S. HRG. 110–991

ROUNDTABLE DISCUSSION: DETERMINING THE PROPER SCOPE OF COVERAGE FOR THE AMERICANS WITH DISABILITIES ACT

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

EXAMINING THE AMERICANS WITH DISABILITIES ACT (PUBLIC LAW 101–336), FOCUSING ON WAYS TO DETERMINE THE PROPER SCOPE OF ITS COVERAGE

JULY 15, 2008

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C O N T E N T S

STATEMENTS

TUESDAY, JULY 15, 2008

ADDITIONAL MATERIAL

ROUNDTABLE DISCUSSION: DETERMINING THE PROPER SCOPE OF COVERAGE FOR THE AMERICANS WITH DISABILITIES ACT

TUESDAY, JULY 15, 2008

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington DC.

The committee met, pursuant to notice, at 10:00 a.m., in Room SD–106, Dirksen Senate Office Building, Hon. Tom Harkin, presiding.

Present: Senators Harkin, Murray, Enzi, Hatch, and Roberts.

OPENING STATEMENT OF SENATOR HARKIN

Senator HARKIN. The roundtable in the Committee on Health, Education, Labor, and Pensions will come to order.

Good morning, and I welcome everyone to our second hearing on the widespread problem of individuals with disabilities being denied protection under the Americans with Disabilities Act of July 26, 1990.

Back in November we had an excellent hearing to examine the U.S. Supreme Court rulings that have limited the scope of the ADA, contrary, I believe, to the clear intent of Congress when we passed the law 18 years ago this month. These rulings have led to the current unacceptable situation where people, who by any common sense standard have disabilities, including people with amputated limbs, intellectual disabilities, epilepsy, or cancer are not covered by the Americans with Disabilities Act. I have a chart here, and it shows, on the left, covered in the Rehab Act of 1973 and also the ADA of 1990, amputation, epilepsy, muscular dystrophy, diabetes, all of those. Under the ADA today, those same ones are not a disability. So that's what has happened with these U.S. Supreme Court decisions.

In the November hearing we reached consensus on a need to address this in a very robust way and I am very pleased that a number of very prominent employer organizations took this to heart. They have devoted a lot of time and effort and good faith to negotiate compromised legislation for groups advocating disability rights. I want to commend these negotiators publicly for putting an enormous amount of thought and effort into the bill that recently passed in the House by an overwhelming majority.

At the same time I want to caution supporters of the House bill that in the Senate serious procedural and substantive concerns have been raised with that bill.

While we welcome the expertise and insights of advocates on both sides, it is the role of the Senate to write the legislation to pass in this body, and that's what we will be doing now. Today's forum is designed to give members of this committee an opportunity to air their concerns with the bill passed by the House and to allow organizations not included in the negotiations, but nonetheless subject to the ADA, to fully express their concerns about the House version.

I want us to work in a cooperative bipartisan fashion. Following today's hearing I want to work quickly to produce a Senate bill that gets the job done by returning the protections of the ADA to all individuals with disabilities. Our aim is to craft the best possible fix, one that could win broad support here in the Senate, and among those impacted by the law.

Let me be clear: The ADA is a broad civil rights statute that is intended to provide protection to all individuals with disabilities in the workplace, in schools, across the entire spectrum of our society, and that is not going to change.

I look forward to hearing the viewpoints of all participants this morning. I look forward to working with all of you to restore the full promise of the ADA—equality of opportunity, full participation, independent living and economic self-sufficiency.

Let me just mention a few words about today's format. It's a hearing roundtable. Our intent is to be less formal than a usual hearing. It will be on the record. After we hear from Senator Enzi we will offer the panel the opportunity to speak for a few minutes. We have your written testimony and that will be made a part of the record. There are a lot of participants here and I would rather have an open discussion back and forth rather than just sitting here and listening to formal statements; and, by the way, we have a vote at 11 o'clock which I had not anticipated.

Following these introductions, I will ask a question of the panelists and other witnesses can join in the discussion. Other Senators can intervene as they see fit to ask questions or to make points.

Again, I ask you to keep your answers brief, to the point, and be respectful of your fellow witnesses. With that I will turn to our Ranking Member, Senator Enzi.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you for holding this very important roundtable on the ADA Amendment Act; and, I appreciate the fact that you are going through the usual Senate process. I have noted that almost every bill that passes the U.S. Senate goes through this process and those that avoid it appear to be kind of pushing on the edge of something and often result in a lot of debate and not much progress. So I appreciate you taking this approach.

I learned about process on my very first bill in the Wyoming State legislature. I was working what I thought was a very simple issue, a little three-sentence bill on unemployment. And when it went to the committee in the House it got three amendments. When it went to the House floor it got two more amendments. Then, it went through the Senate and got two more amendments in the committee. What I noted through this whole process was that every one of those amendments improved the bill. That's why

we have 535 people in Congress—the purpose is to get as many viewpoints as possible.

I've also noted that in any hearing I have ever done and roundtable that I have ever done, there's always been someone in the audience who knew where the loop holes were but didn't share it until after they had taken advantage of it. I would hope that wouldn't be the case, but I notice that it usually is. But I also appreciate you doing this roundtable format. It's something we started doing about 3 years ago and we found it gets a lot more information out than the standard hearing.

With a standard hearing, the chairman would get to pick all the participants except for one, I would get to pick the other one. Then both sides would show up and ask tough, really clever questions. And instead of tough, clever questions, what we want is your viewpoint and your interaction with the other people who also have viewpoints because you are the experts that we've invited to do this, and everybody that has been invited has been invited from both sides, not just from one side.

So we recognize you as experts and count on you for a lot of information that will make sure that we are getting it right.

The Americans with Disabilities Act was signed into law 18 years ago by President George Herbert Walker Bush after a tremendous amount of bipartisan negotiation. Many of our fellow committee members, Senator Hatch, Senator Harkin, and Senator Kennedy were among those who played critical roles in that achievement. Today we are taking steps that would re-fashion the ADA, the bill would change the defined terms that were negotiated in 1990 and cede the responsibility of defining those terms to the courts.

Although the impetus of this legislation may be to re-direct judicial interpretations of the ADA, some of today's participants will point out consequences in the legislation that are broader and may not have been fully considered.

We have several members of the education community here today to explain how the bill would alter their current policies, practices and budgets with regards to students with disabilities. As Senators on the committee with jurisdiction over education, we have a special obligation to listen to those concerns.

This is a very important piece of legislation that will impact millions of Americans. We owe all of those workers, businesses, educators, students and others careful consideration of the implications of this bill. That's our job as legislators and that's why the committee process is so important.

There is no doubt that the ADA has improved the lives of people living with disabilities, but it also benefits all of society because it allows the talents and abilities of many more people to be shared.

However, I have been concerned for sometime that the employment rate for Americans with disabilities is not as high as it should or could be, and I want to remind everybody here today that the ADA is not the simple solution to this problem.

I have been working to revitalize the Federal employment and training programs for persons with significant disabilities and recently re-introduced the Javits-Wagner-O'Day and Randolph-Sheppard Modernization Act of 2008. The bill would create much

more flexibility to provide real job training and real skill development so persons with disabilities can develop marketable skills and make meaningful career choices.

I'm glad to see the hard work and consensus building that has gone on with respect to the ADA bill, and I would like to see the same focus applied to other legislation which could make significant strides towards improving the employment rates for people with disabilities.

I appreciate you holding this hearing and I appreciate your using the roundtable format. I think it will give us a lot of information and we ought to get on with that.

Senator HARKIN. Thank you very much Senator Enzi.

Senator Hatch.

STATEMENT OF SENATOR HATCH

Senator HATCH. Well, thank you, Mr. Chairman, I won't say much. I am very interested in this. I want to compliment the Chairman for being a profound leader in this matter, back when we passed the original bill. I intend to help him as much as I can.

There have been some issues that have been raised that I think must be looked at. I will be doing everything I can to try and help resolve some of these issues and I hope the distinguished Chairman would like to work with me on these, because I would like to link arms again. I feel very deeply about the disability community and about persons who suffer from disabilities, and I do think there are times when the U.S. Supreme Court has narrowed the definition more than it needed to do. I will be working with the Chairman and hopefully we can come to a conclusion that will bring everybody together in this Congress.

If we don't resolve some of these problems then I think it will be very difficult to pass this bill this year. And I intend to see that we resolve them. I know my friend from Iowa and certainly my friend from Wyoming will work diligently with me and others to try and do so. Thank you, sir.

Senator HARKIN. Thank you, Senator Hatch. That brings back a lot of fond memories of our work together in the 1980's on this bill.

Senator HATCH. Sure does.

Senator HARKIN. We did a lot of work together at that time. A lot of people were involved in that. But you remember the long roads we went down. I mean where we started and the give and take over about a 4-year period of time, but we finally got a bill, that as you pointed out, brought broad consensus and that's the best way to do things.

Senator HATCH. Mr. Chairman, I would like to just add, I think the House has really tried to do what is right here. I think they deserve a lot of credit. There are some issues that have been raised that still deserve some consideration. I think unless we resolve some of those issues it is going to be very difficult to do what you and I know needs to be done.

Senator HARKIN. That's the legislative process.

Senator HATCH. You bet.

Senator HARKIN. We'll get it done.

Senator Murray.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. I am sorry for being late. I don't want to delay getting to our witnesses. Let me say for the record, I really appreciate the tremendous work you have done over the years for the disability community. I think we are a great country. We are a great country if every individual has the opportunity to go to work and be who they can be. We have an obligation as the government to ensure that that opportunity is there and that's your goal and I share that with you and I look forward to hearing from the witnesses. We need to make sure, with the court decisions that we have seen occurring over the years, that we do make the right decisions so that individuals with disabilities can feel they can contribute and be protected by our laws.

Senator HARKIN. Thank you very much, Senator Murray.

We will take a couple minutes and go around. We will start with Professor Feldblum and take a couple of minutes or so and then Mr. McClure and then continue in that order.

We have a vote at 11 o'clock and I apologize. There is nothing we can do about that. We may come back after that, depending upon where we are at that point of time. All of your statements will be made a part of the record in their entirety. I just ask you to speak for a couple of minutes and then let's open it up for panel discussion.

Professor Feldblum.

STATEMENT OF CHAI FELDBLUM, PROFESSOR, FEDERAL LEGISLATION CLINIC, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Ms. FELDBLUM. Thank you, Senator Harkin, Senator Enzi, Senator Hatch, Senator Murray. Exactly 8 months ago I testified before this committee in support of S. 1881, the Americans with Disabilities Restoration Act, as originally introduced. In both my written and oral testimony and in several exchanges with you Senator Harkin during that hearing, I defended the broad terms of that bill as reflecting congressional intent during passage of the ADA and as appropriate public policy. I continue to stand by those positions.

However, I also believe that the ADA Amendments Act of 2008 as passed by the House last month represents a legitimate and fair compromise between the interests of people with disabilities and the interests of other entities under the law.

To meet the needs of entities covered under the law, an impairment must substantially limit a major life activity as was put in the original ADA and as was not the case in S. 1881. To meet the needs of people with disabilities, mitigating measures are explicitly not to be taken into account in determining whether an impairment substantially limits a major life activity and the courts strict reading of that critical term "substantially limit" is explicitly rejected.

While the cases that narrowed the definition of disability arose in the employment context, as a legal matter those narrow standards apply across the board to all entities covered under the law. For that reason, any modification to the definition must equally apply to and be workable for all entities covered under the law.

I believe that the ADA Amendments Act before you today does exactly that. Thank you, and I look forward to the exchange.

[The prepared statement of Ms. Feldblum follows:]

PREPARED STATEMENT OF CHAI R. FELDBLUM

Mr. Chairman and members of the committee, I am pleased to testify before you today on the Americans with Disabilities Act (ADA). My name is Chai Feldblum, and I am a Professor of Law and Director of the Federal Legislation Clinic at Georgetown University Law Center.

The lawyers and students at the Federal Legislation Clinic have provided *pro bono* legislative lawyering services to the Epilepsy Foundation over the past 2 years in support of its efforts to advance the ADA Restoration Act. Today, however, I am testifying on my own behalf as an expert on the ADA.

From 1988 to 1990, while working for the American Civil Liberties Union, I served as one of the lead legal advisors to the disability and civil rights communities in the drafting and negotiating of the ADA. From January 2008 until now, I have been actively involved in discussions between representatives of the disability and business communities on S. 1881 and H.R. 3195, the ADA Restoration Acts as introduced, to consider changes that would enable members of the business community to support those bills.

In this submitted testimony, I provide a brief overview of the bipartisan support that propelled passage of the ADA in 1990, describe how Congress discussed the definition of disability in the ADA in its committee reports, and explain how the U.S. Supreme Court narrowed that definition of disability. I then describe the ADA Amendments Act as passed by the House of Representatives in June 2008; the obligations of employers under the House-passed bill as compared to current law; and whether the standard for determining whether an individual is "disabled" should be more clearly defined than it is in the House-passed bill. While other witnesses will address the implications of the House-passed bill for schools and universities in their written testimony, I am happy to answer any questions on those issues.

I. THE BI-PARTISAN ENACTMENT OF THE ADA

A first version of the ADA was introduced in April 1988 by Senators Lowell Weicker and Tom Harkin and 12 other cosponsors in the Senate, and by Congressman Tony Coelho and 45 cosponsors in the House of Representatives.[1] In May 1989, a second version of the ADA was introduced by Senators Tom Harkin, Edward Kennedy, Robert Dole, Orrin Hatch and 30 cosponsors in the Senate, and by Congressman Steny Hoyer and 45 cosponsors in the House of Representatives.[2] This version of the bill was the result of extensive discussions with a wide range of interested parties, including members of the disability community, the business community, and the first Bush administration.[3]

Negotiations on the ADA continued within each committee that reviewed the bill and, in each case, the negotiations resulted in broad, bipartisan support of the legislation. The Senate Committee on Labor and Human Resources favorably reported the bill by a vote of 16–0[4]; the House Committee on Education and Labor favorably reported the bill by a vote of 35–0[5]; the House Committee on Energy and Commerce favorably reported the bill by a vote of 40–3[6]; the House Committee on Public Works and Transportation favorably reported the bill by a vote of 45–5[7]; and the House Committee on the Judiciary favorably reported the bill by a vote of 32–3.[8]

After being reported out of the various committees, the ADA passed the Senate by a vote of 76–8 in September 1989 and the House of Representatives by a vote

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[1] H.R. 4498, 100th Cong., 2d Sess., 134 CONG. REC. H2757 (daily ed. Apr. 29, 1988) (introduction of H.R. 4498); S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5089 (daily ed. Apr. 28, 1988) (introduction of S. 2345).

[2] H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. H1791 (daily ed. May 9, 1989); S. 933, 101st Cong., 1st Sess., 135 CONG. REC. S4984–98 (daily ed. May 9, 1989).

[3] *See* Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMPLE LAW REVIEW 521, 521–532 (1991) (providing a brief overview of passage of the ADA, including a brief description of the various stages of negotiation on the bill).

[4] S. Rep. No. 101–116 at 1 (1989).

[5] H.R. Rep. No. 101–485, pt. 2, at 50 (1990).

[6] H.R. Rep. No. 101–485, pt. 4, at 29 (1990).

[7] H.R. Rep. No. 101–485, pt. 1, at 52 (1990).

[8] H.R. Rep. No. 101–485, pt. 3, at 25 (1990).

of 403–20 in May 1990.[9] Both Houses of Congress subsequently passed the conference report by large margins as well: 91–6 in the Senate and 377–28 in the House of Representatives.[10]

On July 26, 1990, President George H.W. Bush signed the ADA into law, stating:

> "[N]ow I sign legislation which takes a sledgehammer to [a] . . . wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but could not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America."[11]

Standing together, leaders from both parties described the ADA as "historic," "landmark," and an "emancipation proclamation for people with disabilities."[12]

The purpose of the original legislation was to "provide a clear and comprehensive national mandate for the elimination of discrimination" on the basis of disability, and "to provide clear, strong, consistent, enforceable standards" for addressing such discrimination.[13] It was Congress' hope and intention that people with disabilities would be protected from discrimination in the same manner as those who had experienced discrimination on the basis of race, color, sex, national origin, religion, or age.[14]

But that did not happen. In recent years, the U.S. Supreme Court has restricted the reach of the ADA's protections by narrowly construing the definition of disability contrary to congressional intent. As a result, people with a wide range of impairments whom Congress intended to protect, including people with cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, post-traumatic stress disorder (PTSD), and many other impairments, are routinely found not to be "disabled" and therefore not covered by the ADA.

As demonstrated by the legislative history of the ADA, Congress never intended the law's definition to be interpreted in such a restrictive fashion.

II. CONGRESSIONAL INTENT BEHIND THE ADA'S DEFINITION OF DISABILITY

When writing the ADA that was introduced in 1989, Congress borrowed the definition of "disability" from Sections 501, 503 and 504 of the Rehabilitation Act of 1973, a predecessor civil rights statute for people with disabilities that covered the Federal Government, Federal contractors, and recipients of Federal financial assistance. For purposes of Title V of the Rehabilitation Act, "handicap" was defined as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.[15]

For 15 years, the courts had interpreted this definition to cover a wide range of physical and mental impairments, including epilepsy, diabetes, intellectual and developmental disabilities, multiple sclerosis, PTSD, and HIV infection.[16] Indeed, in

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[9] 135 CONG. REC. S10803 (daily ed. Sept. 7, 1989); 136 CONG. REC. H2638 (daily ed. May 22, 1990).

[10] 136 CONG. REC. S9695 (daily ed. July 13, 1990); 136 CONG. REC. H4629 (daily ed. July 12, 1990).

[11] Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), *available at http://www.eeoc.gov/ada/bushspeech.html*.

[12] According to President George H.W. Bush, the ADA was a "landmark" law, an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities." *See id.* Senator Orrin G. Hatch declared that the ADA was "historic legislation" demonstrating that "in this great country of freedom, . . . we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society." Senator Edward M. Kennedy called the ADA a "bill of rights" and "emancipation proclamation" for people with disabilities. *See* National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper* (October 16, 2002), available at *http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm*.

[13] *See* Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

[14] 42 U.S.C. § 12101 (a), (b).

[15] 29 U.S.C. § 705(20)(B) (2007); *See* Americans with Disabilities Act, 42 U.S.C. § 12101(2) (2007). At the time the ADA was being drafted, section 504 used the term "handicap" rather than "disability." Section 504 has since been amended to use the term "disability." The definition of "handicap" under section 504 and of "disability" under the ADA is identical.

[16] *See, e.g.*, Local 1812, *Am. Fed'n. of Gov't Employees* v. *U.S.*, 662 F. Supp. 50, 54 (D.D.C. 1987) (person with HIV disabled); Reynolds v. Brock, 815 F.2d 571, 573 (9th Cir. 1987) (person with epilepsy disabled); *Flowers* v. *Webb*, 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983) (person with intellectual and developmental disabilities disabled); *Schmidt* v. *Bell*, No. 82–1758, 1983 WL 631, at *10 (E.D. Pa. Sept. 9, 1983) (person with PTSD disabled); *Bentivegna* v. *U.S. Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) (person with diabetes disabled); *Pushkin* v. *Regents of Univ. of Colo.*, 658 F.2d 1372, 1376 (10th Cir. 1981) (person with multiple sclerosis disabled).

Continued

School Board of Nassau County v. *Arline*, the U.S. Supreme Court explicitly acknowledged that section 504's "definition of handicap is broad," and that by extending the definition to cover those "regarded as" handicapped, Congress intended to cover those who are not limited by an actual impairment but are instead limited by "society's accumulated myths and fears about disability and disease."[17]

When the ADA was enacted, Congress consistently referred to court interpretations of "handicap" under section 504 as its model for the scope of "disability" under the ADA. For example, the Senate Committee on Labor and Human Resources noted that: "the analysis of the term 'individual with handicaps' by the Department of Health, Education and Welfare in the regulations implementing section 504 . . . apply to the definition of the term "disability" included in this legislation."[18]

Second, the committee reports explicitly stated that mitigating measures should not be taken into account in determining whether a person has a "disability" for purposes of the ADA. As the Senate Committee on Labor and Human Resources put it:

> A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. . . . [W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.[19]

Finally, the committee reports specifically referenced the breadth of the interpretation offered by the U.S. Supreme Court in the *Arline* decision with regard to the third prong of the definition of disability, the "regarded as" prong. As the Senate Committee on Labor and Human Resources Report summarized the coverage under the third prong: "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 toward disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong." [20]

As evident from the ADA's legislative history, Congress' decision to adopt section 504's definition of disability was a deliberate decision to cover the same wide group of individuals who had been covered under that existing law. Congress expected that the definition of "disability" would be interpreted as broadly under the ADA as it had been interpreted under the previous disability rights law for over 15 years.

III. JUDICIAL NARROWING OF COVERAGE UNDER THE ADA

The expectations of Congress with regard to the ADA have not been met. Over the past several years, the U.S. Supreme Court and lower courts have narrowed coverage by interpreting each and every component of the ADA's definition of disability in a strict and constrained fashion. This has resulted in the exclusion of many persons that Congress intended to protect.[21]

The U.S. Supreme Court first narrowed coverage in a trio of cases decided in June 1999, ruling that mitigating measures such as medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment must be considered in determining whether an individual's impairment substantially limits a

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See generally Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 128 (2000) (hereinafter "Definition of Disability") ("[A]lthough there had been . . . a few adverse judicial opinions under section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act.")

[17] *See School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 284 (1987).

[18] S. Rep. No. 101–116 at 21 (1989).

[19] S. Rep. No. 101–116 at 121 (1989).

[20] S. Rep. No. 101–116 at 24 (1989); *see also* H.R. Rep. No. 101–485, pt. 2, at 53 (1990) (discussing *Arline*).

[21] *See* testimony and appendices submitted by Chai R. Feldblum to the Senate Health, Education, Labor, and Pensions Committee, *Hearing on Restoring Congressional Intent and Protections under the ADA*, Nov. 15, 2007. Appendix A to that testimony notes the coverage of people under section 504 as compared to the ADA and Appendix B sets out case stories of people denied coverage under the ADA.

major life activity.[22] Despite the fact that the committee reports from the Senate Labor and Human Resources Committee, the House Judiciary Committee, and the House Education and Labor Committee had all stated that mitigating measures were **not** to be taken into account; that both the EEOC and DOJ had issued guidance that mitigating measures were **not** to be taken into account; and that eight Circuit Courts of Appeal had **followed** that agency guidance, the U.S. Supreme Court concluded that evaluating individuals "in their hypothetical uncorrected state" would be "an impermissible interpretation of the ADA" based on the plain language of the statute.[23]

The U.S. Supreme Court's requirement that courts consider mitigating measures has created an unintended paradox: people with serious health conditions, like epilepsy and diabetes, who are fortunate enough to find treatment that make them more capable and independent and thus more able to work, are often not protected by the ADA because the limitations arising from their impairments are not considered substantial enough. Ironically, the better a person manages his or her medical condition, the less likely that person is to be protected from discrimination, even if an employer admits that he or she has dismissed the person *because of* that person's (mitigated) condition.

The U.S. Supreme Court also narrowed coverage, in 1999, by changing the standard under the third prong of the definition of disability—the "regarded as" prong that was intended to cover individuals with impairments of any level of severity (or with no impairments at all) based on how such individuals were *treated* by an entity covered under the law. Again ignoring both committee reports and EEOC guidance, the U.S. Supreme Court formulated a new and almost impossible standard to meet for any individual seeking coverage under the third prong. The Court's approach essentially required individuals to divine and prove an employer's subjective state of mind. Not only did the individual have to demonstrate that the employer believed that the individual had an impairment that prevented him or her from working for that employer in that job, the individual also had to show that the employer thought that the impairment would prevent the individual from performing a broad class of jobs for other employers. As it is safe to assume that most employers do not regularly consider the panoply of other jobs that prospective or current employees could or could not perform—and certainly do not often create direct evidence of such considerations—the individual's burden became essentially insurmountable except in rare cases.

Finally, the Court made the situation worse 3 years later in another decision regarding the definition of disability. In 2002, the U.S. Supreme Court ruled in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams* that the words "substantially limits" and "major life activities" were to be interpreted strictly to create a "demanding standard for qualifying as disabled."[24] The Court also stated that "'[m]ajor' in the phrase 'major life activities' means important," and so "major life activities" refers to "those activities that are of central importance to daily life," including "household chores, bathing, and brushing one's teeth."[25] As a result of this ruling, lower courts now consistently require people alleging discrimination under the ADA to show that their impairments *prevent or severely restrict them* from doing activities that are of *central importance* to most people's daily lives.

In earlier testimony delivered to this committee, I described 16 cases in which individuals who believed they had been discriminated against because of their physical or mental impairments were never given the chance to prove their cases because the courts had ruled they were not "disabled enough" to be covered under the ADA. These results occurred because the mitigating measures used by the individual meant that he or she was no longer substantially limited in a major life activity; or because the individual could not meet the new standard under the "regarded as" prong; or because the courts deemed the individual's impairment not to be sufficiently severe.[26] These cases all dealt with individuals who should have been given an opportunity to make the case that their impairments had been the basis for a covered entity's discriminatory acts and that they were otherwise qualified for the job.

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

[23] *Sutton*, 527 U.S. at 482. See Feldblum Testimony, *supra* n. 21, at 10–15 for further description of the trio of U.S. Supreme Court cases and the Court's reasoning.

[24] 534 U.S. 184, 197 (2002).

[25] *Id.* at 197, 201–02.

[26] *See* Feldblum Testimony, *supra* n. 21, pages 22–29.

IV. THE ADA AMENDMENTS ACT OF 2008, AS PASSED BY THE HOUSE

In fall 2007, a number of major business associations opposed S. 1881 and H.R. 3195, bills that had been introduced to rectify the situation caused by the U.S. Supreme Court's interpretation of the ADA's definition of disability. These groups felt that the bills as introduced went beyond the original intent of the ADA by including too many people with impairments as people with disabilities. They were particularly concerned about the number of employees with impairments who might be eligible for reasonable accommodations by employers under the proposed amendments to the ADA.[27]

For example, in testimony before this committee on November 15, 2007, Camille Olson, from the law firm of Seyfarth Shaw, articulated a number of concerns that were being voiced by various business associations at the time. These concerns fell into the following broad categories:

- The language of S. 1881 would cover any impairment, no matter how minor or trivial, as a disability.[28]
- The fact that minor and trivial impairments would be eligible for reasonable accommodations could cause considerable difficulty for employers.[29]
- Congress had deliberately and carefully decided, in 1990, that an impairment should "substantially limit" a "major life activity" in order to be a disability.[30]
- S. 1881 would make radical shifts with regard to the burden of proof on qualifications under the ADA.[31]

At the November 15, 2007 hearing, there was an exchange between this witness, Camille Olson, and Senator Tom Harkin as to whether S. 1881 was the appropriate response to the U.S. Supreme Court cases and both this witness and Olson indicated a willingness to continue talking about how to best respond to such cases.[32]

Overtures for such a conversation were made in January 2008 and official discussions between representatives of the disability community and the business community began in February 2008. The disability community was represented (in alphabetical order) by the American Association of People with Disabilities; Bazelon Center for Mental Health Law; Epilepsy Foundation; the National Council on Independent Living; and National Disability Rights Network. The business community was represented (in alphabetical order) by the HR Policy Association; National Association of Manufacturers; Society for Human Resource Management; and the U.S. Chamber of Commerce. Various other groups joined from time to time. In May 2008, the disability and business communities communicated to several Members of the House of Representatives and the Senate some of the agreements they had reached internally.

The ADA Amendments Act of 2008, passed by the House in June 2007 by a vote of 402–17, reflected some of these agreements. This bill makes the following changes to current law in order to respond to the adverse U.S. Supreme Court decisions of 1999 and 2002:

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[27] *See, e.g.*, testimony of Camille A. Olson to the Senate Health, Education, Labor, and Pensions Committee, *Hearing on Restoring Congressional Intent and Protections under the ADA*, Nov. 15, 2007.

[28] *See* Olson Testimony, *supra* n. 27 at pages 1–2 ("There can be no question that sponsors of S. 1881 have proposed changes to the ADA with the intent of benefiting individuals with disabilities. S. 1881's proposed changes, however would unquestionably expand ADA coverage to encompass almost any physical or mental impairment—no matter how minor or short-lived. In essence, S. 1881 changes the focus of the ADA from whether an individual has a functional "disability" to whether the individual has an "impairment," without regard to whether the impairment or ailment in any way limits the individual's daily life.")

[29] *Id.* at 6. ("Moving the ADA's focus away from individuals with disabilities to individuals with impairments, as S. 1881 would do, will give virtually every employee the right to claim reasonable accommodation for some impairment, no matter how minor, unless the employer can prove that doing so would be an undue hardship.")

[30] *Id.* at 10–11 ("The ADA's inclusion of "substantially limits one or more of the major life activities of such individual" was the result of deliberate and careful consideration by Congress. In adopting the substantial limitation on a major life activity requirement, Congress (not the Federal judiciary) made clear that covered disabilities do not include "minor, trivial impairments, such as a simple infected finger.")(Citation omitted.)

[31] *Id.* at 24–25 ("Third, in a clear departure from the current statutory scheme, S. 1881 shifts the burden of proof to the employer to demonstrate that an individual alleging discrimination "is not a qualified individual with a disability." . . . The calculated balancing of the rights and obligations between disabled employees and employers is clear from the ADA's legislative history. . . . S. 1881's attempted reversal of Congress's allocation of the burden of proof contravenes the fundamental tenet of law disfavoring proof of a negative proposition.")(Citations omitted.)

[32] See *http://help.senate.gov/Hearings/2007_11_15_b/2007_11_15_b.html* for video of hearing.

• The statutory language overturns the mitigating measures analysis of *Sutton* and explicitly states that mitigating measures are not to be taken into account in determining whether an individual has a disability.
• The findings in the bill disapprove of the *Sutton* trilogy and disapprove of several statements in *Toyota* v. *Williams.*
• The statutory language clarifies that an individual is not excluded from coverage because of an ability to do many things, as long as the individual is substantially limited in one major life activity.
• The statutory language clarifies that the fact that an otherwise substantially limiting impairment is in remission or episodic does not remove the individual from coverage.
• To respond to the directive in *Williams* that the definition of disability was intended by Congress to be narrowly construed, the statutory language indicates that the definition is to be given a broad construction. (This construction, obviously, cannot go beyond the terms of the Act itself.)
• The "regarded as" prong focuses on how an individual is treated, rather than on the difficult to prove perception of a covered entity.

There are also several changes in the ADA Amendments Act that respond to concerns raised by the business community:

• The most major change in the ADA Amendments Act of 2008 is that it reinstates the current language of the ADA that requires an impairment to "substantially limit" a "major life activity" in order to be considered a disability that requires a reasonable accommodation or modification.
• The term "substantially limits" is defined as "materially restricts" which is intended, on a severity spectrum, to refer to something that is less than "severely restricts," and less than "significantly restricts," but more serious than a moderate impairment which is in the middle of the spectrum.
• The statutory language explicitly provides that ordinary eyeglasses and contact lenses are to be taken into account as mitigating measures.
• The statutory language makes clear that reasonable accommodations need not be provided to an individual who is covered solely under the "regarded as" prong of the definition of disability.
• The statutory language clarifies that there are no changes to the burdens of proof with regard to proving qualifications for a job.
• Although there is no general severity test required under the "regarded as" prong, transitory and minor impairments are not covered under that prong.

The committee has specifically inquired whether the obligations of employers under the House-passed bill would be different than current law. The only difference for employers from the ADA (as enacted in 1990, not as subsequently interpreted by the U.S. Supreme Court) is that the statute now clearly establishes that reasonable accommodations need not be provided to an individual who has a disability solely under the "regarded as" prong of the definition.

This aspect of the language clarifies the current state of the law on whether reasonable accommodations are available to those covered under the "regarded as" prong of the definition of disability. Four circuit courts of appeal (the First, Third, Tenth and Eleventh Circuit Courts of Appeal) have held that plaintiffs who are not covered under the first prong of the definition may nonetheless seek reasonable accommodations under the "regarded as" prong.[33]

It is perhaps no surprise that some courts—when faced with claims that appear to have merit but in which the case law (in light of *Sutton* and *Williams*) precludes coverage of the plaintiff under the first prong of the definition of disability—have concluded that the plain language of the ADA requires employers to provide reasonable accommodations to individuals who fall under the third prong of the definition.

[33] The following circuit courts have held that the ADA requires that reasonable accommodations be provided to individuals who are able to establish coverage under the ADA only under the "regarded as" prong of the definition of disability: *Kelly* v. *Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005) (plaintiff needed oxygen device to breathe); *D'Angelo* v. *ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005) (plaintiff had vertigo resulting in spinning and vomiting); *Williams* v. *Philadelphia Housing Auth. Police Dept*, 380 F.3d 751 (3d Cir. 2004) (plaintiff had major depressive disorder); and *Katz* v. *City Metal Co.*, Inc., 87 F.3d 26, 33 (1st Cir. 1996) (plaintiff had heart attack). In addition, the following district courts have similarly held that reasonable accommodations may be available under the third prong: *Lorinz* v. *Turner Const. Co.*, 2004 WL 1196699, * 8 n.7 (E.D.N.Y. May 25, 2004) (plaintiff had depressive disorder and anxiety); *Miller* v. *Heritage Prod.*, Inc., 2004 WL 1087370, * 10 (S.D. Ind. Apr. 21, 2004) (plaintiff had back injury and could not lift more than 20 pounds, bend or twist); *Jacques* v. *DiMarzio, Inc.*, 200 F. Supp.2d 151 (E.D.N.Y. 2002) (plaintiff had bipolar disorder); and *Jewell* v. *Reid's Confectionary Co.*, 172 F. Supp.2d 212 (D. Me. 2001) (plaintiff had heart attack).

It is also probably not a surprise that other courts have concluded that reasonable accommodations are *not* required under the third prong.[34]

However, when one reviews the facts of the cases in which reasonable accommodations have been found to be required under the third prong, it seems clear that the plaintiffs in those cases should have been covered under the *first* prong of the definition of disability. Hopefully, that will be the case now under the ADA as amended by the ADA Amendments Act of 2008. For example, three of the impairments in those cases—heart attacks, bipolar disorder, and major depressive disorder—should be covered as material restrictions on major bodily functions—the first on the circulatory system and the second two on brain functioning. The particular facts in the cases regarding the severity of the other four impairments—a respiratory impairment requiring use of an oxygen device, vertigo, back injury, and depression and anxiety—could be examples of impairments that materially restrict the major life activities of breathing; standing; bending and twisting; and concentrating, sleeping and thinking (respectively) when mitigating measures are not taken into account and when episodic impairments are considered in their active state.

The committee has also inquired whether the standard for determining whether an individual is "disabled" should be more clearly defined than it is in the House-passed bill. Those of us engaged in the discussions on this bill believe that there is sufficient guidance for the courts to determine when an impairment "materially restricts" a major life activity. In particular, we believe the combination of the findings in the bill, and the direction for a broad construction of the definition of disability (within the limits of the terms of the statute) should provide additional and adequate guidance for the courts.

Thank you for your attention and I look forward to answering any questions.

Senator HARKIN. Thank you, Professor Feldblum. Carey McClure, a citizen from Griffin, GA—I think most of us are familiar with your case, and what happened to you at General Motors, but if you could take a couple of minutes to sum it up for us, Mr. McClure.

STATEMENT OF CAREY L. McCLURE, CITIZEN, GRIFFIN, GA

Mr. MCCLURE. Thank you, sir. I am Carey McClure. I am a retired electrician from Griffin, GA. I have been doing electrical work for about 20 years. I worked for many companies as an electrician. I love my job and I was very good at it.

When I was 15 I was diagnosed with facioscapulohumeral muscular dystrophy. It affects some of the muscles and causes constant pain. I can't lift my arms above my shoulders, but I have found ways to live with my condition. I use step stools and ladders to reach things. I use one arm to help the other reach things. The point is, my muscular dystrophy does not stop me from living my life or from being a good electrician. There is virtually nothing I can't do.

I wanted to work for General Motors like my father and my brother did. The company has good pay and benefits. When I was finally offered a job there I had to take a company physical. The company doctor said that because I could not lift my arms above my head, I could not be an electrician. I had been working as an electrician doing more complicated and demanding work than what General Motors wanted me to do, but the job offer was withdrawn.

[34] There is a circuit split on this issue. The Ninth, Eight, Sixth, and Fifth Circuits have held that reasonable accommodations need not be provided to an employee who is merely regarded or perceived as disabled. *See Kaplan* v. *City of N. Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003); *Weber* v. *Strippit, Inc.,* 186 F.3d 907, 916–17 (8th Cir. 1999); *Workman* v. *Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry* v. *E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

I knew I could do the job despite my physical limitations so we went to court.

During the hearing of the case the lawyers, judges and employers asked me many embarrassing and personal questions about my non-work activities. Questions that had nothing to do with my qualifications for the job. But the appeals court ruled that because I could manage my daily life and because I had compensated so well for my impairment, I was not disabled enough to be covered under the ADA, even though the reason I was not hired was my disability.

So I asked them if someone who suffered from undisputable muscular dystrophy and was refused a job because of this is not an individual with a disability under the ADA, then who is?

The Fifth Circuit passed the buck to the U.S. Supreme Court for the interpretation of the ADA. They said that my problem was with the U.S. Supreme Court, not them. Well, you could do something about the U.S. Supreme Court today—the interpretations of the ADA, by passing the ADA Amendment Act this year for the sake of people with disabilities like me who want to work but are discriminated against. I hope you will. Thank you for listening and I will be happy to answer questions.

[The prepared statement of Mr. McClure follows:]

PREPARED STATEMENT OF CAREY L. MCCLURE

Mr. Chairman and members of the committee, good morning. My name is Carey McClure, and I am an electrician from Griffin, GA. I'd like to thank you for holding this roundtable today, and for giving me a chance to tell my story.

I have been an electrician for over 20 years. I earned a technical certificate from the United Electronics Institute after high school and then worked my way up from apprentice electrician to journeyman electrician. I've always wanted to be an electrician, and I love what I do. It is my hobby, and it is my fun.

When I was 15 years old, I was diagnosed with facioscapulohumeral muscular dystrophy. "Muscular dystrophy" means progressive muscle degeneration. "Facioscapulohumeral" refers to the parts of my body that are most seriously affected: the muscles in my face, shoulder blades, and upper arms. There are nine types of muscular dystrophy, and this is mine. As a result of my condition, the muscles in my face, back, and upper arms are weak. I'm unable to lift my arms above shoulder-level, and I have constant pain in my shoulders.

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

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

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

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

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

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

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

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

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

For over 20 years, I've been an electrician. For over 20 years, I've worked on things above my head without a problem. I've run pipe all the way up against the ceiling. I've worked on lights all the way up against the ceiling. Sometimes I throw my arms up in the air and lock my elbows. Most of the time, there's an object next to me that I can prop my arms on, just like I do when I'm brushing my teeth. Other times, all it takes is a stepstool like I have for my cabinets, or a ladder or a hydraulic lift like many electricians use. When I toured the GM plant, I saw people using those hydraulic lifts just like at every other job I'd had.

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

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

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

Even though GM revoked my offer because of my disability, GM's lawyers started arguing to the Federal courts that I didn't have a disability at all. Well, you can't have it both ways—am I disabled or not? If I am, then the ADA should have been there to protect me. If I'm not, then I should be working with my father and my brother at GM right now.

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

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

I found another job after GM revoked its offer, but it took me 6 months to find one that paid the same as my old job with the roofing company, and it still didn't pay as high as GM. In my first evaluation at that job, my boss ranked me excellent in five out of seven categories and next highest on the other two.

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

As I told the courts who heard my case, "if one who suffers from undisputed muscular dystrophy is not an individual with a disability under the ADA," then who is?

The Fifth Circuit Court of Appeals told me that they were just interpreting the ADA as the U.S. Supreme Court told them to, and that my problem was with the U.S. Supreme Court—not them. They told me that the *Sutton* case, and its companion 1999 cases, *Kirkingburg* and *Murphy*, as well as the 2002 *Toyota* case, had set rules that allowed me to be thrown out of court because I wasn't disabled enough.

Now if the Fifth Circuit was right that my problem is with the U.S. Supreme Court's bad reading of your good law, then you are the ones who can do something about those interpretations of the ADA. For the sake of people with disabilities like me who want to work but are discriminated against, I hope you will.

I am not a lawyer. But people who are lawyers have looked at the proposed ADA Amendments Act and have explained to me that this proposal would take care of every argument the 5th Circuit made in dealing with my own case, based on those U.S. Supreme Court opinions.

Millions of Americans like me will thank you every day for the rest of our lives if you can pass a law that fixes the coverage problem for people with conditions like mine, a law like the ADA Amendments Act which has the support of both the business community and disability advocates.

And the sooner the better, because every day that goes by, more people with disabilities are discriminated against and, like me, cannot get justice in the courts.

Thank you for giving me the opportunity to speak before you today, and for your help in getting a new ADA passed this year.

Senator HARKIN. Thank you, very much, Mr. McClure, first of all for being here and being brave enough to take them on and to highlight what we just put up there. Muscular dystrophy used to be listed as a disability under that ADA and the Rehab Act of 1973, and now it no longer is. We will get to that.

Professor Bagenstos, Professor of Law at the Washington University School of Law in St. Louis, MO.

Professor.

STATEMENT OF SAMUEL R. BAGENSTOS, PROFESSOR OF LAW, WASHINGTON UNIVERSITY SCHOOL OF LAW, ST. LOUIS, MO

Mr. BAGENSTOS. Thank you, Mr. Chairman, and Senator Enzi. I am here because I teach and write about disability discrimination laws. I have been litigating cases under the ADA since the mid-1990's and have been writing about it since I started teaching about a decade ago. I support the ADA Amendments Act and I am happy to answer any questions about any parts of the bill in our discussion, but in this brief statement I want to talk about two issues that staff suggested that I might address.

The first relates to the bill's broad construction provision. What I would like to say about that is, it is not at all unusual in the law. It mirrors very similar provisions in lots of other statutes all across the U.S. Code. The U.S. Supreme Court has emphasized that such a provision doesn't change the meaning of the law. It serves only

as an aid for resolving an ambiguity in the law but can't create an ambiguity of its own. So, in this bill before this committee what it does is nothing more than make clear that ambiguities in the definition of disability are to be resolved in favor of considering claims of discrimination on the merits, of considering whether somebody was actually discriminated against, and it is essential because the courts have aggressively and without support in the statute rejected that view which had been an the typical view for interpreting the statute.

The second point I want to make is that the bill's materiality standard for substantial limitation invokes a concept that is familiar to judges. So there is no particular need to elaborate it further in the bill. Indeed there is a limit on to which it can be elaborated and that is what Justice Scalia has made clear in various cases in the U.S. Supreme Court. Elaborating the materiality standards because it is very fact specific.

If the committee believes it is necessary to elaborate I would suggest in my testimony one possible way of doing that, and I would be happy to talk about that in the question period. Thank you very much, and I look forward to your questions.

[The prepared statement of Mr. Bagenstos follows:]

PREPARED STATEMENT OF SAMUEL R. BAGENSTOS

Mr. Chairman and members of the committee, I am pleased to testify before you today. My name is Samuel Bagenstos. I am a Professor of Law at the Washington University Law School in St. Louis, MO, where I teach constitutional law, employment discrimination, civil rights litigation, and disability law, among other things. For over a decade, I have been litigating cases under and writing about the Americans with Disabilities Act. I have served as counsel to the individual plaintiffs in the U.S. Supreme Court in the two most recent cases in which the Court addressed the constitutionality of the ADA: *Tennessee* v. *Lane*, 541 U.S. 509 (2004); and *United States* v. *Georgia*, 546 U.S. 151 (2006). In both *Lane* and *Georgia*, the Court agreed with our position and upheld the constitutionality of the ADA as applied to my clients' cases.

I have been invited to testify to discuss the ADA Amendments Act, which passed the House last month and is now pending before the Senate. As one who both studies and litigates disability rights cases, I strongly support the bill. The ADAAA will overturn the mitigating-measures holding of *Sutton* v. *United Air Lines*,[1] which has been applied to deprive many individuals with disabilities of the ADA's protections. The bill will also overturn the restrictive interpretation of "substantially limits" applied in *Toyota Motor Mfg., Ky., Inc.* v. *Williams*,[2] and it will decisively reject the *Toyota* Court's unsupported dictate that the statute "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled."[3] And it will make clear, contrary to the practice of many courts, that the "regarded as" prong of the ADA's disability definition occupies an important and independent position in the statutory scheme. As you have heard at previous hearings, and will hear again today, far too many ADA cases have been thrown out of court at the threshold "disability" stage, and far too many people with disabilities have accordingly been unable to have their claims of discrimination heard on the merits. This bill is essential to change that unjust result.

I should emphasize that, just after *Sutton* was decided, I published an article that endorsed the Court's mitigating-measures holding (though not other aspects of the decision).[4] I argued that protecting individuals whose only "disability" was the need to use ordinary corrective lenses was not consistent with the statutory language or Congress's intent. Moreover, I contended, the Court's opinion, properly construed, would still afford ADA coverage for individuals with epilepsy, diabetes, and other conditions that Congress clearly contemplated as being covered by the statute. But

[1] *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999).
[2] *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002).
[3] *Id.* at 197.
[4] Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397 (2000).

experience with the *Sutton* holding has proved me wrong. Lower courts have employed that holding to deny protection to people with muscular dystrophy, diabetes, epilepsy, and many other conditions that would have seemed clearly to fall within the heartland of the statute's coverage.[5] And the U.S. Supreme Court exacerbated the problem by declaring in *Toyota* that the statute "need[s] to be interpreted" as incorporating "a demanding standard" for coverage.[6] These developments have convinced me that a change to the statute is badly needed. The ADAAA is a reasonable compromise that addresses the vast bulk of the problems created by the restrictive judicial decisions. The bill deserves this committee's support.

I have been asked to discuss two questions specifically: First, is the bill's provision requiring that the definition of disability be "construed broadly" permissible or appropriate? Second, is the bill's definition of "substantially limits" sufficiently clear? The answer to both questions, I hope to show in this testimony, is "yes."

BROAD CONSTRUCTION

As part of its amendments to the ADA's definition-of-disability section, the ADAAA would add a set of new rules of construction. One of these rules is set forth in the new subsection 5(A), which states: "To achieve the remedial purposes of this Act, the definition of 'disability' in paragraph (1) shall be construed broadly." I understand that questions have been raised about the constitutionality or propriety of this provision. But there is nothing at all unconstitutional or improper about a broad-construction provision. Such provisions appear in a variety of statutes sprinkled across the U.S. Code. A few illustrative examples include the Religious Land Use and Institutionalized Persons Act,[7] the Indian Land Consolidation Act,[8] the statute authorizing criminal appeals by the United States,[9] and the statute authorizing criminal forfeiture in narcotics cases.[10] In interpreting provisions like these, the U.S. Supreme Court has applied them like any other statutory language, without expressing any doubt about their validity.[11] Importantly, the Court has emphasized that:

> [A broad construction] clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply [the statute] to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation.[12]

In short, a broad construction "clause only serves as an aid for resolving an ambiguity; it is not to be used to beget one."[13]

So understood, the ADAAA's broad-construction provision does nothing more than declare that, in cases of ambiguity, plaintiffs are entitled to have their claims of discrimination heard on the merits. It thus simply re-states the background principle against which Congress adopted the ADA in the first place—the "familiar canon of construction that remedial legislation should be construed broadly to effectuate its purposes."[14] In interpreting the ADA's definition of disability, the courts have utterly disregarded that principle. Worse, they have imposed on the statute a rule of narrow construction that finds no support in the text and is patently inconsistent with the intent of the Congress that enacted the ADA. In holding that the terms

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[5] *See* H.R. Rep. No. 110–730, Part 1, at 15–16 (2008).

[6] *Toyota,* 534 U.S. at 197.

[7] 42 U.S.C. § 2000cc–3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.").

[8] 25 U.S.C. § 2206(i)(7) ("This subsection shall not be considered penal in nature, but shall be construed broadly in order to effect the policy that no person shall be allowed to profit by his own wrong, wherever committed.").

[9] 18 U.S.C. § 3731 ("The provisions of this section shall be liberally construed to effectuate its purposes.").

[10] 21 U.S.C. § 853(o) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.").

[11] *See, e.g.*, *Reves* v. *Ernst & Young*, 507 U.S. 170, 183–184 (1993) (applying the "liberal construction" provision of the Racketeer Influenced and Corrupt Organizations Act, Pub.L. 91–452, § 904(a), 84 Stat. 947, viz.: "provisions of this title shall be liberally construed to effectuate its remedial purposes"); *Tafflin* v. *Leavitt*, 493 U.S. 455, 467 (1990) (same); *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 491 n.10 (1985) ("[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.").

[12] *Reves*, 507 U.S. at 183–184.

[13] *Id.* at 184 (internal quotation marks omitted).

[14] *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (Stevens, J., dissenting) (quoting *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967)).

"substantially limits" and "major life activities" are ones that "need to be interpreted strictly to create a demanding standard for qualifying as disabled,"[15] the U.S. Supreme Court may have imposed its own view of wise policy on the statute, but it did not heed the view of the Congress that enacted the law. The ADAAA's broad-construction provision may prove necessary to ensure that courts heed Congress's policy judgment and refrain from imposing their own restrictive interpretations on the disability definition. Absent the broad-construction provision, many judges will continue to feel free to lean toward "strict" and "demanding" construction of the disability definition in cases of ambiguity. If Congress intends for ambiguities to be resolved in favor of claims being heard on the merits, the ADAAA's broad-construction provision is an apt means of ensuring that courts will heed that intent.

THE "SUBSTANTIALLY LIMITS" DEFINITION

"Substantially limits" is a crucial term in the statute's definition of disability,[16] but the ADA does not define it. Unfortunately, the word "substantial" is notoriously protean. The U.S. Supreme Court itself has pointed out that "the word 'substantial' can have two quite different—indeed, almost contrary—connotations."[17] (To use the Court's example, the term has a very different meaning in the statement, "He won the election by a substantial majority," than it does in the statement, "What he said was substantially true."[18]) The courts have exploited this ambiguity to impose on the ADA the narrowest possible interpretation of the term. The ADAAA solves this problem by adding, as section 3(2) of the ADA, a definition of "substantially limits" that incorporates the familiar materiality test: "The term 'substantially limits' means materially restricts."

Application of a materiality standard "does not lend itself to mechanical resolution" because fact settings differ.[19] But, as Justice Scalia (writing for the Court) has explained, "judges are accustomed to using [such a standard], and can consult a large body of case precedent" in a number of areas for guidance.[20] Because materiality is a concept familiar to judges, there is no particular need to elaborate that concept further in the bill. And indeed, the restrictive effects of impairments often differ from person to person. There is a limit to the degree to which the materiality concept *can* be further elaborated if it is to take those factual differences into account.

That said, if the committee believes that additional elaboration in the statutory text is necessary, one possibility readily suggests itself. The House Judiciary Committee's report on the ADAAA suggests that "materially restricts" is measured against the kinds of restrictions that most people, or the average person, face.[21] The EEOC's current regulations—although they are not framed as implementing a materiality standard—incorporate the same comparative insight. They define "substantially limits" as "[s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[22] The committee, accordingly, could simply adapt the current EEOC "substantially limits" regulation, deleting the "significantly restricted" language, and incorporate it in the ADAAA's text after the "materially restricts" sentence. The result might look like the following: "'Materially restricts' refers to a restriction on the condition, manner, or duration of an individual's ability to engage in a major life activity as compared to that of the average person [or 'most people']." Although I do not believe an addition like this is necessary, it would not, so far as I have been able to determine, introduce problems in application. If the committee believes elaboration of the materiality standard is necessary, the modified EEOC language is likely to be the best approach.

OBJECTIONS TO THE BILL

I have seen two basic objections asserted against the ADAAA. Both are misplaced.

First, a memorandum circulated by the Heritage Foundation contends that the ADAAA will entitle people with minor or bogus medical conditions to receive accom-

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[15] *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 197 (2002).
[16] *See* 42 U.S.C. § 12102(2)(A).
[17] *Pierce* v. *Underwood*, 487 U.S. 552, 564 (1988).
[18] *Id.*
[19] *Kungys* v. *United States*, 485 U.S. 759, 771 (1988).
[20] *Id.* at 772.
[21] *See* H.R. Rep. No. 101–730, Part 2, at 16 (2008) (defining "material" by reference to the "middle of the spectrum" experience).
[22] 29 CFR § 1630.2(j)(1)(ii).

modations from employers, thereby burdening business and reducing the employment prospects of people with disabilities.[23] That argument misunderstands the bill. It is doubtful that the sorts of minor impairments the memorandum discusses would satisfy the "materially restricts" requirement; if not, those impairments could not be covered as actually substantially limiting a major life activity. (If so, and they actually require accommodation to enable individuals with them to work, it would be hard to call them minor or bogus.) And the bill makes clear that reasonable accommodation is not required for individuals who are covered only under the "regarded as" prong of the disability definition.[24] The ADAAA requires employers to provide accommodation only for those conditions that materially restrict major life activities. And it makes no change to the ADA's current accommodation language, which makes clear that an employer need provide accommodations only when doing so is reasonable and can be accomplished without undue hardship.[25]

Second, some in the higher education community have expressed concern that expansion of the disability definition will compromise academic standards.[26] But nothing in the ADAAA would change the portions of the ADA that require only "reasonable" modifications that do not "fundamentally alter" a university's program.[27] Courts have accorded educators great deference in determining whether a proposed accommodation would be consistent with academic standards.[28] Nothing in the ADAAA would change that.

The ADAAA is an essential bill to overturn the restrictive decisions of the U.S. Supreme Court and lower courts. It deserves the committee's support. I look forward to your questions.

Senator HARKIN. Thank you, Professor Bagenstos. Now we turn to Jo Anne Simon, Esq. from the Law Office of Jo Anne Simon in Brooklyn, NY. Ms. Simon has been in the field of working with the disability community for a long, long time.

Ms. Simon, welcome.

STATEMENT OF JO ANNE SIMON, ESQ., THE LAW OFFICE OF JO ANNE SIMON, BROOKLYN, NY

Ms. SIMON. Thank you, Mr. Chairman and Senator Enzi. Thank you very much for holding this hearing.

I would like to address a few comments about to the impact of the ADA Amendments Act with regard to education and high stakes standardized testing. The education community, both K–12 and higher education, have raised some concerns with regard to the number of people who would be requesting accommodations under the ADA Amendments Act, essentially stating that this would enormously expand the people who would be requesting services under the law.

I believe that to be entirely false for two reasons. First, both the K–12 and higher education community are, for the most part, covering these students. This is not going to swell their ranks.

And second, I think it's very important that we keep separate the notion of whether one is protected by the act from whether or not one is entitled to a service under the act. The act, in fact, requires reasonable accommodations for those people with disabilities who may need them and they may need them in certain situations and not in others. So the very fact that one needs an accommodation

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[23] *See* Andrew M. Grossman & James Sherk, *The ADA Restoration Act: Defining Disability Down* (July 2, 2008).

[24] *See* H.R. 3195, § 6 (new 42 U.S.C. § 12201(g)).

[25] *See* 42 U.S.C. § 12112(b)(5).

[26] *See* Sara Lipka, *House Committee Approves Bill to Clarify Who Qualifies Under Disability Law*, CHRONICLE OF HIGHER ED.: TODAY'S NEWS (June 19, 2008), available at *http://chronicle.com/daily/2008/06/3451n.htm*.

[27] *See* 42 U.S.C. 12182(b)(2)(A)(ii); 28 CFR § 35.130(b)(7).

[28] *See, e.g., Zukle* v. *Regents of University of California*, 166 F.3d 1041, 1047–1048 (9th Cir. 1999) (collecting cases).

should not be a litmus test for whether or not one has a disability. That is the second step of an analysis and that step is not changed at all by this amendment.

The standardized testing industry has raised several arguments with regard to, again, the increase in the number of requests for accommodations. I believe that also will not change under this act. The fact is that most people who have a disability are already requesting accommodations when they are taking one of these tests.

What might change is the fact that certain people would be extended accommodations on these tests that are not currently because of the bogus and very, very narrow interpretation of the U.S. Supreme Court case law. These requests are for the most part denied not because the request is not reasonable, but because the entity has substituted its judgment for that of the physician and said, "no, this person does not have a disability" and applied the Sutton and Toyota standards.

To the extent that fears have been raised about the validity of the tests after accommodations have been provided, this is not an issue that is really addressed by this legislation. There is already existing a defense for any organization that if a requested accommodation would fundamentally alter the nature of the tests, then it need not be provided. However, these entities are providing accommodations for a number of people with disabilities and there is a reason for that.

One is a blue ribbon panel commissioned by the College Board who are the people who make the SAT has already examined this issue and found that extended time, which is, the most commonly requested accommodation does not compromise either the validity or the score comparability. Therefore, I think the issues that are raised represent fears, represent concerns, but they do not represent facts. Thank you. I look forward to your questions.

[The prepared statement of Ms. Simon follows:]

PREPARED STATEMENT OF JO ANNE SIMON, ESQ.

Mr. Chairman and members of the committee, I am pleased to submit this testimony for the record. My name is Jo Anne Simon. For the past 12 years I have maintained a law practice concentrating on disability rights in education, high stakes standardized testing and employment discrimination matters. I have been an adjunct Assistant Professor at Fordham University School of Law for the past 10 years and previously served as Staff Attorney for Hofstra University School of Law's Disabilities Law Clinic for 4 years. I have served as counsel on a number of disability rights cases, including *Bartlett* v. *NYS Board of Law Examiners*.[1]

I have been asked specifically to address the impact of the ADA Amendments Act, as passed by the House, on schools and universities.

Like Professor Bagenstos, I both study and litigate disability rights cases. I strongly support this bill. The ADAAA will do no more than protect those Congress originally intended to protect. It would overturn the mitigating measures holding of *Sutton* v. *United Airlines* which has been applied in such a way as to deprive large numbers of individuals with disabilities of the law's protections. These are people that Congress meant to protect when it enacted the ADA. The ADAAA will also overturn the restrictive interpretation of "substantially limits" as applied in *Toyota* and decisively reject that Court's requirement that meeting the threshold for the

[1] *Bartlett* v. *New York State Board of Law Examiners*, 970 F. Supp. 1094 S.D.N.Y. 1997) (Bartlett I); aff'd 2 F. Supp. 2d 388 (S.D.N.Y. 1997) (Bartlett II); *aff'd in part, rev'd & remanded in part*, 156 F. 3d 321 (2d Cir. 1998)(Bartlett III); *vacated and remanded*, 119 S.Ct. 2388 (1999)(Bartlett IV); *aff'd in part & remanded*, 226 F. 3d 69 (2d Cir. 2000)(Bartlett V); 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001) (Bartlett VI). *See also, Root* v. *Georgia Board of Veterinary Medicine*, 114 F.Supp.2d 1324 (N.D. Ga. 2000) *rev'd on other grounds*, No. 00–14751 (11th Cir. 2001).

law's protections is a strict and demanding standard. No other civil rights law so stringently and stingily scrutinizes those whom it seeks to protect.

The threshold issue of who is covered by the ADA has formed the bulk of the case law as covered entities have sought to reject coverage based on narrow interpretations by the U.S. Supreme Court. While the Court has held that the determination of whether a person is protected by the ADA is to be made on a case-by-case basis,[2] the Court's "demanding standard"[3] is harshly inconsistent with the original intent of the Congress which enacted the ADA, and has given rise to cookie-cutter like formulations which sacrifice substance to form.

IMPACT OF THE ADAAA ON K–12 EDUCATION

Under the ADAAA, similar to the current language of the ADA and that of section 504, an impairment must "substantially limit" a major life activity. An impairment meets this test if it "materially restricts" a major life activity. Major life activities include such things as learning, reading, thinking, and concentrating, as well as the operation of various bodily functions.

The ADAAA directs courts not to take into account mitigating measures when determining if impairments substantially limit a major life activity. This will help children with impairments, such as diabetes and epilepsy, who manage their impairments with medication. Similarly, it will help children with learning disabilities who manage to succeed academically by working round-the-clock to complete assignments as a means of overcoming the effects of their impairment on learning. In addition, a key purpose provision of the ADAAA overturns the "demanding standard" for interpreting "substantially limits" that had been articulated by the U.S. Supreme Court in the *Toyota* case.

The ADAAA will ensure that students with disabilities receive appropriate protection under the ADA and section 504. While few Federal court decisions have held that elementary or secondary school children do not have disabilities under these laws,[4] you heard from Sue Gamm's testimony that school districts and State educational agencies routinely refuse to extend these laws' protections to children who have managed to achieve high or even passing grades despite serious impairments. Ms. Gamm provided the example of a hearing officer's decision that a 10th grader who worked exceptionally hard to earn As and Bs was not substantially limited in learning even though she had difficulty organizing ideas and breaking down complex written material, took a long time to break down material, had difficulty completing assignments on time and problems with executive functioning, and occasionally failed tests.[5]

This is precisely the problem that the ADAAA is intended to address. Students like that 10th grader should not be denied the protections of the ADA simply because they have worked hard to overcome the effects of a disability.

Moreover, the notion that a student cannot have a reading or learning disability if he or she manages to attain high or passing grades is fundamentally wrong. It reflects an outmoded and inaccurate understanding of individuals with disabilities as individuals who are completely incapable of performing well.

As the Department of Justice explains in its ADA regulatory guidance, a person has a disability if he or she is substantially limited in the condition, manner, or duration under which he or she performs a major life activity as compared to the condition, manner, or duration under which most people perform the activity. This is the correct way to apply the definition of disability—a student who has an impair-

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[2] *Sutton* v. *United Airlines*, 527 U.S. at 482 (1999). ". . . whether a person has a disability under the ADA is an individualized inquiry").

[3] *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 197 (2002).

[4] Children have lost only a small number of these cases on the ground that they did not have disabilities under the ADA or section 504. See, e.g., *Costello* v. *Mitchell Public School District 79*, 266 F.3d 916 (8th Cir. 2001) (epilepsy, ADD, unspecified learning disabilities, depression and suicidal thoughts); *Kropp* v. *Maine School Administrative Union #44*, 2007 WL 551516 (D. Me. Feb. 16, 2007) ("severe persistent" asthma requiring high-dose inhaled corticosteroids, allergies requiring shots, and gastroesophageal reflux); *Garcia* v. *Northside Independent School District*, 2007 WL 26803 (W.D. Tex. Jan. 3, 2007) (severe asthma that caused child to collapse and die during running exercises at school); *Smith ex rel C.R.S.* v. *Tangipahoa Parish School Bd.*, 2006 WL 3395938 (E.D. La. Nov. 22, 2006) (asthma and allergies requiring daily medication and use of EpiPen); *Marshall* v. *Sisters of Holy Family of Nazareth*, 399 F. Supp. 2d 597 (E.D. Pa. 2005) (ADHD); *Block* v. *Rockford Public School Dist.*, 2002 WL 31856719 (N.D. Ill. Dec. 20, 2002) (asthma and allergies requiring use of inhaler).

[5] Indeed, the Department of Education's Office of Civil Rights has issued guidance making clear that mitigating measures must be considered in education claims brought under the ADA and section 504. *Sutton Investigative Guidance: Consideration of "Mitigating Measures" in OCR Disability Cases* (Sept. 29, 2000).

ment that substantially limits the *conditions* under which she learns, or the *manner* in which she learns, has a disability even if she manages to obtain average grades. The ADA's goal is not equal test scores, but equal *opportunity*.

Ms. Gamm testified that schools are accommodating many students with disabilities informally, but should not be subjected to the planning and evaluation requirements of section 504. Congress did not intend that students with disabilities who need accommodations should be left without legal rights and be dependent solely on the good will of schools to provide the help they need in order to learn. In any event, section 504 imposes minimal planning and evaluation requirements that should effectively be met by any school that is adequately meeting the needs of a child with a disability.[6]

School districts that have been complying with the ADA and section 504 have nothing to fear from the ADAAA. Indeed, they should welcome the clarity that the amendments bring.

Most students, of course, receive their accommodations (related and supplemental services) under the Individuals with Disabilities Education Act (IDEA) and will continue to be so served.[7] Some students, however, receive their accommodations solely under section 504 and the ADA. These same students will continue to receive such accommodations. For those children who have been inappropriately denied the protections of the law, the new bill will help clarify the coverage they should have been receiving.

Concerns that the ADAAA will compel schools to provide services to students who don't really need them are misplaced. Whether a student has a disability and what, if any, services he needs are two distinct issues. Take the hypothetical child with Attention Deficit Hyperactivity Disorder whose medication fully corrects the symptoms of his disorder. That is actually unlikely to be the case since medication does not improve deficits in working memory, processing speed, lexical access or executive functioning.[8] However, even if medication *had* a completely corrective effect, that child would still be protected from discrimination based on his disability. Protection from discrimination, however, only requires the provision of services where there is a demonstrated *need* for those services. The ADA does not require needless service provision. The greater danger, of course, is that a child entitled to protection and perhaps in need of services, will not get them, and will not have the opportunity to learn what he could and should be learning.

IMPACT OF THE ADAAA ON POSTSECONDARY EDUCATION

While the number of students with disabilities on American campuses is growing, today only about 6 to 8 percent of college students identify themselves as having a disability.[9] Unlike K–12 schools, postsecondary institutions bear no responsibility for identifying such students and we rely on students' self-identification in order to ensure that they receive necessary services. It is extremely unlikely that more college students will request help for a disability due to a change in the ***legal*** definition of disability under the ADA. Most students are not aware of the nuances of the law. Rather, they ask for help because they were identified with a disability prior to arriving at the postsecondary institution, or because they are diagnosed with a disability later in life. It is their experience and diagnosis of a disability that triggers the request for help—not a wording change in the law.

Indeed, the vast majority of postsecondary institutions are doing an admirable job of providing welcoming and compliant environments for students with disabilities. While the ADAAA would require changes by those institutions that are applying an unduly restrictive definition of disability in reliance on U.S. Supreme Court cases, those changes are appropriate. Moreover, such institutions are the exception, not the norm.

The ADAAA will prevent the inappropriate loss of protection for students who use various measures to compensate for the limitations caused by their disabilities. It

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[6] 34 CFR §§ 104.33, 104.35.

[7] Twelve percent of public school students receive services under the IDEA, compared with approximately 1.2 percent under section 504 only. *See* Rachel A. Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning "Section 504-Only" Students*, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPLES BULLETIN, MARCH 2008, at 24, 30.

[8] Swanson, H.L. & Jerman, O. (2006). Math disabilities: A selective meta-analysis of the Literature. *Review of Educational Research, 76*, 249–274.

[9] According to the Association on Higher Education And Disability (AHEAD), the average disability services office has a mean of 7 staff members, each of whom serves an average of 100 students (100–1 ratio). Harbour, Wendy S. *2008 Biennial AHEAD Survey of Disability Services and Resource Professionals in Higher Education*, 2008. AHEAD: Huntersville, NC. Other student services programs are generally staffed at higher ratios. For example, many university housing programs are staffed at a ratio of 10–1.

provides that compensatory mechanisms that an individual has used to circumvent some of his or her limitations (for example, listening to books on CD to compensate for limitations caused by dyslexia) cannot be used as evidence that the students do not experience limitations in the first place. Some higher education and standardized testing entities have determined whether a student is "substantially limited" in learning by comparing an individual's scores with those of the statistical average standardized achievement test scores (in other words, below 16th percentile, or virtual failure) or by comparing an individual's real-life outcomes with those of the average person (for example, determining that a student is not disabled simply because he has a graduate degree and the average person doesn't). As a result, students with serious disabilities who have managed to achieve higher than average test scores or outcomes by **taking steps to mitigate the effects of their disabilities** subsequently lose protection under the ADA simply for having taken those steps. The fact that an individual has managed to compensate for his or her impairment, through whatever means, should not be used to punish the individual. The touchstone for accommodations in the testing arena should be that set forth in Department of Justice regulations: whether an accommodation is needed in order to ensure that the examination results "accurately reflect the individual's aptitude or achievement level."[10]

Moreover, as is true now, under the ADAAA, postsecondary students with disabilities will still need to demonstrate that they are qualified and meet the essential eligibility criteria for an educational program or course of study.[11] A student who cannot meet essential eligibility criteria will not prevail on a claim brought under the ADA. Such a claim should be analyzed based on the merits and not on an inappropriately narrow definition of disability.

Considering whether an individual has a disability is distinct from determining what accommodations might be reasonable in a given circumstance. Under current law, colleges and universities are not required to make modifications or offer accommodations that fundamentally alter programs or services or compromise academic standards.[12] The ADAAA does not change this. Colleges and universities will have the same ability to maintain academic standards that they do under current law.

Concerns that the numbers of students bringing legal actions will increase are unjustified. Similar concerns were raised in 1977 before section 504 regulations were promulgated, and again in 1990 when the ADA was enacted. Nevertheless, after over 30 years of protections, roughly 6 to 8 percent of the postsecondary population reports a disability and costs are minimal in comparison to overall institutional budgets. There is no evidence to support a concern about academic standards; rather it seems clear that students with disabilities who graduate from our colleges and universities are fine examples of the power of American education. The law does not require institutions to fundamentally alter the nature of their services or programs. Moreover, considerable deference has historically been given to educational institutions' academic judgments. This deference helps institutions balance the competing equities while maintaining program standards. Although discrimination may not masquerade as deference to academic judgment, the courts have struck a balance well understood by all.[13]

STANDARDIZED TESTING

The standardized testing industry has aggressively and rigidly applied *Sutton's* and *Toyota's* narrow rulings. Testing entities have applied *Sutton* and *Toyota* as if they had replaced all known diagnostic criteria; their approaches have elevated form over substance and ignored scientific practice.[14] Some courts have substituted the covered entity's judgment that an applicant does not have a disability for the individual's physician's judgment rather than get to the merits of the applicant's request.

A WORD ABOUT PUBLIC PERCEPTION

Unfortunately, incorrect public perceptions have driven the courts' analyses of many ADA claims, and have often replaced objective judgment, to the detriment of

[10] 28 CFR § 36.309.
[11] 42 U.S.C § 12131(2).
[12] 42 U.S.C § 12182(b)(2).
[13] *Guckenberger* v. *Boston University*, 8 F. Supp. 2d 82 (D. Mass. 1998), *Wynne* v. *Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992), *Ewing* v. *Michigan*, 474 U.S. 214 (1985).
[14] *See Bartlett VI* at 8. *See also*, Barkley, Russell A. Ph.D.; Biederman, Joseph M.D., Toward a Broader Definition of the Age-of-Onset Criterion for Attention-Deficit Hyperactivity Disorder. Journal of the American Academy of Child & Adolescent Psychiatry, September 1997, PP 1204–1210.

individuals with disabilities. This has particularly been true of standardized testing at all levels of education, and markedly at the college admissions level.

A popular myth is that students without disabilities seek accommodations on the SAT and other tests in order to achieve a competitive edge on the test. Underlying this perception is a belief that with extra time, everyone would perform significantly better,[15] and that students from families of means will therefore unfairly seek this type of advantage.

This perception has been shown to be wrong. A class action suit filed in 2002 alleged that ETS's practice of "flagging" the scores of students who had taken the exam with disability accommodations violated the law. As part of the settlement, the College Board agreed to create a Blue Ribbon Panel of experts to review whether scores for SATs taken under standard administration could be **validly compared** with those taken by students with disabilities under non-standard conditions. If they could be validly compared, then there was no need to "flag" the exams in order to maintain the integrity of the exams.

The panel unanimously agreed that the practice of flagging was not needed. Based on a thorough review of all the scientific evidence, the Blue Ribbon Panel concluded that when students with learning disabilities took exams under standard conditions, the scores they received were ***not*** valid reflections of their actual knowledge. Conversely, when such students received appropriate accommodations, their scores were comparable to those of students without learning disabilities who had not received accommodations.[16] Thus, there was no advantage being given to students with disabilities by virtue of the accommodations.[17]

Based on the report from the Blue Ribbon Panel, the College Board ceased flagging in 2004.

Subsequent studies have confirmed the conclusions of the Blue Ribbon panel.[18] Repeatedly, studies have shown that students without disabilities do not perform significantly better with extended time; students perform significantly better with extended time only when they need the accommodations because of a learning disability.

Accommodations do not improve results; they facilitate the demonstration of knowledge by students who are disadvantaged by the test's mechanics. Aren't we supposed to be testing what students have learned? Why are we suspicious when they can show it? In the *Bartlett* case, after 21 days of trial, two trips to the Second Circuit and one to the U.S. Supreme Court, on remand, the district court found that:

> The Board [of Law Examiners'] preoccupation with test scores and its distrust of clinical judgments, however, seems to be driven, at least in part, by misperceptions and stereotypes about learning disabilities. . . . [t]he Board appears to view applicants who claim to be learning disabled with suspicion. *Bartlett I*, 970 F.Supp. at 1136. Of particular concern . . . were alleged comments [that] . . . "anyone who has the money can pay for a report [concerning a learning disability]." *Id.* This same attitude was evidenced at the remand trial when defendants and their experts implied on numerous occasions that plaintiff might be "faking" her reading problems or contriving her errors.

Bartlett VI, at 42.

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[15] *But see Bartlett VI* at 42 ("this assumption is belied by research showing that extra time does not have a significant impact on the performance of individuals who do not have learning disabilities.")

[16] Gregg, N., Mather, N., Sawpit, S., and Sire, S. (2002) *The Flagging Test Scores of Individuals with Disabilities Who Are Granted the Accommodation of Extended Time: A Report of the Majority Opinion of the Blue Ribbon Panel on Flagging*, at 6.

[17] In fact, while over prediction is often cited as a concern in connection with extended time accommodations, the SAT (the only test for which such data is available) over predicts slightly more for African-American students than students with disabilities. To the extent this represents a problem, it is with the test or the data, not students with disabilities. Id. at 7, 8.

[18] *See*, e.g., Cohen, A., Gregg, N., and Den, M. (2005) *The Role of Extended Time and Item Content on High Stakes Mathematics Test*, Learning Disabilities Research & Practice, 20, 225–233 (finding that extended time does not improve scores unless the test-taker has a disability and sufficient mastery of content). A review of such studies by Ofiesh, et al., found that the results of all studies uniformly indicated that under time constraints, students with learning disabilities scored significantly lower than their peers. When provided with extra time, students with learning disabilities had no significant score differences from those of their peers who received no extra time. *Journal of Psychoeducational Assessment*, Vol. 23, No. 1, 35–53 (2005); *Journal of Postsecondary Education and Disability*, Vol. 14, No. 1 (2000). *See also*, Mandinach, Bridgeman, Cahalan-Laitusis, and Trapani (2005) *The Impact of Extended Time on SAT Performance*. Research Report 2005–8, New York: The College Board. *http://professionals.collegeboard.com/data-reports-research/cb/impact-extended-time-sat;* and Lindstrom and Gregg (2007) Journal of Learning Disabilities (in review)(large scale meta-analysis found that extended time does not change the construct validity of these tests.).

In closing, I highlight the U.S. Supreme Court's decision in *PGA Tour, Inc.* v. *Martin*.[19] In *PGA Tour*, the Court held that the use of a cart by a professional golfer with a physical disability did not fundamentally alter the game of golf even though the PGA Tour's ordinary requirement was that golfers had to walk the course. The U.S. Supreme Court stated:

> The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to "fundamentally alter" the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires.[20]

That is all the ADAAA will do—provide access to the competition that is the stuff of American life: school, work and play. The ADAAA will prevent covered entities from putting individuals with disabilities in a position where everything they have done to better their circumstances will be used against them in a court of law. I strongly urge the committee's support of this bill.

Senator HARKIN. Thank you very much, Ms. Simon. Now we turn to Michael Eastman, Employment Policy Director of the U.S. Chamber of Commerce.

Mr. Eastman, welcome.

STATEMENT OF MICHAEL EASTMAN, EMPLOYMENT POLICY DIRECTOR, U.S. CHAMBER OF COMMERCE, WASHINGTON, DC

Mr. EASTMAN. Thank you, Mr. Chairman and members of the committee. I am pleased to be here before you today to talk about the ADA and the Chamber's support of the ADA Amendments Act. About a year ago the ADA Restoration Act was introduced and the Chamber sent a letter strongly critical of that act to members of the Senate.

What I would like to do in this opening time is talk to you about how we got from there to where we are today. We recognized that the proponents of the Restoration Act, the folks in the disability community had articulated a very legitimate need for legislative solution, and while reasonable people can disagree about the outcome of any one court decision, when taken as a whole aggregating all the Federal court decisions under the ADA, it is incontrovertible that courts have interpreted the ADA too narrowly and a legislative fix is needed.

So we sat down with the disability community as well as others in the business community and worked through to see if we could find common ground in this area—Is there an approach that we can live with and the disability community can live with?—over several months, in more meetings and hours than I care to admit.

When it became clear that we might be able to find a way through this, we engaged in an extensive vetting process. For the chamber that meant we engaged trusted practitioners, our task force of members interested in ADA issues, our labor policy committee and its subcommittee on Equal Employment Opportunity. Other members of the business community had their own vetting processes. And then we entered into larger processes with other members of the business community, trade associations in an attempt to hear from as many companies as possible about what the real world impact of this approach might be.

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[19] *PGA Tour, Inc.* v. *Casey Martin*, 532 U.S. 661 (2001).
[20] *Id.* at 690 (2001).

At the end of the day I am pleased that we can support the approach the House took in the ADA Amendments Act and I hope that as things go through the Senate process we will be able to support the approach the Senate takes as well.

With that, I will conclude and we can save the substantive discussion for later.

Senator HARKIN. Mr. Eastman, I might just add that this reminds me of the previous ADA of 1988, when Senator Weicker and I introduced the first one. The U.S. Chamber was unalterably opposed, but over a period of 2 years, working together as you have done now, we were able to work out all our compromises and the initial ADA had the full support of the U.S. Chamber of Commerce. I remember that very well. It was a great working relationship and I appreciate your being involved in all these discussions this year and your support of this bill.

Mr. EASTMAN. Thank you.

Senator HARKIN. Sue Gamm, Primary Consultant, Public Consulting Group from Chicago, IL.

Ms. Gamm, welcome.

STATEMENT OF SUE GAMM, PRIMARY CONSULTANT, PUBLIC CONSULTING GROUP, CHICAGO, IL

Ms. GAMM. Thank you very much. I really appreciate the opportunity to be here to speak with the esteemed Senators as well as my colleagues around the table.

Just to give you a context for my statement, I have spent the past 30 years working with the Office for Civil Rights, with the U.S. Department of Education, as well as heading up special ed services with the Chicago Public Schools. The last 3 years I have been consulting around a lot of the country and training around issues involving kids with disabilities in elementary and secondary education. So, that's my focus for my comments.

First, let me say that we understand and support efforts being taken to address issues that have arisen primarily in the area of employment. We believe, though, and this is based on my discussions with colleagues over the last period of time around the country who are obligated to comply and actually implement whatever provisions that are established and there is a belief that while this is a great effort that there really are some unintended consequences that haven't been fully explored around impact with elementary and secondary education. And I would just disagree with my esteemed colleague, Ms. Simon.

We do believe that a change or the discussion around these different provisions would have a profound impact or could have a profound impact. I don't have a crystal ball but I'm basing it on what we believe or what we know at this time.

Unlike the employment arena, there are proactive specific procedural requirements that are quite time consuming, involve human physical resources around child find, elementary and secondary education, the evaluation process, the planning process for determining the kind of accommodations that the child might need if eligible as well as procedural safeguards that could include a due process hearing that could actually go all the way up to the U.S. Supreme Court.

Interestingly, although this field has exploded in the area of the Individuals with Disabilities Education Act in terms of litigation and several high level court decisions, there has been a virtual silence, if you will, in the area of section 504, which seems to imply to many of us that things have been working well, pretty much.

I have three areas of concerns around the bill that I won't go into detail about, but just highlight. One has to do with the change in the new definition for "substantially limits."

I believe that given the comments in the House report that this really would impact who would be eligible as a disability and that it would include those students who actually might be achieving higher than most students in the school district, the higher achieving kids, if you will.

There is long precedents that that is not the case. It was the poor performing students which is even a greater number of children, and the third area would be around mitigating measures that I will talk about later.

The last thing I want to say, as we know the school districts, the IDEA gets no funds for their processes around section 504 services and our advocacy for Medicaid funding has not resulted in any relief.

Those are my concerns and I welcome the opportunity to talk about them more.

Senator HARKIN. Thank you very much, Ms. Gamm.

Now we turn to Terry Hartle, Senior Vice President of American Council on Education.

Mr. Hartle.

STATEMENT OF TERRY W. HARTLE, SENIOR VICE PRESIDENT, AMERICAN COUNCIL ON EDUCATION, WASHINGTON, DC

Mr. HARTLE. Thank you very much, Mr. Chairman. I appreciate the opportunity to participate in this roundtable discussion. We would like to thank the Senate HELP Committee for giving us the opportunity to be here to share our views.

Colleges and universities take their responsibilities under the ADA seriously and are committed to providing greater access to higher education and its benefits for all students including students with disabilities. According to the Department of Education, more than 10 percent of all undergraduates identify themselves as students with disability, that's more than 1.8 million individuals. Our institutions have disability support service offices with dedicated staff who respond to hundreds and sometimes thousands of requests for educational accommodation on an annual basis.

Based on an informal survey of large research universities, we found the average university employs 17 individuals working on disability issues with the largest institution reporting 60 professional staff. The average number of requests they deal with per year ranges from 6,000 to 20,000.

Although our institutions are employers, and quite often we are among the largest employers in the State, we have not taken an issue with the broader disability definition of the bill or its potential impact on us as employers.

But in our roles as academic institutions, the changes to the definitions section have the potential to expand the scope of students

that we serve under ADA in ways that are difficult to fully anticipate. Given the potential of these changes to create new and challenging legal questions for institutions, we believe it's crucial that Congress reaffirm the core principle already present in case law protecting our institutions in their traditional academic role.

Protecting the value of academic degrees and the academic content of programs is of fundamental importance to our institutions and to society. Our institutions are credentialing bodies, and by awarding degrees we certify that certain levels of educational attainment and achievement have been met. This is the core of what colleges and universities do.

Therefore, I am here today to ask the Senate to reaffirm directly in statute the current case law principle that institutions need not provide an accommodation when doing so would fundamentally alter the essential aspects of programs or diminish the academic standards set by our institutions.

Given the difficulty that exists in predicting the impact of this legislation on postsecondary institutions in ways the courts will interpret this new legislation, we strongly urge this committee to ensure that colleges and universities and the quality of their academic programs are protected directly by statutory language. Thank you for considering our views.

Senator HARKIN. Thank you very much, Mr. Hartle. And now we will close with Andrew Grossman, Senior Legal Policy Analyst, Heritage Foundation, Washington, DC.

STATEMENT OF ANDREW GROSSMAN, SENIOR LEGAL POLICY ANALYST, HERITAGE FOUNDATION, WASHINGTON, DC

Mr. GROSSMAN. Good morning, Mr. Chairman, and thank you. My greatest concern about the ADA Amendments Act is the definition of disability. This legislation would wipe out nearly two decades of precedence under the ADA and replace it with unclear language that fails to provide any guidance whatsoever to employers, the labor bar and the courts.

As I detail at some length in my written testimony, it materially restricts language of the Amendments Act, which is especially problematic. It is unprecedented in disability law and the standard canons of statutory construction provide little guidance as to how a court should interpret it.

Other changes in the legislation only exacerbate this problem. If the drafters of this bill sought to cabin judicial discretion in disability cases, they have failed. The consequences of this failure will be great. Uncertainty will lead to higher compliance costs for employers and increase the cost of labor. The predictable result will be slower job growth and a knock to the competitiveness of American businesses, especially small businesses that are not exempt from the act.

Dramatically expanding the coverage of the ADA will raise costs across the economy and concern at a time when inflation is inching upwards, growth is slow and unemployment is on the rise. If Congress nonetheless feels compelled to do so, it should act in a way that imposes as little collateral damage as possible by putting forward clear tests and definitions and reducing risk and uncertainty for both disabled individuals and employers.

Thank you.

[The prepared statement of Mr. Grossman follows:]

PREPARED STATEMENT OF ANDREW M. GROSSMAN

My name is Andrew Grossman, and I am Senior Legal Policy Analyst at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

My testimony today concerns what may seem to some a narrow and arcane topic: the definition of "disability" in the compromise Americans with Disabilities Act Amendments Act ("ADAAA," H.R. 3195) that passed the House of Representatives in June and is now before this August chamber. It is anything but. As evidenced by the very fact of this hearing, the precise definition is extremely important. It affects the rights and responsibilities of millions of individuals and employers and, over the long term, societal attitudes toward disability. In addition, the exact workings of the Americans with Disabilities Act ("ADA"), including this definition, impact the U.S. economy and job creation. This topic is worthy of much attention and consideration for all of these reasons, and I applaud the committee for taking the time to address it and to consider the comments of those testifying today.

The definition of disability is an essential piece of the ADA's legal protections against discrimination. The ADA prohibits employers with more than 15 employees from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[1] Discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[2] Thus, whether an individual is disabled determines whether an employer must investigate and implement accommodations and whether an employer is subject to liability under the ADA for failing to do so.

It is particularly important, then, that the definition of "disability" be clear so that employers can meet their obligations under the law with minimal confusion and expense. Under current law, a disability is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; "(B) a record of such an impairment"; or "(C) being regarded as having such an impairment." This statutory text has been applied by the courts in a way that is considerably broader than the common usage of the word "disability." Thus, ailments such as erectile dysfunction and high cholesterol have qualified as disabilities.[3] Nonetheless, the courts, following the lead of the U.S. Supreme Court,[4] have been relatively consistent in their adjudication under the ADA, providing employers and the labor and disability bars with some notice of what impairments are likely to be covered by the ADA. Though a small business lacking inside counsel will usually have to consult outside attorneys to determine whether an employee claiming a disability is covered by the ADA and, if so, what accommodations are reasonable, in many cases, the attorneys are able to render an opinion on these issues within a few days at modest cost—around $1,000 in typical cases. Any change to the definition of disability in the ADA must be made carefully, because it will necessarily upset the reliance of employers and their attorneys, increasing the costs of compliance as well as their uncertainty and risk of liability.

Though some media reports characterize the definition of "disability" in the current version of the ADAAA as a compromise,[5] it is far from modest. It represents a radical expansion of the ADA that would likely have far-reaching effects and unintended consequences. The provision's great breadth, however, is obscured somewhat by its structure. Unlike prior proposed amendments to the ADA,[6] the ADAAA retains the ADA's three-prong core definition of "disability," making only one small change of arguably no substantive import.

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[1] 42 U.S.C. § 12112(a) (2008).

[2] 42 U.S.C. § 12112(b)(5)(A) (2008).

[3] *Arrieta-Colon* v. *Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75 (1st Cir. 2006); Christian v. St. Anthony Medical Center, Inc., 117 F.3d 1051, 1053 (7th Cir. 1997).

[4] *See, e.g., Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998).

[5] *E.g.*, Karoun Demirjian, *Bill Clarifying Legal Meaning of 'Disabled' Passes in House*, CQ TODAY, June 25, 2008.

[6] *E.g.*, H.R. 3195, 110th Cong. (as introduced, 2007).

Unlike the current ADA, however, the ADAAA further defines two of these terms. Under the bill, "a major life activity" includes nearly anything an individual might do in a day. The text includes a non-exclusive list of activities: "performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working."[7] Further, the definition also includes "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[8] Though this definition might seem unduly broad to observers unfamiliar with disability law, it is only slightly broader than current law, under which sexual relations and sleeping, among many others, have been found to be major life activities.[9]

The greatest change in the ADAAA is that it would define "substantially limits" to mean "materially restricts" for the purposes of the first prong of the definition of disability. Thus, any impairment that "materially restricts" a person from performing any major life activity, or impedes the operation of any major bodily function, would constitute a disability for the purposes of the law.

Further, the ADAAA provides several "rules of construction regarding the definition of disability" that would further broaden its scope. These mandate that the word "shall be construed broadly" and specifically extend its meaning to encompass impairments that are "episodic or in remission," including those that are temporary.[10] In addition, overturning the U.S. Supreme Court's decision in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), the bill requires that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . .," such as medication, hearing aids, or "learned behavioral or adaptive neurological modifications," an apparent reference to an individual's ability to learn to work around an impairment. The legislation specifically exempts from the rule "ordinary eyeglasses or contact lenses," which, unlike all other mitigating measures, may be considered when determining whether an individual is disabled.

Finally, the ADAAA strikes two legislative findings of the original ADA that the U.S. Supreme Court has relied upon to determine whether Congress intended to include certain impairments within the act's coverage. One finding declared the number of disabled Americans—and thus, presumably, the number intended to be covered by the act—to be 43 million at the time of its enactment, and growing.[11] The second provision, echoing much civil rights law and jurisprudence, declared individuals with disabilities to be "a discrete and insular minority" subject to discrimination, implying that those not historically subject to such discrimination are not "disabled."[12]

The purpose of these changes, according to the language's drafters, is to overturn the U.S. Supreme Court's decisions in *Sutton, Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*, 534 U.S. 184 (2002), and related cases that served to limit the coverage of the ADA's protections.[13] In *Sutton*, as mentioned above, the Court held that mitigating measures should be considered in determining whether an individual is disabled. In *Williams*, it held that "substantially limits" means "prevents or severely restricts," requiring that, to qualify as disabled, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[14] The Court also held that, under this formulation, the impairment's impact must "be permanent or long term."[15] Without question, the ADAAA rejects these precedents.

Without, at this point, commenting on the merit of that intention, I find great reason to doubt that the ADAAA's proposed replacement for the current statutory understanding is consistent with Congress's and the ADA's expressed purpose to provide "a clear and comprehensive national mandate for the elimination of discrimina-

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[7] H.R. 3195, 110th Cong. § 4 (as passed by House, June 25, 2008).
[8] *Id.*
[9] *Scheerer* v. *Potter*, 443 F.3d 916, 919 (Wis. 2006); *Pack* v. *Kmart Corp.*, 166 F.3d 1300, 1304–05 (Okla. 1999).
[10] *See* H. Rep. No. 110–730 Part 1, at 14 (2008).
[11] *See, e.g., Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 484-88 (1999) ("Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings.").
[12] *Id.* at 494–95 (Ginsburg, J., concurring) ("In short, in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a 'discrete and insular minority.'").
[13] H. Rep. No. 110–730 Part 1, at 6 (2008).
[14] *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*, 534 U.S. 184, 198 (2002).
[15] *Id.*

tion" and "*clear, strong, consistent, enforceable* standards addressing discrimination."[16] Rather, the ADAAA's definitional text, though undoubtedly sweated over by a great many lawyers and interested parties, fails to provide clear guidance to the courts, the Equal Employment Opportunity Commission ("EEOC"), which would be empowered to interpret the definition in regulation,[17] or employers.

The original ADA's definition of disability, as the courts were quick to recognize, is no exemplar of clarity, but the act's structure and findings allow for clear and consistent determinations in the bulk of cases and provide guideposts for interpretation in closer cases.[18] This, in turn, has allowed the accumulation of a large body of coherent case law interpreting the ADA's scope and coverage. The result is that those who have rights and obligation under the act—including individuals with impairments and most employers—can rely on this body of interpretation in conducting their affairs.

Any attempt to overturn *Sutton* and *Williams* would necessarily upset this case law and parties' expectations under it, but the ADAAA's language is particularly pernicious in that it supplies a new and untested vague standard for determining disability and mandates broad construction of this standard, while compounding the uncertainty of these commands by excising the guideposts that the courts have long relied upon in interpreting the ADA.

The use of the phrase "materially restricts" is puzzling in several ways. The foremost question, of course, concerns the continued vitality and relevance of the phrase "substantially limits," which would remain in the statutory text even though a new definition—"materially restricts"—is imposed upon it. The phrase cannot be a mere semantic vessel, for its presence surely has some meaning. It is a standard canon of interpretation that statutory text should not be read so as to render portions of it superfluous.[19] This reserved meaning, in turn, necessarily affects the way that "materially restricts," which would only *partially* supersede it, must be read.

As for "materially restricts" itself, recourse to the case law provides no guidance. The drafters of this provision apparently decided against adopting any standard that had seen significant use in the law or the literature. A search of all Federal case law since the enactment of the Rehabilitation Act of 1973 for this and related terms (e.g., "material restriction") retrieves a total of two cases concerning disabilities, one a bankruptcy and the other a district court decision.[20] Neither sheds much light on these terms save for that materiality, in both instances, is mentioned as relating to something other than its subject. For example, the bankrupt's carpal tunnel syndrome was a material restriction of her ability to work as an unskilled laborer.[21] A search through the output of the State courts is similarly unhelpful. Two New Jersey courts have touched on the term (it is a paraphrase of a provision of the State's worker's compensation statute[22]), both construing materiality as concerning a claimant's ability to work—that is, to receive worker's compensation, a worker must suffer an impairment that "lessen[s] to a material degree" his or her working ability.[23]

Federal statutory law provides no prior use of "materially restricts" or any similar term, and the several appearances of these terms in the Code of Federal Regulations concern tax law and various types of contractual agreements.

Lacking any prior use from which to draw meaning, a court might turn to the dictionary to ascertain the meaning of a term. *Webster's Third New International Dictionary*, that regularly used by the U.S. Supreme Court,[24] informs that to be

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[16] H.R. 3195, 110th Cong. § 2(b)(1) (as passed by House, June 25, 2008) (emphasis added); Americans with Disabilities Act §§ 1(b)(1), (2), 42 U.S.C. §§ 12101(b)(1), (2).

[17] H.R. 3195, 110th Cong. § 6 (as passed by House, June 25, 2008). This provision overturned another holding of *Sutton*. *Sutton*, 527 U.S. at 479 ("Most notably, no agency has been delegated authority to interpret the term 'disability.'").

[18] *See, e.g., Sutton*, 527 U.S. at 482.

[19] *See, e.g., CBOCS West, Inc.* v. *Humphries*, 128 S.Ct. 1951, 1964 (2008) (Thomas, J., dissenting).

[20] *Hughes* v. *Richardson*, 342 F.Supp. 320, 332 (W.D. MO 1971); In re Heath, 371 B.R. 806, 813 (Bkrtcy E.D. Mich. 2007).

[21] 371 B.R. 806 at 813.

[22] The relevant section: "Disability permanent in quality and partial in character" means a permanent impairment caused by a compensable accident or compensable occupational disease, based upon demonstrable objective medical evidence, which restricts the function of the body or of its members or organs; included in the criteria which shall be considered shall be whether there has been a lessening to a material degree of an employee's working ability. N.J. STAT. ANN. § 34:15–36 (2008).

[23] *Brunell* v. *Wildwood Crest Police Dept.*, 176 N.J. 225, 237 (2003); *Mercado* v. *Atlantic States Cast Iron Pipe Co.*, 2008 WL 723773, *3 (N.J.Super.A.D. 2008).

[24] *E.g., Williams*, 534 U.S. at 196.

"material" is "being of real importance or great consequence." For this usage, it offers four synonyms: substantial, essential, relevant, and pertinent. The first three explain too little: The ADAAA, after all, dilutes "substantial" and rejects "essential" as too narrow, for it would be akin to *Sutton's* "prevents." The other two, however, explain too much: Any restriction at all of a major life activity would be relevant or pertinent to that activity. Decisions in a great many cases could hinge on which one of these four words a court chose to apply. In this way, the ADAAA's definition of "disability" utterly fails to cabin judicial discretion, an avowed aim of its drafters.

The legislative history—to which some judges resort when statutory language, as here, is vague—provides no clear answer either. It counsels that "materially restricts" is "intended to be a less stringent standard to meet" than that propounded in *Williams*.[25] Elsewhere, the drafters advise that "'materially restricted' is meant to be less than a severe or significant limitation and more than a moderate limitation, as opposed to a minor limitation."[26] The drafters then refer to the ADAAA's rule of construction that "To achieve the remedial purposes of this Act, the definition of 'disability'. . . shall be construed broadly."[27] Yet, as discussed above, the relevant guideposts in this inquiry—the approximate proportion of the population Congress intended to be covered by the act and the nature of the discrimination suffered by that population—would be excised from the law. Without these touchstones to reality, regulators and the courts will find it difficult or impossible to conceive any coherent limiting principle that works to affect only "the elimination of discrimination" against the disabled without interfering in other relationships.

Some supporters of ADAAA recognized the opaqueness of the bill's text and, fearful that courts might actually attempt to interpret it verbatim and reach an overly broad, though not precluded, result, inserted this in the legislative record:

> "Persons with minor, trivial impairments such as a simple infected finger are not impaired in a major life activity," and consequently those who had such minor and trivial impairments would not be covered under the [original] ADA.
>
> We believe that understanding remains consistent with the statutory language and is entirely appropriate, and we expect the courts to agree with and apply that interpretation. If that interpretation were not to hold but were to be broadened improperly by the judiciary, an employer would be under a Federal obligation to accommodate people with stomach aches, a common cold, mild seasonal allergies, or even a hangnail. Consequently, we want to make clear that we believe that the drafters and supporters of this legislation, including ourselves, intend to exclude minor and trivial impairments from coverage under the ADA, as they have always been excluded.[28]

It is a small relief that several drafters of this legislation "believe" that it would not require an employer to accommodate an individual with a hangnail, but nothing in the actual legislative text, however, compels any court to reach that result. Indeed, the text seems to require otherwise; if, as discussed above, minor visual impairments that can be mitigated with standard eyeglasses are not disabilities, then presumably similarly minor impairments that cannot be so mitigated would be disabilities—the legal doctrine is known as *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another." The inevitable result: arbitrary, inconsistent case law and potentially debilitating legal uncertainty for many businesses.

To this contention, the legislation's supporters respond that their aim is actually the quite modest shift of focus from disability to discrimination:

> Too often cases have turned solely on the question of whether the plaintiff is an individual with a disability; too rarely have courts considered the merits of the discrimination claim, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied inappropriately, or qualification standards were unlawfully discriminatory.[29]

Within this contention, though, is its own rebuttal. A finding of disability, under current law a prerequisite to an ADA complaint, is additionally a prerequisite, in the logical sense, to addressing a claim of discrimination. An example: Polly has, in recent months, increasingly missed work without providing notice to her employer, Donald. She informs Donald that she suffers from major depression and requests two accommodations: a job coach and greater flexibility in taking days off

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[25] H. Rep. No. 110–730 Part 1, at 6 (2008).
[26] *Id.* at 10.
[27] *Id.*; H.R. 3195, 110th Cong. § 3 (as passed by House, June 25, 2008).
[28] H. Rep. No. 110–730 Part 2, at 30 (2008).
[29] H. Rep. No. 110–730 Part 1, at 8 (2008).

without providing advance notice. Even if these accommodations are reasonable, Donald's refusal to provide them may not constitute discrimination if Polly is not disabled. Under the empty standard proposed in the ADAAA, but certainly not under current law, Polly's occasional fatigue and feelings of self-doubt could well be sufficient to render her impairment a disability and thus Donald's refusal to accommodate discrimination. Resort to the question of Polly's qualifications or the "business necessity" of showing up does not avoid this inquiry.[30] Logically, it is impossible to reach the "merits" of a discrimination claim without determining the predicate for that discrimination: whether the individual is, or has been regarded as, a member of the protected class. Thus, any change to the definition of disability made to encourage courts to hear the merits of a disability claim will necessarily alter the substance of that claim. In this way, ADAAA may effect a far broader change than even its supporters claim or realize.

The impact of this change on employers could be severe. It is evident that, under the ADAAA, accommodation costs would rise, as more workers become entitled to more accommodations. That, after all, is the point of the legislation. But there are still more expenses, many of which would be due to the current legislation's lack of clarity. At the same time that a much larger portion of the workforce would fall under the ADA's protections, the law would also become far more uncertain, driving up compliance costs and legal expenses.

Among employers, small businesses are likely to suffer disproportionately, as is usually the case when there is regulatory complexity or legal uncertainty. Larger firms have the structure in place—general counsel offices, compliance officers, and disability consultants—to determine their legal obligations and perform them in a relatively efficient manner. For a small business, however, the costs of compliance on a per-employee basis are far higher. To accommodate a single disabled employee, a small employer may need to bring in a number of outside experts, including a labor lawyer, an ADA consultant, and even an ergonomics expert or engineer. These expenses have a serious impact on the bottom line. By requiring the expertise of outside professionals, such laws put small businesses at a competitive disadvantage to larger firms, which can spread increased costs across their entire workforce.

For all employers, legal uncertainty, especially concerning the risk of liability for discharging an employee, undermines the doctrine of at-will employment. Under ADAAA, most employees could claim they have an impairment, such as asthma or chronic stress, and sue if they were either laid off or not hired in the first place, contending discrimination. Even when the employment decision had nothing to do with the claimed impairment, the employer would still face expensive litigation and be far less likely than today to prevail on a motion for summary judgment relatively early in the litigation. The result: Employers would be less willing to hire new employees and job growth would be reduced. This has been the consistent pattern in countries that more greatly restrict at-will employment by providing greater job protections to employees.[31]

The ADAAA would also increase employee abuses under the ADA. Due to legal uncertainty, employers would likely be even more loathe than they are today to contest borderline claims of disability in the courts, for fear of incurring large legal expenses and potentially large liabilities. This is another consequence of combining vague legal rules that make it difficult to evaluate the merit of litigation with relaxed limitations on coverage.

This concern is not just hypothetical; there is strong evidence that some workers have taken advantage of similar protections recently enacted by Congress. Many workers, for example, have abused the Family and Medical Leave Act ("FMLA"), which requires covered firms to provide their employees with up to 12 weeks of unpaid leave per year, with their job guaranteed during that time, that may be used when an employee suffers a serious health condition or is caring for a family member who does. Though most workers use the leave allowance only when necessary, many use it simply to take time off at will, such as to avoid rush hour traffic and enjoy more frequent 3- and 4-day weekends.[32]

As my Heritage Foundation colleague James Sherk has chronicled in great detail, it is coworkers who often bear the greatest burden of FMLA abuses. Conscientious

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[30] *See* 42 U.S.C. §§ 12112(b)(4), (6).

[31] Hugo Hopenhayn & Richard Rogerson, *Job Turnover and Policy Evaluation: A General Equilibrium Analysis*, 101 J. POL. ECON. 915, 938 (1993); Adriana D. Kugler & Gilles Saint-Paul, Inst. for the Stud. of Labor, Hiring and Firing Costs, *Adverse Selection and Long-term Unemployment*, IZA Discussion Paper 134 (2000).

[32] *See generally*, James Sherk, THE HERITAGE FOUNDATION, USE AND ABUSE OF THE FAMILY AND MEDICAL LEAVE ACT: WHAT WORKERS AND EMPLOYERS SAY (2007), *available at http://www.heritage.org/Research/Labor/sr16.cfm*.

employees suffer each time they have to cover the work or work unscheduled overtime when a coworker abuses FMLA. In many instances, employees also suffer reduced pay and bonuses due to FMLA abuse.[33]

Slower job growth leading to reduced potential employment would be most businesses' response to any change in the legal environment that increases the cost of labor—a troubling result at a time when economic growth has slowed and unemployment is already inching upwards. If Congress nonetheless feels compelled to expand the ADA's protections to an ever-larger body of workers, it should do so in a way that imposes as little collateral damage as possible by putting forward clear tests and definitions and reducing risk and uncertainty for both employers and their workers.

It is an unfortunate and, to date, underappreciated risk that the ADAAA's radical expansion of ADA coverage may injure those who, subject to severe disabilities, who are undisputedly covered under the current law. A common accommodation for disabled workers, for example, is reassignment to a position that is less physically taxing, and no doubt, in certain industries, many employees, both disabled and not, wish to hold these positions. If all available slots are held by mildly disabled employees or employees abusing the ADAAA's protections, truly disabled individuals will have fewer alternatives available and, if unable to perform their current jobs, may be laid off, because creating a new position is not required by the ADA. Overall, it is likely that fewer resources would be available under the ADAAA to accommodate severely disabled individuals.

It should also be noted that the ADA has not been an unqualified success for individuals with disabilities in the workforce. Though no single explanatory theory is dominant, the evidence is strong that the disabled earn less and work far less than they did prior to enactment of the ADA, a period during which those who do not identify as disabled increased their workforce participation and earnings.[34] A number of economists, including MIT's Daron Acemoglu, blame the ADA for the reduced opportunities of the disabled.[35] Other critics contend that the ADA has done little more than produce occasional windfalls for plaintiffs and attorneys.[36] According to Acemoglu, as of 1997, employers faced 40,000 lawsuits per year under the ADA and spent, on average, $167,000 to defend themselves.[37] Labor markets are complex, and it is difficult to intervene in them to produce specific results without encountering unexpected consequences. The risk that a broader ADA will redound to the detriment of those it is meant to protect cannot, based on the data, be overlooked or discounted.

Many of the problems that I have identified with the approach of this legislation can be corrected through more diligent re-drafting, though those economic effects stemming from the bill's central purpose—expanding the ADA's reach—may require changing the substance of the legislation in significant ways. To both those ends—fixing and reworking the current legislation—I offer the following suggestions:

1. The term "materially restricts" is not readily susceptible to any apparent meaning and should be removed from the legislation. Rather than propound a vague definition and then demand that courts construe it broadly, Congress should put forward a clear definition (or retain the current one) and rely on the courts to employs the standard canons of construction to give statutory text meaning. If it is Congress's aim to expand ADA coverage so that it includes the majority of Americans or more, it should do so explicitly, and accept the consequences, rather than foisting the task on the courts.

2. The current three-prong definition of "disability" is valuable, for all the case law and interpretive history built upon it, and significantly changing or modifying it will destroy this value. Congress should be very wary of enacting sudden, dramatic changes that would throw the law into turmoil. The ADAAA, as it currently stands, would be such a change.

3. The legislative findings that the ADAAA would strike from the ADA have proven to be an essential tool for courts attempting to apply the ADA's principles and often vague language to real-world disputes. If Congress believes that these provisions mis-state its intentions, it should fix them rather than strike them. The ADA's

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[33] *Id.*

[34] Richard Burkhauser & David Stapleton, *Introduction*, in The Decline In Employment Of People With Disabilities 3–4 (2003).

[35] *Id.* at 16–17; Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 957 (2001).

[36] Ruth Colker, The Disability Pendulum: The First Decade Of The Americans With Disabilities Act 71–72 (2005).

[37] Acemoglue & Angrist, *supra* note 35, at 920.

findings should continue to state Congress's best estimate of how many Americans it intends to have covered by the act.

4. Though doing so will have adverse economic consequences, reversing *Sutton* can be achieved in the context of a much more modest bill that does not otherwise modify the ADA's three-prong definition of "disability."

5. Granting the EEOC power to promulgate regulations under the non-article sections of the ADA will advance legal certainty and improve compliance. This step alone may be sufficient to accomplish much of what drafters of the ADAAA hope that it will achieve.

6. The subsection on mitigating measures, as drafted, excludes ordinary eyeglasses and contact lenses, recognizing that mild visual impairments, such as are suffered by millions of Americans, are not disabilities. Congress should extend this reasoning and, at the least, exclude from the mitigating measures rule other prevalent ameliorative devices, such as certain types of hearing aids and joint braces.

The ADA Amendments Act, as currently drafted, is so vague that it is impossible to say with any degree of certainty that courts would uniformly decline to find such minor impairments as hangnails, tennis elbows, and infected cuts to be disabilities. The consequences of this confusion in the law would be significant, affecting millions of businesses and their employees, as well as the health of the national economy and American businesses' international competitiveness. If Congress's intention is to radically expand the coverage of the ADA, it should be clear in its mandates and do so with full transparency, accepting responsibility for its policy choices.

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Senator HARKIN. Thank you very much, Mr. Grossman. Thank you all very much for keeping those comments short and to the point.

I was jotting some notes down this morning before we started the hearing. One of the things we want to do here is get a better understanding of what materially restricts means.

Second, we wanted to provide an opportunity for education groups to be heard and have input into this and we are hearing that right now and allow members of the committee to express their concerns. As mentioned, we took a big step forward with the House bill, 402 votes. I want to keep that momentum going. We may have to change some things. We will write a Senate bill sometime this month and hopefully get it done this year.

First of all, let's go to the question of education. What is it that seems to be problematic? Now we heard from Ms. Simon and then Ms. Gamm took an opposite position and so did Mr. Hartle. One with sort of higher education, as I understand it and one with K through 12.

What is it in this bill that again—let's flesh this out—causes you the most concern?

As I read it, as I understand it, I've talked to the staff and I worked with this for 20-some years now, that there is nothing in

here that changes what was an issue in 504 anyway, that we lived with since 1973 and that you lived with since 1973.

If nothing has changed I'm trying to get a handle on what is problematic here. Because we don't change the fundamentally altered—I believe Ms. Simon mentioned that. That there is nothing in here that changes that language. That if something fundamentally alters a test, for example, then it does not apply. So, I need to get a handle on what we need to be concerned about in terms of education. It seems like you are already covering these kids anyway.

Ms. GAMM. I'm not concerned about the fundamentally altered provision—that's not my concern. My concern is the new terms that is being introduced around material restriction. And some of the comments that were specifically included in the House congressional report, which quite frankly took my breath away. You would not have read that in the act but reading that full report gave me a much different perspective in terms of at least what the House intended.

And it's in two areas. One is by implication resulting from the first area and that is a new application that would, I believe, contradict what has been in terms of the ADA and its application with section 504.

For example, in the original 1990 House committee report there was a specific statement in there that said a disability would apply when a major life activity is restricted in the conditions, manner, or duration under which they can be performed in comparison to most people. That directly contradicts statements in the House report that just came out that would say that would not be the standard and individuals who actually are performing at a very high level of academic success would in fact be covered and entitled to accommodation. That opens up a huge range of individuals who under IDEA law—there has been three appellate court decisions that do not have that standard. They say if a student is performing well in school, that would be something to be taken into consideration as well as the very few number—I can count them on two hands the number of cases that I was able to find recorded either by a hearing officer or office of civil rights or a court decision that went the same way. That's one huge change.

The second is while we are talking about high performing kids—what about low performing kids? There is a very interesting chart in rethinking learning disabilities that I submitted to you on page 5 where researchers are now looking at, this is actually one of the very important changes in the reauthorization by the IDEA in regulations that followed around what is a learning disability. And as we know in the area of special education, that's almost 50 percent of all kids have mushroomed through the years in the area of learning disabilities and I think this chart is incredible in that it shows what the research has shown, that it's very difficult to determine whether a child's difficulty in reading is due to what might be a statutory defined learning disability as opposed to a child that begins school with insufficient skills and does not have the phonemic awareness that you need, the building blocks of reading, does not get instruction to change that and as a result has difficulty reading in life.

Here we see in this chart, there are two lines of kids with learning disabilities under the statute and the same under-achieving line, virtually the same, of kids who don't meet that burden under the IDEA, but nevertheless are not readers.

So my concern is for the under-achieving kids—we don't know if the changes in definition will actually open up the door and have a legally protected right and legal procedures under this bill.

Senator HARKIN. We have two situations here. Under IDEA, we don't have to worry about that. That is taken care of. IDEA is taken care of, with an IEP. We know what that is. It seems to me that the problem we have here is 504. Is that right?

Ms. GAMM. However, under the regulations, the original regulations with the U.S. Department of Education they actually talk about the synergy between the two and that under 504 you look at IDEA and there is a relationship between the two, especially in the area of learning disabilities. My concern is whether this change in definition. I don't know. But it could have an impact and could broaden the definition of who has a reading disability.

Senator HARKIN. Some of this may be over my head. Could somebody help me out here?

Ms. SIMON. Senator, I would be happy to address that.

Senator HARKIN. If you want to speak to the topic, turn your card on end or signal me and I'll call on you.

Professor Bagenstos is first, I think.

Mr. BAGENSTOS. A couple of points about that. One is that although the regulations under 504 do reference the IDEA, there is case law and these cases get decided on a weekly or monthly basis that say, "Well, this is a student who is not eligible under IDEA, but may have a disability under section 504 and therefore doesn't get an IEP and all the same IDEA requirements." The statutes have different requirements in them and there is a synergy between them. It makes sense in a lot of cases there is an overlap, but by extending the ADA or section 504 to these children it's not going to incorporate all of the IDEA obligations, child find obligations to ADA is quite clear under the case law that it is an obligation to accommodate a disability that's known or at least that there is some particular reason to believe that their covered and should have been known. That is you don't have to go out and see whether or not this person has a disability and these other obligations under IDEA. I think we can. I think you are right, Senator Harkin, we can deal with them as separate, and deal with the terms of this statute as the terms of this statute.

Senator HARKIN. It seems to me that IDEA is so clear cut and so separate and apart that we don't have a problem with that.

Ms. GAMM. My concern is that that's true, but that this change would actually broaden an addition under 504, a whole new group of children that we are serving but not currently under the strict procedural requirements of section 504.

Senator HARKIN. OK.

Ms. GAMM. That was my concern.

Senator HARKIN. Anybody else want to comment on this at all? Ms. Simon.

Ms. SIMON. Yes, thank you, Senator. I think the problem is that we have an exhaustion requirement under IDEA, an exhaustion of

the procedural remedies. So for a child who might be arguably covered by both statutes, when a parent has a dispute with the school system they have to exhaust the administrative remedies under IDEA anyway. The issue really is that IDEA is taken care of. To the extent that this would expand the number of students who might be protected, I think it is very important to recognize that protection is not the same thing as services. There are many ways in which a student's rights might not be fulfilled, but that may not mean that there is any need for procedural requirements or for due process or for expensive services.

I also think that the issue about learning disability (L.D.) gets raised all the time in terms of low performance. There are two reasons why this may happen. One is a common misperception that learning disabilities are the same thing as low intellectual ability. They are not. So, the fact that someone who does well because of accommodation or class size doesn't mean they don't have a learning disability.

A learning disability is a processing disorder, it's not an academic disorder. It may be demonstrated in academic difficulties but it need not be demonstrated in academic difficulties. The problem is when you try to make one thing something else, you then lose the essence of what it is. It is very important that students with learning disabilities get the right kind of instruction. And to the extent that the chart that was shown before indicates that they fall off along with students who have low achievement may, in fact, be an issue with regard to instructional responses as opposed to whether or not those students have a disability and would be protected by the law.

I think that the way that we can be assured that we are protecting students who need protection is to have a thorough comprehensive clinical assessment of how that child learns. That will separate out those students who have a processing disorder or learning disability from those who have an academic disorder. Thank you.

Senator HARKIN. Professor Feldblum.

Ms. FELDBLUM. If I can add some clarity to this conversation. Sue says that she is concerned that there is going to be a whole new group of students now under section 504—that schools she has been consulting with and advising, who want to do right by the kids, are suddenly going to have a whole new group. And I'm sitting here telling you we don't think that is going to be the case.

In fact, as we went through this language we thought about all entities under the law, not just employers. So how can both of those things be true? This is how I see it. The schools have been dealing with the words "substantially limits a major life activity," but they have not been taking the U.S. Supreme Court cases that allow them to say, that kid with epilepsy, that kid with diabetes, that kid with bad asthma, you don't have to do anything for them because with the medication, they are not disabled.

Schools haven't been doing that. They have been doing the accommodations for kids with epilepsy, diabetes, and severe asthma. They have been doing that. The only time, and I've read all the cases, where schools have come and said, "this kid with asthma does not have a disability" because with the medication the kid

doesn't have a disability, is when they have done amazing accommodations for the kid already and the parents are saying, "no, no, I still want more." Where the court could have decided, "yes, the kid has a disability but you have done everything you need to do school." Instead, in a few cases the courts have done what they have done with employment and said "that kid doesn't have a disability." What is happening is that, there was a change in the definition that was done by the U.S. Supreme Court by saying, "You look at the medication, take that into account." Because those cases arose in the employment context, they were mostly used in the employment context. In the school context, it's sort of like they had that opportunity, they didn't really pick it up. It's not that they didn't use it at all. Like I said, in some litigation they did use it. But in their practice they didn't pick it up. If this Senate would pass the original ADA Restoration Act as introduced then I understand the concern, because it really was a different standard.

But the ADA Amendments Act, what the employer community asked for and got, was essentially the same definition "substantially limits a major life activity," but by using the term materially restricts, simply saying to the courts, we don't want the over-the-top strict standard that you applied before.

So, I understand the fear because it's a new piece of language, but it is not a new piece of language intended to expand the students that they serve right now. One thing that I heard here that is slightly different from Sue today is the concern that somehow we are trying to change the rule that you decide whether someone's impairment substantially limits an activity by looking at the manner, condition, or duration of that impairment. That is not the intention of those of us who have been working on this bill to change. In fact, that was discussed clearly. The employer community wanted to make sure that standard still applied. As you heard from Jo Anne Simon, someone with a learning disability is different in the manner in which they learn, OK? And that is not intended to be changed.

I do understand that there might have been some concern with some report language, and that is something that can be discussed in terms of doing it differently but there was not an intention of changing that comparitor standard.

Senator HARKIN. This brings to light one of the reasons we wanted to have people from education here because we had heard obviously from the education community that there were problems here and I wanted to get this aired. I'm not sure I understand all the implications here, but just listening to this, Mr. Hartle—if you have anything to add to that?

Mr. HARTLE. Our concern is a little different, Senator. We believe that the ADA Restoration Act will increase the number of people who are eligible for services and we will provide those.

But we are worried that the provision of current law that says accommodations do not have to be provided if they alter the essential elements of the academic program could be impacted by the legislation. Indeed the purpose of this bill is largely to overturn existing case law that people believe has narrowed the reach of ADA. And the House report specifically rejects the findings of several higher education cases, and in light of this we think it's important

to make clear that current case law regarding the essential elements of the academic program be reaffirmed in the statute.

We think it's important that current case law provisions regarding the ability of institutions to make decisions based on the essential elements of the academic program be reaffirmed in the statute.

Senator ENZI. I want to note that as we move through this process, we may have additional questions. If we do have additional questions, we will get them to you and hope you can provide us with supplemental responses. There are a lot of people who aren't here, and we will encourage them to read the information you provide, some of which is very technical and may require additional clarification. So I would appreciate it if you would respond to those questions as quickly as possible.

Senator HARKIN. I am trying to figure something out, Mr. Hartle. Would you repeat the last statement that you made for me again? You said you did not want to see essential functions.

Mr. HARTLE. The essential elements of the academic program.

Senator HARKIN. The essential elements of the academic program altered?

Mr. HARTLE. If someone wanted to get a Ph.D. in comparative literature, you have to be able to read and speak foreign languages, to get a Ph.D. in comparative literature. Current case law would reaffirm that, we would not have to make an accommodation in that particular case. What we are concerned about is that the statute's language you are considering may weaken the protection we currently enjoy in current case law that says we don't have to grant accommodation if it changes the fundamental nature of the program.

Senator HARKIN. And that was not changed in the bill?

Mr. HARTLE. It wasn't changed in the bill but we are afraid the courts will look at this legislation which substantially changes ADA.

Senator HARKIN. We did not change that in the bill, and I don't know about your concern with the courts changing it, but I will say this from my standpoint and this goes way back. A lot of times programs are set up with the best of intentions. Education programs are set up with the best of intentions and these harken back to old ways of doing things. Sometimes especially in higher education and when you look at the modern world and what people are doing these days with the Internet and that type of communication skills, that perhaps some of the things that were laid down by higher education communities in the past in order to get a certain degree or a certain diploma of higher education, whatever those requirements were, don't apply in the modern age, and some of them may need to be changed. And if they don't do it internally, maybe the courts should look at that and say, "why is it necessary for someone who wants to get a Ph.D. in comparative literature to be able to speak a foreign language if, for example, they can't speak?" Say they have cerebral palsy and they don't have a language skill but they have every other skill. They can communicate perfectly well over the Internet. But they may not be able to communicate verbally. What is wrong with that, I ask?

Mr. HARTLE. Senator, comparative literature is the study of literature written in foreign languages, and to get a Ph.D. in com-

parative literature, it's a basic requirement that you have to be able to read a foreign language.

Senator HARKIN. Read is different. You said speak.

Mr. HARTLE. Reading is different. One of the most frequent requests we get for accommodation are from people who want a foreign language requirement waived. So the issue here is simply to say, we want to protect the academic integrity and standards of institutional programs so that the degrees continue to mean what they have meant in the past.

Senator HARKIN. I am challenging you a little bit on this. I don't mind institutional integrity if the institutional integrity is not based on antiquated conceptions and dictums handed down from centuries ago that have no real relevance in today's world. I don't mean to single out higher education, there are a lot of those in this institution, too, by the way, in Congress. So those fundamental things have to be challenged once in a while. The idea of reading rather than speaking seems to be an accommodation to me. That's an accommodation. It's not fundamentally altering anything. That's an accommodation. Isn't that what we are about, providing those kinds of accommodations? I don't see that as a big concern.

We don't change that fundamentally altered, we leave that alone. But, you may be right—courts may in the future look at a case and say, "Why is this a requirement? Why do you have it? What is the essence of this requirement that you may have for a degree or something else? Is it pertinent to today's life, the way we live?"

The court may say, "Under the accommodations exception here, you need to provide an accommodation for this individual." I personally don't find anything wrong with that, as a matter of fact. I think that's the evolution of society.

As we progress as a society and we see those kinds of changes made, some are done legislatively, some have been through common law through our court systems. But we left it there, "fundamentally altered." But I'm not saying that sometime in the future the court might not look at something like that and decide to reach a different conclusion. I can't protect you against that. That's common law.

Mr. HARTLE. It would protect us if there were a provision in the statute that ensured that the fundamentally altered provision remains.

Senator HARKIN. The only way we can protect that is to say that in the institution of higher learning, or any other institution, whatever they set down as their requirements, a court can't challenge that, a person can't challenge that. We can't do that.

Mr. HARTLE. They can be challenged, Senator. The institutions would have to demonstrate that it is a fundamental element of the academic program. It doesn't give the institutions carte blanch to act badly and there is nothing in the record over the last 18 years to suggest that colleges and universities wouldn't try to be as accommodating as possible.

Senator HARKIN. I think that is right. And I would think that there would be a presumption on the part of the individual that an accommodation could be made, it would have to be up to the university to show that whatever rules or regulations that they are abiding by overcomes the civil rights protections of ADA or 504.

Somehow that overcomes the broad civil rights protection and I think that's a pretty high hurdle to overcome. You might be able to show that. But I would think you have to overcome the civil rights protection that an individual would have who has a disability.

To close out on education—I want to move to materially restricts—would you on the education side, are you telling us that we need a better definition of "materially restricts?" Is that what you are saying?

Ms. GAMM. Yes, that and also in terms of looking at mitigating measures in terms of elementary and secondary. For example, as was pointed out, students would require a thorough clinical assessment.

The question becomes now, are there are many, many more students that are required to get that thorough clinical assessment?

Senator HARKIN. I think that is very legitimate.

Ms. GAMM. Right now, for example, I would agree with you 100 percent. The districts are doing lots of plans for kids with different health impairments. The issues are most of those plans—as I have talked to my colleagues—are very informal and probably would not reach the threshold of an OCR review in terms of the 504 regulation. Because they don't view them as necessarily disabled under 504, they view them as kids that need some assistance.

For example, I was talking to Chicago and they were thinking about doing more informal plans as opposed to formal 504 procedures. Which, trust me, I monitored for 13 years in school districts. They expect to see the I's dotted and the T's crossed.

Senator HARKIN. What does "materially restricts" mean?

Ms. GAMM. I think we don't know.

[Laughter.]

Senator HARKIN. Mr. Grossman. You had your hand up.

Mr. GROSSMAN. Yes, Senator. In my written testimony I've gone through and applied the standard statutory approaches to determining meaning of statutory language. I think the language is challenging in the sense that this language is unprecedented in the disability context. In other cases in which courts have construed the term materiality, they have always relied upon generally common law or other statutory history that builds up over many, many cases that gives a gloss on the word and that shows how it is limited and how it is to be applied. In other words, it's the history of the case law that allows legislators to use the word in such a way that it cabins judicial discretion. In this case however that body of case law does not exist. The other methods of statutory interpretation that the courts regularly apply are similarly unavailing of a concrete definition.

Indeed, references to other portions of the statute which the courts have made before in construing the ADA would be altered by the Amendments Act. It's sort of removing another touchstone that the courts might apply to determine the precise meaning of that language. Without there being any sort of limiting principle inherent in the language itself there will be confusion and I think that's very evident in the two House reports on the bill. The members who contributed to the House reports have a different understanding of what this actually means, what it would require and

what it would not require. That confusion reasonably reflects the actual text of the statute. I think what you could expect to see is that courts would be free to stamp their own policy preferences upon the law to prevent what they see as bad results. In some cases that may align with Congress' intent but in other cases it may not. I don't think there is anything in the statute that would necessarily prevent courts from interpreting and exercising their discretion under the statute in that way.

Senator HARKIN. Professor Bagenstos, I read your statement last night, and you had something in there about that. What say you on this?

Mr. BAGENSTOS. As an introductory point, the reason why we are here, is because courts have stamped policy preferences on the original ADA's definition of disability. This is trying to stop it. If you look at the term "material," it's not a term that just appears in one place in the law. It appears all over the law.

There is material omission, material misrepresentation, material breach, material adverse change, all over the law. And so that it's unprecedented in the disability discrimination law context, I don't think it's that significant from the perspective of courts developing a body of case law that makes consistent and clear understanding of this term.

What I would say about this is one of the things that was true, going back to the original ADA, is the notion that disability is not—we have a clear line, you're in a group, you're defined as disabled for everything in your life. It's a very individual characteristic going back to the very beginnings of the work that you did, Senator Harkin, on the ADA. Disability is not something where we can just say you have X condition, therefore, you are disabled. It requires an analysis of particular facts. The materiality standard is a standard that is used in the law to address particular facts in widely varying fact situations to make sense of the law. I think that because it's so common, because it's so well understood by judges, it's something that will develop a case law that will be very consistent.

As I say in my testimony, if you are concerned about how do we elaborate this, can we elaborate this more? There are definitely ways that you could elaborate this more. You could elaborate this more by taking what I understood both Sue Gamm and Chai Feldblum to agree on, which is the notion that we are talking about condition, manner, or duration here when you are talking about materially restricts.

You could elaborate that by saying something like materially restricts refers to a restriction on the condition, manner, or duration of an individual's ability to engage in a major life activity as compared to that of either the average person or most people which are the different terms used in the different regulations under the ADA. *EEOC* v. *DOJ*.

You could do that, and that might well add a little bit more confidence in people that there will be consistency and clarity here. But the term itself is one that is well known in the courts. When there have been attempts to create per se rules, saying this isn't material or this is material. The courts have said, we don't need that, because we know what material means.

Senator HARKIN. Ms. Simon.

Ms. SIMON. Thank you, Senator. I would just like to add a brief comment to the professor's discussion here. And that is that one of the things that I think we need to do is exercise common sense when we review these situations.

And that is, if you take the statement that professor just talked about, whether someone is restricted in the condition, manner, or duration in which they perform the activity compared to that of other persons, it becomes very obvious that what we are comparing are the condition, manner, or duration in which one person performs an activity versus the condition, manner, or duration in which another person does.

So the person who walks with two artificial limbs is walking, and he may actually walk quickly in certain circumstances, but he's doing it in a fundamentally different way, a materially restricted way. I think what is important is to make sure that we are comparing like things. When we compare performance outcomes to the manner in which someone performs, we end up comparing apples and oranges and we end up with fruit salad and then we are just confused.

I think what is important is that we start separating things out so we start comparing that which needs to be compared and not muddying the waters.

Senator HARKIN. Professor Feldblum.

Ms. FELDBLUM. My comment actually will follow right on that, I hope. As you heard, the point about putting in the words materially restricts was simply to communicate to the courts that what they had done with the word "substantially limits" was too strict, too tough, excluded too many people. The original S. 1881 had no limitation at all. It would be any impairment.

In our original conversations we wanted to cover only impairment with more than a minor impact, just more than a minor restriction. That wasn't enough for the business community. They needed something that was a higher level of severity and ultimately the disability community agreed with the higher level of severity because once you don't take into account mitigating measures, we believe you will cover the people with the impairment that should be covered. That's why we also do not disagree that when you look at the term materially restricts, and again, it's a functional limitation. I agree with Sam Bagenstos that there is a history of courts applying that in functional ways.

When you look at it, it's helpful to think about it as a condition, manner, or duration in which you perform that activity as compared to the way most people perform that activity, be it walking, thinking, concentrating, speaking, et cetera. There is no confusion, Mr. Grossman, on the House report on this. There was an effort in the House reports to undo the fruit salad. There was an effort with regard to learning disability to explain what Jo Anne Simon just said, that when you decide whether someone with a learning disability is materially restricted you don't look at the final outcome, did they get A's? Maybe they did get A's, you look at whether their manner, duration, or condition of performing the right activity is different than that of most people, and that's what you get from a medical diagnosis.

So it might be it looks a little too much like fruit salad now, and I think it would be great if the Senate could undo that, make more clear what are apples and what are oranges, but I don't think there is a disagreement of understanding in terms of what materially restricts is to mean.

Senator HARKIN. Before I call on you Mr. Eastman, let me read this. I am looking this over, and this is the final rule on title II of ADA. It's interesting in the final rule, under the substantial limitation of major life activity, they said here that:

> A person is considered an individual with a disability for purposes of test A, the first prong, when the individual's important life activities are restricted as to the conditions, manner or duration under which they can be performed in comparison to most people.

You mentioned that. Most people or average person. Does that give us some guidance?

Mr. Eastman.

Mr. EASTMAN. Thank you. First of all I think it does. I agree with the prior witnesses on the condition, manner, or duration language. That may be an appropriate clarification that you may wish to consider. I would say more generally that materially restricts language came about because the current ADA does not provide any definition for "substantially limits." The EEOC in its regulations essentially said substantially limits means significantly restricts.

Now the U.S. Supreme Court questioned whether those regulations, whether the EEOC even had the ability to issue those regulations, but it said substantially limits effectively means severely restricts.

In a discussion over what words we use to describe substantial limitation, we talked about a lot of words. We tried to pick a word that made it clear we are not talking about minor impairment and that on a scale of 1 to 10 might be a 1. We are not talking about moderate that might be more in the five range. But we are talking material. We are not talking severe, or severity but it's still something more than moderate.

That's where the word came about. We welcome the ability to have a conversation about how we can further clarify it. And I think the condition, manner, or duration language that has been proposed here today would go a long way toward that.

Senator HARKIN. Well, for example, referring back to the final rule of title II, it says here, "A person with a minor impairment such as a simple infected finger is not a symptom for major life activity." This goes on to say, "a person who can walk 10 miles continuously is not substantially limited in walking merely because on the 11th mile he or she experiences pain," because most people would not be able to walk 11 miles without experiencing some discomfort," so again, the average person, most people.

I must, for emphasis, repeat here again what they said in this final rule on mitigating measures. I don't know how the court got this wrong. I just for the life of me can't understand this. We put it in our report on the Senate side. It was in the House report, and here is the final rule that says "the question of whether a person has a disability should be assessed without regard to the avail-

ability of mitigating measures such as reasonable modification or auxiliary aids and services."

"Personal hearing loss is substantially limited in the major life activity of hearing even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments such as epilepsy or diabetes, which could substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."

I just don't know how the courts got that wrong. I don't.

Mr. Grossman.

Mr. GROSSMAN. Thank you. With respect to the comments of Ms. Simon as agreed to by Professor Feldblum, they bring up the concept of common sense as a limiting factor. I think it's important to note that with respect to the notion of commonsense as a means of interpreting sort of the breadth and the reach of the statute, I think it's important to note that the House drafters avowed aim was to reduce judicial discretion and try to pull out judge's applying their own common sense and engrained wisdom where it differs from Congress'.

If Congress wishes to change the standard that is in the statute it should do that in a way that is clear, that is easily applied, and that provides appropriate guidance that may be enhanced through findings such as are removed by the Amendments Act. It may be enhanced by other parts of the structure of the statute and it may be enhanced by more precise language. That is what my greatest concern is, is that all of these factors are lacking in the House's text.

Senator HARKIN. Mr. Bagenstos.

Mr. BAGENSTOS. I think what this bill does is not the common sense term but a common law term and there is a real difference there. With a common sense term the idea is—let's think about what it means to us. A common law term takes on a history that goes back in this case—materiality, the term material is used in blackstone, it is hundreds of years old in the common law. It confines judicial discretion by using the common law.

I think given the sense of the history that we have gotten today, also the sense that it's material as a replacement for substantial, because "substantial" is a term, and I talk about this in my testimony, that everybody in the law recognizes can mean two totally opposite things. It could mean "he won the election by a substantial majority" or it could mean "substantial evidence review under the Administrative Procedure Act" which means they have to have just the tiniest bit of evidence to support them. "Substantial" as a term used in the original ADA—very vague—did call on the courts effectively to pour their own policy judgments in.

Material, not true. Material is a term that has been used for generations and in this context it would be applied in a way sensitive to this context but also bringing that meaning it has for generations. So, I don't think it's common sense, it's common law.

Senator ENZI. I'm trying to figure this out a little bit, too. But I think what Mr. Hartle is talking about is the change of adding, as a function, thinking and concentrating, whereas before that wasn't as clearly defined as some of the other physical activities.

How does the court construe the duty to accommodate in those areas? We talked about disability, different people have different abilities to think and concentrate. Some people need different surroundings to be able to do that.

To what degree does the university have to provide that kind of accommodation, that's the question I ask.

Ms. FELDBLUM. If I can respond to that directly. In fact, the major life activities of thinking and concentrating have been in the law for a significant amount of time. There are cases that have recognized thinking, concentrating as major life activities.

In fact, as Sue mentions in her testimony and also the higher education folks, the Office of Civil Rights for the Department of Education, when it issued guidance to the schools, it specifically noted thinking and concentrating as major life activities.

For years we have had thinking and concentrating as major life activities that have been recognized both by the courts and by the agencies. So, this bill is not going to change that in terms of these being major life activities. There is a difference here. As I understand their concern, in some situations if colleges want to be able to say, "In order for you to get this degree, you need to meet certain requirements that might in fact require you to think and concentrate in a certain way or maybe even think and concentrate in a different language." There seems to be a concern, I'm not exactly sure why, but there seems to be a concern that schools will no longer be able to have those eligibility requirements. That is not true in terms of what the law does. So adding thinking and concentrating to the major life activities does not affect the requirements that a school can put in.

My only concern, by the way, as to putting something in statutory language is because it would be really redundant of existing law, I'm not sure what a court would do with it. Certainly in legislative history, I have no problem at all saying that has not at all changed. In fact, a court might wonder why you put it in, but there would be no reason not to, in terms of what this bill is intended to do.

Senator ENZI. They wonder about a lot of things we put in.

[Laughter.]

Senator HARKIN. Is there anything else you want to bring up before I prod a little further on something else? If there is anything that you want to bring up for discussion?

Mr. GROSSMAN. If I might, in response to Professor Bagenstos—I apologize if I have mispronounced your name. In response to his contention that materiality is a straight forward concept of common law, I think it is a little bit misleading and potentially incorrect to say that. The term has been construed by the courts going back to other cases, and there is no doubt about that. It is construed very differently, however, in different context and I think that the case law is very clear on that point.

The U.S. Supreme Court has actually, in the case *Kungys* v. *United States*, actually put forward—this is Justice Scalia—several paragraphs on explication of how it would arrive at a construction of the word materiality in the context of a criminal statute, and it was actually looking at different uses of the word material in different areas of U.S. law, and explicitly rejected pulling in dis-

similar areas of the law to construe the statute. I think it's also worth saying that the U.S. Supreme Court, when it encounters this kind of ambiguity, does resort to other methods such as looking things up in the dictionary and I think like the word substantial, you wind up in the dictionary definition of material which is sort of this bifurcated definition.

Because, at least according to the same sort of dictionaries that the U.S. Supreme Court commonly applies, you wind up with several definitions that would seem to match almost with severe, which the House legislation explicitly rejects. On the other hand, you also see much lesser or much looser standards that speak to you—pertinence that speak to mere relevance. In other words, standards that seem, at least according to the House's legislative history, much lower than what the House is hoping to achieve in its draft language. If Congress aims to expand coverage of the act, it should just do so in a clear and straight forward way. It should use numbers, it should use examples, it should use clear language. It shouldn't replace one cipher with another.

Mr. BAGENSTOS. I think it would be very difficult to use numbers or use examples that would really clarify things. We have had a lot of efforts to try to do that and they all either cover people we don't want to cover or don't cover people we do want to cover. When you look at the *Kungys* case—I love this because this is like a law school seminar, we could talk about discussing cases. When you look at the *Kungys* case, what Justice Scalia says as he goes through that long explication is, here's the thing about materiality. When you try to create a per se rule saying this is material and this isn't, it doesn't work. What we have to do is apply it sensitive to the context in which the term is being applied and sensitive to the facts surrounding it which is really what the common law does with very fact intensive questions like the question of what is a disability. Unless what we are going to do is have a list in the statute—amputation, epilepsy, intellectual developmental disabilities, on down the line—these are disabilities and there are very good reasons I think, why this Congress has rejected that in the past, then we have to use a term that takes account of context and that recognizes the fact intensive nature of these decisions and the factual specificity of these decisions. Using a term like "substantial" with no particular common law meaning is a problem, using a common law term is a good way of dealing with that.

SENATOR HARKIN. Again, Mr. Grossman and Mr. Bagenstos, you said in your written statement, as you have said here too, you felt that the materiality was sufficient. But you said that if the committee believes that additional elaboration on the statutory text is necessary, one possibility readily suggests itself—and you go on to basically use the same language that was in the rule on title II. Would that suffice for you, the same language that was used in the final rule on title II, which says that conditions, manner, or duration in comparison to most people or the average person?

Mr. GROSSMAN. It's my view that it certainly would add a lot of clarity to the legislation.

Senator HARKIN. OK. I am trying to figure this out. It seems there is a general consensus that we have to do more with the term "materially restricts."

The other thing that we didn't really get to—and I see that the vote has started—is the whole idea of broad construction. On the broad construction aspect, is there anything more that we need to say in terms of broad construction other than what the House has said in this bill, in terms of applying this broadly. Does that need to be more specific or not?

Mr. Grossman.

Mr. GROSSMAN. In other areas of the Federal statutory law Congress has usually been much more specific when it encourages courts to imply broad construction to the law. In other words it will frequently say, the exact provisions will say something along the lines of, "broadly construed with respect to," and then it will list specific ends, specific factors, specific considerations. Those are things that are lacking from the current HELP language, that again adds to the confusion about the meaning of the law in this particular case.

Senator HARKIN. Anything else on broadly construct?

Mr. BAGENSTOS. I think it is possible to write a broad construction provision that is like the one that is written in the Religious Land Use and Institutionalized Persons Act, which is of the type that Mr. Grossman is talking about. I just want to point out that actually in the statutes there are a number of provisions. I cite a couple of them on page 4 of my prepared testimony that say, and I am quoting: "The provisions of this section shall be liberally construed to effectuate its purposes."

It's perfectly consistent with statutory drafting practice in the past, to have a provision like that in the ADA Amendments Act. It is also consistent with what I took to be, at the time the ADA was adopted, the background principles construing Civil Rights Laws, which is to broadly construe them to effectuate their purposes as Justice Stevens said in his descent in the *Sutton* case. It is sensible to have the provision that is currently in the bill and it is also quite plausible to write a different kind of more focused provision.

Senator HARKIN. As you said under the broad construction, broad construction provisions does nothing more than declare that in cases of ambiguity the plaintiff are entitled to have their claims of discrimination heard on the merits. That brings me back to Mr. McClure. A live person who basically never got to have his case heard. Here is a person who, correct me if I am wrong Mr. McClure, was hired to do a certain job and had done this job for many years before. The GM doctor examined him and found out through the examination that he couldn't raise his arms above his head and therefore declared him to be disabled, basically.

Well GM didn't hire him. He took it to court and the court said, you are not disabled. So he never really got to get to the merits of his case. So it seems to me that this is a profound instance of where someone was carved out from the first prong and was never allowed to ever be heard on the merits of the case. Mr. McClure never, ever got to the merits of the case.

That's why I point to this and say somehow this has to be more broadly construed so that people can't just be carved out without getting to that next step. So, it seems to me we have to have this construct in this bill somehow. It's very frustrating when people

with epilepsy, amputation—and you think of all the veterans coming back from Iraq who are going to have a lot of prostheses and artificial limbs. They may be able to function pretty well, but if they are discriminated against, they will never have their case heard on the merits, because they fall under here, what the U.S. Supreme Court has now decided.

I think this is one of the essential elements of this bill that we have to make sure we have it right. I am asking what you thought about the construct of the bill itself. I am not hearing anything opposite or—what I am hearing is that what's in the bill is good, is acceptable.

Mr. Eastman.

Mr. EASTMAN. Thank you. I wanted to emphasize the point you raised, Senator, which is a point that was helpful in explaining to employers the House bill and why it might be workable. Even though there is broad construction language and even though parts of this bill when looked at alone appear to be fairly broad, the fact of the matter is it's not universal coverage, an employee will still need to be qualified for the job in question, they would still need to prove their case on the merits.

The employer could certainly articulate legitimate non-discriminatory reasons for their actions, just like title VII. Employers, we think, will still win the cases they should win—the frivolous cases and non-meritorious cases on that basis.

Senator HARKIN. Thank you, Mr. Eastman, and Ms. Gamm. We are about half way through the vote and we have to close it up.

Ms. GAMM. I wanted to voice my dilemma. I wish I was smart enough to know how to deal with it. The dilemma is this. You look at what is a disability in all the various medical and physical impairments, health impairments and you look at school situations. Look at this huge number of kids now who somewhere, somehow are getting diagnosed with ADHD, or allergies—now there are schools that don't allow peanuts to deal with the peanut allergy, for example—diabetes, obesity, the numbers are growing. The issue becomes, those kids are in school, it's not like they are getting a job or getting terminated, they have a right to an education and the question becomes the means by which they get access and are able to benefit. Our concern is, under the current 504 regulation, there is very strict protocol and processes including, thorough evaluations, etc., for any child to determine if it rises to a level of disability and how do we achieve that balance between informality and informal planning which is now taking place and the higher threshold under the current 504 regulation, that requires much more precision and detailed direction, even though the results might be the same.

Senator HARKIN. Here's 504 right here.

Ms. GAMM. We are talking about the procedural regulation.

Senator HARKIN. That's what I have up here.

Ms. GAMM. It's a procedural regulation in terms of how you get to that point. I have it with me. If you want to look at it. It's very detailed.

Senator HARKIN. Ms. Simon, I'm a little confused myself right now, but go ahead.

Ms. SIMON. I think the issue is this, those procedural requirements to the extent that they exist in the regulations, are not going to be changed by this statute. The amendment to the ADA is not going to change that at all.

I think the concern might be that there are students who might be identified who currently are not identified, and the question really is, whether they are protected from discriminatory conduct, if they don't need services, they are not going to be entitled to services. Whether they are protected by the statute or not. I think that it's very important that again we keep our eye on the ball with regard to what it is we are trying to do here. We are trying to cover those people who Congress originally intended to cover and who have been denied those protections by the courts.

Senator HARKIN. I would invite you to submit additional testimony to us, elaborating on this and we will be looking at this closely and taking everything into account. We really have to go. I am going to miss my vote if I don't. I want to thank all of you for being here and more importantly, I want to thank you for your long-time involvement in the process. We will be working on this legislation this month. Hopefully we will be able to move this bill. I hope to get it done this year and with your help, I think we can do that. So thank you all very much.

We are adjourned, subject to the call of the Chair.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR OBAMA

I want to thank the Chairman for holding this important hearing regarding the proper scope of coverage of the Americans with Disabilities Act. As many of you know, 54 million Americans—roughly 1 in 6—personally experience some form of disability. And the wars in Iraq and Afghanistan continue to increase those numbers. Yet 17 years after Congress enacted the Americans with Disabilities Act (ADA), Americans with disabilities still do not have an equal opportunity to fulfill the American Dream.

In 2006, working-age Americans with disabilities were almost three times more likely to live below the poverty line than those without disabilities. While the average annual household income of individuals in the United States without disabilities was $65,400 in 2006, the average annual household income for people with disabilities was $36,300. And the employment rate for persons with disabilities in 2006 was at least 40 points lower than the employment rate of working-age individuals without disabilities. These dismal statistics offer evidence of severe shortcomings in our country's efforts to break down the barriers that exclude people with disabilities and deprive them of true equality of opportunity and independence.

I believe the United States should lead the world in empowering people with disabilities to take full advantage of their talents so they can become independent, integrated members of society. Dozens of countries have adopted laws modeled on the Americans with Disabilities Act, but America's leadership in the world has faded in recent years. Passage of the Americans with Disabilities Restoration Act is an important first step in restoring our Nation's leadership in this important area. In recent years, the U.S. Supreme Court has severely restricted the application of the Americans with Disabilities Act (ADA) by narrowly defining what it means to have a "disability." As a result, lower courts have held that people with epilepsy, diabetes, heart disease, and cancer can be fired from their jobs because they have those conditions. As a nation, that is something we should be ashamed of.

My good friend, Senator Tom Harkin, has long been a national leader in the area of disability rights and I am proud to support his legislation, which would overturn the U.S. Supreme Court decisions that limit the ADA's coverage and effectiveness. I urge my colleagues in the Senate to join this bipartisan effort. I thank the Chairman for holding this hearing, and I thank the witnesses for their time.

PREPARED STATEMENT DUKE UNIVERSITY

Duke University is strongly committed to protecting the civil rights of people with disabilities. The University's Disability Management System (DMS) provides leadership to the University and the University Health System in their efforts to ensure an accessible, hospitable working and learning environment for people with disabilities while ensuring compliance with Federal and State regulations.

The DMS serves as a central clearinghouse for disability-related information, procedures and services. We provide expertise in the development, implementation, and acquisition of standard disability-related University practices, procedures, and resources, including but not limited to:

- Reasonable Accommodation Procedures (Students, Faculty, Staff, Visitors)
- Effective Communication
- Assistive Technology/Adaptive Equipment
- ADA Facilities and Site Surveys/Reviews
- Disability Discrimination Grievance Procedure (in collaboration with the Office for Institutional Equity)

At the outset, we express our sincere concerns about the ADA Amendments which will add new definitions that are unclear and will rely upon court decisions to reinterpret their meaning. For the Nation's colleges and universities, we hope that the Congress will ensure that however it chooses to amend this legislation, that it does so in a manner that enables postsecondary institutions, serving hundreds of thousands of students and staff with disabilities, to meet their obligations in a sensible manner that does not require burdensome analyses and engagement of high level consultants. To this end, we are particularly concerned about redefining "substantially limits" as "materially restricts," which, in our view, will again require judicial interpretation.

It is clear from reviewing the House Committee Report that Congress' primary concern with the act's implementation as interpreted by the courts has been in the area of the employment of persons with disabilities. We believe that if the primary concern is in the employment area, then Congressional revisions to the act should address the perceived inequities in that area alone.

We have reviewed the Senate Committee Roundtable discussion of July 15, 2008 and offer these additional comments. First, we do not agree that Duke University, let alone the vast numbers of colleges and universities, denies accommodations to students with disabilities, such as individuals with cerebral palsy, epilepsy and diabetes, as suggested at the Roundtable. Rather, Duke University, in keeping with pronouncements made by the courts and OCR, has always made decisions on an individualized basis and we assume that Congress would want postsecondary institutions to continue to do so.

We recommend that the Congress amend the proposed language to ensure that short-term conditions, which have not or are not expected to last more than 6 months, are not disabling for purposes of accommodation. The current proposed language only makes that clear for the "regarded as" prong and we see no basis for extending legal protections to individuals with short-term illnesses or conditions.

There is an unfortunate misuse of assessments in the clinical field today. Our learning disability specialist can see up to 150 different types of assessments to document a learning disability. We note that certain clinicians, with a design to document a learning disability, will use certain subtests in a manner designed to elicit a particular response. The quality of many of these assessments is quite poor, and sadly, in some instances, is obviously designed to mislead the campus. We encourage the Congress to review the court decision in *Love* v. *LSAC*, 513 F.Supp.2d 206 (E.D. Penn. 2007) to appreciate the unfortunate reality of what may occur when students with no or minor impairments attempt to garner an unfair advantage over other students by manipulating our civil rights laws. We cannot envision that the Congress would seek to cloak such deception/misuse in civil rights protections. Unfortunately, should Congress weaken the documentation requirements, we anticipate a significant rise in the number of requests for accommodation sought by individuals with minor or no impairments.

Covering all individuals with impairments, regardless of the limitations imposed by such impairments, would have a significant impact on postsecondary institutions. Colleges and universities would be required to process many more requests, not merely for classroom accommodations but also in housing where we receive many, many requests for what we have historically viewed as health conditions which are in most cases not disabling. We anticipate that the addition of major bodily functions to the definition of major life activities, regardless of severity or mitigation, will significantly expand requests for accessible housing beyond management.

What is the purpose of an accommodation? We have always interpreted the Federal disability laws in a manner that promotes equal opportunity to the goods and services that our institution provides nondisabled students, visitors and employees. Frankly, we are at a loss to understand when a person who has no current disabling condition could ever warrant an accommodation because there would seem to be no basis to support such a need if there are no current functional limitations associated with a past disorder.

If Congress significantly expands the roles of who qualifies as disabled by increasing the major life activities in nine ways, removing consideration of mitigating measures (other than use of eye glasses and contact lenses), and modifies "substantially limits" to a lesser standard, such as "materially restricts" we are concerned that every student who has ever had a 504 plan or IEP, regardless of even the exist-

ence of a current impairment, would qualify for accommodations under the ADA/Rehabilitation Act. We find no support in anything that we have reviewed that has been presented to Congress to justify such a significant expansion. On the other hand, if Congress believes that colleges and universities have discriminated against students with a record of a disorder, we believe that the current provisions adequately address those concerns, which we support. Consequently, we respectfully see no need to alter the U.S. Department of Education's long-standing policy in this regard.

In a similar vein, we do not understand why Congress would want to expand the obligation to provide accommodations to students who have conditions that are in remission. Our practice has consistently been to advise students that if their condition changes and they believe they need some form of accommodation merely to update the university on the status of their condition and we will reconsider their request. But we stress, as we believe holds true for the majority of institutions of higher education, our campus extends support to all patrons, be they employees, visitors, parents, alumni and current students who seek assistance, regardless of the existence of a disabling condition. However, as a selective institution, we are concerned that some students may use these amendments (designed to extend the right to accommodation to individuals with little or no functional limitations associated with a current or past disorder) to effectuate an unfair advantage over other students, and, as noted above, to request housing accommodations that will be very costly and limit the availability of accessible housing for those who have serious disabling conditions.

We understand that in 2004, concerned with the significant number of students qualifying as disabled under the Individuals with Disabilities Education Act, Congress amended that act to encourage school systems to use interventions with students experiencing academic difficulties before evaluating them. We are surprised that Congress would now propose legislation that would seemingly result in these students being considered disabled under the ADA as they are using mitigating measures by the school's employment of response to intervention techniques. Again, is it Congress' intent to consider all of these students to be disabled under the ADA and Rehabilitation Act and then entitled to accommodations in postsecondary education?

We express our concern about the elimination of mitigating measures from the analysis of who qualifies as having a current disabling condition. We frankly can think of no student who has ever had any impairment other than a short-term illness or injury, that is not episodic, who would NOT qualify for accommodations. Every student who has been on an IEP or a 504 plan has received mitigating measures—by definition. We speak with lengthy experience formed by our own disability experts as well as consultants we use to assist us in this area as to the difficulty in making decisions based on self-reporting. As an example, many of our students, with or without impairments, have studied long hours in order to gain admission to this university—studying long hours could qualify as a behavioral adaptation for any impairment. Many students have purchased tutorial assistance, again a mitigating measure, to assist them in their educational careers. If these students have any impairment that they link with their tutorial assistance, we are concerned that these students would also qualify for accommodations.

Finally, as the Congress understands, the number of students with an array of mental health problems is increasing on our campuses. We, like many other institutions, afford counseling services and other supports to assist students. We have consistently provided accommodations to those students with chronic serious mental health conditions whose conditions are not well-controlled with medication and/or treatment. We express our sincere concerns that if the ADA Amendments as currently written are adopted, that virtually any student experiencing anxiety or depression, no matter how severe, that extends for more than a short period of time, even if episodic, would be eligible for accommodations. The proposed Amendments will render most students served by our Counseling and Psychological Services office as members of a protected class. Again, given the breadth of the proposed expansion of the definition of who is considered to be a person with a disability, we believe that Congress may not have appreciated how the proposed Amendments would significantly expand the number of affected students whose conditions are not chronic, do not pose significant limitations and/or are treatable.

In conclusion, we appreciate that the Congress is concerned about how the courts have interpreted the ADA in the employment sector. Our review of the testimony at the hearings appears largely about when an employer has refused to permit an employee to use mitigating measures that would permit him/her to perform a job. We have no objection to Congress enacting legislation to curb that ill. Similarly, we have no objection to Congress ensuring that the "regarded as" prong protects indi-

viduals who suffer adverse consequences as a result of the negative attitudes and/or misperceptions about an actual or perceived disorder. The University's primary concern is Congress' effort to expand the right to receive accommodations to significant numbers of students with minor or no current impairments. We truly believe that in the end, this will work a disservice to students with serious impairments with accompanying functional limitations. Thank you for considering our comments.

Questions regarding this statement should be directed to: Christopher Simmons, Associate Vice President, Office of Federal Relations, Duke University, Durham, North Carolina 919–668–6270.

[Whereupon, at 11:48 a.m., the hearing was adjourned.]

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