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ANSWERS TO WRITTEN QUESTIONS OF THE CHAIRMAN OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES REGARDING *THE AMERICANS WITH DISABILITIES ACT: SIXTEEN YEARS LATER*

by

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INTRODUCTION

I thank Chairman Chabot and the Subcommittee for the opportunity to testify before you and to provide these answers to your written questions. In deliberating about the possibility of repairing some aspects of the ADA, you are addressing a hugely important subject and one that is close to my heart. In preparing my answers, I have relied heavily on topic papers and reports of the National Council on Disability (NCD). And in working on some of the answers, I received some help, guidance, and suggestions from NCD personnel. I want to express my sincere gratitude to NCD for all such assistance. At the same time, I am not authorized to speak for or on behalf of NCD, except perhaps where I quote from documents that were formally approved and published by the Council. I take responsibility for the content of these responses including any mistakes or omissions.

Again, I consider it a great honor to have been asked to provide information to you as you go forward with your deliberations on the future of the ADA. Please feel free to contact me for any additional information I may be able to provide.

<u>Questions Submitted By Subcommittee Chairman Steve Chabot</u>

1. **Is discrimination still prevalent among disabled Americans today compared to 1990? How effective is the Americans with Disabilities Act (ADA) in protecting disabled Americans? Are all disabled Americans able to take advantage of the ADA? How many disabled Americans are currently being excluded from the ADA's protections and why? Are these individuals disabled as defined by Congress in the ADA's legislative history? Have certain Supreme Court decisions left disabled individuals in a situation in which they can be freely discriminated against by employers and businesses because of their disability? Also, under certain Supreme Court precedent, are these individuals not considered disabled enough by the courts to invoke the ADA's protections? If the ADA is not available to these aggrieved individuals, what recourse is there? Is state law sufficient to protect disabled Americans? Please elaborate.**

A. PREVALENCE OF DISCRIMINATION/EFFECTIVENESS OF THE ADA

An accurate view of the impact of the ADA must include both a positive and a negative aspect. There is no doubt that the ADA has had a substantial positive impact on America. In my written testimony, I devoted several pages (pp. 16-22) to highlighting some of the many successes of the ADA in addressing various kinds of discrimination on the basis of disability. I mentioned increased accessibility of many buildings and facilities, the clarification of standards for transportation accessibility, the reduction of discriminatory use of preemployment inquiries and medical information, the increased availability of job accommodations, the availability of telephone relay services, and increased closed captioning of federally funded television public service announcements. I noted the positive effect of Titles II and III of the ADA in eliminating many discriminatory practices by private businesses and government agencies. I focused on the promotion of community residential, treatment, and care services in lieu of unnecessarily segregated large state institutions and nursing homes under President Bush's New Freedom Initiative. I also noted that the ADA is the principal federal civil rights law protecting people with HIV and AIDS from discrimination. In my written and oral testimony, I acknowledged the important role the ADA has played in transforming perceptions of disability, both among the general public and people with disabilities, and in bringing civil rights for people with disabilities into the mainstream of public policy. My written testimony includes a sampling of statements from individuals with disabilities from around the country attesting to the transformative effect the ADA has had in their lives.

At the same time, we must acknowledge that the ADA's effectiveness has not been across-the-board, unadulterated, or seamless. There have been some huge gaps in enforcement, some situations in which covered entities (fortunately only a minority) have taken an "I-won't-do-anything-until-I'm-sued" stance, and, as we discussed at the Subcommittee Hearing, some unfortunate, and I think wrong-headed, court decisions. Regarding the latter problem, in her book, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT, Susan Gluck Mezey wrote that

the "most important element in disabling [the ADA]" is "the federal judiciary's constrained interpretation of the law."[1] In 1997, in a very long law review article reflecting a review of ADA decisions, I wrote that the legal analysis in such cases "has proceeded quite a long way down the wrong road."[2] In the intervening years, the trend in ADA court decisions has only gotten worse, particularly in regard to the determination of who is eligible to bring an ADA suit.

Problematic judicial rulings on the ADA at the Supreme Court level are addressed in the *Righting the ADA* report[3] of the National Council on Disability (NCD), that I had the honor of writing. In discussing what it termed "judicial resistance," the report declared:

> 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. NCD has become increasingly concerned about certain interpretations and limitations placed on the ADA in decisions of the U.S. Supreme Court.[4]

NCD admitted that the outcome in ADA cases was not all adverse:

> 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; and (4) ruled that the ADA required the PGA to allow a golfer with a mobility impairment to use a golf cart in tournament play as a "reasonable modification."[5]

At the same time, the negative rulings are quite significant:

> 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

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1 Susan Gluck Mezey, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT (2005) at 173.

2 Robert L. Burgdorf Jr., *Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 585 (1997).

3 National Council on Disability, *Righting the ADA* (2004), found at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm#IIA.

4 *Id.* at p. 39.

5 *Id.*

> 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*,[6] explores the effect such decisions have had on individuals with disabilities.[7]

In short, in such rulings, the Supreme Court "has taken restrictive and antagonistic approaches toward the ADA, resulting in the diminished civil rights of people with disabilities."[8]

In broad terms, NCD describes the overall effect on individuals with disabilities in the initial sentence of the Executive Summary of *Righting the ADA*: "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."[9]

In the hope of getting more documentation of the effects and effectiveness of the ADA, in 2004, NCD undertook a research project to attempt to determine the impact of the ADA as it relates to the four overarching goals of the Act: (1) equality of opportunity, (2) full participation, (3) independent living, and (4) economic self-sufficiency. The report from this study is to be released soon, and will provide more detailed answers to the question about the effectiveness of the ADA and the extent to which people with different types of disabilities are benefiting from it. According to members of the NCD staff, a preliminary review of the findings from this study reveals that people with disabilities are benefiting significantly from the ADA provisions addressing access to places of public accommodation, transportation, higher education, and services of state and local government. However, employment discrimination against people with disabilities remains a significant issue, and, as a result of the Supreme Court's employment decisions, is going largely unchecked, without recourse for the victims of such discrimination.

B. PEOPLE PROTECTED FROM DISCRIMINATION/PEOPLE EXCLUDED FROM ADA PROTECTION/EFFECT OF SUPREME COURT DECISIONS

The Supreme Court has made several ADA decisions relating to the definition of "disability." All of these decisions narrow the definition of "disability," restricting substantially the number of individuals entitled to protection from employment discrimination under the ADA. In a topic paper in its *Righting the ADA Policy Brief* Series, NCD reviewed the history and evolution of the definition of "disability," analyzed the congressional intent with respect to coverage, reviewed the effect of EEOC

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6 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.

7 *Righting the ADA* at 39-40.

8 *Id.* at 11.

9 *Id.*

regulations and guidance on the definition, and examined the Supreme Court decisions involving the definition of "disability."[10] NCD concludes that the Supreme Court's interpretation of the definition of "disability" under the ADA has so altered the scope of persons protected that the majority of people with disabilities now would have no federal legal recourse in the event of discrimination, particularly in instances of employment discrimination.

For many people with disabilities, the problem is compounded by the fact that, given the extensive congressional record regarding findings of discrimination against many types of disabilities and the broad coverage of the ensuing ADA regulations, the general understanding advanced after the ADA's passage was that anyone experiencing disability-related discrimination had a remedy in court. People with disabilities of all types presume they are covered by the ADA when they now are not. A person, who self-identifies as an individual with a disability for purposes of requesting a reasonable accommodation in the workplace, might do so only to be terminated by his or her employer – an action for which most employees with a disability now would have no recourse under the ADA. Individuals with disabilities who use mitigating measures to compensate for the effects of a disability are particularly vulnerable, operating under a false sense of entitlement without awareness of the Supreme Court's decisions holding that mitigating measures must be taken into account in determining whether, and to what extent, an individual has a disability.

People with disabilities living in the twenty-first century employ a variety of measures or technologies to ameliorate the effects of their disabilities.[11] Assistive technology includes such things as augmentative speech devices that enable a person who is unable to speak to communicate through the use of a point-and-speak device and hearing aids that enhance the ability of people with hearing loss to hear. Medications reduce the number or severity of seizures for people with seizure disorders, help to stabilize the blood sugar of people with diabetes, and moderate the blood pressure of people with hypertension. The use of such assistive technologies and measures evince advances in a modern civilization which seeks to maximize the ability of citizens to make contributions to and participate in society and which, in many instances, enable people with disabilities to function successfully in the workplace and in society in general. Such measures do not eliminate disability, however. In enacting the ADA, Congress recognized that "disability" does not mean "inability" and that the public interest is served by including all individuals in all aspects of society, rather than in drawing artificial boundaries that screen certain individuals out. The Supreme Court, however, has taken a course which fails to acknowledge that all people, mitigating measures notwithstanding, fall

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10 *Americans with Disabilities Act Policy Brief Series: Righting the ADA – No. 6, Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity*, National Council on Disability (Feb. 2003), found at www.ncd.gov/newsroom/publication/extentoflimitations.html.

11 John M. Williams, Assistive Technology is Creating a More Inclusive America, National Organization on Disability (Oct. 2003) www.nod.org/content.cfm?id=1441.

somewhere along a continuum of abilities. The Court has chosen to draw boundaries around people based on the extent to which their disability is mitigated with technology, medication, assistive devices, and even the body's own systems, and has determined that those who fall on one side of the line are not entitled to protection from disability-based discrimination.

In June of 1999, the Supreme Court decided *Sutton v. United Airlines*,[12] *Murphy v. United Parcel Service*,[13] and *Albertson's Inc. v. Kirkingburg*,[14] often referred to as the "*Sutton* trilogy." In these cases, the Court held that, in determining whether an individual is substantially limited in a major life activity, courts may consider only the limitations of an individual that persist after taking into account mitigating measures, *e.g.*, medication or auxiliary aids and services and any negative side effects the mitigating measures may cause. The Court held in *Kirkingburg* that a "mere difference" in how a person performs a major life activity does not make the limitation substantial; how an individual has learned to compensate for the impairment, including "measures undertaken, whether consciously or not, with the body's own systems," also must be taken into account. The result of these decisions is that people whom Congress clearly intended to be covered by the ADA,[15] such as people with epilepsy,[16] diabetes,[17] depression,[18] and hearing loss,[19] are now being denied employment and refused reasonable accommodations because of their disability or the mitigating measures they use, and courts refuse to hear their cases, regardless of how egregious their employers' actions are. These decisions have also resulted in courts now making elaborate inquiries into all aspects of the personal lives of certain plaintiffs in order to determine whether, and to what extent, mitigating measures actually alleviate the effects of the disability – none of which is relevant to the question of whether discrimination occurred. Such inquisitions about the extent of people's disabilities is also inconsistent with other provisions of the ADA that sharply restrict the use of inquiries about the nature and extent of disabling conditions and of medical information about an individual's

12 527 U.S. 471 (1999).

13 527 U.S. 51 (1999).

14 527 U.S. 555 (1999).

15 *See* S. Rep. No. 116, 101st Cong., lst Sess. 23 (1989); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 52 (1990).

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

17 *See* Nordwall v. Sears, Roebuck & Co., 46 Fed. App. 364, 2002 WL 31027956 (7th Cir. 2002) (unpublished).

18 *See* Spades v. City of Walnut Ridge, 186 F.3d 897, 900 (8th Cir. 1999).

19 *See* Martell v. Sparrows Point Scrap Processing, 214 F. Supp. 2d 527 (MD. 2002).

limitations.[20] Some of the Supreme Court's decisions read more like a determination for Social Security Disability Benefits rather than an inquiry into a civil rights violation.[21]

Some quantification of the impact of restrictive interpretations of disability under the ADA can be found in the discussion of the dismal statistics regarding success rates of ADA plaintiffs in part C of the answer to Question 6 below. Other parts of that answer discuss the evidentiary standard based on experiencing discrimination that Congress sought to apply to allow people to qualify to bring an ADA action and the much more restrictive standard the Court has applied.

C. OTHER RECOURSE?/STATE LAW ALTERNATIVE?

In enacting the ADA, Congress made an express finding that "individuals who have experienced discrimination on the basis of disability often have no legal recourse to redress such discrimination."[22] In the course of reaching that conclusion, Congress heard testimony that both existing federal laws and state nondiscrimination laws did not adequately address such discrimination. Attorney General Thornburgh, on behalf of President Bush, testified that "existing federal laws are like a patchwork quilt in need of repair. There are holes in fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protection."[23] In regard to state nondiscrimination laws, the Attorney General of the State of Illinois, Neil Hartigan, testified that state laws did not adequately address the problem of discrimination on the basis of disability and called for federal action in this area.[24] The ADA reports of the House Committee on Education and Labor and the Senate Committee on Labor and Human Resources both declared that "[s]tate laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing."[25]

The situation is pretty much the same today, despite some additional state laws prohibiting disability discrimination. On the federal level, there is no alternative to the

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20 42 U.S.C. 12112(d)(2)(A) ("Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."); 42 U.S.C. 12112(d)(2)(B) ("A covered entity may make inquiries into the ability of an employee to perform job-related functions."); 42 U.S.C. 12112(d)(4)(A) ("A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.")

21 See the discussion of the differences in eligibility criteria between a nondiscrimination law and disability benefits programs such as SSI and SSDI in part B of the answer to Question 4 below.
22 42 U.S.C. § 12101(a)(4).

23 Testimony before House Subcommittee on Civil and Constitutional Rights, Ser. No. 101-58, October 11, 1989, p. 812, quoted in H.R. Rep. No. 101-485, pt. 2 (1990) at 48; S. Rep. No. 101-116 (1989) at 19.

24 See S. Rep. No. 101-116 (1989) at 18.

25 H.R. Rep. No. 101-485, pt. 2 (1990) at 47; S. Rep. No. 101-116 (1989) at 18.

ADA for people who experience discrimination on the basis of disability, unless the discrimination is by the federal government, a federal contractor, or a recipient of a federal grant; and, even where such a federal nexus permits action to be brought under Sections 501, 503, or 504 of the Rehabilitation Act, the courts will apply the same restrictive standards as under the ADA. Many state courts also follow ADA precedents unless the state has enacted legislation directing otherwise. An analysis of state disability discrimination protections revealed that less than half of the states had disability discrimination statutes that provide clear protections comparable to the ADA.[26] Fifteen of those do not provide effective enforcement mechanisms for their access laws.[27] Some state disability discrimination statutes apply only to buildings, not sidewalks, curb ramps, or services,[28] and some state disability discrimination laws only cover certain disabilities, as in the case of Alabama[29] and Mississippi,[30] which only cover people with physical disabilities. Moreover, as discussed more fully in the answer to Question 11 below, only a few states have elected to waive Sovereign Immunity for ADA violations, and some states are using the Sovereign Immunity defense to ADA suits instead of being the protector of disability civil rights. Disability discrimination caselaw is rife with cases involving states as the defendant. As in other civil rights contexts, a strong, comprehensive federal antidiscrimination law is essential to protect the rights of people with disabilities.

2. In 1987, the Supreme Court in *School Board of Nassau County v. Arline* recognized and supported the broad remedial purpose of Section 504 of the Rehabilitation Act of 1973. In drafting the ADA, Congress specifically used the same definition of disability contained in the Rehabilitation Act to ensure that the same broad interpretation the Supreme Court had adopted and applied to protect disabled Americans would continue.

Has the Supreme Court, and the lower federal courts, construed the ADA in the same broad remedial light that Congress intended? In your opinion, have the courts reached interpretations and decisions that are inconsistent with the precedent set under the Rehabilitation Act and contrary to the ADA's legislative history? Why or why not?

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.*

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26 Ruth Colker and Adam Milani, The Post-Garrett World: Insufficient State Protection, 53 ALA. L. REV. 1075, 1083 (2002).

27 *Id.*

28 *Id*

29 ALA. ADMIN. CODE r. 670-x-4.01 (2002).

30 MISS. CODE ANN. § 43-6-15 (1999).

Arline,[31] 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.[32] 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.'"[33]

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."[34] The Court elaborated as follows:

> Congress extended coverage ... to those individuals who are simply "regarded as having" a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.[35]

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.[36]

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

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31 480 U.S. 273 (1987).

32 *Id.* at 281.

33 *Id.* at 279, quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 n. 6 (1979).
34 480 U.S. at 284-85, 282.

35 *Id.* at 282.

36 H.R. Rep. No. 101-485, pt. 3 (1990) (Committee on the Judiciary) at 30; H.R. Rep. No. 101-485, pt. 2 (1990) (Committee on the Education and Labor) at 53; S. Rep. No. 101-116 (1989) at 23-24.

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.[37] 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. 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."[38] 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 intended when it enacted the ADA law.

As to the broad, remedial purposes of the ADA, one of the NCD policy papers discusses whether the ADA was intended to be interpreted broadly or narrowly. It includes the following analysis:

> A clear tradition of American law is that civil rights laws and other remedial statutes are to be construed liberally to achieve their remedial purposes. The classic statement in decisions of the Supreme Court has been that such legislation "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."[39] It is well-settled that civil rights legislation is a type of "remedial" legislation that warrants such favorable interpretation.[40] In his dissenting opinion in the *Sutton* case, Justice Stevens, joined by Justice Breyer, articulated this tradition as follows:

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37 42 U.S.C. § 12201(a).

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

39 Voris v. Eikel, 346 U.S. 328, 333 (1953); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 268 (1977); Director, OWCP v. Perini North River Associates, 459 U.S. 297, 315-16 (1983); Estate of Covart v. Nicklos Drilling Co., 505 U.S. 469, 502 (1992); Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 281 (1980); Reed v. the Yaka, 373 U.S. 410, 415 (1963); Baltimore & Phila. Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932).

40 Felder v. Casey, 131, 153 (1988) ("remedial objectives of federal civil rights law"); O'Sullivan v. Felix, 233 U.S. 318, 324-25 (1914) (civil actions under Civil Rights Act are remedial); Burnett v. Grattan, 468 U.S. 42, 49 (1984) ("the broadly remedial purposes of the Civil Rights Acts"). *See, also,* Patterson v. McLean Credit Union, 491 U.S. 164, 181 (1989) ("detailed remedial scheme" of Title VII of Civil Rights Act of 1964).

> It has long been a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Congress sought, in enacting the ADA, to "provide a ... comprehensive national mandate for the discrimination against individuals with disabilities."

> He noted that even in situations involving classes of individuals falling outside "the core" or "immediate concern" of anti-discrimination prohibitions under other civil rights statutes, the Court had consistently construed those statutes to include comparable classes within their coverage. As an example, he observed that the Court had interpreted Title VII of the Civil Rights Act of 1964 to prohibit discrimination against Hispanic-Americans, Asian-Americans, and Caucasians, despite the fact that Congress focused almost entirely on the problem of discrimination against African-Americans when it enacted Title VII. He might also have pointed out that the courts have ruled that gender discrimination proscriptions can be invoked by males as well as females, that discrimination based on a person's national origin is unlawful no matter what the country of origin happens to be, and that religious freedom is guaranteed to atheists and agnostics as well as to members of traditional deistic religions.

> It was, then, quite a startling departure from the traditional practice in construing civil rights provisions for the Court to rule in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that it was going to "interpret[] strictly" the elements of the definition of disability in the ADA to "create a demanding standard for qualifying as disabled." Strict interpretation is the exact opposite of the customary application of liberal or broad interpretation to civil rights laws. And the element of the ADA accorded this strict interpretation was not some minor or secondary provision. It was the critical aspect of who is eligible to be protected by the law--the gateway to all the protections the ADA provides.[41]

The result of the Court's harsh and restrictive approach to defining disability not only deviates from standard practice in civil rights interpretation, but places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination. Time-consuming and expensive legal battles focus 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. Nondiscrimination is a guarantee of equality. It is not a special service reserved for a select few.

For more information on this subject, please see *A Carefully Constructed Law* and *Broad or Narrow Construction of the ADA*, papers No. 2 and No. 4, respectively, of the National

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41 *Broad or Narrow Construction of the ADA*, paper No. 4 of the National Council on Disability's (NCD) *Policy Brief Series: Righting the ADA Papers*, found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

Council on Disability's (NCD) *Policy Brief Series: Righting the ADA Papers*, which can be found at
http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.
Please also see NCD's *Righting the ADA* report at
http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm#IIA.
For an in-depth look at the extent to which a preferred group mentality has tainted regulatory and judicial interpretations of the scope of protection afforded under the primary federal laws that prohibit discrimination based on disability, please see Robert L. Burgdorf Jr., *Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409 (1997).
The Court's problematic rulings regarding "mitigating measures" are discussed in some detail in policy brief No. 11, *The Role of Mitigating Measures in the Narrowing of the ADA's Coverage* in the NCD's *Righting the ADA* series at
http://www.ncd.gov/newsroom/publications/2003/mitigatingmeasures.htm.

3. Is the Supreme Court's treatment of the ADA, especially since 1999, consistent with the treatment afforded to other civil rights and anti-discrimination laws? Do other civil rights laws require that aggrieved individuals first prove that they belong within the scope of the law before invoking its protections? Why has the ADA, which is clearly a civil rights law, been treated so differently by the courts?

The courts have not approached the ADA the same way they approach other civil rights laws. The Supreme Court's surprising deviation in ADA cases from the broad and supportive interpretation traditionally accorded civil rights statutes was described in the answer to Question 2 above. Eligibility to bring suit under other civil rights Acts is construed broadly in support of their remedial purposes. This contrasts sharply with the Court's endorsement in the *Williams* decision of restrictive treatment of ADA eligibility. Civil rights laws and constitutional nondiscrimination requirements are generally interpreted as protecting *all* individuals from discrimination on the grounds prohibited, whether it be race, gender, national origin, age, or religion. Thus, judicial precedents have established that race discrimination prohibitions protect whites and other racial groups as well as blacks;[42] that gender discrimination proscriptions can be invoked by

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42 *E.g.,* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) (Title VII and § 1981 apply to discrimination against white persons); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (§ 1981 prohibits discrimination against Arabs; race discrimination includes, "at a minimum," any discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*"); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 618 (1987) (§1 982 prohibits discrimination against Jews despite fact that they may be considered part of Caucasian race). *See* Gary A. Greenfield and Don B. Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 676-77 (1975) (racial discrimination should be interpreted as encompassing any discrimination in which discriminator perceives victim as having distinct racial characteristics).

males as well as females;[43] that discrimination based on a person's national origin is unlawful no matter what the country of origin happens to be;[44] and that religious freedom is guaranteed to atheists and agnostics as well as to members of traditional deistic religions.[45] The Age Discrimination Act of 1975 applies to individuals of any age who are subjected to discrimination because of their age.[46] Plaintiffs bringing a race discrimination claim, for example, do not have to establish that they belong to a particular race, much less to what extent they belong to that race; if they can show that they were subjected to racial discrimination, that is sufficient. People with disabilities have to prove not only that they are disabled, but also must demonstrate that they are disabled to a great extent and that their disability is not mitigated by measures such as medication, hearing aids, assistive technology, etc.

As to why the courts have taken a different approach to the ADA, some reasons are discussed in part B of the answer to Question 4 below ("Why the Courts Took a Contrary Approach"). In addition to the several reasons described there, another is that the courts may harbor 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

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43 *E.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (all-female college ruled unconstitutional because it discriminated against males); Orr v. Orr, 440 U.S. 268 (1979) (statute permitting wives but not husbands to recover alimony held to violate equal protection); Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973) (male private duty nurse permitted to bring action under Title VII for alleged sex discrimination); Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971) (refusal to hire males as flight attendants constituted violation of Title VII). *See also* 29 C.F.R. pt. 1604 (1993) (EEOC Guidelines on Discrimination Because of Sex).

44 *E.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 89 (1973) (national origin "refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came"; quotes congressional remark that "[i]t means the country from which you or your forebears came. . . . You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2549 (1964)).

45 *E.g.*, Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) (discrimination against atheist prohibited by Title VII); 29 C.F.R. §1605.1 (EEOC Guidelines on Discrimination Because of Religion) (religious practices defined as including "moral and ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views" (citing United States v. Seeger, 380 U.S. 163, 176-86 (1965) (conscientious objector exemption available to persons whose nontheistic beliefs occupied in their lives place of religion)); *and* Welsh v. United States, 398 U.S. 333, 339 (1970) (test is whether "beliefs professed by a registrant are sincerely held and whether they are, in *his own scheme of things,* religious").

46 42 U.S.C. §§ 6101-07. *See*, *e.g.*, 18 C.F.R. §1309.1 (1993) ("age" defined to include any chronological age). *But see* 29 U.S.C. §631(a) (application of Age Discrimination in Employment Act limited to persons who have attained at least 40 years of age) (as amended by Pub. L. No. 99-592, 100 Stat. 3342, 3344 (1986) (codified at 29 U.S.C. §§631(c), (d)) (eliminated upper age limit of 70 years, with exceptions for mandatory retirement of certain executives, high policymakers, and employees of higher education institutions having unlimited tenure)).

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; this concept is discussed in more detail in part A of the answer to Question 4 below. 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.[47]

Another, related reason for the courts' failure to treat the ADA the same way as other civil rights laws stems from the belief that the ADA confers special benefits or protections on people with disabilities – a misperception that has been fueled by the media[48] and those who simply do not want to comply with the law. This leads to a focus on the disability instead of on the discriminatory actions of a covered entity. Programs such as Social Security Disability Insurance or Workers Compensation, for example, provide benefits to certain individuals who qualify based, in part, on the extent of their disability and are based on the medical model approach, which considers disability to be a person's deviation from the "norm" - a defect, infirmity or ailment - and are designed to be limited to a restricted group of eligible recipients. The ADA is based on a social or civil rights model, and its protections should be available to all who experience discrimination on the basis of disability.

Another contributing factor may be the Supreme Court's failure to recognize the seriousness of disability discrimination in this country. In applying the Fourteenth Amendment's guarantee of equal protection under law, the Supreme Court has stated that certain kinds of classifications get a heightened level of protection because the affected groups have been subjected to a history of discrimination. In its decision in the case of *City of Cleburne v. Cleburne Living Center*,[49] the Supreme Court established that, when evaluating whether a person with a disability has been denied equal protection by some

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47 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.

48 NCD's 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.

49 City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

state action, the state need only offer a rational reason for the discrimination. In a case of discrimination based on race, alienage, or national origin, on the other hand, the state must demonstrate a compelling governmental interest for its action.[50] In a case of gender discrimination, the state must show the state action was “substantially related to a sufficiently important governmental interest.”[51] It is clear from these decisions by the Supreme Court that the Court fails to grasp the nature and extent of discrimination against people with disabilities, and does not view it as of the same degree of seriousness as other types of discrimination.

In the ADA, Congress made a number of specific findings about the seriousness and scope of discrimination on the basis of disability. It found that “historically, society has tended to isolate and segregate individuals with disabilities,” and that “discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem.”[52] It added that “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”[53] Congress catalogued some of the major forms that such discrimination takes -- "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities" and found that people with disabilities “continually encounter” such discrimination.[54] When faced with such discrimination, people with disabilities "have often had no legal recourse to redress" it, a situation which Congress found to be in contrast with "individuals who have experienced discrimination on the basis of race, sex, national origin, religion, or age."[55]

Regarding the overall social standing of people with disabilities, Congress declared that they "occupy an inferior status" and are "severely disadvantaged socially, vocationally, economically, and educationally."[56] Congress also made a stark finding that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis ….”[57]

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50 Id. at 440, citing McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

51 Id. at 440, citing Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

52 42 U.S.C. § 12101(a)(2).

53 42 U.S.C. § 12101(a)(3).

54 42 U.S.C. § 12101(a)(5).

55 42 U.S.C. § 12101(a)(4).

56 42 U.S.C. § 12101(a)(6).

57 42 U.S.C. § 12101(a)(9).

Finally, Congress found that individuals with disabilities:

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to position 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....[58]

The somewhat odd wording of this finding results from the fact that it is an amalgamation of language drawn from several different Supreme Court decisions which describe the standards for a classification to receive a heightened level of judicial scrutiny under the 14th Amendment.[59] A few legal scholars, including me, had once argued that people with disabilities qualified to be treated as a constitutionally "suspect class" under the standards the Court had announced.[60] In the 1970s and early 1980s, a few lower courts had accepted this argument.[61] In *City of Cleburne v. Cleburne Living Center,*[62] the Court rejected suspect-class status for disability, at least in regard to individuals with mental retardation, in part because such status would call into question such programs as special education and special hiring programs that single out people with mental retardation for particular benefits and services. The Supreme Court in *Cleburne* also rejected moderate-level scrutiny that is applied to "quasi-suspect classifications" such as gender.[63]

Determining the level of constitutional scrutiny to be applied to a particular type of classification is clearly the province of the courts and, ultimately, of the Supreme Court. What Congress can do is to make findings, based upon its investigative and fact-finding

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58 42 U.S.C. § 12101(a)(7).

59 *See, e.g.,* U.S. v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938); Graham v. Richardson, 403 U.S. 311, 372 (1971); Webber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 4-18 (1973); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

60 . *See, e.g.,* Robert L. Burgdorf Jr. and Marcia Pearce Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause*, 15 SANTA CLARA LAWYER 855, 900-910 (1973); *Note, Mental Illness: A Suspect Classification?* 83 YALE L. J. 1237 (1974).

61 In *In re G.H.,* 218 N.W.2d 441, 447 (N.Dak. 1974), the Supreme Court of North Dakota ruled that "handicapped children" were a suspect class. Several other courts had indicated their willingness to make such a finding upon an appropriate showing. *See. e.g.,* Fialkowski v. Shapp, 405 F.Supp. 946, 959 (E.D. Pa. 1975); Lora v. Board of Educ. of City of New York, 456 F.Supp. 1211, 1275 (E.D.N.Y. 1978). In Frederick L. v. Thomas, 408 F.Supp. 832, 836 (E.D.Pa. 1976), the court applied the moderate or mid-level scrutiny test of equal protection, as did the Court of Appeals for the 5th Circuit in City of Cleburne v. Cleburne Living Center, 726 F.2d 191 (1984), *rev'd in part*, 473 U.S. 432 (1985).

62 473 U.S. 432, 441-444 (1985).

63 *Id.* at 443-447.

activities and representational authority, regarding the factual predicates that underlie the determinations that the courts must make. In the findings in the ADA discussed above, Congress made very clear that people with disabilities satisfy most if not all of the standards that the Supreme Court has announced for heightened judicial scrutiny. It is hard to imagine what more the Congress could do to identify the historical pattern, the continuing pervasiveness, the damaging effects and dire social consequences, and the blatant unfairness, of discrimination on the basis of disability. Despite these clear and strong findings, however, it does not appear that Congress has yet convinced the Court to treat disability discrimination as a pernicious, persistent, and insidious problem in American society that merits the same kinds of remedial attention that have been devoted to other types of discrimination prohibited under our Nation's civil rights laws.

4. In a posting on the Center for an Accessible Society's website in March 1999, you were quoted as saying that "the Americans with Disabilities Act – and the disability rights movement that spawned it – has at its core a central premise both simple and profound: that people called 'disabled' by society are just people – not different in any critical way from other people." You went on to say that " yet the courts . . . have interpreted and applied the law in ways that 'reinforce a diametrically opposite premise.'" Would you elaborate on the central premise of the ADA and why the courts have opposed this premise?

A. UNDERLYING PREMISE OF THE ADA

I appreciate the Subcommittee's recognition of the quotation and the diligent research that must have gone into finding it. I have written about this idea -- one that is close to my heart -- in several publications. The quoted language originated in the opening paragraph of an article I wrote for the Villanova Law Review.[64] To provide the elaboration you have requested, I shall take the liberty of quoting a later section from that article, a section titled "People with Disabilities as Regular Joes and Janes":

> 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 of all of the "orienting principles" that have been presented previously in this section -- that individuals with disabilities are just people, not essentially different from other people. Though this proposition is relatively simple to state, its acceptance is the single most universal aspiration of most individuals with disabilities, a central tenet of the Disability Rights Movement, and a *sine qua non* of real equality for people with disabilities.

[64] 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).

> 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.
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> 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.[65]

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

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

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."[66] In some of its publications, the National Council on Disability has explained and elaborated on the spectrum of abilities concept.[67]

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 ...."[68] Thus, the experience of disability is closely linked to the concept of discrimination. Individuals may encounter discrimination on the basis of disability whether or not they previously thought of themselves as having a disability, and whether or not they meet foreordained, medically oriented criteria. To achieve its purposes of eliminating discrimination and achieving integration, the ADA should reduce the unnecessary differentiation of people because of actual, perceived, or former physical and mental characteristics. It emphatically should not force people to demonstrate their differentness as a prerequisite to receiving protection under the Act.

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

> In the socio-political model, disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations. All of these, in turn, reflect overly narrow assumptions about what constitutes the normal range of human functioning.[69]

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,

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

[67] 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.

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

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

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."[70] She elaborated on the ADA's adoption of the social model as follows:

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

The National Council on Disability has discussed the necessity for applying the social model of disability under the ADA.[71] 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.[72] 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.[73]

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.[74]

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

[71] 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.

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

[73] *Righting the ADA* at p. 109.

[74] *Id.*

B. WHY THE COURTS TOOK A CONTRARY APPROACH

As to why the courts have gone in a dramatically different direction, one that is contrary to the central premises underlying the ADA, I believe that there are several contributing factors, in addition to those discussed above in the answer to Question 3. One is that the federal courts' familiarity with disability prior to the ADA arose primarily from Social Security and other disability benefits cases. Social Security and other disability benefits programs are special benefits programs. They are designed to be limited to a restricted group of eligible recipients. Legal and funding constraints necessitate that they be restricted to the specific individuals for whom such benefits and services are intended. At a fundamental level, disability benefits programs are premised on a medical model approach to disability; they seek to provide income support for people who are found to be totally unable to work due to disability. The SSI and SSDI programs employ identical statutory standards for disability; under both programs, claimants must demonstrate that they are "unable to engage in any substantial gainful activity" because of a "medically determinable physical or mental impairment."[75] Clearly, these restrictions are based on the medical model, and the judicial proceedings center on medical eligibility criteria. Courts hearing such cases are primarily concerned with making sure that only a limited class of eligible beneficiaries gets the benefits. The ADA's protection against discrimination on the basis of disability, in contrast, should be available to all Americans who experience such discrimination. But courts have all too often transferred the prove-you-are-severely-limited-enough-to-be-eligible approach onto ADA cases.

Perhaps the courts' willingness to construe the definition of disability in the ADA narrowly stems in part from the fact that many judges reflect the misconceptions and prejudices about disability that affect American society in general, and have bought into the conceptualization of people with disabilities as intrinsically different from other people. Popular misconceptions about disability have been reinforced by problematic media coverage of disability and disability issues. NCD's extensive and detailed policy paper, *Negative Media Portrayals of the ADA*, discusses prevalent media-fed myths about the ADA.[76] Judges are certainly not immune to popular prejudices and misimpressions regarding the nature of disability and disability discrimination.

Another factor that contributed to the courts' pinched view of eligibility for ADA protection was that the courts all too often followed some misguided stances of the Equal Employment Opportunity Commission (EEOC). In *Promises to Keep*, its detailed report on the performance of ADA enforcement activities by key federal agencies, NCD took the EEOC to task for its performance of its policy-setting responsibilities regarding the meaning of "disability." The report declared:

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[75] 42 U.S.C. § 1382c(a)(3)(A); 42 U.S.C. §§ 416(i), 423(d)(i)(A).

[76] 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.

> Despite repeated congressional statements about its intent to provide "comprehensive" protection against discrimination on the basis of disability, the EEOC has repeatedly taken unnecessarily restrictive positions on the definition and erected a number of obstructions that have impeded persons who seek to claim the protection of ADA. Such constricted interpretations of "individual with a disability" surfaced in the original ADA Title I regulation the EEOC issued in 1991 and have continued to arise periodically in subsequent EEOC policy documents.[77]

The report went on to challenge as unsound several EEOC positions on the meaning of disability that placed restrictions on eligibility not found in the language or the legislative history of the ADA.[78] NCD summed up its view of EEOC's performance regarding the meaning of disability in the following terms:

> it is highly unfortunate that the agency exercised its discretion to exclude some individuals from the opportunity to challenge acts of discrimination and to erect additional proof obstacles in the path of complainants, instead of using its regulatory authority to foster broad access to the protection afforded by ADA. The result of the narrow, legalistic conception of the definition of disability has been that far too many ADA complainants are overcome by harrowing burdens of proof and severe technicalities and never get their day in court on the issue of the discrimination they claim they were subjected to.[79]

It is not surprising that the courts often relied on the positions of the EEOC in imposing narrow parameters as to who can bring suit under the ADA. Too be fair, on some occasions when EEOC took a more expansive, inclusive view, as with the issue of mitigating measures, the courts (in particular the Supreme Court) rejected EEOC's position. But the generally restrictive approach of the EEOC certainly was a significant factor in the courts taking positions that loaded the deck against ADA litigants.

In my view, one of the considerations that prompted the EEOC to take positions that narrowed ADA coverage was the agency's concern about its caseload. When the ADA gave EEOC enforcement responsibilities under Title I, Congress did not provide sufficient additional resources to account for the additional work that such responsibilities would entail. An obvious way for the EEOC to conserve its limited resources was by minimizing the number of ADA cases it would have to handle. I suspect that similar concerns affected courts, which feared an "avalanche" of ADA litigation. One way of reducing the number of cases is to reduce the number of people who are eligible to bring them. This despite that fact that under other federal civil rights laws all Americans are protected from discrimination.

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[77] National Council on Disability, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* (2000) at p. 213.

[78] *Id.* at 213-223.

[79] *Id.* at 222-223.

In arriving at its restrictive stance toward the definition of disability, the Supreme Court got into a strange, bean-counting mode regarding the figure of 43 million in the ADA's findings. It misconstrued statements in an article that I had written about the origins of the ADA,[80] and ignored statements in NCD's *Toward Independence* report regarding the impossibility of considering any estimate of the population with disabilities as accurate.[81] Even worse, the Supreme Court treated the figure as limiting the number of people who should be protected under the ADA, ignoring the fact that under the second (record of) and third (regarded as) prongs of the statutory definition, all Americans should be protected from discrimination. NCD has issued a topic paper examining the origins of the 43 million figure and describing what it was, and was not, intended to signify.[82] To some of us, myself included, the Court's reasoning on this issue was overly simplistic and shoddy jurisprudence.

Some would suggest that the restrictive treatment accorded people's entitlement to challenge discrimination under the ADA is consistent with a judicial climate that has grown less friendly to civil rights laws in general. It is certainly true that some of Supreme Court's restrictive decisions regarding the rights of plaintiffs under such laws have negatively impacted other civil rights laws along with the ADA.[83] And Supreme Court decisions ratcheting up the conditions necessary for Congress to exercise its authority to enact civil rights legislation have not been limited to the ADA.[84] It remains true, however, that under other civil rights laws eligibility to bring a legal action remains broad. It is only in regard to laws prohibiting discrimination on the basis of disability that the courts have gone out of their way to create highly demanding preconditions for statutory protection. This indicates that other reasons, such as those discussed earlier in

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[80] See, *Sutton v. United Airlines*, 527 U.S. 471, 484 (1999), discussing Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW 413 (1991).

[81] National Council on Disability, *Toward Independence* (1986) at p. 3 ("A precise and reliable overall figure is not currently available, due to differing operational definitions of disability, divergent sources of date, and inconsistent survey methodologies, which together make it impossible to aggregate much of the data that are available.").

[82] See, National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 5, "Significance of the ADA Finding That Some 43 Million Americans Have Disabilities*" at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

[83] See, e.g., *Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001) (Court rejected the "catalyst theory" for determining "prevailing party" eligible to be awarded attorney's fees; applicable to the ADA, Fair Housing Amendments Act, the Civil Rights Act of 1964, the Voting Rights Act Amendments of 1975, the Civil Rights Attorney's Fees Awards Act of 1976, and others); *Barnes v. Gorman*, 536 U.S. 181 (2002) (Court ruled that punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, under § 202 of the ADA, nor under Section 504 of the Rehabilitation Act).

[84] See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Court found Congress lacked authority to impose monetary damage sanctions on states under the Age Discrimination in Employment Act).

this answer, are necessary to explain the particularly harsh course of judicial decisions delineating who is deemed eligible for ADA protection.

5. With regard to the ADA's third prong, how much of the discrimination experienced by disabled individuals is the result of stigma and ignorance? How important is the "regarded as" prong to protecting disabled Americans? How has this prong been limited by the Supreme Court?

The U.S. Commission on Civil Rights' 1983 report, *Accommodating the Spectrum of Individual Abilities*, described four common strains of prejudice against people with disabilities in this nation, stemming from a conceptual division between "normal" people and people with disabilities. These attitudes, which include discomfort, patronization and pity, stereotyping, and stigmatization, give rise to discrimination based on fear and misperceptions. The ADA represents a blueprint for ensuring that all people, whatever their characteristics along the spectrum of mental and physical abilities, will not be prevented by unfavorable attitudes, ignorance, and a lack of reasonable accommodations from exercising their inherent right to full participation in society. Congress enacted the ADA to extend this country's promise of equal opportunity to all Americans.

The "regarded as" prong of the definition of disability was established in 1974 under Section 504 of the Rehabilitation Act. It was conceived as a broad element of the definition that would extend statutory protection to anyone who had been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived. Such a broad interpretation was embraced in Section 504 regulations and validated by the Supreme Court in its decision in *School Board of Nassau County v. Arline*, as discussed above in the answer to Question 2. Subsequently, ADA committee reports endorsed the broad interpretation of being regarded as having a disability and this approach was codified in ADA regulations.

In its decision in *Sutton v. United Airlines*, however, the Supreme Court disregarded the expansive view of the third prong and took a restrictive approach to its interpretation. Specifically, the Court narrowed the scope of the "regarded as" prong by (1) its rulings on mitigating measures, (2) its requirement that proving one was regarded as substantially limited in working must include a showing that the employer considered the person to be unable to perform either "a class of jobs or a broad range of jobs in various classes," and (3) its redirection of the focus from whether the covered entity treated the person as having a substantially limiting condition to whether the covered entity was motivated by certain kinds of mistaken beliefs or misperceptions—a notoriously hard thing to prove.

In *Sutton*, the Supreme Court's description of the third prong focused on a mistaken belief or "misperception" by a covered entity. The Court said:

> [I]t is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment

> that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting….[85]

The definition of the third prong in ADA regulations and Section 504 regulations, in contrast, focuses on how individuals are treated by covered entities. The Supreme Court offered no support or justification for deviating from the language of the regulations and the expressed intent of Congress to arrive at its narrow reading of the thrust of the third prong in the *Sutton* decision. The difference between the Court's standard and that of the regulations is significant. The *Sutton* analysis calls for a showing of something in the mental state of a covered entity—a belief or perception. In addition, it is necessary to show that the belief or perception is wrong. Proving what an employer, state or local government agency, or the operator of a private business believes, thinks, or perceives is a difficult, often impossible, proposition. Unless the covered entity makes the mistake of articulating the depths of its prejudices or the exact nature of its motivation, it will be difficult to produce evidence of its state of mind.

When enacting the ADA, Congress made clear that the "regarded as" prong was intended to protect those individuals who were discriminated against because of misperceptions, myths, fears, and stereotypes about disability and disease: "[a] person who is . . . discriminated against . . . because of a covered entity's negative attitude toward that person's impairment is treated as having a disability."[86] In *Sutton*, however, the Supreme Court focused on the fact that the third prong of the ADA's definition of disability covers those who are regarded as having "such an impairment." Under the Court's crabbed reading, "such an impairment" means the same kind of impairment as would give rise to protection if it actually existed, i.e., one that substantially limited one or more major life activities. The Court explained:

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual-it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.[87]

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85 527 U.S. 471, 489 (1999).

86 H.R. Rep. No. 101-485, part 2 (1990) at 53; S. Rep. No. 101-116 (1989) at 24. The Committee reports also cited with approbation the Supreme Court's decision in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), in which the Court interpreted Section 504 of the Rehabilitation Act and explained "[b]y includ[ing] not only those who are actually physically impaired, but also those who are regarded as impaired. . . Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." H.R. Rep. No. 101-485, part 2, at 53; S. Rep. No. 101-116, at 23.

87 *Sutton*, 527 U.S. at 489.

The effect of the Supreme Court's ADA rulings greatly restricts the applicability of the "regarded as" prong and impedes significantly the ability of many plaintiffs to challenge the discrimination they have encountered. If, for example, a private company or a state or local government agency that offers tours of wilderness areas has a policy that excludes from its tours anyone who has diabetes or uses hearing aids, people whose diabetes is controlled by medication or for whom hearing aids ameliorate the effects would be hard-pressed to challenge their exclusion under the ADA if the *Sutton* framework is applied. Such people would not have an actual disability because their conditions do not substantially limit their major life activities in their mitigated state. Trying to prove that the covered entity had a mistaken belief or a misperception about their conditions would be troublesome unless the covered entity explained the rationale behind its policy. Absent such a disclosure, the excluded person would be left to speculate about the belief or perception behind the policy. Does the tour service think that hearing aids might fall out and cause a safety risk at some precarious point in the tour? Does the service have a perception that the altitude, temperature conditions, or strenuousness of the tour might cause the elevation or depression of blood sugar levels for individuals with diabetes, thus thwarting the controlling effects of medication? Are the tour operators concerned that other customers will be uncomfortable around people with such conditions? Is the tour service under a prejudiced misconception that people who have diabetes or use hearing aids have reduced intelligence? Do they consider that such people are genetically inferior and should not be allowed to participate in normal social endeavors? Do they have the misperception that participation by such people will increase insurance costs? Are they acting under the ridiculous impression that these conditions are contagious? These somewhat extreme examples of potential rationales demonstrate that if a covered entity remains silent about its motivation, proving what it believed or perceived about a condition will often be nearly impossible.

The situation under the regulatory language, which focuses on whether one was "treated as" having a substantially limiting condition, is considerably different. By interpreting being "regarded as" as equivalent to being "treated as," the formulation in the regulations removes the extremely subjective element of what was in the mind of the covered entity and instead looks at how the individual was treated. A covered entity treats a person as having a "substantially limited impairment" when it excludes or disadvantages the person because of an actual or purported condition. The Senate committee and House Education and Labor Committee reports both summarized the effect of the third prong very aptly when they declared "[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."[88] Under this interpretation, whenever a covered entity excludes a person or treats a person worse than it otherwise would because of a physical or mental condition the person has or is believed to have, the covered entity has treated the person as having a substantially limiting impairment. In such circumstances the person has been "regarded as" having a disability, and it should not matter whether the person actually has the condition, or whether the condition actually results in a substantial limitation of a major

88 S. Rep. No. 101-116 (1989) at 24; H.R. Rep. No. 101-485, part 2 (1990) at 53.

life activity. If a covered entity treats the person as having a substantially limiting condition, that should be sufficient to establish disability under the third prong.

The lower courts generally had not accorded the third prong of the definition the broad scope the regulatory language calls for; the *Sutton* ruling has accelerated this tendency. Subsequent to the issuance of the decision in *Sutton*, both the EEOC and DOJ reported that they were less likely to pursue certain cases involving claims that a person had been regarded as having a disability. The EEOC reported that, while it always had been reserved in its use of the third prong, after *Sutton*, "we tend to rely on the theory even less, in part because of the proof element that the employer must regard the individual as being substantially limited in a major life activity, and evidence of this perception is difficult to obtain." It certainly is easier to marshal evidence of how one was treated by a covered entity than to demonstrate that the actions of the covered entity were fueled by a particular "mistaken belief" or "misperception."

In the employment context, where plaintiffs also must establish that they are "otherwise qualified to perform the job" in order to prevail on their ADA claims,[89] ADA plaintiffs often argue that they are able to perform the job in question, but that they were discriminated against because their employers "regarded" them as substantially limited in working. Under *Sutton*, however, it is not sufficient to show that an employer fired, or refused to hire, an individual because of concerns regarding the individual's impairment. Since being substantially limited in working is defined as being substantially limited in the ability to perform a broad range or class of jobs, *Sutton* held that an employee must establish that the employer regarded the employee as unable to perform a broad range or class of jobs, rather than a single job.[90] Since employers can argue that they had no opinion as to whether the plaintiff could perform a variety of jobs, but just had concerns regarding the individual's ability to perform the job in question, establishing coverage under the "regarded as" prong has become virtually an impossible task. As a result, individuals who clearly were discriminated against because of "myths, fears, and stereotypes" about disease and disability have nonetheless been found not to be covered under the ADA.

These concerns about the narrowing of the third prong are not merely theoretical; they have played themselves out in a number of lower court cases.[91] For example, in *EEOC v. Rockwell Int'l Corp.*,[92] an employer refused to hire over 70 entry-level job applicants who

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89 42 U.S.C. § 12112 ("[n]o covered entity shall discriminate against a *qualified* individual with a disability . . . ") (emphasis added).

90 *Sutton*, 527 U.S. at 492-94. *See also Murphy v. United Parcel Service*, 527 U.S. at 523 (to be covered under the regarded as prong, an individual must be regarded as limited in more than just one job).

91 Some of the case analysis which follows is derived from the paper "The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities," paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers* at http://www.ncd.gov/newsroom/publications/2003/decisionsimpact.htm. (Sharon Perley Masling, Director of Legal Services, National Association of Protection and Advocacy Systems, wrote this topic paper for NCD.)

92 243 F.3d 1012 (7th Cir. 2001).

failed nerve conduction tests. Though the applicants did not have any medical impairments, they were not hired on the grounds that failing the nerve conduction test was an indication that the applicants *might* suffer from neuropathy and therefore *might* be susceptible to injuries from frequent repetitive motions or the use of vibratory power tools. The EEOC argued that these individuals were denied jobs and thus discriminated against because they had been regarded as persons with substantially limiting impairments. The Seventh Circuit, however, ruled that the EEOC had failed to submit sufficient evidence to show that the applicants were regarded as substantially limited in working. Because the EEOC had failed to introduce demographic or other data regarding the surrounding labor market, the court ruled, the EEOC had only established that the employer perceived the applicants as unable to perform the specific entry level jobs at Rockwell International Corp., rather than unable to perform a class of jobs or broad range of jobs.[93]

In *Sorenson v. University of Utah*,[94] a flight nurse with multiple sclerosis was forcibly reassigned because of her employer's concerns regarding the impact the nurse's MS would have on her ability to do her job. Despite assurances from the nurse's neurologist that she could perform the essential functions of a flight nurse, and despite the fact that after her diagnosis the nurse successfully worked as a regular nurse in the burn unit, the surgical intensive care unit, and the emergency room, the nurse's supervisors remained concerned that she "would suffer from an episode or problem associated with her MS while on duty," and they refused to reinstate her.[95] The Tenth Circuit ruled that the nurse was not protected by the ADA, because the hospital had not regarded her as substantially limited in working. Rather, the court ruled, the hospital merely perceived the nurse as unable to perform the job of flight nurse; the fact that the hospital continued to employ the nurse as a burn unit, surgical ICU, and emergency room nurse showed that the hospital did not regard her as unable to perform a class of jobs or broad range of jobs.[96]

In *Giordano v. City of New York,*[97] a police patrol officer who took anti-coagulant medication following aortic valve replacement surgery was terminated because of the fear that he could sustain catastrophic bleeding if he was injured on the job. The Second Circuit ruled that the New York Police Department did not regard the officer as substantially limited in working. At most, the court found, the officer had introduced evidence that the Department regarded the officer as "disabled from police or other investigative or security jobs that involve a substantial risk of physical confrontation."[98]

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93 *Id*. at 1018. See also EEOC v. Woodbridge, 263 F.3d 812 (8th Cir. 2001).

94 194 F. 3d 1084 (10th Cir. 1999).

95 *Id*. at 1085-86.

96 *Id*. at 1089.

97 274 F.3d 740 (2nd Cir. 2001).

98 *Id*. at 749.

This, the court held, was not sufficient to establish that the Department regarded the officer as substantially limited in working a "broad class of jobs," and thus was insufficient to establish protection under the ADA.[99]

The case law contains many other examples of the lower courts' reluctance to view plaintiffs as being covered by the "regarded as" prong.[100] To address this problem, in its *Righting the ADA* report, NCD proposed the addition of a provision such as the following:

> REGARDED AS HAVING SUCH AN IMPAIR MENT.—"Being regarded as having such an impairment" under subsection 3(2)(C) of this Act (42 U.S.C. § 12102(2)(C)) includes being subjected to adverse action or treated less well than others because of a physical or mental impairment or perceived impairment; or being perceived, whether accurately or not, as having one or more of the conditions included in subsection 3(2)(A) of the Act (42 U.S.C. § 12102(2)(A)). The term "adverse action" includes but is not limited to limiting, segregating, or classifying an individual in a way that adversely affects the opportunities or status of such individual. Showing that an individual has been subjected by a covered entity to an adverse action relating to employment, on the basis of an actual, past, or perceived physical or mental impairment, shall be sufficient to demonstrate that

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99 *Id*. at 749-50.

100 *See, e.g., Fultz v. City of Salem*, 2002 WL 31051577 at *2 (9th Cir. 2002) (police officer fired because of work-related injury to finger only regarded as having impaired finger, not regarded as disabled); *Cooper v. Olin Corp.*, 246 F. 3d 1083 (8th Cir. 2001) (locomotive engineer with chronic depression, prohibited from operating locomotive after return from depressive episode despite clearance to return to work by treating physician, not regarded as substantially limited in working); *Steele v. Thiokol Corp.*, 241 F.3d 1248 (10th Cir. 2001) (rocket test technician with obsessive compulsive disorder (OCD) not regarded as disabled despite employer's awareness of his condition, medicines he was taking, and supervisor's concerns regarding his mood swings); *Krocka v. City of Chicago,* 203 F.3d 507 (7th Cir. 2000) (police officer with depression, treated successfully with medication, not regarded as disabled); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492 (10th Cir. 2000) (individual with severe depression and anxiety, whose managers described as "incapacitated" and who was fired due to inability to make decisions and lapses in memory and judgment, not regarded as substantially limited in any major life activity); *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000) (typesetter with seizure disorder controlled by medication, type 2 diabetes, depression, mitral valve prolapse, high blood pressure, and who had had a brain tumor removed, neither substantially limited nor regarded as substantially limited in working); *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083 (8th Cir. 2000) (railroad manager with major depression and anxiety, whose employer refused to allow him to return to work under maximum 40 hour work week restriction, not regarded as substantially limited in working); *Stumbo v. Dyncorp Technology Services, Inc.*,130 F. Supp. 2d 771 (W.D. Va. 2001); *aff'd, Stumbo v. Dyncorp Procurement Systems, Inc.*, 17 Fed. Appx. 202 (4th Cir. 2001); *cert. denied*, 122 S. Ct. 1302 (2002) (security officer with fully corrected hypertension, denied job because of medication for hypertension not regarded as substantially limited in working); *EEOC v. J.B. Hunt Transp.*, 128 F. Supp. 2d 117 (N.D.N.Y. 2001) (class of applicants not hired by truckload motor carrier because they took specified medications not regarded as substantially limited in any major life activity); *Arnold v. City of Appleton*, 97 F. Supp.2d 937, 948 (E.D. Wis. 2000) (applicant for firefighter position, who was not hired because he had epilepsy, not protected by the ADA; "the perceived inability to perform one job is not sufficient to establish that the plaintiff is substantially limited in the major life activity of working"); *Piascyk v. City of New Haven*, 64 F. Supp.2d 19 (D. Conn. 1999) (patrol officer with multiple injuries from car accident, who was denied promotion to superintendent position, not regarded as substantially limited).

> the individual is regarded by the covered entity as having, or having had, an impairment that substantially limits the major life activity of working.[101]

For additional information on this topic, please see *The Supreme Court's Decisions Discussing the "Regarded As" Prong of the ADA Definition of Disability*, paper No. 15 of NCD's *Policy Brief Series: Righting the ADA Papers*, at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm and NCD's culminating report, *Righting the ADA* at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm. For additional information on Supreme Court cases interpreting the ADA and their impact on the law, please see *Supreme Court Decisions Interpreting the Americans with Disabilities Act* at http://www.ncd.gov/newsroom/publications/2002/supremecourt_ada.htm and *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities*, paper No. 7 of NCD's *Policy Brief Series: Righting the ADA Papers* at http://www.ncd.gov/newsroom/publications/2003/decisionsimpact.htm.

6. **With regard to proving that an individual is disabled for purposes of invoking the ADA's protections, what evidence did Congress intend for aggrieved individuals to demonstrate in order to move beyond the definition threshold? Was the burden on plaintiffs intended to be strictly construed, as interpreted by the Supreme Court in *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*, so that no one would be able to get beyond this threshold to allow the merits of the discrimination complaint to be heard and addressed? How successful are plaintiffs in meeting the definition threshold as set forth by the Supreme Court in both *Sutton* and *Toyota*? Is the Supreme Court's treatment of the ADA's definition provision a new barrier faced by disabled Americans?**

A. EVIDENTIARY THRESHOLD

In adopting the three-prong definition of disability, including its "regarded as" test (discussed above in response to Question 5), and in expressly endorsing the Supreme Court's analysis in the *Arline* case (discussed in response to Question 2 above), Congress was quite clear about the evidentiary threshold for bringing an ADA action -- the focus was to be upon discriminatory treatment. Under the definition, including particularly its third prong, **a person was to be entitled to bring an action whenever that individual had been subjected to discriminatory treatment by a covered entity**. The report of the House Judiciary Committee stated that the definition of disability "is intended to cover persons who are treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity. It applies whether or not a person has an impairment, if that person was treated as if he or she had an impairment

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101 *Righting the ADA* at pp. 111-112. The report is found on the NCD website at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.

that substantially limits a major life activity."[102] Similarly, the Senate ADA report and the report of the House Committee on Education and Labor declared in identical terms:

> The third prong of the definition includes an individual who is regarded as having an impairment. This third prong includes an individual who has a physical or mental impairment that does not substantially limit major life activities, but that is treated by a covered entity as constituting such a limitation. The third prong also includes an individual who has a physical or mental impairment that substantially limits major life activities 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.[103]

During debates on the ADA on the floor of the House, the chief sponsor of the ADA in the House — Representative Steny Hoyer (D-Md.) — declared that the third prong of the definition focuses on discriminatory treatment of an individual "whether or not the person had an impairment that actually limited participation."[104]

The Committee reports are replete with statements that a person who is subjected to discriminatory treatment based on real or perceived disability is entitled to protection under the ADA regardless of the person's actual physical or mental characteristics and regardless of whether the covered entity's motivation for the discriminatory treatment was "negative reactions," "myths and fears about disability," "attitudinal barriers," "workplace concerns," "stereotypes," or "negative attitudes."[105] Regarding the various types of motivations for discriminatory treatments, the House Committee on the Judiciary clarified as follows:

> It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate, job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test.[106]

The Senate Committee report stated unequivocally that "[a] person who is excluded from any activity covered under the Act or is otherwise discriminated against because of a covered entity's negative attitudes toward disability is being treated as having a disability

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102 H.R. Rep. No. 101-485, pt. 3 (1990) at 29.

103 S. Rep. No. 101-116 (1989) at 23; H.R. Rep. No. 101-485, pt. 2 (1990) at 53.

104 136 CONG. REC. E1914 (daily ed. June 13, 1990) (statement of Rep. Hoyer of May 22, 1990).

105 H.R. Rep. No. 101-485, pt. 3 (1990) at 30; S. Rep. No. 101-116 (1989) at 23-24; H.R. Rep. No. 101-485, pt. 2 (1990) at 53.

106 H.R. Rep. No. 101-485, pt. 3 (1990) at 30-31.

which affects a major life activity."[107] Similarly, the House Education and Labor Committee declared that "[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."[108]

B. NARROW CONSTRUCTION OF ADA PROTECTION

In his formal written statement on signing the ADA, President George H.W. Bush observed that "[t]his legislation is comprehensive because the barriers faced by individuals with disabilities are wide-ranging." The National Council on Disability has issued a topic paper that examines the language and legislative history of the ADA, and the legal principles in place at the time it was enacted, bearing on how narrowly or broadly Congress intended the definition of disability to be construed, and comparing the expressed congressional intent with the Court's narrow construction of the definition; among its conclusions are that the ADA in general and the definition of disability in particular were to be "comprehensive."[109]

In the ADA, Congress expressly made use of the full scope of its legislative authority to fashion a comprehensive, efficacious remedy for a problem it found to be pervasive and continuing in American society. In pursuit of this ambitious enterprise, Congress adopted as the definition of disability in the ADA the expansive three-prong definition it had inserted in the Rehabilitation Act in 1974. The language and legislative history of the ADA indicate that Congress intended the comprehensiveness of the Act to apply to the definition of disability the Act incorporates, the definition that contains three separate prongs -- actual disabilities, a record of disability, or being regarded as having a disability.

Congress knew well that it was providing broad protection from disability discrimination. The Committee reports provided numerous examples of the ADA's breadth in protecting individuals who have experienced discrimination because of a covered entity's negative reactions to their conditions; these include burns victims, persons with epilepsy or diabetes (even if controlled by medication), people excluded because they use hearing aids, individuals excluded because of back abnormalities revealed on an x-ray, and persons denied jobs because of an employer's belief that customers would have a negative reaction to the person's condition or appearance.[110] Congress knew how to frame a more restrictive definition of disability, as it had done in Social Security benefits legislation

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107 S. Rep. No. 101-116 (1989) at 24.

108 H.R. Rep. No. 101-485, pt. 2 (1990) at 53.

109 National Council on Disability, *The Americans with Disabilities Policy Brief Series: Righting the ADA Papers, No. 4, "Broad or Narrow Construction of the ADA"* at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

110 H.R. Rep. No. 101-485, pt. 3 (1990) at 30-31; S. Rep. No. 101-116 (1989) at 24; H.R. Rep. No. 101-485, pt. 2 (1990) at 53.

and in the predecessor definition of disability in the Rehabilitation Act. It selected the three-prong formulation with full awareness that it was expansive in scope. Congressional critics of the ADA claimed that the definition of disability in the Act was too broad; no one suggested that the definition was a narrow one. Neither proponents nor opponents contended that the definition of disability in the ADA would be given a narrow or restrictive interpretation, different from the "comprehensive" reading Congress intended for the rest of the ADA.

An eloquent description of the expected breadth of ADA coverage of individuals with disabilities was provided by Representative Aucoin as the ADA was being debated on the House floor:

> The Americans with Disabilities Act is more than just another law; it is a declaration of independence for all Americans with physical or mental disabilities or those afflicted by disease. It says that everyone has the same right as everyone else to hold a job, to ride a bus or to stay at a hotel, without fear of discrimination.[111]

The congressional understanding in enacting the ADA was that "everyone" would be protected if they were subjected to discrimination based on disability.

At the time Congress chose the three-prong definition of disability in the ADA, it knew that the essentially identical definition in the Rehabilitation Act had been interpreted very broadly in administrative regulations and court decisions. The Supreme Court, in particular, had displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. At the time the ADA was adopted the most authoritative and recent decision of the Supreme Court on the meaning of disability under the Rehabilitation Act was *School Board of Nassau County v. Arline*. The *Arline* ruling and its implications were discussed above in response to Question 2. The Supreme Court had observed in 1979, and repeated in *Arline* in 1987, that in adopting the last two categories of the three-prong definition, Congress had expanded the definition to include persons who "may at present have no actual incapacity at all."[112] The Court's lenient interpretation of the definition led it to have little difficulty in finding that Ms. Arline had a disability under the statute. Several of the ADA Committee reports discussed the *Arline* ruling with approval in discussing the ADA definition of disability.

In the ADA, Congress chose to replicate a definition of disability from the Rehabilitation Act, a definition that had been recognized as broad and comprehensive in authoritative regulations and in the courts. Congress was entitled to expect that the definition of disability in the ADA would be accorded a broad and inclusive interpretation.

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111 136 Cong. Rec. H2449 (daily ed. May 17, 1990) (statement of Rep. Aucoin).

112 *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 n. 6 (1979); *School Board of Nassau County v. Arline*, 480 U.S. 273, 279 (1987). The Court quoted from S. Rep. No. 93-1297, at 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6400).

In the face of this history and clearly expressed congressional intent, it was surprising and unfortunate that the Supreme Court took the position in *Williams* that the definition of disability is "to be interpreted strictly to create a demanding standard for qualifying as disabled." As the National Council on Disability declared in its *Righting the ADA* report:

> The Court's position that the definition of disability is to be construed narrowly represents a sharp break from traditional law and expectations. It ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a "comprehensive" prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability. It also flies in the face of an established legal tradition of construing civil rights legislation broadly. Congress knowingly chose a definition of disability that to that time had been interpreted broadly in regulations and the courts; it was entitled to expect the definition would continue to receive a generous reading. In crafting the ADA, Congress did not treat nondiscrimination as something "special" that can be spread too thin by granting it to too many people. Unlike disability benefits programs, such as Social Security Income (SSI) and Social Security Disability Insurance (SSDI), which are predicated on identifying a limited group of eligible persons to receive special benefits or services that other citizens are not entitled to obtain, and for which the courts have sought to guard access jealously, the ADA is premised on fairness and equality, which should be generally available and expected in American society. The Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.
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> The Court put forth a very weak rationale for its "strict" and "demanding" approach to the definition of disability. Primarily, it pointed to an ADA finding that 43 million people have disabilities. The Court's use of the 43 million figure, including its ill-founded assumptions that Congress intended the figure to have a degree of mathematical exactitude and only that number of people were to be protected by the ADA, are addressed in a policy brief in the Righting the ADA series.[113]

C. EFFECT ON ADA PLAINTIFFS

The strict construction of the definition of disability has had a very detrimental effect on disability discrimination plaintiffs. Statistical studies pretty consistently indicate that complainants prevail in fewer than one out of ten ADA Title I (employment) complaints, and often have found the ratio to be even smaller. The American Bar Association's

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113 National Council on Disability, *Righting the ADA* (2004) at 71-72, citing *The Americans with Disabilities Policy Brief Series: Righting the ADA Papers, No. 3, "Significance of the ADA Finding That Some 43 Million Americans Have Disabilities"* at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

Mental and Physical Disability Law Reporter has conducted an ongoing review of the results of ADA Title I decisions that are officially reported or available through the LEXIS or Westlaw online services. Results of this review showed that between the effective date of the ADA employment provisions in 1992 and the end of 1997, the employer prevailed in 92% of cases.[114] The rate of employer success grew to 94.4% in 1998,[115] and to 95.7% in 1999.[116] In the overall period from the ADA's enactment to the end of 1999, out of 1361 final judicial decisions, only eighty-nine (6.5%) plaintiffs prevailed. The paltry success rates of Title I plaintiffs continued to fall until the figures for 2003 and 2004 were hovering around 3%.[117] Numerous other studies have documented similarly meager rates of plaintiffs prevailing in ADA Title I cases.[118]

The authorities who have conducted such studies have been uniform in their perspectives, speaking of "markedly pro-defendant outcomes under the ADA"[119] and of a "pattern... of employers prevailing and employees losing in an overwhelming majority of the final court outcomes,"[120] and declaring that defendants are "enormously successful" in fighting

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114 *Study Finds Employers Win Most Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998).

115 John W. Parry, *Highlights & Trends*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 294 (1999).

116 John W. Parry, *1999 Employment Decisions Under the ADA Title 1 - Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348, 348-50 (2000).

117 Amy L. Allbright, *ABA Special Feature: 2003 Employment Decisions Under the ADA Title I - Survey Update*, 28 MENTAL & PHYSICAL L. REP. 319 (2004) (2.7%); Amy L. Allbright, *2004 Employment Decisions Under the ADA Title I - Survey Update*, 29 MENTAL & PHYSICAL L. REP. 513 (2004) (3%).

118 See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) ("defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level"); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248 (2001) (defendants prevail in 94% of ADA Title I cases at the trial court level, and in 87.5% of cases that reach the courts of appeals); Louis S. Rulli, *Employment Discrimination Litigation Under the ADA From the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade*, 9 TEMP. POL. & CIV. RTS. L. REV. 345 (2000) (plaintiffs prevailed in 2.7% of ADA Title cases filed between 1996 and 1998 in the Eastern District of Pennsylvania); *Courts Continuing Narrow Interpretation of "Disability," Case Study Shows*, DISABILITY COMPLIANCE BULL. Mar. 27, 1997, at 1 (stating that defendants are enormously successful in fighting ADA suits; out of 110 decisions, plaintiffs found to have disability in six percent of the cases). See also, the discussion of such studies in Linda Hamilton Krieger, *Foreword - Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 9 (2000); Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung, and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 223 (2000)); Kathryn Moss, Scott Burris, Michael Ullman, Matthew Johnsen, & Jeffrey Swanson, *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the EEOC*, 50 KANSAS LAW REV. 1 (2001).

119 Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999).

120 Amy L. Allbright, *ABA Special Feature: 2003 Employment Decisions Under the ADA Title I - Survey Update*, 28 MENTAL & PHYSICAL L. REP. 319 (2004).

ADA suits.[121] Other scholars have observed that "[d]efendants prevail in the vast majority of ADA claims"[122] and have spoken of "the overwhelmingly pro-defendant outcomes of Title I cases."[123] Professor Louis Rulli, focusing on Title I cases filed in the Eastern District of Pennsylvania, has found that the success rate is so low that the private bar is hesitant to take these cases.[124] USA Today quoted an attorney who had brought an ADA suit and lost as saying, "Very few plaintiffs' attorneys are taking ADA cases. You just can't win them."[125] An article in the National Law Journal reported the ABA Commission on Mental and Physical Disability had concluded that the facts strongly suggest that employees are being treated unfairly under the ADA.[126]

The results in ADA Title I cases show much less success for plaintiffs than lawsuits brought under other civil rights laws. A baseline study of trial court outcomes in civil rights and prisoners' rights cases over a seven-year period found plaintiff success rates in civil rights actions ranged from voting rights cases (53%) to prisoner civil rights cases (14%). Employment discrimination cases brought under civil rights laws other than the ADA were found to have a success rate of 22%.[127] These rates are significantly higher than those found in the various studies of ADA Title I cases described above. Professor Ruth Colker, who has conducted several such studies of ADA litigation, observed of her findings that "[t]hese results are worse than results found in comparable areas of the law ...."[128]

A principle reason for the low success rates of ADA plaintiffs is that courts dismiss a high percentage of cases on the grounds that the plaintiff has not satisfied the stringent standards for meeting the definition of disability. One of the studies found that courts

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121 *Courts Continuing Narrow Interpretation of "Disability," Case Study Shows*, DISABILITY COMPLIANCE BULL. Mar. 27, 1997, at 1.

122 Barbara Hoffmann, *Between a Disability and a Hard Place: The Cancer Survivors' Catch-22 of Proving Disability Status under the Americans with Disabilities Act*, 59 MD. L. REV. 352, 376 n. 121 (2000).

123 Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VANDERBILT L. REV. 1807, 1809 (2005).

124 Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and its Impact Upon the Poor*, 8 J. GENDER, RACE & JUST. 595 (2005).

125 Stephanie Armour, *Disabilities Act Abused? Law's Use Sparks Debate*, USA TODAY, Sept. 25, 1998, Final Edition, Money, B1.

126 Darryl Van Duch, *Employers Win in Most ADA Suits*, NAT. L.J., June 29, 1998, at B1.

127 Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989).

128 Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999).

ruled that the plaintiff had a disability in only six percent of the cases.[129] In an article that presented the findings from another study of ADA implementation that the authors described as "an exhaustive empirical investigation, funded by the National Institute of Mental Health," the authors joined the chorus of authorities acknowledging the overall favorability of the courts decisions to defendant: "The vast majority of the cases whose outcome is set out in a judicial opinion have been decided in favor of the employer."[130] Looking more closely at the cases in relation to the definition of disability, the authors made the following observations:

> Both the language of this definition and the narrow judicial interpretations given to that language have turned out to be serious barriers to success for people who file Title I charges. Indeed, the question of disability has turned out to be perhaps the most frequently contested issue in Title I litigation, and has been the main issue in most of the cases to reach the Supreme Court. To be covered by the ADA, it is necessary to have an impairment that substantially limits a major life activity, to have a record of such an impairment, or to be regarded as having such an impairment, and to be able to perform all essential job functions with or without reasonable accommodation. As interpreted by many courts, these requirements taken together serve as a "catch-22": if complainants do not have a very severe impairment their claim is dismissed because they cannot establish that they have an ADA covered disability; if they have a serious impairment, but that impairment interferes with their ability to perform their job, their claim is dismissed regardless of whether the respondent discriminated on the basis of disability.
>
> If long-term judicial narrowing of the definition of disability is influencing case outcomes, we would expect to see the complaining party's disability having a strong and growing influence on complaint outcomes. More specifically, we would expect parties with types of disabilities the courts have found to be within the statutory definition - mostly such "traditional" disabilities as mobility impairments, deafness, and blindness, and some frequently litigated new ones, most notably HIV - would have better outcomes than parties with more contested disabilities - such as mental illness. This is, in fact, what we generally found.[131]

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129 *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.").

130 Kathryn Moss, Scott Burris, Michael Ullman, Matthew Johnsen, & Jeffrey Swanson, *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the EEOC*, 50 KANSAS LAW REV. 1, 2, 48 (2001).

131 *Id.* at 90-91 (footnotes omitted).

A law review Comment discussed the legal literature regarding these issues in the following terms:

> For the most part, the perception is that the courts are interpreting ADA lawsuits narrowly and conservatively, especially in deciding who is disabled. Some commentators refer to the courts' virtual across-the-board conservative interpretation as a "pro-defendant bias." ... Despite the various explanations for the judicial response to the ADA, what is apparent is that, more often than not, the courts have narrowly construed almost every element of what it means to be disabled under the ADA.[132]

Most of the discussion of case results in this section has focused on Title I of the ADA. Because there are substantially fewer cases, studies,[133] and scholarly articles[134] in regard to Titles II and III of the ADA, no equally certain conclusions can be stated regarding those Titles. One legal commentator has relied "in part on a quantitative analysis" to contend "that Title II and III cases are more pro-plaintiff than Title I cases ...."[135] It is possible that more selectivity in cases is resulting in better statistical results. One law review article observed that

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132 Elizabeth A. Crawford, *Comment, The Courts' Interpretations of a Disability under the Americans with Disabilities Act: Are They Keeping Our Promise to the Disabled?*, 35 HOUS. L. REV. 1207 (1998) (footnotes omitted).

133 In her study published in 1999, Professor Colker indicated that "[b]ecause there were so few non-employment actions in the database, I have not analyzed the results in those cases in depth at this time." Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 n. 7 (1999). She reported that "[o]f the 122 non-employment cases brought against public entities, I have found that defendants were successful in 101 (82.8%) of the cases. Because there were only 23 cases brought against public accommodations under Title III of the ADA, I have not attempted to categorize those cases at all." *Id.*

134 See, Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VANDERBILT L. REV. 1807, 1812 (2005) ("only a limited number of commentators have focused their research efforts on Titles II and III of the ADA"). That is not to suggest that there has been no legal scholarship regarding Titles II and III. See, for example, Adam Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69 (2004); Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of Garrett: An "As Applied" Saving Construction for the ADA's Title II*, 39 WAKE FOREST L. REV. 133 (2004); Susan Gluck Mezey, *The Federal Courts and Disability Rights: Judicial Interpretation of Title III of the Americans with Disabilities Act*, 15 J. OF DISABILITY POLICY STUDIES 47-58 (2004); Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002); Ruth Colker, *A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. Rev. 99 (1999); Mark C. Weber, *Disability Discrimination by State and Local Governments: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995); Robert L. Burgdorf Jr., *"Equal Members of the Community": The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 TEMPLE LAW REVIEW 551 (1991). But the articles are much fewer than for Title I and focus much less often on the definition of disability issue.

135 Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VANDERBILT L. REV. 1807, 1810 (2005). The author added that "Titles II and III have been limited in their ability to create change," and explained such limited impact as resulting form "these Titles' public and private enforcement mechanisms." *Id.*

> Title I cases, compared to Title II and Title III claims, have the prospect of large monetary awards and so are far more attractive to private litigants. This means that Title II and III claiming is likely much more dependent on public interest and government-based mobilization. At the national level, there are only a handful of public interest firms that litigate ADA cases. The Justice Department has brought Title II and Title III claims, but like the public interest groups, it has limited resources and many other responsibilities.[136]

If public interest organizations and the Department of Justice (along with private attorneys) are choosing to litigate only disabilities that are a "sure thing" under Titles II and III, the resulting deprivation of representation to other Americans, having what, absent the strict interpretation of disability, should have been actionable ADA claims, is simply another unfortunate form of the harm that has resulted from this pernicious misinterpretation of the ADA.

D. A NEW BARRIER FOR PEOPLE WITH DISABILITIES?

As the studies cited in the previous section demonstrate, the strict judicial construction of who has a disability under the ADA has had a catastrophic effect on the ability of persons with disabilities to establish and enforce their ADA rights. In her recent book, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT, Susan Gluck Mezey wrote that the "most important element in disabling [the ADA]" is "the federal judiciary's constrained interpretation of the law."[137] Nowhere has that impact been more evident than in regard to the interpretation of disability. The senseless exclusion of individuals with disabilities who make use of mitigating measures is a dramatic and obvious example of the destructive effects of this approach, but, as the statistical studies show, the impact has extended to people with all sorts of disabilities. The basic purpose of the ADA -- in the words of the analogy President George H.W. Bush used in signing the Act into law, “to take a sledgehammer” to the barrier of discrimination -- is being severely thwarted because hardly anyone is construed as eligible to bring suit to challenge such discrimination. Instead of facilitating the elimination discriminatory barriers, the constricted interpretation of disability amounts to the erection of one more unnecessary, unfair, and unwarranted obstacle to the full participation of people with disabilities in society.

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136 Jeb Barnes, Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC'Y REV. 493, 515 (2006).

137 Susan Gluck Mezey, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT (2005) at 173.

7. Have there been other Supreme Court decisions that have impacted the effectiveness of the ADA apart from those interpreting the Act's definition of disabled?

Yes. In addition to restricting the definition of disability, the Supreme Court has issued opinions that expand defenses available to employers, limit damages and attorneys fees available to victims of discrimination, and even call into question the constitutionality of the ADA. NCD's *Righting the ADA* report discusses in detail the most significant such decisions, except for the constitutionality issue. In my written testimony, I listed five such problems, apart from problems with the definition of disability, resulting from ill-advised ADA rulings of the Supreme Court that are discussed in *Righting the ADA*, as follows:

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 sections that follow elaborate on each of these issues, based on information in the *Righting the ADA* report. The constitutional questions about the ADA raised by decisions of the Supreme Court are discussed below in the answer to Question 10.

A. DIRECT THREAT DEFENSE

The ADA provides a defense for employers in the event an individual with a disability poses a "direct threat" to others in the workplace.[138] The EEOC interpreted this provision of the ADA to mean that an employer could raise a "direct threat" defense if the individual with a disability poses a direct threat *to self or* to others [emphasis added].[139] In *Chevron U.S.A. Inc. v. Echazabal*,[140] the Supreme Court, deferring to the "direct threat" defense established by EEOC regulations, held that an employer can deny employment to a person with a disability if the employer determines that person might pose a danger to him or herself in the course of the employment. The plaintiff in *Chevron*, Mario Echazabal, worked for various contractors at Chevron's oil refinery for some twenty years. In 1993, he was diagnosed as having chronic active Hepatitis C, which remained a symptomatic since first diagnosed. Subsequently, he applied to work directly for Chevron and Chevron determined he was qualified and offered him the job. Chevron withdrew its offer, however, when its physicians concluded that he should not be exposed to the solvents and liver-toxic chemicals in the refinery. The company reached this conclusion even though Echazabal's physicians had not issued any restrictions precluding him from working in the refinery. Chevron's decision was based on a medical assessment -- which Echazabal contested was not grounded in current medical knowledge or the best available objective evidence of the ability of Echazabal's liver to cleanse itself of the chemicals to which he had been, and would continue to be, exposed in the refinery.

Based on the *Chevron* ruling, an employer can deny people a job by determining they are a direct threat to themselves, regardless of their actual ability to do the job, their desire to work, their own physician's recommendations or their history of working without injury. In an age of emphasis on personal responsibility, while people without disabilities can make choices about their line of work -- their own propensities and risks notwithstanding -- people with disabilities now have no "say so" over the degree of risk they are willing or able to incur for the sake of valued employment.

The danger of the *Chevron* precedent was immediately obvious to people with disabilities, who can remember situations throughout their lives in which they were excluded from activities or facilities, such as amusement parks, theaters, and schools, "for their own good." Former Representative Tony Coelho said it well, "The exclusion and segregation of people with disabilities has had an insidious partner: the gloss of good intentions. An atmosphere of charity and concern has cloaked our ill-treatment of disabled people and permeated our excuses for denying them access to the full benefits of the complex fabric of modern American society."[141] The reasons for such acts of

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138 42 U.S.C. § 12111(3) ("The term direct threat means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.").

139 29 C.F.R. § 1630.2 (r) ("Direct threat means a substantial risk of harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.").

140 *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002).

141 134 Cong.Rec. E1308-02 (Feb. 29, 1988).

discrimination include fear of liability, unwillingness to change business as usual, or genuine concern for the individual's well-being. Regardless of the motivation, the result is the same – exclusion, isolation, unemployment, and usurpation of the freedom to make personal choices.

Allowing an employer to deny employment to a person with a disability on the grounds that the individual might pose a danger to him or herself can have other troubling, sometimes unintended, consequences. At a recent public meeting of the National Council on Disability, one person reported that her former employer conveyed to her his concern that, since the *Chevron* decision, employers may now incur liability if they do not conduct a "direct threat" assessment when hiring a person with a disability. The former employer posited that he, post-*Chevron*, would likely have to deny employment to the individual with a disability whom he had formerly employed. If such a fear should become widespread among employers, it could have drastic consequences for the employment outlook for people with disabilities.

The harmful effects of the *Chevron* decision should be repaired by adding language to the ADA to prohibit a risk-to-self defense, thus permitting a "direct-threat" defense only for dangers posed to other persons. In a series of meetings NCD conducted with ADA stakeholders, some participants suggested that NCD accept some degree of a direct-threat defense for risks posed to the person with a disability, while clarifying the limited circumstances within which such a defense should be permitted. Given the prevalence of overprotective employer attitudes and misinformation about the implications of physical and mental impairments, NCD concluded that the better course is to return the scope of the direct-threat defense to the precise dimensions it had in the statutory language as enacted, and not allow it to be expanded by administrative fiat. At the same time, NCD underscored that all safety-related qualification standards imposed by employers are required to satisfy the ADA's "direct-threat" standard, as well as ADA requirements that they be "job related" and "consistent with business necessity."[142] The application of the defense also must include compliance with requirements contained in EEOC regulations that the direct-threat defense must be "based on a reasonable medical judgment" supported by "the most current medical knowledge and/or the best available objective evidence," and must involve an "individualized assessment of the individual's present ability to safely perform the essential functions of the job," which considers how imminent the risk is and how severe the harm would be.[143] The direct-threat defense should apply only where there is "a significant risk of substantial harm" that "cannot be eliminated or reduced by reasonable accommodation."[144] Because the ADA makes

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142 *Echazabal*, 536 U.S. at 86 and n. 6; 42 U.S.C. 12112(b)(6); 29 C.F.R. pt. 1630. app. (commentary on 1630.15(b) and (c)) ("With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an *employer must demonstrate that the requirement,* as applied to the individual, *satisfies the 'direct-threat' standard* in section 1630.2(r) to show that the requirement is job related and consistent with business necessity.") (emphasis added).

143 29 C.F.R. § 1630.2(r).

"direct threat" a defense, it is clear that employers attempting to assert health and safety concerns as a justification for their allegedly discriminatory actions must bear the burden of proof on each of the issues involved in demonstrating the existence of a direct threat.

In *Righting the ADA*, NCD proposed adding additional language to the current definition of "direct threat" as follows:

> 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.[145]

B. RESTRICTIONS ON DAMAGES

As a result of certain Supreme Court decisions, it is now more difficult for plaintiffs to pursue relief for discrimination they have been subjected to.[146] In *Barnes v. Gorman*,[147] the Supreme Court held that punitive damages may not be awarded under Title II of the ADA and Section 504 of the Rehabilitation Act of 1973. In *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, [148] the Supreme Court held that the "catalyst theory" is not a permissible basis for the award of attorneys' fees under either the ADA or the Fair Housing Act. As a result of the Supreme Court's decisions in *Barnes* and *Buckhannon*, aggrieved individuals with disabilities find it extremely difficult to get the necessary legal assistance to pursue legal remedies for disability discrimination.[149] The practical effect of these cases combined is that Title II and Title III entities have little to lose by failing to comply with the ADA.

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144 *Id* Because of the procedural manner in which the case came to the Supreme Court, the *Echazabal* Court also did not have occasion to determine whether Chevron could have made a reasonable accommodation that would have permitted Mr. Echazabal to keep his job in spite of the risk-to-self standard, 536 U.S. at 77 n. 2.

145 *Righting the ADA*, at p. 116.

146 *See* Americans with Disabilities Act Policy Brief Series: Righting the ADA No: 7, The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities, National Council on Disability (Feb. 2003). www.ncd.gov/newsroom/publications/decisionsimpact.html

147 Barnes v. Gorman, 536 U.S. 181 (2002); See, National Council on Disability, The Supreme Court's Refusal to Permit Punitive Damages in Private Lawsuits under Section 202 of the ADA, paper No. 18 of NCD's Policy Brief Series: Righting the ADA Papers, http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

148 532 U.S. 598 (2001).

149 *See*, National Council on Disability, *Americans with Disabilities Act Policy Brief Series: Righting the ADA--No. 8, The Implications of the Supreme Court's Decision in Board of Trustees of the University of Alabama v. Garrett*, found at www.ncd.gov/newsroom/publications/policybrief.html.

The *Buckhannon* Decision

The ADA contains a provision expressly authorizing fees and costs of litigation to be paid to the prevailing party in any action or administrative proceeding brought under the Act. Various other federal laws, the Civil Rights Act of 1964, the Fair Housing Amendments Act of 1988, the Voting Rights Act Amendments of 1975, the Civil Rights Attorney's Fees Awards Act of 1976, and quite a few others, also authorize the awarding of attorney's fees to the "prevailing party." Until the Supreme Court made its ruling in the *Buckhannon* case, a plaintiff whose lawsuit motivated a defendant to change its conduct and to cease performing actions that the plaintiff claimed were violations of the ADA or one of these other laws could recover attorney's fees and certain litigation expenses from the defendant under the "catalyst theory." Under the "catalyst" approach, the courts considered "prevailing party" as meaning something broader than simply a party who wins a final judicial ruling in its favor. A plaintiff was considered a "prevailing party" eligible to be awarded attorney's fees if the lawsuit achieved its desired result because it brought about a voluntary change in the defendant's conduct. The idea was that in circumstances where the filing of a lawsuit caused a defendant to change its ways and cease some action whose legality had been challenged, the plaintiff had achieved the goal of the lawsuit, and was the "prevailing party." If filing a lawsuit proved to be a catalyst for the defendant's compliance, the plaintiff had prevailed even if the legal proceedings never reached the formal decision stage.

In *Buckhannon*, the Supreme Court held that a defendant's voluntary change in conduct, even if it accomplishes what the plaintiff sought to achieve by the lawsuit, lacks the necessary "judicial imprimatur" on the change.

The *Buckhannon* ruling undercuts incentives for public interest lawyers and the private bar to undertake many ADA cases. In her dissenting opinion in *Buckhannon*, Justice Ginsburg predicted that "the Court's constricted definition of 'prevailing party,' and consequent rejection of the 'catalyst theory,' [will] impede access to court by the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general." Her prediction has proven all too accurate. As a consequence of the *Buckhannon* ruling, defendants have a significant motivation to settle promising ADA cases informally rather than by consent decree or to make the cases moot by voluntary compliance, so that they can avoid paying attorney's fees.

Reduced availability of attorney's fees means fewer resources for ADA advocates, who, as a result, can litigate fewer cases. Ultimately, this makes it much more difficult for people with disabilities, including those who have suffered egregious discrimination on the basis of disability prohibited by the ADA, to obtain legal representation. In addition, defendants have more incentive to engage in unlawful discriminatory acts unless and until they are sued, because even if they lose in court they will not be liable for a fee award.

NCD issued a policy paper examining the meaning and effect of the "catalyst theory," and the implications for the enforcement of the ADA caused by the Court's rejection of

the theory. *The Supreme Court's Rejection of the "Catalyst Theory" in the Awarding of Attorney's Fees and Litigation Costs*, No. 17 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at
http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.
It includes numerous real-life examples of unfair and detrimental rulings as lower courts follow *Buckhannon*, as well as documentation of the effects of the ruling on the ability of people with disabilities to obtain legal representation. In *Righting the ADA*, NCD recommends remedial legislation that would decree the opposite—that plaintiffs can recover attorney's fees and litigation expenses under the circumstances provided in the catalyst theory.

<u>The *Barnes* Decision</u>

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. NCD issued a policy paper examining the nature and purpose of punitive damages, their availability under the ADA, and the substance and ramifications of the Court's ruling in *Barnes*. *The Supreme Court's Refusal to Permit Punitive Damages in Private Lawsuits under Section 202 of the ADA*, paper No. 18 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm. The paper also describes the limited, egregious circumstances in which punitive damages can be awarded.

The inability to recover punitive damages acts as a disincentive for individuals considering pursuing their claims in court, and also eliminates the deterrent value of such damages to egregiously discriminatory conduct. In some cases, the possibility of an award of punitive damages also serves to make defendants less intractable in settlement negotiations. Without such a remedy, individuals are dramatically impaired in their ability to enforce civil rights protections and hold their governments accountable for the most extreme acts of intentional discrimination. In *Righting the ADA*, NCD recommends legislation that would restore the right to obtain punitive damages under Title II of the Act.

The *Buckhannon* and *Barnes* rulings were not limited to the ADA, but applied in addition to a variety of other civil rights statutes and other federal laws. Accordingly, it would be advantageous to address the problems created by the decisions as part of a comprehensive initiative addressing all the laws implicated by the decisions.

C. MUDDLING THE REASONABLE ACCOMMODATION REQUIREMENT

In crafting the ADA, the Congress put a lot of effort into clarifying the limits on the obligation of employers to make "reasonable accommodations" for workers with disabilities. The standard arrived at – undue hardship – reflects a compromise between permitting employers to do little or nothing to allow employees with disabilities to function effectively in their workplaces and requiring employers to make disruptive or

financially ruinous modifications. The phrase "undue hardship" was taken from regulations implementing Section 504 of the Rehabilitation Act of 1973 that had proved to be workable over many years of application. The ADA states in considerable detail the kinds of financial, administrative and structural factors that courts should consider when deciding whether an accommodation will place an undue hardship on employers. This linkage of the standard to the size, resources, and nature of the employer's operations was designed by Congress to ensure that it would be applied with flexibility tailored to the specific circumstances of the particular employer. In *U.S. Airways v. Barnett*,[150] however, the Supreme Court threw a monkey wrench into the delicate balance Congress had fashioned by declaring that an employer can evaluate the reasonableness of an accommodation, and courts can review it, apart from, and in addition to, whether it would be effective for the employee and whether it would pose an undue hardship on the employer. NCD issued a policy paper examining the impact of the *Barnett* ruling and the problems it has caused for ADA plaintiffs. *Reasonable Accommodation After Barnett*, paper No. 10 of NCD's *Policy Brief Series: Righting the ADA Papers*, can be found at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.[151]

The term "reasonable accommodation" is a term of art that was previously used in the Rehabilitation Act Section 504 regulations. It describes types of accommodations which an employee with a disability may need in order to have an equal opportunity to succeed in an employment position.[152] The focus of the phrase has always been on the needs of the employee.[153] The phrase "undue hardship," which established a limit to an employer's obligation to provide reasonable accommodation, was also taken from the Section 504 regulations. Virtually all judicial analysis and congressional debate about how an employer could defend itself against a claim for accommodation centered on the

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150 535 U.S. 391 (2002).

151 Portions of the materials contained in this and the next section of these answers are derived from that policy paper.

152 42 U.S.C. § 12111(9). "The term 'reasonable accommodation' may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).

153 The Equal Employment Opportunity Commission (EEOC) regulations on the ADA state that: "1) The term reasonable accommodation means:
(i) 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; or
(ii) 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; or
(iii) 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." 29 C.F.R. § 1630.2(o).

"undue hardship" definition.[154] The settled interpretation of a "reasonable accommodation" was that it must be effective in enabling the employee to do the job, but only to the extent that it did not cause an undue hardship on the employer. The word "reasonable" was never considered by Congress or the drafters of the legislation as an independent modifier for the kinds of accommodation that employers were legally obligated to provide under the ADA. By indicating that it is, the Supreme Court has untethered the concept from any clear and predictable meaning, and undercut the carefully calibrated balance that Congress had established, by sanctioning employers to refuse, and courts not to order the rendering of, workable and practicable accommodations based on their idiosyncratic views as to what strikes them as reasonable. After *Barnett*, an accommodation can be rejected by an employer even if it would be effective for the employee and not pose an undue hardship on the employer. This subjects an accommodation request to a new reasonableness test -- reasonableness as determined by the employer -- regardless of the employer's familiarity with, or understanding of, the worker's disability or the possible accommodations at issue.

In its *Righting the ADA* report, NCD proposed clarifying the limits on reasonable accommodation by adding to the definition of that term an additional subsection as follows:

> 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—
>
> > (1) 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;
> >
> > (2) without the accommodation, such limitation will prevent the individual from enjoying such equal benefits and privileges; and
> >
> > (3) 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.[155]

154 "The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)": 42 U.S.C. § 12111(10). Subparagraph (B) lists four factors, which broadly speaking, relate to financial considerations. "Undue hardship" was the topic of considerable debate at the ADA's enactment. *See* for example 135 Cong. Rec. S10735, S10736 (daily ed. Sept. 7, 1989) (Statements of Sens. Hatch and Harkin); 135 Cong. Rec. S10773 (daily ed. Sept. 7, 1989) (Statements of Sens. Helms and Harkin); 136 Cong. Rec. H2429 (daily ed. May 17, 1990) (Statement of Rep. Bartlett); and 136 Cong. Rec. H2471-H2475 (daily ed. May 17, 1990) (debate on Rep. Olin amendment to put cap on undue burden).

155 *Righting the ADA* at p. 118.

D. ADA RIGHTS AND SENIORITY RIGHTS OF OTHER EMPLOYEES

Applying its new, independent "reasonableness" standard discussed in the prior section of this answer to the requirement that employers make reasonable accommodations, the Supreme Court's decision in the *Barnett* addressed the interaction between job reassignment under the ADA and seniority systems. Robert Barnett had been a cargo handler for U.S. Airways for ten years when he injured his back, after which he transferred to a less demanding mailroom job, consistent with U.S. Airways' personnel policy. Subsequently, the mailroom position he was occupying came up for bid under the seniority system. Upon learning that two employees with greater seniority intended to bid for his mailroom job, Barnett asked U.S. Airways, as an accommodation to his disability, not to open the position up for bid. The company eventually rejected Barnett's request, and also refused to provide alternative accommodations such as lifting equipment that could have enabled Barnett to perform a cargo job for which he had adequate seniority. Barnett lost his job and brought an action under Title I of the ADA.

When the case reached the U.S. Supreme Court, it framed the issue as a potential conflict between "the interests of a disabled worker who seeks assignment to a particular position as a 'reasonable accommodation'" and "the interests of other workers with superior rights to bid for the job under an employer's seniority system."[156] The majority resolved this conflict not by analyzing the statutory factors set forth in the ADA to determine whether an accommodation would pose an "undue hardship,"[157] but, instead, extracted a novel "reasonableness" criterion from the term "reasonable accommodation." The court stated:

> The statute does not require proof on a case-by-case basis that a seniority system should prevail. That is because it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail.[158]

The seniority system and personnel policy at issue in *Barnett* had not resulted from a collective bargaining process; they had been unilaterally adopted by the company. The U.S. Airways Agent Personnel Policy Guide stated that the personnel policy was not intended to be a contract, and did not create legally enforceable obligations for continued

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156 535 U.S. at 393-394.

157 *See* 42 U.S.C. 12111(10)(B): In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:
(i) the nature and cost of the accommodation needed under this Act;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

158 535 U.S. at 403.

employment. U.S. Airways reserved the right to change its stated policies and procedures at any time without advance notice.[159] Accordingly, the Supreme Court was not obliged to treat the case as posing a conflict between the rights of Barnett and other employees, since the seniority system at issue did not purport to give any employee enforceable rights that would infringe on accommodation rights established by the ADA.[160] The Supreme Court transformed the factual situation underlying the dispute in the case into a vehicle for announcing a new interpretive approach to reasonable accommodation. It signaled such an intent by reading the central issue as a direct conflict between the rights of employees, and ultimately by avoiding an necessity to consider analyzing seniority issues as part of the employer's undue hardship defense.

The reasoning, analysis, and implications of the Supreme Court's decision on the seniority issue in *Barnett* are examined in NCD's *Righting the ADA* report.[161] In its decision, 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.'"[162]

To a degree, the Court's ruling regarding situations in which the rights of a worker with a disability seeking assignment to a particular position as a reasonable accommodation under the ADA come into conflict with other workers' rights to bid for the position under the employer's seniority system can be viewed as having improved the legal situation slightly. Although neither the language of the ADA nor anything in its legislative history suggests that modification of seniority policies inherently is unreasonable, before the *Barnett* decision, most courts held that an accommodation that violated a collective bargaining agreement was automatically unreasonable.[163] NCD has taken the position

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159 Brief for Respondent at 2, *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391 (2002) (No. 00-1250).

160 The American Federation of Labor and Congress of Industrial Organizations, a federation of 66 national and international labor organizations, filed an Amicus brief in support of Barnett, pointing out that collectively bargained "seniority rights are judicially enforceable by the employees as a matter of federal law, and employers are forbidden from unilaterally modifying such rights until certain statutory conditions are fulfilled" but "an employer-initiated 'seniority policy' is merely a non-binding guideline for the exercise of management discretion." Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Respondent at 6, *U.S. Airways, Inc., v. Barnett*, 122 S.Ct. 1516 (2002) (No. 00--1250).

161 *Righting the ADA* at pp. 92-98.

162 535 U.S. at 394.

163 See, e.g., *Davis v. Florida Power and Light Co.,* 205 F.3d 1301, 1307 (11th Cir. 2000); *Feliciano v. Rhode Island,* 160 F.3d 780, 787 (1st Cir. 1998); *Cassidy v. Detroit Edison Co.,* 138 F.3d 629, 634 (6th Cir. 1998); *Kralik v. Durbin,* 130 F.3d 76, 81-83 (3d Cir. 1997); *Foreman v. Babcock and Wilcox Co.,* 117 F.3d 800, 810 (5th Cir. 1997); *Eckles v. Consolidated Rail Corporation,* 94 F.3d 1041, 1051 (7th Cir. 1996); *Benson v. Northwest Airlines, Inc.,* 62 F.3d 1108, 1114 (8th Cir. 1995); *Milton v. Scrivner, Inc.,* 53 F.3d 1118, 1125 (10th Cir. 1995).

that ADA rights should not be subject to limitation by the terms of collective bargaining agreements,[164] particularly because Section 504 regulations have long provided that employer obligations under that Act are not affected by the terms of any collective bargaining agreement,[165] and the ADA specifies that "nothing" in the law is to "be construed to apply a lesser standard" than under such regulations. Under *Barnett*, accommodations conflicting with collectively bargained seniority systems would ordinarily, but not automatically, be deemed unreasonable.

The particular accommodation at issue in the *Barnett* case was allowing Mr. Barnett to remain in a position to which he had transferred despite the fact that the position was subject to seniority-based bidding by other employees. The Court ruled that the ADA ordinarily does not require the assignment of an employee with a disability 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 indicated that transfer to a position to which another employee would be entitled under a seniority system would not be reasonable "ordinarily or in the run of cases." But the Court stated that the employee could demonstrate "special circumstances" that would render a requested accommodation reasonable in particular circumstances. As an example of such circumstances, the Court mentioned situations in which other exceptions to a seniority system are made relatively frequently, so permitting another exception to accommodate a worker with a disability would not significantly impact the company or workers' expectations.[166] The upshot of the ruling is that plaintiffs seeking accommodations that conflict with seniority rights of other employees will face an uphill battle but can prevail if they can demonstrate special circumstances that make an exception to the seniority system reasonable.

The Court removed one obstacle that some courts created for plaintiffs seeking reassignment as a reasonable accommodation. Some courts had held that a position that was open for bidding under a seniority system was not "vacant" and, therefore, not available as a possible accommodation. The majority opinion in *Barnett* clarified that for purposes of accommodations in the form of "reassignment to a vacant position" as authorized under the ADA,[167] a vacant position can be one that is open for bidding under a seniority system.[168]

The Supreme Court's recognition in *Barnett* of a rebuttable exception to the ADA's reasonable accommodation mandate for seniority systems offers a line of defense for employers, but it does not require lower courts to let employers off the evidentiary hook. The circuit decisions on this issue that have been decided after *Barnett* generally have

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164 NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 226-27 (2000).

165 45 C.F.R. 84.11(c) ("a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement").

166 535 U.S. at 405-406.

167 42 U.S.C. § 12111(9)(B).

168 535 U.S. at 399.

focused more on the evidentiary framework established in the decision than on the question of what will be considered "reasonable" in the abstract. For the most part, the circuit courts have refused to grant summary judgment for defendants.[169] Fundamentally, however, the *Barnett* decision gives certain workplace norms—seniority systems and terms of collective bargaining agreements—priority over ADA rights in many situations, as the Court put it, "ordinarily or in the run of cases." As a remedial measure for historic and systemic discrimination against people with disabilities, the ADA requires "reasonable accommodation," which involves individualized assessments of what a job requires and what a given person with a disability can do if the work environment is modified. The Court's recognition of traditional workplace practices and processes, including seniority systems and terms of collective bargaining agreements, as having superiority over the accommodation rights of workers with disabilities flies in the face of central objectives of the ADA, and helps to keep in place the discriminatory, exclusionary workplace environment the ADA sought to reform.

Consistent with NCD's position that ADA rights should not be subject to limitation by the terms of collective bargaining agreements,[170] that Section 504 regulations contain a provision stating that employer obligations under that Act are not affected by the terms of any collective bargaining agreement,[171] and that "nothing" in ADA specifications is to "be construed to apply a lesser standard" than under such regulations,[172] NCD concluded that clear and strong legislative guidance is needed to clarify 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 the rights of other employees under a seniority system or collective bargaining agreement. Moreover, NCD recommends that covered entities should be directed to incorporate recognition of ADA rights in future collective bargaining agreements. Based on these principles, the *Righting the ADA* report proposes that a provision should be added to the "Discrimination" provisions of Title I of the ADA, along the following lines:

> 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 in lieu of being discharged by the employer. Covered entities under this Title shall include recognition of ADA rights in future collective bargaining agreements.[173]

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169 See the cases discussed in NCD's *Righting the ADA* report at pp. 94-97.

170 NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 226-27 (2000).

171 45 C.F.R. 84.11(c) ("a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement").

172 42 U.S.C. § 12201(a).

173 *Righting the ADA* at pp. 121-122.

8. The National Council on Disability's 2004 Report, titled "Righting the ADA," and your written testimony, both identify nine problems that have resulted from the Supreme Court's narrow reading of the ADA's definition of disabled and from which harmful consequences have resulted. Would you describe the consequences if Congress left these 9 problems unaddressed?

In discussing the nine problematic ways in which the Supreme Court has narrowed the interpretation of who has a disability under the ADA, the *Righting the ADA* report contains, for each of the nine, a description of "What the Supreme Court Did," an analysis of the "Significance of the Court's Action," and a subsection presenting "Examples of Impact." These materials can be found on pp. 44-74 of the report. In each of the nine areas, the Supreme Court's restrictive approach has caused substantial harm by limiting the protection from discrimination that the ADA was supposed to provide. As a direct result, numerous plaintiffs with otherwise meritorious ADA claims have had their lawsuits thrown out of court, producing the ridiculously low success rates described in the answer to Question 6 above. In addition, many other ADA complainants have had their cases closed without relief in administrative enforcement processes, and no one knows how many attorneys have refused to file lawsuits, or potential plaintiffs have decided not to pursue them, because of awareness that the deck is heavily stacked against proving a disability.

The ultimate result is that employers and other covered entities have less motivation to comply with the requirements of the ADA. In many instances, they stand a good chance of prevailing on the issue of the plaintiff's disability based on the restrictive standards the Supreme Court has imposed. An employer, for example, can fire or refuse to hire a person because of a mental or physical condition and then turn around and argue that the condition is not significant enough to constitute a disability under the ADA; in many circumstances the employer can prevail on such a talking-out-of-both-sides-of-the-mouth argument because of the technical and narrow interpretation of disability the Court has endorsed. Despite Congress's clearly expressed intention to provide protection against discrimination to a very broad class of Americans -- indeed to all Americans who are subjected to such discrimination -- the results of the Court's miserly interpretation have led to what one writer has characterized as "the Incredible Shrinking Protected Class."[174] The ultimate outcome can only be disrespect and disregard for the ADA and the obligations the Act imposes to eliminate discrimination on the basis of disability.

9. The Supreme Court has questioned the authority of Federal agencies to interpret the definition of disabled under the ADA. Does the ADA authorize Federal agencies to issue regulations interpreting the definition of disabled? How did Congress intend for Federal agencies to implement this threshold issue?

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174 Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997).

I drafted a policy brief that was issued by the National Council on Disability on the Supreme Court's treatment of ADA regulations. It is titled "The Supreme Court's Decisions Regarding Validity and Influence of ADA Regulations," No. 16 of NCD's *Policy Brief Series: Righting the ADA*, and is found at
http://www.ncd.gov/newsroom/publications/2003/validityandinfluence.htm
I have derived my answer to your specific question from material in that paper, particularly a section titled "Regulatory Interpretation of ADA Definitions," with some supplementation and reorganization.

In the Americans with Disabilities Act (ADA), Congress assigned several federal agencies the task of issuing regulations for carrying out the Act's requirements. The Equal Employment Opportunity Commission (EEOC) was directed to issue regulations for implementing Title I, the employment provisions of the ADA.[175] As the head of the Department of Justice (DOJ), the Attorney General was charged with issuing regulations both for carrying out Title II's requirements regarding state and local government entities,[176] and for implementing the requirements Title III places on public accommodations.[177] The Secretary of Transportation was made responsible for issuing regulations for the implementation of the ADA's transportation requirements both for state and local government entities under Title II[178] and public accommodations under Title III.[179] The Federal Communications Commission (FCC) was directed to issue and enforce regulations for carrying out Title IV's requirements regarding telephone relay services.[180]

After preliminary sections of the ADA presenting the short title of the Act, a table of contents, congressional findings, and a statement of the purposes of the law, the first provisions of the ADA are definitions of three important terms used in the statute: "auxiliary aids and services," "disability," and "state.[181] The Supreme Court has been highly inconsistent and unnecessarily dismissive in its attitude toward regulations implementing the definition of the term "disability."

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court considered whether asymptomatic HIV infection met the Act's definition of disability. Among other authorities that the Court looked to to resolve this issue were the regulations issued by the Department of

175 42 U.S.C. § 12116.

176 42 U.S.C. § 12134(a).

177 42 U.S.C. § 12186(b).

178 42 U.S.C. §§ 12149(a) & 12164.

179 42 U.S.C. § 12186(a).

180 47 U.S.C. § 225(d).

181 42 U.S.C. §§ 12102(1), (2), & (3).

Justice under Title III of the ADA. The Court said that these regulations should be accorded a high level of respect referred to as "*Chevron* deference."[182] The specific regulatory provisions the Court was referring to in *Bragdon* were those addressing the definition of disability. The Court also was able to "draw guidance from the views of the agencies authorized to administer other sections of the ADA," and cited EEOC's Title I regulations, DOJ's Title II regulations, and DOT's regulations implementing the transportation-related provisions of Titles II and III.[183] In each instance, the Court was discussing the regulations and regulatory guidance of those agencies clarifying elements of the definition of disability.

The Court took a considerably different approach in *Sutton v. United Airlines*,[184] however and accorded considerably less value to the provisions in EEOC's ADA regulations addressing the definition of disability. The Court discussed the various delegations of authority to issue regulations under Titles I to V of the ADA, and then declared that "[n]o agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, ... which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term `disability.'"[185] Because, however, both parties in *Sutton* accepted the EEOC regulations defining "disability" as valid, and the Court determined that the validity of the regulations was not necessary to decide the case, it declined to determine "what deference they are due, if any."[186]

In his dissenting opinion in *Sutton*, Justice Breyer contended that the majority's questioning of EEOC's authority was unnecessarily and inappropriately technical:

> There is no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation, at least if the regulation is consistent with the earlier statutory definition and with the relevant interpretations by other enforcement agencies. The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives. And to pick and choose among which of [Title I's] words the EEOC has the power to explain would inhibit the development of law that coherently interprets this important statute.[16]

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182 Specifically, the Court in *Bragdon* declared in regard to the Title III regulations: "As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference. See *Chevron,* 467 U.S., at 844, 104 S.Ct., at 2782-2783." 524 U.S. at 646 (statutory citations omitted).

183 524 U.S. at 647.

184 527 U.S. 471 (1999).

185 527 U.S. at 479 (citing 42 U.S.C. § 12102(2)).

186 *Id.* at 480.

Indeed, the placement of the ADA's definitions section at the beginning of the Act rather than within one of the substantive Titles serves what one would have thought is a fairly obvious purpose. The terms defined there are ones that are used in more than one of the substantive Titles of the Act; this is in contrast to other terms, such as "employer," "public entity," "public accommodation," "TDD," and a number of others that are defined within the particular Title in which they are used. The term "disability" in particular is used in various provisions throughout the Act. Rather than repeating the identical statutory definition of disability within each of the Titles in which it is used, Congress considered it much more efficient to include the definition at the beginning. At the same time, since the term "disability" is used within different Titles with differing contexts, histories, and complexities, it was appropriate for Congress to authorize the agency charged with issuing regulations implementing each of the Titles to include within its regulations provisions making the definition of disability clear to covered entities, and to add regulatory clarifications or interpretive guidance that might arise from the differing contexts and purposes of the particular Title. This approach had the advantage of adopting a single definition of disability while leaving open the possibility of variations on its application tailored to the particular regulatory setting. The conclusion of the Court in *Sutton* that Congress did not delegate authority for regulations interpreting the definition of disability to any agency seems to ignore the seemingly evident congressional objective in organizing the statute the way it did.

In *Murphy v. United Parcel Service*,[187] *Albertson's, Inc. v. Kirkingburg*,[188] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[189] the Court followed the *Sutton* opinion in assuming without deciding that EEOC's Title I regulations are valid, while casting doubts upon their legal validity. Ironically, in *Williams* the Court stated that regulations interpreting the Rehabilitation Act of 1973 were entitled to considerable persuasive authority in interpreting the ADA. The Court noted that the ADA's definition of disability was drawn nearly verbatim from the definition of "handicapped individual" in the Rehabilitation Act,[190] and observed that "Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[191] But having recognized the significance of Rehabilitation Act regulations in interpreting the ADA, the Court considered the persuasive authority of the EEOC's ADA regulations regarding the definition of disability, which followed its Rehabilitation Act regulations closely, as "less clear."[192] In

187 527 U.S. 516, 523 (1999).

188 527 U.S. 555, 563 n. 10 (1999).

189 534 U.S. 184 , 194 (2002).

190 29 U.S.C. § 706(8)(B).

191 534 U.S. at 193-194.

192 *Id.* at 194.

its *Sutton, Murphy, Kirkingburg,* and *Williams* decisions, the Court took pains to declare that it was assuming, without deciding, that the regulatory provisions interpreting the definition of disability were valid, and that, if valid, it was not deciding what level of deference, if any, they should be accorded. This dubious, begrudging recognition of the regulations' authority is in sharp contrast to the Court's opinion in *Bragdon* where the Court held the regulations entitled to a high level of judicial deference.

Thus, in regard to provisions of the ADA regulations interpreting elements of the definition of disability, the Supreme Court initially indicated (in its *Bragdon* decision) that such regulations were entitled to the high level of judicial deference termed "*Chevron* deference." In later decisions (*Sutton, Murphy, Kirkingburg, and Williams*), however, the Court went out of its way to declare that it had doubts that the ADA authorized any of the federal agencies to issue regulations to implement the Act's provisions regarding the meaning of "disability." Accordingly, the Court said it would only assume, without deciding, that the regulatory provisions interpreting the definition of disability were valid, and it was not deciding what level of deference, if any, they should be accorded.

Similarly, regarding its inclination to accept and follow the agencies' positions on the interpretation of the components of the definition of disability, the Court has retreated from its initial broad view (in *Bragdon*) of the definition of disability. Consequently, the Court has tended not to follow the administrative agencies on issues in which they have taken an inclusive view of elements of the definition. The Court has rejected the regulatory agencies' position on mitigating measures, questioned their stance on working as a major life activity, and adopted a more restrictive definition in lieu of the EEOC's definition of "substantial limitation." The Court has accepted the EEOC's position in creating a one-job-is-not-enough standard that serves to make it harder for potential ADA plaintiffs to establish they have a disability that entitles them to ADA protection.

The Supreme Court's questioning of the EEOC's authority to issue regulations for interpreting the definition of "disability" is quite obviously in the service of restricting the class of people who can bring employment discrimination claims under the ADA. Congress expressly delegated to the EEOC, DOJ, DOT, and FCC the responsibility to issue regulations for implementing the ADA; it is clear that the Congress did not intend, and had no reason to intend that, as the Court suggested, no agency was to have authority to issue regulations providing guidance on the meaning of disability. Based on the language and structure of the ADA, the federal regulatory agencies each came to the conclusion that they were authorized to issue regulations regarding the nuances of the definition of disability in the particular areas over which they were given jurisdiction; as far as I am aware, none of the myriad of legal commentators who have written about the ADA had ever suggested that they did not have such authority. The reasoning given for the Court's insinuations to the contrary is contrived and pedantic, and supported by nothing in the legislative history of the ADA. The only purpose served by denying the ADA-implementing agencies the authority to issue regulations interpreting disability would be to afford the Court more room to impose its own restrictive interpretations of

who is permitted to sue under the ADA, in direct opposition to Congress's statement that it was trying to eliminate discrimination on a "comprehensive" basis.

10. Should Congress be concerned with certain Supreme Court decisions questioning the constitutionality of titles I and II with respect to §12202 and the ADA's waiver of state immunity under the 11th Amendment?

Congress is surely entitled to be concerned about the Court's decisions relating to the constitutional authority of Congress to enact certain parts of the ADA, including § 12202 which declares that states shall not be immune under the 11th Amendment. Congress enacted the ADA to remedy discrimination that has limited the choices and opportunities of millions of Americans with disabilities. Congress had ample justification for concluding that discrimination by state and local governments was a serious problem that justified extending Titles I and II of the ADA to cover these entities and authorizing monetary damages in suits by private persons subjected to such discrimination. The language of the ADA states the legislation "invokes the sweep of congressional authority," specifically citing Congress's powers to enforce the Fourteenth Amendment and regulate interstate commerce.[193] Beginning with important civil rights legislation enacted in the 1960s, Congress has often used those two sources of authority to pass laws that protect people from discrimination at the hands of the government as well as private entities. Some decisions by the Supreme Court, however, have restricted the ability to bring suit for monetary damages against a state under the ADA, and have questioned the constitutional foundation of parts of Titles I and II.

The commerce clause was formerly an expansive source of congressional authority.[194] Prior to the 1996 decision in *Seminole Tribe of Florida v. Florida* decision,[195] Congress often used its power to regulate interstate commerce to abrogate the sovereign immunity of the states. After the Court severely limited the scope of this power, striking down some federal legislative schemes and requiring a more explicit link between the conduct being regulated and interstate commerce,[196] the Fourteenth Amendment has borne much of the weight of providing Congress's authority to create a regulatory scheme like the ADA, which seeks to regulate governmental and private action alike.

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193 42 U.S.C. § 12101(b)(4).

194 *See* Hodel v. Indiana, 452 U.S. 314 (1981). "A Court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Id.* at 323-24.

195 517 U.S. 44 (1996).

196 *See* U.S v. Morrison, 529 U.S. 598 (2000); U.S. v Lopez, 514 U.S. 549 (1995).

Section 5 of the Fourteenth Amendment gives Congress the power to enact "appropriate legislation" to enforce the provisions of the amendment.[197] The language of the Fourteenth Amendment states, in part, that "[n]o state shall…deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[198] This authority has been used to enact numerous civil rights laws. Through the 1990s, Congress was understood to possess the ability to abrogate the states' sovereign immunity to enforce Constitutional rights by prohibiting states from engaging in unfair discrimination against particular groups of people. Since 1997, however, the Supreme Court has questioned and limited this authority.[199]

In *Board of Trustees of the University of Alabama v. Garrett*,[200] the Supreme Court stripped state workers of the right to sue their employers for monetary damages for violations of Title I of the ADA. The Court held that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity to suits brought under the ADA's employment provisions. The decision has resulted in extensive litigation regarding who can be sued under the ADA, the types of remedies that are available, and the scope of Congress's authority to enact civil rights legislation.

In *Garrett,* the Supreme Court considered whether Title I of the ADA which addresses employment discrimination is enforceable against the states. Title I imposes requirements on public as well as private employers.[201] In the *Garrett* case, state employees sued Alabama for failing to make reasonable accommodations and allegedly subjecting them to discrimination on the basis of their disabilities. The Court ruled that in enacting this portion of the ADA, Congress did not have the power to abrogate the states' Eleventh Amendment sovereign immunity.[202] The majority engaged in a three-step analysis to reach this holding. First, the constitutional right in dispute must be identified. Secondly, the Court looks at the history to determine whether the state's behavior amounted to a constitutional violation. Finally, if the Court finds a pattern of

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197 U.S. CONST. amend. XIV § 5.

198 U.S. CONST. amend XIV § 1.

199 See *City of Boerne v. Flores*, 521 U.S. 507 (1997). It was in *Boerne* that the Supreme Court articulated the "congruence and proportionality test," holding that Congress must have identified a history of constitutional violations and its legislation must "exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end*." Id.* at *520. See also Kimel v. Florida Bd. of Regents,* 528 U.S. 62*, 91 (2000).*

200 Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).

201 42 U.S.C. § 12111(2).

202 *Garrett*, 531 U.S. at 372.

constitutional violations, it then determines whether the remedy put forth is "congruent and proportional" to the record of state misconduct.[203]

In applying these three analytical steps to the ADA provisions at issue in *Garrett*, the Court was generally dismissive of the congressional basis for enacting the ADA. It treated the constitutional right at issue as a fairly low-level one because it concluded, based on the *Cleburne* precedent, disability discrimination should only be subjected to "only the minimum 'rational-basis' review" – the lowest level of Equal Protection scrutiny. The Court's decision in *City of Cleburne v. Cleburne Living Center*[204] and the Court's failure to recognize the seriousness of disability discrimination in this country is discussed in the answer to Question 3 above. In *Garrett*, the Court declared, harshly, that "the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly-- and perhaps hardheartedly-- hold to job-qualification requirements which do not make allowance for the disabled."[205] The Court's dicta represents a simplistic view of the dynamics of discrimination on the basis of disability, a disregard for the critical role that (reasonable) "accommodations" play in achieving meaningful equality, and a lack of recognition that employers routinely make all kinds of accommodations for workers without disabilities (although they are not referred to as such).206 The Court was much closer to the mark in its decision in *U.S. Airways, Inc. v. Barnett*, when it declared that "'reasonable accommodations' … are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy."[207]

A central and largely distinctive feature of disability nondiscrimination law is the need for employers to make adjustments and modifications to the workplace and to policies, practices, and procedures that govern the structure and performance of jobs so that individuals with disabilities have a fair chance to do particular jobs. Examples as obvious as steps or narrow doorways for individuals who use wheelchairs or verbal instructions for individuals who are unable to hear demonstrate that treating a person with a disability exactly the same as other people may not be sufficient to provide "equal" treatment. The U.S. Commission on Civil Rights has declared that:

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203 *Id.* at 365-72.

204 City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

205 *Garrett*, 531 U.S. at 367-368.

206 I have written about these ideas elsewhere; *see* 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, 529-32 (1997). For a similar view, *see* Harlan Hahn, "Accommodation and the ADA: Unreasonable Bias or Biased Reasoning?" 21 *Berkeley Journal of Employment and Labor Law* 166, 189-90 (2000).

207 535 U.S. 391, 398 (2002).

> [d]iscrimination against [people with disabilities] cannot be eliminated if programs, activities, and tasks are always structured in the ways people with "normal" physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to permit [people with disabilities] to participate fully have been broadly termed "reasonable accommodation."[208]

Making reasonable accommodations is a vital element of not discriminating on the basis of disability, and is central to the elimination of unfair and unnecessary unequal treatment that is the ADA's core objective.

In its decision in *Garrett*, the Court was also quite dismissive of the evidence that Congress had relied upon in enacting the relevant provisions of the ADA, declaring that the legislative history contained only "minimal evidence of unconstitutional state discrimination in employment against the disabled."[209] Of a massive appendix of materials compiled by the and the congressionally appointed Task Force on the Rights and Empowerment of Americans with Disabilities that Justice Breyer attached to his dissenting opinion and of which the majority admitted "somewhere around 50 of these allegations describe conduct that could conceivably amount to constitutional violations by the States,"[210] the Court complained that the material "consists not of legislative findings, but of unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials.'"[211] To anyone familiar with the work done by the Task Force on the Rights and Empowerment of Americans with Disabilities, the Court's discounting and disparaging of the volumes of information gathered in 63 public hearings across the country was quite surprising. It is noteworthy that, at the time the ADA was enacted, the leading decisions of the High Court did not even require Congress to make legislative findings supporting its authority to legislate, particularly in regard to civil rights legislation.[212] In the ADA, Congress made extensive and strong findings regarding the pervasiveness and seriousness of discrimination on the basis of disability, some of which were discussed in the answer to Question 3 above.

The Court went on to say that, even if there were a pattern of employment discrimination by the states, the ADA was not a congruent and proportional remedy, that is, the discriminatory conduct by states was not so bad as to justify the requirements of the ADA.[213]

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208 *Accommodating the Spectrum* at 102. The currently preferred terminology "people with disabilities" is substituted for the phrasing "handicapped people" in the original.

209 *Garrett*, 531 U.S. at 370.

210 *Id.* at 371 n. 7.

211 *Id.* at 370.

212 See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252 (1964) (Court upheld public accommodation provisions of Civil Rights Act of 1964 despite the absence of any congressional findings).

213 *Garrett*, 531 U.S. at 372-374.

The most direct impact of *Garrett* has been limiting or curtailing the ability of state employees to sue their employers for money damages under Title I of the ADA. While individuals employed by private employers may still seek money damages, individuals who are discriminated against on the basis of disability and happen to be employed by the state (whether a state university, a state hospital, or a state governmental agency) can no longer seek compensation under the ADA for the harm they have suffered.[214]

Garrett pulled the rug out from under dozens of ADA Title I cases pending against state employers at the time the Supreme Court decision came down. For example, Robert Robison, a former correctional officer, sued his employer, the Nevada Department of Prisons (NDOP), after it terminated him because of a back injury.[215] A jury found the NDOP liable and, in 1999, awarded Robison $200,000 in compensatory damages and $248,000 in future lost wages. The district court also awarded Robison $140,000 in back pay.[216] The state appealed. In light of *Garrett*, the Ninth Circuit vacated the damage awards and ordered that the case be dismissed.[217] Because the statute of limitations under state law had already run, Robison was left with no compensation for the discrimination he had suffered.[218]

While the decision in *Garrett* was limited to the ADA's employment provisions (Title I), the Court's analysis raised the issue of whether Congress had the authority to abrogate the states' immunity under Title II of the ADA, which prohibits state and local governments from discriminating against individuals with disabilities in the provision of government programs, services, or activities. Two cases, *Tennessee v. Lane*,[219] and *United States v.*

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214 Of course, at least until recently, state employees could still seek damages under Section 504 of the Rehabilitation Act if the employer was a recipient of federal financial assistance. The issue of whether states have validly waived their immunity under Section 504, however, has also been the subject of significant litigation. *See, e.g., Koslow v. Pennsylvania*, 302 F.3d 161 (3rd Cir. 2002); *Garcia v. S.U.N.Y. Health Science Center of Brooklyn*, 280 F.3d 9 (2nd Cir. 2001); *Nihiser v. Ohio Envt'l Protection Agency*, 269 F.3d 626 (6th Cir. 2001); *Jim C. v. United States,* 235 F.3d 1079 (8th Cir. 2000), *cert. denied sub nom., Ark. Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000).

215 *Robison v. State of Nevada*, 2001 WL 474493 (9th Cir. 2001).

216 *Id.*

217 *Id.*

218 *See also, e.g., Acevedo Lopez v. Police Dep't of Puerto Rico*, 247 F.3d 26 (1st Cir. 2001)(dismissing suit against Puerto Rico police department for failure to accommodate employee with back injuries); *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626 (6th Cir. 2001) (dismissing ADA employment suit against state environmental protection agency, but allowing suit to proceed under the Rehabilitation Act); *Demshki v. Monteith*, 255 F3d 986 (9th Cir. 2001) (dismissing retaliation suit-brought by individual who had advocated for campaign worker with speech impediment and who was fired as a result-against California Senate Rules Committee); *Randall v. Oklahoma*, 2001 WL 830331 (10th Cir. 2001) (dismissing ADA employment suit against state agency).

219 541 U.S. 509 (2004).

Georgia,[220] clarified that Congress did have the ability to abrogate state sovereign immunity within certain narrowly defined circumstances. These decisions, however, leave open the question regarding how far Congress's ability to apply the provisions of the ADA to states extends.

Tennessee v. Lane[221] raised questions regarding the authority of Congress to place certain obligations on states and state entities under Title II and to authorize monetary damages when they fail to comply with these obligations. The plaintiffs in *Lane* sued Tennessee under Title II of the ADA for failing to ensure that courthouses are accessible to individuals with disabilities. The Supreme upheld provisions of Title II of the ADA as applied to the right of access to the courts. The Court in *Lane* found that individuals could sue states for money damages for denial of access to courthouses. In *Lane*, the Court concluded that Title II of the ADA was a congruent and proportional response to the "long history" of "unequal treatment of disabled persons in the administration of judicial services" that had "persisted despite several legislative efforts to remedy the problem of disability discrimination."[222] The ruling in *Lane* did not question whether Congress' authority to enact ADA Title II at all, as some had feared. Though it avoided broadly stripping Congress of its authority in this way, the decision does not settle the questions regarding Congress' authority to abrogate the state's immunity and enforce the ADA (as well as other civil rights statutes) under a different set of facts, specifically, in Title II circumstances such as participation in public programs or activities including social service programs, educational programs, public transportation, or the political process itself.

In *United States v. Georgia,*[223] the Court found that Congress has the authority to apply the Americans with Disabilities Act (ADA) to state prisons, at least insofar as it reaches conduct that could also be challenged under the Fourteenth Amendment.[224] Though this holding was a victory for the plaintiff, the Court stopped short of finding that Congress, in enacting the ADA, validly abrogated states' immunity under Title II for all claims relating to prisons. This situation leaves the question open regarding Congress's authority regarding other types of Title II Claims. ADA Plaintiffs find they have to

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220 546 U.S. 151 (2006).

221 541 U.S. 509 (2004).

222 Lane, 541 U.S. at 531.

223 546 U.S. 151 (2006).

224 The Plaintiff alleged that he was "confined for 23-to-24 hours per day in a 12-by-3-foot cell in which he could not turn his wheelchair around. He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied. On multiple occasions, he asserted, he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own, and, on several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste. He also claimed that he had been denied physical therapy and medical treatment, and denied access to virtually all prison programs and services on account of his disability." 546 U. S. 151 (2006).

litigate the constitutionality issue in all kinds of Title II cases, including those involving access to higher education,[225] public transportation,[226] home and community-based services,[227] and a state fair.[228] Title II of the ADA guarantees access for people with disabilities to critical state programs and services such as public transportation, education, vocational rehabilitation services, access to public rights-of-way, and health care -- programs and services that enable people to live independent and productive lives. Without access to such state services, many people with disabilities would never have the opportunity to work, receive an education, worship, obtain health care, shop, etc. Any ruling from the Supreme Court that strikes down parts of Title II as unconstitutional would have serious negative consequences for people with disabilities, in the direction of a return to segregation, isolation, and dependency. Some have argued that such concerns overstate the problem because individuals could still file suits for injunctive relief. However, it is now more difficult for plaintiffs to pursue injunctive relief because of the Supreme Court's decisions restricting the damages that can be sought by ADA plaintiffs making it difficult or impossible for aggrieved individuals with disabilities to find the necessary legal assistance to pursue injunctive relief. Moreover, suits against states for injunctive relief are procedurally very technical[229] and can be difficult and costly to pursue.[230]

In any event, congressional concern is clearly warranted over the Supreme Court's narrowing of congressional prerogatives and challenging the legitimacy of major social legislation based on new and restrictive standards that were not in place, and indeed not even envisioned as a possibility, at the time the ADA was enacted. In 1990, there was no legal precedent suggesting that the ADA was not amply supported by the congressional fact-finding, indeed some 25 years of methodical congressional study,[231] nor that the legislation was not on a very sound constitutional footing. As NCD declared in *Righting the ADA*, "The will of Americans, reflected in congressional and presidential actions, is being frustrated by the courts in regard to the Americans with Disabilities Act."[232]

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225 *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006).

226 *Disability Rights Council of Greater Washington v. Washington Metro. Area Transit Auth.*, Civil Action No. 04-00498 HHK (D.D.C. 2006).

227 *Bill M. v. Neb. Dep't of Health & Human Servs. Fin. & Support*, 408 F.3d 1096 (8th cir. 2005).

228 *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003).

229 *See e.g.* McMiller v. Board of Trustees of University of Illinois, WL 21842192 (D.Ill, 2003).

230 National Council on Disability, *Americans with Disabilities Act Policy Brief Series: Righting the ADA--No. 8, The Implications of the Supreme Court's Decision in Board of Trustees of the University of Alabama v. Garrett* found at www.ncd.gov/newsroom/publications/policybrief.html

231 See National Council on Disability, *Americans with Disabilities Act Policy Brief Series: Righting the ADA--No. 2,* A *Carefully Constructed Law* found at www.ncd.gov/newsroom/publications/policybrief.html

232 *Righting the ADA* at 29.

For more information regarding the *Garrett* decision and its implications as well as the larger economic and social issues it raises, please see *The Implications of the Supreme Court's Decision in Board of Trustees of the University of Alabama v. Garrett*, paper No. 8 of NCD's *Policy Brief Series: Righting the ADA Papers*, at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm.

NCD's *Amicus Curiae* brief in the *Garrett* case can be found at http://www.ncd.gov/newsroom/publications/2002/chevron_amicus.htm.

Tennessee v. Lane: The Legal Issues and the Implications for People with Disabilities can be found at http://www.ncd.gov/newsroom/publications/2003/legalissues.htm.

NCD's paper, *Goodman and United States v. Georgia: The Supreme Court Hears Another Case Challenging the Constitutionality of Title II of the Americans with Disabilities Act* is available at http://www.ncd.gov/newsroom/publications/2005/goodman.htm.

For additional information, please see *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities,* No. 7 in NCD's ADA Policy Brief Series, at http://www.ncd.gov/newsroom/publications/2003/decisionsimpact.htm.

11. What recommendations would you make to Congress to address the problematic Supreme Court decisions that have been described in the questions above? Are there other recommendations that you would make to Congress apart from those addressing Supreme Court decisions?

A. RECOMMENDATIONS REGARDING PROBLEMATIC SUPREME COURT DECISIONS

The focus of NCD's *Righting the ADA* project was to analyze the problems resulting from the Supreme Court's ADA decisions, and to develop, in consultation with ADA stakeholders, recommendations for remedying the harmful results of such decisions and to get the ADA back on course – the course that NCD had originally mapped out when it proposed the ADA and that Congress had written into law in passing it. NCD went at the task methodically, issuing analyses of the various decisions and their implications, producing topic papers on the particular problems the rulings raised, getting the perspectives of ADA stakeholders, developing and getting feedback on possible approaches for corrective actions, and crafting particular legislative proposals. Ultimately, NCD pulled the various legislative pieces together into a unified draft bill that it called "The ADA Restoration Act." The culmination of all that work was the publication of the *Righting the ADA* report, which presented background information about the enactment of the ADA, described successes and shortcomings of its implementation, identified the major problems that have resulted from some of the Supreme Court's interpretations of it, explained the harm that these problematic rulings have had on ADA plaintiffs and people with disabilities generally, offered proposed

legislative language for addressing the particular problems identified, and, finally, presented NCD's proposed ADA Restoration Act.

Since I have worked very closely with NCD on the *Righting the ADA* initiative and had the honor of writing the final report for the Council, it is not very surprising that I believe very much in the approach in the report as approved by the members of the Council. Accordingly, my answer to your question regarding my recommendations to Congress to address the problematic Supreme Court ADA decisions is direct and short: I recommend that Congress take the analysis and proposals contained in the *Righting the ADA* report to heart and enact NCD's ADA Restoration Act into law.

B. OTHER RECOMMENDATIONS

Apart from recommendations growing out of the key problematic ADA decisions of the Supreme Court, other problems under the ADA have arisen from other sources, including the lower courts and enforcement and advocacy efforts. Over the years since the ADA was enacted, NCD has issued numerous reports documenting troubling issues and making recommendations to the Congress and Administration for addressing them. I would urge the Congress to review these reports and to heed NCD's counsel and recommendations. I would also advise that a systematic and wide-ranging study be undertaken to identify problems that are arising from ADA decisions by the lower courts. I am aware, for example, that, despite the Supreme Court's somewhat ameliorative approach in its decision in *Cleveland v. Policy Management Systems Corp.*,[233] the lower courts have continued to treat applying for or receiving disability benefits as tantamount to not being "qualified" to work under the ADA – as far as I am concerned, a completely inappropriate confounding of standards having sharply different contexts and purposes, as even the EEOC and Social Security Administration have admitted.[234] This problem has forced people who have lost their jobs because of disability discrimination to make a Hobson's choice between benefits programs that can afford them money for basic necessities and pursuing their ADA rights. I would like to see the Congress address such problematic lines of cases that have made the ADA less efficacious than we all hoped and expected when the ADA was signed into law.

Another problem that was touched on at the Subcommittee Hearing relates to the sparsity of remedies under Titles II and III. In addition to addressing the limitations of remedies resulting from the *Buckhannon* and *Barnes v. Gorman* decisions discussed above, Congress should also consider beefing up the remedies available in Title II and Title III cases in other ways, so that prevailing plaintiffs with disabilities would have the full scope of potential remedies available in other types of civil cases, including compensatory damages and punitive damages (in egregious cases), various forms of injunctive relief, attorney and witness fees, and other costs of litigation. In my oral

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233 526 U.S. 795 (1999).

234 I have written in some detail about this problem; see Robert L. Burgdorf Jr., *Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 489-506; 554-559; 575-580 (1997).

testimony at the hearing, I also suggested that Congress should consider authorizing civil penalties for violations of Titles II and III. If a customer is denied service or entry at a public accommodation or a government facility on the basis of disability, compensatory damages will usually be nominal at best, so there will be very little incentive for the shopowner or agency personnel to avoid future misconduct of the same kind. A civil penalty would operate somewhat like a fine to punish the wrongdoer and to provide an automatic compensation for the inconvenience and embarrassment the victim of discrimination experienced.

To improve the enforcement of the ADA, to ensure adequate representation for people who encounter disability discrimination, and to educate covered entities to ensure better compliance, I urge Congress to make more resources available for enforcement, advocacy, and education related to the ADA.

The suggestions presented in this section represent only a few additional ideas. The focus of the *Righting the ADA* effort was on the most significant negative ADA decisions of the Supreme Court. It would be great to devote additional time to working with NCD and ADA stakeholders to identify other serious problems that hamper the effectiveness of the Act.

12. One issue that has been brought to the Committee's attention is that of multiple accommodation requests made by an employee of an employer, which if considered separately, would seem reasonable to implement. However, these multiple accommodation requests, when consider as a whole, may impose increased burdens on an employer.

How did Congress intend for an employer to treat an employee who, for example, alleges physical symptoms that result from allergens in the office and requests that the employer employ all of the following to accommodate the disability: move her, institute a fragrance-free policy, and hire professional cleaners to clean the office rugs, furniture, and curtains? At what point did Congress believe that an otherwise reasonable request(s) would become an undue burden on an employer?

I believe that these problems are more theoretical than real; in the rare instance in which such circumstances might occur, the ADA's "undue hardship" limitation is more than adequate to protect employers. If a series of accommodations is necessary to enable a worker with a disability to enjoy equal employment opportunities, then the employer is obligated to make these accommodations up to the undue hardship limit. If, say, five effective and reasonable accommodations can be made without posing an undue hardship, then the employer should be required to make them. If combining these five with a sixth would together result in undue hardship, then the employer would not be required to make the sixth accommodation at that time. At a later time, however, the

sixth accommodation might be made and not result in undue hardship on the employer; thus, it will often be possible to "phase-in" a series of accommodations.

In its regulations and regulatory guidance, the EEOC has delineated a process for determining an appropriate accommodation, which involves (1) initial discussions between the employer and the employee or applicant, (2) analysis of the particular job involved to determine its purpose and essential functions, (3) consultation with the individual with a disability to identify job-related limitations and how those limitations could be overcome with a reasonable accommodation, (4) identification of potential accommodations and assessment of the effectiveness each would have, and (5) selection and implementation of the accommodation that is most appropriate for both the employee and the employer considering the preference of the individual to be accommodated.[235] The courts have recognized this requirement and commonly refer to it as the "interactive process" for determining reasonable accommodation.[236] Through the give-and-take of such an interactive process, the employer and employee should ordinarily be able to work out a satisfactory approach for making effective accommodations needed by the employee without exceeding the undue hardship limit.

Regarding your question about the specified accommodations for a person with chemical sensitivities, the EEOC's *Technical Assistance Manual* indicates that, where an employee's need for accommodation is not obvious, an employer "may request documentation of the individual's functional limitations to support the request [for an accommodation]."[237] Once the limitation necessitating the accommodation has been demonstrated, the employer should proceed, through the interactive process, to determine and implement the appropriate accommodations. The selection of accommodations can take into account the possibility of too many accommodations at a particular time resulting in an undue hardship on the employer. Based on the facts about the accommodations described in the question, the several accommodations requested do not seem to be particularly difficult or costly ones for the employer to provide in toto.

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235 29 C.F.R. pt. 1630 app. (commentary on 1630.9).

236 See, e.g., *Shapiro v. Township of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997); *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998); *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996); *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 951-54 (8th Cir. 1999); *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171-72 (10th Cir. 1999) (*en banc*).

237 EEOC, *Technical Assistance Manual on the Employment Porvisions (Title I) of the Americans with Disabilities Act* (1992) § 3.6, p. III-8.