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TESTIMONY

to the

COMMITTEE ON EDUCATION AND LABOR

of the

UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON H.R. 3195

"ADA RESTORATION ACT OF 2007"

Witness:

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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

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.").

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 Series: 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

2 42 U.S.C. § 12101.

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 reviewing 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

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

> 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.

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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).

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

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

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:

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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).

> 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

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

"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

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).

> 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

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

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 states14 and in other

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

countries15 have embraced more inclusive interpretations of who has a disability under nondiscrimination laws. And legislatures in the states16 and in other countries17 deliberately have rejected the narrow approach under U.S. law as enunciated in the Supreme Court's decisions.

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 Airlines*, noted the "ameliorative purpose" and "remedial component" of the disability nondiscrimination 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 nondiscrimination 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."

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.

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

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

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

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

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

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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).

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

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[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).

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

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[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).

> 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

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[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.*

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:

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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).

> 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

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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).

> 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 Anegative 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 Aregarded 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

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39 *Id.*

40 *Id.*

41 H.R. REP. NO. 101-485, pt. 2, at 53B54 (1990).

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

43 *Id.* at 30B31.

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 A[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

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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. 414B15 (app. to pt. 1630) (commentary on ' 1630.9) (1993).

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

46 H.R. REP. NO. 101-485 pt. 2, at 65 (1990); S. REP. NO. 101-116 at 34 (1989).

> (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 distinguishing 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

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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).

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.

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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).

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"

CONGRESS SAID	THE COURTS NOW SAY
"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 disability." 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.