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CONGRESSIONAL TESTIMONY

Defining Disability Down: The ADA Amendments Act's Dangerous Details

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

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

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

It is particularly important, then, that the definition of "disability" be clear so that employers can meet their obligations under the law with minimal confusion and expense. Under current law, a disability is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; "(B) a record of such an impairment; or "(C) being regarded as having such an impairment." This statutory text has been applied by the courts in a way that is considerably broader than the common usage of the word "disability." Thus, ailments such as erectile dysfunction and high cholesterol have qualified as disabilities.[3] Nonetheless, the courts, following the lead of the Supreme Court[4], have been relatively consistent in their adjudication under the ADA, providing employers and the labor and disability bars with some notice of what

[1] 42 U.S.C. § 12112(a) (2008).
[2] 42 U.S.C. § 12112(b)(5)(A) (2008).
[3] Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75 (1st Cir. 2006); Christian v. St. Anthony Medical Center, Inc., 117 F.3d 1051, 1053 (7th Cir. 1997).
[4] *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

impairments are likely to be covered by the ADA. Though a small business lacking inside counsel will usually have to consult outside attorneys to determine whether an employee claiming a disability is covered by the ADA and, if so, what accommodations are reasonable, in many cases, the attorneys are able to render an opinion on these issues within a few days at modest cost—around $1,000 in typical cases. Any change to the definition of disability in the ADA must be made carefully, because it will necessarily upset the reliance of employers and their attorneys, increasing the costs of compliance as well as their uncertainty and risk of liability.

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

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

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

Further, the ADAAA provides several "rules of construction regarding the definition of disability" that would further broaden its scope. These mandate that the word "shall be construed broadly" and specifically extend its meaning to encompass impairments that are "episodic or in remission," including those that are temporary.[10] In

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[5] *E.g.*, Karoun Demirjian, *Bill Clarifying Legal Meaning of 'Disabled' Passes in House*, CQ TODAY, June 25, 2008.
[6] *E.g.*, H.R. 3195, 110th Cong. (as introduced, 2007).
[7] H.R. 3195, 110th Cong. § 4 (as passed by House, June 25, 2008).
[8] *Id*.
[9] Scheerer v. Potter, 443 F.3d 916, 919 (Wis. 2006); Pack v. Kmart Corp., 166 F.3d 1300, 1304-05 (Okla. 1999).
[10] See H. Rep. No. 110-730 Part 1, at 14 (2008).

addition, overturning the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the bill requires that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures…," such as medication, hearing aids, or "learned behavioral or adaptive neurological modifications," an apparent reference to an individual's ability to learn to work around an impairment. The legislation specifically exempts from the rule "ordinary eyeglasses or contact lenses," which, unlike all other mitigating measures, may be considered when determining whether an individual is disabled.

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

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

Without, at this point, commenting on the merit of that intention, I find great reason to doubt that the ADAAA's proposed replacement for the current statutory understanding is consistent with Congress's and the ADA's expressed purpose to provide "a clear and comprehensive national mandate for the elimination of discrimination" and "*clear, strong, consistent, enforceable* standards addressing discrimination."[16] Rather, the ADAAA's definitional text, though undoubtedly sweated over by a great many lawyers

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[11] *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 484-88 (1999) ("Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings.").
[12] *Id.* at 494-95 (Ginsburg, J., concurring) ("In short, in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a 'discrete and insular minority.'").
[13] H. Rep. No. 110-730 Part 1, at 6 (2008).
[14] Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002).
[15] *Id.*
[16] H.R. 3195, 110th Cong. § 2(b)(1) (as passed by House, June 25, 2008) (emphasis added); Americans with Disabilities Act §§ 1(b)(1), (2), 42 U.S.C. §§ 12101(b)(1), (2).

and interested parties, fails to provide clear guidance to the courts, the Equal Employment Opportunity Commission ("EEOC"), which would be empowered to interpret the definition in regulation[17], or employers.

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

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

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

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

[17] H.R. 3195, 110th Cong. § 6 (as passed by House, June 25, 2008). This provision overturned another holding of *Sutton*. *Sutton*, 527 U.S. at 479 ("Most notably, no agency has been delegated authority to interpret the term 'disability.'").
[18] *See, e.g., Sutton*, 527 U.S. at 482.
[19] *See, e.g.*, CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951, 1964 (2008) (Thomas, J., dissenting).
[20] Hughes v. Richardson, 342 F.Supp. 320, 332 (W.D. MO 1971); In re Heath, 371 B.R. 806, 813 (Bkrtcy E.D. Mich. 2007).
[21] 371 B.R. 806 at 813.

of a provision of the state's worker's compensation statute[22]), both construing materiality as concerning a claimant's ability to work—that is, to receive worker's compensation, a worker must suffer an impairment that "lessen[s] to a material degree" his or her working ability.[23]

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

Lacking any prior use from which to draw meaning, a court might turn to the dictionary to ascertain the meaning of a term. *Webster's Third New International Dictionary*, that regularly used by the Supreme Court[24], informs that to be "material" is "being of real importance or great consequence." For this usage, it offers four synonyms: substantial, essential, relevant, and pertinent. The first three explain too little: The ADAAA, after all, dilutes "substantial" and rejects "essential" as too narrow, for it would be akin to *Sutton's* "prevents." The other two, however, explain to much: Any restriction at all of a major life activity would be relevant or pertinent to that activity. Decisions in a great many cases could hinge on which one of these four words a court chose to apply. In this way, the ADAAA's definition of "disability" utterly fails to cabin judicial discretion, an avowed aim of its drafters.

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

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[22] The relevant section:

> "Disability permanent in quality and partial in character" means a permanent impairment caused by a compensable accident or compensable occupational disease, based upon demonstrable objective medical evidence, which restricts the function of the body or of its members or organs; included in the criteria which shall be considered shall be whether there has been a lessening to a material degree of an employee's working ability.

N.J. STAT. ANN. § 34:15-36 (2008).

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

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

[25] H. Rep. No. 110-730 Part 1, at 6 (2008).

[26] *Id*. at 10.

[27] *Id*.; H.R. 3195, 110th Cong. § 3 (as passed by House, June 25, 2008).

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

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

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

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

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

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

[28] H. Rep. No. 110-730 Part 2, at 30 (2008).
[29] H. Rep. No. 110-730 Part 1, at 8 (2008).

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

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

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

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

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

growth would be reduced. This has been the consistent pattern in countries that more greatly restrict at-will employment by providing greater job protections to employees.[31]

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

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

As my Heritage Foundation colleague James Sherk has chronicled in great detail, it is coworkers who often bear the greatest burden of FMLA abuses. Conscientious employees suffer each time they have to cover the work or work unscheduled overtime when a coworker abuses FMLA. In many instances, employees also suffer reduced pay and bonuses due to FMLA abuse.[33]

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

It is an unfortunate and, to date, underappreciated risk that the ADAAA's radical expansion of ADA coverage may injure those who subject to severe disabilities who are undisputedly covered under the current law. A common accommodation for disabled workers, for example, is reassignment to a position that less physically taxing, and no doubt, in certain industries, many employees, both disabled and not, wish to hold these

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

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

[33] *Id.*

positions. If all available slots are held by mildly disabled employees or employees abusing the ADAAA's protections, truly disabled individuals will have fewer alternatives available and, if unable to perform their current jobs, may be laid off, because creating a new position is not required by the ADA. Overall, it is likely that fewer resources would be available under the ADAAA to accommodate severely disabled individuals.

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

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

1. The term "materially restricts" is not readily susceptible to any apparent meaning and should be removed from the legislation. Rather than propound a vague definition and then demand that courts construe it broadly, Congress should put forward a clear definition (or retain the current one) and rely on the courts to employs the standard canons of construction to give statutory text meaning. If it is Congress's aim to expand ADA coverage so that it includes the majority of Americans or more, it should do so explicitly, and accept the consequences, rather than foisting the task on the courts.
2. The current three-prong definition of "disability" is valuable, for all the case law and interpretive history built upon it, and significantly changing or modifying it will destroy this value. Congress should be very wary of enacting sudden, dramatic changes that would throw the law into turmoil. The ADAAA, as it currently stands, would be such a change.

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[34] Richard Burkhauser & David Stapleton, *Introduction*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES 3-4 (2003).
[35] *Id*. at 16-17; Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 957 (2001).
[36] RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 71-72 (2005).
[37] Acemoglue & Angrist, *supra* note 35, at 920.

3. The legislative findings that the ADAAA would strike from the ADA have proven to be an essential tool for courts attempting to apply the ADA's principles and often vague language to real-world disputes. If Congress believes that these provisions misstate its intentions, it should fix them rather than strike them. The ADA's findings should continue to state Congress's best estimate of how many Americans it intends to be covered by the Act.
4. Though doing so will have adverse economic consequences, reversing *Sutton* can be achieved in the context of a much more modest bill that does not otherwise modify the ADA's three-prong definition of "disability."
5. Granting the EEOC power to promulgate regulations under the non-article sections of the ADA will advance legal certainty and improve compliance. This step alone may be sufficient to accomplish much of what drafters of the ADAAA hope that it will achieve.
6. The subsection on mitigating measures, as drafted, excludes ordinary eyeglasses and contact lenses, recognizing that mild visual impairments, such as are suffered by millions of Americans, are not disabilities. Congress should extend this reasoning and, at the least, exclude from the mitigating measures rule other prevalent ameliorative devices, such as certain types of hearing aids and joint braces.

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

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