The ADA Amendments Act: An Overview of Recent Changes to the Americans with Disabilities Act

By Emily A. Benfer

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I. Introduction

When President George H.W. Bush signed the Americans with Disabilities Act ("ADA") into law in 1990, he enacted a "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."[1] Through a series of decisions, the United States Supreme Court narrowed the ADA's scope of protection and excluded individuals the Act was originally designed to protect, including people with epilepsy, diabetes and muscular dystrophy. Majority Leader Steny Hoyer, Representative Jim Sensenbrenner, Senator Tom Harkin and Senator Orrin Hatch led a bipartisan effort to reinvigorate the original intent of the ADA through the passage of the ADA Amendments Act of 2008 ("ADAAA"), which went into effect on January 1, 2009.

The ADAAA resulted from seven months of negotiations between representatives of the disability and business communities. Some of the negotiators were involved in the drafting of the original ADA and used their understanding of Congress's original intent to create a bill that carries "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] The ADAAA passed unanimously in both the Senate and House of Representatives, and President George W. Bush signed the act into law on September 25, 2008. For a comprehensive history of the ADA and the ADAAA, please visit www.archiveada.org. The website also includes the text of the law, copies of testimony, interpretive articles and documents, frequently asked questions and answers, policy and advocacy documents, and court cases.

With the passage of the ADAAA, our focus turns to interpretation and exercising rights under the ADA, as amended. This Issue Brief discusses the current status of disability rights under the ADA, as amended, and provides an overview of the ADAAA. Part II provides an overview of the definition of "disability," which is divided into three prongs. Parts III and IV discuss the definition of disability under the first and second prong. Part V examines the rules of construction applicable to the first and second prong. Lastly, Part VI discusses the definition of disability under the third prong.

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

[2] ADA Amendments Act (ADAAA), Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553 (2008) (to be codified at 42 U.S.C. § 12101).

II. Definition of "Disability"

One of Congress's main purposes in enacting the ADAAA was to respond to the Supreme Court's treatment of the definition of disability, which had the effect of severely reducing coverage for people with impairments intended to receive coverage.[3] In the ADAAA, Congress clearly states that the Supreme Court and the Equal Employment Opportunity Commission have imposed too high a level of limitation in their interpretations of disability, specifically the terms "substantially limits" and "major" in life activities. Congress achieved the goal of creating a lower standard by rejecting these past Supreme Court decisions and requiring that the definition of disability be construed broadly.[4]

The ADA contained a three-prong structure for the definition of disability that is retained in the ADAAA:

> The term disability means, with respect to an individual:
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> > (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
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> > (B) a record of such an impairment; or
> >
> > (C) being regarded as having such an impairment (as described in paragraph (3)).[5]

Congress originally adopted this definition of disability from the definition of "handicap" used in the Rehabilitation Act of 1973.[6] The courts had interpreted the Rehabilitation Act definition broadly to include individuals with a wide range of physical and mental impairments;[7] under the Rehabilitation Act, a person's status as disabled was typically "undisputed" and the court turned to the merits of the claim.[8] Unfortunately, the courts did not treat disability under the ADA

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[3] In the "Sutton trilogy" cases, the Supreme Court held that mitigating measures should be considered in determining whether an individual has a disability under the ADA. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999). In Toyota v. Williams, the Supreme Court created a demanding standard for the term "substantially limits." Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). For a detailed discussion about the effect of these cases and the disability community's response, *see* Chai Feldblum, Kevin Barry, Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187 (2008), *available at* http://www.law.georgetown.edu/archiveada/documents/ADAAmendmentsActArticle.pdf.

[4] ADAAA § 2(a)(7).

[5] ADAAA § 3(1) (amending Americans with Disabilities Act (ADA), § 2(a), 42 U.S.C. § 12101 (1990)).

[6] The Rehabilitation Act definition is now codified at 29 U.S.C. § 705(20) (2007). In 1992, the term ''disability'' replaced ''handicap'' in the Rehabilitation Act. *See* Pub. L. No. 102–569, § 102, 106 Stat. 4344, 4355–56 (1992).

[7] Georgetown Law Federal Legislation Clinic, *Fact Sheet on People Covered Under Section 504 of the Rehabilitation Act and People Not Covered by the ADA*, *available at* http://www.law.georgetown.edu/arachiveada/documents/Appendix_A_000.pdf (last visited on Oct. 22, 2008).

[8] *See* Strathie v. Department of Transportation, 716 F.2d 227, 230 (3d Cir. 1983) ("It is undisputed that Strathie is a handicapped person."); Bentivegna v. United States Department of Labor, 694 F.2d 619, 621 (9th Cir. 1982) ("It is not disputed that: (1) Bentivegna is a 'handicapped person' under the Act."); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d. Cir. 1977) ("The appellees do not deny that Margaret Kampmeier and Steven Genecco are within the applicable definition of a 'handicapped individual' in 29 U.S.C. § 706(6).").

similarly. Courts interpreting the ADA engaged in a long, arduous process to determine whether a disability covered under the law existed, a process that often intruded upon the personal lives of the individuals seeking protection from discrimination.[9]

Congress indicated its disapproval of past interpretations of disability by stating in the Findings and Purposes of the ADAAA that courts had failed to fulfill Congress's expectation that "disability" would be interpreted consistently with the definition of "handicapped individual" under the Rehabilitation Act.[10] To rectify these past interpretations, Congress redefined the terms in each prong of the definition of disability and also added a rule of construction requiring that the definition of disability be construed in favor of broad coverage of individuals, consistent with the Findings and Purposes section and to the maximum extent permitted by the ADA.[11] In this way, Congress clearly stated that the ADAAA "should not be unduly used as a tool for excluding individuals from the ADA's protections."[12] Instead, the analysis of whether an individual meets the definition of disability and establishes a prima facie case should be similar to the analysis in cases brought under the Rehabilitation Act and should be inclusive.[13] Under the ADAAA, thanks to an appropriately generous standard for the determination of disability, "courts [are required] to focus primarily on whether discrimination has occurred or accommodations properly refused."[14]

The ADAAA further increases the focus on the prohibition of discrimination by aligning the ADA with other civil rights laws. This was accomplished by eliminating language in the ADA that had prohibited discrimination of an individual "with a disability because of a disability" and replacing it with a simple prohibition on "discrimination on the basis of disability."[15] As the Report from the House Committee on the Judiciary explains, "[t]his change harmonizes the ADA with other civil rights laws by focusing on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists."[16] Based on the broad construction of the Rehabilitation Act and civil rights laws, courts should interpret the ADAAA generously and the focus should shift from whether a person is disabled and onto whether discrimination has occurred.

III. First Prong of the Disability Definition

[9] While the ADAAA may not entirely prevent the investigation into the personal lives of people seeking protection from discrimination, it should avoid delving into personal activities because it requires consideration of an impairment's effect on a major bodily function. *See infra* Part III(b).
[10] ADAAA § 2(a)(3).
[11] ADAAA § 4(a) (amending ADA § 3(4)(A)).
[12] 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (statement of Managers).
[13] *See* Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987); Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); Pushkin v. Regents of University of California, 658 F.2d 1372 (10th Cir. 1981); Flowers v. Webb, 575 F. Supp. 1450 (E.D.N.Y. 1983); Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982); Schuett Inv. Co. v. Anderson, 386 N.W.2d 249 (Minn. App. 1986).
[14] 154 CONG. REC. S8843 (daily ed. Sept. 16, 2008) (statement of Managers).
[15] H.R. Rep. No. 110-730, at 16 (2008).
[16] H.R. Rep. No. 110-730, at 21 (2008).

The first prong of the definition of disability means, with respect to an individual, "a physical or mental impairment that substantially limits one or more major life activities of such individual."[17] The ADAAA maintains the same definition of "physical and mental impairment"[18] as promulgated by the Equal Employment Opportunity Commission ("EEOC") and included in Department of Justice and Department of Education regulations.[19] "Substantially limits" is not defined with new terms but, as explained below, the ADAAA rejects past interpretations of the term in favor of a more inclusive standard. The definition of "major life activities" is more clearly defined and expanded to include "major bodily functions." Together, these changes should make it easier for individuals to qualify as having a disability for purposes of the law and to focus the discussion onto whether discrimination occurred.

It is important to note that a key difference between the third prong, and the first and second prongs, is that the third prong of the disability definition only requires that a person be treated adversely because of an impairment and does *not* require that the impairment limit or be perceived to limit a major life activity.[20] As a result, the ADAAA "relieves entities . . . from the obligation and responsibility to provide reasonable accommodations and reasonable modifications to an individual who qualifies for coverage . . . solely by being 'regarded as' disabled under the third prong."[21] This is discussed in greater detail in Part VI.

The following three sections explore changes to the terms "substantially limits" and "major life activities" and demonstrate that these changes fulfill congressional intent to protect a wide range of individuals with disabilities from discrimination.

A. Substantially Limits

Congress specifically intended that the scope of coverage under the ADAAA be broad and inclusive. The ADAAA states that the "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[22] In keeping with this mandate of broad coverage, the Act provides that the term "substantially limits" should be given a broad interpretation. The

[17] ADAAA § 4(a) (amending ADA § 3(1)(A)).
[18] 28 C.F.R. § 36.104 ("The phrase physical or mental impairment means -- (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;(iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.")
[19] 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (statement of Managers); H.R. Rep. No. 110-730, at 9 (2008).
[20] 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers); *see* H.R. Rep. No. 110-730, at 14 (2008); H.R. Rep. No. 110-730, at 18 (2008).
[21] H.R. Rep. No. 110-730, at 14 (2008).
[22] ADAAA § 4(a) (amending ADA § 3(4)(A)).

ADAAA also includes detailed Findings and Purposes and requires that the term "substantially limits" shall be interpreted consistently with the Findings and Purposes.[23]

The Findings and Purposes of the ADAAA reject past interpretations that narrowed the definition of "substantially limits" and make clear that the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[24] incorrectly "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress."[25] One of the central Findings and Purposes is that Congress rejects the *Toyota* holding that the terms "substantially" and "major life activities" "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[26] The Act also rejects the *Toyota* standard that to be substantially limited in performing a major life activity, "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."[27] Instead, the ADAAA conveys Congress's belief that *Toyota* created an "inappropriately high level of limitation necessary to obtain coverage under the ADA."

Furthermore, "Congress [found] that the EEOC regulations defining the term 'substantially limits' as 'significantly restricted' [are] inconsistent with congressional intent, by expressing too high a standard."[28] To guide the courts' future interpretation of "substantially limits," Congress directs the EEOC to revise its regulations, including the portion that defines the term "substantially limits" as "significantly restricted," to be consistent with the Act.[29] The negotiators of the ADAAA expect that the EEOC will use the plain meaning of the Act in revising its regulations.[30]

In other words, the term "substantially limits" is "not meant to be a demanding standard."[31] Not only does the ADAAA create a more inclusive standard for the term "substantially limits," but it also expands the term "major life activities" as well.

B. Major Life Activities and Major Bodily Functions

When determining whether an individual's impairment substantially limits him or her in a major life activity, the proper analysis includes consideration of whether the individual's activities are limited in condition, duration and manner.[32] To qualify as a disability, an

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[23] ADAAA § 4(a) (amending ADA § 3(4)(B)).
[24] Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (holding that an individual who was terminated because of her carpal tunnel syndrome was not disabled because she was only restricted in a limited class of manual tasks and she was not prevented or severely restricted from performing a variety of tasks central to most people's daily lives).
[25] ADAAA § 2(a)(7).
[26] *Toyota*, 534 U.S. at 197 (2002).
[27] *Id*. at 198 (emphasis added).
[28] ADAAA § 2(a)(8).
[29] ADAAA § 2(b)(6).
[30] ADAAA § 2(b)(5).
[31] 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (statement of Managers); *see* 154 CONG. REC. H8288 (daily ed. Sept. 17, 2008) (statement of Rep. Miller) ("We expect the courts and agencies to apply this less demanding standard when interpreting 'substantially limits.'").
[32] 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers).

impairment need only substantially limit one major life activity.[33] On the other hand, multiple impairments that together substantially restrict a major life activity may also constitute a disability.[34] Throughout the analysis, the ADAAA sets a "lower standard that provides broad coverage" and provides that "the burden of showing that an impairment limits one's ability to perform common activities is not onerous."[35]

In the definition of a "major life activity," the ADAAA now includes "the operation of a major bodily function."[36] The ADAAA defines major bodily functions as "including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[37] A disability can also substantially limit the operation of a major bodily function if the disability causes the operation of the major bodily function to overproduce in some harmful fashion, rather than to under-produce.[38]

The inclusion of major bodily functions is important for people with impairments previously denied protection under the ADA. Prior to the ADA, many courts held that a substantial limitation in a major bodily function, such as liver function,[39] did not qualify as a disability. In its effort to make it easier for individuals to qualify as disabled, the ADAAA clarifies the meaning of "major life activities" and expands the term to include "major bodily functions."[40] Now these individuals no longer need to show how their disability limits them in specific activities – the substantial limitation of a major bodily function is enough to qualify them for protection under the ADAAA. Because the major bodily functions analysis makes it simpler for an individual to qualify as disabled, plaintiffs' lawyers should always consider the client's limitations in major bodily functions first. This will often be the clearest path to coverage, and in many cases should be the plaintiff's primary argument for coverage.

As previously mentioned, the ADAAA rejects the *Toyota* holding that: 1) "interpreted [the definition of "disability"] strictly to create a demanding standard for qualifying as disabled"[41] and 2) required an individual to prove that his or her impairment prevents or severely restricts the individual from engaging in "activities that are of central importance to most people's daily lives" to qualify as disabled.[42] This holding narrowed the definition of "disability" and excluded individuals whom Congress intended to protect. The ADAAA makes multiple changes to address *Toyota* as it applies to major life activities. First, a "major life

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[33] ADAAA § 4(a) (amending ADAAA § 3(4)(C)).
[34] H.R. Rep. No. 110-730, at 10 (2008).
[35] 154 CONG. REC. S8289 (daily ed. Sept. 17, 2008) (statement of Rep. Nadler); *see* 154 CONG. REC. S8355 (daily ed. Sept. 11, 2008) (statement of Sen. Kennedy) ("[O]ur Senate bill avoids this problem and provides the broader coverage needed to correct the excessively restrictive and unintended interpretation in the litigation.").
[36] ADAAA § 4(a) (amending ADA § 3(2)(B)).
[37] ADAAA § 4(a) (amending ADA § 3(2)(B)).
[38] H.R. Rep. No. 110-730, at 11 (2008).
[39] *See* Furnish v. SVI Sys., Inc., 270 F.3d 445, 450 (7th Cir. 2001) (holding that an individual with cirrhosis of the liver caused by Hepatitis B did not substantially limit him in a major life activity because liver function was "not integral to one's daily existence").
[40] 154 CONG. REC. S8350 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).
[41] Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002).
[42] *Id*. at 198.

activity" no longer has to be "of *central importance* to most people's daily lives."[43] Second, the ADAAA clarifies that "[a]n impairment that substantially limits *one* major life activity need not limit other major life activities in order to be considered a disability."[44] Thus, a person need only show he or she is substantially limited in one major life activity to qualify as disabled. Third, the ADAAA expands the non-exhaustive, illustrative list of major life activities. More specifically, "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." Congress provides additional examples of major life activities in its House of Representatives' Committee on Education and Labor Report: "interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination."[45] Therefore, in its effort to make it easier for individuals to qualify as disabled, the ADAAA clarifies the meaning of "major life activities" and expands the term to include "major bodily functions."

C. Examples

The following examples demonstrate how individuals who are substantially limited in the operation of various major bodily functions qualify as disabled under the ADAAA:

- An individual with cerebral palsy is disabled because cerebral palsy substantially limits the neurological function. The individual does not need to show any further limitation under the ADAAA.

- An individual with breast cancer is disabled because in its active state,[46] her breast cancer substantially limits the normal cell growth function.[47]

- An individual with Hepatitis B is disabled because Hepatitis B substantially limits the digestive and liver functions."[48] An individual need only be limited in one major bodily function to qualify as disabled.

- An individual with HIV/AIDS is disabled because the virus substantially limits the immune function.[49]

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[43] ADAAA § 4(a) (amending ADA § 3(4)(C)) (emphasis added).
[44] ADAAA § 4(a) (amending ADA § 3(4)(C)) (emphasis added).
[45] H.R. Rep. No. 110-730, at 11 (2008).
[46] *See infra* Section V(b).
[47] *See* Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177 (D.N.H. 2002) (holding that an individual with stage 3 breast cancer was not disabled because her breast cancer did not substantially limit her in a major life activity on a long-term basis).
[48] *See* Furnish v. SVI Sys., Inc., 270 F.3d 445, 450 (7th Cir. 2001) (holding that an individual with a cirrhosis of the liver caused by Hepatitis B did not substantially limit him in a major life activity because liver function was "not integral to one's daily existence").
[49] *See* U.S. v. Happy Time Day Care Ctr., 6 F. Supp. 2d 1073 (W.D. Wis. 1998) (holding that "there is something inherently illogical about inquiring whether" a five-year old's ability to procreate is substantially limited by his HIV infection); 154 CONG. REC. H8297 (daily ed. Sept. 17, 2008) (statement of Rep. Baldwin) ("Of significance for people living with HIV, among the listed examples of 'major life activities' are 'functions of the immune system,' as well as 'reproductive functions.'").

The following examples demonstrate how an individual would be substantially limited in a major life activity:

- Given the less demanding standard for determining substantial limitations in major life activities, we would expect that a person with carpal tunnel syndrome would be found to have a disability because carpal tunnel syndrome substantially limits the major life activity of performing certain manual tasks.[50]

- Congress has now clarified that the primary factor that has been used to defeat ADA coverage for individuals with learning disabilities – mitigating measures – can no longer be relied on to conclude that such individuals do not have disabilities under the ADA. A learning or intellectual disability ordinarily substantially limits a variety of major life activities, including brain function, reading, learning, concentrating, and writing (a person need only show substantial limitation in one major life activity or major bodily function).[51] Because virtually all individuals with learning disabilities are substantially limited in a major life activity, these individuals will ordinarily be protected under the ADA.

Based on these examples, the ADAAA protects individuals with a wide range of impairments that substantially limit a major life activity or the operation of a major bodily function.

IV. Second Prong of the Definition of Disability

The second prong of the definition of disability covers "individual[s] [with] . . . a history of, or [who have] been misclassified as having, a mental or physical impairment that substantially limits" a major life activity.[52] The ADAAA does not directly alter the second prong, but the changes made to "substantially limits," "major life activities," and "major bodily functions" apply to it in the same way they apply to prong one. As before, an individual can qualify as disabled if they have a "record of . . . an impairment" that substantially limits them in a major life activity.[53] However, as the second prong brings in the functionality test of prong one by reference, the analysis must now occur under the broadened definitions of "substantially limits," "major life activities," and "major bodily functions."[54] Similarly, the new rules of

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[50] *See* Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (holding that an individual with carpal tunnel syndrome who could not perform certain manual tasks was not substantially limited because she was not prevented or severely restricted from engaging in activities that are of central importance to most people's daily lives).

[51] *See* H.R. Rep. No. 110-730 pt. 2, at 19. ("The next rule of construction for the definition of disability in section 4 of the Act 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 court decisions 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.")

[52] S. Rep. No. 101-116, at 22.

[53] ADAAA. § (4)(a) (amending ADA § 3(1)(B)).

[54] *Id.* The structure of the text implies that the functionality test (i.e. the substantially limits a major life activity requirement) applies to both prongs two and three. This is also how the text was traditionally read under the 1973

construction, codified findings and purposes, and statutory findings and purposes apply to the second prong as well. The only difference between the two determinations is that prong one asks for evidence of a present impairment while prong two asks for a "record" of the impairment. The rest of the analysis is essentially the same.

V. Rules of Construction

A. Mitigating Measures

The ADAAA addresses Supreme Court decisions, including *Sutton v. United Air Lines, Inc.*, that required consideration of the ameliorative effects of mitigating measures when determining whether an individual was disabled.[55] As a result of these court decisions, the ADA no longer protected people who took medication or learned to modify their behavior to lessen the effect of their disability. This situation created a Catch-22: "the more successful a person [was] at coping with a disability, the more likely it [was] the Court [would] find that they [were] no longer disabled and therefore no longer covered under the ADA."[56] The ADAAA remedies this byproduct of *Sutton* and its companion cases by requiring that courts determine whether a person is disabled without reference to the ameliorative effects of mitigating measures.[57]

Under the ADAAA:

> [t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the effects of mitigating measures such as: (I) medication, medical supplies, equipment or appliances, low-vision devices, 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.[58]

The House of Representatives included additional examples of mitigating measures in both the Committee on Education and Labor and Committee on the Judiciary Reports. Those reports added "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 life activities."[59] The only exception to this rule is that courts are allowed to consider the ameliorative effects of ordinary eyeglasses or contact lenses when determining whether a disability substantially limits a major life activity.[60]

Rehabilitation Act. Of course, prong three is now explicitly excluded from that test by the language in § (3)(a) of the ADAAA.

[55] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that two women with vision impairments were not disabled because they corrected their vision with glasses or contact lenses).

[56] 154 CONG. REC. S8349 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).

[57] ADAAA § 2(b)(2).

[58] ADAAA § 4(a) (amending ADA § 3(4)(E)(i)).

[59] H.R. Rep. No. 110-730, at 15 (2008); H.R. Rep. No. 110-730, at 20 (2008).

[60] ADAAA § 4(a) (amending ADA § 3(4)(E)(ii)).

The rule against considering the ameliorative effects of mitigating measures will likely expand the coverage of individuals with learning disabilities. It is now clear that individuals with learning disabilities also qualify as disabled and should be able to secure accommodations in an educational setting[61] or in an employment setting.[62] "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 has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking or speaking."[63] In short, a court must determine whether a learning disability is substantially limiting *without regard* to any mitigating measures, such as learned behavior. As such, a learning disability substantially limits the major bodily function of the brain. (A learning disability also substantially limits the major life activities of reading, learning, concentrating, writing, but a person need only show substantial limitation in one major life activity or major bodily function.) Therefore, because they are substantially limited in a major life activity, individuals with learning disabilities are protected under the ADAAA.

The following examples demonstrate how the "mitigating measures" provision in the ADAAA applies to the analysis of disability:

- An individual with epilepsy should qualify as disabled.[64] Under the ADAAA, a court must determine whether epilepsy substantially limits a major life activity without regard to the ameliorative effects of medication. When considered without the effects of medication, epilepsy substantially limits the major bodily function of the brain. (Epilepsy also substantially limits the major life activities of walking, standing, communicating, interacting with others, caring for oneself, and breathing, but a person need only show substantial limitation in one major life activity or major bodily function.)

- An individual with diabetes should qualify as disabled.[65] A court must determine whether diabetes substantially limits a major life activity without regard to mitigating measures, such as insulin, exercise or diet. When considered without the effects of these mitigating measures, a person with diabetes is substantially limited in the endocrine function and is protected under the ADAAA. (Diabetes also substantially limits the major life activities of working, eating, seeing, communicating, and reading, but a person need only show substantial limitation in one major life activity or major bodily function.)

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[61] *See* Price v. Nat'l Board of Medical Examiners, 966 F. Supp. 419, 427 (S.D. W. Va. 1997) (holding that an individual with learning disabilities was not disabled because he was able to read and perform at an average level or better compared to most people); 154 CONG. REC. H8296 (daily ed. Sept. 17, 2008) (statement of Rep. Courtney).
[62] *See* Wong v. Regents of University of California, 379 F.3d 1097 (9th Cir. 2004) (holding that an individual with a learning disability was not disabled because he was able to read and perform at an average level or better compared to most people).
[63] 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers); H.R. Rep. No. 110-730, at 10 (2008).
[64] *See* Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999) (holding that an individual with epilepsy is not disabled because his seizures were generally well controlled by medication).
[65] *See* Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (9th Cir. 2002) (holding that an individual with diabetes is not disabled because he was able to mitigate the effects of his diabetes through a regimen of insulin, exercise and diet).

- An individual with post-traumatic stress disorder should qualify as disabled. A court must determine whether post-traumatic stress disorder substantially limits a major life activity without regard to the ameliorative effects of medication or therapy. When considered without the effects of medication or therapy, PTSD substantially limits the brain function. (PTSD also substantially limits the major life activities of concentrating and interacting with others, but a person need only show substantial limitation in one major bodily function or major life activity.)

- An individual with muscular dystrophy should qualify as disabled.[66] A court must determine whether muscular dystrophy substantially limits a major life activity without regard to the ameliorative effects of behavioral modifications, such as supporting oneself with one arm to perform tasks. When considered without the effects of behavioral modifications, muscular dystrophy substantially limits the neurological function. (Muscular dystrophy also substantially limits the major life activities of lifting, caring for oneself, eating and engaging in sexual activities, but a person need only show substantial limitation in one major bodily function or major life activity.)

Under the ADAAA, courts will no longer consider the ameliorative effects of mitigating measures when determining whether these individuals are disabled. As a result, in all of the circumstances described above, the court should determine that an individual qualifies as disabled based on whether the disability is substantially limiting in its unmitigated state.

B. Episodic or in Remission

Before the ADAAA, many courts held that individuals with epilepsy were not substantially limited because their seizures occurred episodically.[67] Similarly, many courts discounted the impact of an impairment that was in remission as too short-lived to be substantially limiting.[68] The ADAAA rejects these holdings and states "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[69] Furthermore, Congress clarifies in the Senate Statement of Managers that "the rules of construction provide that impairments that are episodic or in remission be assessed in their active state for purposes of determining coverage under the ADA."[70]

The following are examples of individuals with disabilities who meet the definition of disability when their episodic impairments are considered in their active state:

- An individual with epilepsy should qualify as disabled. "[A]n individual with epilepsy who experiences seizures that result in the short-term loss of control over major life activities, including major bodily functions or other major life activities is disabled

[66] *See* McClure v. General Motors Corp., 75 Fed. Appx. 983 (5th Cir. 2003) (holding that an individual with muscular dystrophy was not disabled because he was able to compensate for his condition through the use of behavioral modifications, such as supporting himself with one arm).
[67] *See Todd*, 57 F. Supp. 2d at 453.
[68] *See* Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177, 182-83 (D.N.H. 2002).
[69] ADAAA § 4(a) (amending ADA § 3(4)(D)).
[70] 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers).

under the [Act] even if those seizures occur daily, weekly, monthly, or rarely."[71] A court must determine whether an individual with epilepsy is disabled without considering that seizures occur episodically and momentarily, lasting five to fifteen seconds.[72] When considered in its active state (i.e. during a seizure), epilepsy qualifies as a disability and people with epilepsy are protected under the ADAAA.

- An individual with cancer should qualify as disabled.[73] A court determining whether an individual with cancer is disabled must consider cancer in its active state, whether or not the individual is in remission. In its active state, cancer substantially limits the normal cell growth function. Thus, an individual with cancer is protected under the ADAAA.

- An individual with depression should qualify as disabled. A court must determine whether an individual with depression is disabled without considering whether his depression is episodic. In its active state, depression substantially limits the brain function. Thus, an individual with depression is protected under the ADAAA.

As these examples demonstrate, individuals with impairments that are episodic or in remission qualify as disabled when their impairments are considered in their active state.

VI. Third Prong of the Disability Definition

The ADAAA redefines the third prong of the definition of disability, or the "regarded as" prong. The original third prong was included in the ADA to "prohibit discrimination founded on [misplaced] concerns or fears."[74] However, "[i]n line with the Supreme Court's restrictive interpretation of the first prong of the definition . . . the Court also . . . restrictively construed prong three, increasing the burden of proof required to establish that one has been regarded as disabled."[75] In the *Sutton* decision, the Supreme Court required plaintiffs to show that their employers not only subjectively regarded them as impaired and were substantially limited in a major life activity but also that these same employers subjectively regarded those limitations as disqualifying for a broad range of jobs in the eyes of other employers.[76]

Congress modified the "regarded as" prong in order to counteract the Supreme Court's narrow interpretation in *Sutton* and to broaden coverage. Specifically, the ADAAA provides that:

> An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subject to an action prohibited under this Act because of an

[71] H.R. Rep. No. 110-730, at 19 (2008).
[72] *See Todd*, 57 F. Supp. 2d at 453 (holding that an individual with epilepsy was not disabled because his seizures occurred episodically and were only momentary, lasting five to fifteen seconds).
[73] *See Pimental*, 236 F. Supp. 2d at 183 (holding that an individual with stage 3 breast cancer is not disabled because her breast cancer did not substantially limit her in a major life activity on a long-term basis).
[74] H.R. Rep. No. 110-730 pt.2, at 17.
[75] *Id*. at 18.
[76] 527 U.S. 471, 491 (1999).

> actual or perceived physical impairment whether or not the impairment limits or is perceived to limit a major life activity.[77]

In modifying this standard, Congress reaffirmed that "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society" continue to negatively affect persons with disabilities and, in many ways, "are just as disabling as the actual impact of an impairment."[78]

It is also important to note that "[u]nder this bill, the third prong of the disability definition will apply to impairments, not only to disabilities."[79] The category of impairments is, of course, much broader than disability and the deliberate use of that term reflects the breadth of coverage Congress intended under the third prong.[80]

The subsections below discuss the ADAAA's three major changes to the "regarded as" prong. The first, and most important, is the elimination of the functionality test (i.e. a person no longer needs to show substantial limitation in a major life activity under the third prong). Under the ADAAA, an individual only needs to establish that they were subjected to an act prohibited by the ADA due to a perceived or actual impairment regardless of whether they actually have the impairment. The plaintiff is no longer required to show that a covered entity subjectively believes that the plaintiff's impairment substantially limited him or her in a major life activity, but only that the covered entity believes the plaintiff has an impairment – or the plaintiff actually does have an impairment. Second, Congress clarified that "reasonable accommodations" or modifications are not required for individuals qualifying solely under the "regarded as" prong. Persons seeking accommodations must now qualify under either prong one or two, a standard that should be easy to meet under the broad definitions in the ADAAA. Finally, Congress also narrowed the scope of coverage slightly by providing an exception for impairments that are "transitory and minor." Only the most trivial impairments will qualify as an exception to coverage under the third prong as very few impairments are both transitory *and* minor.

This section explores each of these changes in depth by examining the text and legislative history behind each provision. Finally, a list of examples is provided to illustrate what will be covered under the new "regarded as" prong of the ADAAA.

A. The Functionality Test

The elimination of the functionality test is the most significant change to the third prong of the definition of disability in the ADAAA. Plaintiffs only need to show that they were discriminated against due to an actual or perceived impairment in order to qualify as disabled. Both the House of Representatives and the Senate support this principle. In the words of the Education and Labor Report:

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[77] S. 3406, 110th Cong. § 4(a)(3)(A).
[78] H.R. Rep. No. 110-730, at 7 and 13.
[79] 154 CONG. REC. S8840 (daily ed. Sept. 16, 2008) (statement of Managers).
[80] *See id.* at S8354 (statement of Sen. Hatch).

> The Committee therefore restores Congress' 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.[81]

The Senate Statement of Managers adds that "[i]f an individual establishes that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment – whether or not that impairment limits or is perceived to limit a major life activity – then the individual will qualify for protection under the Act."[82]

Significantly, the new language focuses on discrimination and primarily asks whether the person was subjected to an action prohibited by the ADA. One of the concerns surrounding the ADA jurisprudence was that it failed to adequately examine the question of discrimination. Instead, the decisions revolved solely on whether a person had a disability for purposes of the law. The changes made by the ADAAA to Section 102 of the ADA, pertaining to "discrimination," reflect this concern.[83] The shift in emphasis in the "regarded as" section suggests the same congressional intent. Thus, the primary focus, under the ADAAA, is on whether discrimination took place – not whether a person has a disability.

Under the ADAAA, whether an employer believes the employee is substantially limited in a major life activity no longer matters. When determining the presence of an actual or perceived impairment, an objective, rather than subjective, standard is used. The findings in the ADAAA clearly state that Congress "reject[s] the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc*. . . with regard to coverage under the third prong of the definition of disability and . . . reinstate[s] the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*."[84] In *Arline*, the Supreme Court held that a teacher with tuberculosis fell under both the "regarded as" and "record of disability" prongs of the Rehabilitation Act. In making the "regarded as" determination, the Court did not dwell on the subjective beliefs of the employer. Rather, the Court only looked at whether the teacher had tuberculosis and was discriminated against because of misperceptions about that illness.[85] This analysis stands in sharp contrast to the multiple levels of subjective proof required by *Sutton*.

The plain language of the ADAAA clearly indicates that the objective examination in *Arline* is the appropriate standard. In addition to findings that flatly reinstate the reasoning of *Arline*, the case is cited favorably in the Senate Statement of Managers, the Judiciary Report, and the Education and Labor Report.[86] The drafters of the original ADA "relied extensively on the reasoning of" *Arline* and the ADAAA "restates [Congress's] reliance on the broad views

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[81] H.R. Rep. No. 110-730, at 13-14.
[82] 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).
[83] H.R. Rep. No. 110-730, at 16.
[84] ADAAA § 2(b)(3).
[85] *See* School Board of Nassau County v. Arline, 480 U.S. 273 (1987).
[86] *See* H.R. Rep. No. 110-73 pt. 1, at 12; H.R. Rep. No. 110-73 pt. 2, at 7; 154 Cong. Rec. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).

enunciated in that decision."[87] According to the Senate Statement of Managers, courts should "continue to rely on [*Arline's*] standard."[88] The objective standard it enunciates, rather than the subjective standard of *Sutton*, should now apply to all cases.

B. Reasonable Accommodations

The second significant change to the "regarded as" prong is the elimination of accommodations for persons qualifying solely under prong three. Section 6(g) provides that:

> [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) of such section.[89]

The Senate Statement of Managers explains the change this way: "[w]e believe it is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition, properly applied."[90] Essentially, given the addition of "major bodily functions," the expansion of "major life activities," the elimination of "mitigating measures," and the clarification regarding "substantially limits," no impairment that requires an accommodation should fall outside the scope of the first and second prongs. With the expanded first and second prongs, Congress recognized that there is no longer a need for accommodations based solely on the third prong. Every individual who requires an accommodation should now be eligible under the first or second prongs.

While prohibited from seeking accommodations, persons qualifying under the third prong can, of course, still seek all other remedies available under the ADA. Also, nothing in this section prevents a person who qualifies under prong three *and* prong one or two from requesting an accommodation under prongs one and two.

C. Transitory and Minor

In addition to the clause removing reasonable accommodations under the third prong, there is a new exception for impairments that are "transitory and minor." The ADAAA states that:

> Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an expected or actual duration of 6 months or less. [91]

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[87] 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).
[88] 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).
[89] ADAAA § 6(a) (creating new ADA § 501(g)).
[90] 154 CONG. REC. S8347 (daily ed. Sept. 11, 2008)(statement of Managers).
[91] ADAAA § 4(a) (amending ADA § (3)(3)(b)).

The Senate Statement of Managers and Education and Labor report describe the exception as applying only to "claims at the lowest end of the spectrum of severe limitations."[92] According to the Judiciary Report, "[p]roviding such an exception for claims at the lowest end of the spectrum of severity was deemed necessary under prong three of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in prongs one and two of the definition . . . absent this exception, the third prong of the definition would have covered . . .common ailments like the cold or flu."[93] It is expected that this exception will be, in the words of the Judiciary Report, "construed narrowly" as it runs counter to the general rule of broad coverage under the ADAAA and few ailments are, in fact, both transitory *and* minor.[94]

Apart from the examples of the cold and flu given in the Judiciary Report (these are also mentioned in the Senate Statement of Managers), other ailments described as both transitory and minor in the debates included: "stomachaches," "mild seasonal allergies," "a hangnail," and "an infected finger."[95] Clearly these are all "trivial impairments" and the scope of the exception should be considered in light of them.[96]

Impairments that may have transitory or irregular symptoms but are not minor should still be covered. As such, a person who is treated adversely because he or she has, or is believed to have, an impairment such as colon cancer, epilepsy, bipolar disorder, or HIV/AIDS, could proceed under the "regarded as" prong because these impairments (whether or not the individual actually has them) are not both transitory and minor.[97]

It is also important to note that the "transitory and minor" exception is an objective one, based on the actual nature of the impairment that the person has or is perceived to have. The exception does not create the opportunity for a covered entity to defend itself by claiming it believed the plaintiff had a transitory and minor impairment when the impairment in question is not actually transitory and minor. Given that the application of heightened subjective standards to the "regarded as" prong led to the changes in the ADAAA in the first place, it would make little sense for the drafters to reintroduce the problem in a very narrow exception to the general rule of broad coverage.[98]

D. Examples

The new "regarded as" prong of the ADAAA covers all persons subjected to an act prohibited by the ADA due to a perceived or actual impairment. Under the ADA, prohibited acts include discrimination, denial of equal treatment, and segregation in employment, public

[92] H.R. Rep. No. 110-730 pt. 2, at 18.
[93] *Id.*
[94] *Id.*
[95] 154 CONG. REC. H6064, H6074 (daily ed. Sept. 17, 2008) (statements of Rep. Nadler and Rep. Smith).
[96] *Id.* (statement of Rep. Smith).
[97] H.R Rep. No. 110-730, at 14; 154 Cong. Rec. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).
[98] H.R. Rep. No. 110-730, at 13.

services, public transport, or public accommodations.[99] The following examples illustrate how some persons, among others, would be eligible for protection under this standard:

- A child prevented from enrolling in a daycare facility *because of* his HIV status should qualify for protection under the third prong. Denial of a public service due to an impairment is a prohibited act under the ADA. A plaintiff denied entrance to daycare because of HIV (an impairment that is not transitory and minor) qualifies for protection from discrimination under the new "regarded as" prong.[100]

- A person removed from her position as a nurse *because of* her stage three breast cancer should meet the definition of disability under the third prong. Termination is an action prohibited under the Act and stage three breast cancer is an impairment. Thus, the nurse removed from her position should be covered.[101]

- A person whose job offer is rescinded *because of* his muscular dystrophy is covered under the "regarded as" prong. Denial of employment based upon a perceived or actual impairment is a prohibited act under the ADA. Muscular dystrophy is an impairment that is not transitory and minor. Thus, the individual should qualify as disabled.[102]

- A person terminated *because of* PTSD, depression, or other mental illness should qualify as disabled. Termination based upon a perceived or actual impairment is prohibited under the ADA and mental illnesses, such as PTSD, are impairments that are not transitory and minor. Thus, the individual terminated should qualify as disabled.[103]

- A person denied employment in the aviation industry due to unfounded concerns about a severe visual impairment should be eligible under the ADAAA. A severe visual impairment qualifies as a physical or mental impairment that is not transitory and minor. Thus the individual denied employment should qualify as disabled.[104]

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[99] S. Rep. No. 101-116, at 2-3 (areas covered by ADA), 27 (types of discrimination prohibited).

[100] *See* U.S. v. Happy Time Day Care Center, 6 F. Supp. 2d 1073 (W.D. Wisc. 1998) (holding that a child denied access to a daycare center due to their HIV was not regarded as disabled because they could not show that the daycare believed the HIV was substantially limiting).

[101] *See* Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177 (D.N.H. 2002) (holding that a person removed from her nursing job due to breast cancer was not disabled under the regarded as prong because she could not show that her employer considered her to be substantially limited).

[102] *See* McClure v. General Motors Corp., 75 Fed. Appx. 983 (5th Cir. 2003) (holding that an individual fired as a result of their muscular dystrophy could not meet the standards of the regarded as prong as they failed to show their employer believed they were substantially limited).

[103] *See* McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1289 (D. Wyo. 2004) (holding that a U.S. Marshall terminated due to depression could not fall under the regarded as prong because he failed to show that his employer subjectively believed he was substantially limited); Schriner v. Sysco Food Service, 2005 U.S. Dist. LEXIS 44743 (holding that a employee terminated due to PTSD failed to qualify under the regarded as prong because he could not show that the employer subjectively believed his PTSD was substantially limiting).

[104] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that two sisters with severe myopia that was correctable with standard aides did not meet the regarded as requirements as they failed to show their employers subjectively believed they were substantially limited in a broad range of pilot jobs).

As these examples indicate, the new "regarded as" prong places a high value on proving causality between the existence of the impairment and the adverse employment action. As in all employment cases, the claimant bears the ultimate burden of proving that a discriminatory act prohibited by the ADA was taken *because of* a perceived or actual impairment. The existence of an actual or perceived impairment that is not transitory and minor should be settled quickly and require minimal evidence from an objective standard.

VII. Conclusion

This Issue Brief provides a blueprint for proper application of the ADA as amended and gives a basic overview of the new law and the supporting legislative history. The ADAAA makes significant changes to the definition of "substantially limits," "major life activities," and "regarded as." Congress intends these changes to reflect the "broad and inclusive" intent behind the original ADA.[105] However, these adjustments will never be fulfilled without an adequate focus on proper interpretation of its terms. While the passage of the ADAAA was a victory for people with disabilities, it is extremely important that the ADAAA be implemented consistently with Congress's intent to allow for individuals with disabilities to fully participate in a society free from discrimination.

[105] 154 CONG. REC. S3845 (daily ed. Sept. 11, 2008) (statement of Managers).