

November 7, 2006

The Honorable Steve Chabot
Chair, Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

**RE: Questions from the September 13, 2006 Oversight Hearing,
"The Americans with Disabilities Act: Sixteen Years Later"**

Dear Representative Chabot:

Thank you for inviting me to testify at the September 13, 2006 oversight hearing on the Americans with Disabilities Act. As a former Member of Congress, and as an author and an original co-sponsor of the ADA, I share and applaud your commitment to keeping the ADA's promises.

Making sure that the ADA's promises are kept is also personal. I have epilepsy. I take medication every day that helps manage this condition. Because of this medication, epilepsy does not prevent me from working or from participating in other daily life activities. But before passage of the ADA, an employer could refuse to hire me because I have epilepsy – and many did. It didn't matter that I was qualified and able to do the job. I was never given the chance. The stereotypes, fears, mistaken beliefs, and prejudices of others proved far more limiting than my disability.

I wanted a law that would prevent this. A law that would give me and the millions of other Americans with disabilities the same opportunities that our neighbors enjoy.

Congress passed that law – the Americans with Disabilities Act – with overwhelming bipartisan support. Just as Title VII protects all Americans from discrimination based on, for example, race or sex, Congress intended for the ADA to protect all Americans from discrimination based on disability, and to ensure equal opportunities for people with disabilities.

The Subcommittee's September 13th ADA oversight hearing provided an opportunity to examine whether we've fulfilled these promises. The hearing confirmed the many ways that the ADA has improved the lives of people with disabilities. It also confirmed that the ADA has not been interpreted and enforced by the courts as Congress intended. Subcommittee members questioned how court rulings have frustrated congressional intent and what needs to be fixed. Several common concerns emerged, which I have tried to capture through question and answer format in this letter. Chairman Chabot also

requested my assistance in answering questions from the Subcommittee, and I have included my responses to those specific questions as an attachment to this letter.

Q: How has the Supreme Court limited the intended reach of the ADA?

The purpose of the ADA is to provide a “clear and comprehensive national mandate”¹ for eliminating disability-based discrimination. Yet the Supreme Court has not interpreted the ADA as providing comprehensive protections. On the contrary, the Court has interpreted the law strictly and has limited the ADA’s reach significantly by (1) creating an unreasonable standard for meeting the ADA’s definition of “disability” and denying the ADA’s protection to broad classes of persons with disabilities that Congress clearly intended to protect, (2) narrowing employers’ “reasonable accommodation” obligations, and (3) expanding defenses to charges of disability-based discrimination.²

With regard to the definition of “disability,” the Court has restricted the reach of the ADA by

- requiring that mitigating measures – medication, prosthetic devices, hearing aids, and other auxiliary devices – be taken into account in determining whether an individual has a disability under the ADA.³ This creates the Catch-22 identified by Ranking Member Nadler: people with serious health conditions like epilepsy or diabetes who are fortunate enough to find a treatment that makes them more capable and independent – and more able to work – may find that they are not protected by the ADA at all and unable to challenge discriminatory treatment;⁴
- making it harder for an individuals to show that they were “regarded as” disabled where an employer fires or refuses to hire them;
- making it harder for individuals to prove that their impairment substantially limits them by requiring that an impairment prevent or severely restrict an individual’s ability to perform activities considered to be of central importance to most people’s everyday lives.

In the wake of these restrictive rulings, millions of Americans who experience disability-based discrimination have been or will be denied protection of the ADA and prevented from challenging discriminatory conduct. This is not what Congress intended.

Q: What should be done to address these Supreme Court rulings?

The definition of “disability” should be amended. Additional problems created by Supreme Court misinterpretation of Congressional intent also should be addressed through technical and clarifying changes. As a starting point for discussion, the Subcommittee should consider the National Council on Disability’s Righting the ADA report,⁵ which addresses many of the problems outlined above and includes suggested proposals for restoring the original intent of the ADA.

Q: Should the ADA be amended to require additional notice to businesses before legal action is taken to remedy noncompliance?

No. Business owners have had sixteen years to learn about and comply with the ADA's requirements and the liability that business owners face for violations of the Act is relatively minimal. Money damages are not available under Title III. This means that businesses currently have the opportunity to make voluntary changes once a lawsuit is filed to avoid additional litigation costs. Under Title III, private parties get only "preventive relief" – temporary or permanent orders requiring businesses to fix accessibility or other problems. While Congress gave courts discretion to compensate a "prevailing party" for costs and attorney's fees, the Supreme Court unfortunately has prevented plaintiffs from recovering their fees in most cases where a defendant voluntarily fixes the problem.⁶

Even if a court finds that attorney's fees are available under Title III, those fees must be "reasonable." Because Title III lacks any other monetary consequences for businesses that have failed to comply with the ADA, allowing reasonable attorney's fees provides an incentive for businesses to figure out what needs to be done and to do it, hopefully long before a person with a disability is denied access or otherwise discriminated against.

Congress balanced the interests of business owners and the accessibility needs of people with disabilities in one way in 1990 by limiting the relief available to plaintiffs under Title III. To the extent that proposals like the Notification Act (H.R. 2804) seek to strike a new balance now, the full scope of the previous agreement needs to be considered. At a minimum, this would require adding money damages to Title III's remedy provision as noted by Ranking Member Nadler.⁷

Q: Should the ADA be amended to protect small businesses from "drive by" lawsuits?

No. My understanding of a "drive by" lawsuit is when an unscrupulous attorney files a suit against a business, invoking both the ADA (which does not provide for money damages) and state law (which often does). The lawyer then settles the claim with the business for a sum of money, which the business owner concludes is less than the monetary damages/attorney's fees that might be assessed by a court. The lawyer then moves on without requiring or assuring that accessibility improvements are made. Such lawsuits do not serve the disability community's interest.

But the ADA is not the source of this problem, and an additional notification requirement would not fix this problem. As I noted above, Title III of the ADA does not provide for money damages. A damages claim is possible only if a state has chosen to allow it under the state's anti-discrimination law. The Notification Act (H.R. 2804) seeks to undermine such state laws by allowing dismissal of a case in either state or federal court if certain notification requirements have not been met. In other words, H.R. 2804 is using federal law (the ADA) to fix a problem that arises under state law. Not only is this inconsistent with basic federalism principles, it is also inconsistent with the original intent of the ADA. The ADA explicitly does not override more protective state laws.⁸ Moreover,

even if an additional notification requirement were added to the ADA, “drive by” lawsuits would still be possible because a damage claim might be brought exclusively under state law. Any changes in state laws to reduce their reach should be made at the state level – not through the back door of amending the ADA.

It is also critical that we recognize that – 16 years after passage of the ADA – it is continued noncompliance with the law that provides “drive by” attorneys with an enticing target to exploit in the first place.⁹ In some instances, a business owner may have tried to comply with the ADA and state law but has truly misunderstood what those laws require. Or it could be that a business owner has made little or no effort to comply at all with either law, perhaps choosing to wait and see if anyone will force him to do so. It is certainly unfortunate if the first attorney to bring such noncompliance to the attention of the business owner is a “drive by” attorney. But the answer is not to further reduce the incentives in the ADA for compliance. Rather, the real answer is to beef up the Government’s technical assistance while maintaining some incentives for businesses to take the steps necessary to assure compliance requirements have been met.

Q: How can we assist small businesses in complying with the requirements of Title III?

There are several possible ways to improve the existing assistance provided to small businesses. At this point, however, the source and scope of the problem remains unclear, and the Subcommittee might begin by holding a second ADA oversight hearing to examine enforcement and technical assistance provided by the DOJ. The Subcommittee should ask the DOJ to study and report on its successes and failures in implementing Title III, and to assess the effectiveness of existing materials and methods in meeting the technical assistance needs of small businesses. The DOJ already has created several publications focused on small businesses,¹⁰ has conducted trainings for thousands of individuals and businesses,¹¹ and has specialists available to answer technical questions through a toll free hotline. Despite these efforts, however, some business owners like Harry Horner, who testified at the September 13th hearing, express frustration with the lack of compliance support. The Subcommittee should consider the sufficiency of existing funding provided for technical and other assistance and the need to increase the resources of the federal agencies responsible for ADA enforcement.

The Subcommittee might also seek additional recommendations from the National Council on Disability (NCD). NCD convened focus groups and interviewed interested stakeholders – including large and small businesses – about improving ADA implementation. NCD also reviewed best business practices and public awareness strategies and will publish its findings and recommendations in 2007. NCD’s statement for the record for the September 13th ADA Oversight Hearing provides more information on this and other NCD initiatives and recommendations.

Again, I thank all of you for your leadership in examining the progress made – and the challenges that we still face – in implementing the ADA. I applaud your bipartisan commitment to ensuring that this landmark legislation is restored, and I look forward to the day when Congress’s comprehensive mandate to end discrimination based on disability is fulfilled.

Respectfully yours,

Honorable Tony Coelho
Chair, Epilepsy Foundation

¹ 42 U.S.C. § 12101(b)(1) (2000).

² See, e.g., *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002); see also NATIONAL COUNCIL ON DISABILITY POLICY BRIEF SERIES: RIGHTING THE ADA PAPERS, available at <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm> (last visited Sept. 27, 2006).

³ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

⁴ See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000).

⁵ NATIONAL COUNCIL ON DISABILITY, RIGHTING THE ADA (2004), available at http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf (last visited Sept. 27, 2006).

⁶ See *Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) (narrowing the “catalyst theory,” which allows a plaintiff to recover attorney’s fees as a prevailing party where a lawsuit causes change in a defendant’s position).

⁷ Regardless of any change in remedies, Congress also should restore the availability of attorney’s fees by clarifying that “prevailing party” includes a plaintiff whose lawsuit causes a defendant to change its position.

⁸ 42 U.S.C. § 501(b) (2000).

⁹ Frivolous or vexatious litigation can be addressed through the ethics and disciplinary bodies of State bar associations or with the court where litigation is pending. See, e.g., Fed. R.Civ. P. 11 (providing sanctions for frivolous or harassing litigation).

¹⁰ These publications are readily available through the United States Department of Justice website and include the ADA Title III Technical Assistance Manual (available at <http://www.usdoj.gov/crt/ada/taman3.html>) (last visited Sept. 27, 2006), ADA Guide for Small Businesses (available at <http://www.usdoj.gov/crt/ada/smbusgd.pdf>) (last visited Sept. 27, 2006), Common ADA Errors in New Construction and Alterations (available at <http://www.usdoj.gov/crt/ada/errors.pdf>) (last visited Sept. 27, 2006), Ten Small Business Mistakes Video (available at <http://www.usdoj.gov/videogallery.htm#anchor10mistakes990>) (last visited Sept. 27, 2006), and ADA Tax Incentive Package for Business (available at <http://www.usdoj.gov/crt/ada/taxpack.htm>) (last visited Sept. 27, 2006).

¹¹ See United States Department of Justice, Civil Rights Division, Disability Rights Section, Technical Assistance, <http://www.usdoj.gov/crt/drs/drsroles.htm#anchor726276> (last visited Sept. 27, 2006).