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ADA AMENDMENTS ACT OF 2008

JUNE 23, 2008.—Ordered to be printed

Mr. GEORGE MILLER of California, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3195]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3195) to restore the intent and protections of the Americans with Disabilities Act of 1990, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "ADA Amendments Act of 2008".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of handicap under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

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(4) the holdings of the Supreme Court in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) and its companion cases, and in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect; and

(5) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.

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

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "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"; and

(5) to provide a new definition of "substantially limits" to indicate that Congress intends to depart from the strict and demanding standard applied by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams and by numerous lower courts.

SEC. 3. CODIFIED FINDINGS.

Section 2(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101) is amended—

(1) by amending paragraph (1) to read as follows:

"(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;"; and

(2) by striking paragraph (7).

SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

(a) DEFINITION OF DISABILITY.—Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

"SEC. 3. DEFINITION OF DISABILITY.

"As used in this Act:

"(1) DISABILITY.—The term 'disability' means, with respect to an individual—

"(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment (as described in paragraph (4)).

"(2) SUBSTANTIALLY LIMITS.—The term 'substantially limits' means materially restricts.

"(3) MAJOR LIFE ACTIVITIES.—

"(A) IN GENERAL.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

"(B) MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, di-

gestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"(4) REGARDED AS HAVING SUCH AN IMPAIRMENT.—For purposes of paragraph (1)(C):

"(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

"(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

"(5) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.—The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

"(A) To achieve the remedial purposes of this Act, the definition of 'disability' in paragraph (1) shall be construed broadly.

"(B) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

"(C) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

"(D)(i) The 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—

"(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

"(II) use of assistive technology;

"(III) reasonable accommodations or auxiliary aids or services; or

"(IV) learned behavioral or adaptive neurological modifications.

"(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

"(iii) As used in this subparagraph—

"(I) the term 'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

"(II) the term 'low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image.".

(b) CONFORMING AMENDMENT.—The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) is further amended by adding after section 3 the following:

"SEC. 4. ADDITIONAL DEFINITIONS.

"As used in this Act:

"(1) AUXILIARY AIDS AND SERVICES.—The term 'auxiliary aids and services' includes—

"(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

"(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

"(C) acquisition or modification of equipment or devices; and

"(D) other similar services and actions.

"(2) STATE.—The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.".

(c) AMENDMENT TO THE TABLE OF CONTENTS.—The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

"Sec. 3. Definition of disability.
"Sec. 4. Additional definitions.".

SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) ON THE BASIS OF DISABILITY.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(1) in subsection (a), by striking "with a disability because of the disability of such individual" and inserting "on the basis of disability"; and

(2) in subsection (b) in the matter preceding paragraph (1), by striking "discriminate" and inserting "discriminate against a qualified individual on the basis of disability".

(b) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Section 103 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12113) is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively, and inserting after subsection (b) the following new subsection:

"(c) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Notwithstanding section 3(5)(D)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.".

(c) CONFORMING AMENDMENT.—Section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)) is amended—

(1) in the paragraph heading, by striking "WITH A DISABILITY"; and

(2) by striking "with a disability" after "individual" both places it appears.

SEC. 6. RULES OF CONSTRUCTION.

Title V of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201) is amended—

(1) by adding at the end of section 501 the following:

"(e) BENEFITS UNDER STATE WORKER'S COMPENSATION LAWS.—Nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

"(f) CLAIMS OF NO DISABILITY.—Nothing in this Act shall provide the basis for a claim by a person without a disability that he or she was subject to discrimination because of his or her lack of disability.

"(g) REASONABLE ACCOMMODATIONS AND MODIFICATIONS.—A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C).";

(2) by redesignating section 506 through 514 as sections 507 through 515, respectively, and adding after section 505 the following:

"SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY.

"The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions contained in sections 3 and 4."; and

(3) in the table of contents contained in section 1(b), by redesignating the items relating to sections 506 through 514 as sections 507 through 515, respectively, and by inserting after the item relating to section 505 the following new item:

"Sec. 506. Rule of construction regarding regulatory authority.".

SEC. 7. CONFORMING AMENDMENTS.

Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended—

(1) in paragraph (9)(B), by striking "a physical" and all that follows through "major life activities", and inserting "the meaning given it in section 3 of the Americans with Disabilities Act of 1990"; and

(2) in paragraph (20)(B), by striking "any person who" and all that follows through the period at the end, and inserting "any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990.".

SEC. 8. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on January 1, 2009.

I. PURPOSE

The purpose of H.R. 3195, the "ADA Amendments Act of 2008," is to restore the intention and protections of the Americans with Disabilities Act of 1990, providing a clear and comprehensive national mandate for the elimination of discrimination on the basis of disability.

II. Committee and Legislative Action

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On September 29, 2006, Representatives James F. Sensenbrenner (R–WI), Steny H. Hoyer (D–MD), and John Conyers (D–MI) introduced H.R. 6258, the "Americans with Disabilities Act Restoration Act of 2006." The bill was referred to the House Committees on Education and the Workforce, Judiciary, Transportation and Infrastructure, and Energy and Commerce. It was subsequently referred to the Subcommittee on Employer-Employee Relations of the Education and the Workforce Committee, but no further action was taken.

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On July 26, 2007, Representatives Steny H. Hoyer (D–MD) and James F. Sensenbrenner (R–WI) introduced H.R. 3195, the "ADA Restoration Act of 2006," with 144 original cosponsors. The bill has garnered a total of 245 cosponsors. The bill was referred to the House Committees on Education and Labor, Judiciary, Transportation and Infrastructure, and Energy and Commerce.

On July 26, 2007, Senator Tom Harkin (D–IA) introduced S. 1881, the "ADA Restoration Act of 2006" with one original cosponsor. The bill has garnered a total of three cosponsors. The bill was referred to the Senate Health, Education, Labor, and Pensions Committee.

On October 4, 2007, a hearing was held by the House Judiciary Committee on H.R. 3195. The following persons and organizations presented testimony: Honorable Steny Hoyer (D–MD), Majority Leader and Chief Sponsor of H.R. 3195; Cheryl Sensenbrenner, Chair of the Board, American Association of People with Disabilities; Stephen Orr, Pharmacist (Plaintiff in Orr v. Wal-Mart); Michael Collins, Executive Director, National Council on Disability; Lawrence Lorber, Attorney, on behalf of the U.S. Chamber of Commerce; Chai Feldblum, Director, Federal Legislation Clinic and Professor of Law, Georgetown Law Center.

On November 15, 2007, a hearing was held by the Senate HELP Committee on S. 1881. The following persons and organizations presented testimony: John D. Kemp, Attorney; Dick Thornburgh, Attorney; Stephen Orr, Pharmacist (Plaintiff in Orr v. Wal-Mart); Camille Olson, Attorney; Chai Feldblum, Director, Federal Legislation Clinic and Professor of Law, Georgetown Law Center.

On January 29, 2008, a hearing was held by the House Committee on Education and Labor on H.R. 3195. The following persons and organizations presented testimony: Honorable Steny Hoyer (D–MD), Majority Leader and Chief Sponsor of H.R. 3195; Andrew Imparato, President and CEO, American Association of People with Disabilities; Carey McClure, electrician (Plaintiff in McClure v. General Motors); Robert L. Burgdorf, Professor of Law, University of the District of Columbia; David K. Fram, Esq., Director, ADA & EEO Services, National Employment Law Institute.

On June 18, 2008, the House Committee on Education & Labor held a markup to consider H.R. 3195. An amendment was offered as a substitute to the original bill, and it was reported out of the Committee by a vote of 43 to 1.

III. Summary of the Bill

The "ADA Amendments Act of 2008" amends the Americans with Disabilities Act (ADA), by amending the definition of disability, providing clarifications related to terminology used in the definition, and rejecting several opinions of the U.S. Supreme Court that have served to narrow the definition of disability.

The bill essentially maintains the language of the original three prongs of the definition of disability: a physical or mental impairment that substantially limits one or more life activities; a record of such impairment; or being regarded as having such impairment, but does clarify the intent of several elements of the definition.

Rejecting the reasoning of the U.S. Supreme Court in Sutton v. United Airlines, Inc.[1] and its companion cases, the bill prohibits the consideration of mitigating measures such as medication, assistive technology, accommodations, and modifications when determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses and contact lenses are excluded from this prohibition, and may be considered when determining whether a visual impairment materially restricts a major life activity.

In a departure from the standards enunciated by the U.S. Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,[2] the bill defines "substantially limits" as "materially restricts," which is intended to be a less stringent standard to meet than the Court's interpretation of the definition as "prevents or severely restricts."[3] The bill also explicitly rejects the Court requirement that the terms "substantially" and "major" need "to be interpreted strictly to create a demanding standard for qualifying as disabled."[4] Instead, the bill provides that the definition of disability shall be construed broadly.

Additional clarity is provided in an illustrative, non-comprehensive list of major life activities, offering specific examples of some of the major life activities that may be materially restricted by a physical or mental impairment. Major life activities are also defined to include the operation of major bodily functions.

The bill defines an individual as "being regarded as having such impairment" if such individual can establish that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment, regardless of whether the impairment limits or is perceived to limit a major life activity.

Aligning the construction of the Americans with Disabilities Act with Title VII of the Civil Rights Act of 1964, the bill amends the ADA to provide that no covered entity shall discriminate against a qualified individual "on the basis of disability."

Entities covered under the ADA will not be required to provide reasonable accommodations or reasonable modifications to policies and procedures for individuals who meet the definition of disability only under the "regarded as having such an impairment" prong of the definition.

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[1] 144 L. Ed. 2d. 450 (1999)
[2] 151 L. Ed. 2d. 615 (2002)
[3] Id at 631.
[4] Id.

The bill clarifies that the three agencies that currently issue regulations under the ADA have regulatory authority related to the definitions contained in Section 3. Conforming amendments to Section 7 of the Rehabilitation Act of 1973 are intended to ensure harmony between federal civil rights laws.

IV. Statement and Committee Views

When the Americans with Disabilities Act (ADA) was enacted in 1990 with strong bipartisan support, Congress expected that the purpose of the Act, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[5] would be fulfilled. Eighteen years later, many individuals with physical and mental impairments whom Congress intended to protect are not covered under the law, due to a series of Supreme Court decisions interpreting the definition of disability.

In Sutton v. United Airlines, Inc.[6] and its companion cases, Murphy v. United Parcel Service, Inc.[7] and Albertson's, Inc. v. Kirkingburg,[8] and again in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,[9] the Supreme Court offered interpretations of the law inconsistent with both the Committee's intent and general Congressional intent.

The ADA Amendments Act of 2008 is an important step towards restoring the original intent of Congress. The scope of protection under the ADA was intended to be broad and inclusive. Unfortunately, the courts have narrowed the interpretation of disability and found that a large number of people with substantially limiting impairments are not to be considered people with disabilities. The Committee hopes to re-establish clear and comprehensive protections for people with disabilities while maintaining a law that is workable and effective for all entities subject to responsibilities under the ADA.

The House Committee on Education and Labor has always been strongly committed, on a bipartisan basis, to protecting the civil rights of people with disabilities. In May 1990, the Committee favorably reported H.R. 2273, the Americans with Disabilities Act, after a unanimous Committee vote. In the 110th Congress, H.R. 3195 has been cosponsored by a majority of members of the Committee.

The Committee intends to lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA, and to refocus the question on whether discrimination on the basis of disability occurred.

CODIFIED FINDINGS

The Committee amends two findings in the ADA that have been interpreted by the Supreme Court to support a narrow reading of the term "disability."

Specifically, the bill replaces the ADA's finding pertaining to "43 million Americans" with a finding focusing on the many people with physical or mental disabilities who have been precluded from

[5] 42 U.S.C. § 12101.
[6] 527 U.S. 471 (1999)
[7] 527 U.S. 516 (1999)
[8] 527 U.S. 555 (1999)
[9] 534 U.S. 184 (2002)

fully participating in all aspects of society as a result of discrimination. This finding has been deleted because of the manner in which it was used by the Court in Sutton to reason that "[h]ad 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." [10]

The bill deletes the ADA's finding pertaining to a "discrete and insular minority," because of the manner in which it was used in Sutton to reason that Congress intended to "restrict the ADA's coverage to a confined, and historically disadvantaged, class" and that "in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a 'discrete and insular minority.'" [11] However, the Committee does continue to believe that individuals with disabilities "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." [12]

DEFINING DISABILITY

To clarify Congressional intent, the bill amends the definition of disability, defines or clarifies three terms within the definition of disability ("substantially limits," "major life activities," "regarded as having such impairment") and, under the rules of construction for the definition, adds several standards that must be applied when considering the definition of disability.

The Committee understands that many employers do not discriminate against individuals with disabilities, however, the civil rights protections of the ADA have been diminished by the narrowing of the definition of disability, especially in the workplace. 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.

In the ADA of 1990, the Committee adopted the definition of "handicap" from the Rehabilitation Act of 1973, as there had been 17 years of case law with very little controversy related to the definition of disability. Congress sought to protect anyone who experiences discrimination because of a current, past, or perceived disability.

Under the ADA, there are three prongs of the definition of disability, with respect to an individual—

(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.[13]

[10] 144 L. Ed. 2d. at 465.
[11] Id. at 470.
[12] 42 U.S.C. § 12101.
[13] 42 U.S.C. § 12102

In 1990, the Committee expected the Courts to apply the same analysis used in interpreting the term "handicap" under sections 501, 503, and 504 of the Rehabilitation Act of 1973. Nearly a decade later, in Sutton and its companion cases, and again in Williams, the Supreme Court interpreted the definition of disability in a manner inconsistent with Congressional intent.

The findings in these decisions restricted the definition of disability in two ways. In Sutton and its companion cases, the Court ruled that the determination of disability should be made after considering whether mitigating measures had reduced the impact of the limitation of the impairment. Three years later in Williams, the Court concluded that the terms "substantially" and "major" in the definition of disability under the ADA had to be "interpreted strictly to create a demanding standard for qualifying as disabled."[14] The Court then concluded that "substantial" requires a showing that an individual's impairment "prevents or severely restricts" major life activities; and "major" life activities requires a showing that the individual is restricted from performing tasks that are "of central importance to most people's daily lives."[15]

The Committee intends that the establishment of coverage under the ADA should not be overly complex nor difficult, and expects that the bill will lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA.

Physical or mental impairment

The bill does not provide a definition for the terms "physical impairment" or "mental impairment." The Committee expects that the current regulatory definition of such terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change.[16]

Substantially limits

In Williams the Supreme Court effectively defined "substantially limits" as "severely restricts," with the result that many individuals with substantially limiting physical and mental impairments have been determined not to be individuals with disabilities under the ADA. This has resulted in the exclusion of many individuals whom Congress intended to cover.

As explained by the Committee in 1990, "A person is considered an individual with a disability for the purposes of the first prong of the definition when an 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."[17] The determination of whether an impairment substantially limits a major life activity is to be made on an individualized basis.

By adding the term "materially restricts" to define "substantially limits," the Committee intends to reject the Supreme Court's demanding standard in Williams. While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform

[14] *Toyota Motor Mfg.* v. *Williams*, 151 L. Ed 2d. 615, 631 (2002)
[15] Id. at 631.
[16] 28 C.F.R. § 36.104; 29 C.F.R. § 1630.2(h)(1)–(2); 34 C.F.R. § 104.3 (j)(2)(i)
[17] H.R. Rep. No. 101–485, pt. 2 (1990)

a major life activity in order to qualify as a disability. In the range of severity of the limitation, "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. The level of the restriction created by the impairment must be the determining factor—not the severity of the impairment itself. For example, an individual with mild mental retardation (intellectual disability) would be considered materially restricted in the major life activities of learning and thinking. Multiple impairments that combine to materially restrict a major life activity also constitute a disability. The Committee believes that this interpretation of the term "materially restricts" would be consistent with cases decided under the Rehabilitation Act of 1973.

For example, in Littleton v. Wal-Mart Stores, Inc.[18] the Eleventh Circuit determined that a person with intellectual disabilities (formerly known as "mental retardation") was not substantially limited in a major life activity because, in part, he was able to read, drive a car, and communicate with words. Under the amended Act, the Committee expects that a plaintiff such as Littleton could provide evidence of material restriction in the major life activities of thinking, learning, communicating and interacting with others. In addition, the Committee expects that the plaintiff in Littleton would be found to be substantially limited in the operation of a major bodily system because he is materially restricted in neurological function.

The Committee also seeks to clarify how the bill's concept of "materially restricts" should be applied for individuals with specific learning disabilities who are frequently substantially limited in the major life activities of learning, reading, writing, thinking, or speaking. In particular, some courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to "most people." When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in Price v. National Board of Medical Examiners,[19] Gonzales v. National Board of Medical Examiners,[20] and Wong v. Regents of University of California.[21]

The Committee believes that the comparison of individuals with specific learning disabilities to "most people" is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an

[18] 231 Fed. Appx. 874 (11th Cir. 2007)
[19] 966 F. Supp. 419,427 (S.D. W.Va. 1997)
[20] 225 F. 3d 620 (6th Cir. 2000)
[21] 379 F. 3d 1097 (9th Cir. 2004)

individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life.[22] The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act.

Additionally, the Committee intends that the bill will not change the principle that entities, including institutions of higher education, need not make modifications to policies, practices or procedures that would fundamentally alter the nature of programs or services, as is true under current law.[23] For example, a university would not be expected to eliminate academic requirements essential to the instruction being pursued by a student, although it may be required to make modifications in order to enable students with disabilities to meet those academic requirements. Current regulations provide that "Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."[24]

Nothing in the amended Act is intended to change the specific documentation required by educational or testing entities in order to establish eligibility under the ADA, provided such requirements are appropriate and reasonable.

Major life activities

The bill provides an illustrative list of "major life activities" to include activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

As the Committee believes it is impossible to guarantee comprehensiveness in a finite list, this list of major life activities is illustrative and non-exhaustive. Thus, the Committee does not intend for the absence of a major life activity from the list to convey a negative implication as to whether such activity constitutes a major life activity under the Act. Other activities the Committee considers to be examples of major life activities include interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination.

"Major life activities" also include the operation of major bodily functions such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. In addition, an impairment can substantially limit the operation of a major bodily function if it causes the operation to overproduce in some harmful fashion, rather than to under-produce. As with the list of other major life activities, the list of major bodily functions in this bill is illustrative and non-exhaustive. Thus, the Committee also does not intend for the absence of a major bodily function from the list to convey a negative implication as to whether such function constitutes a major bodily function under the Act.

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[22] "Overcoming Dyslexia," Fortune; Morris, Betsy (May 2002)
[23] 42 USC 12182 (b)(2)(ii)
[24] 34 CFR 104.44(a)

The Committee expects that the bill will affect cases such as U.S. v. Happy Time Day Care Ctr.[25] in which the courts struggled to analyze whether the impact of HIV infection substantially limits various major life activities of a five-year-old child, and recognizing, among other things, that "there is something inherently illogical about inquiring whether" a five-year-old's ability to procreate is substantially limited by his HIV infection; Furnish v. SVI Sys., Inc,[26] in which the court found that an individual with cirrhosis of the liver caused by Hepatitis B is not disabled because liver function—unlike eating, working, or reproducing—"is not integral to one's daily existence;" and Pimental v. Dartmouth-Hitchcock Clinic,[27] in which the court concluded that the plaintiff's stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate. The Committee expects that the plaintiffs in each of these cases could establish a material restriction on major bodily functions that would qualify them for protection under the ADA.

The rule of construction related to major life activities clarifies that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. This responds to and corrects those courts that have required individuals to show that an impairment substantially limits more than one life activity or that, with regard to the major life activity of "performing manual tasks," have offset substantial limitation in the performance of some tasks with the ability to perform others. For example, in Holt v. Grand Lake Mental Health Center, Inc.,[28] the court found that an individual whose cerebral palsy adversely affected her speech and ability to perform various tasks, including eating and chewing food and buttoning her clothing, was not substantially limited because of her ability to perform other manual tasks. The Committee seeks to clarify that an individual is not excluded from coverage because of an ability to perform many activities, provided that the individual has an impairment that substantially limits at least one major life activity.

Regarded as having such an impairment

When considering whether an individual has been "regarded as having such an impairment," the Committee also rejects the Supreme Court's ruling in Sutton.[29] The Supreme Court's reasoning in School Board of Nassau County v. Arline[30] was cited extensively in the 1990 committee report to the ADA, as it set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973, and the Committee believes the Courts should rely on this standard.

While retaining the essential language contained in existing law, the Committee clarifies that an individual who is "regarded as having such an impairment" is not subject to the functional test (i.e., required to establish that the perceived or actual impairment "materially restricts" a major life activity) set forth in the first prong of the definition. The bill makes clear that an individual meets the

[25] 6 F. Supp. 2d 1073 (W.D. Wis. 1998)
[26] 270 F. 3d 445, 450 (7th Cir. 2001)
[27] 236 F. Supp. 2d 177 (D.N.H. 2002)
[28] 443 F.3d 762 (10th Cir. 2006)
[29] 144 L. Ed. 2d 450.
[30] 480 U.S. 273 (1987)

requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under the Act because of an actual or perceived impairment, regardless of whether or not the impairment limits a major life activity.

This clarification is necessary because the third prong incorporated the "substantial limitation" requirement from the first prong by reference.[31] However, while the plain language used by Congress when it passed the ADA in 1990 incorporates this requirement, Congress did not expect or intend that this would be a difficult standard to meet. On the contrary, Congress intended and believed that the fact that an individual was discriminated against because of a perceived or actual impairment would be sufficient: "if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employment of persons with disabilities could be inferred and the plaintiff would qualify for coverage under the 'regarded as' test."[32]

This third, "regarded as" prong, was meant to express the Committee's understanding that unfounded concerns, mistaken beliefs, fear, myths, or prejudice about disabilities are often just as disabling as actual impairments, and its corresponding desire to prohibit discrimination founded on such perceptions. Early decisions under the ADA reflected this understanding, as did guidance from federal agencies like the Department of Justice.[33] For example, in U.S. v. Happy Time Day Care Ctr.,[34] the court rejected the argument that a day care center's refusal to enroll a child with HIV did not establish that they believed that his HIV infection was substantially limiting, and concluded that the child was protected under the "regarded as" prong because "defendants' misapprehensions and fears" about HIV infection were substantially limiting.

In line with the Supreme Court's strict interpretation, however, the Court also increased the burden of proof required to establish that the impairment one is regarded as having is a substantially limiting one. For example, in Sutton[35] the court found that disqualification from a single job is insufficient; individuals seeking coverage under the "regarded as" standard must show that they were perceived as unable to perform a broad range of jobs utilizing the same skills. These restrictive rulings conflict with the Court's earlier recognition in Arline that the negative reactions of others are just as disabling as the actual impact of an impairment, a conclusion endorsed by Congress when it adopted the "regarded as" prong.

The Committee therefore restores Congress's original intent by making clear that an individual meets the requirement of "being regarded as having such an impairment" if the individual shows that an action (e.g., disqualification from a job, program, or service) was taken because of an actual or perceived impairment, whether or not that impairment actually limits or is believed to limit a major life activity. Because there is no functional limitation re-

[31] Prong (C) protects only those individuals who are "regarded as having such an impairment" under the bill. See, H.R. 3195 § 3(1)(C)

[32] H.R. Rep. No. 101–485, pt. 3, at 30–31 (1990).

[33] See, 28 C.F.R. Pt. 36, App. B, at 612.

[34] 6 F.Supp. 2d 1073, 1083–84 (1998)

[35] 144 L. Ed. 2d 450.

quirement under the "regarded as" prong of the definition, the requirement for proving substantial limitation of the major life activity of working under the first two prongs is not applicable to the analysis under the third prong, and EEOC regulations regarding the major life activity of working under the first two prongs are not impacted by this change. The Committee does not intend to convey that EEOC regulations regarding class of jobs/range of jobs under the first two prongs need to be revisited as a result of the clarification of third.

If an individual can show that an entity covered by the Act thought that he or she had an impairment (whether or not he or she actually does), and as long as an individual's impairment is not transitory and minor, an individual will qualify for protection under the Act by showing that an entity covered by the Act thought subjected them to an action prohibited under the ADA (e.g., disqualification from a job, program, or service) as a result.

Additionally, the bill relieves entities covered under the ADA from the obligation and responsibility to provide reasonable accommodations and reasonable modifications to an individual who qualifies for coverage under the ADA solely by being "regarded as" disabled under the third prong of the definition of disability.[36]

Transitory and minor impairments

The bill further clarifies that coverage for individuals under the "regarded as" prong is not available where the impairment that an individual is regarded as having is a transitory and minor impairment. Providing such an exception for claims at the lowest end of the spectrum of severe limitations was deemed necessary under the "regarded as" prong of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition. Therefore, absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu.

Inclusion of this provision responds to concerns raised by members of the employer community regarding potential abuse of the Act and the misapplication of resources on individuals with minor ailments that last only a short period of time. A similar exception is not necessary for the first two prongs as the functional limitation requirement adequately prevents claims by individuals with common ailments that do not materially restrict a major life activity. However, as an exception to the general rule for broad coverage under the "regarded as" prong, this limitation on coverage should be construed narrowly.

Mitigating measures

The bill prohibits consideration of the ameliorative effects of mitigating measures when determining whether an individual's impairment substantially limits major life activities. This restores Congress's original intent and overturns the Supreme Court's decision in Sutton that the effect of mitigating measures should be considered. The Committee provides an illustrative list of measures

[36] See discussion of Reasonable Accommodations and Modifications, infra.

whose use might reduce the impact of the limitations caused by an impairment.

Mitigating measures include low vision devices, which are devices that magnify, enhance, or otherwise augment a visual image, such as magnifiers, closed circuit television, larger-print items, and instruments that provide voice instructions. Low vision devices do not include ordinary eyeglasses or contact lenses, which are lenses that are intended to fully correct visual acuity or eliminate refractive error. The Committee provides an exception to the prohibition against the consideration of the ameliorative effects of mitigating measures by requiring consideration of the ameliorative effects of ordinary eyeglasses or contact lenses in determining whether an impairment substantially limits a major life activity.

The Committee acknowledges that guaranteeing comprehensiveness in a finite list of mitigating measures is impossible, therefore the bill includes a non-exhaustive list of such measures. The Committee does not intend to convey a negative implication in the absence of any particular mitigating measure from the list. For example, other measures like the use of a job coach, personal assistant, service animal, surgical intervention, or compensatory strategy that might mitigate, or even allow an individual to otherwise avoid performing particular major life activities, should not be considered in determining whether an impairment substantially limits a major life activity.

The Committee believes that an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability. The Committee supports the finding in Bartlett v. NYS Board of Law Examiners,[37] in which the court held that in determining whether the plaintiff was substantially limited with respect to reading, Bartlett's ability to 'self-accommodate' should not be taken into consideration.

The Committee expects that upon elimination of the consideration of ameliorative effects of a mitigating measure, individuals with serious health conditions who were improperly excluded from the ADA's protected class will be found to be substantially limited and entitled to protection from disability-based discrimination.

Thus, examples that likely would be decided differently with regard to the threshold question of whether one qualifies as disabled once the effects of mitigating measures are not taken into account include several cases as described below. In McClure v. General Motors Corp.[38] the court decided an individual with muscular dystrophy who successfully learned to live and work with his disability was not qualified to protection under the ADA. In Orr v. Wal-Mart Stores, Inc.[39] the court noted that the Supreme Court's Sutton decision required consideration of the impact of the plaintiff's careful regimen of medicine, exercise, and diet and declining to consider the impact of uncontrolled diabetes on the plaintiff's ability to see,

[37] See generally, 226 F.3d 69 (2nd Cir. 2000)
[38] 75 Fed. Appx. 983 (5th Cir. 2003)
[39] 297 F.3d 720 (8th Cir. 2002)

speak, read, and walk. In Todd v. Academy Corp.[40] the court found that, "without medication, Plaintiff would suffer daily seizures, including grand mal seizures which involve loss of consciousness, general thrashing, and tonoclonic activity," but concluded that the plaintiff was not disabled because medication reduced the frequency and intensity of these seizures. In Schriner v. Sysco Food Service[41] the court found that the plaintiff with diagnosed post-traumatic stress disorder was not substantially limited in a major life activity when taking medication to manage his condition. In McMullin v. Ashcroft,[42] the court decided that "[v]iewing Plaintiff's impairment in light of the corrective measures of his medication, the Court finds that Plaintiff has failed to show that his depression" substantially limits a major life activity.

DISCRIMINATION ON THE BASIS OF DISABILITY

The bill amends Section 102 of the ADA to mirror the structure of nondiscrimination protection in Title VII of the Civil Rights Act of 1964, changing the language of Section 102(a) from prohibiting discrimination against a qualified individual "with a disability because of the disability of such individual" to prohibiting discrimination against a qualified individual "on the basis of disability." This more direct language, structured like Title VII, ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is even a "person with a disability" with any protections under the Act at all.

During congressional hearings on H.R. 3195, questions were raised about whether the original bill would change the framework of shifting burdens for plaintiffs and defendants under Texas Dep't of Community Affairs v. Burdine[43] in those ADA cases governed by Burdine. As introduced, H.R. 3195 would have amended ADA Section 102 to prohibit discrimination "against an individual on the basis of disability," without mentioning whether such individual needed to be "qualified." As introduced, H.R. 3195's elimination of the word "qualified" from this section of the Act raised the Burdine questions.

Developed in the context of Title VII, the Burdine framework applies to ADA employment cases that involve indirect evidence of discrimination.[44] Under Burdine, a plaintiff carries the initial burden of establishing a prima facie case that: (1) (s)he met the qualifications of the job; (2) (s)he suffered an adverse job action; and (3) the adverse action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class.[45]

If the plaintiff makes his or her prima facie case, the burden of production shifts to the defendant to articulate a "legitimate, nondiscriminatory reason for the employee's rejection."[46] The defend-

[40] 57 F.Supp. 448, 452 (S.D. Tex. 1999)
[41] 2005 U.S. Dist. LEXIS 44743
[42] 337 F.Supp. 2d 1281, 1289 (D. Wyo. 2004)
[43] 450 U.S. 248, 252–56 (1981)
[44] The Burdine framework ordinarily does not apply to cases involving direct evidence of discrimination.
[45] 450 U.S. 248, 253 (1981).
[46] Id. at 252–53 (quoting *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973))

ant does not need to "persuade the court that it was actually motivated by the proffered reasons."[47] Rather, the employer "bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."[48]

If the defendant meets this burden of production, the plaintiff then carries a burden of persuasion to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[49]

It is the intent of the Committee that the Burdine framework remains intact and is not affected by the amendments. To address the concerns raised, the substitute, unlike H.R. 3195 as introduced, does not eliminate the word "qualified" from Section 102 of the Act, retaining the Act's current language regarding job qualifications.

The Committee also does not intend to alter the burden-shifting analyses in ADA employment cases involving qualification standards, tests, or other selection criteria, or contentions regarding reasonable accommodation. These analyses are intended to remain the same as articulated in existing case law.[50]

The bill also makes clear that an individual who suffers an adverse employment action as the result of an employer's use of qualification standards, employment tests, or other selection criteria that are based on uncorrected vision may challenge those vision requirements and that the covered entity must show that such requirements are job-related and consistent with business necessity. This provision is necessary to ensure that vision requirements are job-related and consistent with business necessity in light of the provision requiring consideration of the ameliorating effects of ordinary eyeglasses and contact lenses in determining whether an individual has a disability.

RULES OF CONSTRUCTION

Benefits under State worker's compensation laws

The bill provides that nothing in the Act alters the standards for determining eligibility for benefits under State worker's compensation laws or other Federal or State disability benefit programs.

Claims of no disability

The bill prohibits reverse discrimination claims by disallowing claims based on the lack of disability, (e.g., a claim by someone without a disability that someone with a disability was treated more favorably by, for example, being granted a reasonable accommodation or modification to services or programs).

The Committee intends to clarify that a person without a disability does not have the right under the Act to bring an action against an entity on the grounds that he or she was discriminated against "on the basis of disability" (i.e., on the basis of not having a disability).

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[47] Id. at 254.
[48] Id. at 260.
[49] Id. at 253.
[50] See, e.g., *Prewitt* v. *United States Postal Service,* 662 F.2d 292, 309–10 (5th Cir. 1981), cited in the legislative history of the ADA for purposes of explaining the proper burden-shifting analysis; H.R. Rep. No. 101–485, pt. 3, at 42 (1990). See also, *Fenney* v. *Dakota, Minnesota & Railroad Co.,* 327 F.3d 707, 711–12 (8th Cir. 2003).

Reasonable accommodations and modifications

The bill establishes that entities covered under the ADA do not need to provide reasonable accommodations under title I nor modify policies, practices, or procedures under title II or III when an individual qualifies for coverage under the ADA solely by being "regarded as" disabled under the third prong of the definition of disability. This makes clear that the duty to accommodate or modify arises only when an individual establishes coverage under the first or second prong of the definition. This change responds to courts who have interpreted the ADA to require accommodation or modification for individuals who qualify as being "regarded as" disabled and may have been limited in a major life activity, but who were not able to meet the Supreme Court's demanding standard of being substantially limited in a major life activity.[51] The Committee believes courts will no longer need to resort to a strained interpretation in order to provide accommodations to those who need them under the less demanding standard of "materially restricts" and the rules of construction related to the definition of disability.

REGULATORY AUTHORITY

In Sutton, the Supreme Court stated that "[n]o agency * * * has been given authority to issue regulations implementing the generally applicable provisions of the ADA which fall outside Titles I–V.[52] Most notably, no agency has been delegated authority to interpret the term 'disability.'" The bill clarifies that the authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act, includes the authority to issue regulations implementing the definitions contained in section 3, including the definition of "disability."

The introduced language of H.R. 3195 provided that duly issued federal regulations and guidance for the implementation of the ADA, including provisions implementing and interpreting the definition of disability, shall be entitled to deference by administrative bodies or officers and courts hearing any action brought under the ADA. This provision was intended to clarify that courts should give appropriate deference to agency regulations and guidance interpreting the ADA.

This provision has been deleted because the proposed addition could have been incorrectly interpreted as running contrary to longstanding Supreme Court precedent, which requires that certain threshold criteria be met before a court defers to an agency interpretation of a statute that is a reasonable interpretation of the statute, when Congressional intent is unclear. That was not the intent of this provision. The Committee expects that the courts, applying Supreme Court precedent, will give the regulations and guidance implementing the ADA the deference currently accorded to agency regulations and guidance under existing statutory interpretation doctrine.

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[51] See, e.g., *Kelly* v. *Metallics West, Inc.,* 410 F.3d 670 (10th Cir. 2005) (holding that an individual who needed supplemental oxygen after being discharged from the hospital due to a pulmonary embolism did not have a substantially limiting impairment but was regarded as disabled and should have been accommodated by being allowed to use her supplemental oxygen while at work).

[52] 144 L. Ed. 2d at 460 (1990).

CONFORMING AMENDMENT

The bill ensures that the definition of disability in Section 7 of the Rehabilitation Act of 1973, which shares a duplicative definition, is consistent with the ADA.

The Rehabilitation Act of 1973 preceded the ADA in providing civil rights protections to individuals with disabilities; in drafting the definition of disability in the ADA, the authors relied on the statute and implementing regulations of the Rehabilitation Act. The ADA, under Title II and Title III, and Section 504 of the Rehabilitation Act provide overlapping coverage for many entities, including public schools, institutions of higher education, childcare facilities, and other entities receiving federal funds.

Maintaining uniform definitions in the two federal statutes is critical so that such entities will operate under one consistent standard, and the civil rights of individuals with disabilities will be protected in all settings.

The Committee expects that the Secretary of Education will promulgate new regulations related to the definition of disability to be consistent with those issued by the Attorney General under this Act. Other current regulations issued by the Department of Education Office of Civil Rights under Section 504 of the Rehabilitation Act are currently harmonious with Congressional intent under both the ADA and the Rehabilitation Act.

V. SECTION-BY-SECTION ANALYSIS

Sec. 1. Short Title. This Act may be cited as the "ADA Amendments Act of 2008."

Sec. 2. Findings and Purposes. Acknowledges Congressional intent of the Americans with Disabilities Act of 1990 (ADA) to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to provide broad coverage, and that the U.S. Supreme Court subsequently erroneously narrowed the definition of disability in a series of cases. The purposes of the Act are to reinstate a broad scope of protection to be available under the ADA, to reject several Supreme Court decisions, and to re-establish original Congressional intent related to the definition of disability.

Sec. 3. Codified Findings. Amends one finding in the ADA to acknowledge that many people with physical or mental impairments have been subjected to discrimination, and strikes one finding related to describing the population of individuals with disabilities as "a discrete and insular minority."

Sec. 4. Disability Defined and Rules of Construction. Amends the definition of "disability" and provides rules of construction for applying the definition. The term "disability" is defined to mean, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment. Defines "substantially limits" as "materially restricts"; provides an illustrative list of "major life activities" including major bodily functions; and defines "regarded as having such an impairment" as protecting individuals who have been subject to an action prohibited under the ADA because of an actual or perceived impairment, whether or not the impairment is perceived to limit a major life ac-

tivity. Requires the definition of disability to be construed broadly. Provides rules of construction regarding the definition of disability, requiring that impairments need only limit one major life activity; clarifying an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and prohibiting the consideration of the ameliorative effects of mitigating measures such as medication, learned behavioral modifications, or auxiliary aids or services, in determining whether an impairment is substantially limiting, while excluding ordinary eyeglasses and contact lenses.

Sec. 5. Discrimination on the Basis of Disability. Prohibits discrimination under Title I of the ADA "on the basis of disability" rather than "against a qualified individual with a disability because of the disability of such individual." Clarifies that covered entities that use qualification standards based on uncorrected vision must show that such a requirement is job-related and consistent with business necessity.

Sec. 6. Rules of Construction. Provides that nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or other disability benefit programs. Prohibits reverse discrimination claims by disallowing claims based on the lack of disability. Establishes that entities covered under all three titles of the ADA are not required to provide reasonable accommodations or modifications to an individual who meets the definition of disability only as a person "regarded as having such an impairment." Authorizes the EEOC, Attorney General, and the Secretary of Transportation to promulgate regulations implementing the definition of disability and rules of construction related to the definition.

Sec. 7. Conforming Amendments. Amends Section 7 of the Rehabilitation Act of 1973 to cross-reference the definition of disability under the ADA.

Sec. 8. Effective date. Amendments made by the Act take effect January 1, 2009.

VI. Explanation of Amendments

The only amendment considered during the Committee markup was the amendment in the nature of a bill, which is described in detail in the body of this report. The amendment passed by voice vote.

VII. Application of law to the Legislative Branch

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act, requires a description of the application of this bill to the legislative branch. H.R. 3195 amends the definition of "disability" in the Americans with Disabilities Act to clarify the intent that it shall be construed broadly, which includes coverage under Section 509 (42 USC 12209) for the United States Senate and House of Representatives. For matters "other than employment" the Architect of the Capitol sets remedies and procedures regarding rights. The Congressional Accountability Act reiterates application of Title I of the ADA to Congress and provides the procedural mechanisms/rules for enforcement.

VIII. Unfunded Mandate Statement

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the attached CBO letter.

IX. Earmark Statement

H.R. 3195 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI.

ROLLCALL VOTE
COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 1 **BILL: H.R. 3195** **DATE: 6/18/2008**
AMENDMENT NUMBER **PASSED: 43 AYES / 1 NO**
SPONSOR/AMENDMENT: ANDREWS / FAVORABLY REPORT THE BILL AS AMENDED

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman	X			
Mr. KILDEE, Vice Chairman	X			
Mr. PAYNE	X			
Mr. ANDREWS	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY				X
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Mrs. SUSAN DAVIS	X			
Mr. DANNY DAVIS	X			
Mr. GRIJALVA	X			
Mr. TIMOTHY BISHOP	X			
Ms. SANCHEZ	X			
Mr. SARBANES	X			
Mr. SESTAK	X			
Mr. LOEBSACK	X			
Ms. HIRONO	X			
Mr. ALTMIRE	X			
Mr. YARMUTH	X			
Mr. HARE	X			
Ms. CLARKE	X			
Mr. COURTNEY	X			
Ms. SHEA-PORTER	X			
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS				X
Mr. MARCHANT				X
Mr. PRICE		X		
Mr. FORTUÑO	X			
Mr. BOUSTANY	X			
Mrs. FOXX				X
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
[vacancy]				
TOTALS	**43**	**1**		**4**

XI. Statement of Oversight Findings and Recommendations of the Committee

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

XII. New Budget Authority and CBO Cost Estimate

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 3195 from the Director of the Congressional Budget Office:

June 23, 2008.

Hon. George Miller,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3195, the ADA Amendments Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

Peter R. Orszag.

Enclosure.

H.R. 3195—ADA Amendments Act of 2008

Summary: H.R. 3195 would make several amendments to the Americans with Disabilities Act (ADA) of 1990 (Public Law 101–336). The bill would amend the definition of disability and clarify the prohibition on discrimination on the basis of disability. Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 3195 would cost about $25 million over the 2009–2013 period for the Equal Employment Opportunity Commission (EEOC) to handle additional discrimination cases. Enacting H.R. 3195 would not affect direct spending or revenues.

Section 4 of the Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provision that establishes or enforces statutory rights that prohibit discrimination on the basis of disability. CBO has determined that sections 3 through 6 of H.R. 3195 fall within that exclusion; therefore, we have not reviewed them for intergovernmental or private-sector mandates. The remaining provisions of H.R. 3195 contain no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments, or the private sector.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3195 is shown in the following table. The costs of this legislation fall within budget function 50 (administration of justice).

	By fiscal year in millions of dollars—					
	2009	2010	2011	2012	2013	2009–2013
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	3	5	5	6	6	25
Estimated Outlays	3	5	5	6	6	25

Basis of estimate: CBO estimates that implementing H.R. 3195 would cost about $25 million over the 2009–2013 period, assuming appropriation of the necessary amounts. For this estimate, CBO assumes that the necessary amounts will be appropriated near the start of each fiscal year and that outlays will follow the historical spending pattern of those activities. The bill would not affect direct spending or revenues.

The EEOC's current caseload for ADA actions is about 20,000 annually. CBO expects that H.R. 3195 would increase this workload by no more than 10 percent in most years, or roughly 2,000 cases annually. Based on EEOC staffing levels necessary to handle the agency's current caseload, we expect that implementing H.R. 3195 would require 50 to 60 additional employees. CBO estimates that the costs to hire those new employees would reach $5 million by fiscal year 2010, subject to appropriation of the necessary amounts. In 2008, the agency received an appropriation of $329 million.

The additional cases resulting from H.R. 3195 also could increase the workload of the Department of Justice and the federal judiciary. However, CBO estimates that increased costs for those agencies would not be significant because of the relatively small number of cases likely to be referred to them.

Estimated intergovernmental and private-sector impact: Section 4 of UMRA excludes from the application of that act any legislative provision that establishes or enforces statutory rights that prohibit discrimination on the basis of disability. CBO has determined that sections 3 through 6 of H.R. 3195 fall within that exclusion; therefore, we have not reviewed them for intergovernmental or private-sector mandates. The remaining provisions of H.R. 3195 contain no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments, or the private sector.

Previous CBO estimate: On June 23, 2008, CBO transmitted a cost estimate for H.R. 3195 as ordered reported by the House Committee on the Judiciary on June 18, 2008. The two versions of the bill are identical as are the cost estimates.

Estimate prepared by: Federal Costs: Mark Grabowicz; Impact on State, Local, and Tribal Governments: Lisa Ramirez-Branum; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

XIII. Statement of General Performance Goals and Objectives

In accordance with clause 3(c) of House rule XIII, the goal of H.R. 3195 is to restore the intention and protections of the Americans with Disabilities Act of 1990.

XIV. Constitutional Authority Statement

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 3195. The Committee believes that the amendments made by this bill, which clarify protections from employment discrimination for Americans with disabilities are within Congress' authority under Article I, Section 8, Clauses 3 and 18 and Amendment XIV.

XV. Committee Estimate

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3195. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

XVI. Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

AMERICANS WITH DISABILITIES ACT OF 1990

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) * * *

(b) Table of Contents.—The table of contents is as follows:

Sec. 1. Short title; table of contents.

* * * * * * *

[Sec. 3. Definitions.]
Sec. 3. Definition of disability.
Sec. 4. Additional definitions.

* * * * * * *

TITLE V—MISCELLANEOUS PROVISIONS

* * * * * * *

Sec. 506. Rule of construction regarding regulatory authority.
Sec. [506] *507*. Technical assistance.
Sec. [507] *508*. Federal wilderness areas.
Sec. [508] *509*. Transvestites.
Sec. [509] *510*. Coverage of Congress and the agencies of the legislative branch.
Sec. [510] *511*. Illegal use of drugs.
Sec. [511] *512*. Definitions.
Sec. [512] *513*. Amendments to the Rehabilitation Act.
Sec. [513] *514*. Alternative means of dispute resolution.
Sec. [514] *515*. Severability.

* * * * * * *

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings.—The Congress finds that—

[(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;]

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

* * * * * * *

[(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;]

* * * * * * *

[SEC. 3. DEFINITIONS.

[As used in this Act:

[(1) AUXILIARY AIDS AND SERVICES.—The term "auxiliary aids and services" includes—

[(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

[(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

[(C) acquisition or modification of equipment or devices; and

[(D) other similar services and actions.

[(2) DISABILITY.—The term "disability" means, with respect to an individual—

[(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

[(B) a record of such an impairment; or

[(C) being regarded as having such an impairment.

[(3) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.]

SEC. 3. DEFINITION OF DISABILITY.

As used in this Act:

(1) DISABILITY.—The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (4)).

(2) SUBSTANTIALLY LIMITS.—The term "substantially limits" means materially restricts.

(3) MAJOR LIFE ACTIVITIES.—

(A) IN GENERAL.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

(B) MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity 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.

(4) REGARDED AS HAVING SUCH AN IMPAIRMENT.—For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(5) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.—The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) To achieve the remedial purposes of this Act, the definition of "disability" in paragraph (1) shall be construed broadly.

(B) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(C) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(D)(i) The 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—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph—

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

SEC. 4. ADDITIONAL DEFINITIONS.

As used in this Act:

(1) AUXILIARY AIDS AND SERVICES.—The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I—EMPLOYMENT

SEC. 101. DEFINITIONS.

As used in this title:

(1) * * *

* * * * * * *

(8) QUALIFIED INDIVIDUAL [WITH A DISABILITY].—The term "qualified individual [with a disability]" means an individual [with a disability] who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * * * * * *

SEC. 102. DISCRIMINATION.

(a) GENERAL RULE.—No covered entity shall discriminate against a qualified individual [with a disability because of the disability of such individual] *on the basis of disability* in regard to job application procedures, the hiring, advancement, or discharge of employ-

ees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION.—As used in subsection (a), the term "[discriminate] *discriminate against a qualified individual on the basis of disability*" includes—

(1) * * *

* * * * * * *

SEC. 103. DEFENSES.

(a) * * *

* * * * * * *

(c) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Notwithstanding section 3(5)(D)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

[(c)] *(d)* RELIGIOUS ENTITIES.—

(1) * * *

* * * * * * *

[(d)] *(e)* LIST OF INFECTIOUS AND COMMUNICABLE DISEASES.—

(1) * * *

* * * * * * *

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 501. CONSTRUCTION.

(a) * * *

* * * * * * *

(e) BENEFITS UNDER STATE WORKER'S COMPENSATION LAWS.—Nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

(f) CLAIMS OF NO DISABILITY.—Nothing in this Act shall provide the basis for a claim by a person without a disability that he or she was subject to discrimination because of his or her lack of disability.

(g) REASONABLE ACCOMMODATIONS AND MODIFICATIONS.—A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C).

* * * * * * *

SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY.

The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to

issue regulations implementing the definitions contained in sections 3 and 4.

SEC. [506] *507*. TECHNICAL ASSISTANCE.

(a) * * *

* * * * * * *

SEC. [507] *508*. FEDERAL WILDERNESS AREAS.

(a) * * *

* * * * * * *

SEC. [508] *509*. TRANSVESTITES.

For the purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

SEC. [509] *510*. INSTRUMENTALITIES OF THE CONGRESS

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) * * *

* * * * * * *

SEC. [510] *511*. ILLEGAL USE OF DRUGS.

(a) * * *

* * * * * * *

SEC. [511] *512*. DEFINITIONS.

(a) * * *

* * * * * * *

SEC. [512] *513*. AMENDMENTS TO THE REHABILITATION ACT.

(a) * * *

* * * * * * *

SEC. [513] *514*. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

SEC. [514] *515*. SEVERABILITY.

Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

REHABILITATION ACT OF 1973

* * * * * * *

SEC. 7. DEFINITIONS.

For the purposes of this Act:

(1) * * *

* * * * * * *

(9) DISABILITY.—The term "disability" means—

(A) * * *

(B) for purposes of sections 2, 14, and 15, and titles II, IV, V, and VII, [a physical or mental impairment that substantially limits one or more major life activities] *the meaning given it in section 3 of the Americans with Disabilities Act of 1990*.

* * * * * * *

(20) INDIVIDUAL WITH A DISABILITY.—

(A) * * *

(B) CERTAIN PROGRAMS; LIMITATIONS ON MAJOR LIFE ACTIVITIES.—Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 2, 14, and 15, and titles II, IV, V, and VII of this Act, [any person who—

[(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

[(ii) has a record of such an impairment; or

[(iii) is regarded as having such an impairment.] *any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990.*

* * * * * * *

XVII. COMMITTEE CORRESPONDENCE

None.

MINORITY VIEWS

The Americans with Disabilities Act (ADA) was enacted in 1990 with broad bipartisan support. Among that historic legislation's most important goals (and that most salient to this Committee) was to protect individuals with disabilities from discrimination in the workplace.

Now, as then, Committee Republicans endorse the purposes of the ADA, among them "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with inabilities," and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."

We support H.R. 3195, as amended in Committee and reported to the House. Our support for this legislation rests on our belief that it represents Congress's best effort to ensure that relief is extended to those most in need, while still maintaining meaningful limitations as to the law's scope and effect. To do less would upset the careful balance of interests embodied in the ADA since its enactment in 1990, and worse, threaten to do harm to the very individuals the law was meant to protect.

For the purposes of interpretation and the determination of the intent of Congress with respect to the provisions of this legislation, we hereby adopt the reasoning set forth in the report of the Committee on Education and Labor, supra.

HOWARD P. MCKEON.
TOM PETRI.
PETE HOEKSTRA.
MIKE CASTLE.
MARK SOUDER.
VERNON J. EHLERS.
JUDY BIGGERT.
TODD R. PLATTS.
RIC KELLER.
JOE WILSON.
JOHN KLINE.
CATHY MCMORRIS RODGERS.
LUIS FORTUÑO.
C.W. BOUSTANY, Jr.
RANDY KUHL.
DAVID DAVIS.
TIM WALBERG.

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