c) facility. Ms. Hau said, “[w]e have also learned that inclusion is often the cruelest form of isolation” and “Many of these individuals are unable to function in a typical workplace due to behavioral, medical, or physical limitations. They are generally socially ostracized, as they have nothing in common with their coworkers.”⁹¹ Ms. Hau’s comments are included in the report, but no effort is made to respond to them. If we are honest, it is because there is no response.

Many other family members struck similar notes in their comments to the Commission. “While I drove [my daughter] to her previous job in the private sector she would breakdown of sobbing. Her difficulties in dealing with the pressures and pace of regular employment were too much for her.”⁹² “[My son] works with adults that have similar needs so they are his family as much as I am.”⁹³

⁸⁸ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999).

⁸⁹ *Olmstead* at 597.

⁹⁰ *Olmstead* at 601-602.

⁹¹ Report at n. 364-365.

⁹² Eve Mudrinich, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

⁹³ Florence Selonke, Public Comment for the Subminimum Wages Briefing before the U.S. Comm’n on Civil Rights.

Whomever it was that came up with the idea to get rid of the workshops plainly doesn't have a family member in the situation to need one. This reminds me very much of when my sister was in junior high school and was mainstreamed. She went from the protected environment of special education classes to the "normal" classes with other students, and this was the most traumatizing experience of her life. I was young, but I remember how bad it was. Forty years later, Debbie still refers to her school as "that place." It was "that place" at which Debbie's self-esteem was completely destroyed. She was at the mercy of a society to whom she was a freak, a retardo, a weirdo – she was different, and our society doesn't like different. And that's exactly what the proponents of getting rid of 14c will be doing to Debbie again if they strip her of the protections 14c provides.⁹⁴

Another mother, Dawn Kovacovich, wrote:

Even the definition of "integrated" employment is flawed. From Laura's point of view, the community-based thrift store where she currently works (operated by our DT&H program by primarily handicapped people) is "integrated" with a few non-handicapped work supervisors. From the legislative point of view, many people would prefer to **keep her in the minority** and feel that "integrated" means she needs to work with a **majority of non-handicapped employees**. Truth be told, her work pace is so slow and her anxiety needs are so great that if she were thrust into a competitive job market, there is no possible way she could continue to be employed. Nor would she enjoy the incredible social/emotional benefits she has been receiving from her current supported work setting. A mandate of minimum wage work is equivalent to no work for her. [emphasis in original]⁹⁵

The Commission even received comments from individuals with disabilities who support the continuation of 14(c). Jeremy Spranger is an individual with multiple disabilities. Mr. Spranger wrote:

At MaryHaven I am able to work to the best of my abilities and earn money. I would be unable to do this anywhere else. I am treated with dignity and respect by everyone at MaryHaven. ***This is very important to me as I suffered from bullying and ridicule my whole life.*** [emphasis added]⁹⁶

Consequences for Individuals and Families if 14(c) is Eliminated

We are assured that if 14(c) is eliminated, those formerly employed under 14(c) will be gainfully employed in competitive integrated employment with all the support they need. When they are not working in mainstream employment, they will be participating in enriching extracurricular activities. Everything will be for the best in the best of all possible worlds.

⁹⁴ Cindy Fields, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

⁹⁵ Dawn Kovacovich, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

⁹⁶ Jeremy Spranger, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

There are many problems with this, but just let us address one: cost. Cheryl Felak wrote that it costs \$3078 per month for a job coach to support her son for 36 hours of work per month. Rickey Williams, whose daughter works at Beacon Industries in Tucson, Arizona (and who is a board member at Beacon), wrote:

Beacon is currently paid \$6.10 per hour from the Arizona Division of Developmental Disabilities to supervise Sarah at Beacon's Center Based Employment.

If Sarah would choose not to work in production and instead spend her time in a Day Treatment program, Beacon would receive \$10.61 per hour from the Arizona Division of Developmental Disabilities for providing Day Treatment and Training services. That's \$4.51 per hour more than if Sarah works in production.⁹⁷

The economic effects of the coronavirus pandemic are causing massive shortfalls in tax revenues for state and local governments everywhere. Many services will have to be cut. Most of us remember the local budgetary retrenchments of the 2007-2009 recession, when, for example public libraries reduced the days and hours they were open. The pandemic will likely result in even more austerity, and it is very likely that supports such as funding for job coaches and day programs will be cut. If there is nowhere for these individuals to spend their days, what will happen to them? Christie Kjelland wrote to the Commission to tell us that her daughter Morgan works 18 hours per week in group supported employment. "If she does not have this time to train, I would have to leave my job to be at home with her and my job pays for health insurance for her and our family."⁹⁸

Rickey Williams wrote:

Having Sarah work at Beacon allowed my wife and me to work full time as a pediatrician and a pediatric nurse. It is not safe for Sarah to stay at home alone. She is pretty high maintenance, and always has my wife or me direct her activities when she is at home. She does not watch TV. This is one instance where it would be nice to have your children watch a little TV.⁹⁹

The Loudest Voices Do Not Speak for Everyone

The witnesses and public commenters with disabilities who spoke at our briefing are not representative of the full spectrum of the disability community. As evidenced by the fact that they were able to come and speak at the Commission, these are some of the highest-functioning members of the disability community. As one mother wrote:

⁹⁷ C. Williams, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

⁹⁸ Christie Kjelland, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

⁹⁹ C. Williams, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

There are those within the disabled adult community, employed by sheltered workshops, who are higher-functioning and have the skills necessary to hold higher paying jobs. They, unfortunately, are in the minority. However, because they are able to articulate their frustration and dissatisfaction with their lower wages, their voices are the ones the public hears. Their voices become the rallying cry for the whole movement, but do not fairly represent their peers.

In attempting to raise the wages for all within the disabled adult population, doing away with 14(c) will raise the wages of a few and guarantee failure for the masses of others who are not, and will never be, able to hold a job that justifies a minimum wage of \$15.

My daughter is fifty-nine years old. We won't address the years it took to get special education classes in our Arkansas schools. Rather, we'll look at the results of decisions made by those tasked with determining what was best for our children academically, a commission much like yours.

After functioning happily and successfully in a classroom designed for children with special needs, and because a commission decided that she, and those like her, were being labeled and discriminated against, she was 'mainstreamed'.

At the age of fifteen, my lovely daughter endured the ridicule of classmates; the inability to grasp what was being taught (by teachers who had to teach the many and not 'the one') . . . the terrible isolation that comes with being different. And, her family endured the heartbreak of watching our Debbie being broken by the system.

After a few years it was determined a mistake had been made; special education classes were indeed needed. Unfortunately, history repeats itself as we see from the proposal to do away with 14(c). It won't work; it's designed to fail. It will be enormously expensive, both monetarily and emotionally.¹⁰⁰

Another mother wrote:

Unfortunately, a number of disability rights groups is advocating for the removal of the 14c clause. These groups certainly do not speak for me or for my son! . . .

I believe another objection by the disability rights groups is their fervent belief that everyone should have a job in an inclusive work environment. As I have stated above, in my son's case, this is simply not an option secondary to his lack of employable skills. In addition, I think much of this desire to eliminate workshops is driven by parents of young children who are often fed the myth that everyone, regardless of their level of disability, can work in competitive employment. This myth is perpetuated by many of these disability rights groups which is very unfair.

¹⁰⁰ Email from mother of disabled individual to Carissa Mulder, special assistant to Commissioner Peter Kirsanow, July 3, 2020.

They may be dismantling something that these very parents may desire and need once their children reach adulthood and reality sets in that jobs in the competitive employment arena are few and far between. Parents of young children with severe cognitive and behavioral deficits do not yet understand that their children may not be capable of performing even the most basic jobs in the community. People with mild intellectual delay who possess relatively strong speech skills and have minimal behavioral concerns can often find jobs as bus boys in a restaurant or as clerk assistants (bag boys) in a local grocery store. However, the reality is that companies are not under any obligation to hire people with disabilities and people with severe intellectual delay, poor to nonexistence speech skills and significant behavioral issues are not hired by competitive employers. Sheltered workshops can be one productive and welcoming outlet for this group of people with disabilities.¹⁰¹

Yet another mother wrote:

I am well aware there are parents with adult disabled children who have advocated for the closing of sheltered workshops because they are fortunate to have a loved one capable of competitive employment so they want more work opportunities to be developed (and they need to be). But these parents fail to understand that competitive employment is not a one size fits all concept. Those with a developmental disability fall on a continuum ranging from adult day care programs for the most severely disabled to competitive employment with short term job coaching support for high functioning individuals. Somewhere in between is Andrew and many other adults who need the support and safety of an employment training center. Please Please Please do not relegate my son to a day program by eliminating the sheltered workshops as you will break his heart and spirit. He feels like the man that he is – allow him to work as one.¹⁰²

The Report is Untethered from Reality

This report is unmoored from reality in ways too numerous to count. However, one example might be missed. Rep. Emanuel Cleaver, (D-MO) wrote to the Commission supporting 14(c) workshops. The report quotes his letter:

In many of the rural towns in my district, sheltered workshops are essential to disabled individuals' feelings of dignity, self-worth and of being able to contribute to their communities. My staff and I have visited sheltered workshops, such as Richmond and Higginsville, and have seen first hand the importance of the disabled individual's ability to get up every morning and go to work with their friends.

Most of the towns in the rural areas of the 5th District and all of Missouri do not have the job opportunities or public transportation for disabled individuals. Section 14(c) programs provide transportation for employees. Many rural community jobs for these workers are part-time if available. Most programs that use Section 14(c)

¹⁰¹ Debbie Cole, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

¹⁰² Cindy Kessler, Public Comment for the Subminimum Wages Briefing before the U.S. Comm'n on Civil Rights.

provider [*sic.*] closer to full time hours. Do not discount what this means to families. If the person with disability has shorter hours per week or no job at all, this means that another family member cannot work in order to be the caretaker.¹⁰³

The report then comments:

The data from the Congressman's letter suggests that lack of public transportation and employment opportunities may contribute to over-reliance on 14(c) sheltered workshops that pay subminimum wages to persons with disabilities in his state. The Americans with Disabilities Act requires that employment opportunities and public transportation be reasonably accessible to persons with disabilities.¹⁰⁴

This throwaway comment from the report perfectly encapsulates the arrogance and unreality that underpins the entire report. None of us have visited the workshops in Congressman Cleaver's district. Most of us have never even visited the small towns in his district. Yet somehow, we think we know better than a seven-term congressman about the needs of his district.

Furthermore, the report says that the ADA "requires that employment opportunities and public transportation be reasonably accessible to persons with disabilities." Rural areas and small towns often will not have public transportation at all. There isn't a sufficient tax base to support public transportation, and the area is not dense enough to make public transportation feasible. The ADA doesn't require small towns to create public transportation systems out of whole cloth. Complaining that public transportation in rural Missouri isn't reasonably accessible to people with disabilities is like complaining that the train to Hogwarts isn't handicapped-accessible. "[B]y regulation a public entity is required only to make 'reasonable modifications in policies, practices, or procedures' when necessary to avoid discrimination It follows that a State may not be forced to create a community-treatment program where none exists."¹⁰⁵

The ADA cannot be interpreted to require closing sheltered workshops and requiring integration over the objections of people with disabilities or their guardians. In *Lane v. Kitzhaber*¹⁰⁶, which resulted in the settlement that ended sheltered workshops in Oregon, the court dismissed the plaintiffs' claims. The court wrote:

[S]ome of the allegations in the Complaint go beyond the clarification offered by plaintiffs at the hearing and seek the forbidden remedy of requiring defendants to provide an adequate level of employment services to enable plaintiffs to obtain a competitive job. In particular, plaintiffs allege that defendants are violating Title II of the ADA and the Rehabilitation Act by "failing to offer an adequate array of integrated employment and supported employment services" and "to provide them with supporting employment services that would enable them to work in integrated employment settings. These allegations are subject to dismissal because they demand that defendants provide a competitive job in the community and a certain

¹⁰³ Report at n. 1035.

¹⁰⁴ Report at n. 1036.

¹⁰⁵ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 613 (1999)(Kennedy, J., concurring).

¹⁰⁶ *Lane v. Kitzhaber*, 841 F.Supp.2d 1199 (D. Ore. 2012).

standard of care or level of benefits. Instead, to comply with the scope of plaintiffs' claims as described at the hearing, these allegations (and other related allegations) must be amended to clarify that defendants are violating Title II of the ADA and the Rehabilitation Act by denying employment services for which they are eligible with the result of unnecessarily segregating them in sheltered workshops.¹⁰⁷

This opinion does not suggest that sheltered workshops must be eliminated, or that 14(c) wages must be eliminated. Rather, it simply says that the state must provide some supported employment services to individuals with disabilities who are capable of availing themselves of those services and wish to do so.

Conclusion

Whether to maintain or eliminate 14(c) is not a Republican or Democratic issue. Our colleagues note in their findings and recommendations that there is bipartisan support for eliminating 14(c). True. They failed to note that **there is also bipartisan support for maintaining 14(c)**. Congressman Emanuel Cleaver, a Democrat, wrote to the Commission in support of 14(c), as did a number of Republican Members of Congress. Rather, it is a matter of realism and trust. The realism lies in recognizing, as so many parents have, that there are some people whose disabilities mean that their life choices are limited. The trust lies in trusting that the parents and guardians of these individuals, who know them far better than we do, can decide whether a job in competitive integrated employment, a 14(c) job in an integrated environment, a sheltered workshop, or day activities are best for their loved ones.

¹⁰⁷ *Lane*, 841 F.Supp.2d at 1208.