Testimony of Prof. Samuel R. Bagenstos
Before the United States Senate Committee on
Health, Education, Labor, and Pensions

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

I have been invited to testify to discuss the ADA Amendments Act, which passed the House last month and is now pending before the Senate. As one who both studies and litigates disability rights cases, I strongly support the bill. The ADAAA will overturn the mitigating-measures holding of *Sutton v. United Air Lines*,[1] which has been applied to deprive many individuals with disabilities of the ADA's protections. The bill will also overturn the restrictive interpretation of "substantially limits" applied in *Toyota Motor Mfg., Ky., Inc. v. Williams*,[2] and it

[1] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).
[2] *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

will decisively reject the *Toyota* Court's unsupported dictate that the statute "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled."[3] And it will make clear, contrary to the practice of many courts, that the "regarded as" prong of the ADA's disability definition occupies an important and independent position in the statutory scheme. As you have heard at previous hearings, and will hear again today, far too many ADA cases have been thrown out of court at the threshold "disability" stage, and far too many people with disabilities have accordingly been unable to have their claims of discrimination heard on the merits. This bill is essential to change that unjust result.

I should emphasize that, just after *Sutton* was decided, I published an article that endorsed the Court's mitigating-measures holding (though not other aspects of the decision).[4] I argued that protecting individuals whose only "disability" was the need to use ordinary corrective lenses was not consistent with the statutory language or Congress's intent. Moreover, I contended, the Court's opinion, properly construed, would still afford ADA coverage for individuals with epilepsy, diabetes, and other conditions that Congress clearly contemplated as being covered by the statute. But experience with the *Sutton* holding has proved me wrong. Lower courts have employed that holding to deny protection to people with muscular dystrophy, diabetes, epilepsy, and many other conditions that would have seemed clearly to fall within the heartland of the statute's coverage.[5] And the Supreme Court exacerbated the problem by declaring in *Toyota* that the statute "need[s] to be

[3] *Id.* at 197.
[4] Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397 (2000).
[5] *See* H.R.Rep. No. 110-730, Part 1, at 15-16 (2008).

interpreted" as incorporating "a demanding standard" for coverage.[6] These developments have convinced me that a change to the statute is badly needed. The ADAAA is a reasonable compromise that addresses the vast bulk of the problems created by the restrictive judicial decisions. The bill deserves this Committee's support.

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

Broad Construction

As part of its amendments to the ADA's definition-of-disability section, the ADAAA would add a set of new rules of construction. One of these rules is set forth in the new Subsection 5(A), which states: "To achieve the remedial purposes of this Act, the definition of 'disability' in paragraph (1) shall be construed broadly." I understand that questions have been raised about the constitutionality or propriety of this provision. But there is nothing at all unconstitutional or improper about a broad-construction provision. Such provisions appear in a variety of statutes sprinkled across the U.S. Code. A few illustrative examples include the Religious

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

Land Use and Institutionalized Persons Act,[7] the Indian Land Consolidation Act,[8] the statute authorizing criminal appeals by the United States,[9] and the statute authorizing criminal forfeiture in narcotics cases.[10] In interpreting provisions like these, the Supreme Court has applied them like any other statutory language, without expressing any doubt about their validity.[11] Importantly, the Court has emphasized that:

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

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

So understood, the ADAAA's broad-construction provision does nothing more than declare that, in cases of ambiguity, plaintiffs are entitled to have their claims of discrimination heard on the merits. It thus simply restates the background

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[7] 42 U.S.C. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.").
[8] 25 U.S.C. § 2206(i)(7) ("This subsection shall not be considered penal in nature, but shall be construed broadly in order to effect the policy that no person shall be allowed to profit by his own wrong, wherever committed.").
[9] 18 U.S.C. § 3731 ("The provisions of this section shall be liberally construed to effectuate its purposes.").
[10] 21 U.S.C. § 853(o) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.").
[11] See, *e.g.*, *Reves v. Ernst & Young*, 507 U.S. 170, 183-184 (1993) (applying the "liberal construction" provision of the Racketeer Influenced and Corrupt Organizations Act, Pub.L. 91-452, § 904(a), 84 Stat. 947, *viz.*: "provisions of this title shall be liberally construed to effectuate its remedial purposes"); *Tafflin v. Leavitt*, 493 U.S. 455, 467 (1990) (same); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 491 n.10 (1985) ("[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.").
[12] *Reves*, 507 U.S. at 183-184.
[13] *Id.* at 184 (internal quotation marks omitted).

principle against which Congress adopted the ADA in the first place—the "'familiar canon of construction that remedial legislation should be construed broadly to effectuate its purposes.'"[14] In interpreting the ADA's definition of disability, the courts have utterly disregarded that principle. Worse, they have imposed on the statute a rule of narrow construction that finds no support in the text and is patently inconsistent with the intent of the Congress that enacted the ADA. In holding that the terms "substantially limits" and "major life activities" are ones that "need to be interpreted strictly to create a demanding standard for qualifying as disabled,"[15] the Supreme Court may have imposed its own view of wise policy on the statute, but it did not heed the view of the Congress that enacted the law. The ADAAA's broad-construction provision may prove necessary to ensure that courts heed Congress's policy judgment and refrain from imposing their own restrictive interpretations on the disability definition. Absent the broad-construction provision, many judges will continue to feel free to lean toward "strict" and "demanding" construction of the disability definition in cases of ambiguity. If Congress intends for ambiguities to be resolved in favor of claims being heard on the merits, the ADAAA's broad-construction provision is an apt means of ensuring that courts will heed that intent.

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[14] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (Stevens, J., dissenting) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).
[15] *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

The "Substantially Limits" Definition

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

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

[16] *See* 42 U.S.C. § 12102(2)(A).
[17] *Pierce v. Underwood*, 487 U.S. 552, 564 (1988).
[18] *Id.*
[19] *Kungys v. United States*, 485 U.S. 759, 771 (1988).
[20] *Id.* at 772.

materiality concept *can* be further elaborated if it is to take those factual differences into account.

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

[21] *See* H.R. Rep. No. 101-730, Part 2, at 16 (2008) (defining "material" by reference to the "middle of the spectrum" experience).
[22] 29 C.F.R. § 1630.2(j)(1)(ii).

elaboration of the materiality standard is necessary, the modified EEOC language is likely to be the best approach.

Objections to the Bill

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

First, a memorandum circulated by the Heritage Foundation contends that the ADAAA will entitle people with minor or bogus medical conditions to receive accommodations from employers, thereby burdening business and reducing the employment prospects of people with disabilities.[23] That argument misunderstands the bill. It is doubtful that the sorts of minor impairments the memorandum discusses would satisfy the "materially restricts" requirement; if not, those impairments could not be covered as actually substantially limiting a major life activity. (If so, and they actually require accommodation to enable individuals with them to work, it would be hard to call them minor or bogus.) And the bill makes clear that reasonable accommodation is not required for individuals who are covered only under the "regarded as" prong of the disability definition.[24] The ADAAA requires employers to provide accommodation only for those conditions that materially restrict major life activities. And it makes no change to the ADA's current accommodation language, which makes clear that an employer need provide

[23] *See* Andrew M. Grossman & James Sherk, *The ADA Restoration Act: Defining Disability Down* (July 2, 2008).
[24] *See* H.R. 3195, § 6 (new 42 U.S.C. § 12201(g)).

accommodations only when doing so is reasonable and can be accomplished without undue hardship.[25]

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

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

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[25] *See* 42 U.S.C. § 12112(b)(5).

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

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

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