STATEMENT OF

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Good morning, Mr. Chairman and Members of the Subcommittee. It is an honor to appear before this Subcommittee and assist in the important work you are doing on behalf of our Nation.

I am Armand Derfner, of Charleston, South Carolina. I am a partner in the law firm of Derfner, Altman & Wilborn. I am also Distinguished Scholar in Residence in Constitutional Law, at the Charleston School of Law, where I currently teach Constitutional law.

I have been practicing in the fields of constitutional law, civil rights and civil liberties for nearly 50 years. During that time I have tried cases and argued appeals in many federal and state courts including the Supreme Court of the United States. I have taught, lectured and written about Constitutional Law, civil rights and civil liberties.

During my career, it has also been my pleasure to testify before this Subcommittee on various topics. Counting today, my best estimate is that I have testified before this Subcommittee and related subcommittees of the Committee on the Judiciary

nine times, going back to the days of Chairman Emanuel Celler. Chairman Nadler, Ranking Member Sensenbrenner, you and your colleagues on this Subcommittee are carrying on a proud tradition of service, and doing it superbly.

The title of today's hearings reflects a situation of great importance to the Nation, and I am grateful to this Subcommittee's for drawing attention to it.

The scheme of our Constitution is one of checks and balance, among the three branches of the federal government, between the federal government and the states, and, above all, between all these institutions and the people of the United States of America.

In that scheme, Congress exercises the legislative function: it makes the laws of the United States. The Supreme Court, along with lower courts, exercises the judicial function: it interprets the laws of the United States. Since Marbury v. Madison, the Supreme Court has also had the role of interpreting the Constitution.

The Supreme Court's interpretation of the Constitution is of great importance. Other witnesses will address issues of serious concern in the Court's constitutional decisions in the areas of civil rights and civil liberties, and I share that concern.

But my main focus today is the Court's decisions involving statutory interpretation of laws in the areas of civil rights and civil liberties.

It bears repeating: the legislative function in our National government is exercised by Congress. The judicial function in interpreting statutes is to carry out faithfully what Congress has said and done.

Every Justice says that in the area of statutory interpretation, Congress is the master. But how has the Supreme Court carried out its task?

I propose to look at this question by asking how you in Congress have assessed

the Court's performance in carrying out your laws and intentions. Specifically, I want to focus on instances where the Supreme Court has issued a decision giving its interpretation of a federal statute, and Congress has come back to pass an amendment or a new statute correcting the Supreme Court and restoring Congress' original meaning.

Of course, this happens from time to time, but with the current Supreme Court, in the area of civil rights, the sequence has been repeated so many times as to be astonishing. And in every case, the Supreme Court decision that Congress has had to overturn has been one that weakened the Congressional enactment. This unprecedented development properly leads Congress -- starting with this Subcommittee – to question whether the Supreme Court is faithfully deferring to Congress and is fairly carrying out its assigned task under Article III, which is to interpret the meaning that *Congress* gave to these laws.

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Before I turn to this examination, I would like to go back in history to illustrate a far different relationship between Congress and the Supreme Court. I argued my first case in the Supreme Court 40 years ago. It was *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the first case interpreting the landmark Section 5 of the Voting Rights Act.

It was a seminal case in American history. For a century, the Fifteenth Amendment's noble guarantee of equal voting rights without regard to race had been ignored in a group of states, and previous legislation to enforce it had been ineffective. Civil rights laws passed in the aftermath of the Fifteenth Amendment had been strangled by the Supreme Court of that day, and the long period of Jim Crow followed.

After a century of disfranchisement, Congress returned to the task and passed new civil rights laws to end disfranchisement, in 1957, 1960 and 1964. None of them worked. Finally, in 1965, in the aftermath of Bloody Sunday and the Selma-to-Montgomery March, Congress passed its most far-reaching law, the Voting Rights Act of 1965.

The Act was a quick success in ending the noxious literacy tests and poll taxes which had been the main engines of discrimination.

But we were soon confronted by new tactics, like racial gerrymandering, midnight moves of polling places and other tactics that came to be called vote dilution. These tactics were designed to make the new voters' votes meaningless even if the Act guaranteed their right to register and cast a ballot.

We believed that a critical section of the Act, Section 5, should block these tactics. Section 5 was included in the Act because previous history had shown Congress that new discriminatory tactics would likely replace those that had just been eliminated. To guard against this, Section 5 required states whose literacy tests had been outlawed to obtain "pre-clearance" of any voting changes before putting them into effect.

The problem was that the Voting Rights Act didn't specifically refer to vote dilution tactics, and because of that the lower courts interpreted the law narrowly and rejected our challenges. We said that was just the point – that Congress didn't know what the new tactics would be, but it knew they would come, and that Section 5 was designed to be a broad prophylactic against any new disfranchising tactic, no matter how novel or diabolically inventive.

That was the test facing the Supreme Court in the *Allen* case, and it was a test of how the Court would carry out its obligation to interpret the laws of Congress.

The Supreme Court of that day and in that case faithfully and fully lived up to its duty to respect Congress and interpret the law as Congress wrote it and meant it to be interpreted.

The Court began by observing that the Voting Rights Act "was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens," and it referred to that purpose as Congress' "laudable goal." That was the lens through which the Supreme Court saw that law and that case.

The Supreme Court paid careful attention to the words, structure and meaning that Congress had given the law. The Court concluded that "we must reject the narrow construction that appellees would give Section 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations" that would discriminate. And "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." Drawing on Congress' clear expression of purpose, reflected not only in the wording and structure of the Act but also in the massive legislative history, the Supreme Court concluded "we are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the Section 5 approval process."

That decision was in complete accordance with one of the most fundamental rules of statutory interpretation, which provides that remedial statutes are to be interpreted broadly to secure their goals. The Voting Rights Act is clearly a remedial statute of the highest order, as, indeed, is the entire category of Congress' anti-discrimination laws.

Looking back on our history, we know that the Voting Rights Act, and Section 5 of the Act, helped save this Nation. It is fashionable nowadays for everyone to agree that

Section 5 properly covered vote dilution tactics, and to agree that Section 5 as so interpreted has played a crucial role in our Nation's progress. That widespread view is held even by those who doubt whether Section 5 should still be in force – doubts, by the way, that Congress overwhelmingly rejected in 2006 when it extending Section 5.

But, and this is the reason I have dwelt on the *Allen* case, if today's modes of Supreme Court interpretation had been current 40 years ago, the *Allen* case would have been decided the opposite way, with tragic consequences for the United States.

The current mode of interpretation would very likely have adopted the narrow interpretation of the statute as not covering vote dilution schemes, because they were not specified in the law. The legislative history that gave the issues such sharp definition would have been insufficient or been ignored under today's approach that disdains looking at what Congress has said and done in the course of passing the law.

Indeed, the case might have been thrown out of court entirely on the grounds that Section 5 did not specify a "private right of action." What does this mean? Section 5, although it gave voters a "right" – the right not to be subjected to new voting laws that were discriminatory -- did not give them a "private right of action," which simply means that the law didn't specifically say they could bring their own lawsuit if they were denied that right.

The Supreme Court of 1968 dealt with that issue in accordance with longstanding precedent: it said "the achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." The longstanding precedent held there was an implied private right of action in statutes passed to protect a class of citizens, even if

there is not a specific authorization for a private lawsuit. The Court said that rule "is applicable here. The guarantee of Section 5 . . . might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition."

But this is ancient history. Today's Supreme Court has outlawed the implied private right of action. Unless Congress specifically says in the statute that victims can sue, they can't. Their only recourse is to hope that a government official or agency will decide to focus on their individual case.

So let us be happy – and relieved – that the Voting Rights Act – the great charter of freedom – came before the Supreme Court in a different day and age.

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Since that day and age, the Supreme Court has steadily narrowed the protections of civil rights, both constitutional and statutory. Many scholars have addressed this development. One of the most powerful criticisms has come from Hon. John Noonan, of the Ninth U.S. Circuit Court of Appeals, a noted conservative scholar who was appointed to the bench by President Ronald Reagan. In a powerful book entitled *Narrowing the Nation's Power*, Judge Noonan has taken sharp issue with the current Supreme Court's interpretation of the 11th Amendment, an amendment that limits certain types of lawsuits against States. Based on that amendment, the current Supreme Court has done something no Supreme Court has ever done since the days of *Plessy v. Ferguson*, which is to hold a federal civil rights statute unconstitutional. Judge Noonan has shown that the Court's history is wrong, its sense of federalism is wrong, and its doctrines are unsupportable. Other scholars, liberal and conservative alike, have also criticized the Court's work in this area.

But we don't need to delve into the academic literature to see that the Court is overstepping its bounds when in comes to how it interprets statutes passed by Congress. In the view of Congress itself, the Court is plainly getting it wrong, repeatedly misinterpreting Congress' laws.

To start with the bottom line, Congress has passed statutes to correct Supreme Court interpretations of federal civil rights statutes no fewer than 5 times in recent years, and those corrective statutes have overturned more than a dozen Supreme Court cases. It is not my intention here to argue the details of the interpretation; the point is that you here in Congress were persuaded that the Supreme Court was getting it wrong.

We are all familiar with the most recent instance, passage earlier this year of the Lily Ledbetter Fair Pay Act, which corrected the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007), but that is only the latest entry in a long parade.

Here is a short list, which makes no pretense to be complete:

1. *Grove City College v. Bell,* 465 U.S. 555 (1984)
   Overturned by the Civil Rights Restoration Act of 1987

2. *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989)
   Overturned by the Civil Rights Act of 1991

3. *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989)
   Overturned by the Civil Rights Act of 1991

4. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)
   Overturned by the Civil Rights Act of 1991

5. *Lorance v. AT&T, Technologies,* 490 U.S. 900 (1989)
   Overturned by the Civil Rights Act of 1991

6. *Martin v. Wilks,* 490 U.S. 755 (1989)
   Overturned by the Civil Rights Act of 1991

7. *West Virginia Univ. Hosp. v. Casey,* 499 U.S. 83 (1991)
Overturned by the Civil Rights Act of 1991

8. *E.E.O.C. v. Arabian American oil Co.,* 499 U.S. 244 (1991)
Overturned by the Civil Rights Act of 1991

9. *Reno v. Bossier Parrish School Board,* 528 U.S. 320 (2000)
Overturned by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006

10. *Georgia v. Ashcroft,* 539 U.S. 461 (2003)
Overturned by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006

11. *Sutton v. United Airlines, Inc.,* 527 U.S. 555 (1999)
Overturned by the Americans with Disabilities Act Amendments Act of 2008

12. *Murphy v. United Parcel Service, Inc.,* 527 U.S. 516 (1999)
Overturned by the Americans with Disabilities Act Amendments Act of 2008

13. *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555 (1999)
Overturned by the Americans with Disabilities Act Amendments Act of 2008

14. *Toyota Motor Mfg, Inc. v. Williams,* 534 U.S. 184 (2002)
Overturned by the Americans with Disabilities Act Amendments Act of 2008

15. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 550 U.S. 618 (2007)
Overturned by the Lily Ledbetter Fair Pay Act of 2009

* * *

That is 15 cases in which Congress felt compelled to write a new law or amendment to restore what it thought it had already done.

Nor has Congress acted silently. Increasingly, the new statutes have made plain Congress' view of the Supreme Court's handiwork. Here is the record:

In the 2006 voting statute, Congress made the following finding:

> "(6) The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in Reno v. Bossier Parish II and Georgia v. Ashcroft, which have misconstrued Congress' original intent in enacting the Voting Rights of 1965 and narrowed the protections afforded by section 5 of such Act."

And in the 2009 Lily Ledbetter law, Congress made these findings:

> "(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.
>
> (2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended."

But it is in the 2008 ADA amendments that the reaction to the Supreme Court decisions was strongest. Here Congress made its views plain in both a set of Findings and a statement of Purposes:

Findings:

> "(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
>
> (4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

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

(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress"

Purposes:

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

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

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

> be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
>
> (5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that eh primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis"

That is an astounding record. Moreover, these have not been partisan ventures. The corrective laws were all passed by overwhelming margins in both houses of Congress, with both Democratic and Republican majorities, and were signed by Presidents of both political parties.

* * *

I do not believe the list of 15 is the end of it. There are other Supreme Court cases that seem to be prime candidates for corrective legislation, and such legislation is already making progress through this House or the other body. I will not attempt to catalog them but will just name two.

One case is *Gross v. FBLFinancial Services, Inc.*, decided on June 18, 2009, which restricted the ability to prove a case under the Age Discrimination in Employment Act (ADEA). This case is a clear illustration of the problem. A powerful dissent by Justice Stevens points out that the Court is reaching out to decide a question not

presented in the certiorari petition and not briefed by the parties. He then says "unfortunately, the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent." As Justice Stevens further explains, the most surprising thing about the majority's opinion is its citation of the Civil Rights Act of 1991 to support the same misinterpretation the 1991 Act was designed to correct.

Ironically, the plaintiff in this case is reported to be a relative of the late Rep. H.R. Gross, a longtime Member of this House from Iowa. As conservative as Rep. Gross was, he was always protective of Congress' legislative role.

The other case I want to cite is *Arlington District v. Murphy*, 548 U.S. 291 (2006), which barred recovery of expert witness fees in cases under the Individuals with Disabilities Education Act (IDEA). The irony here is that the Supreme Court based its restrictive holding partly on *West Va Univ. Hosp. v. Casey*, a case which Congress has already had to correct. See No. 7 in the list above.

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Those who would claim that the Supreme Court is showing proper deference to Congress might advance several arguments – the Supreme Court just calls it as it sees it, or Congress should write better laws, or the intention of a later Congress says nothing about the meaning of a statute passed by an earlier Congress. Any of these arguments might conceivably explain one or a handful of instances. But 15? No, these theories will not do.

Finally, there is a more fundamental question of how a court should interpret statutes. Some people equate "strict construction" or "narrow" reading of statutes as the

most appropriate or deferential approach for a judge. But taking a narrow view of legislation is a very active, even aggressive approach. I believe it is a myth to say there is only one way to read a statute – as if it were a key that goes in a door only one way. Judges interpreting statutes make judgment calls and value choices. A so-called "strict construction," rejecting anything not required by the words, is one such judgment call and value choice. I further believe a judgment call that excludes reliable indicators of legislative meaning is likely to produce poorer results, not better ones. It is like saying a black-and-white copy of a color photo is the real thing.

A fames law review article by Professor Henry Hart contained an imaginary dialogue that illustrates the complexity of interpretation. In that dialogue, one of the characters advanced a certain interpretation of a case, to which the other speaker responded, "you read that case for all it might be worth rather than the least it has to be worth, don't you?"

Possible readings of a statute, like a case, can range along a continuum, from "for all it might be worth" to "the least it has to be worth." The Supreme Court has been reading civil rights cases for "the least they have to be worth."

That is plainly a value judgment, and I believe it is a deeply flawed value judgment that in fact *devalues* Congress' laws. The pointed corrective legislation I have cited shows that Congress agrees.

Thank you for highlighting this problem in these extraordinarily important hearings.