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H.R. 3195, ADA RESTORATION ACT OF 2007

HEARING

BEFORE THE

COMMITTEE ON
EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, JANUARY 29, 2008

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H.R. 3195, ADA RESTORATION ACT OF 2007

Tuesday, January 29, 2008
U.S. House of Representatives
Committee on Education and Labor
Washington, DC

The committee met, pursuant to call, at 10:01 a.m., in room 2175, Rayburn House Office Building, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Kildee, Payne, Andrews, Woolsey, Hinojosa, McCarthy, Kucinich, Holt, Bishop of New York, Sarbanes, Loebsack, Hirono, Yarmuth, Hare, Courtney, McKeon, Petri, Castle, Ehlers, Platts, Wilson, Kline, Kuhl, Davis of Tennessee, and Walberg.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jordan Barab, Health/Safety Professional; Chris Brown, Labor Policy Advisor; Jody Calemine, Labor Policy Deputy Director; Carlos Fenwick, Policy Advisor for Subcommittee on Health, Employment, Labor and Pensions; Michael Gaffin, Staff Assistant, Labor; Brian Kennedy, General Counsel; Thomas Kiley, Communications Director; Sharon Lewis, Senior Disability Policy Advisor; Stephanie Moore, General Counsel; Alex Nock, Deputy Staff Director; Joe Novotny, Chief Clerk; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Robert Borden, General Counsel; Cameron Coursen, Assistant Communications Director; Ed Gilroy, Director of Workforce Policy; Rob Gregg, Legislative Assistant; Victor Klatt, Staff Director; Alexa Marrero, Communications Director; Jim Paretti, Workforce Policy Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Ken Serafin, Professional Staff Member; Linda Stevens, Chief Clerk/Assistant to the General Counsel.

Mr. ANDREWS [presiding]. Good morning. The committee will come to order. We appreciate your attendance.

This morning, the chairman of our full committee, Mr. Miller, is occupied in a markup in the Resources Committee. He has asked me to begin the hearing on his behalf, which I am privileged to do.

Nearly two decades ago, President George Herbert Walker Bush, working with a Democratic majority in the Senate and a Democratic majority in the House, ably managed and led by the gentleman who is now our majority leader, who was then Congressman Hoyer, enacted a landmark piece of civil rights legislation called the Americans with Disabilities Act.

The act has always had great promise. It came from a great consensus to do the right thing by Americans to help them achieve their highest potential, irrespective of their abilities or disabilities. It was a law that has enjoyed broad support and done much good. I would say that nearly 2 decades ago when President Bush signed that bill and leaders like Mr. Hoyer made possible, they certainly would not have thought that we would be sitting here in a situation where muscular dystrophy is not a disability, at least according to some of the federal courts of the land; a situation where carpal tunnel syndrome is not a disability according to the United States Supreme Court; where we would be in a situation where a severe vision impairment is not a disability according to the United States Supreme Court.

Suffice it to say that what I believe are tortured judicial interpretations of the definition of a "disability" have put us in the position where the Americans whom we sought to protect under that law are not enjoying the full and robust protections of the law. The Americans with Disabilities Act essentially has three concepts. The first is that no American should be deprived of the right to pursue his or her best objectives and best aspirations because of any disability, and it defines "disability."

Second, it says that there cannot be discrimination or mistreatment based upon disability. And third, it sets up a process where, in the case of our jurisdiction, employers and employees can determine what reasonable accommodations can and should be made so that a person with a disability can reach his or her highest potential. It is my judgment, based upon history of the last nearly 20 years, that the judicial interpretations of the meaning of "disability" has severely undercut the effectiveness of this act and severely excluded a lot of worthy Americans from the act's protection.

As he did nearly two decades ago, Mr. Hoyer has responded to this concern. He has introduced legislation which would correct these judicial misinterpretations and we are privileged that he is with us this morning to discuss his legislation, discuss the underlying problem, and for this committee to begin the process of debating, on a bipartisan basis, what the best solution to the problem is.

The way we will proceed this morning is that my friend the ranking member of the full committee, Mr. McKeon, will have an opening statement. Other members are invited to submit opening statements for the record. We will then turn to Mr. Hoyer, who will give us his testimony. Members will have a chance to ask him questions, although I will suggest to members that it has been our practice in the committee to recognize the busy schedules of our member witnesses, and then try to get our lay witnesses up as quickly as we can to proceed with the rest of the hearing. But obviously if members have questions for Mr. Hoyer, they are welcome to ask them.

So with that in mind, at this time I would turn to my friend, the ranking member of the full committee, Mr. McKeon.

Mr. MCKEON. Thank you, Chairman Andrews, and good morning, Mr. Hoyer. With that introduction, I am sure you will be very brief and hurry up out of here.

Mr. ANDREWS. That is not what I meant.

Mr. MCKEON. I know that is not what you meant. [Laughter.]

We are here today to examine H.R. 3195, the ADA Restoration Act of 2007. The Americans with Disabilities Act was enacted in 1990 with broad bipartisan support. Among its purposes was to protect individuals with disabilities from discrimination in the workplace. By many measures, the law has been a success. It has increased awareness of the needs of individuals with disabilities and has fostered recognition that these individuals can succeed and thrive if given the opportunity.

I believe the employer community has taken the ADA to heart with businesses adopting policies specifically aimed at providing meaningful opportunities to individuals with disabilities. Although the ADA has been successful, supporters of the ADA Restoration Act believe the law needs to be expanded. They argue that it has been unduly narrowed, leaving some individuals without protections. I look forward to examining these concerns more fully today.

At the same time, although there is widespread support for the principles of the ADA, concerns have been raised about the unintended consequences that could result from an expansion of the law. As this committee well knows, even the best of legislative intentions often produce harmful unintended consequences. Sometimes measures such as this may even harm the very individuals they seek to help.

For instance, it has been argued that the ADA Restoration Act would significantly and dramatically expand the number of individuals receiving coverage. This may seem like a well-intended goal. Surely we all agree that every individual with a disability should be given adequate accommodations and protections.

However, if the protections are dispersed to virtually every individual in the workplace, as some fear this bill would do, protections for those with the most substantial and limiting disabilities could be diluted. Resources could be stretched too thin, leaving those who need the help the most without the accommodations they deserve.

I expect to hear discussion today about a series of judicial decisions and how they have impacted the law. Some believe these decisions have clarified and underscored the original congressional intent. Others believe they have appropriately narrowed the application of the ADA. I look forward to a vigorous debate on these questions.

However, we must proceed cautiously before enacting legislation that seeks to overrule judicial findings. Certainly it is the prerogative of Congress to enact laws and ensure those laws are implemented as Congress intended. Yet as we have seen in this committee on one bill after the next, legislative fixes are rarely as clear-cut or narrowly drawn as we would hope. All too often in trying to correct one problem, we create several others.

Such was the case, for instance, with the Ledbetter fair pay bill that did not overrule a single decision, as its supporters intended, but rather fundamentally altered decades of anti-discrimination policy and precedent. I hope and expect that will not be the case with the bill before us, the ADA Restoration Act. Although a number of concerns with the legislation have already been identified, I am hopeful that as the committee moves forward we can correct

these flaws so that the ADA Restoration Act enjoys the same strong support as its predecessor nearly 18 years ago.

We have with us today an esteemed group of witnesses, including the sponsor of the legislation, the House majority leader. I want to thank each of the witnesses for joining us as we give careful consideration to this bill. I look forward to a thoughtful, open-minded debate that looks not only at the bill's intended consequences, but also those that may not be intended. By ensuring the legislation is crafted narrowly and precisely, we can avoid undue burdens and litigation traps that will harm the very individuals we are seeking to protect.

Thank you, Chairman Andrews, and I yield back the balance of my time.

Prepared Statement of Hon. Howard P. "Buck" McKeon, Senior Republican Member, Committee on Education and Labor

Thank you Chairman Miller, and good morning. We are here today to examine H.R. 3195, the ADA Restoration Act of 2007.

The Americans with Disabilities Act was enacted in 1990 with broad bipartisan support. Among its purposes was to protect individuals with disabilities from discrimination in the workplace.

By many measures, the law has been a success. It has increased awareness of the needs of individuals with disabilities, and has fostered recognition that these individuals can succeed and thrive if given the opportunity.

I believe the employer community has taken the ADA to heart, with businesses adopting policies specifically aimed at providing meaningful opportunities to individuals with disabilities.

Although the ADA has been successful, supporters of the ADA Restoration Act believe the law needs to be expanded. They argue that it has been unduly narrowed, leaving some individuals without protections. I look forward to examining these concerns more fully today.

At the same time, although there is widespread support for the principles of the ADA concerns have been raised about the unintended consequences that would result from an expansion of the law.

As this committee well knows, even the best of legislative intentions often produce harmful unintended consequences. Sometimes measures such as this may even harm the very individuals they seek to help.

For instance, it has been argued that the ADA Restoration Act would significantly and dramatically expand the number of individuals receiving coverage. This may seem like a well-intended goal—surely, we all agree that every individual with a disability should be given adequate accommodations and protections. However, if the protections are dispersed to virtually every individual in the workplace—as some fear this bill would do—protections for those with the most substantial and limiting disabilities could be diluted. Resources could be stretched too thin, leaving those who need help the most without the accommodations they deserve.

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I hope and expect that will not be the case with the bill before us, the ADA Restoration Act. Although a number of concerns with the legislation have already been identified, I am hopeful that as the committee moves forward we can correct these flaws so that the ADA Restoration Act enjoys the same strong support as its predecessor nearly 18 years ago.

We have with us today an esteemed group of witnesses including the sponsor of the legislation, the House Majority Leader. I want to thank each of the witnesses for joining us as we give careful consideration to this bill.

I look forward to a thoughtful, open-minded debate that looks not only at the bill's intended consequences, but also those that may not be intended. By ensuring the legislation is crafted narrowly and precisely, we can avoid undue burdens and litigation traps that will harm the very individuals we are seeking to protect. Thank you Chairman Miller, I yield back the balance of my time.

Mr. ANDREWS. Thank you, Mr. McKeon.

Steny Hoyer is the majority leader of the House of Representatives. He represents Maryland's fifth congressional district. Prior to being elected majority leader, Congressman Hoyer served 2 terms as the Democratic whip. Congressman Hoyer's service as majority leader makes him the highest ranking member of Congress from Maryland in the history of Maryland.

Now serving his 14th term in Congress, which included his stellar service in helping to make the Americans with Disabilities Act a reality, he became the longest serving member of the U.S. House of Representatives from Maryland in Maryland's history on June 4, 2007.

He is broadly respected on both sides of the aisle. He is a consummate legislator and a dear friend and colleague. We welcome him to the committee.

STATEMENT OF HON. STENY H. HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND, MAJORITY LEADER

Mr. HOYER. Thank you very much, Mr. Chairman, for that generous introduction.

Mr. McKeon, thank you for your very thoughtful statement. As someone who worked with one of your predecessors, Steve Bartlett, for literally scores of hours, over 100 hours trying to do what you say is our objective jointly, and that is a piece of legislation which is reasonable and can be applied and used and interpreted as the Congress intends. That is the purpose of this legislation.

I am pleased to be joined in the room, if not at the table, with Cheryl Sensenbrenner. My cosponsor of this legislation is Jim Sensenbrenner, the ranking member of the Judiciary Committee. Mr. Sensenbrenner and I have worked long together on issues regarding disabilities, and I thank his wife, Mrs. Sensenbrenner, who has been a leader in her own right on this issue, who is as I say, with us today.

One other person I would like to mention, the real hero of the Americans with Disabilities Act, were those with disabilities all over this country who came to Congress and told us of the discrimination to which they were subjected. A galvanizing leader in that effort was Justin Dart. Many of you knew Justin Dart. His widow, Yoshiko, is in the room with us and she has, as she does so often have, Justin's hat with her. His admonition to us was to keep the faith and keep the focus on making sure that the opportunities promised by the Americans with Disabilities Act became the reality. Yoshiko, thank you for the efforts that you have made.

I want to thank you for holding this hearing on the ADA Restoration Act. It was introduced last July 26 and it already has 244

cosponsors, a broadly bipartisan cosponsorship. Let me assure you of one thing at the outset of my testimony. The purpose of this legislation we believe is straightforward and unambiguous. The bill does not seek to expand the rights guaranteed in the landmark Americans with Disabilities Act. Instead, it seeks to clarify the law, restoring the scope of protection available under the ADA.

It responds to court decisions that have sharply restricted the class of people who can invoke protection under the law. And it reinstates the original congressional intent when we passed the ADA, and which I might say was a collaborative effort between President Bush, in the late 1980s and 1990, and the Congress in a very bipartisan way. When the first President Bush signed the ADA on July 26, 1990, he hailed it as, "the world's first comprehensive declaration of equality for people with disabilities." He was absolutely correct, and it has been viewed as such around the world.

This landmark civil rights law prohibited discrimination against Americans with disabilities in the workplace, public accommodations, and other settings. We knew that it would not topple centuries of prejudice overnight, but we believed that it could change attitudes and unleash the talent of millions of Americans with disabilities.

And we were right, as Mr. McKeon has indicated and Mr. Andrews also. Since its enactment, thousands of Americans with disabilities have entered the workplace, realizing self-sufficiency for the first time in their lives. However, despite our progress, the courts, including the United States Supreme Court, have narrowly interpreted the ADA, limiting its scope and undermining, I suggest to you, congressional intent.

When we wrote the ADA, we intentionally used a definition of "disability" that was broad, borrowing from an existing definition of the Rehabilitation Act of 1973, our assumption being that that law, in effect for 17 years prior to the signing of this bill, had been interpreted many times, and therefore we were trying to eliminate controversy, rather than create it. We did this because the courts have generously interpreted this definition in the Rehabilitation Act, and we thought using established language would help us avoid a potentially divisive political debate over the definition of "disabled."

Therefore, we could not have fathomed or anticipated that people with diabetes, epilepsy, heart conditions, cancer, and mental illness would have their ADA claims rejected and kicked out of court because, with medication, they would be considered too functional to meet the definition of "disabled."

In other words, our premise now is that if I discriminate against you because you have epilepsy, but you can perform a major life function because the medication that you are taking mitigates the effects of your epilepsy and prevents seizures, the fact that I have discriminated against you and said you can't have the job because you have epilepsy will not be covered under this act. No one on this panel, from right to left, Republican or Democrat, could have conceived that such a conclusion would have been reached.

The Supreme Court decision in *Sutton, Kirkingburg,* and *Murphy* cases in 1999 and the *Toyota Manufacturing* case in 2002 are, simply put, misinterpretations of the law. I wrote an op/ed piece in

The Washington Post shortly after one of those decisions stating that. In Toyota Manufacturing, for example, Justice O'Connor, writing for the court, said the terms, "substantially limited," and "major life activities" need to be, and in her words "strictly interpreted to create a demanding standard for qualifying as disabled."

That is a conclusion that I think none of us would have reached who voted for the act, nor would President Bush when he signed the act. The court went on to say, "'substantially limited' means to prevent or severely restrict." This was not our intent when Congress passed the ADA. Again, if I discriminate against you because you have epilepsy, the fact that your epilepsy does not adversely affect your ability to do the job for which you apply seems to be irrelevant. It is the discrimination that is relevant.

We did not anticipate that contrary to our explicit instructions in the legislation, the court would eliminate from the act's coverage individuals who have mitigated the effects of their impairment with medication or assistive devices, as in *Sutton, Murphy* and *Kirkingburg.* Again, this is not, I suggest to you, what the Congress intended. We intended a broad application of the law. Simply put, the point of the ADA is not the disability. It is the discrimination. It is the prevention of wrongful and unlawful discrimination.

Let me be clear—only people who can prove that they have been discriminated against on the basis of real or perceived disability have potentially valid claims under the ADA. Such people must also prove that they are qualified to do the job with or without a reasonable accommodation. Mr. Bartlett and I and members of Congress and outside advocacy groups, business and consumers, prospective employees, all spent a lot of time on this so the act would be a reasonable act.

H.R. 3195, introduced by myself and Congressman Sensenbrenner, and now 242 others, the former chairman of the Judiciary Committee, Mr. Sensenbrenner—we designed it to restore the broad reach of ADA that we believed was plain in 1990. I think President Bush's statement upon signing reflects that belief. Among other things, the bill will amend the definition of "disability" so that people who Congress originally intended to protect from discrimination are in fact covered under the ADA.

Secondly, it will prevent courts from considering mitigating measures. The issue was not whether measures could mitigate your disability. It was the discrimination based upon your disability, such as eyeglasses or medication, when determining whether a person qualifies for protection under the law.

Thirdly, it will modify findings in the ADA that have been used by the courts to support a narrow reading of "disability." Almost every civil rights statute, indeed every civil rights statute we have passed, was intended to be and was instructed to be broadly interpreted to affect the objective of eliminating arbitrary and capricious discrimination. Specifically, this bill strikes the finding pertaining to "43 million Americans" and the findings pertaining to "discrete and insular minority."

Let me conclude, Mr. Chairman and Mr. McKeon, by noting that this past July 26, we marked the 17th anniversary of this landmark law. I believe that its promise remains unfulfilled, but very much still within our reach. Passage of this legislation is impera-

tive to restoring congressional intent, to achieving the ADA's promise, and to creating a society in which Americans with disabilities can realize their potential and have a confidence that they will not be discriminated against, notwithstanding their ability.

Thank you, Mr. Chairman.

[The statement of Mr. Hoyer follows:]

Prepared Statement of Hon. Steny H. Hoyer, Majority Leader, U.S. House of Representatives

Chairman Miller, Ranking Member McKeon, and Members of the Committee: Thank you for holding this hearing on H.R. 3195, the "ADA Restoration Act of 2007"—legislation that was introduced last July 26 and which already has been cosponsored by 244 Members from both sides of the aisle.

Let me assure you of one thing at the outset of my testimony: The purpose of this legislation is straight-forward and unambiguous.

The bill does not seek to expand the rights guaranteed under the landmark Americans With Disabilities Act.

Instead, it seeks to clarify the law, restoring the scope of protection available under the ADA. It responds to court decisions that have sharply restricted the class of people who can invoke protection under the law. And it reinstates the original Congressional intent when we passed the ADA.

When the first President Bush signed the ADA into law on July 26, 1990, he hailed it as "the world's first comprehensive declaration of equality for people with disabilities." This landmark civil rights law prohibited discrimination against Americans with disabilities in the workplace, public accommodations, and other settings.

We knew that it would not topple centuries of prejudice overnight, but we believed that it could change attitudes and unleash the talents of millions of Americans with disabilities.

And, we were right. Since its enactment, thousands of Americans with disabilities have entered the workplace, realizing self-sufficiency for the first time in their lives.

However, despite our progress, the courts—including the U.S. Supreme Court—have narrowly interpreted the ADA, limiting its scope and undermining its intent.

When we wrote the ADA, we intentionally used a definition of "disability" that was broad—borrowing from an existing definition from the Rehabilitation Act of 1973.

We did this because the courts had generously interpreted this definition in the Rehabilitation Act. And, we thought using established language would help us avoid a potentially divisive political debate over the definition of "disabled."

Therefore, we could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, and mental illnesses would have their ADA claims kicked out of court because, with medication, they would be considered too functional to meet the definition of "disabled."

Nor could we have anticipated a situation where an individual may be considered too disabled by an employer to get a job, but not disabled enough by the courts to be protected by the ADA from discrimination.

The Supreme Court's decisions in the Sutton, Kirkingburg and Murphy cases in 1999, and Toyota Manufacturing in 2002 are, simply put, misinterpretations of the law.

In Toyota Manufacturing, for example, Justice O'Connor, writing for the Court, said the terms "substantially limited" and "major life activities," need to be "strictly interpreted to create a demanding standard for qualifying as disabled." The Court went on to say that "substantially limited" means to prevent or severely restrict. This was not our intent when Congress passed the ADA.

Nor did we anticipate that, contrary to our explicit instructions, the Court would eliminate from the Act's coverage individuals who have mitigated the effects of their impairments with medication or assistive devices, as in Sutton, Murphy and Kirkingburg.

Again, this is not what Congress intended when it passed the ADA. We intended a broad application of this law. Simply put, the point of the ADA is not disability, it is the prevention of wrongful and unlawful discrimination.

Let me be clear: Only people who can prove that they have been discriminated against on the basis of a real or perceived disability have a potentially valid claim under the ADA. Such people must also prove that they are qualified to do the job, with or without a reasonable accommodation.

H.R. 3195—introduced by myself and Congressman Sensenbrenner, the former Chairman of the Judiciary Committee—is designed to restore the broad reach of ADA that we believed was plain in 1990.

Among other things, the bill will:

• amend the definition of "disability" so that people who Congress originally intended to protect from discrimination are covered under the ADA;

• prevent courts from considering "mitigating measures"—such as eyeglasses or medication—when determining whether a person qualifies for protection under the law; and

• modify findings in the ADA that have been used by the courts to support a narrow reading of "disability." Specifically, this bill strikes the finding pertaining to "43 million Americans" and the finding pertaining to "discrete and insular minority."

Let me conclude by noting that this past July 26th, we marked the 17th anniversary of this landmark law. I believe that its promise remains unfulfilled but very much still within reach.

Passage of this legislation—H.R. 3195—is imperative to restoring Congressional intent, to achieving the ADA's promise, and to creating a society in which Americans with disabilities can realize their potential.

Mr. ANDREWS. Thank you, Mr. Leader. I think that your statement very persuasively demonstrated why 243 of your colleagues have taken the position that you have, including many members of this committee on both sides of the aisle. So thank you.

Mr. HOYER. Mr. Chairman, if I could just observe on that issue in response to Mr. McKeon's observations. The ADA passed with some 400 votes through the House of Representatives, but it was a very long and focused process that we went through in four major committees and a number of subcommittees before we got the legislation passed. We worked very hard on it. We think it did what we wanted to do. We think, as I have said, that the court cases misinterpret our intent.

But it is not so much the misinterpretation of our intent that is important. It is the consequence for those people to whom we were opening the doors, which is what the first President Bush talked about in terms of giving them full access to the opportunities America provides.

I thank the chairman for this opportunity to testify. I know you look forward to hearing from some folks who are extraordinarily committed and courageous and knowledgeable about this issue. Thank you, Mr. Chairman.

Mr. ANDREWS. We thank you.

Do any of our majority members have a question for the majority leader?

Mr. McKeon, do any of your members have a question for the majority leader?

Mr. HOYER. I want to thank all the members.

Mr. HOLT. Mr. Chairman?

Mr. ANDREWS. Yes, Mr. Holt?

Mr. HOLT. Just to add to your earlier comments, to thank the majority leader for his years of effort to prevent the arbitrary discrimination and to support those who are working so hard for access and equal opportunity.

Mr. HOYER. Thank you. I appreciate that very much.

Mr. ANDREWS. Thank you, Mr. Hoyer. Now, go make the place run. [Laughter.]

Mr. HOYER. A heavy responsibility, but I will try to carry it out. [Laughter.]

Mr. ANDREWS. Yes, sir.

I would ask if the witnesses from the second panel could approach the table and take their seats. I am going to begin the process of reading their introductions now, so we can get to their testimony.

Mr. Andrew Imparato is the president and chief executive officer of the American Association of People with Disabilities. Prior to joining the AAPD, Imparato was general counsel and director of policy for the National Council on Disability. Mr. Imparato graduated from Yale College and Stanford Law School.

Mr. Carey McClure is an electrician and a resident of Griffin, Georgia. We welcome him. He enjoys fishing, playing games with friends, and spending time with his children and grandchildren. We welcome Mr. McClure.

Mr. David Fram is the director, ADA and EEO services, of the National Employment Law Institute. From 1991 to 1996, Mr. Fram—did I pronounce your name correctly, Mr. Fram?

Mr. FRAM. Fram.

Mr. ANDREWS. Fram.

Mr. FRAM. Close enough.

Mr. ANDREWS. Okay. Mr. Fram was policy attorney in the Office of Legal Counsel for the Equal Employment Opportunity Commission here in Washington. Prior to joining the EEOC, Mr. Fram was with the firm of Hogan and Hartson in Washington. Welcome.

And finally, Professor Robert Burgdorf is a professor at the University of the District of Columbia, the David A. Clarke School of Law. He directs the legislation clinic and teaches disability rights law and constitutional law. The United States Supreme Court has recognized Professor Burgdorf as, "the drafter of the original ADA bill introduced in Congress in 1988"—quite a testimony to your competence being here today.

Gentlemen, we welcome you. The rules are that your written statements will be accepted into the record of the hearing without objection, so everything you have had to tell the committee will be part of the permanent record of these proceedings. We would ask you to summarize those written statements in 5 minutes or less so that we can get to dialogue and questions from the members of the committee.

In front of you, you will see a box with lights on the box. You have 5 minutes, as we said, to summarize your views. When the yellow light appears, it means you have 1 minute remaining on your time. When the red light appears, it means that your 5 minutes is up and we would ask you to briefly wrap things up so we can get to questions from the members.

So we welcome you. We are very glad that you are with us. Mr. Imparato, we would ask that you begin with your testimony.

STATEMENT OF ANDREW IMPARATO, PRESIDENT AND CEO, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES

Mr. IMPARATO. Thank you very much, Congressman Andrews and Ranking Member McKeon and everybody on the committee for being here and for having a hearing on this very important topic.

As a Baltimore resident, I also want to acknowledge one of our representatives. Congressman Sarbanes, it is great to see you here.

Our children play piano together, so it is good to see you in another context.

You know, I want to start just by saying I am here as an attorney who graduated from law school in 1990, the year that the Americans with Disabilities Act was enacted into law. I personally have bipolar disorder and manic depression, and I am one of thousands of professionals who have developed our careers in the context of a law that protected our civil rights.

I have been very open about my disability, and it hasn't kept me from accomplishing my career goals. I think that was one of the things that those of you who are here and worked on the ADA the first time around were hoping would happen, so I wanted to start in that positive vein.

I am testifying today on behalf of the American Association of People with Disabilities, which was founded on the fifth anniversary of the Americans with Disabilities Act. Our mission is to organize the disability community defined broadly so that we have more power politically, socially and economically.

I also want to join Majority Leader Hoyer in acknowledging Cheryl Sensenbrenner, who is the chair of my board at the American Association of People with Disabilities. I want to acknowledge Majority Leader Hoyer and Congressman Sensenbrenner for their leadership on this bipartisan effort.

The ADA Restoration Act is the top legislative priority for AAPD, and we believe it is critically important that the ADA's protection of equal employment opportunity be extended to all the people who Congress intended when you passed the ADA in 1990, including people with epilepsy, diabetes, cancer, depression, intellectual disabilities, and a whole host of other conditions who have been told by federal courts that they aren't disabled enough to have civil rights protections.

The ADA gave hope to millions of Americans with disabilities and we must pass ADA restoration so that we can restore that hope for people like my colleague, Carey McClure, who you are about to hear from, who have been removed from the ADA's protections by activist judges.

On a personal level, because of what the courts have done to the ADA, I no longer believe that I can count on the law to protect me against employment discrimination. At a minimum if I were to bring a case, I would be subject to a barrage of personal questions that have nothing to do with my qualifications on the job.

The ADA is not a disability retirement law, but the Supreme Court and the lower federal courts have gone out of their way to read the ADA as if it were only for people with disabilities that are so significant that they cannot work and cannot take care of themselves. Under this narrow reading, two of the ADA's strongest legislative champions, Tony Coelho and Bob Dole, would likely be told by a federal court that they are not disabled enough to be protected by the ADA.

Employment discrimination cases should be about how a person is treated in the workplace. But because of Supreme Court decisions like the 2002 *Toyota* v. *Williams* case that Majority Leader Hoyer referenced, we have come to a point where the Supreme Court has opined that the term "disability" is to be "interpreted

strictly to create a demanding standard for qualifying as disabled," and victims of disability discrimination are finding it harder and harder to reach the issue of how they were treated by their employer.

Citing the Williams case, the 11th Circuit ruled last May in *Littleton* v. *Wal-Mart* that a 29-year-old with an intellectual disability who was receiving Social Security disability benefits, did not submit enough evidence to establish that he had a disability for purposes of the ADA. Examining whether Mr. Littleton was substantially limited in a major life activity, the 11th Circuit stated that, "It is unclear whether thinking, communicating and social interaction are major life activities under the ADA." The court went on to use evidence about Mr. Littleton's ability to drive and be interviewed for a job against him on the issue of his disability.

I just want to briefly mention the broader policy context for this legislation. This is a committee that oversees the Individuals with Disabilities Education Act, the ADA, the Vocational Rehabilitation legislation, and I ask you as a committee, what is the message that you want to send to people with disabilities? Do we want to send 18 years after the Americans with Disabilities Act the message that you should be careful not to achieve to your full potential, be careful not to live as independently as possible, or you may lose your federal civil rights protections?

That is the message that the court decisions are sending to people with disabilities. That is the message that a lot of our disability benefit programs are sending to people with disabilities. Those programs need to be modernized.

But certainly in the area of civil rights, we should be sending the message that people with disabilities should achieve to their full potential, should enjoy their civil rights protections, and cases of employment discrimination should turn on whether they are qualified for the job, not how disabled they are.

Thank you very much for the opportunity to testify. I look forward to the questions.

[The statement of Mr. Imparato follows:]

Prepared Statement of Andrew J. Imparato, President and Chief Executive Officer, American Association of People with Disabilities (AAPD)

Chairman Miller, Ranking Member McKeon, and Members of the House Committee on Education and Labor: Thank you for the opportunity to provide testimony today in support of the Americans with Disabilities Act Restoration Act (ADA Restoration Act) of 2007, H.R. 3195. My name is Andrew J. Imparato and I am the President and Chief Executive Officer of the American Association of People with Disabilities (AAPD). With more than 100,000 members around the country, AAPD is the largest cross-disability membership organization in the United States. AAPD's mission is to organize the disability community to be a powerful force for change—socially, politically and economically. Founded on the fifth anniversary of the signing of the Americans with Disabilities Act (ADA), AAPD has a strong interest in the full enforcement and implementation of this landmark civil rights law. On behalf of the Board, staff and members of AAPD, I applaud you for holding this hearing today and for devoting your attention to one of the top policy priorities of the disability community.

Prior to joining AAPD in 1999, I worked as an attorney at the Disability Law Center in Boston, the U.S. Senate Subcommittee on Disability Policy, the U.S. Equal Employment Opportunity Commission, and the National Council on Disability. In my role as General Counsel and Director of Policy at NCD, I oversaw a multi-year study of federal enforcement of the ADA and other civil rights laws for people with disabilities.

I am honored to testify today along with Professor Robert Burgdorf, an attorney and disability leader who played such an important role in conceptualizing and drafting the ADA when he worked for the National Council on Disability (NCD) in the late 1980s. Professor Burgdorf also helped to lead NCD's more recent effort to develop recommendations for the legislative changes needed to restore the ADA to its original intent in the wake of a number of highly problematic Supreme Court and lower federal court decisions that have severely restricted the scope of the protected class and made it difficult for people with a wide range of disabilities to bring claims for discrimination in employment. Since the ADA's passage, courts have repeatedly told plaintiffs—who are seeking not federal disability retirement benefits but simply fair treatment in the workplace—that their conditions do not rise to the level of an ADA disability and that they are not protected against discrimination under the ADA.

Having graduated law school in 1990, I am one of many professionals with disabilities who have pursued our careers armed with a federal law designed to ensure our equal employment opportunity. I was a third year law student when I experienced my first episode of serious depression. Seemingly overnight, I went from being a confident visiting student at Harvard Law School to having difficulty getting out of bed and making it through the day. I was blessed to have an incredibly supportive wife and was able to get the support I needed to finish law school and begin my career. Since that time, I have lived with recurrent episodes of depression and hypomania, with a diagnosis of bipolar disorder or manic depression. I spend approximately six months every year with low energy and low self-confidence followed by six months of high energy, high self-confidence, and limited patience. One of the symptoms of depression is a tendency to undervalue one's skills and work capacity, and I remember during my first bout with depression wondering if I would be able to function in a full-time professional environment. I now know that going to work every day in a field that I find compelling has turned out to be one of the strongest mood stabilizers in my life. I strongly believe in the therapeutic value of work for people with psychiatric conditions and a wide range of disabilities, and I am deeply troubled that we have not seen measurable increases in the employment rates of people with significant disabilities since the ADA's enactment in 1990.[1] A report out from the U.S. Equal Employment Opportunity Commission (EEOC) just this month[2] has only added to my alarm and dismay. The report notes a decline in the employment of people with significant disabilities in the federal government every year for more than the last decade, in sharp contrast to the overall growth of the federal workforce.

As someone who has been very open about my diagnosis over the course of my legal career, I have found it difficult to predict how people may react upon learning that I have bipolar disorder. It is my observation, especially in instances in which a disability is not visible or readily apparent, that people have the tendency either to question whether it is real or to assume that it is so severe that it disqualifies that person from particular jobs or assignments. One of our challenges as disability advocates is to facilitate the ability of individuals to be open about their disabilities and have them be taken seriously and accommodated at work if necessary, all the while avoiding overreactions by employers or prospective employers upon learning of a diagnosis. Surmounting such attitudinal barriers leads to better employment outcomes, greater productivity, and a healthier work climate for the millions of Americans who still feel the need to keep their disabilities and chronic health conditions a secret at work.

For the most part, I have been quite fortunate to have found employers and mentors who have cultivated my talents and created opportunities for me to grow and demonstrate my abilities. However, that is not to say that I have been nor will continue to be immune from facing discrimination in the workplace. Until recent years, I took comfort in knowing that I had civil rights protections should I ever need them. Unfortunately, in light of a number of narrowing court decisions in the last decade, I no longer have confidence that the ADA would protect me if I needed it. Because of court decisions that have aggressively narrowed the scope of the ADA's protected class, were I to bring a claim of disability employment discrimination today, a court would likely conclude that my employment successes and integrated family life indicate that my diagnosis is not sufficiently disabling to claim the protections of the ADA, even in light of blatant discrimination on the basis of my bipolar disorder.[3] At a minimum, I could expect to be subjected to a battery of questions probing into the intimate details of my life and disability that are entirely irrelevant to my ability to perform the job. Throughout the country, this has become not the exception but the norm for victims of employment discrimination on the basis of disability who attempt to have their day in court. I will highlight several of their stories throughout my testimony. Their stories help to demonstrate that this problem

is not limited to a single outlier judge, a problematic employer or particular geographic region. Rather, the troubling case law, which is voluminous, is indicative of a growing nationwide problem that requires a Congressional remedy.

I am here today to testify that the broad remedial statute that Congress wrote and passed in 1990 has fallen victim to a form of judicial activism whereby the U.S. Supreme Court and the lower federal courts have made it increasingly difficult for individuals with epilepsy, diabetes, amputations, various forms of cancer, and a wide range of mental and physical conditions to establish that they have a disability for purposes of the ADA. On account of these narrowing court decisions, Americans who experience employment discrimination on the basis of their disabilities are increasingly precluded from reaching the issue of whether they were treated fairly in the workplace because their cases are being tossed out of court on the issue of whether their disability is "severe enough" to come under the protections of the ADA. In fact, data suggests that as many as 97% of all disability discrimination cases are decided in favor of the employer, often before the individual even has the opportunity to demonstrate how their treatment was unfair.[4] So much a deviation is the ADA's current state of affairs from original Congressional intent that Members of Congress and the former U.S. Attorney General, involved in its original passage, have repeatedly stated their displeasure[5] and their support of H.R. 3195 as a remedy to the courts' damage.

In 1990, the ADA was heralded as an "emancipation proclamation"[6] for people with disabilities. Seventeen years later, on account of judicial activism, we are far from having a law that can be counted on to safeguard the fair treatment of people with disabilities in the workplace. On the contrary, we have a federal court decision from just last May in which Charles Littleton, Jr., a young man with intellectual and developmental disabilities who was attempting to start work as a cart pusher at a local retailer through the help of a state vocational assistance program, was told that he did not qualify for the ADA's protections after he experienced discrimination during the hiring process. The Eleventh Circuit Court of Appeals noted about Mr. Littleton, who lives with his mother, has the cognitive abilities of an 8 year-old, and receives Social Security disability benefits: "We do not doubt that Littleton has certain limitations because of his mental retardation. In order to qualify as 'disabled' under the ADA, however, Littleton has the burden of proving that he actually is * * * substantially limited as to 'major life activities' under the ADA."[7] Later in their analysis, the court stated that no evidence existed to support Mr. Littleton's contention that his intellectual disabilities substantially limit him in major life activities, explaining, "It is unclear whether thinking, communicating, and social interaction are 'major life activities' under the ADA."[8]

How did we end up with such absurd court decisions all over the country, and how do we fix them?

When Congress wrote and passed the ADA in 1990, it included in the statute a definition of "individual with a disability" that had been used since 1978 under the federal Rehabilitation Act. That three-pronged definition provides protections for individuals with a physical or mental impairment that substantially limits at lease one major life activity; individuals with a history of such an impairment; or individuals who are regarded or perceived as having such an impairment and treated unfairly on that basis. As the Supreme Court noted in its 1987 Nassau County School Board v. Arline decision, "By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired * * *, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[9] This key observation, coupled with over a decade of federal case law interpreting the definition of "handicap" in the Rehabilitation Act broadly, gave Congress every reason to expect that the ADA's definition would receive a similarly broad construction by the courts, thus protecting people with all kinds of disabilities against employment discrimination.

Regrettably, beginning with a trio of Supreme Court decisions in 1999, we have witnessed an aggressive effort by the federal courts to narrow the scope of who qualifies for civil rights protections under the ADA. In Sutton v. United Airlines and two related 1999 decisions,[10] the Supreme Court ruled that people who are able to function well with the help of "mitigating measures," including medication, prosthetics, diet, hearing aids, etc., should not be considered substantially limited even if they clearly are so in their natural or unmitigated state. This holding, which directly contradicted the positions of the all of the federal agencies charged with enforcing the ADA,[11] the eight federal Courts of Appeal that had addressed "mitigating measures" prior to Sutton case,[12] as well as the report language of Congressional committees that helped to write the ADA,[13] has led to a string of decisions in which plaintiffs are told that their serious health conditions do not rise to the

level of "disabilities" and therefore they are not within the law's protected class. That is what happened to Ruth Eckhaus. Ms. Eckhaus, a railroad employee who used a hearing aid and who was told by her employer that they "could not hire someone with a hearing aid because [the employer] had no way of knowing if she would remember to bring her hearing aid to work," [14] was not protected by the ADA when she sought to bring a case of employment discrimination. The court held that Ms. Eckhaus "failed to show that her hearing impairment, when corrected by hearing aids, substantially limits a major life activity," [15] and was therefore not "disabled" for purposes of the ADA's protections.

The effect of the Sutton trilogy is that people with all kinds of disabilities, who make use of a treatment or support to enable themselves to participate more fully and independently in society, including in the workplace, are increasingly finding themselves without the ADA's civil rights protections. Moreover, when employees attempt to establish that they do indeed have a disability by introducing evidence that was previously unknown to the employer and that did not form the basis for the adverse action being challenged, that evidence is then being used successfully by employers to argue that the employee is not qualified in the first place for the position in question.[16]

The damage caused by the mitigating measures decisions has been magnified by other rulings, notably the 2002 Supreme Court decision in Toyota v. Williams.[17] In Williams, contrary to the clear intent of Congress that the law be construed broadly as a remedial measure, the Court ruled that that the definition of disability needed to be interpreted strictly "* * * to create a demanding standard for qualifying as disabled." [18] Lower courts certainly took note of the Williams decision, ruling in case after case that people with all varieties of disabilities—muscular dystrophy,[19] epilepsy,[20] traumatic brain injury,[21] amputation,[22] breast cancer (and accompanying masectomy, chemotherapy, and radiation therapy),[23] fractured spine[24]—are not disabled for purposes of the protections of the ADA. Mr. Carey McClure, an electrician who has muscular dystrophy, is here today to give his own account of how the Williams decision did just that to his case of employment discrimination in the Fifth Circuit.

The universe of people who could experience discrimination in the workplace on the basis of fears, myths, and stereotypes surrounding physical attributes, psychiatric conditions, or medical diagnoses is extensive, and the ADA was created with all of these people and circumstances in mind. Unlike an analysis for a disability retirement program's cash benefit, civil rights laws should be construed broadly to ensure equality for all Americans. This was the clear intent of Congress and the President in 1990, and the ADA Restoration Act seeks to reinstate this objective.

Disability civil rights laws start with the recognition that disability is a natural part of the human experience that in no way should limit a person from participating fully in all aspects of society. Some people are born with their disabilities. Others acquire them through accident or injury or while placing themselves in harm's way in service of our country. Unlike other protected classes, disability is a category that any person at any time can join. A broad interpretation of the ADA is something that every American can benefit from if and when they experience disability discrimination.

People with disabilities should have every incentive to function to the fullest extent of their abilities and not be punished for their successes nor subjected to a fishing expedition regarding the extent of their disabilities when they seek to challenge discrimination at work. Each summer, AAPD places college students with varied disabilities into summer internships on the Hill and in the federal Executive Branch. Each of our interns has worked exceptionally hard in school and life and many have garnered a number of impressive awards and recognitions. As they graduate and enter the workforce, I hope they continue to encounter work environments that appreciate their work ethic and focus on their skills and abilities rather than on their disabilities. In light of the Supreme Court's restrictive interpretations of the ADA, however, I fear, given how much they have been able to achieve, whether they too would be shut out of the ADA's protections should they ever require them.

I think, too, of our country's returning Iraq and Afghanistan war veterans. I think of the estimates that as many as 60-70% of all wounded returning veterans may have traumatic brain injury (TBI).[25] Many others are returning with post-traumatic stress disorder (PTSD), epilepsy, depression, hearing impairments, loss of limbs, and other complex conditions. Once these veterans begin to return to the workforce in greater numbers, what trends will emerge regarding their integration and civil rights protections in the workplace, given that case law surrounding each of these disabilities is increasingly dismal?

Moreover, my two sons, ages 9 and 14, may be genetically predisposed to bipolar disorder. What civil rights legacy can we promise them if we do not right this law?

As members of the Education and Labor Committee, you know that our nation's policies under the Individuals with Disabilities Education Act, the Rehabilitation Act, the ADA and other laws are designed to promote equality of opportunity, full participation, independent living and economic self-sufficiency for people with disabilities. Due to a series of decisions limiting the scope of the ADA, probably best exemplified by the recent Littleton decision, people with disabilities are being forced to give up their civil rights protections when they try to improve their functioning and participate in the economic mainstream. Whereas Congress intended the ADA to tear down the shameful wall of exclusion that had barred people with a wide range of disabilities from achieving to their full potential, the federal courts have contorted the law to the point where they have created a new wall that is keeping disabled victims of discrimination from ever reaching the issue of whether they were treated fairly or discriminated against at work.

The ADA Restoration Act, H.R. 3195, is a straightforward bill that will make it crystal clear that employment discrimination cases should be about how a person was treated at work and not about whether that person's impairments make it hard to brush one's teeth,[26] comb one's hair,[27] or have children.[28] The bill will refocus the courts on an employee or applicant's qualifications and performance and away from intimate details about their disabilities that are irrelevant to the workplace and often unknown to their employer or prospective employer. It will restore civil rights protections for people with epilepsy, diabetes, cancer, depression, amputations, and a whole host of physical and mental disabilities who have been denied their day in court because of activist judicial rulings that ignore legislative history and Congressional intent. It will end the perverse incentive created by court rulings that punish people who successfully manage their disabilities and enter the workforce.

I am delighted that H.R. 3195 has attracted broad bipartisan support in the House under the strong leadership of Congressmen Steny Hoyer and Jim Sensenbrenner, and I encourage this Committee to mark it up and send it to the House floor with strong bipartisan support. H.R. 3195 will recreate the level playing field that Congress had in mind when it passed the ADA in 1990. It will send a message to the activist bench that they should adhere to Congressional intent and not rewrite laws to suit their own political or policy agenda. It will not solve all of the many challenges that people with disabilities continue to face in the workplace, but it will reestablish a solid foundation on which we can build policies and programs to bring more people with disabilities into the economic mainstream.

Thank you again for the opportunity to provide testimony, and I look forward to your questions.

ENDNOTES

[1] Despite many factors contributing to a positive outlook for employment of people with disabilities, including the passage of civil rights laws like the ADA, the employment rate of people with disabilities has not improved significantly, as EEOC Chair Naomi C. Earp pointed out in her testimony during the September 13, 2006 ADA Oversight Hearing held by the House Judiciary Committee, Subcommittee on the Constitution. See also Harris, L. & Associates (1998) N.O.D./Harris Survey Program on Participation and Attitudes: Survey of Americans with Disabilities. New York. See also L. Harris & Associates, N.O.D./Harris Survey Program on Participation and Attitudes: Survey of Americans with Disabilities (2004).

[2] "Improving the Participation Rate of People with Targeted Disabilities in the Federal Workforce," available at: www.eeoc.gov/federal/report/pwtd.html, noting that while federal government grew by 135,000 workers between fiscal years 1997 and 2006, the number of federal employees with significant disabilities decreased from 28,671 to 24,442, leaving them at 0.94 percent of the overall federal workforce.

[3] In fact, case law already exists which has found bipolar disorder not to be a disability under the ADA. Johnson v. North Carolina Dep't of Health and Human Servs., (M.D.N.C. 2006).

[4] See Amy L. Allbright, 2004 Employment Decisions Under the ADA Title I—Survey Update, 29 Mental & Physical Disability L. Rep. 513, 513 (July/August 2005) (stating that in 2004, "[o]f the 200 [employment discrimination] decisions that resolved the claim (and have not yet been changed on appeal), 97 percent resulted in employer wins and 3 percent in employee wins").

[5] Press release of Majority Leader Steny Hoyer, "Hoyer Introduces Americans with Disabilities Restoration Act of 2007," available at: *http://hoyer.house.gov/Newsroom/index.asp?ID=955&DocumentType=Press+Release,* stating: "Let me be clear: This is not what Congress intended when it passed the ADA. We intended a broad application of this law. Simply put, the point of the ADA is not disability, it is the prevention of wrongful and unlawful discrimination;" Emailed letter of the Honorable Dick Thornburgh, Former Attorney General of the United States, to the Honorable Orrin Hatch, requesting support of the ADA Restoration Act of 2007, available at: *http://www.aapd.com/News/adainthe/071025dt.htm,* referencing the current circumstances as an "untenable situation" and stating: "Under a series of court decisions, the definition of who qualifies as an 'individual with a disability' has become so restrictive and difficult to prove that millions of people we intended to protect from discrimination—including people with epilepsy, diabetes and cancer—are no longer covered by the law's protections."

[6] See Remarks of President George Bush at the Signing of the Americans with Disabilities Act, available at *http://www.eeoc.gov/ada/bushspeech.html;* See also Remarks from Senators Orrin G. Hatch and Edward M. Kennedy, at National Council on Disability, The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper (October 16, 2002), available at *http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm.*

[7] Littleton v. Wal-Mart Stores, Inc., No. 05-12770, 2007 WL 1379986, at *4 (11th Cir. May 11, 2007).

[8] Id., at *3.

[9] Nassau County School Board v. Arline, 480 U.S. 273, at 283-284 (1987).

[10] Sutton v. United Airlines, 527 U.S. 471 (1999);); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

[11] Sutton, 527 U.S. at 496-97 (Stevens, J., dissenting).

[12] Id., (listing cases).

[13] See, e.g., Senate Committee on Labor and Human Resources, S. REP. NO. 101-116 at 121 (1989), stating: "[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."

[14] Eckhaus v. Consolidated Rail, Corp., No. Civ. 00-5748 (WGB), 2003 WL 23205042, at *5 (D.N.J. Dec. 24, 2003).

[15] Id., at *9.

[16] See Claudia Center & Andrew J. Imparato, Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers, 14 STAN. L. & POL'Y REV. 321 (2003).

[17] Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

[18] Id., at 197.

[19] McClure v. General Motors Corp., 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).

[20] Equal Employment Opportunity Comm'n v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001).

[21] Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274 (S.D. Ala. 1999).

[22] Williams v. Cars Collision Center, LLC, No. 06 C 2105 (N.D. Ill. July 9, 2007).

[23] Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177, 183 (D.N.H. 2002).

[24] Williams v. Excel Foundry & Machine, Inc., 489 F.3d 309, 311 (7th Cir. 2007)

[25] Institute of Medicine, the National Academies, Evaluating the HRSA Traumatic Brain Injury Program, Washington, D.C.: The National Academies Press, Eden, Jill and Rosemary Stevens, Editors, 2006, p. 41.

[26] McClure v. General Motors Corp., 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).

[27] Id.

[28] Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177, 183 (D.N.H. 2002).

Mr. ANDREWS. Mr. Imparato, thank you, and I apologize for leaving briefly in the middle of your testimony. I have read it and appreciate it. I think that your personal insights further amplify the scholarship and work you have done here. Thank you very, very much.

Mr. McClure, welcome to the committee. We are happy to have you here.

STATEMENT OF CAREY MCCLURE, ELECTRICIAN

Mr. MCCLURE. Thank you very much.

Mr. Chairman and members of the committee, good morning. My name is Carey McClure, and I am from Griffin, Georgia. I am an electrician and I would like to thank you for holding his hearing to give me a chance to tell my story.

I have been an electrician for over 20 years. I have always wanted to be an electrician, and I have loved to do it. When I was 15 years old, I was diagnosed with facioscapulohumeral muscular dystrophy. As a result of my condition, the muscles in my face, back and upper arms are weak. I have constant pain in my shoulders, and I will now show you how high I can lift my arms in the air. That is the highest they will go.

Like so many other people with disabilities, I found ways to live with my condition. For instance, I use a step-stool in the kitchen so I can reach the cabinets. When I shampoo my hair, I support one hand with the other to get my hand over my head, like this.

I do much the same to comb my hair, brush my teeth. Instead of wearing T-shirts, I generally wear button-down shirts, which don't require me to raise my arms over my head. When I eat, I hold

my head over my plate and prop my elbow on the table so that I can raise the fork or spoon to my mouth. The point is, my muscular dystrophy does not stop me from living my life. There is virtually nothing I can't do.

Unfortunately, General Motors didn't feel the same way. My father and brother both work for General Motors, so you could say that General Motors practically raised me. General Motors supported our family, it pays well, and offers good benefits. For as long as I can remember, it has been a dream job for me.

In September, 1999, I applied for an electrical position at the General Motors assembly plant in Arlington, Texas. The following month, General Motors invited me to fly out to its Texas assembly plant and take a written and practical exam. I passed both of them. In December of 1999, GM sent me a letter and offered me a job and asked me to take a pre-employment physical.

I called back and accepted the job and scheduled an appointment with the GM plant medical director for January 5, about a week before I started my job. In the meantime, I got ready for the big move. I quite my electrical job at the roofing company, sold my house in Griffin, Georgia, withdrew my daughter from high school, and packed up all the things we needed in anticipation of the relocation.

When I got to Texas, I went to the plant medical director's office for my physical exam. The physical went fine until the doctor asked me to lift my arms above my head, which I could not do. The doctor asked me hypothetically how I could reach electrical work above my head. I told him I would get a ladder. He asked, what if a ladder would not reach high enough? I told him I would get a taller ladder. [Laughter.]

For over 20 years, I have been an electrician. For over 20 years, I have been working on things above my head without a problem. Sometimes I throw my arms above my head and lock my elbows. Most of the time there is something that I can prop my arm against so I can reach it just like if I am brushing my teeth. Other times, all it takes is a step-stool or to have a ladder or a hydraulic lift as other electricians use. When I toured the GM plant, I saw people using hydraulic lifts just like I used on every other job I had.

But this doctor wouldn't hear it. He didn't think I could do the job that I have been doing my entire life. He recommended that GM revoke my job offer, and that is exactly what they did. An assistant gave me the bad news, and I just stood there stunned. I had just quit the previous job, sold my house, packed my bags, relocated my family from Georgia to Texas for the dream job I had been trying to get my whole professional life. General Motors had just taken my dream job away from me.

I didn't know much about the ADA, but I knew that I had a disability and GM took the job away from me because of my disability, not because I couldn't do the work of an electrician. I can do the job. That is the bottom line. So I found a lawyer and we filed a lawsuit. During my lawsuit, General Motors asked me all sorts of personal questions like how I comb my hair, how I brush my teeth. They asked me how I play with my grandchildren. They asked me

how I bathe and how I clean my house. They even asked me how I would have intercourse.

They asked me things that they didn't need to know, that did not have anything to do with work at the GM plant. Even though GM revoked my job offer for my disability, GM lawyers started arguing with the court that I did not have a disability at all. Well, you can't have it both ways. Am I disabled or not? If I am, then the ADA should have been there to protect me. If I am not, then I should be working with my father and brother both at General Motors right now.

Unfortunately, the courts agreed with GM. The trial court said to me, "The ability to overcome the obstacles that life has placed in my path is admirable," but that in light of my abilities, I was no longer disabled because I had adapted so well to living with muscular dystrophy, and made myself a productive member of the workforce for over 20 years, the court said I wasn't protected by the ADA. That doesn't make any sense to me.

As I told the court who heard my case, if someone who was suffering from an undisputable muscular dystrophy is not an individual with a disability under the ADA, then who is? The court told me that they were just interpreting the ADA like the Supreme Court told them to, and that my problem was with the Supreme Court, not them. Well, you can do something about the Supreme Court's interpretation of the ADA. For the sake of people with disabilities like me who want to work, but are discriminated against, I hope you will.

Thank you very much for giving me the opportunity to speak.

[The statement of Mr. McClure follows:]

Prepared Statement of Carey L. McClure, Electrician

Mr. Chairman and members of the Committee: Good Morning. My name is Carey McClure, and I am an electrician from Williamson, Georgia. I'd like to thank you for holding this hearing today, and for giving me a chance to tell my story.

I have been an electrician for over twenty years. I earned a technical certificate from the United Electronics Institute after high school and then worked my way up from apprentice electrician to journeyman electrician. I've always wanted to be an electrician, and I love what I do. It is my hobby, and it is my fun.

When I was fifteen years old, I was diagnosed with facioscapulohumeral muscular dystrophy. "Muscular dystrophy" means progressive muscle degeneration. "Facioscapulohumeral" refers to the parts of my body that are most seriously affected: the muscles in my face, shoulder blades, and upper arms. There are nine types of muscular dystrophy, and this is mine. As a result of my condition, the muscles in my face, back, and upper arms are weak. I'm unable to lift my arms above shoulder-level, and I have constant pain in my shoulders.

But like so many other people with disabilities, I've found ways to live with my condition. For instance, I have a stepstool in my kitchen that I use to reach my cabinets. When I shampoo my hair, I support one hand with the other to get it over my head, or I bend forward so my hands can reach my head. I take showers because it's easier for me to bathe all of my body parts standing rather than sitting down. When I comb my hair or brush my teeth, I prop up my elbow with the other hand. Instead of wearing T-shirts, I generally wear button-down shirts, which don't require me to raise my arms over my head. To put on a T-shirt, I bend at the waist and pull the back of the shirt over my head. When I eat, I hold my head over my plate and prop my elbows on the table so that I can raise my fork or spoon to my mouth. And while I love my grandchildren, and play actively with them, I don't take care of them alone for fear I might suddenly need to lift them above chest-height to get them out of harm's way.

The point is, my muscular dystrophy doesn't stop me from living my life. There is virtually nothing I can't do. Unfortunately, General Motors (GM) didn't feel the same way.

My father and brother both work for GM, so I guess you could say GM practically raised me. GM supported our family, and it pays really well and offers good benefits. It's a great place to work, and for as long as I can remember, it's been my "dream job."

I applied for an apprenticeship with GM three times, but those positions were put on hold and never filled. I applied for a journeyman electrician position another time, but there were 400 applicants for seven or eight positions and so I didn't get that job either.

In September 1999, I gave it another shot and responded to a newspaper ad seeking applicants for electrician positions at the GM assembly plant in Arlington, Texas. This time was different. In November 1999, GM invited me to fly out to its Texas assembly plant to take a written exam and a practical, "hands-on" exam. I passed both of them. In December 1999, GM sent me a letter offering me the job and asked me to take a pre-employment physical. I called back and accepted the job, and scheduled an appointment with GM's plant medical director for January 5th—about a week before my start date.

In the meantime, I got ready for the big move. I quit my electrician job with a roofing company; sold my house in Griffin, Georgia; withdrew my daughter from her high school; and packed up all of our things in anticipation of relocating.

When I got to Texas, I went on a tour of my new plant. From the tour and the job description in the ad I answered, I knew that the job I'd be filling would be easier than the one I had left in Georgia, and would also pay better wages. At my prior job with the roofing company, I was doing electrical maintenance on a production line. That meant that I performed two completely different types of jobs: I was both an electrician and a mechanic. If there was a 400-pound motor sitting there that needed replacing, I'd have to disconnect the wires, unbolt the motor, move the motor, put the new motor in, then wire it back up. The position I'd accepted at GM was much more specialized. There, I would be doing just the job of an electrician—I'd only have to disconnect the wires and then let the GM mechanics take care of the rest.

There was a doctor's office in the plant where I went for my physical exam. It was a normal physical exam like those I'd taken and passed for all of my other jobs. The physical went fine until the doctor asked me to lift my arms above my head, which I could not do.

The doctor asked me hypothetically how I would reach electrical work above my head. I told him I'd get a ladder. He asked what I'd do if the work was higher than the ladder. I told him I'd get a taller ladder.

For over twenty years, I've been an electrician. For over twenty years, I've worked on things above my head without a problem. I've run pipe all the way up against the ceiling. I've worked on lights all the way up against the ceiling. Sometimes I throw my arms up in the air and lock my elbows. Most of the time, there's an object next to me that I can prop my arms on, just like I do when I'm brushing my teeth. Other times, all it takes is a step-stool like I have for my cabinets, or a ladder or a hydraulic lift like many electricians use. When I toured the GM plant, I saw people using those hydraulic lifts just like at every other job I'd had.

But this doctor wouldn't hear of it. He didn't think I could do a job that I'd been doing my entire life, even though he later admitted that he didn't even know what the functions of my electrician job were. Regardless, he recommended that GM revoke my job offer, and that's exactly what GM did. An assistant gave me the bad news, and I just stood there stunned, in the middle of the doctor's office lobby, and I didn't know what had hit me. I had just quit my previous job, had sold my house, packed my bags, and relocated my family from Georgia to Texas for the dream job I'd been trying for my whole professional life. GM had just taken my dream job away from me.

I didn't know much about the Americans with Disabilities Act, but I knew that I had a disability, and that GM took my job away because of my disability—not because I couldn't work as an electrician. I can do that job—that's the bottom line. So I found a lawyer, and we filed a lawsuit.

During my lawsuit, GM's attorney asked me all sorts of personal questions like how I comb my hair and how I brush my teeth. They asked me how I play with my grandchildren. They asked me how I bathe, and how I clean my house. They asked me how I drive a car. They even asked me how I have intercourse. They asked me things they don't need to know—things that don't have anything to do with my ability to work at GM.

Even though GM revoked my offer because of my disability, GM's lawyers started arguing to the federal courts that I didn't have a disability at all. Well, you can't have it both ways—am I disabled or not? If I am, then the ADA should have been

there to protect me. If I'm not, then I should be working with my father and my brother at GM right now.

Unfortunately, the courts agreed with GM. The trial court said that my "ability to overcome the obstacles that life has placed in my path is admirable," but that in light of my ability, I was no longer disabled. Basically, the court punished me for making myself a productive member of the workforce for over twenty years. Because I'd adapted so well to living with muscular dystrophy, the court said I wasn't protected by the ADA. That doesn't make any sense to me.

I lost my case. I lost my house. And I lost two jobs—the electrician job with the roofing company that I left, and the electrician job that GM gave and then took away from me. But I have no ill will towards GM. I still buy vehicles from them, and I'd work there today if I could. That's all I've ever wanted to do.

I found another job after GM revoked its offer, but it took me six months to find one that paid the same as my old job with the roofing company, and it still didn't pay as high as GM. In my first evaluation at that job, my boss ranked me excellent in five out of seven categories and next highest on the other two.

I enjoy being an electrician, and I'm good at it. I wish that GM had given me the chance to prove that I can do the job, and I wish that the ADA had been there to protect me when GM didn't give me that chance. Unfortunately, there are many people with disabilities like me who are not getting the protection they deserve because the courts are telling them that they're not "disabled."

As I told the courts who heard my case, "if one who suffers from undisputed muscular dystrophy is not an individual with a disability under the ADA," then who is? The courts told me that they were just interpreting the ADA like the Supreme Court told them to, and that my problem was with the Supreme Court—not them. You can do something about the Supreme Court's interpretation of the ADA. For the sake of people with disabilities like me who want to work but are discriminated against, I hope you will.

Thank you for giving me the opportunity to speak before you today.

Mr. ANDREWS. Mr. McClure, thank you very much for coming and telling us meaningful stories about your life that will help us make the decisions we need to do. Thank you very, very much. We appreciate it.

Mr. Fram, welcome. I understand you came here as a page, and have extensive Washington history. Welcome back.

STATEMENT OF DAVID K. FRAM, DIRECTOR, ADA & EEO SERVICES, NATIONAL EMPLOYMENT LAW INSTITUTE

Mr. FRAM. Thank you. My name is David Fram, and I am the director of ADA training for the National Employment Law Institute. I have provided ADA training to most federal agencies, including the House, and most Fortune 500 companies. My book, Resolving ADA Workplace Questions, which is now in its 23rd edition, analyzes the Supreme Court cases and all of the federal Courts of Appeals cases on the issues. Prior to my work with the Institute, I was a policy attorney in the ADA Division of the EEOC.

It is because of my work on both sides of the issue that I have been asked to address some of my concerns about the ADA Restoration Act. It is important to first look at what the law currently does. The ADA does two things. It says you can't discriminate against somebody because of a disability, and it says you have to provide a reasonable accommodation to an otherwise qualified individual with a disability. And of course, it defines "disability" as being an impairment that substantially limits a major life activity.

Courts have very broadly over the years determined what is an impairment. Any disorder is an impairment, so the flu, a broken finger, a scar could be an impairment. The reason these aren't dis-

abilities is because they don't substantially limit a major life activity. "Substantially limits" looks at duration, looks at seriousness.

If somebody does have a disability, the next question, of course, is whether that person is qualified. Do they have the background and can they do the essential functions of the job?

Now, let us look at the three major changes proposed by the Restoration Act. First, the act would change the definition of "disability" to cover any impairment, removing the "substantial limitation" requirement. So there would be no degree of seriousness or duration. So a chipped tooth, the flu, a broken finger would automatically be disabilities. It also means that alopecia, having a hair impairment like mine, would be an automatic disability. And it is just not correct to say that this restores the ADA to what it was.

The statute on its face, the Rehab Act on which it was based, the regulations from the EEOC—all say there has to be a substantial limitation of a major life activity. In all of my years at the EEOC and with the Institute, I have never heard anyone argue that the ADA should cover all impairments.

Question—Would it be good policy to change the law in this sweeping way? Now, I understand that proponents want to, validly want to change the law so courts focus on whether there has been discrimination, instead of focusing on whether there is a disability. The problem is that the ADA is not like the typical discrimination law. It requires reasonable accommodation. So the proposed changes would potentially mean that an employer has to give an accommodation to somebody like me so I can get a hair transplant, and that can't be what Congress intended.

Also, since employers have limited resources, it means that somebody with the flu could be competing with somebody who has lung cancer for the modified schedule. And that couldn't be what Congress intended. Remember, the ADA also prohibits disability-related questions of employees unless they are specifically about the job. So if disability equals impairment, that makes it flatly illegal for an employer, for a supervisor to ask an employee, "oh, do you have a cold or how did you break your leg." And that can't be what Congress intended.

An even more basic question is whether the ADA is intended to give someone with a sprained ankle the same protection as somebody who has paraplegia. It is intended to give somebody with the flu, put that person in the same category with somebody with breast cancer? In my opinion, that can't be what Congress intended. So it seems to me the definition of "disability" should not be changed, but it is also clear that courts have excluded individuals who Congress did want to protect under the law.

Now, a fair reading of the legislative history supports the proponents' view for the second proposed change, which is that the law should be read expansively and that the seriousness of a person's condition should be analyzed as if that person were not taking medication. Congress wanted to do this to prevent people from being thrown out of court because they took steps to alleviate their conditions.

The Supreme Court decided, of course, not to follow the legislative history. In *Sutton* v. *United Airlines,* they considered whether the vision impairment of the plaintiffs who wore glasses should be

analyzed with or without their glasses, and decided instead of just carving out an exception for glasses, they said, no, we are going to look at everyone with their mitigating measures. And of course, after Sutton, lots of plaintiffs, as you see in the written materials I have submitted, were thrown out of court because they took medication. Is that what Congress intended?

The third change by the act would put the burden of proof on employers to show that an individual is not qualified. Now, in the interest of time, I won't get into that right now except to say that this is simply inconsistent with every other employment discrimination law.

So it boils down to this. The legislation would restore the ADA in that an individual's condition should be analyzed without medication or mitigating measures, but to change the definition of "disability" to cover, literally cover everyone in America wouldn't be restoring the ADA. It would certainly lead to a deluge of unintended consequences.

Thank you.

[The statement of Mr. Fram follows:]

Prepared Statement of David K. Fram, Esq., Director, ADA & EEO Services, National Employment Law Institute

It is a pleasure to be here as you consider changes to the Americans with Disabilities Act, the most important piece of civil rights legislation of our generation.

It is especially great to be back in this place where I formed wonderful memories of my teenage years—as both a Congressional Page, and as an intern for Senator Paul Sarbanes. And what an honor it is to be in front of this Committee, with representatives from my hometown, Baltimore (Congressman Sarbanes), and my current home, Long Island (Congressman Bishop).

My name is David Fram, and I'm the Director of ADA and EEO Services for the National Employment Law Institute. In this role, I train a wide range of groups on how to comply with and how to enforce the ADA. These groups include virtually every federal agency (including the U.S. House of Representatives and the U.S. Senate), most Fortune 500 companies, colleges and universities, non-profits, unions, and plaintiffs' organizations. I have also written a book, Resolving ADA Workplace Questions, now in its 23rd edition, which analyzes every major ADA case from the Supreme Court and the federal Courts of Appeals, as well as any new positions from the Equal Employment Opportunity Commission.

Prior to my work with the Institute, I was a Policy Attorney at the EEOC from 1991 through 1996. In that job, I was part of the ADA Division, working on EEOC documents interpreting and enforcing the ADA and the Rehabilitation Act.

A number of employers and employer-oriented organizations expressed concerns to me about the changes proposed by the ADA Restoration Act. Because of my experience on both sides of these issues, these groups have encouraged me to testify concerning my personal concerns on the proposed legislation. I cannot in all candor, however, tell you that these groups will necessarily agree with everything I'm about to say.

Before anyone can intelligently discuss those changes, it's critical to briefly review the most important provisions of the ADA as it currently exists.

The employment provisions of the ADA accomplish two major goals. First, the law says that an employer cannot discriminate against a qualified individual with a disability in, among other things, hiring, firing, employment terms and conditions, and insurance coverage. Second, the law says that these non-discrimination provisions require an employer to provide "reasonable accommodations" to otherwise qualified individuals, so that these individuals can perform the essential functions of the job.[1]

In addition to these basic provisions, the ADA also prohibits employers from asking any disability-related questions or requiring medical examinations of applicants, and allows employers to ask these questions and require these exams of employees only when these are considered "job-related and consistent with business necessity."[2]

As you have heard from other witnesses, the law specifically defines someone with a "disability" as an individual who currently has, has a "record of," or is "regarded

as" having an "impairment" that "substantially limits" a "major life activity."[3] This language was specifically taken from the Rehabilitation Act of 1973.[4] Courts have interpreted broadly what is considered an impairment—any physical or mental disorder is an impairment.[5] So, this would include a chipped tooth, the flu, or a broken finger. The reason these conditions would not be considered disabilities is that they do not "substantially limit" a major life activity. In determining whether an impairment "substantially limits" a major life activity, courts analyze the individual's abilities compared to those of the average person.[6] Ever since the ADA came into force, one important question has been whether to analyze the individual's condition in a medicated or mitigated state (if s/he medicates or mitigates), or whether to analyze what the condition would be like without medication or mitigation. On its face, the statutory language arguably suggested that an individual should be analyzed with medications or mitigating measures. However, based on the ADA's legislative history, the EEOC instructed employers to look at what the individual's condition would be like without medication or mitigation, and many federal courts followed this approach.[7]

Indeed, shortly before the Supreme Court weighed in on the issue, the Fifth Circuit Court of Appeals noted the "most reasonable reading of the ADA" was to consider mitigating measures in determining when an individual had a disability.[8] But, the court also pointed out that the EEOC's Guidelines, the legislative history and the majority of other federal courts provided that an individual's mitigating measures should not be considered in determining whether an individual had a disability.[9] The Fifth Circuit adopted a middle of the road approach recognizing that while Congress intended that courts should consider people in their unmitigated state in deciding whether an individual was disabled, it didn't make sense for courts not to consider some mitigating measures in situations where a person's condition has been permanently corrected or ameliorated. In fact, the court held that serious conditions similar to those mentioned in the legislative history and EEOC guidelines, such as diabetes, epilepsy, hearing impairments, etc. would be considered in their unmitigated state.[10] The Supreme Court, however, held the opposite when it decided Sutton v. United Airlines,[11] which I'll talk about shortly.

Once the individual is determined to have a covered disability, the next question is whether the individual is "qualified," which means that the individual satisfies the job's background requirements and that s/he can perform the job's "essential functions," with a reasonable accommodation if needed.[12] As with other discrimination laws, courts use the McDonnell Douglas framework,[13] requiring the individual to show as part of his prima facie case that s/he has a disability and that s/he is qualified. In this regard, the courts have put the burden of proof on the employer to demonstrate which functions are essential, and then put the burden on the individual to show that s/he can do those essential functions.[14]

I would like to address the three major changes proposed by the ADA Restoration Act: (1) changing the definition of disability to cover all impairments, regardless of the seriousness of the impairment; (2) reversing the Supreme Court cases instructing courts to analyze conditions as controlled with medication or mitigating measures if the individual uses such measures; and (3) changing the burden of proof to require an employer to show that an individual is not qualified.

1. Changing the Definition of Disability

The "ADA Restoration Act" would change the definition of disability to cover any physical or mental impairment, and to remove the requirement that the impairment "substantially limit" a major life activity. This, therefore, does away with the notion that the impairment has to have some degree of seriousness and some degree of duration. As a result, a chipped tooth, the flu, and a broken finger would automatically be covered as disabilities. It also means that alopecia (having a hair impairment, like mine) would be a covered disability.

It is simply incorrect to say that this restores the ADA to what it once was. The statute, on its face, states that the impairment has to substantially limit a major life activity.[15] The Rehabilitation Act, on which the ADA was based, states that the impairment has to substantially limit a major life activity.[16] The EEOC's regulations (and the Appendix to the regulations, and the EEOC's own Compliance Manual instructions on the definition of disability), all state that the impairment must substantially limit a major life activity.[17] In fact, in my years at the EEOC and in all of my years with the Institute, I've never heard anyone say that the ADA was meant to cover people with any impairment. So, it is not accurate to say that this is a "restoration" act. Rather, this would be a new law that is vastly broader than the ADA.

Would it be good policy to change the law in such a sweeping way? I understand that the proponents of the bill want to change the ADA so that the issue becomes

whether discrimination has occurred, rather than focusing on whether an individual's condition is a disability.[18] The problem with this view is that the ADA is not like the traditional discrimination laws. The ADA goes several steps further. As we've talked about, it requires reasonable accommodation for the individual with a disability. In fact, as the Supreme Court has noted, the ADA requires employers to give preferential treatment to individuals with disabilities. If the proposed changes were enacted, it would mean that an employer would have to provide reasonable accommodation for the person with a chipped tooth or the flu. An employer would have to provide reasonable accommodation for someone with a sprained ankle. An employer would have to provide reasonable accommodation for someone who is bald who wants time off to get a hair transplant. This couldn't be what Congress intended.

In addition, rewriting the definition of "disability" would have detrimental effects in the workplace. Because employers have limited resources, it means that the person with a sprained ankle could be competing with the veteran who has no legs for the accessible parking space. It means that the person with the flu could be competing with someone with AIDS for the modified schedule. This couldn't be what Congress intended.

The ADA also covers employer-provided health insurance. What this means is that disability-based distinctions in health insurance plans might be illegal.[19] If the definition of disability were changed to cover all impairments, employers could be acting illegally if they had different medical coverage for dental conditions than for other types of medical conditions. Employers would be acting at their peril if they denied medications or medical treatment for baldness, because that would be a disability-based distinction. This couldn't be what Congress intended.

As I also have mentioned, the ADA prohibits pre-offer questions likely to disclose an applicant's disability, and it prohibits those questions of employees unless they are specifically related to the job. But if the definition of disability is changed to cover all impairments, that would make it flatly illegal to ask applicants about any impairments, and to ask employees about any impairments unless specifically related to the job. This means that if an employee comes to work with a broken leg and the supervisor says, "How did you break your leg?" the supervisor has engaged in illegal conduct under the ADA. It also means that if an employee comes to work sneezing and coughing, and his supervisor says, "Do you have a cold?" the supervisor has engaged in illegal conduct under the ADA. This couldn't be what Congress intended.

An even more basic question is whether the ADA is intended to give someone with a sprained ankle the same protections as someone who has paraplegia? Is the ADA intended to put someone with the flu in the same category as someone who has breast cancer and is undergoing chemotherapy and radiation? Is the ADA intended to give someone with a toothache the same rights as someone who has insulin-dependent diabetes? This couldn't be what Congress intended.

2. Reversing the Supreme Court Cases on Mitigating Measures

To me, it is clear that the ADA was never intended to cover every individual with any impairment. But, it also is my view that the effects of the Sutton decision have excluded individuals whom Congress wanted to protect under the law. For example, in one recent Court of Appeals case, a court said that a woman with breast cancer, who had undergone chemotherapy and radiation, had suffered severe nausea, and had been unable to care for herself or to work, was not considered covered under the law.[20] In other cases, individuals with insulin-dependent diabetes and epilepsy were not considered covered under the law even though the legislative history identified those conditions as impairments which were likely to reach the level of disabilities.

A fair reading of the ADA's legislative history supports the notion that the law was to be read expansively and that individuals were to be analyzed in their unmedicated (i.e., unmitigated) state.[21] This approach was grounded in the idea that Congress did not want to exclude people because they took steps to alleviate their conditions. It also was grounded in the idea that otherwise, individuals would be stuck in a Catch 22—they might only have disabilities if they did not take their medications, but they might not be qualified if they did not take their medications. As I said earlier, the EEOC and most federal courts followed the legislative history.

The Supreme Court, however, decided not to follow the legislative history. In Sutton v. United Airlines,[22] the Supreme Court considered whether the plaintiffs, who wore glasses, should be analyzed with or without their glasses in determining whether their vision impairments were substantially limiting. The Court concluded that individuals should be analyzed with mitigating measures if they used these measures. The Supreme Court arguably could have carved out an exception for

glasses (since glasses are so common in our society, and an individual's condition is analyzed as compared to the average person). But they chose instead to say that all individuals, regardless of condition, should be analyzed as mitigated.[23] After Sutton, many plaintiffs have not been able to proceed with a disability discrimination claim because they took medication (even for a serious condition) or used prostheses.[24] This result appears to be inconsistent with legislative intent expressed in legislative history.

3. Changing the Burden of Proof

The ADA Restoration Act also changes the burden of proof in ADA cases, by removing the plaintiff's responsibility to show that s/he is qualified for the job. Instead, the Act puts the burden of proof on the employer to show that the individual is not qualified. This is simply not consistent with other employment discrimination laws, which use the McDonnell-Douglas standard, discussed earlier. In addition, from a practical perspective, it makes sense to require the plaintiff to prove that s/he is qualified, since that individual has the critical evidence on this issue. Moreover, the burden of proof has simply not been a problem under the ADA.

Therefore, to change this burden would make the ADA burden of proof scheme different from the other EEO laws, and would not make sense from an evidentiary or practical perspective.

Conclusion

It boils down to this: the legislation would likely only "restore" the ADA in the sense that it would require courts to analyze an individual's disability status without regard to medication or mitigating measures. But changing the definition of disability to cover everyone in America would not be "restoring" the ADA. In fact, it would dilute the importance of the law for people who have serious conditions, and could lead to a deluge of unintended consequences.

ENDNOTES

[1] 42 U.S.C. §§ 12101-12213.

[2] 42 U.S.C. §§ 12112(d).

[3] 42 U.S.C. § 12101(2).

[4] 29 U.S.C. § 705(20)(B).

[5] 29 C.F.R. § 1630.2(h). For example, in Agnew v. Heat Treating Services of America, 2005 U.S. App. LEXIS 27884 (6th Cir. 2005)(unpublished), the court noted that a bad back would be an impairment. Similarly, in Benoit v. Technical Manufacturing Corp., 331 F.3d 166 (1st Cir. 2003), the court noted that back and knee strains, caused either by the employee's improper lifting techniques or by his weight gain, were "impairments." In Arrieta-Colon v. Wal-Mart, Inc., 2006 U.S. App. LEXIS 826 (1st Cir. 2006), the court did not disturb the jury's finding that the plaintiff's erectile dysfunction, which required a penile implant (having the side effect of a "constant semi-erection"), was an impairment. Likewise, in Sinclair Williams v. Stark, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001)(unpublished), the court noted that the plaintiff's headaches were an impairment. In Cella v. Villanova University, 2004 U.S. App. LEXIS 21740 (3d Cir. 2004)(unpublished), the court held that the plaintiff's "tennis elbow" was an impairment under the ADA.

[6] 29 C.F.R. § 1630.2(j). See Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499 (7th Cir. 1998)(adopting EEOC's definition of "substantially limits"). Courts compare the individual's condition to the average person in order to determine whether the condition is serious enough. For example, in Collins v. Prudential Investment and Retirement Services, 2005 U.S. App. LEXIS 148 (3d Cir. 2005)(unpublished), the court found that the employee's ADHD did not "substantially limit" her ability to think, learn, concentrate, and remember, where she sometimes became distracted from her tasks, had trouble placing tasks in priority order, and had trouble showing up for events on time. The court noted that "many people who are not suffering from ADHD/ADD must regularly cope with" such limitations. In Bowen v. Income Producing Management of Oklahoma, Inc., 202 F.3d 1282 (10th Cir. 2000), the plaintiff, who suffered a brain injury, claimed that he was substantially limited in learning in light of his memory loss, inability to concentrate and difficulty performing simple math. The court found that he was not "substantially limited" because he had "greater skills and abilities than the average person in general." Similarly, in Wong v. Regents of the University of California, 410 F.3d 1052 (9th Cir. 2005), the court held that the plaintiff was not substantially limited in "learning" or "reading" when compared to the general population. Concerning "learning," the court noted that the plaintiff had completed the first two years of medical school with good grades and without any special accommodations. Concerning reading, the plaintiff claimed that he read very slowly and did much better when he did not have time constraints. The court stated that the plaintiff's evidence that he was limited (compared to his own reading abilities without time limits) was not the relevant issue. Instead, the court held that he had not presented evidence as to the "appropriate standard"—comparing himself to "what is important in the daily life of most people," such as his ability to read newspapers, government forms, and street signs.

On the other hand, many plaintiffs have shown that, compared to the average person, their impairments were serious enough to be substantially limiting. For example, in Jenkins v. Cleco Power LLC, 487 F.3d 309 (5th Cir. 2007), the court held that where the employee could, with intermittent breaks, sit only for up to three hours per day, he was substantially limited in sit-

ting. In Heiko v. Colombo Savings Bank, F.S.B., 434 F.3d 249 (4th Cir. 2006), the court held that the plaintiff, who had kidney failure, was "substantially limited" in eliminating waste because he "was required to spend at least four hours, three days a week undergoing dialysis in order to remove waste from his body." In Battle v. UPS, Inc., 438 F.3d 856 (8th Cir. 2006), the court held that the plaintiff may have been substantially limited in performing cognitive functions where there was testimony that he "thinks and concentrates at a laborious rate," "has to spend significant extra time working on projects," "cannot think and concentrate about matters unrelated to work," and, therefore, cannot make "household or financial decisions, or discipline[] his children, because he does not have the ability to deal with extraneous or unexpected issues, conflicts, or demands outside of work." In EEOC v. Sears, 417 F.3d 789 (7th Cir. 2005), the court held that where the plaintiff could not "walk the equivalent of one city block without her right leg and feet becoming numb," she could be substantially limited in walking.

[7] Many courts stated that the effects of medication or prosthetic devices were irrelevant in determining whether someone's impairment substantially limits a major life activity. See, e.g., Arnold v. United Parcel Service, Inc., 135 F.3d 1089 (1st Cir. 1998)(diabetes); Taylor v. Phoenixville School District, 174 F.3d 142 (3rd Cir. 1999)(mental disability)(decision vacated); Washington v. HCA Health Services of Texas, 152 F.3d 464 (5th Cir. 1998)(Adult Still Disease); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998)(diabetes); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), cert. denied, 118 S. Ct. 693 (1998)(monocular vision); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349 (1997); Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996)(Graves disease).

[8] Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 469 (5th Cir. 1998) (emphasis in original).

[9] Id. at 469-471.

[10] Id. at 470-71.

[11] 527 U.S. 471, 119 S.Ct. 2139 (1999).

[12] 42 U.S.C. 12111(8); 29 C.F.R. § 1630.2(m).

[13] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[14] For example, in Bates v. UPS, Inc., 2007 U.S. App. LEXIS 29870 (9th Cir. 2007), the court noted that the employer must "put forth evidence establishing" which functions are essential (because this information "lies uniquely with the employer"), and the employee "bears the ultimate burden of persuading the fact finder that he can perform the job's essential functions." Similarly, in Fenney v. Dakota, Minnesota & Railroad Co., 327 F.3d 707 (8th Cir. 2003), the court noted that although "the plaintiff retains the ultimate burden of proving that he is a qualified individual," the employer must show which functions are essential (if that issue is disputed). In EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007), the court noted that the employer has the burden of proving which functions are essential when it disputes the plaintiff's claim that he is qualified. However, as noted above, the individual bears the burden of proving that s/he can perform the essential job functions. For example, in Hammel v. Eau Galle Cheese Factory, 407 F.3d 852 (7th Cir. 2005), the court held that the plaintiff has the burden of demonstrating that he is capable of performing the essential functions of the job. In this case, the court held that the plaintiff could not make this showing, where his performance had been deficient in many respects. Similarly, in Breitfelder v. Leis, 2005 U.S. App. LEXIS 21821 (6th Cir. 2005)(unpublished), the court held that the plaintiff had the "burden of showing he could perform the essential tasks" of the job.

[15] 42 U.S.C. § 12101(2).

[16] 29 U.S.C. § 705(20)(B).

[17] 29 C.F.R. § 1630.2(g). Appendix to Regulations, Compliance Manual Section 902: Definition of the Term Disability, March, 1995.

[18] See Testimony of Chai Feldblum before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, United States House of Representatives (10/4/07) at p. 17.

[19] See EEOC Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-based Distinctions in Employer Provided Health Insurance June, 1993.

[20] Garrett v. University of Alabama, 2007 U.S. App. LEXIS 26476 (11th Cir. 2007).

[21] H.R. REP. NO. 101-485, pt. 2, at 52 (1990); see also H.R. REP. NO. 101-485, pt. 3, at 28-29 (1990); S. REP. NO. 101-116 at 23 (1989).

[22] 527 U.S. 471, 119 S.Ct. 2139 (1999).

[23] The Sutton case was decided along with Murphy v. United Parcel Service, 527 U.S. 516, 119 S.Ct. 2133 (1999) and Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 119 S.Ct. 2162 (1999). These three cases are commonly referred to as the Sutton triology, and stand for the proposition that individuals should be analyzed as they are, not what they might or could be. For example, in Albertson's, a monocular vision case, the Supreme Court stated that "people with monocular vision 'ordinarily' will meet the Act's definition of disability." However, the Court noted that in determining whether an individual's monocular vision is "substantially limiting," it will analyze the individual's ability with any behavioral modifications that the individual has undertaken to compensate for his impairment.

[24] For example, in Darwin v. Nicholson, 2007 U.S. App. LEXIS 8153 (11th Cir. 2007)(unpublished), the court held that the plaintiff's hearing impairment was not a disability because, with his hearing aids, he was not substantially limited in hearing as compared with "the general populace." In Knapp v. City of Columbus, 2006 U.S. App. LEXIS 17081 (6th Cir. 2006)(unpublished), a class action, the court held that the plaintiffs' ADHD did not substantially limit their major life activity of learning where it was admittedly controlled with Ritalin. In Greathouse v. Westfall, 2006 U.S. App. LEXIS 27882 (6th Cir. 2006)(unpublished), the court held that the plaintiff was not substantially limited in sleeping where he admittedly slept well with the use of medication. In Nasser v. City of Columbus, 2004 U.S. App. LEXIS 4737 (6th Cir. 2004)(unpublished), the court held that the plaintiff's back impairment was not a disability

because, in part, "he relieved his back pain through exercises and medicine." Similarly, in Mancini v. Union Pacific Railroad Co., 2004 U.S. App. LEXIS 8213 (9th Cir. 2004)(unpublished), the court held that the plaintiff's epilepsy was not a disability because "the manifestations of his epilepsy, i.e., the seizures, are 'totally controlled' through the consistent use of medication." In Collins v. Prudential Investment and Retirement Services, 2005 U.S. App. LEXIS 148 (3d Cir. 2005)(unpublished), the court noted that the employee's ADHD might not be a disability where the condition was corrected with medication. The court stated that the mitigating measure need not "constitute a cure." In Manz v. County of Suffolk, 2003 U.S. App. LEXIS 3361 (2d Cir. 2003)(unpublished), the court found that the plaintiff's vision impairments were not a disability because he used very strong glasses which allowed him to see sufficiently well. Likewise, in Casey v. Kwik Trip, Inc., 2004 U.S. App. LEXIS 22569 (7th Cir. 2004)(unpublished), the court found that the plaintiff was not substantially limited in performing household chores where she admitted that she performs these chores by using adaptive measures, such as using both hands or certain tools or equipment (such as an electric can opener) to grip and manipulate objects. In Carr v. Publix Super Markets, Inc., 2006 U.S. App. LEXIS 2845 (11th Cir. 2006)(unpublished), the court held that the employee's impaired arm did not substantially limit his major life activities because he had learned to compensate through the use of his other arm. Similarly, in Didier v. Schwan Food Co., 465 F.3d 838 (8th Cir. 2006), the court held that despite his hand injury, the employee was not substantially limited in performing manual tasks and caring for himself. The court noted that although the employee "has difficulty with shaving and other grooming activities, he learned to do these things left-handed." Interestingly, in Walton v. U.S. Marshals Service, 492 F.3d 998 (9th Cir. 2007), the court held mitigating measures includes not only "measures undertaken with artificial aids, like medications and devices," but also "measures undertaken, whether consciously or not, with the body's own systems." In this case, the court held that the plaintiff's inability to "localize sound" was mitigated by her own "visual localization." In Berry v. T-Mobile USA, Inc., 490 F.3d 1211 (10th Cir. 2007), the court held that the plaintiff was not substantially limited in her major life activities since she can perform her activities "given sufficient rest," she can "walk with the aid of a cane," and she "can treat her symptoms with medication." Using curious legal reasoning, the court also held that the plaintiff's "family's assistance with the household chores" can be considered in determining whether she is substantially limited "as that is part of daily living in most families."

In Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002), the court found that the plaintiff did not show that his diabetes, as controlled with insulin, substantially limited his major life activities. The court noted that it would not analyze "what would or could occur if Orr failed to treat his diabetes or how his diabetes might develop in the future. In Sinclair Williams v. Stark, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001)(unpublished) and Hill v. Kansas City Area Transportation Authority, 181 F.3d 891 (8th Cir. 1999), the courts found that the employees' hypertension was not a disability because they controlled the condition with medications such that it did not substantially limit their major life activities. In Cotter v. Ajilon Services, Inc., 287 F.3d 593 (6th Cir. 2002), the court held that the individual's colitis "must be viewed in its medicated—and thus substantially controlled—state." Likewise, in Hein v. All America Plywood Co., 232 F.3d 482 (6th Cir. 2000), the court held that the plaintiff's hypertension, as medicated, was not a disability because he functioned "normally" and had "no problems 'whatsoever'" (quoting the plaintiff). In this case, the plaintiff, a truck driver, had asked the court to analyze his unmedicated condition because he was fired for refusing to take a driving assignment that he claimed would prevent him from getting a refill of his medication. The court concluded that he could have obtained the refill if he had been more diligent. In Spades v. City of Walnut Ridge, 186 F.3d 897 (8th Cir. 1999), the court held that the employee's depression was not a disability since he conceded that he functioned well with his medications. Similarly, in EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999), the court noted that it did "not doubt" that the plaintiff's condition, "if left untreated, would affect the full panorama of life activities, and indeed would likely result in an untimely death." Nonetheless, the court concluded that "the predicted effects of the impairment in its untreated state for the purposes of considering whether a major life activity has been affected by a physical or mental impairment has, however, been foreclosed" by the Supreme Court. In Muller v. Costello, 187 F.3d 298 (2d Cir. 1999), the court concluded that the plaintiff's asthma did not substantially limit his ability to breathe, after taking into account his inhalers and other medications. Similarly, in Ivy v. Jones, 192 F.3d 514 (5th Cir. 1999), the court held that whether the plaintiff's hearing impairment "substantially limited" her hearing should be determined as corrected by her hearing aids. The court noted that the plaintiff's hearing might not be substantially limited in light of the evidence showing that her hearing was "corrected to 92% with one hearing aid and 96% with two hearing aids."

Mr. ANDREWS. Mr. Fram, thank you very much for your thoughtful testimony.

Dr. Burgdorf, we appreciate your contribution to this law from the beginning, and we are happy that you are with us today.

STATEMENT OF ROBERT L. BURGDORF, PROFESSOR OF LAW, UNIVERSITY OF THE DISTRICT OF COLUMBIA

Mr. BURGDORF. Thank you.

Chairman Andrews, Ranking Member McKeon, members of the committee, it is an honor and it is a solemn responsibility for me

to have this opportunity to testify before the committee. I am humbled somewhat by the thought that there are many, many, many Mr. McClures in America, many people who were told by the Congress, were told by the president, were told by many of us who teach about disability rights law, that henceforth they would be protected from discrimination.

Today, they find out—not today literally—in recent years they have found out that isn't true anymore. Many people who were clearly protected by the ADA when it was enacted, in everyone's eyes that spoke at that time, find out when they are told by a court, you may have a disability, but it is not a serious enough disability for you to be protected by the Americans with Disabilities Act.

To put it as simply as I can, the courts have made a royal mess of the definition of "disability" in the ADA. In trying to figure out how to communicate in a simple fashion and not in my typical law professor fashion, the complex mess that has been made of the Americans with Disabilities Act, I prepared a little chart that I have attached as appendix B to my testimony. I have asked that copies be made available if you would rather just take a look at it, rather than flipping through my testimony.

Mr. ANDREWS. The members do have copies of that.

Mr. BURGDORF. Okay, they have that. On the left column is simply what Congress said, either in statutory language or in multiple, multiple expostulations in the congressional committee reports. The right side is where we have gotten to now. In each of these instances, the courts have basically rewritten the definition of "disability." The things that Congress said, the very language of the statute, has been interpreted in a way that now means something totally different.

Some of those things have to do with just narrow or broad construction. Some of them have to do with mitigating measures. But they have to do with a lot of other things that the court has taken the term "substantial limitation" to a major life activity and turned it into a crushing burden, an impossible burden for many people with disabilities to meet. Or if they can, they have to do ridiculous things like prove what their sex life is like, prove things that have nothing to do with the fact that they were denied employment or terminated from employment.

I also put together as another appendix, an appendix A, just a list of cases. There are many of these floating around now. It is an endless task. This list could be hundreds of cases of particular conditions that people had and went to the courts to say, " I have been discriminated against," and the court said "you can't prove that you have a serious enough condition to be protected." That is appendix A.

It is all kinds of conditions—muscular dystrophy, multiple sclerosis, breast cancer, amputation, loss of use of an eye, loss of use of an arm. It is just many things that we were all sure were protected.

In the remainder of my time, I would like to begin to address, and I am not sure I can completely do so, Representative McKeon's concerns about unintended consequences. That is the last thing that we want to have happen. The Restoration Act is based in large

part upon a report by the National Council on Disability called Righting the ADA. It is on the NCD websites and copies have been provided to members of Congress. I was lucky enough to get to be the principal author for the council of that report.

The council represents—it is 15 people appointed by President Bush, and they really are concerned with what is happening to the Americans with Disabilities Act. This report goes at great length to describing the problems, but also trying to suggest the solutions. Let me just address a couple of things, and if there are questions about other unintended consequences, I would be happy to take those one.

The first is that this represents an expansion. Well, it doesn't represent an expansion if one understands what the third prong of the ADA said and what Congress and the courts to this time had said the third prong is, which is regarded as what having a disability means. I quoted in my testimony from language from this committee's report that says very clearly that if a person is discriminated against because of a covered entities negative attitudes toward the person's impairments, they are treated as having a disability and are covered under the third prong.

Also, your report and the reports of all the committees that discussed the definition quoted from the leading precedent at the time, the Supreme Court's decision in the *Arline* case, that such an impairment might not diminish a person's physical or mental abilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reaction of others to that impairment. People could have minor impairments. They could have no impairment.

The last thing I want to say is that—no, there are two things actually.

Mr. ANDREWS. If I could ask you to quickly summarize so we can get to questions.

Mr. BURGDORF. Okay. I am over time. Okay. I apologize. I would love to take on the "reasonable accommodation" issue and also to talk about some of what the court had to say.

[The statement of Mr. Burgdorf follows:]

Prepared Statement of Robert L. Burgdorf, Jr., Professor of Law, University of the District of Columbia

Introduction

In November 1989, the Committee on Education and Labor, by a vote of 35-0, approved and reported out the Americans with Disabilities Act (ADA). The Committee's action was a significant step in the process by which Congress and the George H.W. Bush Administration realized the momentous and long-needed objective of according people with disabilities protection from discrimination—the right to be treated equally and to challenge unfair treatment against them—by enacting the ADA. In this legislation, the two elected branches of government made a compact with the American people that America would no longer tolerate discrimination on the basis of disability, and if people encountered such discrimination they could challenge it in court. Unfortunately, the judiciary—the unelected branch—has largely taken away protection of the ADA and access to the courts to enforce it by drastically and aggressively limiting the coverage of the ADA. Today, large numbers of people with disabilities around the country find that they no longer have the rights the Congress and the President gave them.

I have been working on a law review article addressing discrimination against people with cancer; in doing research for that article, I found considerable statistical and anecdotal information documenting serious discrimination directed at people who currently have cancer and those who have previously been treated for cancer.

Estimates of the prevalence of such discrimination in the workplace vary all over the board, from 5% to 90%, but considering that over 10 million people living in the United States currently have cancer or have been treated for cancer, including over two million who have been treated for breast cancer, and that about 40% of them are of working age, even the most conservative estimates mean that hundreds of thousands of Americans with cancer or a history of cancer have been discriminated against by their employers.

Many workers facing such discrimination have sought to assert their rights under the ADA. All too often, however, the courts' restrictive interpretations of the Act's coverage have resulted in judicial rulings that a worker's cancer is not a disability, much to the sad surprise of those who drafted and enacted the legislation. This means that hundreds of thousands of people who have had to battle a life-threatening disease and then encountered unfair and unnecessary discrimination may have no recourse under a law that was manifestly intended to protect them. Even those who do manage to satisfy the stringent criteria for disability can only do so by making obviously off-the-point and often embarrassing and painful showings of how their sexual activities or ability to perform personal self care or other unrelated activities are severely limited.

The article I am working on focuses on cancer, but the same situation applies to many, perhaps most, other types of disabilities. Even a cursory review of the cases decided under the ADA reveals a plethora of court decisions in which people with conditions everyone thought were covered under the law when it was enacted have had their lawsuits thrown out of court based on technical, harshly narrow interpretations of what a "disability" is. To provide a small, but representative, sampling of such cases, I have attached a list of decisions in which plaintiffs with significant impairments were unable to convince a court that their conditions constituted disabilities under the ADA as Appendix A to this testimony. Statistical studies pretty consistently indicate that complainants prevail in fewer than one-out-of-ten ADA Title I (employment) complaints. One of the studies found that courts ruled that the plaintiff had a disability in only six percent of the cases.[1] Ludicrously, employers who take drastic steps, such as termination or demotion, against employees because of their conditions can successfully contend that the conditions are not serious enough to constitute a disability.

For these reasons, it is both an honor and a solemn responsibility for me to have this opportunity to submit comments to the Committee. I am pleased to be a part of this panel of distinguished witnesses, including Andrew Imparato whom I have worked with and admired for many years. In my 19 years as Professor of Law at the University of the District of Columbia, David A. Clarke School of Law, I initially taught the School's Constitutional Law courses, and for many years now have directed a clinical program in legislation—the Legislation Clinic. For over 35 years, however, my particular area of legal research and expertise has been the rights of people with disabilities. During my career, I have had the good fortune to be presented with some wonderful opportunities to contribute to the advancement of such rights. Chief among these was working for the National Council on Disability during the Administration of George H.W. Bush to develop the concept of an Americans with Disabilities Act (ADA) and then to craft the Council's original version of the ADA. This is the version that Representative Tony Coelho and Senator Lowell Weicker had the vision and valor to introduce in the 100th Congress in 1988.

I subsequently worked with Members of Congress and their staffs, legal experts, and representatives of affected industries to revise the ADA bill for introduction in the 101st Congress in 1989. After the ADA was enacted in 1990, I had the opportunity to do some scholarly writing, including a hefty legal treatise and several law review articles, that discussed the provisions of the ADA and the court decisions that started to arise under it. I also had occasion to continue to work with the National Council on Disability (NCD) in monitoring the case law and federal enforcement efforts regarding the ADA. At the Council's request, I developed a summary of the Supreme Court's ADA decisions and their implications that is posted on the NCD website at *http://www.ncd.gov/newsroom/publications/2002/supremecourt—ada.htm.*

During the Administration of George W. Bush, NCD focused on the digression of some of the Supreme Court's decisions from the intent and spirit of the ADA, and decided to undertake an in-depth study of the impact of these decisions, consistent with NCD's statutory obligation to "gather information about the implementation, effectiveness, and impact of the Americans with Disabilities Act of 1990."[2] The Council commissioned a series of policy documents discussing specific topics raised by problematic Supreme Court ADA decisions; 19 such topic papers have been issued to date. They are posted on the NCD website under the title Policy Brief Se-

ries: Righting the ADA Papers at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.*

Based upon information uncovered in the development of these topic papers, NCD became convinced that corrective legislative action is called for, and accorded me the high honor of asking me to pull together the various strands and issues discussed in the individual topic papers and to draft a unified legislative proposal for getting the ADA back on track. The result, a report titled Righting the ADA, was issued in December of 2004. It provides an analysis of problematic Court rulings, describes the resulting impact on people with disabilities, and offers legislative proposals designed to restore the ADA to its original intent. Out of various legislative proposals discussed in the report, NCD chose to consolidate its preferred solutions to the problems created by judicial misinterpretation of the ADA into a single draft bill—the ADA Restoration Act.

NCD has sent copies of the Righting the ADA report to Congress, additional copies are available from the National Council, and the report is posted on the NCD website at *http://www.ncd.gov/newsroom/publications/2004/righting—ada.htm.* For convenience, however, I am including as the final section of my observations the Executive Summary of the Righting the ADA report, which includes a Section-by-Section Summary and the text of the Council's ADA Restoration Act proposal. I will only add a caution that the full text of the report contains considerable materials clarifying, explaining, and amplifying the impact of the ADA decisions of the Supreme Court and I strongly advise those interested in the proposals to read the full rationale that supports them. A considerable portion of my testimony is derived more or less directly from the Righting the ADA report, the series of topic papers that led up to it, and other NCD reports that I helped develop.

In my testimony, I will describe some of the background of the enactment of the ADA and the positive impacts that it has had. I will then discuss some of the problematic judicial decisions, particularly those of the United States Supreme Court, that have inhibited the achievement of some the legislation's central objectives, including the unexpected restrictive court interpretations of the definition of "disability" in the Act. My testimony will outline how the courts have missed the boat as to some of the central premises of the ADA. I will summarize the efforts of the National Council on Disability to get the ADA back on track, culminating in its Righting the ADA report that contained an ADA Restoration Act proposal. Finally, I will examine H.R. 3195, derived in part from the NCD proposal, and discuss the extent to which it achieves the goal of undoing the damage done by judicial restrictions on the coverage of the ADA.

Broad bipartisan support

President George H.W. Bush called July 26, 1990, "an incredible day * * * an immensely important day," for on that date he signed into law the Americans with Disabilities Act (ADA). In his remarks at the signing ceremony, the President described the Act as an "historic new civil rights Act, * * * the world's first comprehensive declaration of equality for people with disabilities." He added that "[w]ith today's signing of the landmark Americans with Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom." He also noted that "my administration and the Congress have carefully crafted this Act."

A rarity about the ADA was that it was an important piece of legislation that almost everyone supported. The votes in Congress to pass the ADA were overwhelmingly in favor of passage. The Senate passed its version of the ADA bill by a vote of 76 to 8; the House of Representatives passed its bill 403 to 20. After differences were ironed out in conference, the House approved the final version of the bill by a vote of 377 to 28, and the Senate followed suit, adopting the final ADA bill by the lopsided margin of 91 to 6. Congressional committees that considered the ADA were equally united in their backing of the legislation. Two of the five committees—the Senate Labor and Human Resources Committee and the House Committee on Education and Labor—adopted ADA bills unanimously. The Subcommittee on Civil and Constitutional Rights favorably reported the bill by a recorded vote of 7-1, and the House Judiciary Committee followed suit by a recorded vote of 32-3. None of the formal up-or-down committee votes on reporting out the ADA, nor any of the floor votes on passage of the legislation, had less than a 90 percent majority in favor of the ADA bills.

Such overwhelming approval of a measure—with at least 9 out of 10 voting for it—obviously can occur only if it has both Republican and Democratic support. The ADA originated, as Senator Robert Dole, the Senate minority leader emphasized, "with an initiative of the National Council on Disability, an independent federal body composed of 15 members appointed by President Reagan and charged with re-

viewing all laws, programs, and policies of the Federal Government affecting individuals with disabilities." Proposed by Reagan appointees, initially sponsored by a Republican in the Senate (Senator Lowell Weicker) and a Democrat in the House of Representatives (Representative Tony Coelho), passed by a Democrat-controlled Senate and House of Representatives, and supported and signed by President George H.W. Bush, the ADA was a model of bipartisanship.

Before the ADA was reintroduced in the 101st Congress, ADA advocates in Congress determined that, to pass an effective and enforceable law, they needed the support of the administration and members of Congress from both major political parties. As Congressman Coelho would later report, "If it had become a Democratic bill, [the ADA] would have lost. * * * It had to be bipartisan." As the ADA passed the Senate, Senator Dole called it "a good example of bipartisanship in action." Likewise, President George H.W. Bush credited the success of the ADA to the fact that members of Congress, "on both sides of the political aisle" agreed to "put politics aside" to "do something decent, something right." He credited the ADA's passage to "a coalition in the finest spirit. A joining of Democrats and Republicans. Of the Legislative and the Executive Branches. Of federal and state agencies. Of public officials and private citizens. Of people with disabilities and without."

Members of both political parties participated in cooperative meetings to craft compromise provisions and revise problematic language in the bills. Republican Representative Steve Bartlett described meetings with the leading House advocate for the ADA, Democrat Steny Hoyer, as "the most productive and satisfying legislative negotiations that I had ever been involved with."

In addition to congressional dialogue and bargaining, a key factor in obtaining bipartisan backing and ultimately passing the ADA was the unwavering support for the legislation by President George H.W. Bush and his administration. While he was Vice President, Mr. Bush had pledged that he would promote a civil rights act for people with disabilities. Two days before his inauguration as President, Mr. Bush declared, "I said during the campaign that disabled people have been excluded for far too long from the mainstream of American life. * * * One step that I have discussed will be action on the Americans with Disabilities Act in order, in simple fairness, to provide the disabled with the same rights afforded others, afforded other minorities." Early in the Senate hearings on the ADA, Senator Tom Harkin, a Democrat, made a remarkable statement crediting President George H.W. Bush's public remarks in favor of rights for people with disabilities:

[W]e have had strong, strong statements made by President Bush—no President of the United States, Republican or Democrat, has ever said the things about disabled Americans that George Bush has said. No President, including the President who was in a wheelchair, Franklin Roosevelt.

Senator Harkin concluded that "this bodes well" and meant that "we can work together with the administration, [on] both sides of the aisle * * *" on the ADA.

Attorney General Dick Thornburgh formally announced the Bush administration's support for the ADA during Senate hearings on the legislation. He declared, "[w]e at the Justice Department wholeheartedly share [the ADA's] goals and commit ourselves, along with the President and the rest of his administration to a bipartisan effort to enact comprehensive legislation attacking discrimination in employment, public services, transportation, public accommodations, and telecommunications." He added, in regard to the ADA bill, that "[o]ne of its most impressive strengths is its comprehensive character" that was consistent with President George H.W. Bush's commitment to ensuring people with disabilities' "full participation in and access to all aspects of society." After Administration and Senate advocates ironed out differences on specific provisions, the Administration's express endorsement of the legislation led to a unanimous Senate Committee vote to report the bill out of committee, and to more than 60 Senators signing on as cosponsors. It also set the stage for favorable House action and final passage of the ADA.

As the ADA passed the Senate, Senator Dole praised President George H.W. Bush for his leadership on the legislation, and declared that "[w]e would not be here today without the support of the President." The senator credited a list of administration officials, including Chief of Staff John Sununu and Attorney General Dick Thornburgh, whose efforts contributed to the passage of the ADA. He also appended to his remarks a New York Times opinion-editorial piece about the ADA written by James S. Brady, who had been President Reagan's Press Secretary. Mr. Brady wrote:

As a Republican and a fiscal conservative, I am proud that this bill was developed by 15 Republicans appointed to the National Council on Disability by President Reagan. Many years ago, a Republican President, Dwight D. Eisenhower, urged that people with disabilities become taxpayers and consumers instead of being dependent upon costly federal benefits. The [ADA] grows out of that conservative philosophy.

NCD has observed:

More than any other single player, the role of President Bush cannot be overestimated. The ADA would have made little headway were it not for the early and consistent support from the nation's highest office. * * * The president's support brought people to the table to work out a bipartisan compromise bill that could obtain the support of the business community as well as that of the disability community.[3]

Acclaim for the ADA came from many other sources. Senator Dole called the ADA "landmark legislation" that would "bring quality to the lives of millions of Americans who have not had quality in the past." Senator Hatch declared the ADA was "historic legislation" whose passage was "a major achievement" demonstrating that "in this great country of freedom, * * * we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society." The executive director of the Leadership Conference on Civil Rights described the ADA as "the most comprehensive civil rights measure in the past two-and-a-half decades." Senator Edward M. Kennedy termed the legislation a "bill of rights" and "an emancipation proclamation" for people with disabilities. The late Justin Dart, who occupied disability policy positions in the Reagan, Bush, and Clinton administrations, called the ADA "a landmark commandment of fundamental human morality."

Backing by subsequent Presidents

In 2000, President Bill Clinton proclaimed July as "The Spirit of the ADA Month" and declared:

The enactment of the Americans with Disabilities Act 10 years ago this month signaled a transformation in our Nation's public policies toward people with disabilities. America is now a dramatically different—and better—country because of the ADA.

In addition to citing past accomplishments and pending initiatives his administration was pursuing to further the implementation of the ADA, President Clinton added, "Vice President Gore and I are proud to join in the celebration and to renew our own pledge to help advance the cause of disability rights." For his part, Vice President Al Gore observed, "We know we can't just pass a few laws and change attitudes overnight. But day by day, person by person, we can make a difference. Together, let's not just complete the work of the ADA—let's say to the whole world: this is one country that knows we don't have a person to waste, and we're moving into the next century—together."[4]

Bipartisan support and presidential commitment to the ADA have continued. President George W. Bush endorsed the Act and, in February 2001, issued his "New Freedom Initiative," committing his administration to ensuring the rights and inclusion of people with disabilities in all aspects of American life. On June 18, 2001, President Bush issued Executive Order No. 13217, declaring the commitment of the United States to community-based alternatives for individuals with disabilities. On the twelfth anniversary of the signing of the ADA, July 26, 2002, the President proclaimed the ADA to be "one of the most compassionate and successful civil rights laws in American history."[5] The White House also declared that "[t]he administration is committed to the full enforcement of the Americans with Disabilities Act." President Bush asserted a clear continuity between his commitment to the ADA and that of his father:

[W]hen my father signed the ADA into law in 1990, he said, "We must not and will not rest until every man and woman with a dream has the means to achieve it." Today we renew that commitment, and we continue to work for an America where individuals are celebrated for their abilities, not judged by their disabilities.

Will of the people

In enacting the ADA and in seeking its vigorous enforcement, the elected branches of the Federal Government—the Congress and the President—have carried out the will of the American people. A large majority of the public reports that it favors the ADA. A 2002 Harris Poll found that, of the 77 percent of Americans who said they were aware of the ADA, an overwhelming percentage (93 percent) reported that they "approve of and support it." The ADA is supported by most of the business sector. A Harris Poll of business executives in 1995, for example, showed that 90 percent of the executives surveyed said that they supported the ADA.

In the face of negative media reports on the ADA (often misleading and sometimes flatly inaccurate), most Americans are still highly favorably disposed to the Act. They have had experience with the realities of the ADA in their communities and workplaces, and have seen how people have benefited from it. They have noticed people with visible disabilities at stores, malls, theaters, stadiums, and museums. They have seen the ramps, accessible bathrooms, disabled parking spaces, and

other accessibility features that the ADA has engendered. They encounter people who use wheelchairs now able to go to department stores, fast food places, and government offices. They know that the son of their neighbors is now living comfortably in an apartment in the neighborhood with appropriate support services instead of in an institutional setting. They are aware that sign language interpreters now are routinely present at their county council meetings. In these and countless other ways, they have seen the ADA in action, and they approve.

Impact of the ADA

In a variety of ways, the ADA has lived up to the high hopes that accompanied its passage. The provisions of the ADA that address architectural, transportation, and communication accessibility have changed the face of American society in numerous concrete ways. A vast number of buildings and other structures have been affected by provisions of the ADA that make it illegal to design or construct any new place of public accommodation or other commercial facility without making it readily accessible to and usable by people with disabilities, or to alter such a facility without incorporating accessibility features. The ADA's mass transit provisions ended decades of disagreements and controversy regarding many of the issues that determined exactly what is required of public transportation systems to avoid discriminating on the basis of disability. The ADA contains detailed provisions describing requirements for operators of bus, rail, and other public transportation systems, and intercity and commuter rail systems. Although implementation has been far from perfect and ADA provisions do not answer all the questions, much progress in transportation accessibility has been made. The ADA's employment provisions have dramatically affected hiring practices by barring invasive preemployment questionnaires and disability inquiries and the misuse of preemployment physical information. These provisions also have made job accommodations for workers with disabilities more common than they were before the ADA was enacted. The ADA's telecommunications provisions have resulted in the establishment of a nationwide system of relay services, which permit the use of telephone services by those with hearing or speech impairments, and a closed captioning requirement for the verbal content of all federally funded television public service announcements.

Other provisions of Title II of the ADA (covering state and local governments) and Title III (covering public accommodations) have eliminated many discriminatory practices by private businesses and government agencies. The ADA has had a particularly strong impact in promoting the development of community residential, treatment, and care services in lieu of unnecessarily segregated large state institutions and nursing homes. The Act provided the impetus for President George W. Bush's "New Freedom Initiative," issued in February 2001, committing his administration to assuring the rights and inclusion of people with disabilities in all aspects of American life; and for Executive Order No. 13217, issued on June 18, 2001, declaring the commitment of the United States to community-based alternatives for people with disabilities.

At the ADA signing ceremony, the first President Bush declared that other countries, including Sweden, Japan, the Soviet Union, and each of the 12 member nations of the European Economic Community, had announced their desire to enact similar legislation. In the years since its enactment, numerous other countries have been inspired by the ADA to seek legislation in their own jurisdictions to prohibit discrimination on the basis of disability. These countries have looked to the ADA, if not as a model, at least as a touchstone in crafting their own legislative proposals.

In 1988, while the original ADA bills were pending before Congress, the Presidential Commission on the Human Immunodeficiency Virus (HIV) Epidemic endorsed the legislation and recommended that the ADA should serve as a vehicle for protecting from discrimination people with HIV infection. The ADA has proved to be the principal civil rights law protecting people with HIV from the sometimes egregious discriminatory actions directed at them.

In a broader sense, the ADA has, as the Council has observed in a report issued in 2000, "begun to transform the social fabric of our nation:"

It has brought the principle of disability civil rights into the mainstream of public policy. The law, coupled with the disability rights movement that produced a climate where such legislation could be enacted, has impacted fundamentally the way Americans perceive disability. The placement of disability discrimination on a par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country. The ADA has become a symbol, internationally, of the promise of human and civil rights, and a blueprint for policy development in other countries. It has changed permanently the architectural and telecommunications landscape of the United States. It has created increased recognition and understanding of the

manner in which the physical and social environment can pose discriminatory barriers to people with disabilities. It is a vehicle through which people with disabilities have made their political influence felt, and it continues to be a unifying focus for the disability rights movement.[6]

This is not to ignore the fact that there are huge gaps in enforcement of the ADA's requirements or that some covered entities have taken an I-won't-do-anything-until-I'm-sued attitude toward the obligations imposed by the law. Indeed, the Promises to Keep report, from which the preceding quotations were taken, described a variety of problems and weaknesses in federal enforcement of the ADA and presented recommendations for remedying such deficiencies.

Numerous people with disabilities, however, have declared that the ADA has played an important role in improving their lives. In 1995, NCD issued a report titled Voices of Freedom: America Speaks Out on the ADA, in which it presented a large number of statements by individuals with disabilities talking about the impact of the ADA. The following is a tiny sampling of the thousands of statements NCD received:

The ADA is fantastic. I can go out and participate. The ADA makes me feel like I'm one of the gang. (Sandra Brent, Arkansas)

Even though we had the Rehab Act of 1973, it took the ADA to make real change. The ADA has given me hope, independence, and dignity. (Yadi Mark, Louisiana)

Because of the ADA, I have more of the opportunities that other people have. Now I feel like a participant in life, not a spectator. (Brenda Henry, Kansas)

A successful person with a disability was once thought of as unusual. Now successful people with disabilities are the rule. It's the ADA that has opened the door. (Donna Smith-Whitty, Mississippi)[7]

The report presented statements by people with disabilities about their experiences with the ADA in various aspects of their lives, including access to the physical environment, access to employment opportunities, communication mobility, and self image. The report concluded that, * * * the actual research data and the experiences of people with disabilities, of their family members, of businesses, and of public servants, [demonstrates] that this relatively new law has begun to move us rapidly toward a society in which all Americans can live, attend school, obtain employment, be a part of a family, and be a part of a community in spite of the presence of a disability. What is needed now is a renewed commitment to the goals of the Act (which were crafted under unprecedented bipartisan efforts), sufficient resources to support further education and training concerning the ADA, and effective enforcement.[8]

In a similar vein, President George W. Bush declared the following in 2002:

In the 12 years since President George H.W. Bush signed the ADA into law, more people with disabilities are participating fully in our society than ever before. As we mark this important anniversary, we celebrate the positive effect this landmark legislation has had upon our Nation, and we recognize the important influence it has had in improving employment opportunities, government services, public accommodations, transportation, and telecommunications for those with disabilities.

Today, Americans with disabilities enjoy greatly improved access to countless facets of life; but more needs to be done. We must continue to build on the important foundations established by the ADA. Too many Americans with disabilities remain isolated, dependent, and deprived of the tools they need to enjoy all that our Nation has to offer.[9]

Judicial resistance

In light of the overwhelming endorsement of the ADA by Congress in enacting it, by the Presidents in office at and since its enactment, and by the majority of the general public, it is surprising and disappointing that the judiciary all too often has given the Act the cold shoulder. Problematic judicial interpretations have blunted the Act's impact in significant ways. The National Council on Disability, numerous legal commentators, and large numbers of people with disabilities have become increasingly concerned about certain interpretations and limitations placed on the ADA in decisions of the U.S. Supreme Court.

This is not to suggest that all the rulings of the high court on the ADA have been negative. Among favorable decisions, the U.S. Supreme Court has (1) upheld the ADA's integration requirement and applied it to prohibit unnecessary segregation of people receiving residential services from the states; (2) held the ADA applicable to protect prisoners in state penal systems; (3) held that the ADA prohibits discrimination by a dentist against a person with HIV infection; (4) ruled that the ADA required the PGA to allow a golfer with a mobility impairment to use a golf cart in tournament play as a "reasonable modification;" and ruled that the ADA protects the rights of people with disabilities to have access to the courts. But while not all

of the Court's ADA decisions are objectionable, those that are have had a serious negative impact. They have placed severe restrictions on the class of persons protected by the ADA, have narrowed the remedies available to complainants who successfully prove violations of the Act, have expanded the defenses available to employers, and have even called into question the very legality of some parts of the Act. NCD's policy paper, The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities, explores the effect such decisions have had on individuals with disabilities. Paper No. 7 of NCD's Policy Brief Series: Righting the ADA Papers can be found at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.*

Media coverage of the Court's ADA decisions has made matters worse. While such coverage has not been uniformly negative, a significant portion of it has been misleading, presenting the Act in a highly unfavorable light and placing a negative "spin" on the ADA, the court decisions interpreting it, and its impact on American society. NCD's extensive and detailed policy paper, Negative Media Portrayals of the ADA, discusses prevalent media-fed myths about the ADA. Paper No. 5 of NCD's Policy Brief Series: Righting the ADA Papers can be found at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.*

Inhibitive court decisions combined with harmful media perspectives have caused the ADA to be the object of frequent misunderstanding, confusion, and even derision. The detrimental pronouncements of the courts and negative impressions of the ADA fostered by media mischaracterizations have fed on one another and have generated increasing misunderstandings of the Act's underlying purposes and vision, frustrated some of its central aims, and narrowed the scope and degree of its influence.

Problematic interpretations of the ADA

A. Surprising Problems with the Definition of Disability

When Congress passed the ADA and President George H.W. Bush signed it into law, hardly anyone expected trouble in the courts with the definition of disability. Congress played it safe by adopting in the ADA a definition of disability that was the same as the definition of "handicap" under the Rehabilitation Act. That definition was enacted in 1974 and clarified in regulations issued under Section 504 of the Rehabilitation Act. Because the definition was a broad and relatively uncontroversial one, defendants seldom challenged plaintiffs' claims of having a disability.[10] In 1984, a federal district court noted that, after 10 years' experience with the Rehabilitation Act definition, only one court found a Section 504 plaintiff not to have a "handicap."[11]

In 1987, the U.S. Supreme Court made it abundantly clear that the definition of "handicap" under Section 504 was very broad. In School Board of Nassau County v. Arline, the Court took an expansive and nontechnical view of the definition. The Court found that Ms. Arline's history of hospitalization for infectious tuberculosis was "more than sufficient" to establish that she had "a record of" a disability under Section 504 of the Rehabilitation Act. The Court made this ruling even though her discharge from her job was not because of her hospitalization. The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted that, in establishing the new definition of disability in 1974, Congress had expanded the definition "so as to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"

The Court declared that the "basic purpose of Section 504" was to ensure that individuals "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others" or "reflexive reactions to actual or perceived [disabilities]" and that the legislative history of the definition of disability "demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual." The Court elaborated as follows:

Congress extended coverage * * * to those individuals who are simply "regarded as having" a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

When Congress was considering the ADA, the Supreme Court's decision in School Board of Nassau County v. Arline was the leading legal precedent on the definition of disability. The Arline ruling was expressly relied on in several ADA committee reports discussing the definition of disability, including the report of the House Judiciary Committee, which quoted the exact language of the Court as set out above.[12]

This was the legal background when Congress adopted the essentially identical definition of disability in the ADA. To further ensure that the definition of disability and other provisions of the ADA would not receive restrictive interpretations, Congress included in the ADA a provision requiring that "nothing" in the ADA was to "be construed to apply a lesser standard" than is applied under the relevant sections of the Rehabilitation Act, including Section 504, and the regulations promulgating them. In his remarks at the ADA signing ceremony, President George H.W. Bush pointed with pride to the ADA's "piggybacking" on Rehabilitation Act language:

The administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. The Rehabilitation Act standards are already familiar to large segments of the private sector that are either federal contractors or recipients of federal funds. Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act.

Accordingly, at the time of the ADA's enactment, it seemed clear that most ADA plaintiffs would not find it particularly difficult to establish that they had a disability. NCD issued two policy papers that discuss the care with which the ADA definition of disability was selected and the breadth of that definition. A Carefully Constructed Law and Broad or Narrow Construction of the ADA, papers No. 2 and No. 4, respectively, of NCD's Policy Brief Series: Righting the ADA Papers, can be found at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.*

For some time after the ADA was signed into law, the pattern of broad and inclusive interpretation of the definition of disability, established under Section 504, continued under the ADA. In 1996, a federal district court declared that "it is the rare case when the matter of whether an individual has a disability is even disputed."[13] As some lower courts, however, began to take restrictive views of the concept of disability, defendants took note, and disability began to be contested in more and more cases.

Beginning with its decision in Sutton v. United Airlines in 1999, the U.S. Supreme Court started to turn its back on the broad, relaxed interpretation of disability endorsed by the Court in the Arline decision. By the time of the Toyota Motor Manufacturing, Kentucky, Inc. v. Williams decision in 2002, the Court was espousing the view that the definition should be "interpreted strictly to create a demanding standard for qualifying as disabled." This stance is directly contrary to what the Congress and the President intended when they enacted the ADA.

The result of the Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination. The focus of many time-consuming and expensive legal battles is on the characteristics of the person subjected to discrimination rather than on the alleged discriminatory treatment meted out by the accused party. The ADA was intended to regulate the conduct of employers and other covered entities, and to induce them to end discrimination. To the extent that these parties can divert the focus to a microscopic dissection of the complaining party, central objectives of the law are being frustrated.

Other governments and judicial forums have rejected the Supreme Court's restrictive interpretation of disability. Thus, courts in the individual states[14] and in other countries[15] have embraced more inclusive interpretations of who has a disability under nondiscrimination laws. And legislatures in the states[16] and in other countries[17] deliberately have rejected the narrow approach under U.S. law as enunciated in the Supreme Court's decisions.

B. Specific Problems with the Interpretation of Disability

In its Righting the ADA report, the National Council on Disability described nine issues to which the Supreme Court's narrow approach to the definition of disability in the ADA had led it to deviate from the legislative intent with harmful consequences. These issues were:

(1) Consideration of Mitigating Measures in Determining Disability,
(2) Substantial Limitation of a Major Life Activity,
(3) Employment as a Major Life Activity,
(4) The "Class or Broad Range of Jobs" Standard,
(5) "Regarded As" Having a Disability,
(6) Validity of and Deference to Be Accorded Federal Regulations Implementing the ADA's Definition of Disability,
(7) Duration Limitation on What Constitutes a Disability,
(8) Per Se Disabilities, and
(9) Restrictive Interpretation of the Definition of Disability to Create a Demanding Standard.

In regard to each of these issues, the report describes "What the Supreme Court Did," analyzes the "Significance of the Court's Action," and gives specific "Examples of Impact" of the rulings. To provide a graphic summary of the ways that the court decisions have deviated from the intentions expressed by Congress when it enacted the ADA, I have prepared and attached as Appendix B to this testimony a chart contrasting "What Congress Said" with "What the Courts Are Now Saying." Similarly, the Righting the ADA report contains a section titled "Principles and Assumptions Regarding the Definition of Disability When the ADA Was Enacted That Have Been Disregarded or Contradicted by the Supreme Court" which presents 11 important ways in which the Court's ADA definitions decisions deviate from expectations in place when the ADA was negotiated debated and enacted. For the sake of brevity, that information is not reiterated here, but the discussion of one of the issues—mitigating measures—that follows hopefully exemplifies the kinds of serious problems the Court's approach to the definition has caused.

Before the Supreme Court upset the applecart, all the relevant authorities were nearly unanimous in the view that mitigating measures should not be considered in deciding whether a person has a disability under the ADA. Even before the ADA was enacted, the committee reports on the pending legislation declared clearly that mitigating measures should not be factored in. The three ADA Committee Reports that addressed the issue all concurred that mitigating measures are not to be taken into account when determining whether an individual has a disability. This Committee declared unequivocally that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures * * *."[18] The House Committee on the Judiciary likewise declared that "[t]he impairment should be assessed without considering whether mitigating measures * * * would result in a less-than-substantial limitation."[19] To illustrate the application of this approach, the Committee discussed the examples of a person with epilepsy whose condition is mitigated by medication and of a person with a hearing impairment whose hearing loss is corrected by the use of a hearing aid. In the Committee's view, these individuals would be covered by the ADA.

In a sharp break from the legislative history of the ADA, the position of the executive agencies responsible for enforcing the ADA, and the prior rulings of eight of the nine federal courts of appeal that had addressed the issue, the Supreme Court decided, in its rulings in the Sutton v. United Airlines, Inc., Murphy v. United Parcel Service, and Albertson's, Inc. v. Kirkingburg cases, that mitigating measures should be considered in determining whether an individual has a disability under the ADA. The Supreme Court's position on mitigating measures ignores the rationale that led courts, regulatory agencies, and Congress to take a contrary position—that unless you disregard mitigating measures in determining eligibility for ADA protection, you shield much discrimination on the basis of disability from effective challenge.

The result of the Court's rulings on mitigating measures turns the ADA's definition of disability into an instrument for screening out large groups of individuals with disabilities from the coverage of the Act, and thereby insulating from challenge many instances of the pervasive unfair and unnecessary discrimination that the law sought to prohibit. To the extent that mitigating measures are successful in managing an individual's condition, the Supreme Court's stance on mitigating measures deprives the individual of the right to maintain an ADA action to challenge acts of disability discrimination she or he has experienced, because such a person is not eligible for the ADA's protection. This means an employer or other covered entity may discriminate with impunity against such individuals in various flagrant and covert ways. NCD issued a policy paper examining the function and types of mitigating measures, discussing the near consensus in the law prior to the Supreme Court's taking a contrary position, and describing the repercussions of the Court's position. The Role of Mitigating Measures in the Narrowing of the ADA's Coverage, paper No. 11 of NCD's Policy Brief Series: Righting the ADA Papers, can be found at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.*

Taking the condition of epilepsy to illustrate, before the Supreme Court's rulings in Sutton, Murphy, and Kirkingburg, "a person [with] epilepsy would receive nearly automatic ADA protection,"[20] consistent with statements in the ADA legislative history and regulatory guidance. The ADA regulatory commentary of the Equal Employment Opportunity Commission (EEOC) and Department of Justice (DOJ) specifically declared that an individual with epilepsy would remain within the coverage of the ADA even if the effects of the condition were controlled by medication.

The situation changed dramatically with the Supreme Court's mitigating measures decisions. To the extent that a covered entity can successfully demonstrate (after extensive, intrusive discovery into the details of the person's condition) that an individual's epilepsy is effectively controlled by medication, the individual cannot challenge the discriminatory actions of the covered entity. This is true even if the

employer or other covered entity has an express policy against the hiring of people with epilepsy; puts up signs that say, "epileptics not welcome here;" inaccurately assumes that all persons with epilepsy are inherently unsafe; or has the irrational belief that epilepsy is contagious. The unfairness or irrationality of the covered entity's actions and motivations, including stereotypes, fears, assumptions, and other forms of prejudice, cannot be challenged by a person whose condition is mitigated. The end result is that it is a rare plaintiff who is in a position to challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated. One study, by the Epilepsy Legal Defense Fund, found that, of 36 cases in which courts had ruled on the issue since the Supreme Court issued its decision in Sutton v. United Airlines, 32 had decided that epilepsy was not a disability.

Epilepsy is an illustrative example, but the same principles apply to diabetes, various psychiatric disabilities, hypertension, arthritis, and numerous other conditions that, for some individuals, can be controlled by medication. Moreover, the same problems arise with conditions for which techniques and devices other than medication provide an avenue for mitigation. Thus, a company that discriminates against people who use hearing aids will be insulated from challenge by people for whom the hearing aids are effective in offsetting, to some degree, diminution of functional ability to hear. Other mitigating measures, including prosthetic devices, can raise the same issues—to the extent that they are successful, they may lead to an argument that the person does not have a disability, even if she or he is discriminated against precisely because of the underlying condition or even the use of the mitigating measure itself. Obviously, this is directly contrary to the stated intentions of this Committee and the Congress as a whole.

C. Misconstruing a Central Premise Underlying the ADA

Courts that have espoused restrictive interpretations of the definition of disability under the ADA have truly missed the boat on disability. They have exhibited long-held, antiquated notions about disability and about the role of government in addressing disability. If courts think of people with disabilities as not capable of working, for example, anyone who is able to work must not be disabled. Similarly, access barriers were historically viewed by many people as being barriers because of an individual's disability, as opposed to the problem being the barrier itself. When a person with a mobility impairment, for example, could not cross a street with curbs, the person's disability was considered to be the reason, as opposed to recognizing that the design of the curb was deficient because it was done with only certain types of people in mind, when it could just as easily have been designed to be usable by all. The ADA embodies a social concept of discrimination that views many limitations resulting from actual or perceived impairments as flowing, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions. The social model is at variance with the medical model of disability that centers on assessments of the degree of a person's functional limitation.[21]

I once wrote that "[d]isability nondiscrimination laws, such as the Americans with Disabilities Act, and the disability rights movement that spawned them have, at their core, a central premise both simple and profound * * * that people denominated as 'disabled' are just people—not different in any critical way from other people."[22] To elaborate a bit on that idea, I wrote a section titled "People with Disabilities "People with Disabilities as Regular Joes and Janes" that I shall take the liberty of quoting from here:

Over thirty years ago, Jacobus tenBroek characterized people with disabilities as "normal people caught at a physical and social disadvantage." In his remark, Professor tenBroek captured a truth that is both the guiding star and essential foundation * * *—that individuals with disabilities are just people, not essentially different from other people. Though this proposition is relatively simple to state, its acceptance is the single most universal aspiration of most individuals with disabilities, a central tenet of the Disability Rights Movement, and a sine qua non of real equality for people with disabilities.

This helps to explain why terminology in regard to disabilities has been a sensitive issue. People with disabilities have come to recognize that processes by which they are assigned labels have reinforced the perception that they are substantially different from others. In response, they have strongly insisted that "we are 'people first,'" and have demanded that their common humanity be acknowledged rather than their differentness magnified. It also explains why many individuals with disabilities resist attempts to characterize them as "special" or their daily accomplishments as "inspirational" or "courageous." At best, such characterizations mark the individual so labeled as extraordinary and different from the rest of the population and one whose accomplishments and success are a surprise; at worst, they suggest

that the speaker is saying "Being who you are is so bad that I could not face it—I would just give up," "Your limitations are so severe that I don't see how you accomplish anything," or even "I would rather be dead than to live with your impairments." People with disabilities do not view their going about the tasks and trials involved in ordinary activities and trying to have accomplishments and success as something atypical and heroic. They would prefer to be seen for what they are, as ordinary individuals pursuing the same types of goals—love, success, sexual fulfillment, contributing to society, material comforts, etc.—as other folks.

The "integration" that is required under the ADA and Sections 501, 503, and 504, and the "full participation" that is the ultimate objective of federal laws relating to disabilities dictate that individuals with disabilities not be unnecessarily differentiated from the rest of society. To achieve this end, analysis under these laws should not focus on differentiating characteristics of the individual alleging discrimination, but instead on the practices and operations of covered entities to determine whether or not they are in fact discriminatory, when examined in light of latent flexibility in structuring and modifying tasks, programs, facilities, and opportunities. Legal standards imposed under these laws should serve to eliminate practices, policies, barriers, and other mechanisms that discriminate on the basis of disability, not to eliminate as many people as possible from the protection provided in these laws. In short, these laws seek to promote real equality, not to protect a special group.[23]

Despite common misconceptions that there are two distinct groups in society—those with disabilities and those without—and that it is possible to draw sharp distinctions between these two groups, people actually vary across a whole spectrum of infinitely small gradations of ability with regard to each individual functional skill. And the importance of particular functional skills varies immensely according to the situation, and can be greatly affected by the availability or unavailability of accommodations and alternative methods of doing things. This human "spectrum of abilities" was recognized in a 1983 report by the U.S. Commission on Civil Rights—Accommodating the Spectrum of Individual Abilities. The Commission noted that, while the popular view is that people with disabilities are impaired in ways that make them sharply distinguishable from nondisabled people, instead of two separate and distinct classes, there are in fact "spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional."[24] In some of its publications, the National Council on Disability has explained and elaborated on the spectrum of abilities concept.[25]

In addition, authorities on disability are generally in agreement that the concept of disability entails a social judgment; people come to have a disability when they are viewed and treated as having one by other people. As the U.S. Commission on Civil Rights put it in Accommodating the Spectrum of Individual Abilities, "people are made different—that is socially differentiated—by the process of being seen and treated as different in a system of social practices that crystallizes distinctions * * *."[26] Thus, the experience of disability is closely linked to the concept of discrimination. Individuals may encounter discrimination on the basis of disability whether or not they previously thought of themselves as having a disability, and whether or not they meet foreordained, medically oriented criteria. To achieve its purposes of eliminating discrimination and achieving integration, the ADA should reduce the unnecessary differentiation of people because of actual, perceived, or former physical and mental characteristics. It emphatically should not force people to demonstrate their differentness as a prerequisite to receiving protection under the Act.

The ADA is based on a social or civil rights model (sometimes referred to as a socio-political model), in contrast to the traditional "medical model." It views the limitations that arise from disabilities as largely the result of prejudice and discrimination rather than as purely the inevitable result of deficits in the individual. Sociology Professor Richard K. Scotch, a disability policy author, has written:

In the socio-political model, disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations. All of these, in turn, reflect overly narrow assumptions about what constitutes the normal range of human functioning.[27]

Law Professor Linda Hamilton Krieger has written that the ADA's concept of disability views it "not only in terms of the internal attributes of the arguably disabled individual, but also in terms of external attributes of the attitudinal environment in which that person must function. 'Disability,' under this conception, resides as much in the attitudes of society as in the characteristics of the disabled individual."[28] She elaborated on the ADA's adoption of the social model as follows:

[T]he drafters of the ADA sought to transform the institution of disability by locating responsibility for disablement not only in a disabled person's impairment, but also in "disabling" physical or structural environments. Under such a construction, the concept of disability takes on new social meaning. It is not merely a container holding tragedy, or occasion for pity, charity, or exemption from the ordinary obligations attending membership in society. The concept of disability now also, or to a certain extent instead, contains rights to and societal responsibility for making enabling environmental adaptations. The ADA was in this way crafted to replace the old impairment model of disability with a socio-political approach.

The National Council on Disability has discussed the necessity for applying the social model of disability under the ADA.[29] In the topic paper accompanying its initial proposal of an Americans with Disabilities Act, NCD expressly rejected the "medical model" and the need for people to demonstrate the severity of their limitations as a precondition to being protected from discrimination.[30] In its Righting the ADA report, NCD included a section titled "Incorporation of a Social Model of Discrimination." The Council declared:

The ADA embodies a social concept of discrimination that views many limitations resulting from actual or perceived disabilities as flowing, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions. This is in contrast to the medical model of disability that centers on assessments of the degree of a person's functional limitation.[31]

Accordingly, NCD called for the enactment of a specific provision of its ADA Restoration Act proposal to make the endorsement of the social model explicit.[32]

D. Other Kinds of Problems Resulting from Supreme Court Rulings

Apart from problems with the definition of disability, the Righting the ADA report discusses in detail several other kinds of problems that have resulting from ill-advised ADA rulings of the Supreme Court. These include the following:

1. In Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, the Supreme Court rejected the "catalyst theory" that most lower courts had applied in determining the availability of attorney's fees and litigation costs to plaintiffs in cases under the ADA and other civil rights statutes, and under other federal laws that authorize such payments to the "prevailing party."

2. In Barnes v. Gorman, the Supreme Court ruled that punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, under Section 202 of the ADA, or under Section 504 of the Rehabilitation Act.

3. In Chevron U.S.A. Inc. v. Echazabal, the Supreme Court upheld as permissible under the ADA the EEOC regulatory provision that allows employers to refuse to hire applicants because their performance on the job would endanger their health because of a disability, despite the fact that, in the language of the ADA, Congress recognized a "direct-threat" defense only for dangers posed to other workers.

4. In U.S. Airways, Inc. v. Barnett, the Supreme Court recognized a reasonableness standard for reasonable accommodations separate from undue hardship analysis.

5. In U.S. Airways, Inc. v. Barnett, the Supreme Court ruled that the ADA ordinarily does not require the assignment of an employee with a disability, as a reasonable accommodation, to a particular position to which another employee is entitled under an employer's established seniority system, but that it might in special circumstances. The Court declared that "to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not 'reasonable.'"

The implications of some of these rulings are a bit technical and a fuller explanation is not provided here. They are explained in some detail in Righting the ADA and in the specific topic papers mentioned in the report. As those sources explain, the negative impact of such decisions on the protection of people with disabilities under the ADA is significant and disturbing.

Getting the ADA back on track: remedial legislation

A. Generally

Based on its analysis of what has happened in the last 17 years since the ADA was enacted the National Council on Disability reached the following conclusion:

Incisive and forceful legislative action is needed to address the dramatic narrowing and weakening of the protection provided by the ADA, resulting from the Supreme Court's decisions, and to restore civil rights protections. Millions of Americans experience discrimination based on ignorance, prejudice, fears, myths, misconceptions, and stereotypes that many in American society continue to associate

with certain impairments, diagnoses, or characteristics. To revive the scope and degree of protection that the ADA was supposed to provide—to address "pervasive" discrimination in a "comprehensive" manner, as the Act declares—and to put ADA protections on a more equal footing with other civil rights protections under federal law, it is necessary to remove conceptual and interpretational baggage that has been attached to various elements of the ADA. Any legislative proposal should address, in some way, each of the problems listed in Section II of this report [Righting the ADA] that the Court's decisions have created.

For convenience I am attaching as Appendix C to this testimony the Executive Summary of NCD's Righting the ADA report. It contains a legislative proposal for getting the ADA back on course—an ADA Restoration Act bill—with an explanatory introduction and a section-by-section summary. I believe it represents the best thinking to date on what ought to be done to "restore" the ADA to its original congressionally intended course. NCD's proposal addresses a broader array of issues than are dealt with in H.R. 3195, but the amendments proposed in H.R. 3195 to restore the protections and scope of coverage of the ADA are largely based on and generally quite consistent with the Righting the ADA proposals.

B. Restoring the Scope of ADA Protection—H.R. 3195

The courts have made a royal mess of the three-prong definition of disability in the ADA. This has occurred in spite of very clear and explicit language and guidance Congress provided in the Act and its legislative history. Baffled individuals with all sorts of physical and mental impairments find that they are not allowed to challenge discrimination against them, based on legal rationales that are tortured, hypertechnical, and contrary to common sense.

Employers are able to say "Your condition is so problematic that I can't hire you," or "so problematic that I must terminate you," and then turn around and argue in court, successfully, that "your condition isn't serious enough to constitute a disability." The focus of proceedings in most ADA cases is not on the alleged discrimination the plaintiff experienced. Instead the focus is on an invasive and often embarrassing, detailed dissection of the plaintiff's condition, limitations, and medical background. Instead of concentrating on employment or other particular activity in which the discrimination is alleged to have occurred, the proceedings and arguments often are about other activities, such as sexual activities, reproduction, personal care, and many other areas of life far afield from the alleged discrimination. Plaintiffs are required to demonstrate whether, in discharging them, employers were thinking they were unfit for a broad class or range of jobs—a matter that is purely hypothetical and concerns the mental state of the employer—a notoriously difficult thing to prove. Astoundingly, the Supreme Court has even questioned whether employment is a major life activity at all.

H.R. 3195 addresses the most serious distortions that have resulted from a constricted interpretation by the courts of the ADA definition of disability. It does so in a manner that is straightforward and effective in clearing up the detrimental analytical muddle of the current judicial interpretations. Consistent with informed public policy, the bill returns the primary focus away from misplaced efforts to draw pedantic, absurd distinctions based on judicial assessments of degree of limitation and returns it to identifying and eliminating discrimination on the basis of disability. To repair the tangle of interpretations that have resulted from the Supreme Court's announced proclivity for seeing to it that the ADA's coverage is "interpreted strictly to create a demanding standard for qualifying as disabled,"[33] the bill replaces the concept of "substantial limitation," that has been so thoroughly and irreparably compromised and misapplied by the courts, with the straightforward concept of physical or mental impairment, a concept that has a clear and settled definition. A person who has been subjected to an adverse employment action (or disadvantaged in regard to other types of services or benefits of non-employment programs and entities covered by the ADA) because of a physical or mental impairment will be protected by the ADA.

At first glance, one might question whether this alteration to the statutory language will engender an unwarranted enlargement of ADA coverage—expansion rather than restoration. A more informed understanding of the scope of protection Congress intended to establish in 1990 leads to the opposite conclusion. The third prong of the ADA definition, which includes people who are "regarded as" having an impairment, was understood at the time of enactment to include anyone who was disadvantaged by a covered entity on the basis of disability. It is well-documented, if all too often ignored by the courts that, as understood by Congress when it passed the ADA, the law was supposed to protect any person who was discriminated against because of a physical or mental impairment. In its Committee Report accompanying its reporting out of the ADA, this Committee said:

The third prong of the definition includes an individual who is regarded as having a covered impairment. This third prong includes an individual who has physical or mental impairment that does not substantially limit a major life activity, but that is treated by a covered entity as constituting such a limitation. The prong also includes an individual who has a physical or mental impairment that substantially limits a major activity only as a result of the attitudes of others toward such impairment or has no physical or mental impairment but is treated by a covered entity as having such an impairment.[34]

The Senate ADA Report contained identical language.[35]

The Committee on Education and Labor went on to explain, in crystal clear terms:

A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability.[36]

The Report of this Committee and those of the Senate and the House Judiciary Committee all discussed, as guiding precedent, the decision of the Supreme Court in the Arline case, which, as described above, took an expansive view of the third prong of the definition, and all three quoted the following language from the Arline decision:

Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of other to the impairment.[37]

Clearly, Congress understood that Section 504 did, and intended that the ADA would, protect a person with an impairment, even if it did not substantially limit a major life activity.

Contrary to the Supreme Court's view discussed above, Congress intended that adverse employment action by a single employer in regard to a single job would be sufficient to satisfy the third prong of the ADA definition. The Senate Committee Report pointedly cited as examples of individuals included within the "regarded as" concept "people who are rejected for a particular job for which they apply because of findings of a back abnormality in an x-ray, notwithstanding the absence of any symptoms, or people who are rejected for a particular job solely because they wear hearing aids * * *."[38] The report added:

A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the (negative reactions(of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.[39]

Not only is there no suggestion of a need to show that the individual is limited in connection with other jobs or participation in other programs, but in support of the quoted language the report cited Thornhill v. Marsh and Doe v. Centinela Hospital—two decisions which broadly interpret the third prong, consistent with the Arline decision.[40] This Committee expressed similar sentiments and included the same case citations in its report.[41]

The House Committee on the Judiciary used language that differs somewhat from that in the other reports but to similar effect. It noted that a person who is rejected from a job because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.[42]

To manifest its intent even further, the Judiciary Committee declared:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the (regarded as(test.[43]

Thus, all of the Congressional Committees that commented on the ADA definition of disability understood it to include persons with any degree or type of physical or mental impairment if they were discriminated against because of it; or even if they

had no impairment at all, if the covered entity believed they did and subjected them to discrimination for that reason. Accordingly, H.R. 3195 merely restores, not expands, the coverage of the ADA by protecting persons who are discriminated against because of a physical or mental impairment regardless of severity.

Another possible objection to H.R. 3195 is that it might make people with very minor impairments eligible for "reasonable accommodations," to the serious detriment of employers. This concern reflects a misunderstanding about the entitlement to reasonable accommodations under the ADA. The ADA does not entitle everyone protected from discrimination under the Act to receive a reasonable accommodation, nor does the Act provide a right to covered individuals to any accommodations they may desire.

Reasonable accommodations are required under the act for a reason—to overcome the effects of impairment that will prevent performance of essential job functions or result in denial of job benefits. The ADA regulations issued by the EEOC make this abundantly clear; they declare that the term "reasonable accommodation" means:

Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position."[44]

The EEOC's Interpretive Guidance explains that ([t]he reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated(and adds that those barriers may consist of physical or structural obstacles, rigid schedules, inflexible procedures, or undue limitations in the ways tasks are accomplished.[45]

The nature and function of reasonable accommodation mean that a person cannot qualify for one unless he or she can show that a physical or mental impairment prevents the performance of an essential job function. Unless the impairment has such an effect, there is no reason for an accommodation. Accordingly, fears that people having very minor impairments will be able to demand accommodations willy-nilly is totally unfounded. Minor impairments will seldom, if ever, prevent performance of essential employment functions.

Even if a person could show that a minor impairment did somehow preclude performance of an essential function of the job, that would still not mean that the person could obtain some extravagant accommodation. The process of deciding upon and rendering accommodation is largely within the auspices of employers.

The EEOC's Interpretive Guidance and the ADA committee reports specified a process that covered entities should follow when determining what type of accommodation ought to be provided in a particular situation. The reports of this Committee and that of the Senate Labor and Human Resources declared in identical language that:

The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.[46]

If initial discussions between the employer and the employee or applicant do not readily disclose what accommodation is called for, the EEOC recommends that an employer undertake a four-step process:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[47]

The first step, analyzing the job, involves examining the actual job duties and determining the true purpose or object of the job and identifying the essential functions that an accommodation must enable the individual with a disability to perform.[48] The ADA committee reports refer to this step as "identifying and distin-

guishing between essential and nonessential job tasks and aspects of the work environment of the relevant position(s)."[49] The second step, ascertaining the limitations imposed by the disability and how a reasonable accommodation might overcome them, seeks to identify the precise barrier to the employment opportunity that needs to be addressed by an accommodation.[50]

The third step, identifying possible accommodations and assessing their effectiveness, begins with suggestions of accommodations by the individual needing accommodation and may also involve consultations with vocational rehabilitation personnel, the EEOC, or disability constituent organizations.[51] Assessing the effectiveness of various possible accommodations includes considering the likely success of each potential accommodation in assisting the individual to perform the essential functions of the position, the reliability of the accommodation, and whether it can be provided in a timely manner.[52]

The fourth step is to select and implement an appropriate accommodation. Where more than one accommodation will enable the individual with a disability to perform the essential functions of the position, his or her preference should be given primary consideration, but the employer retains the ultimate discretion to choose between effective accommodations and may choose the one that is less expensive or easier to provide.[53]

At each of these steps, employers are in the driver's seat, although they are definitely required to consult with the individual seeking the accommodation. Employers will certainly be able to say no to unjustified or excessive requested accommodations. And ultimately the employer can, if necessary, invoke the ADA's defense against having to provide accommodations that result in an undue hardship. Thus, in the highly unlikely hypothetical situation in which a person could demonstrate that a minor impairment would somehow prevent performance of an essential job function, the employer would be fully within its rights to select a realistic and proportionate accommodation.

H.R. 3195 will not cause a problem of accommodations for minor impairments. Nor will it enlarge the ADA's coverage beyond that intended when the law was enacted. The bill's approach to restoring the definition of disability is well-designed to undo the damage wrought by the courts' constricted interpretation of ADA protection. I hope that this Committee will advance this legislation promptly to achieve what the Committee intended when it voted 35-0 to report out the ADA in 1989.

Thank you very much for this opportunity to provide input to the Committee on this highly important subject.

APPENDIX A.—SAMPLING OF CASES IN WHICH PLAINTIFFS HAVING SIGNIFICANT IMPAIRMENTS WERE UNSUCCESSFUL IN DEMONSTRATING THAT THEY WERE PROTECTED BY THE ADA

Amputation: Williams v. Cars Collision Center, LLC, No. 06 C 2105 (N.D. Ill. July 9, 2007).

Asbestosis: Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996).

Asthma: Tangires v. Johns Hopkins Hosp., 79 F.Supp.2d 587, 589 (D.Md.2000)

Back Injury: Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 684 (8th Cir.2003)

Bipolar disorder: Johnson v. North Carolina Dep't of Health and Human Servs., (M.D.N.C. 2006).

Breast cancer (and accompanying mastectomy, chemotherapy, and radiation therapy): Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177, 183 (D.N.H. 2002); Turner v. Sullivan University Systems, Inc., 420 F. Supp. 2d 773, 777 (W.D. Ky. 2006).

Breast cancer (and accompanying mastectomy and chemotherapy): Schaller v. Donelson Air Conditioning Co., 2005 WL 1868769 (M.D. Tenn. Aug. 4, 2005).

Cirrhosis of the liver caused by chronic Hepatitis B: Furnish v. SVI Sys. Inc., 270 F.3d 445 (7th Cir. 2001).

Depression: McMullin v. Ashcroft, 337 F.Supp.2d 1281, 1298-99 (D.Wyo.2004).

Diabetes: Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002).

Epilepsy: Equal Employment Opportunity Comm'n v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001); Todd v. Academy Corp., 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999).

Fractured spine: Williams v. Excel Foundry & Machine, Inc., 489 F.3d 309, 311 (7th Cir. 2007).

Heart disease and diabetes: Epstein v. Kalvin-Miller International, Inc., 100 F. Supp. 2d 222, 223 (S.D.N.Y. 2000).

HIV Infection: Cruz Carrillo v. AMR Eagle, Inc., 148 F.Supp.2d 142, 146 (D.P.R.2001).

Impaired hearing/use of hearing aid: Eckhaus v. Consolidated Rail, Corp., No. Civ. 00-5748 (WGB), 2003 WL 23205042, at *5 (D.N.J. Dec. 24, 2003).
Loss of most vision in one eye: Foore v. City of Richmond, 6 Fed. Appx. 148, 150 (4th Cir. 2001).
Loss of use of right arm: Didier v. Schwan Food Co., 465 F.3d 838 (8th Cir. 2006).
"Mental retardation"—intellectual and developmental disabilities: Littleton v. Wal-Mart Stores, Inc., No. 05-12770, 2007 WL 1379986, at *4 (11th Cir. May 11, 2007)
Multiple sclerosis: Sorensen v. University of Utah Hosp., 194 F.3d 1084, 1089 (10th Cir.1999).
Muscular dystrophy: McClure v. General Motors Corp., 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).
Post-Traumatic Stress Disorder: Rohan v. Networks Presentations LLC, 375 F.3d 266, 277 (4th Cir.2004).
Traumatic brain injury: Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274 (S.D. Ala. 1999).

APPENDIX B

CONGRESS SAID	THE COURTS NOW SAY
''COMPREHENSIVE PROHIBITION OF DISCRIMINATION ON THE BASIS OF DISABILITY''	ELEMENTS OF DEFINITION ''NEED TO BE INTERPRETED STRICTLY TO CREATE A DEMANDING STANDARD FOR QUALIFYING AS 'DISABLED' ''
''DISABILITY SHOULD BE ASSESSED WITHOUT REGARD TO THE AVAILABILITY OF MITIGATING MEASURES''	MITIGATING MEASURES SHOULD BE CONSIDERED IN DETERMINING EXISTENCE OF A DISABILITY
EMPLOYMENT IS A MAJOR LIFE ACTIVITY	EMPLOYMENT MAY NOT BE A MAJOR LIFE ACTIVITY
DENIAL OF A PARTICULAR JOB IS SUFFICIENT TO CONSTITUTE A SUBSTANTIAL LIMITATION IN EMPLOYMENT	THERE MUST BE DENIAL OF A BROAD RANGE OR CLASS OF JOBS TO CONSTITUTE A SUBSTANTIAL LIMITATION
FEDERAL AGENCIES ARE DIRECTED TO ISSUE REGULATIONS FOR CARRYING OUT ADA	REGULATIONS INTERPRETING THE DEFINITION OF DISABILITY ARE OF DOUBTFUL VALIDITY
''MAJOR LIFE ACTIVITIES OF SUCH INDIVIDUAL''	''ACTIVITIES THAT ARE OF CENTRAL IMPORTANCE IN MOST PEOPLE'S DAILY LIVES''
''SUBSTANTIALLY LIMITS''	''PREVENTS OR SEVERELY RESTRICTS''
''REGARDED AS'' PRONG APPLIES TO PERSON DISCRIMINATED AGAINST BASED ON DISABILITY EVEN IF PERSON DOES NOT HAVE SUBSTANTIALLY LIMITING CONDITION	''REGARDED AS'' PRONG SUBJECT TO FIRST PRONG LIMITATIONS, SUCH AS CONSIDERATION OF MITIGATING MEASURES AND REQUIREMENT THAT PERSON BE UNABLE TO PERFORM BROAD RANGE OR CLASS OF JOBS
''REGARDED AS'' PRONG APPLIES TO PERSON TREATED AS HAVING A DISABILITY	''REGARDED AS'' PRONG APPLIES ONLY WHEN EMPLOYER SHOWN TO ''ENTERTAIN MISPERCEPTIONS ABOUT THE INDIVIDUAL'' AND BELIEVES THE PERSON HAS A SUBSTANTIALLY LIMITING IMPAIRMENT
NO MENTION OF DURATION-OF-IMPAIRMENT LIMITATION	''IMPAIRMENT'S IMPACT MUST ALSO BE PERMANENT OR LONG TERM'' TO CONSTITUTE A DISABILITY
HIV, PARAPLEGIA, DEAFNESS, HARD OF HEARING/HEARING LOSS, LUNG DISEASE, BLINDNESS, MENTAL RETARDATION, ALCOHOLISM ARE DISABILITIES	MAYBE SO, MAYBE NOT

APPENDIX C

The following is from the righting the ADA Report of the National Council on Disability (December 2004), PP. 11-27:

Executive Summary

Many Americans with disabilities feel that a series of negative court decisions is reducing their status to that of "second-class citizens," a status that the Americans with Disabilities Act (ADA) was supposed to remedy forever. In this report, the National Council on Disability (NCD), which first proposed the enactment of an ADA

and developed the initial legislation, offers legislative proposals designed to get the ADA back on track. Like a boat that has been blown off course or tipped over on its side, the ADA needs to be "righted" so that it can accomplish the lofty and laudable objectives that led Congress to enact it.

Since President George H.W. Bush signed the ADA into law in 1990, the Act has had a substantial impact. The Act has addressed and prohibited many forms of discrimination on the basis of disability, although implementation has been far from universal and much still remains to be done. In its role in interpreting the ADA, the judiciary has produced mixed results. Led by the U.S. Supreme Court, the courts have made some admirable rulings, giving effect to various provisions of the Act. Unfortunately, however, many ADA court decisions have not been so positive. This report addresses a series of Supreme Court decisions in which the Court has been out of step with the congressional, executive, and public consensus in support of ADA objectives, and has taken restrictive and antagonistic approaches toward the ADA, resulting in the diminished civil rights of people with disabilities. In response to the Court's damaging decisions, this report seeks to document and explain the problems they create and advance legislative proposals to reverse their impact. NCD has developed more extensive and detailed analyses of these issues in a series of papers published under the title Policy Brief Series: Righting the ADA Papers. The papers can be found at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm*.

In an effort to return the ADA to its original course, this report offers a series of legislative proposals designed to do the following: (1) reinstate the scope of protection the Act affords, (2) restore certain previously available remedies to successful ADA claimants, and (3) repudiate or curtail certain inappropriate and harmful defenses that have been grafted onto the carefully crafted standards of the ADA.

As this report was going to press, the Supreme Court issued its decision in the case of Tennessee v. Lane, in which the Court upheld provisions of Title II of the ADA, as applied, to create a right of access to the courts for individuals with disabilities. The Lane ruling certainly merits additional study, and NCD expects to issue future analyses of the decision and the questions it leaves open. This report does not attempt to address such issues.

The body of the report at times discusses alternative legislative approaches to some of the problems it addresses. NCD has chosen, however, to consolidate its preferred solutions to the various problems into a single draft bill. The following represent the specific legislative proposals made by NCD at this time for "righting the ADA," first described in a Section-by-Section Summary and then presented as a proposed "ADA Restoration Act of 2004."

The ADA Restoration Act of 2004: Section-by-Section Summary

Section 1—Short Title

This section provides that the law may be cited as The ADA Restoration Act of 2004 and conveys the essence of the proposal's thrust, which is not to proffer some new, different rendition of the ADA but, rather, to return the Act to the track that Congress understood it would follow when it enacted the statute in 1990. The title echoes that of the Civil Rights Restoration Act of 1987, which was passed to respond to and undo the implications of a series of decisions by the Supreme Court, culminating in Grove City College v. Bell, which had taken a restrictive view of the phrase "program or activity" in defining the coverage of various civil rights laws applicable to recipients of federal financial assistance. As with that law, The ADA Restoration Act would "restore" the law to its original congressionally intended course.

Section 2—Findings and Purposes

Subsection (a) presents congressional findings explaining the reasons that an ADA Restoration Act is needed. It describes how certain decisions of the Supreme Court have weakened the ADA by narrowing the broad scope of protection afforded in the Act, eliminating or narrowing remedies available under the Act, and recognizing some unnecessary defenses that are inconsistent with the Act's objectives.

Subsection (b) provides a statement of the overall purposes of the ADA Restoration Act, centering on reinstating original congressional intent by restoring the broad scope of protection and the remedies available under the ADA, and negating certain inappropriate defenses that Court decisions have recognized.

Section 3—Amendments to the ADA of 1990

This section, and its various subsections, includes the substantive body of the ADA Restoration Act, which amends specific provisions of the ADA.

Subsection (a) revises references in the ADA to discrimination "against an individual with a disability" to refer instead to discrimination "on the basis of dis-

ability." This change recognizes the social conception of disability and rejects the notion of a rigidly restrictive protected class.

Subsection (b) revises certain of the congressional findings in the ADA. Paragraph (1) revises the finding in the ADA that provided a rough estimate of the number of people having actual disabilities, a figure that a majority of the Supreme Court misinterpreted as evidence that Congress intended the coverage of the Act to be narrowly circumscribed. The revised finding stresses that normal human variation occurs across a broad spectrum of human abilities and limitations, and makes it clear that all Americans are potentially susceptible to discrimination on the basis of disability, whether they actually have physical or mental impairments and regardless of the degree of any such impairment. Paragraph (2) revises the wording of the ADA finding regarding the history of purposeful unequal treatment suffered by people with certain types or categories of disabilities. Paragraphs (3) and (4) add a new finding that incorporates a social concept of disability and discrimination on the basis of disability.

Subsection (c) revises some of the definitions used in the ADA. Paragraph (1) amends the definition of the term "disability" to clarify that it shall not be construed narrowly and legalistically by drawing fine technical distinctions based on relative differences in degrees of impairment, instead of focusing on how the person is perceived and treated. This approach rejects the medical model of disability that categorizes people because of their supposedly intrinsic limitations, without reference to social context and socially imposed barriers, and to individual factors such as compensatory techniques and personal strengths, goals, and motivation. The second part, headed "Construction," invalidates the Supreme Court's rulings in Sutton v. United Airlines, Murphy v. United Parcel Service, and Albertson's, Inc. v. Kirkingburg by clarifying that mitigating measures, such as medications, assistive devices, and compensatory mechanisms shall not be considered in determining whether an individual has a disability.

Paragraphs (2) and (3) add definitions of the terms "physical or mental impairment," "perceived physical or mental impairment," and "record of physical or mental impairment" to the statutory language. These definitions are derived from current ADA regulations, and were recommended for inclusion in NCD's original 1988 version of the ADA.

Subsection (d) clarifies that the ADA's "direct-threat" defense applies to customers, clients, passersby, and other people who may be put at risk by workplace activities, but, contrary to the Court's ruling in Chevron U.S.A. Inc. v. Echazabal, not to the worker with a disability. The latter clarification returns the scope of the direct-threat defense to the precise dimensions in which it was established in the express language of the ADA as enacted.

Subsection (e) restores the carefully crafted standard of undue hardship as the sole criterion for determining the reasonableness of an otherwise effective accommodation.

Subsection (f) clarifies that ADA employment rights of individuals with disabilities, including the opportunity to be reassigned to a vacant position as a reasonable accommodation, are not to take a backseat to rights of other employees under a seniority system or collective bargaining agreement. In addition, covered entities are directed to incorporate recognition of ADA rights in future collective bargaining agreements.

Subsection (g) adds new subsections to the Remedies provision of Title II of the ADA. The first restores the possibility of recovering punitive damages available to ADA plaintiffs who prove they have been subjected to intentional discrimination, an opportunity that was foreclosed by the Supreme Court in Barnes v. Gorman. The second added subsection underscores the fact that other remedies, but not punitive damages, are available to ADA plaintiffs who prove that they have been subjected to "disparate impact" discrimination. The third new subsection establishes that intentionally refusing to comply with certain requirements of Title II of the ADA and the Rehabilitation Act, including accessibility requirements, auxiliary aids requirements, communication access requirements, and the prohibition on blanket exclusions in eligibility criteria and qualification standards, constitutes engaging in unlawful intentional discrimination.

Subsection (h) provides that the provisions of the Act are to be liberally construed to advance its remedial purposes. To counter the Court's ruling that eligibility for ADA protection should be "interpreted strictly to create a demanding standard for qualifying" (Toyota Motor Manufacturing, Kentucky, Inc. v. Williams), another provision declares that the elements of the definition of "disability" are to be interpreted broadly. In addition, the subsection provides that "discrimination" is to be construed broadly to include the various forms in which discrimination on the basis of disability occurs. The subsection adds provisions that direct the attorney general,

the Equal Employment Opportunity Commission, and the Secretary of Transportation to issue regulations implementing the "ADA Restoration Act," and establish that properly issued ADA regulations are entitled to deference in administrative and judicial proceedings.

Subsection (i) corrects the ruling of the Supreme Court in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, which rejected the catalyst theory in determining eligibility of ADA plaintiffs to attorney's fees, by reinstating the catalyst theory.

Section 4—Effective Date

This section provides that the Act and the amendments it makes shall take effect upon enactment, and shall apply to cases that are pending when it is enacted or that are filed thereafter.

The ADA Restoration Act of 2004: A Draft Bill

To amend the Americans with Disabilities Act (ADA) of 1990 to restore the broad scope of protection and the remedies available under the Act, and to clarify the inconsistency with the Act of certain defenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1.—Short Title.

This Act may be cited as the "ADA Restoration Act of 2004."

Section 2.—Findings and Purposes.

(a) Findings.—The Congress finds that——

(1) in enacting the ADA of 1990, Congress intended that the Act "establish a clear and comprehensive prohibition of discrimination on the basis of disability," and provide broad coverage and vigorous and effective remedies without unnecessary and obstructive defenses;

(2) some decisions and opinions of the Supreme Court have unduly narrowed the broad scope of protection afforded in the ADA, have eliminated or narrowed remedies meant to be available under the Act, and have recognized certain defenses that run counter to the purposes of the Act;

(3) in enacting the ADA, Congress recognized that physical and mental impairments are natural and normal parts of the human experience that in no way diminish a person's right to fully participate in all aspects of society, but Congress also recognized that people with physical or mental impairments having the talent, skills, abilities, and desire to participate in society are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(4) Congress modeled the ADA definition of disability on that of Section 504 of the Rehabilitation Act of 1973, which had to the time of the ADA's enactment been construed broadly to encompass both actual and perceived limitations, and limitations imposed by society; the broad conception of the definition had been underscored by the Supreme Court's statement in its decision in School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987), that the Section 504 definition "acknowledged that society's myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment;"

(5) in adopting the Section 504 concept of disability in the ADA, Congress understood that adverse action based on a person's physical or mental impairment might have nothing to do with any limitations caused by the impairment itself;

(6) instead of following congressional expectations that disability would be interpreted broadly in the ADA, the Supreme Court has ruled, in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002), that the elements of the definition "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and, consistent with that view, has narrowed the application of the definition in various ways;

(7) contrary to explicit congressional intent expressed in the ADA committee reports, the Supreme Court has eliminated from the Act's coverage individuals who have mitigated the effects of their impairments through the use of such measures as medication and assistive devices;

(8) contrary to the expectations of Congress in enacting the ADA, the Supreme Court has rejected the "catalyst theory" in the awarding of attorney's fees and litigation costs under the Act, and has ruled that punitive damages may not be awarded in private suits under Section 202 of the Act;

(9) contrary to congressional intent and the express language of the ADA, the Supreme Court has recognized the defense that a worker with a disability could pose a direct threat to her or his own health or safety;

(10) contrary to carefully crafted language in the ADA, the Supreme Court has recognized a reasonableness standard for reasonable accommodation distinct from the undue hardship standard that Congress had imposed;

(11) contrary to congressional intent, the Supreme Court has made the reasonable accommodation rights of workers with disabilities under the ADA subordinate to seniority rights of other employees; and

(12) legislation is necessary to return the ADA to the breadth of coverage, the array of remedies, and the finely calibrated balance of standards and defenses Congress intended when it enacted the Act.

(b) Purposes.—The purposes of this Act are——

(1) to effect the ADA's objectives of providing "a clear and comprehensive national mandate for eliminating discrimination" and "clear, strong, and enforceable standards addressing discrimination" by restoring the broad scope of protection and the remedies available under the ADA, and clarifying the inconsistency with the Act of certain defenses;

(2) to respond to certain decisions of the Supreme Court that have narrowed the class of people who can invoke the protection from discrimination the ADA provides, reduced the remedies available to successful ADA claimants, and recognized or permitted defenses that run counter to ADA objectives;

(3) to reinstate original congressional intent regarding the definition of disability by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived impairment, or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning disability or particular disabilities, or by the failure to remove societal and institutional barriers;

(4) to restore the full array of remedies available under the ADA;

(5) to ensure that the rights afforded by the ADA are not subordinated by paternalistic and misguided attitudes and false assumptions about what a person with a physical or mental impairment can do without endangering the individual's own personal health or safety;

(6) to ensure that the rights afforded by the ADA are not subordinated to seniority rights of other employees in regard to an otherwise vacant job position to which the individual requires transfer as a reasonable accommodation; and

(7) to ensure that the carefully crafted standard of undue hardship as a limitation on reasonable accommodation rights afforded by the ADA shall not be undermined by recognition of a separate and divergent reasonableness standard.

Section 3.—Amendments to the ADA of 1990.

(a) Discrimination.—References in the ADA to discrimination "against an individual with a disability" or "against individuals with disabilities" shall be replaced by references to discrimination "on the basis of disability" at each and every place that such references occur.

(b) Findings.—Section 2(a) of the ADA of 1990 (42 U.S.C. 12101(a)) is amended——

(1) by striking the current subsection (1) and replacing it with the following:

"(1) though variation in people's abilities and disabilities across a broad spectrum is a normal part of the human condition, some individuals have been singled out and subjected to discrimination because they have conditions considered disabilities by others; other individuals have been excluded or disadvantaged because their physical or mental impairments have been ignored in the planning and construction of facilities, vehicles, and services; and all Americans run the risk of being discriminated against because they are misperceived as having conditions they may not actually have or because of misperceptions about the limitations resulting from conditions they do have;"

(2) by striking the current subsection (7) and replacing it with the following:

"(7) some groups or categories of individuals with disabilities have been subjected to a history of purposeful unequal treatment, have had restrictions and limitations imposed upon them because of their impairments, and have been relegated to positions of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society; classifications and selection criteria that are based on prejudice, ignorance, myths, irrational fears, or stereotypes about disability should be strongly disfavored, subjected to skeptical and meticulous examination, and permitted only for highly compelling reasons;"

(3) by striking the period (".") at the end of the current subsection (9) and replacing it with "; and"; and

(4) by adding after the current subsection (9) the following new subsection:

"(10) discrimination on the basis of disability is the result of the interaction between an individual's actual or perceived impairment and attitudinal, societal, and institutional barriers; individuals with a range of actual or perceived physical or mental impairments often experience denial or limitation of opportunities resulting from attitudinal barriers, including negative stereotypes, fear, ignorance, and prejudice, in addition to institutional and societal barriers, including architectural, transportation, and communication barriers, and the refusal to make reasonable modifications to policies, practices, or procedures, or to provide reasonable accommodations or auxiliary aids and services."

(c) Definitions.—Section 3 of the ADA of 1990 (42 U.S.C. 12102) is amended——

(1) by striking the current subsection (2) and replacing it with the following:

"(2) Disability.

"(A) In General.—The term "disability" means, with respect to an individual——

(i) a physical or mental impairment;

(ii) a record of a physical or mental impairment; or

(iii) a perceived physical or mental impairment.

"(B) Construction.——

(i) The existence of a physical or mental impairment, or a record or perception of a physical or mental impairment, shall be determined without regard to mitigating measures;

(ii) The term "mitigating measure" means any treatment, medication, device, or other measure used to eliminate, mitigate, or compensate for the effect of an impairment, and includes prescription and other medications, personal aids and devices (including assistive technology devices and services), reasonable accommodations, or auxiliary aids and services; and

(iii) actions taken by a covered entity because of a person's use of a mitigating measure or because of a side effect or other consequence of the use of such a measure shall be considered 'on the basis of disability.'"

(2) by redesignating the current subsection (3) as subsection (6); and

(3) by adding after the current subsection (2) the following new subsections:

"(3) Physical or mental impairment.—The term "physical or mental impairment" means——

"(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"(4) Record of physical or mental impairment.—The terms "record of a physical or mental impairment" or "record of impairment" means having a history of, or having been misclassified as having, a physical or mental impairment.

"(5) Perceived physical or mental impairment.—The terms "perceived physical or mental impairment" or "perceived impairment" mean being regarded as having or treated as having a physical or mental impairment."

(d) Direct threat.—Subsection 101(3) of the ADA of 1990 (42 U.S.C. 12111(3)) is amended——

(1) by redesignating the current definition as part (A)—In general; and

(2) by adding after the redesignated part (A) a new part (B) as follows:

"(B) Construction.—The term "direct threat" includes a significant risk of substantial harm to a customer, client, passerby, or other person that cannot be eliminated by reasonable accommodation. Such term does not include risk to the particular applicant or employee who is or is perceived to be the source of the risk."

(e) Reasonable accommodation.—Subsection 101(9) of the ADA of 1990 (42 U.S.C. 12111(9)) is amended——

(1) by redesignating the current definition as part (A)—Example s of types of accommodations.; and

(2) by adding after the redesignated part (A) a new part (B) as follows:

"(B) Reasonableness.—A reasonable accommodation is a modification or adjustment that enables a covered entity's employee or applicant with a disability to enjoy equal benefits and privileges of employment or of a job application, selection, or training process, provided that——

(i) the individual being accommodated is known by the covered entity to have a mental or physical limitation resulting from a disability, is known by the covered entity to have a record of a mental or physical limitation resulting from a disability, or is perceived by the covered entity as having a mental or physical limitation resulting from a disability;

(ii) without the accommodation, such limitation will prevent the individual from enjoying such equal benefits and privileges; and

(iii) the covered entity may establish, as a defense, that a particular accommodation is unreasonable by demonstrating that the accommodation would impose an undue hardship on the operation of the business of such covered entity."

(f) Nonsubordination.—Section 102 of the ADA of 1990 (42 U.S.C. 12112) is amended by adding after the current subsection (c) a new subsection as follows:

"(d) Nonsubordination.—A covered entity's obligation to comply with this Title is not affected by any inconsistent term of any collective bargaining agreement or seniority system. The rights of an employee with a disability under this Title shall not be subordinated to seniority rights of other employees in regard to an otherwise vacant job position to which the individual with a disability requires transfer as a reasonable accommodation. Covered entities under this Title shall include recognition of ADA rights in future collective bargaining agreements."

(g) Remedies.—Section 203 of the ADA of 1990 (42 U.S.C. 12133) is amended——

(1) by redesignating the current textual provision as subsection (a)—In general ., and adding at the beginning of the text of subsection (a) the phrase "Subject to subsections (b), (c), and (d),"; and

(2) by adding, after the redesignated subsection (a), new subsections as follows:

"(b) Claims based on proof of in tent ional discrimination.—In an action brought by a person aggrieved by discrimination on the basis of disability (referred to in this section as an 'aggrieved person') under Section 202 of this Act, or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), against an entity covered by those provisions who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under those sections (including their implementing regulations), an aggrieved person may recover equitable and legal relief (including compensatory and punitive damages) and attorney's fees (including expert fees) and costs.

"(c) Claims based on disparate impact .—In an action brought by an 'aggrieved person' under Section 202 of this Act, or under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), against an entity covered by those provisions who has engaged in unlawful disparate impact discrimination prohibited under those sections (including their implementing regulations), an aggrieved person may recover equitable relief and attorney's fees (including expert fees) and costs.

"(d) Construction.—In addition to other actions that constitute unlawful intentional discrimination under subsection (b), a covered entity engages in such discrimination when it intentionally refuses to comply with requirements of Section 202 of this Act, or of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or of their implementing regulations, by willfully, unlawfully, materially, and substantially——

(1) failing to meet applicable program and facility accessibility requirements for existing facilities, new construction and alterations;

(2) failing to furnish appropriate auxiliary aids and services;

(3) failing to ensure effective communication access; or

(4) imposing discriminatory eligibility criteria or employment qualification standards that engender a blanket exclusion of individuals with a particular disability or category of disability."

(h) Construction.—Section 501 of the ADA of 1990 (42 U.S.C. 12201) is amended by adding after the current subsection (d) the following new subsections:

"(e) Supportive construction.—In order to ensure that this Act achieves its objective of providing a comprehensive prohibition of discrimination on the basis of disability, discrimination that is pervasive in America, the provisions of the Act shall be flexibly construed to advance its remedial purposes. The elements of the definition of "disability" shall be interpreted broadly to encompass within the Act's protection all persons who are subjected to discrimination on the basis of disability. The term "discrimination" shall be interpreted broadly to encompass the various forms in which discrimination on the basis of disability occurs, including blanket exclusionary policies based on physical, mental, or medical standards that do not constitute legitimate eligibility requirements under the Act; the failure to make a reasonable accommodation, to modify policies and practices, and to provide auxiliary aids and services, as required under the Act; adverse actions taken against individuals based on actual or perceived limitations; disparate, adverse treatment of individuals based on disability; and other forms of discrimination prohibited in the Act.

"(f) Regulations implementing the ADA Restoration Act.—Not later than 180 days after the date of enactment of The ADA Restoration Act of 2004, the attorney general, the Equal Employment Opportunity Commission, and the Secretary of Transportation shall promulgate regulations in an accessible format that implement the provisions of the ADA Restoration Act.

"(g) Deference to regulations.—Duly issued federal regulations for the implementation of the ADA, including provisions implementing and interpreting the definition

of disability, shall be entitled to deference by administrative bodies or officers and courts hearing any action brought under the Act."

(i) Attorney's fees.—Section 505 of the ADA of 1990 (42 U.S.C. 12205) is amended by redesignating the current textual provision as subsection (a)—In general, and adding additional subsections as follows:

"(b) Definition of prevailing party—The term 'prevailing party' includes, in addition to a party who substantially prevails through a judicial or administrative judgment or order, or an enforceable written agreement, a party whose pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.

"(c) Relationship to other laws——

(1) Special criteria for prevailing defendants—If any other Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, or of any judicial or administrative rule, which addresses the recovery of attorney's fees, requires a defendant, but not a plaintiff, to satisfy certain different or additional criteria to qualify for the recovery of attorney's fees, subsection (b) shall not affect the requirement that such defendant satisfy such criteria.

"(2) Special criteria unrelated to prevailing—If an Act, ruling, regulation, interpretation, or rule described in paragraph (1) requires a party to satisfy certain criteria, unrelated to whether or not such party has prevailed, to qualify for the recovery of attorney's fees, subsection (b) shall not affect the requirement that such party satisfy such criteria."

Section 4.—Effective Date.

This Act and the amendments made by this Act shall take effect upon enactment and shall apply to any case pending or filed on or after the date of enactment of this Act.

ENDNOTES

[1] Courts Continuing Narrow Interpretation of "Disability," Case Study Shows, DISABILITY COMPLIANCE BULL. Mar. 27, 1997, at 10. See also, Amy L. Allbright, ABA Special Feature: 2003 Employment Decisions Under the ADA Title I—Survey Update, 28 MENTAL & PHYSICAL L. REP. 319, 320 (2004) ("A clear majority of the employer wins in this survey were due to [the] employees' failure to show that they had a protected disability.").

[2] 42 U.S.C. § 12101.

[3] National Council on Disability, Equality of Opportunity : The Making of the Americans with Disabilities Act at 184 (1997).

[4] Statement by Vice President Al Gore, December 14, 1998, quoted in the Presidential Task Force on Employment of Adults with Disabilities, Working on Behalf of Americans with Disabilities: President Clinton and Vice President Gore: Goals and Accomplishments at 17.

[5] George W. Bush, Presidential Proclamation on the Anniversary of the Americans with Disabilities Act, 2002 (July 26, 2002).

[6] NCD, Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act at 1 (2000).

[7] NCD, Voices of Freedom: America Speaks Out on the ADA at 26 (1995).

[8] NCD, Voices of Freedom: America Speaks Out on the ADA at 26 (1995).

[9] George W. Bush, Presidential Proclamation on the Anniversary of the Americans with Disabilities Act, 2002 (July 26, 2002).

[10] See Mary Crossley, "The Disability Kaleidoscope," 74 Notre Dame Law Review 621, 622 (1999).

[11] Tudyman v. United Airlines, 608 F. Supp. 739 (C.D.Cal. 1984).

[12] H.R. Rep. No. 101-485, pt. 3, at 30 (1990).

[13] Morrow v. City of Jacksonville, 941 F. Supp. 816, 823 n. 3 (E.D.Ark. 1996).

[14] See, e.g., Stone v. St. Joseph's Hospital of Parkersburg, 538 S.E.2d 389, 400-402, 404 (W.Va. 2000), in which the Supreme Court of West Virginia, after acknowledging that the state law had been amended in 1989 to adopt the federal three-prong definition of disability, chose to reject the "restrictive approach" of federal interpretation of the definition, endorsing an "independent approach * * * not mechanically tied to federal disability discrimination jurisprudence." The court also cited a number of cases from other states that had interpreted the definition of disability more expansively than under federal nondiscrimination laws. Id. at 405 and n. 23. Likewise, in Dahill v. Police Department of Boston, 434 Mass. 233, 748 N.E.2d 956 (2001), the Massachusetts Supreme Judicial Court embraced virtually every argument advanced by disability rights advocates that the United States Supreme Court had rejected in Sutton v. United Airlines, and ruled that mitigating measures should not be considered in determining whether an individual has a "handicap" under Massachusetts antidiscrimination law. According to the Dahill Court, the public policy underlying the antidiscrimination statute supported its interpretation that mitigating measures should be excluded, while embracing the Sutton standard would "exclude[ ] from the statute's protection numerous persons who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of a job." Id. at 240 and n. 10.

[15] See, e.g., Granovsky v. Canada, [2000] 1 S.C.R. 703, in which the Supreme Court of Canada expressly rejected the restrictive approach of the U.S. Supreme Court in Sutton v. United Air-

lines, noted the "ameliorative purpose" and "remedial component" of the disability non-discrimination provision of the Canadian Charter of Rights and Freedoms, and adopted an approach in which the focus is "not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the [defendant] state to either or both of these circumstances." The Court added that it was the alleged discriminatory action "that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any) * * *" Similarly, in Quebec v. Canada, [2000] 1 S.C.R. 665, the Supreme Court of Canada noted that "[h]uman rights legislation is [to be] given a liberal and purposive interpretation," and ruled, "The objectives of the Charter, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer." The Court ruled that "a 'handicap,' therefore, includes ailments which do not in fact give rise to any limitation or functional disability."

[16] Some states, such as California and Rhode Island, have amended their disability non-discrimination statutes to reject federal case law narrowing the scope of individuals protected. Others, such as Connecticut, New Jersey, and New York have never adopted the rigid and stringent concept of "disability" consisting of an "impairment" which "substantially limits" one or more major life activities. For a discussion of state laws that have deviated from the restrictive federal model, see NCD's paper titled Defining "Disability" in a Civil Rights Context: The Courts' Focus on the Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity. Paper No. 6 of NCD's Policy Brief Series: Righting the ADA Papers can be found at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.*

[17] For example, the definition of disability provisions of Australia's Disability Discrimination Act of 1992 (4.(1)) and of Ireland's Employment Equality Act (1998) (2), both of which were adopted after the ADA was enacted, are framed in very broad terms that encompass not only a wide variety of currently existing conditions, but also include any condition that previously existed but no longer does, that "may exist in the future," or that "is imputed to a person."

[18] H.R. Rep. No. 101-485, pt. 2 at 52 (1990).

[19] H.R. Rep. No. 101-485, pt. 3 at 28 (1990).

[20] Todd v. Academy Corporation, 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999).

[21] In light of the courts' failure to appreciate and apply the social model of disability discrimination, NCD's Righting the ADA report suggests that the social model should be made explicit by incorporating it as an additional ADA finding as follows:

Discrimination on the basis of disability is the result of the interaction between an individual's actual or perceived impairment and attitudinal, societal, and institutional barriers; individuals with a range of actual or perceived physical or mental impairments often experience denial or limitation of opportunities resulting from attitudinal barriers, including negative stereotypes, fear, ignorance, and prejudice, in addition to institutional and societal barriers, including architectural, transportation, and communication barriers, and the refusal to make reasonable modifications to policies, practices, or procedures, or to provide reasonable accommodations or auxiliary aids and services.

Id. at 109.

[22] Robert L. Burgdorf Jr. "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILLANOVA LAW REVIEW 409 (1997).

[23] Id. at 534-536 (footnotes omitted).

[24] U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983), at p. 87.

[25] See, for example, National Council on Disability, The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 5, "Negative Media Portrayals of the ADA" at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.*

[26] Accommodating the Spectrum of Individual Abilities, p. 95, n. 17).

[27] Richard K. Scotch, Models of Disability and the Americans with Disabilities Act, 21 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 213, 214-15 (2000).

[28] Linda Hamilton Krieger, Afterword: Socio-Legal Backlash, 21 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 476, 480-81 (2000).

[29] See, for example, National Council on Disability, The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 5, "Negative Media Portrayals of the ADA" at *http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.*

[30] National Council on Disability, Toward Independence, Appendix of Topic Papers (1986) at pp. A-22 to A-23.

[31] Righting the ADA at p. 109.

[32] Id.

[33] Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 194 (2002).

[34] H.R. REP. NO. 101-485, pt. 2, at 53 (1990).

[35] S. REP. NO. 101-116 at 24 (1989).

[36] Id.

[37] H.R. REP. NO. 101-485, pt. 2, at 53 (1990); S. REP. NO. 101-116 at 23-24 (1989); H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

[38] S. REP. NO. 116, 101st Cong., 1st Sess. 24 (1989) (emphasis added).

[39] Id.

[40] Id.

[41] H.R. REP. NO. 101-485, pt. 2, at 53(54 (1990).

[42] H.R. REP. NO. 101-485, pt. 3, at 30 (emphasis added).

[43] Id. at 30(31.
[44] 29 C.F.R. (1630.2(o)(1)(ii) (1993). Similar definitions are provided for accommodations in the job application process and in regard to job benefits and privileges. 29 C.F.R. (1630.2(o)(1)(i) (1993) ("Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires"); 29 C.F.R. (1630.2(o)(1)(iii) (1993) ("Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.").
[45] 29 C.F.R. 414(15 (app. to pt. 1630) (commentary on (1630.9) (1993).
[46] H.R. REP. NO. 101-485 pt. 2, at 65 (1990); S. REP. NO. 101-116 at 34 (1989).
[47] Id.
[48] Id.
[49] H.R. REP. NO. 101-485 pt. 2, at 66 (1990); S. REP. NO. 101-116 at 35 (1989).
[50] 29 C.F.R. 414 (app. to pt. 1630) (commentary on (1630.9) (1993).
[51] Id.
[52] 29 C.F.R. 414 (app. to pt. 1630) (commentary on (1630.9) (1993); H.R. REP. NO. 101-485 pt. 2, at 66 (1990); S. REP. NO. 101-116 at 35 (1989).
[53] 29 C.F.R. 414 (app. to pt. 1630) (commentary on (1630.9) (1993); H.R. REP. NO. 101-485 pt. 2, at 66-67 (1990); S. REP. NO. 101-116 at 35 (1989).

Mr. ANDREWS. Thank you, and I am certain in the dialogue with the members there will be those opportunities.

I thank each of the four of you for excellent testimony.

Mr. McClure is not working as an electrician today at General Motors because the court found he wasn't disabled. That is the reason. A person with muscular dystrophy is not disabled. Mr. Fram, you have acknowledged that people who should have been protected by the law aren't, and that is a problem. I appreciate that. It is a good point for us to start our discussion. I want to explore the concerns that you have raised about the remedial measures in Mr. Hoyer's legislation.

Your organization is thoroughly involved, you said, in training and teaching people how to comply with this law. Is that correct?

Mr. FRAM. Yes.

Mr. ANDREWS. And you have done extensive writing. You said 23 editions of your book on this subject?

Mr. FRAM. Yes.

Mr. ANDREWS. That is very impressive, and I am sure that as part of that you have done extensive research on the case law interpreting the ADA and on similar statutes around the country. Is that correct?

Mr. FRAM. Mostly the ADA.

Mr. ANDREWS. Okay. On page three of your testimony, you talk about the specter of people raising claims because of chipped tooth, the flu, broken finger. And you indicate that that is the plethora of litigation that would flow if Mr. Hoyer's bill were to be adopted. In my state of New Jersey for nearly four decades we have had a very broad definition of "disability." It does not limit the definition by substantiality or any of the other criteria that you talked about. Are you aware of any cases brought under the New Jersey statute by someone who claims that a chipped tooth is a disability?

Mr. FRAM. I haven't researched the New Jersey statute.

Mr. ANDREWS. Your answer is you don't know because you haven't researched it?

Mr. FRAM. The New Jersey statute.

Mr. ANDREWS. Okay. California in 2000 adopted a very broad definition of "disability" that to my understanding does not have limitations based on substantiality. Are there any data that would indicate that there has been this flood of litigation from California?

Mr. FRAM. California actually still does have—it has to limit a major life activity. So they haven't totally dropped the——

Mr. ANDREWS. But the California definition is much broader than the definition of "disability" in the federal statute, isn't it?

Mr. FRAM. Absolutely.

Mr. ANDREWS. Well, there is one piece of data, and I wonder if you would dispute it, that the percentage of discrimination claims owing to disability in California is the same as it was in the total universe before this new definition. In other words, X percent of discrimination claims were based on disability before this law, and it is still about X percent.

Now, if there was going to be this flood of litigation because of a broader definition, wouldn't disability claims make up a larger share of employment claims in California? Wouldn't that have happened?

Mr. FRAM. I honestly don't think there would be a flood of litigation. The problem is——

Mr. ANDREWS. Contrary to what you just said?

Mr. FRAM. I don't think there would be a flood of litigation, but what there would now be is a brand new responsibility for employers to have to provide reasonable accommodation to somebody who comes in and says, "I have a stomach ache; I don't want to go to that meeting because I have a stomach ache." Or, "I need time off because of my chipped tooth."

Mr. ANDREWS. But your position, I think, then assumes that employers would just do that, not dispute it and there wouldn't be more claims resulting in court. Isn't that a little counter-intuitive?

Mr. FRAM. Smart employers do the right thing. The question is, would this create a federal requirement that an employer has to let somebody out of a meeting because of a stomach ache?

Mr. ANDREWS. I guess I just respectfully disagree with your argument. It seems to me that your premise today is that a broader definition of "disability" under federal law will create more claims. And we have a broader definition of "disability" under California law and it didn't.

Mr. Imparato, do you have some comment on what California and New Jersey have done?

Mr. IMPARATO. Well, I appreciate the point that you are making. The ADA definition was taken from the Rehab Act. A number of states have had broader definitions of "disability." But the point is that the ADA creates a floor. What we are trying to do with the ADA Restoration Act is reestablish a floor that protects people with epilepsy, diabetes and a whole host of conditions that have been interpreted out. We are not aware of more litigation or percentage-wise more litigation in states like New Jersey, California, Maine, Washington state, that have broader protection.

Mr. ANDREWS. Mr. McClure, what is it that General Motors needed to do for you so that you could have done that job as an electrician really well? What did they need to do?

Mr. MCCLURE. They wouldn't have had to buy nothing. They already had ladders there. They had all the lifts, everything. All they had to do was put me to work.

Mr. ANDREWS. Didn't they actually test you, sort of on the job, to do the job you were supposed to do and you passed the test and got the job?

Mr. MCCLURE. Yes, sir.

Mr. ANDREWS. Sounds pretty reasonable to me.

I thank the witnesses, and I would at this time turn to the ranking member, Mr. McKeon, for questioning.

Mr. MCKEON. Thank you, Mr. Chairman.

First, Mr. Fram, did you have something more that you wanted to add about the response to Mr. Andrews's question about New Jersey?

Mr. FRAM. No. I did want to add that, of course, there are all these other parts as well, like the disability-related questions in medical exams. I mean, in the real workplace, what supervisor doesn't say to an employee, "how did you break your leg," if the person comes in. And I don't think there can be any dispute that changing the definition to mean "any impairment" would make a question like that flatly illegal.

Now, question—Is that going to lead to litigation? Who knows whether it is going to lead to litigation. So my point is, whether or not there is going to be a plethora of litigation, should it be a federal requirement, should it be a federal prohibition that a supervisor couldn't say, "do you have a cold." Is it a federal requirement that an employee would have to give somebody with an ear ache time off.

Now, of course, there is already the Family and Medical Leave Act which covers serious health conditions. This would essentially make the Family and Medical Leave Act irrelevant for half of it, anyway—the part about the person's serious health condition.

Mr. MCKEON. I would like to ask—I am not an attorney, and I know Mr. Andrews is. I know several of you are, and you could probably debate this a long, long time. But what I would like to ask is, I mean it seems incredulous to me that Mr. McClure could be told they can't hire him because he has a disability that precludes him from doing the job, and then when he sues on that basis, they say, no, you don't have a disability.

How would you gentlemen, as attorneys, fix that without having some unintended consequences that would go so far as some of the things you are talking about, Mr. Fram?

Mr. BURGDORF. I think you fix it by going with the original legislative history, which says that *Sutton* is wrong. The Supreme Court was wrong in *Sutton* and *Murphy* and *Kirkingburg*.

Mr. MCKEON. My understanding is, not being an attorney, that the Supreme Court is the final word on the law.

Mr. BURGDORF. But you get to make the law. [Laughter.]

Mr. MCKEON. So we write a law, and I have seen unintended consequences come from laws that we have passed. So you would suggest we rewrite the law and you would have some suggestions as to how we would do it without incurring those unintended consequences. Dr. Burgdorf?

Mr. BURGDORF. I think it is a great question. As I understand Mr. Fram's testimony, he is sympathetic and understanding about the issue of mitigating measures, but he would like to limit the correction to that. For many people, including Mr. McClure, it is not

going to help him. This is not a mitigating measures case, and many of the cases are not mitigating measures cases.

Mr. MCKEON. How would you fix it?

Mr. BURGDORF. That is the proposal that I am trying to explain and defend, H.R. 3195. I think it is a very good fix.

Mr. MCKEON. It is a perfect bill and no problems with it?

Mr. BURGDORF. No, not at all. In fact, if we can't get people like you to agree or to buy into the approach that the bill is proposing, then we are not going to get anywhere. But I think properly explained, it is a good bill. Could it use some tinkering? Sure.

Mr. MCKEON. Let me tell you my concern. We have had some bills that have come before us in this committee last year where we really tried to make some little tinkering changes. For instance, one of them was card check. We had 15 amendments, and I think some of them were very good amendments. We did not get one Democratic vote. We did not change one word in that bill.

Now, it is not becoming law. They can't get it through the Senate and the president wouldn't sign it. But my concern is, given the environment that we have here now—I mean, to me it is ludicrous that we can't fix a problem like this, that my real concern is as we go through this process, this bill will go exactly the way it is written right now, even though you would say it is probably not perfect, and you are here as a witness for the bill. You would maybe make some tinkering changes. I would like to know what those are because I would like to offer them as an amendment when we get to that process.

I would hope that there would be some real working together, rather than just saying, oh, you know, this is on a fast track and it is going to go and that is the way it is. And then what will happen is it probably will not become law, and we will end up with more of Mr. McClure's situations, and I don't think any of us want that.

I don't think any of us want to have that kind of problem. He should be working now, as far as I am concerned, for GM. It is his life-long ambition. He could do the job. And to be told that he can't do it because he is disabled, and then when he takes it to court, the highest court in the land turns it down because he is not disabled. It is crazy.

But I have real concern that there won't be a desire to work together to really tinker around the edges to make it—I don't think we would get a perfect bill—but to make it a better bill.

Mr. BURGDORF. One of the things that I have always been surprised and delighted about is how very bipartisan the ADA and similar legislation has been in the Congress. The ADA legislation passed every one of the five substantive committees and on the floor, never by a vote of less than 90 percent in favor. It is incredibly bipartisan.

Mr. MCKEON. I would still like to have your suggestions to tinker around the edges to make it better, and then see if we are able to do that.

Mr. ANDREWS. The gentleman's time has expired.

I would say to my friend, the ranking member, that you and Mr. Miller worked together with Mr. Castle and Ms. Woolsey and others, and Mr. Kildee, to produce the Head Start bill that I think was

excellent. We all worked together to produce a genetic discrimination bill which passed the House overwhelmingly. It has run into some issues in the Senate, but I think we can work together on that. And we can do the same, and I hope that we would on this.

Mr. MCKEON. Those are some great examples. I could list a whole bunch that——

Mr. ANDREWS. Sure. I would say for the record that the only perfect bills are those reported out by the Health Subcommittee. [Laughter.]

The chair recognizes the gentleman from Michigan, Mr. Kildee, for 5 minutes.

Mr. KILDEE. I thank the chairman. I thank him for having this hearing.

You know, I have held many jobs in my life. I have been a lettercarrier. I have been a Latin teacher. I have been an electrician. I have been a lawmaker. As a matter of fact, the job that is probably the longest in my life has been lawmaker, for 32 years. But I was an electrician, so I know quite a bit about the responsibilities of being an electrician.

Let me—and Mr. McClure you may answer this, too—but I will address it to Mr. Imparato and Mr. Burgdorf. It seems that this is really, and we often overuse the word "catch-22," but it is kind of a catch-22 situation really situation here. It is a classic example of catch-22. How would H.R. 3195 address this problem? I mean, this man's life—he sold his house, moved to Texas, and to have this absurdity, that has led to a great injustice, afflict him? Maybe Mr. Imparato and Mr. Burgdorf, if you could?

Mr. IMPARATO. Thank you for that question.

First, just on the catch-22 issue, you are exactly right. When you have the kind of strict standard that the Supreme Court has created around what is a disability, you end up having to introduce a lot of evidence to meet that narrow threshold that then can and will be used against you on the issue that matters, which is whether you are qualified for the position. And anything that you introduce to show that you are qualified for the position can and will be used against you on whether you are disabled enough to have a civil right.

So you are exactly right. It is a catch-22. And it is not a catch-22 that existed under the Rehab Act, which was the definition that Congress was modeling the ADA after.

H.R. 3195 would fix this problem by getting past the issue of whether he is in the protected class very quickly. He has an impairment, and you quickly get to the issue that matters, which is, was he qualified for the position in question? To the extent he was asked to do things that require accommodation, were there reasonable accommodations that would allow him to do the essential functions of the job? And if the employer was not justified in denying him the position, the employer would lose. But we never reached that issue because so much time was spent trying to establish the existence of a disability.

So I think the catch-22 term is exactly the right term for where the courts have brought us under the ADA.

Mr. KILDEE. Mr. Burgdorf?

Mr. BURGDORF. The only thing I would have to add to that is sometimes it is worse than a catch-22. Even if there were no qualified concept in the ADA, you can't get past the proving the disability. People have a very difficult, impossible time meeting that burden. The fact is, I think the underlying problem is a mis-assumption about disability, that a person really is only disabled if somehow the condition has really messed up their life. And most of us who have disabilities try to deal with our lives and have successful lives and go on to live what people would call "normal lives."

Then, when we are shocked to find out somebody is discriminating against us, we want to be relieved from that. We want to have the ADA to protect us. That idea that you have to be really messed up is what the ADA definition has turned into. It is not what Congress intended. It is not what President Bush thought he was signing. It is not what those of us who worked on the National Council on Disability's proposal that was before, and was ultimately enacted by Congress and what we were trying to do.

We were very clear that if you were discriminated against based on a condition, that was enough. You have proven what you have to prove, and then we can argue about whether it was justified or not. We are not saying people with disabilities are going to win all their cases, but they ought to at least get in the courthouse door.

Mr. KILDEE. I was present when President George H. Bush signed this into law. It was a joyous occasion, and he was expansive in his enthusiasm, and I think expansive in his idea of how this should be interpreted. To have Congress pass a law trying to find a reasonable remedy, a president signing it with enthusiasm—this was truly a bit of strong bipartisan work within the Congress, and the president joyfully signing this bill.

And the court, in kind of a grand isolation, saying this didn't apply to Mr. McClure's case was just, to my mind—sometimes law should be refined common sense, I think. I don't think it was very refined or very common sense in this instance here.

Mr. IMPARATO. Can I say one more thing?

Mr. ANDREWS. Very briefly.

Mr. IMPARATO. Briefly, I just—in terms of the unintended consequences, I just want to point out that whatever we do to try to keep the definition somewhat narrow can also have unintended consequences. That is why any PD feels that H.R. 3195 is a simple straightforward way to fix this problem. It came from a lot of work from the National Council on Disability, and any of these efforts to tinker with it, I would just encourage us to worry about unintended consequences on the other side, where the courts will jump on one word like they have under the ADA, and we are back to having to come back and fix a new problem that the courts have created.

Mr. ANDREWS. The gentleman's time has expired.

Mr. KILDEE. Thank you very much, Mr. Chairman.

Mr. ANDREWS. The chair recognizes the ranking member of the subcommittee, my friend from Minnesota, Mr. Kline, for 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman.

Thank you, gentlemen, for being here and for your testimony.

I think what we are seeing is that there is widespread agreement I believe on both sides of this aisle that we need to change the law so that we don't have an incident such as we have seen with Mr. McClure. I think, as Mr. McKeon and others said, that is absurd. But I am concerned that in our effort to make sure that doesn't happen to Mr. McClure or someone like that, that we don't have those unintended consequences.

When the ADA was enacted in 1990, one of the first findings included was that "43 million Americans have one or more physical or mental disabilities." So I am wondering what the number would be. So let me start, Mr. Fram, I have about three questions for you, and we will go as quickly as we can.

What do you think the language as it is now in this bill—what would that number 43 million be?

Mr. FRAM. Well, it would have to be 350 million, because every single one of us has an impairment. I mean, every one of us has either a vision problem—we don't have perfect vision—or we have had the flu. Because remember, this covers actual disability regarded as impairment, which is——

Mr. KLINE. I appreciate the answer, but again, the original intent, which the majority leader talked about, was to cover 43 million. And now in your interpretation, it is 350 million or whatever the current population of the United States is, and that was clearly not the original intent. So it raises the question, if every worker has some form of disability, what does that do for the workers who would truly need the protection—Mr. McClure's example?

Mr. FRAM. I think it would certainly limit an employer's resources. Everybody agrees, I think everybody on this panel would agree that Mr. McClure, under what I am proposing in terms of reversing the Sutton case, that he would be covered.

I respectfully disagree with Dr. Burgdorf because I think reversing *Sutton* would lead to Mr. McClure being covered because you would be looking at somebody without mitigating measures, which include behavioral modifications, and that was the reason the lower court excluded him, because he could reach certain heights if he used a ladder. At least that was my reading of the case, but if you look at him without behavioral modifications, he would be covered.

But what it would wind up meaning, if everybody was covered, that the person who needs a modified schedule, for example, because she has breast cancer, and if that modified schedule has already been given to somebody who has the flu, it might not be available for her. So it would restrict what an employer could do for people who have serious conditions.

Mr. KLINE. And have exactly the unintended consequence which we are trying to avoid here. We are trying to make sure that Americans with disabilities have the protection, and it waters it down so that every American is there, it simply will not be able to do that. While I have great faith in my chairman and all lawyers who look at these things, it is our job to get this language right, so it is not left to continuing battles in the courts over the definition, a concern that all of you have expressed. We really do need to get this right.

Continuing again, Mr. Fram. In your testimony, you noted that H.R. 3195, the bill under consideration here, changes the burden of proof with respect to claims of discrimination. Can you take some time here to expand on that point? How is the burden of proof allocated under other civil rights statutes? How does that differ from H.R. 3195?

Mr. FRAM. There is something called the McDonnell-Douglas standard. That is where employees, as a prima facie case, have to show they are in the protected group and that they are qualified to do the job. And what this bill would do is to change it in the ADA context to mean the employer now has the burden of showing that the person cannot do the job.

I don't think from a practical perspective that makes sense, because what courts have done—and honestly, I haven't seen where there has been a problem with this, which is why I am surprised that it is in the bill. What courts do is they say to employers, "you have the burden of showing what the essential functions are," and then they say to the individual, "you have the burden of showing you can do those essential functions."

That is allocating the burdens to the parties who have access to the evidence. This bill would make it the opposite of McDonnell-Douglas.

Mr. KLINE. Thank you.

My time is just about to expire, but very quickly if I could ask the flanking attorneys here what they think that 43 million would look like under this bill—just a shot.

Mr. BURGDORF. I would like to try to answer it because the Supreme Court quoted my law review article in the Sutton case about that issue as the explanation, and then completely misunderstood and misused it. The 43 million figure was put in—originally it was a 36 million figure—it was put in the National Council on Disability draft bill, and was proposed and put into its report, On The Threshold of Independence. And it was intended not as who is covered by the ADA. There is nowhere in the ADA or in that report that says that is how many people are covered by the ADA. It was trying to give an order of magnitude estimate of people with actual disabilities.

The definition has three prongs—actual, record, and regarded as. No one had ever thought that 43 million people were who were protected by the ADA, and that is important because——

Mr. KLINE. Excuse me. What do you think that number would be—350 million?

Mr. BURGDORF. The ADA would under this legislation and always has protected all Americans—not that all Americans have a right to bring a suit. They are protected. It protects associates of people with disabilities. It protects who regarded as who are just mistakenly thought to have a condition. Yes, all Americans are protected. Only some of them are going to be subjected to discrimination and therefore can go to court to do anything about it.

Mr. KLINE. Thank you, professor.

Mr. ANDREWS. Thank you, Mr. Kline.

The chair recognizes the gentleman from Iowa, who has not only policy insight, but personal insight on these issues, Mr. Loebsack, for 5 minutes.

Mr. LOEBSACK. Thank you, Mr. Chairman.

Another point, if I may elaborate on a personal nature on all this, but at this moment in the interest of time, I will refrain from that—but I want to thank all the panelists for being here today as well. With the chair's permission, I do want to enter a brief statement into the record on this matter. I won't read that at the moment.

I do want to just address an issue related to veterans, because you do say, Mr. Imparato, in your statement that you submitted for the record, on pages 9, 10, and 11, you refer to veterans who have returned and will be returning from the wars in Iraq and Afghanistan—and not just those veterans, but veterans of previous wars, too, who may be suffering from post-traumatic stress disorder.

I am on the Armed Services Committee. As a freshman, I have been fortunate enough, I guess if you can call it that, to go to Iraq twice, and I just went to Afghanistan recently. We have a Veterans Administration hospital in my district in Iowa City, and I have visited that a number of times, as well as Walter Reed.

If you could just elaborate on your reference to TBI and PTSD in your testimony, and enlighten us a little bit on that. But before you do that, I do want to express my desire, too, to make sure that we come together in a bipartisan way to solve this problem. I am really thankful to Ranking Member McKeon for his comments, and Mr. Kline as well. I think everybody here wants to resolve this problem, and it is a question of how we are going to do it.

But if you could elaborate, and that is really the only question I have. Maybe Mr. Burgdorf might want to comment as well, if he has any thoughts. Thank you.

Mr. IMPARATO. Sir, thank you for that question, Congressman Loebsack. The veterans who are returning from Iraq and Afghanistan are going to have the same definition of "disability" that we are talking about here applied to them if they experience employment discrimination. The veterans who are recovering, who are functioning well either at home or in the workplace will have that used against them on the issue of whether they have civil rights protections.

This has dramatically affected people with psychiatric disabilities. So veterans that have post-traumatic stress disorder, depression, anxiety disorders—if they are able to control those well, they are likely to be found not to have disabilities for purposes of the ADA.

It can also affect people with brain injuries. Again, if they are able to manage their disabilities and function well at home and at work, lots of courts are likely to interpret what the Supreme Court has done in a way that leaves them out. I would argue that would be true even if we fix the mitigating measures issue. This issue is bigger than simply fixing the mitigating measures.

I agree with Professor Burgdorf that Carey McClure's situation would not be addressed by simply fixing mitigating measures. It was the *Toyota* v. *Williams* decision that really severely restricted what constitutes a substantial limitation and a major life activity. The court said that they had to be activities that were of central importance to most people's daily lives. That was invented by the

court. That was not the standard from Congress. It was not the standard under the Rehab Act.

So again, veterans coming back—we want them to have full lives. We want them to participate fully in all aspects of society, and we want them to have civil rights protections if they experience discrimination. The veterans who are functioning at the highest level are the ones who are most at risk of not having civil rights protections under the ADA.

Mr. LOEBSACK. Yes, Mr. Burgdorf?

Mr. BURGDORF. The only thing I would add is that win or lose, the focus is on the wrong thing. These people with these conditions are going to have to submit themselves to an inquisition into the details of their disorders. When they argue that they are being discriminated against—the employer said that this is significant enough that I won't let you have the job, or I am going to fire you. Focusing on the details of their condition is invasive, unnecessary, and it is the wrong question.

Mr. LOEBSACK. In just the little bit of time left. I mean obviously it is difficult enough to serve ordinary folks who don't go off and fight for our country to be going through this process. I think it is far worse for those who are putting their lives on the line to come back and face these kinds or problems.

Thank you very much for your response. I appreciate it, and I yield back the rest of my time. Thank you.

Mr. ANDREWS. Thank you. Mr. Sarbanes.

Mr. SARBANES. Thank you, Mr. Chairman, and welcome to the panel. This is fascinating. Welcome, Mr. Imparato. We have survived a number of piano recitals together.

I am just fascinated by the court's mischief in this area, and how they have managed a 180-degree turnabout in terms of what was intended with the original legislation. I view the removal of the "substantial limitation" component, the definition, as trying to neutralize that opportunity for mischief in some ways and widen the ledge of protection, again, in ways it can't be chipped away at so much that it just completely gives way.

I assume that once that component is removed, the "substantial limitation" piece of it—that the court will set to work on the threshold definition of "impairment." I would be curious, Dr. Burgdorf, on what you think they will do there. And then if you could expand beyond and take me through the chipped tooth scenario, so I can understand how much that is a red herring, which I view it as, or not. I mean, how does the chipped tooth case get started, and how does it proceed along the line?

Mr. BURGDORF. What none of us has mentioned today is that H.R. 3195 adopts a definition of "impairment" that is based upon existing regulations that as far as I know, no one on either side of any issue has argued is not valid. It goes back to the original section 504 regulations. It requires a physiological disorder, which is medical terminology. It is not—I hesitate to disagree with my friend, Mr. Fram—but it doesn't apply to things like baldness. I would think a person would have an incredibly hard time arguing that a chipped tooth is a disorder, any more than my ugly face is an disorder.

These are attributes of people. They are not disorders. And there is no precedent anywhere that I have ever heard of, and I have written my big fat book about the meaning of the definition of "disability," too, and I have never heard of a chipped tooth case. I don't think that is a valid concern. I think maybe Mr. Fram should consider being a law professor, because we spend a lot of time dreaming up weird hypotheticals. I think that that is all this is. It is a red herring.

In fact, many of the examples that are used go toward the same issue, which is that people have to have an impairment. That is defined. And if people want a reasonable accommodation, they have to show that the impairment prevents them from doing a job task. That is what the EEOC regulations have always said. Reasonable accommodation is not a wish list for people with disabilities. It is designed for a purpose. It is to remove something that is keeping that person from performing a job. A person with a cough is ordinarily not going to be able to show that.

The bigger problem is that employers get to pick what they think is serious, and then throw people out of the workplace. At that point, we would like to say they have discriminated against a person. That person is entitled to file a claim. They may not win the claim, but they can file the claim. That is what H.R. 3195 does, and I am very comfortable in saying that it is not going to lead to all these horrible weird consequences.

Mr. SARBANES. Do you want to respond to that?

Mr. FRAM. I think it is just not correct. "Impairment" is very broad. I have cited cases in the written testimony where courts have said things like a sprained knee, erectile dysfunction, tennis elbow—all of these things are impairments. What keeps them from being covered disabilities is that they don't substantially limit major life activities.

I would also disagree with Mr. Imparato that major life activity has been a great problem, because courts have been very, very broad in terms of what our life's major activities are, including things like sex, which courts have said are major life activities. So it doesn't have to relate to the job.

Mr. SARBANES. In that case, in the chipped tooth case, does litigation begin with an employer discriminating based on the chipped tooth? That is what I am asking.

Mr. FRAM. I don't think it would begin with that. It would be if the person says "I want time off," and I am entitled to time off under federal law, to go get my tooth fixed.

Mr. SARBANES. It just strikes me that those are implausible starting points for the litigation that you are raising the specter of.

I have run out of time. I just wanted to say to you, Mr. McClure, thank you for your testimony. I loved your quote where you said that the reasonable accommodation that could have been given to you would have simply been to put you to work. So stick with it. Thank you.

Mr. ANDREWS. Thank you, Mr. Sarbanes.

The chair is pleased to recognize my friend from New Jersey, Mr. Payne, for 5 minutes.

Mr. PAYNE. Thank you very much.

Let me thank the panel for coming. I had the opportunity to be involved when the original ADA legislation was passed, and went around with Justin Dart. He was really quite a person. He invited the committee to Houston, Texas in the late 1980s. It was interesting, as you know, Houston has a large number of disabled people because the land is relatively flat and in the old days before mechanized wheel chairs, it made it a lot easier. The weather was better. You didn't have snow. So there were a lot of things that made it more of a natural place where people with a disability would go.

But it was interesting—Justin was very clever. He invited the committee to a baseball game, the Houston Astros or something, and of course you would probably have a violation today—the ticket only cost about $10, but you know, with the new laws you can't take a ticket. Anyhow, what he did, though, was we went to the area where he got tickets for people that he knew, and it was in the handicapped section. I think he did it cleverly because it was the worst place in the stadium. It was stuck up somewhere under some beams where you couldn't even sit straight and you couldn't hardly see the field. It was just a horrible situation.

However, evidently, you know, when people did public accommodations, they made it, well, let us throw this little space up in the corner in the dark in the back for those people, you know, and they ought to be glad we got a little place. So I think it was a very interesting, subtle way that he had to do this thing.

The other thing I remember clearly was, you know, some of the, particularly the Greyhound Bus Company, said, oh, we are going out of business and there won't be another Greyhound bus that will be able to stay on the road because the cost is going to be enormous and we can't afford it and all that. Of course, you know, Greyhound buses kept running ever since. I don't know if they are still running, but ADA certainly did not put them out of business.

And also this question about the ramp, when people said, "we will try to do a ramp if we can." This was talked about. The sky was falling or businesses were going out of business—we can't afford to do it. And you found that the average ramp at a little place, at that time, it cost about $50 to put in.

So I think that we find ourselves creating much more of a hysteria when we try to correct injustices than it is really worth. I would hope that we—and I know Mr. McKeon talked about opening up and people with real disabilities won't be able to be serviced because you are going to have so many additional folks, so that is why we shouldn't do this. Well, I think that water seeks its own level. I think that if we make the adjustments, we will be able to handle it like we did before. If we need more resources, then we should simply go about getting more resources.

I just would like to once again commend you, Mr. McClure, for coming and telling us your story. In your opinion, do you think you could have done the job just as well as any other electrician?

Mr. MCCLURE. I was doing the work when I went there, and I was doing the work after I left there.

Mr. PAYNE. As a matter of fact, I have noticed in some instances that working with some people I worked with, I actually was sort of a plant director at a small plant. We had about 40 employees.

So the forklift operator was deaf, so they said, "you can't hire Leon. You know, he can't hear." I said, "well, he can drive the forklift all right, and he is very careful. It is going to be up to the employees, as they should anyway, to be sure that they observe the safety regulations." If you back up, it makes noise. If you go forward, you can see it.

And don't you know that our record on safety so far as the forklift was better than it was ever because everyone knew that, you know, many times people will yell at the forklift operator to say "hey, I am here" or something. So since they knew that Leon couldn't hear, they had to make sure that they were out of the way. And everybody was extra careful because you couldn't say, "well, he didn't hear me." It worked out perfectly. We had the best safety record. He did the job fantastically.

So if you work with people that have disabilities, I think that you find, in my opinion, that you even get an employee who really puts more into the effort. They work hard. They really do, in my opinion, more to show that they are just as equal as a person without a disability. So I think it was General Motors' loss certainly.

I guess I didn't really get a chance to ask my question, but I did want to reflect on that.

Thank you very much, Mr. Chairman.

Mr. ANDREWS. Thank you, Mr. Payne.

The chair recognizes the gentleman from South Carolina, Mr. Wilson, for 5 minutes.

Mr. WILSON. Thank you, Mr. Chairman.

Thank all of you for being here today.

I particularly am happy to receive additional information about the Americans with Disabilities Act. A dear friend of mine, actually my campaign chairman, Landon Whitehead, was present at the White House when the bill was signed. He has been a champion in our state for persons with head injuries. So over the years, I am really grateful for what has been done and can be done.

Additionally, my late brother-in-law was a victim of a sniper at Okinawa, and was in a wheelchair for the balance of his life. I know it would have been so wonderful if he could have had the benefits that have come legitimately from this law. I thank all of you for being here.

Mr. Fram, a question for you. Many advocates have argued that claims of discrimination under the ADA should be treated exactly the same as, say, claims of race or sex discrimination under Title VII, or claims of age discrimination under the Age Discrimination in Employment Act. That notion has appeal, particularly if the ADA is identical in scope to Title VII and the Age Discrimination Act. Is that the case? If not, can you tell us how does the ADA differ from other civil rights laws?

Mr. FRAM. Well, that is exactly the problem that I have been pointing out, is that the ADA is different from Title VII, not in the general discrimination part, because it would be easy if you just said you can't discriminate against somebody because they have an impairment. That is easy. The hard part is that the ADA also requires reasonable accommodation.

So the ADA puts a federal requirement on an employer to reasonably accommodate, unless it causes an undue hardship. In this

case, it would put that requirement on an employer who has somebody who has—I will get away from the chipped tooth example and use the flu. Nobody could dispute the flu is a disorder.

So do you have to reasonably accommodate somebody with the flu? Would you have to provide a modified work station for somebody with a sprained ankle? Of course you have to provide a modified work station for somebody who has paraplegia, but for somebody with a sprained ankle—that would turn this into a federal requirement.

The other things that it does—and I won't repeat myself with the medical examinations and inquiries—but that is a really serious part, that it prohibits disability-related questions of employees unless they are specifically about the job. Title VII doesn't do that.

ADA also has certain insurance provisions. The EEOC has a guidance dealing with disability-based distinctions in insurance provisions. If disability equals impairment, that means a lot of policies that, for example, might differentiate between dental coverage and medical coverage, could be suspect under this law. So there is a lot of additional requirements that ADA imposes that Title VII does not.

Mr. WILSON. Additionally, how does ADA address issues of safety in the workplace? Do you have any concern of how H.R. 3195 might change that treatment?

Mr. FRAM. Well, the ADA has a provision dealing with direct threat—that an employer can only screen someone out if, because of his disability, he poses a direct threat, a significant risk of substantial harm. The problem that has come up in the courts over the past—really over the past year—has dealt with conduct issues and whether an employer can enforce its conduct rules.

Specifically, there has been—even conduct rules concerning safety—there was a case out in the Ninth Circuit, which is generally the West Coast, that dealt with an employee who had bipolar disorder, who in the words of the court, the Ninth Circuit, said had engaged in violent misconduct in the workplace. This is a Ninth Circuit case. We are not talking a lower-level case. And the court said you had to provide reasonable accommodation to her.

What is the accommodation you are supposed to give to somebody who engages in violent misconduct in the workplace? So in that sense, I think the ADA was not intended to interfere with an employer's right to have conduct rules concerning safety, but the way it has been interpreted by some courts, in the same way that we have been talking about some of the really conservative decisions, there are some decisions like this that say you might have to accommodate violent misconduct. That, in my opinion, would need to be corrected.

Mr. WILSON. Again, I thank all of you for being here, and I yield the balance of my time.

Mr. ANDREWS. I thank the gentleman for yielding.

The chair recognizes the gentlewoman, the chairperson of the Workforce Standards Subcommittee, Ms. Woolsey, for 5 minutes.

Ms. WOOLSEY. Thank you, Mr. Andrews.

First of all, I would like to recognize that Dr. King Jordan from Gallaudet University is here with us today.

Mr. ANDREWS. Welcome, doctor.

Ms. WOOLSEY. He brought reasonable accommodations, as you can see—his interpreters, and how important that is in order for him to do what he does, so he can hear what we are doing today. So there is a good example.

You know, I am really thankful that we have brains like yours, Chairman Andrews, and many of the other brains that have spoken before me today that will talk about H.R. 3195 and the details, because I get all caught up in statements like chipped teeth and baldness and having the flu. I am a 20-year human resources professional. A person that has the flu is accommodated. You don't want them in the factory or in the workplace, period. That is human relations.

Yes, indeed, every company has problem employees who try to take advantage of everything. That is the exception. It is not the rule, and it is something as a manager, a supervisor, a human resources person, you deal with. It has nothing to do with ADA. And when you, Mr. Fram, talked about accommodating baldness, that did it for me. [Laughter.]

What does—I mean, you too are going to be middle-aged someday, men—what you do is, you know, you start losing your hair. What in the world would that have to do with anybody's job and any kind of accommodations? I mean, that threw me for a loop. That was a horrible example. If you are willing to tell me what you think would be a reasonable accommodation that would relate to your sitting here talking to us and being an expert in your own way, I would be glad to hear it, but I don't get it.

Mr. FRAM. Well, I completely agree with you that it should have nothing to do with the ADA, because the ADA should cover people with serious conditions, not somebody with a sprained ankle. Now, in the workplace, of course, I would never ask for accommodation because of my hair impairment.

Ms. WOOLSEY. I hope not. [Laughter.]

Mr. FRAM. Some people find it nice. [Laughter.]

Mr. ANDREWS. We are not going any further on that. [Laughter.]

Mr. FRAM. The sprained ankle, though, if somebody were to say, "I want a modified work station because of my sprained ankle," the question would be: Is that person entitled to this as a federal mandate, entitled to a modified work station because of a sprained ankle? And that can't be what Congress intended.

Certainly, it intended to cover people who have paraplegia or a veteran returning home with no legs. Of course, it is intended to cover that. But is it intended to cover somebody with a sprained ankle or the flu?

Ms. WOOLSEY. Well, I am going to let Dr. Burgdorf, Mr. McClure, and Mr. Imparato answer that question. What does that mean for our discussion today? Let me start with you, Mr. Imparato.

Mr. IMPARATO. Thank you.

I think Professor Burgdorf did a good job of explaining how the reasonable accommodation analysis happens under the ADA. The employee is not entitled to time off for anything they want time off for. They are entitled to an accommodation that enables them to do the essential functions of the job. So getting time off for hair treatment is not going to enable you to do the essential functions of the job.

I just briefly want to also touch on this issue about the ADA's protections on health disparities. The EEOC guidance that David Fram cited was a 1993 guidance. We have case law from 1999 where the courts have very narrowly interpreted what the ADA requires in the area of health care. They said it is okay to have a separate cap for AIDS-related illnesses than you have for other illnesses. They said it is okay to have different coverage for mental disabilities around disability insurance. They said it is okay not to cover hearing aids.

All those have been challenged under the ADA and failed. So I don't see how having a broader definition is somehow going to invite a lot more health disparity cases because we are not successful under the current law with the cases that have gone forward.

Ms. WOOLSEY. Mr. McClure, would you like to—I mean, a sprained ankle?

Mr. MCCLURE. I have worked with a sprained ankle. [Laughter.]

Ms. WOOLSEY. I will bet you have.

Mr. MCCLURE. Your tolerance from the pain of a sprained ankle is nothing to compare with the pain I am in all the time.

Ms. WOOLSEY. Right.

Mr. MCCLURE. I would like to note that I agree with you fully. Most Americans are not going to try to do the things they are saying, with chipped teeth, flu. Most of us want to work just like everybody else. Thank you.

Ms. WOOLSEY. Thank you.

Dr. Burgdorf?

Can he, Chairman Andrews?

Mr. ANDREWS. Yes, very briefly. Thank you.

Mr. BURGDORF. The issue is in the wording that Mr. Fram used, of "serious" and who decides that it is serious. The ADA has a standard for reasonable accommodation. A person with a sprained ankle or any other thing that we might think of as minor will have to show that it interferes with the performance of an essential job function. If it does, then it is not that the person gets whatever he or she wants. It is that employers then enter into a dialogue about "what do I need to do."

It might be the employer says the accommodation is go home. It might be the employer says "put some ice on it and get back to work." There are any number of possible accommodations, and the employer gets to pick, unless they are not effective or unreasonable. The person with the disability has to accept it.

Mr. ANDREWS. Thank you very much.

The gentlelady's time has expired.

The chair recognizes the gentlelady from Hawaii, Ms. Hirono, for 5 minutes.

Ms. HIRONO. Thank you, Mr. Chairman.

I would like to thank the panel.

I agree that the ADA needs remedial legislation and should be broadly interpreted to support the group of people that it was intended to help. I think in these cases, whoever bears the initial burden of proof often is the person who gets to go forward and proves his or her case. It seems as though this initial burden of having to show substantial limitation pretty much kicks out so many people from ever moving forward that we don't even get to

the question of reasonable accommodation or whether or not that person could do the job.

So what this bill does is to eliminate that initial burden, and then, as Mr. Fram says, I take it that we then get to this question of whether or not the person could do the job, and it shifts the burden to the employer.

I would like to ask Mr. Imparato and Mr. Burgdorf whether you believe that this burden-shifting is an undue burden or somehow an unfair burden on the employers.

Mr. IMPARATO. Well, thank you for that question. I think one of the things that Mr. Fram has argued and a number of employers have argued is that this statute is somehow changing an employee's burden to show that they are qualified, that they meet the basic functions of the position. That was not the intent of the legislation.

Title VII does not require you—it doesn't say in the statute that you have to be a qualified woman or a qualified minority in order to have protection under Title VII. But it has been read—the prima facie case under Title VII has been read to include that you have to show you meet the basic qualifications.

Our intent with ADA Restoration is to follow that. We took out the word "qualified" because it didn't appear in any other civil rights law, but the intent is to have the same kind of burden-shifting that you would have under Title VII. And that seems to work fine for employers.

So the answer to your question is no, I don't think this would create an unfair burden for employers.

Mr. BURGDORF. At the time the ADA was enacted, and this is reflected in some of the committee reports, there were cases under Section 504 dealing with the issue of burden of proof. What they essentially said is that the person with the disability has to come forward first with evidence that he or she satisfies the basic announced job qualifications. You may have to have a degree. You may have to have a license, a driver's license if the job involves driving.

A person with a disability comes forward, shows that he or she meets the employer's announced qualification standards, then the burden shifts and the employer can argue, "well, despite that, you can't really do the job." Then ultimately the burden would be on the employer. The person with the disability, meeting the announced criteria, should be presumed okay until, if and when the employer comes back and proves disqualification.

That has gotten quite muddled in the interim. It appears that people with disabilities are going to have to prove they meet essential job functions when the employer knows what the essential job functions are, and the factors that go into determining job functions, as specified in the regs, are all things the employer knows. How much time has to be spent on this; what will happen if this function isn't performed—those are all things within the expertise of the employer.

So H.R. 3195 moves the word "qualified" out of the first part of the statute. It leaves it in the statute. In fact, it is in there three times. This will take out one. It is specifically stated as a defense on employers. Therefore, ultimately if the employer wants to argue

that you can't do the job, the employer is going to have to show that, despite the person having already shown that he or she meets the qualification standards that were announced.

Ms. HIRONO. So this bill would require an initial prima facie showing by the plaintiff, and then the burden shifts to the employer to show that the person is not qualified. So it is really a burden-shifting kind of thing that the initial burden is still on the plaintiff, and then it shifts to the employer. Is that how you are interpreting this bill?

Mr. BURGDORF. That is how I interpret it.

Ms. HIRONO. Okay. Thank you.

I yield back the rest of my time.

Mr. ANDREWS. I thank the gentlelady for her questions.

At this time, I would yield to the ranking member of the subcommittee for any concluding remarks he may have to make, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman.

Again, thanks to all for being here today, and Mr. McClure, for your touching personal testimony. I couldn't help but notice in the last series of questions that the lawyers at the table, we had two nodding their heads up and down and one shaking his head left and right. So this battle of lawyers is very common here, and in fact on this committee.

What we want to do as we look to make sure that Mr. McClure—his case, his issue—is adequately covered here, that we do this in a way that doesn't dilute the act itself in such a way that it works counter to what we would like to see done. We would like to get to the point where we have all lawyer heads nodding. It may never happen, but we would like to get a lot closer to that than I think we are here.

Again, I want to thank the witnesses for their testimony. We are looking forward to the tweaks or whatever it takes to get some more of those heads nodding.

I yield back.

Mr. ANDREWS. Mr. Kline, thank you.

We thank all of our colleagues.

I want to extend my appreciation to each of the witnesses. Mr. Imparato and Mr. Fram and Dr. Burgdorf I think really gave us excellent, well-reasoned arguments that the committee will take into deliberation.

And Mr. McClure, I just want to say to you how important what you have done today is. I think there is a universal conclusion here that what happened to you is unfair and wrong. And unfortunately because it has already happened, there is not much that the committee can do to address your specific case because that is the way our system works. But you have done something that exceeds your own self-interest and you have done something very important for the men and women of your country by calling your case before us so we can fix it, so that what happened to you does not happen to other people.

I think the way to fix it—I think the record is pretty clear that the court has confused the question of who has a disability with the question of what should be done in response to that disability. When the court has identified circumstances where it is uncomfort-

able in the kind of accommodations it thinks might happen, it has chosen to deal with the situation by defining out of the definition of "disability" people who ought to be protected. I think that is a core problem here that we have to address, and I believe that Mr. Hoyer and Mr. Sensenbrenner's bill does.

Mr. McClure said a lot of very compelling things today, but I think the best thing, Mr. McClure, that you said was, "most people just want to work." It is not about battle of the lawyers. I am also appalled by battle of the lawyers. It is contrary to everything I believe in. It is not about statutory interpretation. It is about a decent man or woman who wants to earn a paycheck for his or her family and do the job.

I think what we always have to keep in mind here, as Mr. Kline just said, is how would anything we do affect you, Mr. McClure, and people like you, but also a broader question. When Mr. McClure was denied his rightful opportunity to excel in his job, it is not just that he suffered or that, frankly, General Motors suffered. The whole economy suffered because a talented, hard-working person was left out of the process.

You don't win when you don't put your best people on the field. It is something that the New York Giants will probably find out on Sunday. [Laughter.]

Sorry, for all my fellow New Jersey friends.

But if you don't put your best people on the field, you don't win. I think one of the main purposes of the Americans with Disabilities Act is to make sure that we always put our best team on the field. And we do not say, well, you are okay, but you have some condition that makes us look at you a little bit differently, and we don't want your talent. In a global competition as fierce as the one in which we find ourselves, we can't afford to say to any person that we can leave their talent out.

So Mr. McClure, we are sorry that your talents were left out. You can tell those grandchildren I know that you are so proud of that their grandfather did something very significant by coming here and telling his story and helping convince us, which I think you have done, to work together and solve this problem.

So we thank everyone for their participation. Members will have 7 days to submit additional materials for the hearing record. Any member who wishes to submit a follow-up question in writing to the witnesses should coordinate with the majority staff also within 7 days.

Again, we thank everyone for their participation. Without objection, the hearing is adjourned.

[The statement of Mr. Courtney follows:]

Prepared Statement of Hon. Joe Courtney, a Representative in Congress From the State of Connecticut

Chairman Miller, Representative McKeon—thank you for convening this hearing today. Majority Leader Hoyer, I want to thank you for bringing this issue forward. I know that you have been involved with the ADA for nearly 20 years, and you were instrumental in working to initially craft it in a bipartisan and bicameral manner.

Ultimately, the intent of the ADA has been restrained; instead, the courts have limited its scope. Too many people are being denied their civil rights and denied coverage intended under the Act.

Most people never reach the threshold of whether they have been discriminated against; rather they are being forced to prove they are truly disabled.

It is not simply an injustice; it also has economic consequences. It impacts a person's ability to earn a living, contribute to one's family, save for retirement and attend college.

I have heard from an organization established at Yale—the Center for Dyslexia and Creativity. A dedicated group of individuals led by Dr Sally Shaywitz are working on the issue of Dydlexia and how it impacts education and employment. Former Congressman Sam Gejdenson, Former FCC Chairman Reed Hundt and Steven Spielberg have joined her in this quest. I know the Chairman and Representative Andrews listened to her passionate testimony linking brain function mapping and dyslexia.

Those with dyslexia may sometimes be granted additional testing time in normal educational settings but they are rarely given time when they need to take medical, law, graduate or college entrance exams which all impact their future employment and professional lives.

And so—thank you for convening this important hearing. I cosponsored this important civil rights bill. And I ask unanimous consent to enter testimony by Dr. Shaywitz into the Record.

[The statement of Dr. Shaywitz follows:]

Prepared Statement of Dr. Sally Shaywitz, Audrey G. Ratner Professor of Learning Development, Yale University School of Medicine

I am Dr. Sally Shaywitz, the Audrey G. Ratner Professor of Learning Development at the Yale University School of Medicine where I am Co-Director of the Yale Center for the Study of Learning, Reading and Attention, and, of the newly formed Yale Center for Dyslexia & Creativity. I am a member of the Institute of Medicine of the National Academy of Sciences and serve on the National Board of the Institute of Educational Sciences.

A developmental pediatrician by training, I became concerned with the devastating impact of a reading disability on otherwise highly intelligent, and often gifted boys and girls who experienced an unexpected difficulty learning to read. Although dyslexia is often referred to as a "hidden disability," the negative impact of the disorder on every aspect of a person's life became readily apparent as I followed these children and young adults and their families over time. And so I became deeply concerned about the impact of this disability on the lives of the children and resolved to learn more about this puzzling disorder that was stealing the joy of childhood from so many children, and worse, not allowing them as young adults to realize their often very high potential.

Over the past two decades, my colleagues and I have investigated the epidemiology, cognitive mechanisms, and most recently, the neurobiological basis of dyslexia. At Yale, I see or review the requests of students at all levels of the University, undergraduate, graduate, and professional schools who request accommodations for a learning disability.

I am here today because I am concerned that the current interpretations of the ADA are preventing otherwise deserving young men and women from entering college, graduate and professional schools, and then, professions—all of which are dependent on how well a student scores on the pervasive gate-keeper, high stakes examinations, for example, SAT; LSAT, MCAT, USMLE, the Bar Exam, certifying and licensing examinations for every medical specialty, nursing, financial services and many more. I have personally seen increasing numbers of deserving young men and women with clear histories of dyslexia, who with incredible effort and determination and reasonable accommodations, mostly the provision of additional time on exams, succeed in school but, who are then turned down for accommodations by standardized testing agencies and boards precisely because they have succeeded and their performance is compared to a standard of the average person.

Clearly, using comparison to the average person for determination of a learning disability violates the fundamental tenets of a learning disability which is based on an intra-individual disparity, that is, a disparity existing within a person—between a person's intellectual ability and his/her achievement, and not on how a person compares to an external measure—the average person. By judging a learning disability by comparison to the average person and not based on the individual's own potential, all brighter than average learning disabled students are summarily excluded from receiving the accommodations they require to achieve their potential. In practical terms, this means not being admitted to law, medical or nursing school and these professions because of artificially low scores on high stakes exams so that the exam reflects that person's disability rather than his or her ability. Without ac-

commodations, these tests cannot and do not reflect the LD person's knowledge or aptitude. The effect is for the average person standard to restrict the rights of bright LD students and set limits, essentially, a ceiling on their future jobs and careers.

The past decade has seen an increase in the understanding of the nature of learning disabilities such as dyslexia, by far the most common LD, and, an increase in the provision of educational services, both instructional and accommodations that allow students to succeed and begin on the road to realizing their potential. And so, it is particularly cruel that these extraordinarily hardworking students, who are the original 24/7 folks and are at the verge of realizing their potential and their dreams, are artificially prevented from doing so. These young men and women have climbed the mountain, and now, when they are about to reach the peak, suddenly they are knocked down and prevented from reaching their earned and deserving goal. Time after time, I have witnessed LD students turned down and penalized for their hard work just because they have succeeded, with the interpretation that academic success (achieved with accommodations) precludes a diagnosis of LD and eligibility for accommodations under the ADA. As a result, students are placed in a Kafkaesque Catch-22: they succeed because of their intellect, hard work, and provision of accommodations which they received only because they are LD. However, for the very success in school that they have achieved and that makes them eligible for further study, particularly in graduate and professional schools, and for certification and licensure, they are penalized and denied accommodations on gate-keeper exams (e.g., GMAT, MCAT, USMLE, LSAT, bar exam) preventing access to professions.

A major and important difference between the "average" person and the LD person is that the provision of accommodations will have a significant impact on the LD person's performance, but not the average person's performance. We often hear, "wouldn't everyone benefit if they had extra-time?" The answer is a clear and unequivocal no! Results of scientific studies now provide undeniable evidence that only LD students increase their scores significantly when provided with extra-time, and what's more there is now definitive neurobiological evidence of the need for extra-time by dyslexic students.

Scientific studies comparing the performance of LD and nonLD college students with and without extra-time demonstrate, for example, that while nonLD students score at the 82nd percentile without extra-time, they score at the 83rd percentile with additional time. Scores of nonLD students remain essentially unchanged; providing extra-time to nonLD students makes virtually no difference.

What about LD students? Here we see a significant and substantial increase in scores, evidence of the difference extra-time makes for LD students. In this study, LD college students scored in the 13th percentile without extra-time, and with extra-time, scores increased substantially from the 13th percentile to the 76th percentile; a significant difference. Extra-time for LD students levels the playing field, precisely reflecting the intentions of the ADA.

Today, in 2008, it is possible to show you actual brain images obtained during functional magnetic resonance imaging (fMRI) that provide clear and compelling neurobiological evidence of the absolute need for extra-time for dyslexic students. fMRI allows us to literally peer into the living brain as a person reads and we can see which brain systems are used by typical or average readers in contrast to dyslexic readers.

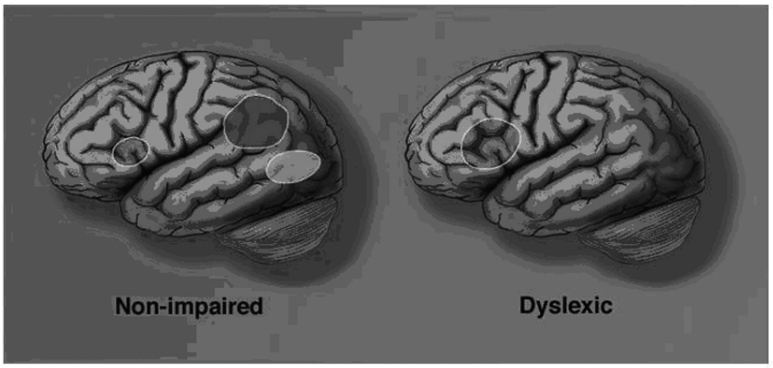
What have we learned? Typical readers light up—activate three neural systems on the left side of the brain, one in the front of the brain and two in the back. One of these systems, we and others have shown, is essential for rapid, fluent automatic reading that is effortless. In dyslexic readers, this neural circuit (aptly named the wordform area) that is responsible for automatic, rapid reading remains silent, fails to activate preventing these impaired readers from reading fluently, that is, rapidly and automatically. Dyslexic readers compensate by developing other systems in other areas of the brain; however, these systems provide only partial compensation. They allow the dyslexic reader to read relatively accurately, but not automatically, that is, rapidly. Consequently dyslexic readers remain slow, nonautomatic readers across their lifetime. Thus, with great effort and effective reading instruction, dyslexics can learn to read words accurately, but not rapidly. In contrast, peers learn to read both accurately and automatically (rapidly). Slow, effortful reading persists and characterizes dyslexic readers at all ages. As a result of this neurobiological disruption, dyslexics require extra-time in order to demonstrate their knowledge and to level the playing field. Without protection of the ADA (i.e., a denial of additional time), a dyslexic person performs below his/her ability and the high stakes test becomes a measure of a dyslexic person's disability bringing with the denial a barrier impeding access to jobs and careers. Critically, brain imaging has made a hidden disability and its consequences visible. There now exists a neu-

ral signature for dyslexia and scientific proof of the need for extra-time for dyslexic students.

From a neuroscience perspective, dyslexic readers show a persistent disruption in the specific neural system for rapid, automatic reading; nondyslexic readers have an intact system. This is demonstrated by the figures below:

Neural Signature for Dyslexia:

Disruption of Posterior Reading Systems

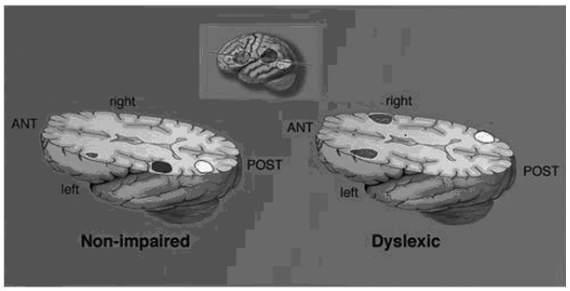


© Sally Shaywitz, *Overcoming Dyslexia*, 2003

Neural system (word form area, shown in yellow) for automatic, rapid reading is impaired in dyslexia; other areas provide compensation for accuracy, but not for speed.

Accommodations:
Neurobiological evidence for requirement of extra time

- Word form area fails to form
- Reliance on ancillary systems
- Partial compensation for accuracy, not for automaticity



Reading not automatic, effortful, even with extra time feels rushed

And so, we now know that if you are a non-dyslexic reader, you use the word-form area well, you look at a word and you're on the express highway to reading. Look at the word and instantly you know it and can read it. But, if you are a dyslexic, that express route is blocked and you have to get off and take another an-

cillary, secondary "country" road—it's circuitous, and it's bumpy. And so its slower and you have to work a lot harder; it will get you to your destination but it takes a lot longer. Just as a diabetic requires insulin, a dyslexic has a physiologic need for extra-time.

To summarize, the evidence is now clear; accommodations are critical to assure fairness and equity to students who are LD. Currently, standardized testing agencies are denying large numbers of dyslexic students extra time. This discriminatory practice has significant negative consequences for the futures of these students. Today, standardized tests are the gate-keeper to the future: access to college, graduate and professional study, job certification all share a dependence on performance on these high-stakes tests.

Denial of accommodations to LD students represents particularly cruel discrimination, for it penalizes those with the most potential, those who have struggled throughout school, given up much of their childhood, worked the hardest to achieve academically and did so with provision of accommodations. And now these incredibly hardworking, deserving dyslexic students are being told because they have achieved academically, they are not eligible for protection of the ADA, closing the door on years of effort and dedication and preventing access to higher education and future jobs.

Why should we care? I believe, and I think you will too, that denying LD students extra-time goes against the intent of the ADA, scientific evidence, and hurts not only the students, but harms our society as well through the loss of human capital that could contribute substantially to our nation's well-being.

I will leave you with one example. Dr. Toby Cosgrove is recognized as perhaps the finest cardiothoracic surgeon in the world; he led the Cleveland Clinic Department of Cardiothoracic Surgery to greatness, achieving number one status in US News & World Report's rankings year after year. His over 20 patents have saved countless lives and given better lives to hundreds, if not thousands, of others. The frightening fact is that Toby Cosgrove came very close to never becoming a doctor. Dr. Cosgrove is dyslexic.

When I visited with him and lectured with him at the Cleveland Clinic, I heard him speak movingly to the hushed crowd of his difficulties in school in learning to read and his memories of the tutors who tried to teach him to read. Reading remained a "big problem" for Dr. Cosgrove. For young Toby, college meant nonstop work. "All I did was study, even on weekends. While everyone else was partying or going to the movies or sports events, I packed my suitcase and left campus for home where I studied all weekend." Reflecting his slow reading, standardized testing was a disaster for him, not at all reflecting his potential, but rather his dyslexia. A particular problem was the impact of his slow, nonautomatic reading on the Medical College Admissions Test, the MCAT. It seemed doubtful that Cosgrove would ever fulfill his dream of becoming a doctor. In fact, he was accepted at only one of the 13 medical schools to which he applied, and rejected from 12 out of 13, because of the impact of his slow reading on the gate-keeper test that allows or bars access to medical school and to becoming a physician.

The frightening thought is that not only would Toby Cosgrove have been denied the dream he worked so hard to achieve; society would have been deprived of the substantial, lasting benefits of his inventions and patents that have saved so many lives and given so many people better lives. The question I leave you with is how many other potential Toby Cosgroves are we in danger of losing because of denial of proven to be necessary accommodations for dyslexic students? Let us weigh, would it be worth it to give this man extra-time not to lose him and his contributions? Thank you.

[The statement of Mr. Fortuño follows:]

Prepared Statement of Hon. Luis G. Fortuño, a Representative in Congress From the Territory of Puerto Rico

Chairman Miller, Ranking Member McKeon, I would like to thank you both for holding this critical hearing as we move towards reauthorization of the American with Disabilities Act. As the sole representative of 4 million U.S. citizens on the Island of Puerto Rico, it is my will that we come together today and find a way to settle our differences and ensure passage of this critical piece of legislation. Coming together is the only way to make sure we protect the civil rights of the sector of the population that needs us the most.

During my years in Congress I have always been a strong advocate for the right of those with disabilities. In my district alone there are approximately nine hundred

thousand U.S. citizens who suffer from an impediment, eighty percent of which are unemployed. Puerto Rico is losing out on the contributions these individuals have to offer to our society. The fact is that the reauthorization of this legislation would be a critical factor in changing these numbers for the better but only if amended. It is my belief that the current language of the bill is too broad and instead of protecting, it could hurt those it was originally intended to protect.

I would like to express my support for the reauthorization of this bill and trust that through this hearing and through open dialogue we will find a consensus that will ultimately benefit our constituents with disabilities.

Thank you Chairman Miller and Ranking Member McKeon for allowing me to speak about this critical issue.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, a Representative in Congress From the State of California

Everyone deserves equal access and opportunity to live, learn, and work, without fear that they will somehow be denied that opportunity because of the color of their skin or whether they have a disability. Since the passage of the Americans with Disabilities Act (ADA) in 1991, we have worked to end discrimination. However, we still have a long way go to ensure that all disabled Americans are treated fairly.

No person with a disability should be prevented from pursuing the job of his or her choice if fully capable of doing the work required of them. A person with a disability shouldn't be punished for trying to find ways to manage his or her disability in order to live the best possible life. However, because of the way the courts have defined disability, employers have been allowed to discriminate against some disabled employees.

The ADA Restoration Act, H.R. 3195, would amend the ADA's definition of disability to cover all the people Congress originally intended to protect and would prevent courts from disqualifying people from coverage under the law because of the narrow definition of a disability or for mitigating factors, such as eyeglasses and medication. The ADA was passed to ensure that all people with disabilities have equal access and opportunities and it is high time that we bring back its original intent. It's a matter of doing what's right.

[Additional submissions of Mr. Andrews follow:]
[The statement of the ACLU follows:]

Prepared Statement of the American Civil Liberties Union

The American Civil Liberties Union (ACLU) applauds the House Education and Labor Committee for holding this hearing on the Americans with Disabilities Act ("ADA") Restoration Act of 2007 and appreciates the opportunity to submit a statement for the record. The ACLU also wishes to thank Representatives Hoyer (D-MD) and Sensenbrenner (R-WI) and Chairman Miller (D-CA) for their important leadership in championing this key legislation.

The ACLU is a nonpartisan public interest organization dedicated to protecting the constitutional rights of individuals. The ACLU consists of hundreds of thousands of members, activists, and 53 affiliates nationwide. The ACLU has pursued pioneering work in disability rights for over 35 years. A highlight in this long record was the ACLU's leadership role in securing passage of the Americans with Disabilities Act ("ADA") in 1990.[1] In addition, the ACLU has participated in landmark disability litigation including Bragdon v. Abbott, 524 U.S. 624 (1998);[2] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999);[3] Chevron, USA, Inc. v. Mario Echazabal, 122 S. Ct. 2045 (2002).[4]

In 1990 Congress passed the ADA with overwhelming bipartisan support, creating a landmark civil rights law that improved the lives of millions of people with disabilities. In passing the ADA, Congress advanced the goals of ensuring equal opportunity, full participation, independent living, and economic self-sufficiency for all people with disabilities.[5] The purpose of the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination" on the basis of disability, and "to provide clear, strong, consistent, enforceable standards" for addressing such discrimination.[6]

Unfortunately 17 years after enactment of the ADA, the promise of equal opportunity in employment has gone unfulfilled to many people with disabilities due to

a series of U.S. Supreme Court decisions that have narrowed the definition of disability under the ADA contrary to Congressional intent. This has resulted in the exclusion of many persons whom Congress intended to protect including people with cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, post traumatic stress syndrome, and many other impairments. The ACLU believes that an individual has the right to be judged on the basis of her or his individual capabilities, not on the presumed characteristics and capabilities that others may attribute to those who share a particular impairment. The court decisions have created an unintended Catch-22 where individuals taking medication or using other mitigation measures to manage their condition may no longer qualify as "disabled" under the ADA. Thus those individuals diligently managing their condition may be denied reasonable accommodations or be terminated, without ever being able to present the merits of their case in court.

The ACLU supports the ADA Restoration Act of 2007 (H.R. 3195) as a necessary fix to this Catch-22 problem. The ADA Restoration Act restores Congress's original intent in extending discrimination protections to all people with disabilities, regardless of mitigating measures, who are discriminated against because of their disability. The ACLU encourages its passage in order to guarantee equal protection for all people, regardless of disability.

ENDNOTES

[1] Chai Feldblum, former legislative counsel with the ACLU, served as a lead legal advisor to the disability and civil rights communities in the drafting and negotiating of the ADA.

[2] The ACLU wrote an amicus brief in Bragdon which addressed whether individuals with asymptomatic HIV and AIDS were covered under the protections of the ADA. Available at *http://www.aclu.org/scotus/1997/22683lgl19980201.html.*

[3] The ACLU wrote an amicus brief in Sutton, arguing that the ADA was intended to be applied broadly to protect individuals with disabilities from discrimination in the workplace. Available at *http://www.aclu.org/scotus/1998/22639lgl19990222.html.*

[4] The ACLU wrote an amicus brief in Echazabal, arguing that an employer violates the ADA when refusing to hire an individual on the basis of her or his disability. The ACLU further argued that allowing individuals to decide what risks—physical, social, or otherwise—she or he is willing to take is at the very core of a person's civil rights. Available at *http://www.aclu.org/images/asset—upload—file411—21954.pdf.*

[5] See 42 U.S.C. § 12101(a)(8).

[6] See Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

[The statement of the Bazelon Center for Mental Health Law follows:]

January 29, 2008.

Bazelon Center for Mental Health Law Urges Congress to Pass the Americans With Disabilities Restoration Act

The Judge David L. Bazelon Center for Mental Health Law commends the House Education and Labor Committee for holding today's hearing concerning a much-needed measure—the Americans with Disabilities Restoration Act. This legislation is needed to correct federal courts' misinterpretations of the ADA and ensure that the protections that Congress enacted in the ADA are in fact available for all people with disabilities.

The Bazelon Center is a nonprofit organization that provides assistance and representation to individuals with mental disabilities. For three decades, the Center has engaged in policy advocacy and precedent-setting litigation that has opened up public schools, workplaces, housing and other opportunities for people with mental disabilities to participate in community life.

Almost eighteen years ago, President George H.W. Bush signed the Americans with Disabilities Act into law. This landmark legislation was the first comprehensive national civil rights law for individuals with disabilities, intended by Congress as a broad mandate barring discrimination against all people with disabilities and ensuring access to the mainstream of American life. As he signed the law, President Bush stated: "Let the shameful walls of exclusion finally come tumbling down."

The ADA has had a tremendous impact on the lives of people with disabilities, opening up many doors that were previously closed and enabling them to participate fully in many aspects of life. The Supreme Court, however, has misconstrued the scope of the ADA's protections and held that it covers a far narrower group of individuals than Congress intended. The Court's decisions have created a "Catch 22" for people with disabilities: many have lost their jobs because of their disability, but their employers have successfully argued that these individuals are not disabled

enough to be protected by the ADA. This was not Congress's intent in passing the ADA.

We urge Congress to act promptly in passing this legislation to restore the rights of all Americans with disabilities to be free from unwarranted disability-based discrimination.

Very truly yours,

ROBERT BERNSTEIN,
Executive Director.

[The statement of the United Jewish Communities follows:]

January 28, 2008.

Prepared Statement of the United Jewish Communities

DEAR MEMBER OF CONGRESS: As concerned Jewish organizations committed to protecting the rights of people with disabilities, we urge Congress to pass the ADA Restoration Act of 2007 (H.R. 3195/S. 1881). This bill is essential to protect people with disabilities from discrimination and to correct the rollback of civil rights which has occurred since the enactment of the Americans with Disabilities Act (ADA) in 1990. In advance of the tomorrow's hearing in the Education and Labor Committee, we encourage you to support this crucial piece of legislation.

The ADA promised to be a vital means of protecting the livelihoods of people with disabilities who faced discrimination. Since the enactment courts have narrowed the definition of disability to the point that the law often harms the very individuals it was designed to protect. The ADA Restoration Act would attempt to close loopholes in the ADA's workplace provisions by clearly redefining the term "disability" to apply to any individual with a real or perceived physical or mental impairment. The definition of disability, which would restore clear Congressional intent, would ensure that individuals with conditions such as epilepsy, diabetes, hearing loss, learning disabilities, or psychiatric disabilities who utilize "mitigating measures" such as prescription drugs, prosthetics, and hearing aids, will be protected under the legislation. To encourage the courts to stop construing disability legislation narrowly in a way that defies the spirit of the law, the bill states that its provisions should be broadly construed to advance their remedial purpose.

The Torah teaches us that the stamp of the Divine is present in each of us, regardless of physical or mental ability. Exodus 4:10-11 reads, "But Moses said to the Lord, 'Please, O Lord, I have never been a man of words, either in times past or now that You have spoken to Your servant; I am slow of speech and slow of tongue.' And the Lord said to him, 'Who gives man speech? Who makes him dumb or deaf, seeing or blind? Is it not I, the Lord?'" Furthermore, Jewish tradition teaches us of our obligation to ensure equal access for all people and to help facilitate the full participation of individuals with disabilities in our communities. As we read in Leviticus 19:14, "You shall not insult the deaf, or place a stumbling block before the blind."

The right to earn a livelihood without fear of discrimination is one that should be unquestionably granted to all Americans, regardless of physical or mental disability. We urge you to show your support for equal rights by co-sponsoring and supporting the ADA Restoration Act of 2007. If you have any questions about the legislation or this letter, please contact Kate Bigam at (202) 387-2800 or Amy Aarons Rosen at (202) 736-5871.

Sincerely,

THE UNION FOR REFORM JUDAISM,
UNITED JEWISH COMMUNITIES.

And the following organizations:

NATIONAL

American Conference of Cantors,
American Jewish Committee,
Anti-Defamation League,
Association of Jewish Aging Services of North America,
Association of Jewish Family & Children's Agencies,
B'nai B'rith International,
Central Conference of American Rabbis,
International Association of Jewish Vocational Services,
Jewish Council for Public Affairs,
Jewish Reconstructionist Federation,

KESHER: URJ College Department,
Men of Reform Judaism,
National Council of Jewish Women,
North American Federation of Temple Youth,
The United Synagogue of Conservative Judaism,
Women of Reform Judaism,
Yad HaChazakah—The Jewish Disability Empowerment Center, Inc.

STATE

Massachusetts Association of Jewish Federations,
Ohio Jewish Communities,
Wisconsin Jewish Conference.

LOCAL

Bronstein Jewish Family Service *(Southbury, CT),*
Council for Jewish Elderly *(Chicago, IL),*
Greater Bridgeport Section, NCJW, Inc. *(Greater Bridgeport, CT),*
JEVS Human Services *(Philadelphia, PA),*
Jewish Child and Family Services *(Chicago, IL),*
Jewish Community Relations Council of Greater Washington *(Greater Washington, DC),*
Jewish Community Relations Council of the Jewish Federation of Southern Arizona *(Tucson, AZ),*
Jewish Family and Community Services *(Jacksonville, FL),*
Jewish Family and Children's Service of Greater Boston *(Boston, MA),*
Jewish Family & Children's Service of Minneapolis *(Minneapolis, MN),*
Jewish Family and Children's Services of San Francisco, the Peninsula, Marin and Sonoma Counties *(San Francisco, CA),*
Jewish Family and Children's Services of the East Bay *(Berkley, CA) Jewish Family and Vocational Service (Louisville, KY),*
Jewish Family Service *(Houston, TX),*
Jewish Family Service *(San Diego, CA),*
Jewish Family Service *(Wilkes-Barre, PA),*
Jewish Family Service of Buffalo & Erie County *(Buffalo, NY),*
Jewish Family Service of Seattle *(Seattle, WA),*
Jewish Family Service of the Desert *(Palm Springs, CA),*
Jewish Family Services *(Danbury, CT),*
Jewish Family Services of York *(York, PA),*
Jewish Federation of Broward County Community Relations Committee *(Broward County, FL),*
Jewish Federation of Greater Philadelphia *(Philadelphia, PA),*
Jewish Federation of Metropolitan Chicago *(Chicago, IL),*
Jewish Vocational Service and Employment Center *(Chicago, IL),*
Jewish Vocational Service of MetroWest *(East Orange, NJ),*
Jewish Vocational Services of the San Francisco Bay Area *(San Francisco, CA),*
Metropolitan Council on Jewish Poverty *(New York, NY),*
Milwaukee Jewish Council for Community Relations *(Milwaukee, WI),*
National Council of Jewish Women, St. Louis Section *(St. Louis, MO),*
National Council of Jewish Women, Brooklyn Section *(New York, NY),*
Partnership for Jewish Life and Learning *(Greater Washington, DC),*
Ruth Rales Jewish Family Service *(Boca Raton, FL),*
Shaare Tefila Congregation *(Silver Spring, MD),*
Sinai Health System *(Chicago, IL),*
Syracuse Jewish Family Service, Inc. *(Syracuse, NY),*
The Keshet Organization *(Chicago, IL),*
The Amit Program, Inc. *(Atlanta, GA),*
UJA-Federation of NY *(New York, NY).*

[The statement of the Disability Policy Collaboration follows:]

For Immediate Release **Contact: Erika Hagensen 202.783.2229**

STATEMENT IN SUPPORT OF THE ADA RESTORATION ACT OF 2007 (H.R. 3195)

The Disability Policy Collaboration of The Arc and United Cerebral Palsy Urges Congress to Keep its Promise to End Unfair Employment Discrimination

The Arc and United Cerebral Palsy (UCP) are proud of our 57-year history successfully advocating for the civil rights of individuals with a wide range of disabilities including developmental disabilities. We were at forefront when the Americans with Disabilities Act (ADA) of 1990 was created, working with law-makers and other disability and civil rights organization to ensure that people with disabilities finally enjoyed the same opportunities as their nondisabled peers.

Although the ADA of 1990 resulted in access to thousands of public accommodations and government services that people with disabilities were never before able to enjoy, the full promise of this law is yet unfulfilled. Many people with disabilities who want to work and be treated fairly in the workplace face the same continued discrimination that the ADA sought to eliminate.

The Supreme Court and other court decisions have narrowly interpreted the definition of disability under the ADA, which is reasonably defined as: (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

Instead of protecting people with disabilities, the courts have created a no-win situation for people with disabilities in the workplace. People with disabilities are often deemed "too disabled" to do the job but not "disabled enough" to be protected by the law. The following cases exemplify this unfortunate catch-22:

- A circuit court upheld a lower court's refusal to hear the case of a man with an intellectual disability. Writing for the majority, the judge wrote that it wasn't clear under the ADA "whether thinking, communicating and social interaction are 'major life activities.'"[1]
- A pharmacist with diabetes was fired for taking a break to eat during his ten-hour shift. He needed a brief lunch break to properly control his diabetes. He was fired because he continued to manage his disability by the best practice guidelines of proper food intake. The court deemed he was not disabled enough to be protected

under the ADA because his diabetes was so well-managed – "Not disabled enough" for protection under the ADA and yet "too disabled" to work.[2]

Restoring Congress' intent when it passed the ADA in 1990

"[T]he point of the ADA is not disability; it is the prevention of wrongful and unlawful discrimination…Passage of this legislation is critical to helping us achieve the ADA's promise – and creating a society in which Americans with disabilities can realize their potential."

House Majority Leader Steny Hoyer when he introduced the ADA Restoration Act of 2007

The bipartisan ADA Restoration Act of 2007 will amend the ADA to shift the focus from requiring individuals with disabilities to "prove" their disability to determining whether a person has experienced discrimination "on the basis of disability." By eliminating the catch-22, the ADA Restoration Act restores the right to be judged based solely on one's qualifications for the job, bringing the ADA in line with other civil rights laws and requiring the courts to interpret the law fairly. *The Disability Policy Collaboration strongly believes that H.R. 3195, without weakening amendments, is the appropriate and modest mechanism to right the landmark legislation of the ADA.*

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[1] Littleton v. Wal-Mart Stores, Inc., No. 05-12770, 2007 WL 1379986, at *1 (11th Cir. May 11, 2007).

[2] Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 722 (8th Cir. 2002).

# # #

[The statement of the Epilepsy Foundation follows:]

January 29, 2008.

Epilepsy Foundation Commends House Education and Labor Committee on ADA Restoration Act Hearing

The Epilepsy Foundation, the national voluntary agency solely dedicated to the welfare of the three million people with epilepsy in the U.S. and their families, commends the U.S. House Committee on Education and Labor for holding a hearing on the ADA Restoration Act of 2007 (H.R. 3195). The Foundation also commends the leadership and vision of Committee Chairman, George Miller (D-CA) and Ranking Member Howard P. "Buck" McKeon (R-CA).

In a series of decisions issued beginning in 1999, the Supreme Court effectively denied persons with a broad range of serious, but treatable, health conditions protection from discrimination in the workplace. The Court ruled that if the condition

can be managed through the use of "mitigating measures," such as medication, prosthetics or the use of devices, the individual will be viewed as too functional to have a disability and will be denied the ADA's protection against employment discrimination. People with a broad range of disabilities—including epilepsy, diabetes, cancer, multiple sclerosis, depression, bipolar disorder, posttraumatic stress disorder, HIV, missing limbs and intellectual and developmental disabilities—have been found not to be "disabled" under the ADA. The Supreme Court has shifted the focus away from an employer's alleged misconduct and onto whether an individual can first meet a "demanding standard for qualifying as disabled."

This creates an absurd Catch-22 which allows employers to say a person is "too disabled" to do the job but not "disabled enough" to be protected by the law. People are being unfairly denied a job or fired because an employer mistakenly believes they cannot perform the job—or because the employer does not want "people like that" in the workplace. The case is thrown out of court without the individual ever having the chance to show he or she is qualified for the position.

Here is a description of just a few of the many, many individual workers with epilepsy whom the lower courts have denied ADA protection:

• A merchandize stocker who experienced weekly seizures and had memory problems as a result of antiseizure medication: In discussing the impact of the seizures, the court concluded that the effects of the seizures were not substantial enough because they "only" lasted 10 to 15 seconds and occurred "only" weekly. Because the court found that the individual was not covered under the ADA, it did not rule on whether the individual was able to do the job, but it did note in passing that "there is no indication that he is unable to perform the functions of his job as a result of his epilepsy or that he creates a dangerous situation in the workplace or any place else."

• A production line worker with uncontrolled nocturnal and daytime seizures: The nocturnal seizures occurred once or twice a week and caused severe sleep loss; the daytime seizures, though less frequent, caused shaking and loss of awareness, along with some memory loss. These impairments, the court found, were not substantial enough to qualify for protection.

• A laborer in a food processing plant, who experienced a seizure causing loss of consciousness approximately once a month: The court held that the employee did not have a disability, even though it recognized that his epilepsy is debilitating at times.

• A registered nurse, who worked as a claims adjuster for the county health department: Her seizures were uncontrolled despite her medication regimen and, as a result, she was unable to drive and had to rely on friends and family for transportation. Again, no coverage was available for this worker.

This is not what Congress intended when it passed the ADA in 1990. Most employers and businesses try to do the right thing with regard to people with disabilities. But for those who discriminate against people with disabilities, the courts must be available to ensure that people with disabilities have a fair opportunity to work and be a part of everyday society.

The ADA Restoration Act of 2007 (H.R. 3195) is based upon the model legislation proposed by the National Council on Disability in 2004, and is designed to give people with all kinds of conditions protection from adverse treatment on the basis of their condition, as Congress had originally intended when the law was passed in 1990. Unlike the NCD's broad proposed legislation which addressed a host of problems court interpretations have created, problems that must eventually be solved, in this legislation, H.R. 3195, Congress focuses only on fixing the definition of disability, that is, ensuring that the ADA has the broad scope and covers people as the law originally intended. We believe that this problem must be solved immediately, or the rest of the law has limited usefulness as a tool to redress employment discrimination against people with epilepsy and similar disabilities.

The Epilepsy Foundation applauds the Congressional leaders who have introduced and co-sponsored H.R. 3195 for recognizing and addressing the fundamental problem of coverage under the current definition of disability in the ADA as now implemented by the courts. We appreciate the hearing being held in the Education and Labor Committee and look forward to speedy passage of this legislation.

[The statement of the National Council on Disability follows:]

Testimony Submitted to the

Committee on Education and Labor

U.S. House of Representatives

Hearing on H.R. 3195,
the "ADA Restoration Act of 2007"

January 29, 2008

By the
National Council on Disability
1331 F St NW, Suite 850
Washington, DC 20004

www.ncd.gov

202-272-2004 (V)
202-272-2074 (TTY)
202-272-2022 (FAX)

NATIONAL COUNCIL ON DISABILITY

An independent federal agency working with the President and the Congress to increase the inclusion, independence, and empowerment of all Americans with disabilities.

The National Council on Disability (NCD) would like to thank the Committee for this opportunity to provide testimony in support of the need to restore the Americans with Disabilities Act (ADA), and to share information the NCD has learned about the impact on people with disabilities resulting from a series of Supreme Court interpretations of the definition of "disability" under the ADA.

Introduction

NCD is an independent federal agency, composed of 15 members appointed by the President and confirmed by the Senate. NCD's purpose is to promote policies and practices that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability, and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and integration into all aspects of society.

NCD's duties under its authorizing statute include gathering information about the implementation, effectiveness, and impact of the ADA. In keeping with this requirement, one of NCD's monitoring activities has been to analyze the Supreme Court cases interpreting the ADA. From 2002 to 2004, NCD produced a series of 19 policy briefs analyzing the Supreme Court's ADA cases[1] and their ramifications on subsequent federal court cases. This work culminated in a comprehensive report, *Righting the ADA*[2], in which NCD proposed language for an ADA Restoration Act, supported unanimously by NCD's members.

The Supreme Court has issued several decisions relating to the definition of "disability" under the ADA. These decisions have narrowed the definition of "disability," restricting substantially the number of individuals entitled to protection under the law. NCD has reviewed the history and evolution of the definition of "disability," analyzed the Congressional intent with respect to coverage, reviewed the effect of EEOC regulations and guidance on the definition, and examined the Supreme Court decisions involving the definition of "disability."[3] NCD concludes that the Supreme Court's interpretation of the definition of "disability" under the ADA has so altered the ADA that the majority of people with disabilities now would have no federal legal recourse in the event of discrimination, particularly in instances of employment discrimination. Passage of the ADA Restoration Act is urgently needed to restore the ADA's protections against disability-based discrimination for all Americans.

NCD's Role in the Passage of the ADA

NCD played a key role in the inception of the ADA, and remained closely involved while it was being deliberated by Congress.[4] NCD first proposed the concept for the ADA,

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federal legislation to address the discrimination experienced by people with disabilities, in its 1986 publication: *Toward Independence: An Assessment of Programs and Laws Affecting Persons with Disabilities—With Legislative Recommendations.*[5] The first published draft of the law was included in NCD's report, *On the Threshold of Independence*[6] in early 1988. The ADA was then introduced in the House and the Senate in April of that year.

While the bill was introduced too late in the congressional session to be voted on by both chambers, NCD continued to play a pivotal role in the passage of the bill. NCD members continued to meet with various members of the disability community. NCD released another report, *Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities*, which evaluated poll results and made recommendations based on the findings.

On Capitol Hill, Congressman Major Owens created the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities, which researched the extent of discrimination. The Task Force was chaired by former NCD Vice Chairperson Justin Dart, and its coordinator was former NCD Executive Director Lex Frieden. Revisions were made to the initial draft, with the assistance of national disability consumer organizations. Strong bipartisan support for the ADA had developed by the time Congress returned for the next session. Both the House and Senate passed similar bills and, in mid-July, both chambers passed the final version of the ADA, which was signed into law by President George H. W. Bush on July 26, 1990.

Definition of "Disability" in the ADA

Congress modeled the definition of disability in the ADA on Section 504 of the Rehabilitation Act, which had been construed to encompass both actual and perceived limitations, and limitations imposed by society. The definition adopted by Congress and the legislative history of the ADA demonstrate the intention to create comprehensive coverage under the statute. This definition of "disability" was conceived as a broad element that would extend statutory protection to anyone who had been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived.

The leading legal precedent on the definition of disability when Congress was considering the ADA, was the Supreme Court's decision in *School Board of Nassau County v. Arline.*[7] Several Committee reports regarding the ADA expressly relied on the *Arline* ruling in discussing the definition of disability. In *Arline*, the Court took an expansive and nontechnical view of the definition of "disability." The Court found that Ms. Arline's history of hospitalization for infectious tuberculosis was "more than sufficient" to establish that she had "a record of" a disability under Section 504 of the Rehabilitation Act.[8] The Court made this ruling even though her discharge from her job was not because of her hospitalization.

The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted that, in establishing the new definition of disability in 1974, Congress had expanded the definition "so as to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"[9]

To ensure that the definition of disability and other provisions of the ADA would not receive restrictive interpretations, Congress included a requirement that "nothing" in the ADA was to "be construed to apply a lesser standard" than is applied under the relevant sections of the Rehabilitation Act, including Section 504.[10] At the time of the ADA's enactment, it was not contemplated that disability discrimination cases would come to be more about determining the extent of someone's disability, rather than about whether discrimination, in fact, occurred.[11]

For several years after the ADA was signed into law, the pattern of broad and inclusive interpretation of the definition of disability, established under Section 504, continued under the ADA. In 1996, a federal district court declared that "it is the rare case when the matter of whether an individual has a disability is even disputed."[12] As some lower courts, however, began to take restrictive views of the concept of disability, defendants took note, and disability began to be contested in more and more cases.

The Supreme Court Changes the ADA Definition of Disability

Beginning with its decision in *Sutton v. United Airlines* in 1999, the U.S. Supreme Court started to turn its back on the broad interpretation of disability endorsed by the Court in the *Arline* decision.[13] By the time of the *Toyota v. Williams* decision in 2002, the Court was espousing the view that the definition should be "interpreted strictly to create a demanding standard for qualifying as disabled."[14] This position is directly contrary to what the Congress and the President intended when they enacted the ADA.

A narrow interpretation of the term "disability" in the ADA excludes many people whom Congress intended to protect. Recognizing that discrimination on the basis of disability takes place in various ways against people with various types of disabilities, Congress had adopted a time-tested and inclusive, three-prong definition of "disability" in the ADA. Congress was entitled to expect that this definition would be interpreted expansively because the courts and regulations had interpreted the identical definition in the Rehabilitation Act broadly. NCD views as "draconian" and "erroneous" the "stereotypical view of disability" that would extend ADA protection only to those who "are so severely restricted that they are unable to meet the essential demands of daily life."[15]

In June of 1999, the Supreme Court decided *Sutton v. United Airlines*,[16] a case involving pilots needing corrective lenses, and *Murphy v. United Parcel Service*,[17] a case involving a man with high blood pressure. In both cases, the Court held that, in determining whether an individual is substantially limited in a major life activity, courts may consider only the limitations of an individual that persist after taking into account

mitigating measures, e.g., medication or auxiliary aids and services and any negative side effects the mitigating measures may cause.

On the same day in 1999, the Supreme Court decided *Albertson's v. Kirkingburg*,[18] a case involving a man who was blind in one eye. The Court held in *Kirkingburg* that a "mere difference" in how a person performs a major life activity does not make the limitation substantial; how an individual has learned to compensate for the impairment, including "measures undertaken, whether consciously or not, with the body's own systems," also must be taken into account.[19] These three cases, *Sutton, Murphy* and *Kirkingburg* are often referred to as the "*Sutton* trilogy."

The result of these decisions is that people who Congress clearly intended to be covered by the ADA,[20] such as people with epilepsy,[21] diabetes,[22] depression,[23] and hearing loss,[24] are now being denied employment and refused reasonable accommodations because of their disability or the mitigating measures they use, and courts refuse to hear their cases, regardless of how egregious their employers' actions. Many federal cases have ensued in which an employer who discriminates against an individual with a disability, *because of* the disability, is then permitted to defend its actions by arguing the person does not have a disability. This is not only illogical, it is patently unjust.

These decisions have resulted in courts now making elaborate inquiries into all aspects of the personal lives of certain plaintiffs in order to determine whether, and to what extent, mitigating measures actually alleviate the effects of the disability – none of which is relevant to the question of whether discrimination occurred. Such inquisitions about the extent of people's disabilities is also inconsistent with other provisions of the ADA that sharply restrict the use of inquiries about the nature and extent of disabling conditions and of medical information about an individual's limitations.[25]

When elaborate inquiries are called for by the ADA, they should be about the individual's abilities – not his or her disabilities.[26] Not only are elaborate inquiries into the extent of a person's disability demeaning and extremely costly in terms of litigation resources, they miss the point. It does not matter if medication stabilizes a person's blood sugar if the employer harbors an irrational fear that it will not do so, and terminates the employee. It does not matter how effective someone's hearing aids are if an employer refuses to hire him because the employer believes his insurance rates will increase if he hires a person with a hearing impairment. It does not matter if working the day shift would eliminate someone's risk of seizures if the employer refuses the employee's request to switch from the night shift to the day shift.

By focusing on how well mitigating measures alleviate the effects of a disability, the Supreme Court has denied discrimination protection to people who are likely to be capable of doing the job. It is a rare plaintiff who is able to successfully challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.

The Supreme Court has also changed the meaning of "substantial limitation of a major life activity" in ways that screen out even more people with disabilities that Congress intended to protect. Closely tracking the Rehabilitation Act, the first prong of the ADA definition of disability provides that a condition constitutes a disability if it "substantially limits one or more of the major life activities of such individual."[27] In *Toyota v. Williams*, the Court changed substantially limits to mean "prevents or severely restricts."[28]

In the *Williams* case, the Court also decided that to be substantially limited in a major life activity, a person must be substantially limited in an activity "of central importance to most people's daily lives," and held that "substantially limited in a major life activity" must be "interpreted strictly to create a demanding standard for qualifying as disabled."[29] The phrase "of central importance to most people's daily lives" has led to extensive questioning about an individual's ability to brush his or her teeth, bathe, dress, stand, sit, lift, eat, sleep, and interact with others.[30] It has led to contradictory rulings by federal courts about whether activities such as communicating, driving, gardening, crawling, jumping, learning, shopping in the mall, performing house work, and even working and living are "major life activities."[31] In hundreds of cases of alleged disability-based discrimination, people with disabilities have had to spend their resources litigating such issues, often with the question of whether disability-discrimination occurred never being addressed.

The cases discussed here represent only a portion of the problematic issues raised by a string of decisions by the Supreme Court which have significantly diminished the civil rights of people with disabilities.[32] The ADA Restoration Act is needed to return the focus to examination of the relevant facts of the case when disability discrimination is alleged. Can the person with a disability perform the essential functions of the job, with reasonable accommodations, if necessary? Would the reasonable accommodation pose an undue hardship on the employer? Would the person's mental or physical impairment pose a safety risk to others that could not be eliminated by a reasonable accommodation? Did the employer discriminate against the employee on the basis of a real or perceived disability?

As NCD declared in its *Righting the ADA* report:

> The Court's position that the definition of disability is to be construed narrowly represents a sharp break from traditional law and expectations. It ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a comprehensive prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability. It also flies in the face of an established legal tradition of construing civil rights legislation broadly. Congress knowingly chose a definition of disability that to that time had been interpreted broadly in regulations and the courts; it was entitled to expect the definition would continue to receive a generous reading.

> In crafting the ADA, Congress did not treat nondiscrimination as something special that can be spread too thin by granting it to too many people. Unlike disability benefits programs, such as Social Security Income (SSI) and Social Security Disability Insurance (SSDI), which are predicated on identifying a limited group of eligible persons to receive special benefits or services that other citizens are not entitled to obtain, and for which the courts have sought to guard access jealously, the ADA is premised on fairness and equality, which should be generally available and expected in American society. The Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.[33]

Given the extensive congressional record regarding findings of discrimination against many types of disabilities and the broad coverage of the ensuing ADA regulations, the general understanding following enactment of the ADA was that anyone experiencing disability-related discrimination had a remedy in court. People with disabilities of all types presume they are covered by the ADA when many of them now are not.

Restoration, Not Expansion

The ADA was intended to apply to every person who experiences discrimination on the basis of disability; protection from discrimination is not a special service reserved for a select few. The law was crafted to extend protection even to people who are not actually limited by their conditions but who experience adverse treatment based on fear, stereotyping, and stigmatization.

The ADA Restoration Act supports the purpose of the ADA, to prohibit discrimination, by removing the obstacle of forcing a person to prove that he or she has a sufficiently severe impairment to justify protection under the law. The language in the ADA Restoration Act still requires a plaintiff to show that discrimination occurred based on his or her real or perceived physical or mental impairment to successfully bring a claim under the ADA. Under the ADA Restoration Act, the ADA would still protect only individuals who can prove discrimination based on that impairment, and, in addition, in the employment context, individuals who can demonstrate that they are qualified to perform the essential functions of the job.

Congress balanced the interests at stake when it passed the ADA 17 years ago. Congress included, for instance, elements intended to protect the interests of small businesses, and these elements remain in place under the ADA Restoration Act, including: the exemption for small employers, the undue hardship limitation, the readily achievable limit on barrier removal in existing public accommodations, the undue burden limitation regarding auxiliary aids and services, and the elevator exception for small buildings, among others.[34] The bill currently before Congress restores the original intent of a carefully crafted law.

Veterans with Disabilities

NCD is particularly concerned about the impact of the developments in the ADA case law on veterans with disabilities. Service members returning from the current conflict in Iraq and Afghanistan are experiencing a very high incidence of disabilities, including post-traumatic stress disorder and traumatic brain injury.[35] Many of our veterans with disabilities will require the use of mitigating measures such as medication, orthotics, and assistive technology. It is imperative that Congress restore the ADA so that these men and women will not be subjected to discrimination as a result of disabilities they incurred while serving our country.

NCD hosted a veterans' program at its quarterly meeting held in San Diego, California on January 29 - 31, 2007. The purpose of the program was for Council members to learn from veterans with disabilities, particularly service members returning from the current conflicts, about the programs available to assist them as they transition to life with a disability, and whether those programs are meeting their needs. NCD learned that veterans with disabilities returning from the current conflicts differ from those in prior wars in that many are electing to remain in the military or enter the civilian workforce after rehabilitation. This phenomenon is due, in part, to advances in assistive technology that make it possible for people with disabilities to perform a wide range of jobs and, in part, to progressing attitudes, as many more people have experienced first-hand the skills and potential of people with disabilities.

We must ensure that our society welcomes home our veterans with disabilities, and that those who can perform essential job functions are not prevented from doing so solely on the basis of their disability or the mitigating measures they use. The rights of veterans with disabilities to be free from discrimination cannot be ensured without restoration of the ADA.

Conclusion

The Americans with Disabilities Act was designed to prohibit disability-based discrimination against all Americans, whether or not they actually have a disability. The Supreme Court has issued many decisions interpreting the ADA since its enactment, limiting the scope of the ADA and transforming it into a "special" protection for a select few. The result is that disability discrimination now occurs with impunity, particularly in the workplace. Unless and until Congress takes action to correct the course of the ADA, most Americans are no longer protected from disability-based discrimination. NCD urges Congress to act quickly to reinstate the scope of protection Congress initially provided in the ADA.

Respectfully submitted,

John Vaughn
Chairperson

[1] See NCD's *Policy Brief Series: Righting the ADA at* http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.
[2]National Council on Disability, *Righting the ADA* (2004), available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.
[3] *See* National Council on Disability, *Americans with Disabilities Act Policy Brief Series: Righting the ADA – No. 6, Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity*, (2003), *at* http://www.ncd.gov/newsroom/publication/extentoflimitations.html.
[4] For additional information, see NCD's 1997 publication, *Equality of Opportunity: the Making of the Americans with Disabilities Act,* http://www.ncd.gov/newsroom/publications/1997/equality.htm. NCD's role with respect to the ADA is also described in the 2004 report *National Council on Disability: 20 Years of Independence,* http://www.ncd.gov/newsroom/publications/2004/publications.htm.
[5]National Council on Disability, *Toward Independence: An Assessment of Programs and Laws Affecting Persons with Disabilities—With Legislative Recommendations* (1986), *available at* http://www.ncd.gov/newsroom/publications/1986/toward.htm.
[6] National Council on Disability, *On the Threshold of Independence* (1988), available at http://www.ncd.gov/newsroom/publications/1988/threshold.htm.
[7] *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).
[8] *Id.* at 281.
[9] *Id.* at 279.
[10] 42 U.S.C. § 12201(a).
[11] For additional information, see NCD's policy papers that discuss the care with which the ADA definition of disability was selected and the breadth of that definition, *A Carefully Constructed Law* and *Broad or Narrow Construction of the ADA*, papers No. 2 and No. 4, respectively, of NCD's *Policy Brief Series: Righting the ADA at* http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.
[12] *Morrow v. City of Jacksonville*, 941 F. Supp. 816, 823 n. 3 (E.D.Ark. 1996).
[13] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).
[14] *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197-98 (2002).
[15] National Council on Disability, *National Council on Disability: 20 Years of Independence (2004), available at* http://www.ncd.gov/newsroom/publications/2004/twentyyears.htm.
[16] *Sutton*, 527 U.S. 471 (1999).
[18] *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).
[18] *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
[19] *Id.* at 564-67.
[20]*See* S. Rep. No. 116, 101st Cong., Ist Sess. 23 (1989); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 52 (1990).
[21] *See Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999).
[22] *See Nordwall v. Sears, Roebuck & Co.*, 46 Fed. App. 364, 2002 WL 31027956 (7th Cir. 2002) (unpublished).
[23] *See Spades v. City of Walnut Ridge*, 186 F.3d 897, 900 (8th Cir. 1999).
[24] *See Martell v. Sparrows Point Scrap Processing*, 214 F. Supp. 2d 527 (MD. 2002).

[25] 42 U.S.C. 12112(d)(2)(A) ("Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."); 42 U.S.C. 12112(d)(2)(B) ("A covered entity may make inquiries into the ability of an employee to perform job-related functions."); 42 U.S.C. 12112(d)(4)(A) ("A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.").
[26] *Id.*
[27] 42 U.S.C. § 12102(2)(A).
[28] *Toyota*, 534 U.S. 184 (2002).
[29] *Id.*
[30] National Council on Disability, *Policy Brief Series: Righting the ADA, No. 13, The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities* (2003), *at* http://www.ncd.gov/newsroom/publications/2003/limitation.htm.
[31] *Id.*
[32] *See* NCD, *Righting the ADA* (2004), *available at* http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.
More detailed descriptions of the specific issues and problems are presented in the *Righting the ADA* series of policy briefs published on NCD's Web site at www.ncd.gov/newsroom/publications/2003/policybrief.htm.
[33] National Council on Disability, *Righting the ADA* (2004) at 11, *available at* http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm#IIA.
[34] For more information, see NCD statement on the subject of the Notification Act at http://www.ncd.gov/newsroom/news/2003/r03-408.htm.
[35] According to the 2004 Report of the Special Committee on Post-Traumatic Stress Disorder, established by Congress in 1984 to monitor this problem, forty percent of casualties returning from Iraq and Afghanistan to Walter Reed Army Medical Center reported symptoms consistent with PTSD.

[The statement of the National Council on Independent Living follows:]

Prepared Statement of the National Council on Independent Living (NCIL)

Background: Passed with overwhelming bipartisan support, the Americans with Disabilities Act of 1990 was designed as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Without doubt, the ADA has transformed America's communities, removing barriers to persons with disabilities in the built environment and infrastructure, and has substantively advanced the cause of community integration for people with disabilities.

Issues: Yet, as documented in the National Council on Disability's report "Righting the ADA," a series of flawed Supreme Court decisions have seriously undermined our ability to realize the full promise of the ADA. In Sutton v. United Air-

lines, and Toyota v. Williams, the Supreme Court has taken to interpreting the definition of disability in a restrictive manner that Congress never envisioned, placing the burden on persons with disabilities to prove that they are entitled to the ADA's protections—particularly in the employment sphere. This creates a Catch-22 in which employees can be discriminated against on the basis of their disability but unable to enforce their rights because they cannot meet the high threshold the courts have set to prove they are disabled. Furthermore, in University of Alabama v. Garrett, the Supreme Court ruled 5-4 that the 11th Amendment prohibits suits in federal court by state employees to recover monetary damages under Title I of the ADA. The Supreme Court's restrictive approach to the ADA in employment cases is especially disconcerting since the unemployment of persons with disabilities wishing to work remains widespread.

Proper implementation of the original intent of the ADA in the employment sphere is critical to the economic self-sufficiency and full societal participation of people with disabilities that is at the core of the Independent Living (IL) movement. The fact that only 7% of persons with disabilities own their own homes and roughly 30% of Americans with disabilities are employed is a reflection of the continued inability of persons with disabilities to enforce their right to non-discrimination in the workplace under the Americans with Disabilities Act.

Issues Raised by the U.S. Chamber of Commerce: The U.S. Chamber of Commerce claims that H.R. 3195 ensures that protections on the basis of disability apply broadly. This is correct. The Supreme Court did not understand that significant disability as defined by the Americans with Disabilities Act includes people with intellectual disabilities (formerly known as Mental Retardation), epilepsy, diabetes, cancer, and mental illnesses, among others. For a person who merely has poor vision that is correctible, he or she may indeed be considered disabled by a court. The question is not whether a person with a disability has a disability or is regarded as a person with a disability. The question is whether or not the person has been discriminated against on the basis of disability. The intent of H.R. 3195 is to prevent discrimination on the basis of disability, not to create a protected class.

The Chamber of Commerce also alleges that "H.R. 3195 would reverse the longstanding rule that allows employers to determine what the essential functions of a job are, allowing plaintiffs to second-guess routine job decisions that employers must make every day." There is no such language in H.R. 3195 to this effect.

The problem with the Supreme Court's and lower courts' decisions, referenced in HR 3195's "Findings and Purposes," is that they refuse to even consider whether discrimination based on disability has occurred. Therefore, the courts ruled that the plaintiff was either not disabled or not disabled enough to be protected by the ADA. Had the courts properly reviewed these cases, they would have decided them on the basis of whether the plaintiff was qualified to perform the essential functions of the job with or without reasonable accommodation.

The real problem in the Chamber of Commerce's August 22 letter to the U.S. House of Representatives is not their fallacious reasoning, but the blatant prejudice it exhibits against Americans with disabilities. NCIL has members in all but five Congressional Districts. Our experience working with businesses in communities across the country over three decades shows that the majority of businesses are more open minded than the board and staff of the Chamber of Commerce.

NCIL supports:

Enactment of the ADA Restoration Act as introduced by House Majority Leader Steny Hoyer, Rep. James Sensenbrenner, and cosponsored by more than 200 of their colleagues to remedy decades of purposeful, unconstitutional discrimination;

Funding for ongoing public education on the requirements of the ADA, and adequate funding for strong enforcement by the US Department of Justice, US Equal Employment Opportunity Commission, Federal Communications Commission, and other agencies with enforcement responsibilities;

Creative efforts by federally-funded enforcement, technical assistance, and advocacy organizations to promote the positive aspects of the ADA's accessibility and equal opportunity requirements;

Efforts by States to voluntarily waive their immunity from damage suits brought by people with disabilities under Titles I and II of the ADA, and;

Bipartisan Congressional efforts to overturn Supreme Court decisions narrowing the scope of the ADA, by enacting the ADA Restoration Act, H.R. 3195.

Thank you for your consideration. Please do not hesitate to contact Deb Cotter of our policy staff if you have additional questions or concerns, please contact us.

Sincerely,

JOHN A. LANCASTER, *Executive Director,*
KELLY BUCKLAND, *President,*
National Council on Independent Living.

[Additional statements submitted by Mr. McKeon follow:]

[A statement of organizations in opposition to the bill follows:]

January 28, 2008.

Hon. GEORGE MILLER, *Chairman,*
Hon. HOWARD "BUCK" MCKEON, *Ranking Member,*
Committee on Education & Labor, U.S. House of Representatives, Washington, DC.

DEAR CHAIRMAN MILLER AND RANKING MEMBER MCKEON: We write today to share our concerns regarding H.R. 3195, the "ADA Restoration Act" that your committee will discuss in a legislative hearing on January 29. As a group, we strongly believe that the Americans with Disabilities Act (ADA) provides important and necessary protections for employees and applicants. However, this legislation as currently drafted would not "restore" the ADA, but would dramatically expand it to cover even the most minor impairments, such as bad eyesight, the flu or a small scar. In short, the bill is inconsistent with Congressional intent expressed when the law was passed in 1990, would trivialize the concept of disability and inappropriately divert employer resources from those who need them most.

As you examine H.R. 3195, it is critical to note the key distinction between "disability" and "impairment" under the law. Under the ADA, an individual is "disabled" if he or she has a physical or mental impairment that substantially limits a major life activity. The law defines "impairment" broadly to cover virtually any physical or mental condition. An impairment is considered a covered disability only if it substantially limits activities that are central to daily life, such as seeing, reading or breathing. If an individual is found to be disabled and qualified to perform the essential functions of the job, he or she may request an accommodation from the employer. The individual and employer then engage in an interactive process to reach a reasonable accommodation so the employee can perform his or her job. This process has worked well under the law and is structured to respond to the individual needs of employees.

H.R. 3195 drastically expands the definition of "disability," by eliminating the requirements that an individual's impairment substantially limit a major life activity. Thus, the bill's concept of "disabled" would be expanded to cover any impairment, regardless of how temporary, intermittent, occasional, mild or minor it is, including health conditions such as the flu. The change would result in the law covering conditions that Congress never intended to be covered by the ADA, exponentially increasing the number of persons who can bring a disability discrimination claim. For example, a person with a minor finger cut requiring stitches would be considered just as disabled as a veteran returning home having lost his or her arm in combat, and an individual with occasional headaches would receive the same protection as an individual with a serious brain damage. In essence, H.R. 3195 would create an environment where anything less than perfect health would cause an individual to be covered under the ADA. The resulting increase in requests for accommodation would overwhelm employers and make it more difficult for them to assist the severely disabled.

These bills make many other unworkable changes to the ADA including a dramatic expansion of employers' reasonable accommodation obligations and a reversal of a long-established rule found in all federal antidiscrimination laws that a person must show that he or she is qualified to perform the job. Instead, the bills would shift this responsibility to employers.

Thank you for your consideration.

Sincerely,

AMERICAN ARCHITECTURAL MANUFACTURERS ASSOCIATION,
AMERICAN COMPOSITES MANUFACTURERS ASSOCIATION,
AMERICAN HOTEL & LODGING ASSOCIATION,
AMERICAN IRON AND STEEL INSTITUTE,
AMERICAN SPORTFISHING ASSOCIATION,
AMERICAN SUPPLY ASSOCIATION,
ASSOCIATED BUILDERS & CONTRACTORS,
ASSOCIATED GENERAL CONTRACTORS,
COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES,
ENVIRONMENTAL INDUSTRY ASSOCIATIONS,
FOOD MARKETING INSTITUTE,
HR POLICY ASSOCIATION,
INDEPENDENT ELECTRICAL CONTRACTORS,
INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION,
INTERNATIONAL FRANCHISE ASSOCIATION,
INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES,
INTERNATIONAL WAREHOUSE LOGISTICS ASSOCIATION,
NATIONAL ASSOCIATION OF CONVENIENCE STORES,
NATIONAL ASSOCIATION OF MANUFACTURERS,
NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS,
NATIONAL COUNCIL OF CHAIN RESTAURANTS,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION,
NATIONAL RESTAURANT ASSOCIATION,
NATIONAL RETAIL FEDERATION,
NATIONAL ROOFING CONTRACTORS ASSOCIATION,
NATIONAL SHOOTING SPORTS FOUNDATION,
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATIONS,
NON-FERROUS FOUNDERS' SOCIETY,
NORTH AMERICAN DIE CASTING ASSOCIATION,
PRINTING INDUSTRIES OF AMERICA,
RETAIL INDUSTRY LEADERS ASSOCIATION,
SOCIETY FOR HUMAN RESOURCE MANAGEMENT,
SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE,
STEEL MANUFACTURERS ASSOCIATION,
TEXTILE CARE ALLIED TRADES ASSOCIATION,
TEXTILE RENTAL SERVICES ASSOCIATION OF AMERICA,
U.S. CHAMBER OF COMMERCE,
WASTE EQUIPMENT AND TECHNOLOGY ASSOCIATION,
WOOD MOULDING & MILLWORK PRODUCERS ASSOCIATION.

[The statement of the U.S. Chamber of Commerce follows:]

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RANDEL K. JOHNSON
VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463 5448 · 202/463 3194 FAX

January 29, 2008

The Honorable George Miller
Chairman, Committee on Education and Labor
United States House of Representatives
Washington, DC 20515

The Honorable Buck McKeon
Ranking Republican member, Committee on Education and Labor
United States House of Representatives
Washington, DC 20515

Dear Chairman Miller and Ranking Member McKeon:

On behalf of the U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, I am pleased to submit the following testimony for the record of today's legislative hearing on H.R. 3195, the ADA Restoration Act.

After 18 years, it is certainly appropriate to examine the Americans with Disabilities Act to ensure that it is working as intended. However, as discussed more fully in the attached testimony, H.R. 3195 is not merely a restoration of the Act, but would instead radically expand it. Consequently, the Chamber strongly opposes this bill.

We look forward to working with you on this important issue. Thank you for your consideration of our concerns.

Sincerely,

Randel K. Johnson

Statement of the U.S. Chamber of Commerce

ON: **HEARING ON H.R. 3195—THE ADA RESTORATION ACT OF 2007**

TO: **THE HOUSE COMMITTEE ON EDUCATION AND LABOR**

BY: **LAWRENCE Z. LORBER**
PROSKAUER ROSE LLP

DATE: **JANUARY 29, 2008**

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 105 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Testimony of

Lawrence Z. Lorber*

Before the United States House of Representatives

Committee on the Judiciary

Subcommittee on Constitution, Civil Rights and Civil Liberties

Hearing on H.R. 3195—The ADA Restoration Act of 2007

October 4, 2007

Chairman Nadler, Ranking Member Franks, and members of the Subcommittee, I am pleased to be able to present this testimony on behalf of the United States Chamber of Commerce addressing H.R. 3195, the ADA Restoration Act of 2007.

The United States Chamber of Commerce (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every industry, sector, and geographical region of the country. I serve as the Chair of the Chamber's policy advisory committee on equal employment opportunity matters.

The Chamber strongly supports equal opportunity in employment, in particular greater inclusion of people with disabilities in the workplace. While the Chamber believes H.R. 3195 is offered with the best of intentions to rectify perceived shortcomings in the Americans with Disabilities Act (the "ADA"), we respectfully disagree with respect to the impact that the bill's provisions would have and, for the reasons that will be discussed more fully in this testimony, the Chamber opposes H.R. 3195 as drafted.

Perhaps my own background may lend some authority to this testimony. I am a practicing employment lawyer and a partner in the Labor and Employment department of Proskauer Rose LLP in Washington, D.C. I have had a long involvement in the issues impacting the inclusion of the disabled in to the workplace. In 1975, I was privileged to be appointed as the Director of the Office of Federal Contract Compliance Programs ("OFCCP") and Deputy Assistant Secretary of the Department of Labor. In that capacity, I was responsible for reviewing the 1974 Amendments to the Rehabilitation Act of 1973. Subsequently, I was responsible for issuing the first regulations promulgated under § 503 of the Rehabilitation Act. These regulations require affirmative action and non-discrimination with respect to the handicapped by federal contractors. My agency also administered the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which required affirmative action and non-discrimination for Vietnam-

* I would also like to acknowledge Meredith C. Bailey, an associate at Proskauer Rose, for her invaluable assistance in the preparation of this testimony.

era veterans and disabled veterans of any era, and the first regulations under that statute were issued under my supervision. In addition, the OFCCP enforced Executive Order 11246, as amended requiring non-discrimination and affirmative action by federal contractors on the basis of race, gender and ethnicity.

In particular, my experience in enforcing § 503 and in supervising the final adoption of the post-1974 amendment regulations provide a valuable insight to the current legislation. Working on a blank slate, we understood certain principles. First, not every individual with an impairment would benefit from the program. To afford appropriate, targeted relief, we adopted as guidance the American Medical Association's Guides to the Evaluation of Permanent Impairment. Second, we understood that to enforce a new requirement, we must make employers aware of their responsibilities and covered individuals aware of their rights. So we instituted an enforcement program including back pay relief as well as vigorous outreach. I have appended to this testimony perhaps my most cherished memento from that time in my career: a memorandum from my executive staff, all career employees, enumerating what was achieved and what precedent was set at that time. While they had kind sentiments for me, they do set forth what became the framework for the treatment of employees under § 503, and which had some influence, we believe, on the subsequent issuance of the § 504 regulations—the basis for the ADA.

On July 26, 1990, the Americans with Disabilities Act of 1990 ("ADA") was signed into law.[1] President George H.W. Bush described the ADA as an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."[2] The goals of the ADA's passage were two-fold: (1) to provide a clear mandate for the elimination of discrimination against individuals with disabilities; (2) to address accommodation of disabled individuals in both society and the workplace.

For seventeen years, the ADA has fulfilled its promise to the individuals it was meant to protect—a protected class of individuals with "disabilities." The proposed legislation, which seeks to drastically alter the statutory scheme under the ADA, effectively dilutes the protections for those whom the ADA was originally enacted to protect. H.R. 3195 will relegate the ADA to a statement of principle lacking the structure and content needed to sustain changes for the inclusion of the disabled.

The ADA Restoration Act of 2007

H.R. 3195 represents a radical departure from the ADA. As written, the proposed legislation would drastically alter the statutory scheme in that it would:

- remove the current ADA requirement that a disability "substantially limit a major life activity;"

[1] Pub. L. No. 101-336, 104 Stat. 327 (1990).
[2] President George Bush, *Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990, available at* http://www.presidency.ucsb.edu/ws/?pid=18712 (John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database)).

- effectively substitute the status of "impairment" for that of a "disability" to determine coverage under the ADA;
- prevent courts and employers from considering mitigating measures an individual may be using (such as medication or devices) when determining whether he or she is disabled; and
- shift the burden of proof from plaintiffs to employers regarding whether an individual is "qualified" to perform a job.

Nothing justifies such a drastic overhaul of the ADA.

The ADA was enacted in 1990 in response to a growing public awareness and concern about discrimination against people with disabilities and the effects of such discrimination on the economic and employment opportunities available to these individuals.[3] In his prepared statement before Congress, United States Attorney General Richard Thornburgh described the need to integrate disabled persons, otherwise ostracized, into the American economic and social fabric: "[M]any persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. . . . [P]ersons with disabilities are still too often shut out of the economic and social mainstream of American life."[4] The House Committee on Education and Labor's favorable report on the ADA concluded that "to the extent that the changes in practices and attitudes brought about by the implementation of the Act ultimately assist people with disabilities in becoming more productive and independent members of society, both they and our entire society benefit."[5] There was a clear understanding by the Administration supporting the ADA and the relevant committees that the Act would be directed to those unfairly and wastefully denied opportunities to be productive participants in the economy.

Congress recognized that the unique aspects of discrimination against individuals with disabilities required legislation that would be distinct from other civil rights statutes that preceded it. Civil rights statutes generally protect all individuals from discrimination on the grounds prohibited, whether it be age, sex, religion, or national origin.[6] The ADA, like the Age Discrimination in Employment Act, defined a distinct class to be afforded benefits and protection under the statute. Congress recognized it was imperative to define "disability," as it had defined "age," for purposes of extending civil rights protection to those truly in need of it. In doing so, it patterned the definition of disability after the Rehabilitation Act of 1973,[7] which requires that an "individual with a handicap" be "substantially limited in one or more major life activities."[8] The

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[3] Lauren J. McGarity, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 Yale L.J. 1161, 1164-5 (2000).
[4] *Americans with Disabilities Act of 1989: Hearing Before the Comm. of the Judiciary*, 101st Cong. (1989) (prepared statement of Richard Thornburgh, Attorney General of the United States of America), *as reprinted in* H. Comm. on Educ. and Lab., 101st Cong., Americans with Disabilities Act 2021; 2034-5 (Comm. Print 1990).
[5] H.R. Rep. No. 101-485, pt. 2, at 45-46, reprinted in 1990 U.S.C.C.A.N. at 327-28.
[6] Robert L. Burgdorf Jr., *The American with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. Rev. 413, 441 (1991).
[7] 29 U.S.C. § 794(a).
[8] H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 27; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 3 (199) at 50.

ADA Committee reports expressly endorse this definition.[9] In adopting the major life activity requirement, the Committee reports describe the need to clarify that "disability" does not include "minor, trivial impairments, such as a simple infected finger."[10]

H.R. 3195 removes the current ADA requirement that a disability "substantially limit a major life activity," such that it effectively substitutes the term "impairment" for "disability." This definition of disability mirrors an early version of a definition rejected by the ADA drafters.[11] Congress refused to adopt this overreaching definition because it conflicted with the then-fifteen year history of § 504 of the Rehabilitation Act of 1973, created an unworkable standard as a matter of policy, and effectively created a universal federal employment statute, rather than a statute directed at dealing with disabilities.

The definition of "disability" in H.R. 3195 undermines the original intent of the ADA in that it entitles anyone with a "physical or mental impairment" to the protection of the ADA.[12] Individuals with temporary or minor physical or mental "impairments" have not been the subject of such discrimination, nor have they been subject to prejudicial myths and stereotypes about their employability.[13] Changing the definition to provide ADA protection to individuals with commonplace impairments would cast the ADA's net too wide and diffuse protections afforded to the truly disabled.[14]

As a practical matter, the definition of "impairment" is so broad that any physical or mental health condition—no matter how minor—will satisfy the impairment requirement. Indeed, as the EEOC has noted, "the determination of whether an individual has a 'disability' in not necessarily based on the name of the diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[15] Because the definition of "physical or mental impairment" is so expansive, there has been minimal litigation regarding what conditions constitute "impairments." The few courts which have addressed the issue have recognized that relatively minor conditions meet the definition of impairment, but not an ADA disability. Examples include:

- back and knee strains,[16]
- erectile dysfunction,[17]

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[9] S. Rep. No. 116, 101st Cong. 1st Sess. 22 (1989); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 52 (1990); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 28 (1990).

[10] S. Rep. No. 116, 101st Cong. 1st Sess. 23 (1990); H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 52 (1990).

[11] The ADA drafters rejected an early version of the ADA that prohibited discrimination "because of a physical or mental impairment, perceived impairment or record of impairment," favoring instead the framework of the ADA's statutory precursor, the Rehabilitation Act of 1973. *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And what Can We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91 (2000).

[12] *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Con We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91, 101 (2000) (stating that an "argument can be made that not every person with a physical or mental impairment experiences discrimination.").

[13] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 251 (2002).

[14] Katherine Jsu Hagmann-Borenstein, *Much Ado About Nothing: Has the U.S. Supreme Court's Sutton Decision Thwarted a Flood of Frivolous Litigation*, 37 Conn. L. Rev. 1121, 1134 (2005).

[15] 29 C.F.R. pt. 1630, App. § 1630.2(j).

[16] *Benoit v. Tech. Mfg. Corp.*, 331 F.3d 166 (1st Cir. 2003).

- headaches,[18]
- "tennis elbow."[19]

It is, therefore, critical that the scope of the ADA definition of "disability" be sufficiently defined to ensure that truly disabled, but genuinely capable, individuals will receive protection and opportunities under the statute. The ADA's noble purpose—the elimination of discrimination in employment based on stereotypes about the insurmountability of disability—would be debased if the statutory protections available to those who are truly disabled could be claimed by *anyone* whose disability was minor and whose relative severity of impairment was widely shared.

The United States Supreme Court decisions[20] that have been such a magnet for controversy are wholly consistent with the ADA's language and intent. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court held that the phrase "substantially limits one or more major life activities" distinguishes a mere impairment from an actionable disability under the ADA.[21] Similarly, in *Sutton*, and its companion cases, the Supreme Court ruled in a seven to two decision that if a person takes steps "to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity."[22]

The problems cited by proponents of this legislation are derived, in part, from the lack of a simplistic "one size fits all" approach to the ADA. Determinations about who qualifies for protection under the law and what is required once protection is afforded are not easily solved in the context of disability law. This has required courts to craft a jurisprudence that addresses the unique facts and circumstances of each job situation.[23] The Supreme Court opinions, which are oft-criticized as having "unduly narrowed the broad scope of protection afforded in the ADA,"[24] have instead preserved the protections of the ADA by carefully crafting opinions that recognize the devastating effect that an expansive interpretation of "disability" could have on the ADA's intended beneficiaries.

The three cases in the "*Sutton*-trilogy" represent the Supreme Court's careful approach. In *Sutton*, for example, plaintiffs with myopic vision attempted to use the ADA to circumvent the defendant airline's minimum vision requirement to become commercial pilots. The facts in *Sutton* may have influenced the outcome: the Court might not have wanted to tell commercial

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[17] *Arrieta-Colon v. Wal-Mart P.R., Inc.*, 434 F.3d 75 (1st Cir. 2006).
[18] *Sinclair Williams v. Stark County Bd. of Comm'rs*, No. 99-4081, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001).
[19] *Cella v. Villanova Univ.*, No. 03-1749, 2004 U.S. App. LEXIS 21740 (3d Cir. 2004).
[20] *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Toyota Motor Mfg, Ky, Inc. v. Williams*, 534 U.S. 184 (2002).
[21] *Toyota*, 534 U.S. at 197. It is important to note that the decision did not eliminate all people with carpal tunnel syndrome from the ADA's protections. The case merely requires the individualized analysis to include an examination of manual tasks essential to daily living. *See* Commissioner Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 Brandeis L.J. 769, 773 (2003).

[22] *Sutton*, 527 U.S. at 482.
[23] Commissioner Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 Brandeis L.J. 769, 771 (2003).
[24] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 2 (2007).

airlines that they could not establish rigorous vision standards for their pilots.[25] On the same day it decided *Sutton*, the Supreme Court also issued its opinion in *Albertson's, Inc. v. Kirkingburg*. The plaintiff in that case had a similar, monocular vision impairment. Justice Souter held that the determination of disability under the ADA is not a *per se* categorical test based on an impairment's name or characteristics.[26] The Court simply held that "the [ADA] requires monocular individuals, like others claiming the [ADA's] protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial."[27]

Finally, in *Murphy*, the plaintiff, a mechanic, was fired because he did not satisfy Department of Transportation ("DOT") health standards for commercial drivers because of his high blood pressure. In holding that the plaintiff was not substantially limited in working, the court noted that there were many other jobs the plaintiff could perform, including a number of mechanic jobs *not* requiring DOT certification. The court pointed out that the plaintiff in fact "secured another job as a mechanic shortly after leaving UPS."[28]

Proponents of this legislation claim that the *Sutton*-trilogy has narrowed the protected class under the ADA by effectively excluding individuals who attempt to mitigate or control a disability. Such concerns are largely unfounded. In an explicit attempt to clarify the specific nature of its holding, the Supreme Court majority in *Sutton* was careful to identify groups of individuals that would still be entitled to the law's protections.[29] For example, the majority in *Sutton* responded to the dissent's argument that viewing individuals in their corrected state created an overly exclusive definition of disability by pointing out that individuals with prosthetic limbs, for example, "may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run."[30] The majority clarified that "the use or nonuse of a corrective device does not determine whether the individual with an impairment is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are substantially limiting."[31]

The fact that other courts have maintained the contours of the ADA legislation reinforces the conclusion that Supreme Court disabilities cases are undeserving of the criticism leveled by advocacy groups. For instance, in *Nawrot v. CPC International*,[32] the plaintiff sufficiently demonstrated that his diabetes substantially limited "his ability to think and care for himself, which are both major life activities."[33] Likewise, a prosthesis may be the cause of a substantial limitation. In *Belk v. Southwestern Bell Telephone Co.*,[34] the court noted that, in addition to

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[25] Mark A. Rothenstein, *et. al.*, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 265 (2002).
[26] *Albertson's*, 527 U.S. at 566.
[27] *Id.* at 567.
[28] *Murphy*, 527 U.S. at 524.
[29] Lauren J. McGarity, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might Be the Saving Grace of Sutton*, 109 Yale L.J. 1161, 1162 (2000).
[30] *Sutton*, 527 U.S. at 488.
[31] *Id.*
[32] 277 F.3d 896 (7th Cir. 2002).
[33] *Id.* at 905.
[34] 194 F.3d 946 (8th Cir. 1999)

having a "pronounced limp" because of residual effects from polio, the plaintiff's "full range of motion in his leg is limited by the brace" he wore for his condition.[35]

Even assuming that the courts have not struck the appropriate balance under the ADA, the proposed bill does not provide the "modest, reasonable legislative fix" called for by Senator Tom Harkin (D-IA) in response to the Supreme Court decisions.[36] H.R. 3195 drastically re-writes the ADA, without providing any degree of clarity to employers, employees, or the courts in resolving the basic issues of who is covered under the ADA, except, perhaps, indicating that everyone is to be covered.[37] The purpose of the ADA is to establish a clear and comprehensive prohibition of discrimination on the basis of disability and vigorous and effective remedies, and, in so doing, create a strong impetus for self-correction.[38]

H.R. 3195, as proposed, does not achieve this goal. Indeed, it moves the entire process into a mode predominated by litigation. The proponents of H.R. 3195 argue that the low success rate of charging parties at the EEOC and in court compels the sweeping changes contemplated by the bill. This argument lacks logic. It presumes that "success" is measured by lawsuits or that it is inconceivable that after seventeen years of experience under the ADA, employers might not understand their requirements and proactively move to meet them. Rather than acknowledging that the wisdom of President George H.W. Bush and Attorney General Thornburgh has been realized, the proponents of H.R. 3195 offer, instead, interminable individual litigation instead of cooperative problem resolution.

Because the definition of disability delineates the class of individuals protected by the ADA,[39] expanding the definition of disabled to include all individuals with a "physical or mental impairment" would change the scope of the ADA, and effectively negate the underlying legislative scheme intended to prevent, and, if necessary, remedy, disability discrimination. Currently, the ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees . . . ."[40] In addition, "discrimination" under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[41]

The duty to provide reasonable accommodation is a fundamental component of the ADA given that the nature of discrimination faced by individuals is a result of a unique disability.

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[35] *Id.* at 950.

[36] Michael Sandler, *Bill Seeks to Brooden Definition of 'Disability'*, CQ.com, *available at* http://www.aapd-dc.org/News/adaintho/070727cq.htm.

[37] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 269-270.

[38] *See* 42 U.S.C. § 12101(b).

[39] Mark A. Rothenstein, et. al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 Wash. U. L.Q. 243, 296 (2002).

[40] 42 U.S.C. § 12112(a).

[41] *Id.* at § 12112(b)(5)(A).

Thus, the reasonable accommodation process requires the employer to engage in the interactive process and render an individualized assessment[42] to the disabled employee. The individualized assessment generally entails identifying the nature and extent of the impairment, the resulting limitations, the essential functions of the occupation, and the nexus between the worker's limitations and the essential functions. From there, employers and their employees collaborate to identify possible options, evaluate their efficacy, and determine the most reasonable solution.

If H.R. 3195 becomes law, every employee with an impairment will be entitled to reasonable accommodation from an employer for any limitation resulting from that "disability," except if the employer can show undue hardship. When one remembers the broad nature of accommodation, the results will be overwhelming to employers. Employers can expect significant increases in requests for leave, modified schedules, teleworking, exceptions to workplace policies, and removal of marginal functions. Every employee who wants leave (full day, half day, intermittent) for a cold, a headache, seasonal allergy, or a bad back could be entitled to such leave. There is no twelve-week cap on leave as there if for FMLA; for many employers it will be impossible to show undue hardship even when intermittent leave for such conditions is over twelve weeks.

Furthermore, this expanded right to reasonable accommodation for persons with minor impairments will force those with true disabilities to compete for certain limited accommodations. For example, there are likely to be occasions when two employees will compete for a reassignment, but there will be only one vacant job. That reassignment could well go to someone with a minor impairment rather than the person now covered under the ADA. Similarly, there are only so many parking spaces next to a door. A person with a sprained ankle could well make a request before the person who is a paraplegic, or missing a leg, or someone with severe emphysema. Nothing in the bill or ADA would require or even allow an employer to give preference to the person with the more serious condition; under the bill there would be no legal difference between the sprained ankle and paraplegia. While this problem does exist to some extent under current law, expanding the definition to include all impairments will exacerbate it.

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[42] Ten years after the passage of the ADA, Chai Feldblum described the great import of individualized assessments with respect to disability law:

> [I]ndividualized assessments lie at the very core of disability anti-discrimination law. Because one of the causes of discrimination faced by people with disabilities is stereotypes regarding what people with disabilities are capable of doing, it is critical that each person with a disability be assessed to determine his or her capacity to do a job. Moreover, because an employer is obliged to make those reasonable accommodations that will allow an employee to be qualified for a particular job, disability law presumes the need for intensive individualized assessments whenever reasonable accommodation is at issue.

Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkley J. Emp. & Lab. L. 91, 151-2 (2000).

Furthermore, the bill will make it far easier to have class action lawsuits on a wide array of disability-related issues since there no longer will be any individualized assessment of "disability."

The underlying premise of the reasonable accommodation scheme is that the individual is first "qualified" under the ADA standards. Section 5 of H.R. 3195 strikes the requirement that an individual be "qualified" (*i.e.* able to perform the job with or without accommodation) before determining whether an employer must accommodate under the ADA. Instead, the legislation would place the burden on employers to prove that a disability discrimination plaintiff is "not qualified."[43]

By shifting the burden, which was fundamental to the consideration of the ADA, H.R. 3195 makes a nullity of the basis for joint examination of the job and the accommodation. By removing the requirement that an individual first be "qualified," H.R. 3195 provides no logical basis to retain the current statutory structures of the ADA, including the interactive process and individualized assessment, that have proven so valuable in advancing the rights of disabled individuals. It is these special features of the ADA not found in other non-discrimination laws which makes the ADA particularly directed to the needs of the disabled. The proposed legislation would eviscerate the special protections by an unreasonable stroke of a pen.

The "ADA Restoration Act of 2007" would radically expand the ADA's coverage by redefining the term "disabled" By changing the definition of "disability" the proposed legislation, in turn, alters the scope of the ADA so as to make it almost unrecognizable. The interests of the employment community and the disabled individuals that the ADA is meant to protect are not mutually exclusive. The Chamber of Commerce recognizes that any statutory scheme deserves reexamination after seventeen years of experience. However, it rejects the notion that the long experience under the Rehabilitation Act of 1973 and the ADA be tossed aside and replaced by a litigation regime not focused on the universally lauded goal of full inclusion of qualified individuals with disabilities into the mainstream of American life.

[43] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 5 (2007).

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance Programs
WASHINGTON, D.C. 20210

January 27, 1977

AN EXPRESSION OF APPRECIATION
to
OUR FIRST DIRECTOR, OFCCP

The Veterans and Handicapped Operations Division is indeed grateful to you,

LAWRENCE Z. LORBER
Director, OFCCP
Deputy Assistant Secretary, ESA

For your strong leadership and guidance in developing a totally new program of Affirmative Action for the Handicapped, Vietnam Era and Disabled Veterans, we especially appreciate:

The overall thrust in developing program policies that will impact on the future of an effective Affirmative Action Program for Veterans and the Handicapped, in putting necessary procedures in motion;

Your persistence in the development and issuance of the Handicapped and Veteran Regulations in a timely manner for a new program and still incorporating suggestions from both contractors and constituency groups;

The establishment of the principle of job related medical requirements in the regulations which set the stage for elimination of "systemic discrimination;"

Your vigorous pursuit of the legal principle of law and justice in pursuing "back pay" as an action to remedy discrimination against Veterans and the Handicapped;

Your invaluable legal experience and the application of legal principles in the preparation of cases for sanctions;

Your recognition of the uniqueness of the program by reliance on the Veteran and Handicapped Staff's expertise in accepting many of our independent decisions that have far reaching implications;

and we are particularly appreciative for your

Personal interest in the daily problems faced by the staff and for your frequent informal visits and close interrelationship with staff at all levels.

[The statement of the U.S. Department of Justice follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 28, 2008

The Honorable George Miller
Chairman
Committee on Education and Labor
United States House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

This letter expresses the views of the Department of Justice on H.R. 3195, the "ADA Restoration Act of 2007" ("ADARA"), introduced in the House on July 26, 2007. Although we support the idea of improving the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ("ADA"), we strongly oppose the proposed legislation. The ADARA would dramatically increase unnecessary litigation, create uncertainty in the workplace, and upset the balance struck by Congress in adopting the ADA.

At the outset of his Administration, President George W. Bush announced the New Freedom Initiative, a comprehensive set of goals and a plan of action to ensure that people with disabilities are able to enjoy full participation in our free market economy and society. The Department, responding to the New Freedom Initiative, has increased and improved its implementation of the ADA. In fact, vigorous enforcement of the ADA is one of the top priorities of the Civil Rights Division and we are pleased to have played an active role in its implementation.

Our experience in enforcing the ADA has led us to believe that there is the potential for improvement in the ADA and we support legislation that would *clarify* the treatment of mitigating measures under the ADA. Unfortunately, we believe that the proposed bill goes too far and unnecessarily broadens the scope of ADA protections far beyond the original intent of the ADA or what could fairly be termed its "restoration."

Indeed, as is more fully explained below, the ADARA's definition of disability would reach individuals with virtually any kind of impairment — no matter how minor or temporary, such as the common flu, a cut finger, or a sprained ankle — and therefore would go beyond the original intent of Congress when it enacted the ADA, and would also be unworkable in practice. Furthermore, the proposed legislation would remove the ADA's requirement that an individual be "qualified" in order to receive the benefit of ADA protection; a critical change that would effectively rewrite the ADA and goes beyond mere "restoration."

ADARA's Revisions to the ADA Regarding Definition of Disability

The ADARA's primary revision to the ADA is alteration of the definition of disability. Currently, the ADA defines disability as follows:

> The term "disability" means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The ADARA would amend this definition to delete reference to the terms "substantially limits" and "major life activities." ADARA § 4(1). Currently, where a physical or mental impairment limits one or more major life activities of an individual, but those limitations do not rise to the level of "substantial" limitations, the individual at issue does not have a "disability" under the ADA and is not entitled to the ADA's protections. Similarly, where an individual has a physical or mental impairment that substantially limits one or more activities, but those activities that are substantially limited are not "major life activities," the individual does not have a disability under the ADA and is not entitled to the ADA's protections.[1]

In contrast to the ADA's definition, the ADARA defines disability much more broadly, as any physical or mental impairment. ADARA § 4. The ADARA defines physical and mental impairment in the same way as the current ADA regulations. *See* 28 C.F.R. §§ 35.104, 36.104. It defines mental impairment as any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disability. ADARA § 4. The ADARA defines physical impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. *Id.* Under the ADARA, persons with any impairment meeting the definitions above would be defined as having a "disability" under the ADA and would not be required to show specifically how their impairment impacts any life activity.

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[1] The ADA has a three-pronged definition of "disability": (1) a person with a physical or mental impairment that substantially limits one or more major life activities; (2) a person with a record of such an impairment; or (3) a person who is regarded as having such an impairment. In order to simplify the discussion, this paragraph and the remainder of the letter refer only to the first prong of the definition of "disability." However, all discussions about the ADA requirements regarding "substantial limitation" in a "major life activity" also apply to the two other prongs of the definition.

Thus, the ADARA's definition of disability would make it easier for many individuals — including those with actual disabilities as well as those regarded as having a disability — to invoke ADA protections, and it would do so by dramatically expanding the class of persons who could claim ADA coverage. Because most individuals who brought a claim would be covered, it is likely that the majority of cases would turn on whether the alleged discrimination occurred. Section 2 of the ADARA also would revise the Findings and Purposes section of the ADA to make it consistent with the ADARA definition of disability and to clarify the ADARA's purpose in covering a broader group of individuals.

Further, the ADARA specifies that the determination of whether an individual has a physical or mental impairment shall be made without regard to whether the individual uses a mitigating measure. ADARA § 4. This would broaden the class of covered individuals even further.

Finally, the ADARA removes a fundamental requirement of the ADA that plaintiff has the burden of showing that he or she is "qualified for the position at issue." Instead, the ADARA would shift the burden to the employer, as an affirmative defense, to show that the individual is not qualified. This is unprecedented in our nation's civil rights laws and unnecessary.

Supreme Court Treatment of the Definition of Disability Under the ADA

The Findings and Purposes section of the ADARA asserts that the "decisions and opinions of the Supreme Court[2] have unduly narrowed the broad scope of protection afforded in the ADA." ADARA § 2(a)(2). The Department has urged the Court to adopt a more protective stance with respect to persons with disabilities who utilize mitigating measures to perform major life activities such as work[3] and would support a legislative amendment to that effect. Indeed, in the preamble to the Department's regulations implementing title III of the ADA, the Department has taken the position that a person's disability — including hearing loss, epilepsy and diabetes

[2] The ADARA references four Supreme Court cases that, in its view, significantly limited the ADA's coverage. ADARA Sec. 2(a)(4)(B), 2(a)(6), (b)(2). They are *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

Sutton, *Murphy*, and *Kirkingburg* were decided on the same day, and addressed similar legal questions. *Sutton* held that a disability must be evaluated with regard to whatever corrective or mitigating measures the individual uses, and thus that few impairments were *per se* disabilities. Further, to be substantially limited in working, the individual must be unable to work in a broad class of jobs. In each case, the Department urged the Court to adopt a more expansive view of the definition of disability.

In *Toyota*, the Department filed an amicus brief arguing that the court of appeals was wrong to limit its analysis to only the manual tasks associated with a particular job, and the Supreme Court agreed with that position. 534 U.S. 184. The Department opposes legislation that would undermine the Supreme Court's decision in *Toyota*.

[3] *See Sutton*, 527 U.S. 471; *Murphy*, 527 U.S. 516; and *Kirkingburg*, 527 U.S. 555.

— should be assessed without regard to mitigating measures. 28 C.F.R. Part 36, app. B at 691 (2007).

Problems with the ADARA

Scope of the Definition of Disability

The Department has concerns about the seemingly unrestricted scope of the ADARA's definition of disability. This definition would reach individuals with virtually any kind of impairment — no matter how minor or temporary — such as the common flu, a cut finger, or a sprained ankle. There is no evidence that Congress, when enacting the ADA as a civil rights law, intended to include such individuals in its protection. *See* H.R. Rep. No. 101-485, pt. II, p. 52 (1990). Entitling such individuals not only to nondiscrimination in hiring and firing, but also to reasonable accommodations (to the extent that such accommodations would not pose an undue hardship), would go beyond the original intent of Congress and could pose substantial constitutional questions.

For example, the expansion of the definition of disability and, consequently, the protected class under the ADA, is likely to have significant adverse implications for the constitutionality of title II in light of the Supreme Court's interpretation of the Eleventh Amendment. *See U.S. v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004). Because the protected class would include individuals with relatively minor impairments that historically have not given rise to invidious discrimination, the remedies provided under title II likely would not be considered congruent and proportional to historical discrimination. Accordingly, there is a substantial risk that title II would be found unconstitutional as applied to the States.

Removal of the "Qualified Individual" Requirement

Furthermore, the proposed legislation would eliminate the ADA requirement that a plaintiff show that he or she is a "qualified individual" as part of establishing coverage; a critical change that would represent a fundamental rewrite of the ADA, and a major departure from employment discrimination law in general. Such a change shifts the burden of proving an applicant or employee is qualified for a job from the plaintiff to the employer. Under the ADARA, an employer would now have to show that an individual is not qualified as an affirmative defense. And an employer – who currently, and appropriately, has the burden of showing direct threat or justifying qualification standards – would now also bear the burden of demonstrating that the individual is unqualified.

H.R. 3195 purports to call for "restoration" of the ADA. However, deletion of the provision dictating that ADA protection is extended only to a "qualified individual with a disability" can not be portrayed as a "restoration" because it affirmatively removes a key element

of the ADA – a requirement that originates from the Rehabilitation Act of 1973.[4] Moreover, this change would place a lower burden on ADA plaintiffs than on those pursuing race, sex, religion, or age claims. Indeed, both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act place the burden on plaintiffs to show they are qualified as part of their *prima facie* case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The Department strongly opposes any bill that eliminates the ADA requirement that a plaintiff show that he or she is "qualified" as part of establishing coverage.

Potential Area of Compromise: Treatment of Mitigated Disabilities

Although we have not attempted to craft statutory language that would broaden the ADA's current definition of disability without over-extending it, we present here an alternative for your consideration.

In general, the Department could support a change to the ADA to clarify that, for purposes of coverage under the ADA, a disability must be evaluated without regard to mitigating measures, provided there was an exception for people who wear glasses. Under this exception, an individual would not have an impairment because of poor vision if, with corrective lenses, he or she would not be legally blind. This exception appropriately would exclude from coverage most people whose visual impairment was minor enough that it could be corrected by wearing glasses. There may be other common impairments that should also be statutorily excepted. Further, the Department believes that if ADA coverage were expanded to persons with mitigated disabilities, employers should only be required to make those reasonable accommodations necessary to enable a person whose disability is mitigated (such that, with their mitigation, they are not substantially limited in a major life activity, and thus not currently covered by the ADA), to utilize his or her mitigating measures.[5]

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[5] *See* 42 U.S.C. §12112(a). *See also* S. Rep. No. 116, 101st Cong., 1st Sess. 26 (1989), that explains that the definition of "qualified" is comparable to the one found in the regulations implementing section 501 of the Rehabilitation Act of 1973. The Senate Report states, "By including the phrase 'qualified individual with a disability,' the Committee intends to reaffirm that [the ADA] does not undermine an employer's ability to choose and maintain qualified workers. [The ADA] simply provides that employment decisions must not have the purpose [or] effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability." The House Reports also make similar statements. *See* H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 55 (1990) ("The basic concept is that an employer may require that every employee be qualified to perform the essential functions of a job.").

[6] The Department does not propose any alternative that would entail the prohibition of conduct that does not "actually violate[] the Fourteenth Amendment." *United States v. Georgia*, 546 U.S. 151, 159 (2006) ("[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." [emphasis in original]). Moreover, the Department recognizes that any such proposal to expand the definition of "disability" under the ADA must be supported by a legislative record that demonstrates past State discrimination against the expanded class, consistent with constitutional requirements.

The Honorable George Miller
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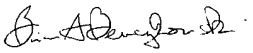
Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Howard McKeon
Ranking Minority Member

IDENTICAL LETTER SENT TO THE HONORABLE JOHN CONYERS, JR., CHAIRMAN, COMMITTEE ON THE JUDICIARY, WITH A COPY TO THE HONORABLE LAMAR S. SMITH, RANKING MINORITY MEMBER; THE HONORABLE JAMES L. OBERSTAR, CHAIRMAN, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, WITH A COPY TO THE HONORABLE JOHN MICA, RANKING MINORITY MEMBER; THE HONORABLE JOHN D. DINGELL, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE, WITH A COPY TO THE HONORABLE JOE BARTON, RANKING MINORITY MEMBER

[The statement of the HR Policy Association follows:]

Statement Submitted for the Record

by

HR POLICY ASSOCIATION

Before the

U.S. House of Representatives Committee on Education and Labor

Hearing on

The Americans With Disabilities Restoration Act of 2007

JANUARY 29, 2008

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE:

Thank you for this opportunity to present the views of HR Policy Association regarding the American With Disabilities Act Restoration Act of 2007 (H.R. 3195/S. 1881). HR Policy Association represents the chief human resource officers of more than 250 of the largest corporations in the United States, collectively employing over 12 million employees in the United States. One of HR Policy's principal missions is to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the modern workplace.

HR Policy Association believes that the Americans With Disabilities Act (ADA) provides important protections for employees and applicants. However, it strongly opposes H.R. 3195 and S. 1881 because of the unprecedented adverse effect the bills would have on the workplace. These bills would effectively rewrite the ADA, radically expanding the number of persons covered by the Act. Individuals with minor, temporary impairments would receive the same protections as persons with serious disabilities. Indeed, the revisions to the ADA would be so broad that "anything less than perfect health" would constitute a disability. The expansive legislation would divert employers' time and resources from addressing requests for reasonable accommodations from people with serious disabilities to people with minor impairments. Moreover, with the expanded ambiguity of who is "disabled" under the bills, employers would continue to struggle even more to understand and comply with their reasonable accommodation obligations.

In an unprecedented manner, the bills would also shift the burden of proof from plaintiffs to employers regarding whether an individual is "qualified" to perform the job. This measure will increase frivolous lawsuits and is poor public policy. Indeed, the legislative proposals incorporating new definitions and requirements are so drastic that such legislation would effectively render almost two decades of case law interpreting the ADA moot.

The following testimony provides an overview of how the ADA has been interpreted since its enactment in 1990 and explains how those interpretations would change if the ADA Restoration Act became law.

I. Background on the Law and Policy of the ADA

The concept of prohibiting discrimination against persons with a "disability" has immense moral, emotional, and political appeal. Disabilities are not limited to any race, gender, religion, nationality or region of the country. In fact, Sen. Harkin, the bill's sponsor in the Senate noted that there are currently "50 million Americans with Disabilities."[1]

Individuals with disabilities can be found in every social and economic class and political party. Indeed, many *current* lawmakers have personal experiences with family members who have disabilities. For example, Senator Harkin (D-IA) has a brother who is deaf.[2] Senator Kennedy (D-MA), the chairman of the Senate's Health, Education, Labor and Pension Committee, has a son who lost his leg to cancer and a sister who had a developmental disability.[3] Senator Hatch (R-UT), a ranking Republican, has a brother who lost the use of his legs because of childhood polio,[4] and Senator Elizabeth Dole's (R-NC) husband, former senator and Republican presidential candidate Bob Dole, suffers from paralysis of his arm as the result of a war injury. The wide appeal of protection of persons with a disability is an important factor in the broad bipartisan support the ADA received when originally enacted. The legacy of this bipartisanship has played a role in gaining the 235 cosponsors H.R. 3195 has garnered so far in the House.

The ADA Prohibits Discrimination Against Individuals With a "Disability"

The ADA was signed into law by President George H.W. Bush on July 26, 1990, after being passed by substantial majorities in the House (377 to 28) and Senate (91 to 6). It prohibits employers from discriminating "against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[5] In addition, "discrimination" under the ADA, includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[6]

The law creates a protected class of individuals with a "disability" that is quite different from protected classes covered by other antidiscrimination statutes. Under the other federal antidiscrimination statutes, it is typically easier to determine whether a person falls within the class intended to be protected. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, and national origin. To demonstrate that an individual is protected under Title VII, an individual needs to show that they are either male or female, or of a particular national origin or religion. Similarly, every person has a "color" and a "race" and the law also protects persons who are considered "biracial." Similarly, the Age Discrimination in Employment Act (ADEA) forbids discrimination against persons who are at least 40 years of age.

By contrast, the "protected class" under the ADA is much more fluid. For example, individuals may be born with disabilities or disabilities may develop throughout one's life. Similarly, a person can be disabled for periods of time and then no longer suffer from the disability. In addition, a health condition amounting to a "disability" may be mitigated or corrected by medicine, chemicals or assistive devices. Moreover, unlike other federal discrimination laws, the ADA requires employers to provide preferential treatment to individual's with a disability by providing reasonable accommodations in the workplace.

Because of the fluid nature of disabilities, and the unique reasonable accommodation requirement, Congress devised a carefully defined standard for the concept of disability under the ADA.

Disabled Individual Must Be Substantially Limited in a Major Life Activity

Congress defined "disability" as "a physical or mental impairment that substantially limits one or more major life activities," "a record of such an impairment" or being "regarded as having such an impairment."[7] Indeed, the ADA's legislative history explains that the term "disability" as defined under the ADA is identical to the definitions under the Rehabilitation Act of 1973[8] and the Fair Housing Act,[9] both of which require that an "individual with a handicap" be "substantially limited in one or more major life activities."[10] The ADA uses the term "disability" instead of "handicap" but Congress explicitly noted that no change in the definition was intended.[11]

The courts have generally recognized that the term "disability" is not meant to cover all individuals "with health conditions"[12] nor is it "a general protection of medically afflicted persons."[13] Similarly, the law is not meant to be "a medical leave act nor a requirement of accommodation for common conditions that are short-term or can be promptly remedied."[14] Indeed, as the U.S. Supreme Court has asserted, "merely having an impairment does not make one disabled for the purposes of the ADA."[15] Instead, the law only protects "disabled" individuals who are substantially limited in one or more major life activities.

An employee's "threshold burden" is to establish that he or she has a condition that constitutes a "disability" under the ADA.[16] Because physical or mental conditions can vary substantially, determinations of "disability" are made on an individualized basis.[17] As one court aptly noted, "some impairments may be disabling for particular individuals but not for others, depending upon the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors."[18] Indeed, a host of factors can be considered in measuring whether an individual is disabled.

Tracking the statutory definition, the U.S. Supreme Court has established a basic three-part test to measure whether a person has a "disability," which asks: (1) whether the condition alleged constitutes a physical or mental impairment, (2) whether that impairment affects a major life activity, and (3) whether the impairment operates as a substantial limit on the major life activity asserted.[19] For an individual to be within the statute's "protected class," his or her condition must satisfy all three elements.[20]

Test One: The Expansive Definition of a "Physical or Mental Impairment"

Establishing that an individual's condition is a "physical or mental impairment" is the first and easiest step in ascertaining whether the individual has a "disability" because of the broad definition of "physical or mental impairment." While the statute itself does not define "physical or mental impairment," the courts have accepted the broad definitions of those terms[21] in guidance promulgated by the Equal Employment Opportunity Commission (EEOC), which administers the statute. The regulations define a "physical impairment" as "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting…neurological, musculoskeletal, special sense organs, (respiratory including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin and endocrine)."[22] A "mental

impairment" includes "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[23]

The regulation's definitions are so broad that almost any mental or physical health condition is almost certainly an impairment. Moreover, the regulation's definitions of "impairments" is not comprehensive. Indeed, any attempt to identify every physical or mental impairment would be futile. As one commentator aptly noted, "[b]ased on the sheer number of variations in human circumstance, any attempt to draft an exhaustive list covering all the possible types of diseases and conditions that might constitute a protected physical or mental impairment certainly would be impossible."[24] Similarly, the EEOC acknowledged the futility in attempting to identify all impairments by noting comprehensive publications such as the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* does not even include all conditions that may qualify as mental impairments.[25]

Because the definition of "physical or mental impairment" is so expansive, there has been minimal litigation regarding what conditions constitute "impairments." Instead, employers and courts often will simply assume, agree or concede that a plaintiff's condition is an impairment.[26] The few courts which have addressed the issue have recognized that relatively minor conditions meet the definition of impairment. Examples include:

- back and knee strains,[27]
- knee contusions and back strain,[28]
- a knee injury,[29]
- high cholesterol,[30]
- erectile dysfunction,[31]
- headaches,[32]
- "tennis elbow,"[33]
- the occasional inability to localize sound,[34] and
- a six inch scar along an individual's chin line.[35]

Moreover, it is irrelevant whether an individual developed an impairment through some volitional act on the part of the individual.[36] As one court noted, "the source of an impairment is irrelevant to a determination of whether the impairment constitutes a disability."[37]

Yet, the EEOC and courts have recognized a few narrow exclusions from the regulation's sweeping definition of "impairments." For instance, general physical characteristics (such as eye color, hair color or left-handedness), common personality traits (such as being irresponsible or showing poor judgment),[38] cultural, environmental, or economic disadvantages, homosexuality, bisexuality, pregnancy,[39] and normal deviations in height,[40] weight,[41] or strength are not impairments.[42] Similarly, "characteristic predispositions to illness or disease" due to social, economic or environmental conditions are not impairments under the ADA.[43]

As a practical matter, the definition of "impairment" is so broad that almost any physical or mental health condition —no matter how minor— will satisfy the impairment requirement. Thus, it is critical that additional criteria be required. Indeed, as the EEOC has noted, "the determination of whether an individual has a 'disability' is not necessarily based on the name of diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[44] Thus, in almost every situation the disability determination is made in step

two and three —*i.e.*, whether the impairment substantially limits a major life activity— or as one court recently noted, "the dispute is not over whether the Plaintiff has a condition, but whether that condition is severe enough to qualify as a disability pursuant to the ADA."[45]

Test Two: An Impairment Must Affect a Major Life Activity

The determination of whether an impairment affects a major life activity is guided by the U.S. Supreme Court's unanimous decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[46] In that case, the Court held that the phrase "substantially limits one or more major life activities" distinguishes a mere impairment from an actionable disability under the ADA. In *Toyota*, the Supreme Court found that the term "major" in the phrase "major life activities" means "important."[47] Moreover, the Court ruled that the concept of "major life activity" refers to "those activities that are of central importance to daily life."[48] Lower federal courts and the EEOC have articulated similar meanings to the phrase "a major life activity," asking in their analyses whether the activity is "a basic function of life,"[49] "basic to any person's daily regimen,"[50] "a daily activity that the average person can accomplish with little effort," "is of life-sustaining importance," or are rudimentary activities "that the average person in the general population can perform with little or no difficulty."[51]

"Major life activities" has been broadly defined to include, among many others, functions such as:

- caring for oneself;
- performing manual tasks;
- walking;
- seeing;
- hearing;
- speaking;
- breathing;
- learning;
- working;[52]
- sitting;
- standing;
- lifting;
- reaching;[53]
- thinking;
- concentrating;
- interacting with others;[54]
- reading;[55]
- eating;[56]
- digesting;[57]
- reproduction;[58]
- childbearing;[59]
- engaging in sexual relations;[60]
- sleeping;[61]
- bathing;[62]
- controlling one's bowels;[63]
- and running;[64]

By contrast, activities such as driving,[65] physical exertion,[66] lawn mowing,[67] weight lifting, sport activities,[68] bowling, camping, restoring cars,[69] climbing,[70] sweeping, dancing,[71] skiing, golfing, painting, plastering, shoveling snow and shopping in a mall[72] were not considered of sufficient importance to the daily life of the average person to be "major life activities."

Moreover, to establish an ADA disability, it is not necessary that an impairment be a "workplace-related limitation."[73] Instead, the measure for determining "disability" is whether any major life activity is affected.[74] In *Janssen v. COBE Laboratories, Inc.*,[75] the court confirmed this by noting that "applicable law…does not require that the

disability affect a claimant's work, only that it affect a major life activity." That said, an impairment must bear some relationship to a requested workplace accommodation. For example, in *Wood v. Crown Redi-Mix, Inc.*,[76] the court determined that the plaintiff could not establish a discriminatory failure to accommodate claim even though he was impotent and limited in the major life activity of procreation, because his requested accommodation of driving a "non ready mix truck" had absolutely nothing to do with his impotence or inability to procreate.[77]

Test Three: The Impairment Must Substantially Limit a Major Life Activity.

Once one or more major life activities have been identified, the final step in determining whether an individual has a "disability" is ascertaining whether the condition "substantially limits" them. In the U.S. Supreme Court's unanimous *Toyota*[78] decision discussed above, the Court also ruled that an impairment is "substantially limiting" if it prevents or severely restricts an individual from doing activities that are central to most people's daily lives. In *Toyota*,[79] the Supreme Court noted that the word "substantially" in the phrase "substantially limits" suggests "considerable" or "to a large degree."[80] Thus, the term "substantial" "clearly precludes impairments that interfere … in only a minor way."[81] Hence, a limitation resulting from an impairment will only be considered disabling if it is significant.[82]

To determine whether an impairment is "substantially limiting," courts compare the degree to which the impairment limits the individual's life activities to those of the average person. According to the EEOC, to be "substantially limiting," the impairment must make the individual "unable to perform a major life activity that the average person in the general population can perform" or "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[83]

Consequently, individuals must establish the nature and severity of the condition for an impairment to be substantially limiting. For example, in *Clemente v. Executive Airlines, Inc.*,[84] a plaintiff failed to establish that her impairment of "temporary diminution in her right-ear hearing" substantially limited the major life activity of hearing. The plaintiff failed to identify "the overall functional degree of loss suffered" and failed to show that "compared to the average person in the general population, she was significantly restricted in her hearing." Thus, she was not covered by the ADA.

Similarly, an individual's impairment must be long-term or permanent.[85] A short-term or temporary impairment will generally not constitute a disability under the ADA, depending, of course, upon the severity of the condition.[86] The EEOC and courts have maintained that if an impairment lasts "at least several months" it is not short term.[87] In *Guzman-Rosario v. United Parcel Service*,[88] the First Circuit suggested that an impairment must have a minimum duration between 6 and 24 months. But other courts have found that periods as short as two to three months may be long enough.[89] Likewise, occasional or intermittent impairments (depending upon severity) will generally not be considered a "disability." For instance, in *Dillon v. Roadway Express*,[90] the plaintiff was not substantially limited in the major life activity of hearing where "the only symptom he complains of is an *occasional* inability to localize a sound" but did not suffer "any actual

hearing loss."[91] Therefore, while he suffered from an impairment, he was not disabled under the ADA.

Mitigating Measures Are Considered in Determining Whether an Individual Has a "Disability"

In ascertaining whether an individual has a "disability," his or her use of mitigating measures is taken into account to determine whether the impairment is "substantially limiting." In *Sutton v. United Airlines, Inc.*,[92] and its companion cases,[93] the U.S. Supreme Court in a seven to two decision ruled that if a person takes steps "to correct for, or mitigate, a physical or mental impairment, the effects of those measures —both positive and negative— must be taken into account when judging whether that person is 'substantially limited' in a major life activity."[94] In other words, a disability exists only where an impairment actually and currently substantially limits a major life activity, "not where it might, could, or would be substantially limiting if mitigating measures were not taken." The Court noted that, "to be sure, a person whose physical or mental impairment is corrected by mitigating measures *still has an impairment, but if the impairment is corrected it does not 'substantially limit' a major life activity*."[95]

In interpreting the clear language of the statute, the Court rejected legislative history and EEOC guidelines indicating that "individuals should be examined in their uncorrected state,"[96] and ruled that three provisions of the ADA "read in concert" mandated that a person's mitigating measures must be taken into account when determining whether the ADA applied. First, the Court found that "substantially limits" is a verb requiring that "a person be presently —not potentially or hypothetically— substantially limited in order to demonstrate a disability."[97] Second, the statute requires "an individualized inquiry" regarding whether a person has a disability and the "directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA."[98] The Court found that the EEOC's approach would "create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals," which "is contrary to both the letter and the spirit of the ADA."[99]

Finally, the Supreme Court concluded that the congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities…reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA."[100] According to the Court, if Congress intended to include "persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[101] Indeed, Justice Ginsburg concurred, pointing out that the congressional findings that 43 million Americans were disabled and that such persons "are a discrete and insular minority" and such persons have been "subject to a history of purposeful unequal treatment, and relegated to a position of political powerlessness" is simply inconsistent with "the enormously embracing definition of disability" urged by the plaintiff.[102]

The Court noted that the congressional finding that 43 million Americans were disabled indicated that Congress adopted a "functional" instead of a "nonfunctional"

approach to the concept of "disability."[103] For example, the Court noted that the "nonfunctional" "health conditions approach, which looks at all conditions that impair the health or normal functional abilities of an individual," would yield 160 million disabled Americans.[104] The "functional disability" approach, instead, looks at whether individuals have difficulty performing one or more basic physical activities, such as "seeing, hearing, speaking, walking, using stairs, lifting or carrying, getting into or out of bed."[105] By contrast, the number used —43 million— showed that Congress did not intend to cover the more than 100 million Americans with vision impairments, 28 million people with impaired hearing or the approximately 50 million people with high blood pressure.[106]

Only "Qualified Individuals" Can Prevail in an ADA Discrimination Claim

Reasonable accommodation and disability-based discrimination claims under the ADA, consistent with other federal antidiscrimination laws, require that a person demonstrate that he or she is a qualified individual with a disability.[107] A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[108] To be qualified, according to the EEOC, a person must (1) have the requisite skills, experience, education, licenses, etc. and (2) be able to perform the essential functions of the job with or without a reasonable accommodation.[109]

Similar to other federal antidiscrimination statutes such as Title VII, Section 1981, the ADEA or the Rehabilitation Act, ADA plaintiffs bear the burden of proof of proving that they are qualified.[110] Indeed, in a typical disability discrimination case, a plaintiff must show that he or she (1) has a disability (2) is a qualified individual and (3) suffered an adverse employment action because of the disability.[111] In other words, disability discrimination plaintiffs must establish that they have the necessary knowledge, skills, abilities or licenses *and* are capable of performing the job.[112]

While ADA plaintiffs ultimately bear the burden of proof to establish that they are qualified, employers bear the burden of proving that an aspect of a job is an "essential function" *if* a plaintiff raises the issue.[113] The term "essential functions" means the "fundamental job duties of the employment position" but does not include "marginal functions of the position."[114] Several factors are considered in determining whether a function is "essential" or merely "marginal" including the employer's judgment as to which functions are essential, written job descriptions prepared before advertising or interviewing applicants for the job, the amount of time spent on the job performing the function, and the work experience of both past and current employees in the job.[115] The most important factor, however, is whether employees actually perform the specific function.[116]

Employers Must Provide "Reasonable Accommodations" to Disabled Employees

Under the ADA, an employer unlawfully discriminates against a "qualified individual with a disability" when it fails to make "reasonable accommodations to the known physical or mental limitations" of the disabled employee.[117] To establish a claim for failure to accommodate, a plaintiff must show that: (1) she is a qualified individual with a disability; (2) the employer was aware of her disability; and (3) the employer failed to

reasonably accommodate the disability.[118] This standard requires the "employer and employee engage in an interactive process to determine a reasonable accommodation."[119]

Employers are not required to provide the particular accommodation that an employee requests.[120] At the very least, the employer is obliged to provide an accommodation that effectively accommodates the disabled employee's limitations.[121] If a disabled employee shows that his or her disability was not reasonably accommodated, the employer will be liable only if it is responsible for the breakdown of the interactive process.[122]

As with determining whether a person is disabled as defined by the ADA, assessing whether an employee requires a reasonable accommodation and the type and nature of that accommodation is made on an individualized basis. Reasonable accommodations may include but are not limited to "making existing facilities used by employees readily accessible to and usable by individuals with disabilities,"[123] providing unpaid leave[124] (the amount of leave is highly fact specific based on the individual and workplace),[125] restructuring an employee's job,[126] providing an assistant or job coach,[127] a modified work schedule,[128] reassignment,[129] or even monitoring an employee's medications.[130]

In sum, the ADA has been carefully crafted to protect disabled individuals who are most in need of protection. Given the breadth of the term, Congress chose not to cover all "impairments," but rather only those that substantially limit a major life activity for an individual otherwise qualified to perform the job. This narrowly crafted approach based on individual circumstances has served its purposes well—*i.e.*, to enable individuals with disabilities to participate in the workplace with reasonable accommodations arrived at through an interactive process. By contrast, as discussed below, the ADA Restoration Act would expand the class of individuals covered so fundamentally as to make the concept of a protected disability essentially meaningless.

II. The ADA Restoration Act Would Fundamentally Rewrite the ADA

The stated purposes of the ADA Restoration Act (H.R. 3195 /S. 1881) are to:

- "restore the broad scope of protection available under the ADA;"[131]
- overturn several U.S. Supreme Court decisions that proponents allege have narrowed the intended protected class;[132] and
- "reinstate original congressional intent regarding the definition of disability."[133]

In truth, however, the bills would radically *expand* —not restore— the ADA. Specifically, the bills would fundamentally broaden the coverage of the ADA to include individuals Congress never intended to fall within the purview of the ADA by completely rewriting the definition of "disability."

Under the bill, the new definition of "disability" would expand coverage of the ADA from individuals with disabilities to include all individuals with an impairment regardless of how minor. The bills would also prohibit the consideration of mitigating measures (such as medication or assistive devices) an individual may be using when determining whether he or she is disabled. Moreover, the legislation would flip the burden of proof from plaintiffs onto employers regarding whether an individual is "qualified."

The proponents claim that the proposed legislation is nothing more than "a modest, reasonable, legislative fix."[134] The bills, however, would "wield a broad ax in lieu of a scalpel."[135] They would introduce sweeping and expansive changes to regulations governing the workplace. Furthermore, the new definition would render much of the legal precedent under disability discrimination useless because the ADA cases have focused on the current functional definition of "disability."

The ADA Restoration Act Would Substantially Expand ADA Coverage to Include All Impairments

H.R. 3195/S. 1881 would revise the definition of "disability" and drastically expand the number persons covered by the ADA. As explained above, under the ADA, a "disability" is "a physical or mental impairment that *substantially limits one or more major life activities*." The bills, however, would redefine "disability" to simply mean "a physical or mental impairment" and abolish the requirement that an impairment substantially limit one or more major life activities. In other words, under the bills, any physical or mental impairment constitutes a protected disability. Indeed, the terms "impairment" and "disability" are used interchangeably in the proposed legislation.[136]

The proponents of the legislation argue that it simply "amends the definition of 'disability' so that people who Congress originally intended to be protected from discrimination are covered by the ADA."[137] Such statements, however, fail to reveal the significance of the dramatic revisions to the ADA. Moreover, they misconstrue Congress's original intent regarding the definition of "disability" under the ADA. The ADA was never meant to cover mere impairments, but has always required a person's impairment to substantially limit a life activity.

Furthermore, unlike current law, the bills would codify the sweeping definition of "physical or mental impairments" in the EEOC regulations without any limitation. As previously discussed, these definitions are so inclusive that almost any mental or physical health condition, regardless of how minor, would be an impairment. A small scar or even a tattoo could be a cosmetic disfigurement affecting skin. A sprained ankle could be a physiological condition affecting the musculoskeletal system, and a simple case of the flu could qualify under several criteria as an impairment.

Indeed, the proposed legislation would adopt the physician's concept of "disability" in *Partlow v. Runyon*[138] considered erroneous under current law. In *Partlow*, the doctor determined that the plaintiff's relatively minor back problem was a "disability" because the doctor considered "*anything less than perfect health to be a [disability]*."[139] The court, however, noted that the doctor's definition of disability as "anything less than perfect health *does not even approximate the statutory definition*."[140] If the ADA Restoration Act became law, virtually anyone in less than perfect health could bring suit because there would be no limit on impairments protected under the bill.

Contrary to Proponents' Claims, Congress Clearly Intended the ADA to Apply to Impairments That Substantially Limit a Major Life Activity

Contrary to the proponents' claims, in originally enacting the ADA, Congress clearly intended that an impairment must substantially limit one or more major life activities. The relevant Committee Reports clearly state that "[a] physical or mental impairment

does not constitute a disability under the first prong of the definition for the purposes of the ADA *unless* its *severity* is such that it results in a 'substantial limitation of one or more major life activities.'"[141] Congress provided examples of impairments that substantially limit a major life activity. The report noted, for example, "a person who is a paraplegic will have a substantial difficulty in the major activity of walking; a deaf person will have a substantial difficulty in hearing aural communications; and a person with lung disease will have a substantial limitation in the major life activity of breathing."[142]

In measuring the severity of an individual's condition on a major life activity, Congress intended that he or she be compared to "most people" or the "average person." The Committee Reports directed that "a person is considered an individual with a disability…when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."[143] The reports noted, for example "a person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."[144] More importantly, the reports further noted that "[p]ersons with *minor, trivial impairments* such as a simple infected finger are not impaired in a major life activity."[145] Not only did Congress clearly intend that to be covered by the ADA an impairment must substantially limit a major life activity, but also the reports unequivocally establish that the statute did not cover impairments that do not substantially limit a major life activity.

Requirement That a Disability "Substantially Limit a Major Life Activity" Has Ensured Statutory Protections Are Properly Focused

Since the ADA was enacted, the EEOC and courts have followed Congress's directive and used the phrase "substantially limits a major life activity" to set reasonable boundaries between mere impairments and disabilities. Eliminating this requirement will also remove the line between a minor impairment and a serious disability, such as a vision impairment of 20/60 eyesight requiring corrective lens as compared with a serious disability such as complete blindness. Under current law, only the individual with complete blindness would be considered disabled and thus protected by the ADA. Under the bills, both conditions would be "disabilities" and thus equally protected under the ADA. Indeed, under the proposed legislation, all impairments would be covered regardless of how temporary, intermittent, occasional, mild, or minor and would exponentially increase the number of persons who can bring a disability discrimination claim.

In making this change, the bills would also overturn the U.S. Supreme Court's unanimous decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[146] which recognized that the phrase "substantially limits" distinguishes a mere impairment from an actionable disability by ruling that an impairment is "substantially limiting" if it prevents or severely restricts an individual from doing activities that are central to most people's daily lives. Eliminating the reasonable limitations which distinguish between mere impairments and real disabilities would exponentially increase the number of persons who can bring a disability discrimination claim.

As noted above, the ADA was intended to prohibit discrimination against individuals with serious "disabilities" not mere impairments. In *Christian v. St. Anthony Medical Center, Inc.*,[147] the Seventh Circuit highlighted the fact that the ADA protected disabled individuals, not employees with a common illness or a minor health condition. The court noted:

> She [the plaintiff] believes, in other words, that the American with Disabilities Act protects an employee from being fired because of illness. *It does not. This is a subtle but important point and we wish to be as emphatic about it as we can. The Act is not a general protection of medically afflicted persons. It protects people who are discriminated against by their employer…either because they are in fact disabled or because their employer mistakenly believes they are disabled.*[148]

Proponents of the bills claim that "[s]imply put, the point of the ADA is not disability, it is the prevention of wrongful discrimination."[149] Such hyperbolic statements highlight the central problem with the bills, which is that the concept of "disability" will be expanded so dramatically that it will technically cover almost everyone at one time or another, and the definition of "disability" would be trivialized. As one court aptly noted, "the purpose of the ADA would be undermined if protection could be claimed by those whose relative severity of impairment was widely shared."[150]

Proponents have argued that under other federal antidiscrimination laws, plaintiffs do not need to make a showing that they are "a member of a protected class" before relief can be granted.[151] To the contrary, it is axiomatic that the threshold showing in any type of discrimination case —whether it be based on race, color, religion, sex, national origin, or age— is that an individual is a member of the protected class. Moreover, unlike these other antidiscrimination statutes, ADA plaintiffs need not show that they were treated differently than a person outside the protected class.

Indeed, the legislation would make the concept of a "protected class" on the basis of "disability" almost meaningless because virtually everyone would be protected by it. For example, a person with a bunion would be considered just as disabled as a diabetic foot amputee. An individual with occasional headaches would be protected like a person who suffered from substantial brain damage resulting from a head injury. Similarly, a person with a cut on their finger requiring seven stitches would be considered just as disabled as a veteran returning home from battle having lost his or her arm in combat. An individual with a kidney stone would be on par with a person suffering from kidney failure requiring dialysis a couple of times a week.

The Class of Persons Covered under the ADA has Not Been Narrowed

As discussed, one of the purposes of the proposed legislation is to "respond to" or overturn several U.S. Supreme Court decisions, which have allegedly "narrowed the class of people who can invoke the protection from discrimination the ADA provides."[152] One of these cases is *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[153] Critics of the case and proponents of the legislation claim that the *Toyota* case narrowed the definition of "disability" —narrowing the protected class— by using the word "severely" in its analysis of how much an impairment must substantially limit a major life activity.

But the Supreme Court's decision in *Toyota*,[154] did not "narrow" or change the class of persons protected by the ADA. Moreover, the decision was limited in its scope to the major life activity of performing manual tasks.

In *Toyota*, the Court held that to be substantially limited in a major life activity, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[155] Using the word "severely," however, did not change the definition of "disability" nor the applicable standard. Indeed, the relevant congressional Committee Reports on the ADA expressly used the word "severity" noting that an impairment does not qualify as a disability unless its "*severity* is such that it results in a 'substantial limitation of one or more major life activities.'"[156] Moreover, the EEOC maintains that the Court's use of the term "severely" did not change the pre-*Toyota* standard of "substantially limits."[157] Federal courts of appeals have agreed, as demonstrated by the Seventh Circuit's decision in *Keane v. Sears, Roebuck & Co.*[158]

In *Keane*, the EEOC filed suit against an employer for failing to reasonably accommodate an employee's disability. The federal district court granted summary judgment in favor of the employer, concluding that the plaintiff did not have a "disability" under the ADA. The decision was appealed and the Seventh Circuit reversed and remanded the case to the district court ("*Keane I*").[159] On remand, the district court determined that the Supreme Court's intervening decision in *Toyota* changed the definition of "substantially limits." Thus, the district court concluded that courts may no longer rely upon the EEOC's regulations because they define a disability as an impairment that "significantly restricts" one or more major life activities and that the Supreme Court set a higher threshold by using the phrase "severely restricts."[160] Once again, the district court found that Keane was not disabled under this new standard.

The Seventh Circuit, however, rejected the district court's opinion. The appeals court, instead, determined that *Toyota* did not alter the statutory standard that, to be disabled, one's impairment must "substantially limit" a major life activity.[161] According to the court, *Toyota* "did not change the way in which courts are to go about making this determination—asking whether the limitation is substantial or considerable in light of what most people do in their daily lives, and whether the impairment's effect is permanent or long term."[162] Consequently, the Seventh Circuit sent the case back to the district court to make the same findings it had ordered before the *Toyota* decision.

Moreover, the Seventh Circuit determined that Toyota was limited in its scope to the major life activity of "performing manual tasks."[163] Specifically, analyzing an individual's ability to perform several types of tasks is different from considering the major life activity of walking. For example, "the ability of a person who is wheelchair-bound to wash his face or pick up around the house does not indicate that he is not disabled under the ADA, and it would not relieve his employer of the obligation to install a ramp or reasonably accommodate his limitations in other ways."[164] The requirement that a plaintiff be unable to perform a "variety of tasks" like the ones discussed in *Toyota* would not apply where the major life activity at issue is something other than the performance of manual tasks.[165]

Similarly, in *Albert v. Smith's Food & Drug Ctrs., Inc.*,[166] the Tenth Circuit agreed that *Toyota* was largely limited to the major life activity of "performing manual tasks." The court found that "*Toyota* did not set down the rule that all people claiming a disability must show an inability to perform the variety of tasks required to be performed in most people's daily lives."[167] Instead, the appeals court held that the "Supreme Court's analysis regarding the impact of the disability relevant in that case on the ability to perform basic tasks does not apply to what is required to show a substantial limitation in the major life activity of breathing."[168]

Mitigating Measures No Longer Considered

In addition to covering all impairments, under the proposed legislation, mitigating efforts such as medicines, eye glasses, or prosthetic devices would be ignored in determining whether a person is disabled. The Supreme Court cases of *Sutton v. United Airlines*,[169] and its two companion cases[170] would be overturned by the proposed bills. *Sutton* and its counterparts held that if a person takes steps "to correct for, or mitigate, a physical or mental impairment, the effects of those measures —both positive and negative— must be taken into account when judging whether that person is 'substantially limited' in a major life activity." In other words, a disability exists only where an impairment actually substantially limits a major life activity, "not where it might, could, or would be substantially limiting if mitigating measures were not taken." Thus, mitigating measures, under the bills, could no longer be considered in analyzing a disability. Not only would the expanded definition of "disability" dispense with the boundaries between mere impairments and disabilities, but also the EEOC and courts could not even consider the mitigating measures used to correct a simple impairment.

Proponents of the legislation and critics of *Sutton* claim that the case has narrowed the protected class under the ADA by effectively excluding individuals who attempt to mitigate or control a disability. Such concerns are largely unfounded. For instance, in *Nawrot v. CPC Int'l*,[171] the plaintiff sufficiently demonstrated that his diabetes substantially limited "his ability to think and care for himself, which are both major life activities."[172] The plaintiff injected himself with insulin approximately three times a day and tested his blood sugar level at least ten times a day. Even taking these mitigating measures, which the court noted was "itself a substantial burden," did not remedy the adverse effects of the plaintiff's diabetes.[173] He could not "completely control his blood sugar level" and he suffered from "unpredictable hypoglycemic episodes, of such extreme consequence that death [was] a very real and significant risk." When suffering from such episodes "his ability to think coherently [was] significantly impaired" inhibiting his ability to express coherent thoughts and occasionally "causing him to make completely nonsensical statements." Moreover, aside from full-blown diabetic episodes, he had "close calls," where he felt the onset of an episode but was able to avert a serious, debilitating attack.[174] The plaintiff also suffered early stages of kidney damage and nerve damage in his feet (affecting his ability to sense feeling) as a consequence of his diabetes and "depression and mood changes accompany his swings in blood sugar level."[175] In sum, the claim that *Sutton* narrowed the individuals protected by the ADA has not played out in practice.

Burden of Proof Shifts From Plaintiffs to Employers

Unlike other federal anti-discrimination laws, the proposed bills would eliminate the requirement that a plaintiff establish that he or she is a "qualified individual," (*i.e.*, able to perform the job with or without accommodation). Instead, the legislation would place the burden on employers to prove that a disability discrimination plaintiff is "not qualified." Even though Congress intended for an ADA plaintiff to bear the burden of proof that he or she is "qualified individual with a disability."[176]

Under the ADA, a person is "qualified" if they can perform the essential functions of the job, with or without reasonable accommodation.[177] Currently, in a typical disability discrimination case, a plaintiff must show the following elements: (1) the plaintiff has a disability as defined by the ADA; (2) the plaintiff is a *qualified* individual; and (3) the plaintiff suffered an adverse employment action under circumstances which gave rise to an inference of unlawful discrimination. Indeed, under "disability discrimination actions, the plaintiff has not shown the defendant has done anything wrong until the plaintiff can show that he or she was able to do the job with or without reasonable accommodation."[178] Flipping the burden of proof from plaintiffs to employers would substantially increase litigation costs and is bad public policy.

In fact, even the California Supreme Court has recently ruled that under California law a disability discrimination plaintiff bears the burden of proof to show that he or she is qualified (*i.e.*, able to perform the essential functions of the job with or without reasonable accommodation). The Court noted that shifting the burden from employees to employers to prove that the person could not perform the essential functions of the job with or without a reasonable accommodation "would defy logic and establish a poor public policy in employment matters."[179]

With this unprecedented measure, employers would bear a tremendous burden. Take, for example, a disability applicant case in which an individual with a disability interviewed for a position was not selected. If sued, the employer would be required to show that the plaintiff was "not qualified" for the position. As has been recognized by every other discrimination law, plaintiffs are in a much better position to show that they are qualified. They will know where the evidence is and will have the *ability and authority* to acquire the information, whereas the employer often would not.

Flipping the burden would require employers to interview and evaluate candidates thoroughly. It will likely result in more pre-employment testing and evaluations. Indeed, if the burden to prove that an individual is "not qualified" is put on employers, they will want to know as much information as possible before hiring a candidate. Moreover, it would necessitate that employers fish through the plaintiff's background looking at and confirming education, test results, medical records, interviewing former coworkers, friends, neighbors or anyone that could assist the employer in meeting the evidentiary burden that the plaintiff was "not qualified." Shifting the burden of proof would likely result in heightened employer scrutiny and extend the hiring process. Such results clearly would not fulfill the purposes of the ADA.

Employer Requirement to Provide Reasonable Accommodations Expanded

The expansion of the term "disabled" would also expand an employer's accommodation obligations. The ADA requires employers to provide reasonable accommodations so disabled individuals may perform the essential functions of the job.

To do this, an employee generally requests an accommodation from his or her employer and then the two engage in an interactive communicative process regarding possible accommodations.

Under the proposed bills, any employee with any impairment (*i.e.*, disability) may request an accommodation. This would require the employer to engage in the interactive accommodation process even for minor impairments, which would divert employers' time and resources from addressing requests for reasonable accommodations from qualified individuals with serious disabilities. Thus, an accommodation request from a blind individual may have to wait while employers engage in the interactive process with persons having minor impairments such as the flu, an ingrown toenail, or even mild seasonal allergies.

Moreover, with the expanded ambiguity of who is "disabled" under the bills, employers would continue to struggle even more to understand and comply with their reasonable accommodation obligations. For example, under the bill, employers may be required to provide large screen computer monitors for most employees who wear glasses, less strenuous hours or fewer deadlines for those with high blood pressure, and sleep breaks for those who suffer apnea. The bill imposes an extremely broad duty on employers to accommodate a large share of employees. Unfortunately, as resources are stretched, those that are most in need of assistance are likely to suffer the greatest adverse consequences.

Conclusion

We strongly encourage the House Education and Labor Committee to take a very close look at these and other problems related to rewriting the ADA as the ADA Restoration Act would do. We also urge you to be very careful in shaping policy changes that will have a dramatic impact on the ADA and the ability of employers to assist those who need it the most. We are very eager to join you in this effort and thank you for allowing us an opportunity to express our views.

Endnotes

[1] 153 Cong. Rec. S10,151 (daily ed. July 26, 2007) (statement of Sen. Harkin).
[2] NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT, 96 (1997).
[3] *Id.* at 97.
[4] *Id.* at 102.
[5] 42 U.S.C. § 12112(a).
[6] *Id.* at § 12112(b)(5)(A).
[7] *Id.* at § 12102(2).
[8] 29 U.S.C. § 794(a).
[9] S. Rep. No. 116, 101st Cong. 1st Sess. (1989), at 21.
[10] H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 27; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 3 (1990) at 50.
[11] H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 26.
[12] *Narwot v. CPC Int'l*, 277 F.3d 896, 903 (7th Cir. 2002) (citations omitted).
[13] *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1053 (7th Cir. 1997). *See also Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. 1998) (holding that if an individual's medical condition does not rise to the level of a disability then he or she is not protected under the ADA).
[14] *Guzman-Rosario v. United Parcel Service*, 397 F.3d 6, 10 (1st Cir. 2005); *see also Flemmings v. Howard University*, 198 F.3d 857, 861 (D.C. Cir. 1999) ("The ADA does not cover every individual with an impairment who suffers an adverse employment action.").
[15] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 195 (2002). *See also Dalton v. Subaru-Isuzu Auto*, 141 F.3d 667, 675 (7th Cir. 1998) ("Not all impairments are substantial enough to be deemed a protected disability under the ADA.").
[16] *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944, 950 (7th Cir. 2000).
[17] *Toyota*, 534 U.S. at 199 ("An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.").
[18] *Moore*, 221 F.3d at 950 (citing *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996)).
[19] *Bragdon v. Abbott*, 524 U.S. 624, 632-42 (1998).
[20] The *treatment* of a condition that is not itself a "disability" can count as a disability under the ADA. *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1052 (7th Cir. 1997) ("Obviously, having high cholesterol is not in itself disabling; it does not prevent a person from engaging in any of the activities of living and working; it is wholly unlike blindness or paraplegia or the other conventional disabilities that trigger the protection of the ADA. But it is lifethreatening, albeit only in the long term, and if a medical condition that is not itself disabling nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, then the individual has a disability within the meaning of the Act, even though the disability is, as it were, at one remove from the condition."). *See also Gordon v. E.I. Hamm & Associates, Inc.*, 100 F.3d 907 (11th Cir. 1996) (assuming that the effects of chemotherapy treatment for a cancer could be disabling, even though the cancer itself did not substantially limit a major life activity. Although, the cancer did not trigger the protections of the statute because it did not render the individual disabled, the treatment did.)
[21] The EEOC adopted the definitions of physical or mental impairment from the Senate and House committee reports. *See* H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 28 and 51; S. Rep. No. 116, 101st Cong. 1st Sess. (1989), at 21-22.
[22] 29 C.F.R. § 1630.2(h)(1).
[23] 29 C.F.R. § 1630.2(h)(2).
[24] PETER A. SUSSER, DISABILITY DISCRIMINATION & THE WORKPLACE, 17 (2005).
[25] EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (March 25, 1997).
[26] *See, e.g.*, *Keane v. Sears, Roebuck & Co.*, 417 F. 3d 789, 797 (7th Cir. 2005); *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 684 (8th Cir. 2003); *Nowrot*, 277 F.3d at 904 n. 4; *Moore*, 221 F.3d at 950; *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 506 (7th Cir. 1998).
[27] *Benoit v. Technical Manufacturing Corp.*, 331 F.3d 166 (1st Cir. 2003).
[28] *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000).

[29] *DiCarlo v. Potter*, 358 F.3d 408 (6th Cir. 2004).
[30] *Christian*, 117 F.3d at 1052.
[31] *Arrieta-Colon v. Wal-Mart, Inc.*, 2006 U.S. App. LEXIS 826 (1st Cir. 2006).
[32] *Sinclair Williams v. Stark*, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001).
[33] *Cella v. Villanova University*, 2004 U.S. App. LEXIS 21740 (3d. Cir. 2004).
[34] *Dillon v. Roadway Express*, 2005 U.S. App. LEXIS 7490 at *8 (5th Cir. 2005).
[35] *Van Sickle v. Automatic Data Processing*, 952 F. Supp. 1213, 1218 (E.D. Mich. 1995).
[36] EEOC Compliance Manual § 902.2(c) at 14.
[37] *Navarro v. Pfizer*, 261 F.3d 90 (1st Cir. 2001).
[38] *Dewitt v. Carsten*, 941 F. Supp. 1232 (N.D. Ga. 1996), *aff'd*, 122 F.3d 1079 (11th Cir. 1997).
[39] *Villorreal v. J.E. Merit Constructors, Inc.*, 895 F. Supp. 149, 152 (S.D. Tex. 1995) (dismissing the complaint because pregnancy is not a disability under the ADA because it is not a disorder and the temporary nature of the condition weighs against considering it an impairment).
[40] *Mehr v. Starwood Hotels & Resorts*, 2003 U.S. App. LEXIS 14815 (6th Cir. 2003).
[41] *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (holding that obesity was not an impairment because it was not caused by a physiological condition).
[42] 29 C.F.R. pt. 1630. App. § 1630.2(h).
[43] EEOC Compliance Manual § 902.2(c)(2).
[44] 29 C.F.R. pt. 1630. App. § 1630.2(j).
[45] *Lehman v. U.S. Steel Corp.*, No. 2:05-cv-01479-NBF at *7 (W.D. Pa. Sept. 19, 2007).
[46] 534 U.S. 184 (2002).
[47] *Id.* at 197.
[48] *Id.*
[49] *Davidson*, 133 F.3d at 505.
[50] *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249 (6th Cir. 2004).
[51] 29 C.F.R. pt. 1630. App. § 1630.2(i).
[52] 29 C.F.R. § 1630.2(h).
[53] 29 C.F.R. pt. 1630. App. § 1630.2(i).
[54] EEOC Compliance Manual § 902.3(b) at 15.
[55] *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005); *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000).
[56] *Waldrip v. General Electric Co.*, 325 F.3d 652 (5th Cir. 2003); *Fraser v. U.S. Bancorp*, 342 F.3d 1032 (9th Cir. 2003).
[57] *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001).
[58] *Bragdon*, 524 U.S. at 634.
[59] *Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th Cir. 2001).
[60] *Miller v. Ameritech Corp.*, 2007 U.S. App. LEXIS 1039 (7th Cir. 2007); *Swart v. Premier Parks Corp.*, 2004 U.S. App. LEXIS 2964 (10th Cir. 2004).
[61] *Greathouse v. Westfall*, 2006 U.S. App. LEXIS 27882 (6th Cir. 2006).
[62] *Toyota*, 534 U.S. 184.
[63] *Workman v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999).
[64] *Sutton*, 527 U.S. at 471.
[65] *Robinson v. Lockheed Martin Corp.*, 2007 U.S. App. LEXIS 331 (3d Cir. 2007); Collado v. United *Parcel Service, Co.*, 419 F.3d 1143 (11th Cir. 2005).
[66] *MacKenzie v. Denver*, 414 F.3d 1266 (10th Cir. 2005).
[67] *Nazum v. Ozark Automotive Distributors, Inc.*, 2005 U.S. App. LEXIS 28736 (8th Cir. 2005).
[68] *Rossbach v. City of Miami*, 371 F.3d 1354 (11th Cir. 2004).
[69] *Moore*, 221 F.3d at 950.
[70] *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35 (5th Cir. 1996).
[71] *Toyota*, 534 U.S. at 196.
[72] *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635 (2d Cir. 1998).
[73] *Davidson*, 133 F.3d at 508 ("The statute requires proof of a limitation on one or more major life activities, and among the major life activities cited by the regulations is 'working'; but nowhere do we find a requirement that limitations on the other life activities –walking, for example—be shown to manifest specifically in the workplace before the plaintiff may be accorded disabled status under the statute.").

[74] *Sizemore v. Consolidated Rail Corp.*, 2003 U.S. App. LEXIS 952 (3d Cir. 2003) (holding that employee could bring an ADA claim because he was regarded as substantially limited in hearing even though he was not regarded as substantially limited in working); *Davidson*, 133 F.3d at 499.
[75] 1999 U.S. App. LEXIS 30586 (10th Cir. 1999).
[76] 339 F.3d 682 (8th Cir. 2003).
[77] *Id.* at 686.
[78] 534 U.S. 184 (2002).
[79] *Id.*
[80] *Id.* at 196 (citations omitted).
[81] *Id.* at 197.
[82] *Davidson*, 133 F.3d at 506.
[83] 29 CFR § 1630.2(j)(1); *see also Sutton*, 527 U.S. at 480.
[84] 213 F.3d 25, 31-32 (1st Cir. 2000).
[85] *Toyota*, 534 U.S. at 198 (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii)).
[86] *See Rinehimer v. Cemcotift, Inc.*, 292 F.3d 375 (noting that a temporary impairment is not protected by the ADA).
[87] *See* EEOC Compliance Manual § 902.4(d) at 30; *Sinclair Williams v. Stark*, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001) (noting that 3 months may be long enough).
[88] 397 F.3d 6, 10 (1st Cir. 2005).
[89] *Reg. Economic Comm. Action Program v. City of Middleton*, 281 F.3d 333 (2d Cir. 2002) (noting that somewhere between three and nine months is "long-term"); *Sinclair Williams v. Stark*, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001) (noting that hypertension lasting three months could be considered "substantially limiting").
[90] 2005 U.S. App. LEXIS 7490 (5th Cir. 2005).
[91] *Id.* at *8 (emphasis added).
[92] 527 U.S. 471 (1999).
[93] *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (7-2 decision); *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555 (1999) (unanimous decision).
[94] *Sutton*, 527 U.S. at 482.
[95] *Id.* at 483.
[96] *Id.* at 482.
[97] *Id.* at 483.
[98] *Id.* at 483.
[99] *Id.* at 483-84.
[100] *Id.* at 484-85.
[101] *Id.* at 487.
[102] *Id.* at 494 (Ginsburg J., concurring).
[103] *Id.* at 486-87.
[104] *Id.* at 485, 487.
[105] *Id.* at 485 (citing National Council on Disability, On the Threshold of Independence 19 (1988)).
[106] *Id.* at 487.
[107] 42 U.S.C. § 12112.
[108] 42 U.S.C. § 12111(8).
[109] 29 C.F.R. § 1630.2(m).
[110] *Fenney v. Dakota, Minnesota & Railroad Co.*, 327 F.3d 707, 712 (8th Cir. 2003); *Flemmings v. Howard University*, 198 F.3d 857, 861 (D.C. Cir. 1999).
[111] *Fenney v. Dakota, Minnesota & Railroad Co.*, 327 F.3d 707, 711-12 (8th Cir. 2003); *Moore*, 221 F.3d at 950; *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 51-52 (5th Cir. 1997) (per curiam).
[112] *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852 (7th Cir. 2005) (holding that the plaintiff has the burden of demonstrating the he was capable of performing the essential functions of the job); *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001) (same).
[113] *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 568 (8th Cir. 2007); *Hamlin v. Township of Flint*, 165 F.3d 426, 430 (6th Cir. 1999). *But see Laurin v. The Providence Hospital*, 150 F.3d 52, 59 (1st Cir. 1998) ("an ADA plaintiff ultimately must shoulder the burden of establishing that she was able to perform all 'essential functions'").

[114] 29 C.F.R. § 1630.2(n)(1). *See also Kapche v. City of San Antonio*, 176 F.3d 840, 843 (5th Cir. 1999).
[115] *EEOC v. E.I. Du Pont de Neumours & Co.*, 480 F.3d 724, 730 (5th Cir. 2007) (citing 29 C.F.R. § 1630.2(n)(3)(i)-(vii)).
[116] *See, e.g., Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006) (holding that "driving" was not an "essential function" where the employee had "consistently arranged for his own transportation between customer locations"); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001) (questioning whether "climbing" was an "essential function" when the employee had worked for over 3 years "without ever having to perform overhead work").
[117] 42 U.S.C. §§ 12112(a), and (b)(5)(A).
[118] *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001); *Jones v. United Parcel Serv.*, 214 F.3d 402, 408 (3d Cir. 2000).
[119] *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998).
[120] *Jay v. Internet Wagner, Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000).
[121] *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) ("An *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations.").
[122] *Keane v. Sears, Roebuck & Co.*, 417 F. 3d 789, 797 (7th Cir. 2005).
[123] 42 U.S.C. § 12111(9).
[124] 29 C.F.R. pt. 1630, App. § 1630.2(o); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1335-36 (10th Cir. 1998) (holding that providing leave for four months to be treated for post traumatic stress disorder was a reasonable accommodation).
[125] The analysis of the length of leave is fact specific depending on whether the leave would impose an undue hardship on the employer. *See, e.g., Garcia-Alaya v. Lederle Parenterals, Inc.*, 212 F.3d 638, (1st Cir. 2000) (noting that it may not have been an undue hardship for the employer to hold the employee's secretarial job open for an extended period of time given that the company was able to fill her position with temporary help).
[126] 42 U.S.C. 12111(9)(B); *see also Benson v. Northwest Airlines*, 62 F.3d 1108, 1113 (8th Cir. 1995) (noting that reallocating marginal functions of the job is a reasonable accommodation).
[127] 29 C.F.R. § 1630.2(o)(2)(ii).
[128] 42 U.S.C. § 12111(9).
[129] 42 U.S.C. § 12111(9)(B). *But see Denszak v. Ford Motor Co.*, 2007 U.S. App. LEXIS 2435 (6th Cir. 2007) (holding that employer was not required to displace existing employees to create an opening for reassignment).
[130] EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (March 25, 1997) at 27-28.
[131] See H.R. 3195 § 2(b)(1) 110th Cong., 1st Sess. (July 26, 2007).
[132] See H.R. 3195 § 2(b)(2) 110th Cong., 1st Sess. (July 26, 2007).
[133] See H.R. 3195 § 2(b)(3) 110th Cong., 1st Sess. (July 26, 2007).
[134] 153 Cong. Rec. S10,152 (daily ed. July 26, 2007) (statement of Sen. Harkin).
[135] *Rodriguez v. Con Agra Grocery Products Co.*, 436 F.3d 468 (5th Cir. 2006).
[136] *See, e.g.*, H.R. 3195 § 2(b)(3) 110th Cong., 1st Sess. (July 26, 2007) (stating that the purpose of the legislation is to reinstate original congressional intention "regarding the definition of *disability* by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived *impairment*, or record of *impairment* or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning *disability*…") (emphasis added).
[137] 153 Cong. Rec. S10,152 (daily ed. July 26, 2007) (statement of Sen. Harkin).
[138] 826 F.Supp. 40, 45 (D.N.H. 1993).
[139] *Id.* at 45. The *Partlow* case arose under the § 504 Rehabilitation Act and analyzed the definition of "handicap" instead of "disability." For consistency, and because both terms —"handicap" under the Rehabilitation Act and "disability" by the ADA— are defined the same, the term "disability" has been substituted in place of "handicap" in this case.
[140] *Id.* (emphasis added).
[141] S. Rep. No. 116, 101st Cong. 1st Sess. (1989) at 22 (emphasis added); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52 (emphasis added).
[142] S. Rep. No. 116, 101st Cong. 1st Sess. (1989) at 22 (emphasis added); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52 (emphasis added).

[143] S. Rep. No. 116, 101st Cong. 1st Sess. pt. 1 (1989) at 23; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52.
[144] S. Rep. No. 116, 101st Cong. 1st Sess. pt. 1 (1989) at 23; H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52.
[145] S. Rep. No. 116, 101st Cong. 1st Sess. pt. 1 (1989) at 23 (emphasis added); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52 (emphasis added).
[146] 534 U.S. 184 (2002).
[147] 117 F.3d 1051 (7th Cir. 1997)
[148] *Christian*, 117 F.3d at 1053 (emphasis added).
[149] Hoyer Introduces Americans With Disabilities Restoration Act of 2007 (July 26, 2007) available at http://www.tiltc.org/docs/07707hoyer.htm. Rep. Sensenbrenner made a similar statement that "prohibiting discrimination 'on the basis of a disability' will finally enable people utilizing the ADA to focus on the discrimination that they have experienced rather than having to prove that they fall within the intended scope of the ADA's protections." Representative F. James Sensenbrenner, Jr., Third Annual Tony Coelho Lecture in Disability Employment Law and Policy (March 26, 2007).
[150] *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 185-86 (3d Cir. 1999).
[151] SUSAN STEFAN, HOLLOW PROMISES, 73 (2002). Rep. Sensenbrenner, a sponsor of the H.R. 3195, referred to the fact that under other antidiscrimination statutes a plaintiff need not prove that he or she is a member of a protected class. He stated, "No other civil rights law, including Title VII of the Civil Rights Act of 1964, requires a victim of discrimination to first prove that she or he is worthy of the law's protections before proving a discrimination case." Representative F. James Sensenbrenner, Jr., Third Annual Tony Coelho Lecture in Disability Employment Law and Policy (March 26, 2007).
[152] H.R. 3195 § 2(b)(2) 110th Cong., 1st Sess. (July 26, 2007).
[153] 534 U.S. 184 (2002).
[154] *Id.*
[155] *Id.* at 198 (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii)).
[156] S. Rep. No. 116, 101st Cong. 1st Sess. (1989) at 22 (emphasis added); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990) at 52 (emphasis added).
[157] EEOC's Reply Br. in *EEOC v. Sears, Roebuck & Co.*, No. 04-2493 (Brief filed in Seventh Circuit, Feb. 25, 2005); EEOC's Br. in EEOC v. UPS, No. 01-15410 (Brief filed in Ninth Circuit, Nov. 1, 2001) at n. 6.
[158] 417 F. 3d 789 (7th Cir. 2005).
[159] *See EEOC & Keane v. Sears Roebuck & Co. ("Keane I")*, 233 F.3d 432 (7th Cir. 2000).
[160] *EEOC & Keane v. Sears Roebuck & Co. ("Keane")*, 417 F. 3d 789, 798 (7th Cir. 2005).
[161] *Keane* , 417 F. 3d at 801.
[162] *Id.*
[163] *Id.* (noting that in *Toyota* the Supreme Court "expressly limited its grant of certiorari, its analysis, and its holding, to the "major life activity of performing manual tasks.").
[164] *Id.*
[165] *See Toyota*, 534 U.S. at 200-202.
[166] 356 F.3d 1242, 1250 n.5 (10th Cir. 2004).
[167] *Id.* (citing *Toyota*, 534 U.S. at 198).
[168] *Id.*
[169] 527 U.S. 471 (1999).
[170] *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (7-2 decision); *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555 (1999) (unanimous decision).
[171] 277 F.3d 896 (7th Cir. 2002).
[172] *Newrot*, 277 F.3d at 905.
[173] *Id.* at 904.
[174] *Id.* at 905.
[175] *Id.*
[176] *See* H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 3 (1990) at 31-34 ("This additional language adopted by the Committee is not meant to change the current burden of proof. This language simply assures that the employer's determination of essential functions is considered. A plaintiff may challenge the employer's determination of what is an essential function.").
[177] 42 U.S.C. § 12111(8).

[178] *Green v. State of California*, 42 Cal. 4th 254, 266, 165 P.3d 118 (Cal. 2007).
[179] *Id.* at 267.

[The statement of the National Federation of Independent Business follows:]

January 29, 2008.

Hon. GEORGE MILLER, *Chairman,*
Hon. HOWARD "BUCK" MCKEON, *Ranking Member,*
Committee on Education & Labor, U.S. House of Representatives, Washington, DC.

DEAR CHAIRMAN MILLER AND RANKING MEMBER MCKEON: On behalf of the National Federation of Independent Business (NFIB), the nation's leading small-business advocacy group, I am writing to express opposition to H.R. 3195, the "ADA Restoration Act."

The 1990 Americans with Disabilities Act (ADA) provides important and necessary protections against disability discrimination in the workplace. H.R. 3195 would dramatically expand the original ADA by changing the definition of disability, expanding coverage to less severe impairments. H.R. 3195 is inconsistent with the

original intent expressed by Congress to protect individuals who are substantially limited by severe disabilities. Trivializing the concept of "disability" will inappropriately divert employer resources from those who need them most.

NFIB opposes H.R. 3195 because it does not aim to make any positive policy changes to an already complex ADA law. NFIB approves of Congressional considerations to improve small employers' ability to comply with the law, such as a grace period for accommodating disabled employees. In an 2000 member ballot survey, 97 percent of NFIB members agreed that small businesses should be given time to correct ADA violations before a lawsuit can be filed against them.

Small-business resources are limited, yet small businesses actively seek counsel and already contribute a great deal of resources to comply with a myriad of confusing employment policy regulations like ADA. More challenging, H.R. 3195 does not provide any clear legislative guidance or intent on what constitutes a disability. Due to this lack of clarity, NFIB is concerned that an individual with occasional headaches could file a lawsuit demanding the same protection as an individual with serious brain damage. The resulting increase in questionable requests for accommodation will only make it more difficult for them to assist the severely disabled. It will also certainly increase the number of persons that will bring unreasonable disability discrimination claims.

With this, H.R. 3195 would prohibit employers from considering the effects of any mitigating measures an individual uses to manage his or her impairment. For instance, a small employer would not be able to consider the very significant negative effects of medication that may be used by employees—such as those which come with warnings with respect to operating heavy machinery.

Finally, H.R. 3195 also includes an unworkable and dramatic expansion of employer obligations and reverses a long-established rule found in all federal anti-discrimination laws that a person must show that she or he is qualified to perform the job. Instead, this legislation would shift the responsibility to employers. Under current law, if an individual is found to be disabled and qualified to perform the essential functions of the job, he or she may request an accommodation from the employer. The individual and employer then engage in an interactive process to reach a reasonable accommodation so the employee can perform his or her job.

Last year, the EEOC received 15,575 charges of discrimination under the ADA yet found reasonable cause for discrimination in only 5.6 percent of the time. NFIB is concerned that H.R. 3195 will only serve as additional fodder for trial lawyers, diverting needed resources from protecting the rights of the truly disabled. I urge your opposition to H.R. 3195.

Sincerely,

DAN DANNER, *Executive Vice President,*
Federal Public Policy and Political, National Federation of Independent Business.

[Whereupon, at 11:53 a.m., the committee was adjourned.]

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