IN THE

COURT OF APPEALS OF MARYLAND

September Term, 2008

No. 128

LISA MEADE,
Petitioner,

v.

SHANGRI-LA LIMITED PARTNERSHIP AND T/A & D/B/A CHIDREN'S MANOR MONTESSORI SCHOOL,
Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

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BRIEF OF PUBLIC JUSTICE CENTER, METROPOLITAN WASHINGTON EMPLOYMENT LAWYWERS ASSOCIATION, MARYLAND DISABILITY LAW CENTER, MARYLAND EMPLOYMENT LAWYERS ASSOCIATION, MARYLAND NURSES COALITION, INC., CIVIL JUSTICE INC., AND MARYLAND NURSES ASSOCIATION AS *AMICI CURIAE* FOR PETITIONER

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SUMMARY OF ARGUMENT

The salient question presented in this case is whether the terms "disabled" and "handicap" as used in Maryland state and local ordinances will be interpreted primarily to exclude seriously impaired individuals from statutory protection or, rather, whether their reach will extend protections from discrimination in accord with the remedial nature of the statutes. The Court of Special Appeals in this case opted for an analysis that restricts greatly the reach of the statute. *See infra* p. 7. Amici urge this Court to reject a cramped reading of the statute and instead to construe broadly the term "handicap" in the Howard County Code to protect individuals with serious impairments from discrimination.

In making its ruling in this case, the lower court borrowed restrictive interpretive tenets derived from Americans with Disabilities Act jurisprudence to determine that the Petitioner was not handicapped, tenets that have since been rejected soundly by Congress as inconsistent with the intent of Congress in enacting that law. Amici here contend that those tenets used to exclude Ms. Meade are inconsistent with the broad, remedial nature of Maryland state and local disability anti-discrimination laws such as Howard County Code §§ 12.200-12.218, because they exclude from coverage individuals who are in fact substantially limited in major life activities, the touchstone under federal and state law for statutory protection. For instance, the court below considered this plaintiff in her mitigated state of impairment, an approach that bars from coverage individuals with serious disabilities who may require only modest accommodation to participate fully in society, such as in the public accommodation at issue here, or in employment. Experience under this repudiated approach under the ADA reveals that consideration of

mitigating measures in the determination of whether an individual is substantially limited in a major life activity may actually encourage greater impairment of the plaintiff when a defendant denies the plaintiff an accommodation involving those mitigating measures. Similarly, the court below erred by rejecting an individualized inquiry into the major life activities of the plaintiff that are affected by the impairment, a flawed approach that would disqualify from coverage under Maryland's statutes individuals who are substantially impaired in their own major life activities. Finally, the Court of Special Appeals employed a flawed rationale for statutory coverage by discounting impairments that are activated on an intermittent basis, an approach that illogically excludes from statutory protection individuals with life-threatening ailments, as the Petitioner presents here. Each of these tenets of the Court of Special Appeals addressed herein has a track record under federal interpretations of the Americans with Disabilities Act, providing this Court with the opportunity to avoid the pitfalls that became well apparent to Congress and prompted remediation through passage of the ADA Amendments Act, Pub. L. 110-325, 122 Stat. 3553 (Sept. 25, 2008).

At the same time, recent research indicates that no dramatic increase (if at all) in the number of disability discrimination filings would flow from a reasonable approach to coverage for individuals with disabilities under Maryland's statutes. The more immediate impact of such a change would be to allow disability discrimination claims that are being filed to proceed beyond the question of coverage for disabilities to the fundamental proscription of the statute: whether the defendant's conduct was discriminatory.

Finally, a failure to consider as disabled an individual with a severe latex allergy may enable employers to force healthcare professionals with such an allergy from their employment, thereby exacerbating this nation's severe shortage of qualified nurses.

INTERESTS OF AMICI

The **Public Justice Center (PJC)** is a non-profit civil rights and anti-poverty legal services organization. PJC's Appellate Advocacy Project seeks to expand and improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate courts. PJC has submitted numerous briefs in this Court and others defending Maryland citizens' civil rights ensconced in federal, state and local anti-discrimination ordinances. *See, e.g., Dep't of Health and Mental Hygiene v. Kelly*, 397 Md. 399 (2007); *Haas v. Lockheed Martin*, 396 Md. 469 (2007); *Toledo v. Sanchez-Rivera*, 454 F.3d 24 (1st Cir. 2006). PJC has an interest in the present case because affirmance of the decision of the court below will likely exclude thousands of Maryland residents with serious impairments from the statutory protection of state and local disability anti-discrimination laws.

The **Metropolitan Washington Employment Lawyers Association (MWELA)** is a local chapter of the National Employment Lawyers Association, a national organization of attorneys, primarily plaintiffs' counsel, who specialize in employment law. MWELA has frequently submitted *amicus curiae* briefs in cases of interest to its 300 members, including in the following cases: *Manor Country Club v. Flaa.*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 376 Md. 543 (2003); *Friolo v. Frankel*, 373 Md. 501 (2003); and *Jordan v. Alternative Resources Corporation*, 447 F.3d 324, *rehearing en*

banc den., 467 F.3d 378 (4th Cir. 2006), *cert. den.*, 549 U.S. 1362 (2007). Because the outcome of this case will have a direct impact upon the ability of disabled clients of MWELA members to achieve meaningful participation in the workplace and in public accommodations in Maryland, MWELA has an interest in the fair resolution of the issues presented in this appeal.

The **Maryland Disability Law Center (MDLC)** is desginated by the Governor of Maryland as the federally-mandated protection and advocacy agency for persons with disabilities in the state. Founded in 1977, MDLC's mission is to work for and with persons with disabilities in defense of their legal and human rights. MDLC represents numerous persons with developmental, physical, mental and related disabilities. MDLC relies frequently on the ADA as well as state and local anti-discrimination statutes to ensure the full and fair inclusion into all aspects of community life of individuals who experience life differently due to medical or other conditions. Accordingly, MDLC has a specific interest in this case to see that judicial construction of the term "handicap" or "disability" does not exclude in an arbitrary fashion many Maryland residents who endure serious impairments and require reasonable accommodations.

The **Maryland Employment Lawyers Association (MELA)**, organizationally and through its members, is comprised of more than 100 attorneys who represent and protect the interests of employees under federal and state law. MELA is a local affiliate of the National Employment Lawyers Association. The purpose of MELA is to bring into close association employee advocates and attorneys in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA has

been granted leave to participate as *amicus curiae* in many cases before the Maryland state and federal appellate courts. *See, e.g.*, *Newell v. Runnels*, No. 08-48 (Md.); *Addison v. Lochearn*, No. 08-134 (Md.). MELA members have represented numerous clients with disabilities seeking to enforce state and local anti-discrimination ordinances. It has a significant interest in this case to ensure that Maryland citizens who endure serious impairments and experience discrimination have access to a remedy.

The **Maryland Nurses Coalition, Inc.**, **(MNC)** is a non-profit organization representing the voices of more than 60,000 registered nurses in this state, particularly on the legislative, political, and legal issues affecting nurses. This case is important because thousands of nurses and other healthcare professionals throughout Maryland are impacted by latex allergies. A latex allergy is a progressive, oftentimes debilitating condition that worsens with each additional exposure to latex. Healthcare employers and facilities that do not reasonably accommodate employees with these allergies force numerous qualified professionals from the healthcare arena and worsen our nation's nursing shortage. Thus, MNC has a strong interest in ensuring that state and local disability anti-discrimination ordinances are broadly construed to protect individuals with severe latex allergies.

Civil Justice Inc. (CJ), is a non-profit, public interest legal association founded in 1998 for the purpose of increasing the delivery of legal services to clients of low and moderate means. Through its concentrated work CJ has represented numerous Maryland consumers in individual as well as class action cases when those consumers have been victimized by predatory real estate practices in violation of state and local remedial

legislation.[1] CJ has also appeared as *amicus curiae* before this Court previously, including in *Wells Fargo Home Mortgage Inc. v. Neal*, 398 Md. 705 (2007). Presently, CJ is leading a statewide pro bono project to help homeowners find sustainable solutions in the foreclosure process, and many solutions are based on local or state protections that are greater than those enacted by the federal government. CJ has an interest in this case because thousands of other Maryland residents rely on the broad, remedial protections of state or local civil rights legislation like the provisions here. These residents need clarity from the Court with regard to how canons of statutory construction will be applied to protect state and local rights that are more expansive than federal counterparts.

The **Maryland Nurses Association (MNA**) is a nonprofit statewide association founded in 1903. MNA is at the forefront of promoting best practice standards by addressing educational, economic, ethical and legal issues that affect the nursing profession. As the voice for nursing in Maryland for over a century, MNA advocates for policy supporting the highest quality health care. Presently, there is a critical shortage of nurses in Maryland endangering the state's standard of care. This shortage is exacerbated by severe latex allergies that force qualified individuals to leave the profession when reasonable accommodations are not provided by the health care employer. Accordingly, MNA has a significant interest here to ensure that the Court recognizes the impact of severe latex allergies on Maryland residents, and applies disability anti-discrimination

[1] *See, e.g., Capitol Mortgage Bankers, Inc. v. Cuomo*, 222 F.3d 151 (4th Cir. 2000) (on behalf of *Amici Curiae*); *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478 (D. Md. 2006); *Gray v. Fountainhead Title*, Civil Action No. 03-cv-01675 (D. Md. Aug. 30, 2004.); *Greer v. Crown Title Corp.*, No. 24-C-02001227 (Cir. Ct. for Balt. City Aug. 26, 2005).

ordinances to protect individuals with these allergies—thereby encouraging healthcare employers to reasonably accommodate and retain affected employees.

ARGUMENT

I. RESTRICTIVE INTERPRETATIONS OF THE TERM "DISABLED" HAVE LIMITED THE PROTECTION OF DISABILITY ANTI-DISCRIMINATION STATUTES FOR INDIVIDUALS WITH SERIOUS IMPAIRMENTS

The term "disability" or "handicap" as used in Howard County Code §§ 12.200-12.218 (1991), and other state and local anti-discrimination statutes concerns whether the plaintiff is "substantially limited" in her "major life activities." *See* Howard Co. Code § 12-201(a). Once a plaintiff shows that he or she is substantially limited in a major life activity, the focus of the judicial inquiry shifts to whether the defendant's conduct was motivated by discriminatory animus. *Id.* at § 12-210. The Court of Special Appeals in this case never reached the second part of the statutory inquiry, relying primarily on since-repudiated decisions under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 – 12-213 (1990), to guide its opinion that Ms. Meade's disabling latex allergy did not substantially limit her major life activities. *See Shangri-La Ltd. P'ship v. Meade*, 181 Md. App. 127 (2008). In this brief, Amici outline some of the shortcomings of the ADA that have resulted from restrictive interpretations of the statute similar to those adopted by the court below, and which Congress recently overturned through passage of the ADA Amendments Act of 2008. Pub. L. 110-325, 122 Stat. 3553 (Sept. 25, 2008).

Anti-discrimination statutes, such as the ADA and Howard County Code §§ 12.200-12.218, were enacted with a broad mandate to remedy disability discrimination.

In passing the ADA, Congress promised persons with disabilities "the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. at § 12101(a)(9). To achieve this goal, the ADA provides a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). To that end, the ADA prohibits discrimination in arenas beyond those covered in the Civil Rights Act of 1964, including private employment, public goods and services, telecommunications, transportation, and an unprecedented number of private providers of goods and services to the public. 42 U.S.C. § 12181(7); *see* Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 Ala. L. Rev. 997, 1038-39 (Summer 2004). The relevant sections of the Howard County Code were enacted with a broad mandate similar to that of the ADA and Section 504 of the Rehabilitation Act of 1973, to end discrimination based on an individual's disability in private and public. Thus, while this case involves the alleged discrimination of a public accommodations provider, cases involving employment discrimination are also relevant in that the initial hurdle for pursuing a claim for relief is the same: the plaintiff bears the burden to first show that she is "disabled" or "handicapped" by showing that she has an impairment that substantially limits a major life activity.

Notwithstanding its promise, the ADA has been broadly recognized to have fallen short of realizing its intended goals. For example, long before the ADA's enactment, individuals with disabilities had suffered rampant discrimination in employment opportunities, and yet "the actual employment rate of people with disabilities has declined since the passage of the ADA in 1990." Carrie Griffin Basas, *Back Rooms,*

Board Rooms--Reasonable Accommodation And Resistance Under The ADA, 29 Berkeley J. Emp. & Lab. L. 59, 69 (2008).

Scholars agree that part of this shortfall is due to an overly restrictive definition of who qualifies as "disabled" so as to invoke the protections of the Act. One study of Title I[2] ADA claims in the Eastern District of Pennsylvania in 1996, 1997, and 1998, concluded that employers prevailed in 94.2% of cases and that "[p]laintiffs stumbled most often by not being able to satisfy the definition of disability, despite clearly possessing physical or mental impairments." Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 Am. U. L. Rev. 1213, 1215-16 (2003) (citing Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I be Fulfilled for Low-Income Workers in the Next Decade?*, 9 Temp. Pol. & Civ. Rts. L. Rev. 345, 365-66 (2000)).

Since 1998 in particular, the Supreme Court's restrictive interpretations of the term "disabled" have only further limited who may be considered a member of the ADA's protected class, and federal courts have routinely dismissed the claims of plaintiffs with substantial impairments who were found not "disabled enough." Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment Of The Medical Model Of Disability And The Goldilocks Dilemma*, 83 Ind. L.J. 181, 226-27 (2008). In 2002, employers prevailed in 94.5% of the 327 ADA cases decided in federal court and

[2] Title I of the ADA prohibits discrimination in employment. *See* Rulli, *supra* at 351.

in 78.1% of all ADA administrative appeals with the EEOC.[3] Basas, *supra* at 63 n.16. Presently, federal courts dismiss 80% of ADA suits at summary judgment; the majority of dismissals stem from a holding that the plaintiff's impairment is not "substantially limiting" enough of a "major life activity." Areheart, *supra* at 217. Yet, the second most common reason for dismissal is that the plaintiff is "too disabled." *Id*. In those cases, courts found that the plaintiff's condition was so disabling that a satisfactory accommodation would pose an undue hardship or burden on the defendant, or that the defendant's actions was motivated by concerns that the employee could not perform the job's essential functions. *See id.*; Nathan Catchpole & Aaron Miller, Comment, *The Disabled ADA: How A Narrowing ADA Threatens To Exclude The Cognitively Disabled*, 2006 B.Y.U. L. Rev. 1333, 1364 (2006) ("Yet herein lies the paradox: if a person has sufficient ability to perform the essential functions of his or her job, he or she will have difficulty simultaneously showing sufficient limitation in a major life activity so as to clear the courts' 'severe limitation' high bar.").

This paradox was illustrated by the Fourth Circuit's decision in *Rohan v. Networks Presentations LLC*,375 F.3d 266 (4th Cir. 2004). There the employer hired Ms. Rohan as an actress in a Broadway musical. Ms. Rohan, however, was diagnosed with post-traumatic stress disorder arising out of the sexual abuse she suffered as a child, and when her colleagues engaged in various sexually-charged antics on set, she endured flashbacks

[3] Empirical studies have verified that plaintiffs under the ADA fair considerably worse than plaintiffs under the closest statutory analogue, Title VII, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. *See* Areheart, *supra* at 217 n.271.

to the abuse causing "hyperventilation, inability to speak, inability to open her eyes, gagging, bodily pain, and/or staring off into space." *Id.* at 270. At several points during her employment she became suicidal. *Id.* at 271. The employer terminated Ms. Rohan because of her inability to cope with daily life on set, and Ms. Rohan filed suit alleging a failure to reasonably accommodate her disability, among other claims. *Id.* at 271-72.

The district court granted an employer motion for summary judgment holding that Ms. Rohan was, essentially, too disabled: Because she could not properly interact with colleagues, she could not perform the essential functions of her job as an actress and therefore could not prevail in her suit. *Id.* at 272. The Fourth Circuit affirmed yet for the exact opposite reason, *i.e.*, the Court found that the plaintiff was not disabled enough to qualify as "disabled" under the ADA. *Id.* at 275. The Court reasoned that Ms. Rohan's impairment was not "substantial" because she was still able to interact with some people, including her family and certain cast members, and her disorder-driven episodes were sporadic such that she was not afflicted by the disorder on a daily basis. *Id.* at 275-76.

That the district court could conclude that Ms. Rohan was so disabled so as to negate any obligation by the employer to make accommodations, yet the Fourth Circuit could view the same record and conclude that Ms. Rohan was not disabled enough to fall within the ADA's protected class speaks volumes on the difficulties plaintiffs experience in being disabled the "right amount" to gain statutory protection. Ms. Rohan and others have been thrust into what has been referred to as the "Goldilocks" dilemma of disability law: They are either too disabled or not disabled enough, and very few have been disabled "just right" to claim protection. Areheart, *supra* at 181; *see also* Lisa Eichhorn,

Major Litigation Activities Regarding Major Life Activities: The Failure Of The "Disability" Definition In The Americans With Disabilities Act Of 1990, 77 N.C. L. Rev. 1405, 1458 (1999) ("This interpretation creates . . . a catch-22 situation for plaintiffs. In order to prevail, plaintiffs must prove not only a substantial limitation but also must prove that they are qualified for the job opportunities or services that defendants have denied them.").

II. THE COURT SHOULD BROADLY CONSTRUE THE TERMS "HANDICAPPED" AND "DISABLED" TO EFFECTUATE THE REMEDIAL PURPOSE OF ANTI-DISCRIMINATION STATUTES.

Maryland follows the well-accepted tenet of statutory construction that remedial statutes such as Howard County Code §§ 12.200-12.218 must be construed liberally to effectuate their goals. *See Pak v. Hoang*, 378 Md. 315, 326 (2003*); Haas v. Lockheed Martin*, 396 Md. 469 (2007) ("As a remedial statute, § 42 of Article 49B [authorizing local anti-discrimination laws] should be construed liberally in favor of claimants seeking its protection."). The routine exclusion of plaintiffs who have experienced discrimination because of a serious impairment, as described above, is inconsistent with the broad construction that must be afforded remedial statutes. In the present case, the Court of Special Appeals relied on three tenets of ADA jurisprudence that unreasonably restricted the protected class of individuals who can claim to have a "disability," and which Amici respectfully suggest should not be engrafted upon the Howard County Code § 12.210(a) and similar statutes.

As the Petitioner is likely to observe, the ADA Amendments Act, effective January 1, 2009, repudiates the tenets that were based on an erroneous interpretation of

Congressional intent, effectively reopening the protected class to individuals who had erroneously been excluded from coverage. *See* ADA Amendments Act, Pub. L. 110-325 § 2(a)(4) (recognizing that the Supreme Court had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect"). Amici here urge the Court to clarify that these restrictive tenets do not presently guide, nor have they ever guided, the application of Maryland's state and local anti-discrimination laws. These rejected doctrines are inconsistent with the broad remedial purpose of disability anti-discrimination statutes such as Howard County Code §§ 12.200-12.218, because they would erroneously exclude individuals whom the legislature intended to protect.

A. Mitigating Measures Should Not Exclude An Individual From Statutory Protection.

The Court of Special Appeals reasoned that Ms. Meade's latex allergy was not a substantial limitation on her major life activities in part because "Meade testified that she can control her latex allergy by avoiding certain products." 181 Md. App. at 140. The court's rationale in considering the mitigating measures taken by Ms. Meade stems from *Sutton v. United Air Lines, Inc.*, where the Supreme Court of the United States held that the disability evaluation should consider corrective measures taken by a plaintiff in determining whether the plaintiff's major life activities were substantially limited by an impairment. 527 U.S. 471, 482 (1999). The recently enacted ADA Amendments Act overturned the *Sutton* decision and made clear that its restrictive interpretation ran

counter to the broad remedial purposes of the ADA. *See* ADA Amendements Act, Pub. L. 110-325 § 2(b)(2) (repudiating *Sutton*'s mitigation principle).

Amici contend that the court below should not have considered the mitigating measure Ms. Meade had taken (avoiding latex) to determine whether her major life activities were substantially limited. The consideration of mitigating measures led to illogical results under the ADA, discouraging individuals with disabilities from attempting to ameliorate their impairments and allowing employers and service providers to discriminate against individuals who are perceived as not "disabled enough" but who may nevertheless have serious impairments that require reasonable accommodations.

The recent Eighth Circuit opinion in *Orr v. Wal-Mart Stores, Inc.* demonstrates the problematic results flowing from consideration of mitigating measures in the disability analysis. 297 F.3d 720 (8th Cir. 2002), *cert. denied,* 541 U.S. 1070 (2004). There, the plaintiff, Stephen Orr, required a strict dietary schedule to control the effects of his diabetes. *Id.* at 722. Orr took a pharmacist job at Wal-Mart and managed his diabetes by taking short breaks throughout the day and a half-hour lunch to administer his medication and control his blood sugar. *Id.* at 722-23. A new manager took control and demanded an end to Orr's modified schedule. *Id.* at 723. Orr complied initially but found it was impossible to control his diabetes. In the past he had experienced seizures, deteriorated vision, and slurred speech when his diabetes was not properly regulated. *Id.* at 726 (Lay, J. dissenting). After Orr complained, he was terminated, and he subsequently brought suit under the ADA. 297 F.3d at 724-25.

Relying on *Sutton*, the Eighth Circuit looked to Orr's mitigating measures (routine treatment of his diabetes) to determine that he was not substantially limited in his major life activities of eating or working *Id.* at 724. As aptly noted by Judge Lay in dissent, however, whether Orr would actually suffer from an absence of accommodation was not a product of mere speculation or guesswork; rather Orr presented evidence that he had, in fact, suffered significant and dangerous physical side effects when he did not take the mitigating measures of scheduled diet alterations and medication. *Id.* at 726.

The reasoning employed in *Orr* with regard to mitigating measures is by no means unique. As one scholar has noted, federal courts have excluded plaintiffs with heart conditions, cancer, hypertension, hearing impairments, severe depression, mental illness, asthma, epilepsy, and deformed limbs on the basis of the mitigating measures doctrine articulated in *Orr* and in *Sutton*. *See* Areheart, *supra* at 220-21.[4] The problematic nature of the mitigation exclusion is self-evident: that is, the doctrine allows an employer (or public service provider) to refuse without legal consequence the request of a seriously impaired individual to access a mitigating measure, thereby rendering the plaintiff more impaired, and yet the court considers whether the plaintiff is sufficiently disabled only in the hypothetical mitigated state. The effect is to allow the employer or public service

[4] Citing *Taylor v. Nimock's Oil Co.*, 214 F.3d 957 (8th Cir. 2000); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999); *Hill v. Kan. Area Transp. Auth.*, 181 F.3d 891, 891 (8th Cir. 1999); *Spades v. City of Walnut Ridge*, 186 F.3d 897, 900 (8th Cir. 1999); *Nordwall v. Sears, Roebuck & Co.*, 46 F. Appx. 364, 364 (7th Cir. 2002); *Muller v. Costello*, 187 F.3d 298, 298 (2d Cir. 1999); *Chenoweth v. Hillsborough Co.*, 250 F.3d 1328 (11th Cir. 2001); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 349 (4th Cir. 2001).

provider to render the plaintiff more disabled, yet take advantage of mitigating measures that the plaintiff would usually observe to exclude the plaintiff from statutory coverage. *See* Kevin L. Cope, *Sutton Misconstrued: Why The ADA Should Now Permit Employers To Make Their Employees Disabled*, 98 Nw. U. L. Rev. 1753, 1755 (2004) (discussing the "bizarre and counterintuitive notion" arising from the *Sutton* mitigation rule "that employers may, without violating the ADA, deny an employee the opportunity to mitigate the symptoms of her disability and then deny her reasonable accommodations for her condition or even terminate her for being disabled").[5]

Yet, even beyond situations in which the defendant actually prevented the plaintiff from using mitigating measure and yet still claimed the plaintiff was not disabled, the mitigation rule used by the *Sutton* majority excludes countless individuals whom Congress clearly intended to cover. As Justice Stevens, joined by Justice Breyer, observed in a *Sutton* dissent: "There are many individuals who have lost one or more limbs in industrial accidents, or perhaps in the service of their country in places like Iwo Jima. With the aid of prostheses, coupled with courageous determination and physical therapy, many of these hardy individuals can perform all of their major life activities just as efficiently as an average couch potato." 527 U.S. at 497. Yet, the current paradigm punishes such individuals who "ascertain[] ways to overcome their physical or mental

[5] The absurd results flowing from application of the *Sutton* rule are boundless: an employer refuses to allow a legally blind employee to wear glasses at work, yet the employee is not disabled because she can "mitigate" her sight by wearing glasses; in the context of public services, a hearing-impaired, competitive swimmer who regularly uses a sophisticated hearing aid yet cannot use the aid while in the water would not be considered disabled and so could not require the swim meet provider to place a strobe light under her block so she could "hear" the start.

limitations" by removing them from statutory protection allowing "an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication, or every person who functions efficiently with a prosthetic limb." *Id.* at 499, 509. The *Sutton* majority's rigid definition is doubly ironic since Congress enacted the ADA in large part to remedy discrimination against individuals who are not severely limited in their mitigated condition, but who are often still the victims of "'stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.'" *Id.* at 510 (quoting 42 U.S.C. § 12101(a)(7)).

Nor, according to Justice Stevens, would the consideration of a plaintiff in an unmitigated state require speculation or hypotheticals: "Viewing a person in her 'unmitigated' state simply requires examining that individual's abilities in a different state, not the abilities of every person who shares a similar condition. It is just as easy individually to test petitioners' eyesight with their glasses on as with their glasses off." 527 U.S. at 509. Justice Stevens also observed that, based on legislative history, both the EEOC and Justice Department had taken the "unmitigated" approach to determinations. *Id.* at 502-04.

In sum, the mitigation rule put forth in *Sutton* has allowed employers and public service providers to discriminate with abandon against individuals such as the plaintiff in *Orr* who are clearly, seriously impaired in major life functions and yet repeatedly denied reasonable accommodations. Because of these arbitrary restrictions, ADA litigation has frequently devolved into a contest of whether the plaintiff is disabled enough rather than an examination of whether or not the defendant's conduct was discriminatory on the basis

of the plaintiff's impairment. Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409, 561 (1997). This kind of restrictive analysis runs contrary to the intended broad, remedial nature of disability anti-discrimination statutes.

B. The Court Should Adopt A Wholly Individualized Inquiry To Determine Whether An Impairment Restricts The Major Life Activities Of The Individual Plaintiff.

The exclusionary effect of Sutton's mitigation rule has been augmented by the Supreme Court's increasingly restrictive view of what limitations on major life activities are substantial enough to constitute a disability. Specifically relevant to the case at bar, the Court of Special Appeals, based on *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184 (2002), implied that Ms. Meade's latex allergy did not "prevent or severely restrict" her enough from parenting or breathing in the same way "most people's daily lives" engage in parenting or breathing. 181 Md. App. at 143.

This tenet is derived from *Toyota Motor*'s holding that a plaintiff's carpel tunnel syndrome, which restricted her from manual tasks associated with her assembly line employment and caused her "to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances," was not a severe enough restriction on "performing manual tasks" to qualify the plaintiff as disabled. 534 U.S. at 201-02. Because the plaintiff could still brush her teeth and wash her face, "the changes in her life did not amount to such severe restrictions in the activities *that are of central importance to most people's daily lives* . . .

." *Id.* at 202 (emphasis added). In sum, the Court did not analyze whether Ms. Williams was restricted enough by reference to the manual tasks that were major to her life (*e.g.*, work, dressing herself, gardening), but by reference to whether her activities were restricted across a broad enough range of manual activities in which "most people" engage.

Amici urge this Court to reject the notion that whether an individual is disabled depends on whether the individual's impairment extends to the major life activities performed by *most people*. This principle – recently repudiated in the ADA Amendments Act – is inconsistent with the well-established canon that whether a person is disabled is an individualized inquiry. *See Sutton*, 527 U.S. at 483; *E.E.O.C. v. Lee's Log Cabin, Inc.*, 546 F.3d 438, 442 (7th Cir. 2008); *Bryson v. Regis Corp.*, 498 F.3d 561, 575 (6th Cir. 2007). All parties agree that whether an impairment is substantial is judged by the severity of the individual plaintiff's impairment. For example, normal hypertension may not usually sufficiently restrict major life activities, but a particular plaintiff's severe hypertension may sufficiently restrict major life activities such as walking. *See Mass Transit v. Comm'n on Human Relations*, 68 Md. App. 703, 711, *cert. denied*, 308 Md. 382 (1986). Yet, *Toyota Motor* dictates that the individualized inquiry does not extend to the "major life activities" side of the equation. In other words, the substantive nature of the impairment is not measured by how it affects the life activities that are major to the specific plaintiff, but how it might affect the life activities of "most people." 534 U.S. at 202. Like the mitigation principle, this inconsistent, rigid reading of the statute leads to paradoxical results.

The analysis by reference to "most peoples'" activities ignores the fact that disability discrimination does not occur in a vacuum of possibilities and hypotheticals, but in the specific context of an activity being performed. For example, "a dyslexic person may not experience substantial limitation when leisurely reading the newspaper at home but may experience significant limitation when deciphering complex documents at work." Catchpole & Miller, *supra*, at 1363. Nonetheless, that person with a significant impairment would not be considered disabled in the life activity of reading under *Toyota Motor* since the activity of reading and analyzing work documents is not considered "major" in most peoples' daily lives, even though there is no doubt that the activity of work-related reading as it was practiced by the individual plaintiff was substantially restricted.[6] *Id.* Thus, under *Toyota Motor*, an employer could discriminate against a dyslexic individual based on a groundless stereotype regarding the capabilities of dyslexic individuals when a simple accommodation could have resolved any performance issue.

Prior to this case, the Maryland Court of Special Appeals had appropriately adopted an individualized inquiry in *University of Maryland at Baltimore v. Boyd*, 93 Md. App. 303 (1992). There, the plaintiff alleged that he suffered from pseudofolliculitis barbae (PFB). *Id.* at 306-07. The plaintiff's PFB caused "skin irritation, pus and blood filled sores, and scarring" on his neck when he was forced to shave to conform to his

[6] This is not to say that, even if considered disabled under a more individualized inquiry, the dyslexic individual would automatically prevail in any suit against her employer; the individual must still propose a reasonable accommodation and the employer would then be able to argue undue hardship.

employer's dress code. *Id.* at 314-15. The plaintiff testified that his PFB, when activated, significantly limited the major life activity of socializing as he saw fit to engage in it: "I wouldn't go anywhere because I was just embarrassed to be seen in public. I had to go to work in order to make a living. But that's all I would do was go to work and come home." *Id.* at 317. The court concluded that the plaintiff was indeed "handicapped" under Maryland Article 49B, reasoning that there was sufficient evidence that the plaintiff's PFB "condition significantly impairs his ability to socialize, considered to be a major life activity, and, therefore, is *physically handicapping to him*." *Id.* at 318 (emphasis added). The court did not consider whether the plaintiff was impaired in socializing as most people engage in socializing or across a broad enough range of socializing activities, but because socializing as he specifically practiced the activity was impaired, the court found the plaintiff covered by the statute.

In this case, therefore, the proper inquiry is not whether Ms. Meade's latex allergy affected breathing and/or parenting as engaged in across a broad spectrum of breathing or parenting activities by most people, but whether her latex allergy substantially limited her actual activities of breathing and/or parenting. This kind of individualized inquiry transfers the analytical emphasis from creating an arbitrarily restrictive class of protected parties based on what *most* people do for "major life activities" to determining whether the defendant's actions were actually discriminatory in the life activities major to the individual plaintiff.[7]

[7] An individualized inquiry also allows for an appropriate determination as to the severity of a plaintiff's condition. Mild hypertension may well not be a disability, while severe

C. Measuring Impairments Primarily By Severity Of Effect Best Serves the Anti-Discrimination Goals of The Statute.

The third restrictive maxim utilized by the Court of Special Appeals is also derived from *Toyota Motor*'s admonition to consider as a disability only a condition "that prevents or severely restricts the individual from doing activities that are of central importance to most people's *daily* lives." 181 Md. App. at 143 (emphasis added). The court dismissed Ms. Meade's latex allergy *not* because she did not have a severe enough reaction to latex but because she did not experience a latex reaction on a *daily* basis. Yet there was no dispute that Ms. Meade would always experience a severe reaction on contact with latex, but that contact with latex, and thus the reaction, did not occur everyday. *Id.* at 140-41.

This reasoning imposes a temporal limitation on the protected class when all evidence of legislative intent indicates that a condition should be measured primarily by the severity of the plaintiff's reaction and corresponding restriction of her life activities. This off-hand dismissal of impairments that are not "activated" on a daily basis yet may be life-threatening, like some latex allergies, is arbitrary and only serves to exacerbate the Goldilocks dilemma.

1. Impairments should be measured by the severity of impact on the individual's life, not by temporal considerations.

The drafter of the original ADA, Robert Burgdorf, conducted an extensive study of the ADA's legislative history and concluded that there is no support for notion that

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hypertension could be. Such an inquiry also leaves plenty of room for an appropriate credibility determination as to severity and limitations on major life activities.

"impairments should be excluded because they do not last long enough." Burgdorf, *supra* at 513-16. Instead, it was clear at the time of the statute's passage that conditions would be measured by the severity of impact and that conditions of minor effect would be excluded: "A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity." H.R. Rep. No. 101-485, at 53 (1990); *see* Burgdorf, *supra* at 575-76; Colette U. Matzzie, *Substantive Equality and Anti-discrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 Geo. L.J. 193, 220 (1993) (noting that nothing in ADA suggests Congress intended to limit "definition of impairment to permanent disabilities"). In fact, prior to the ADA's enactment, the administrative agency charged with interpreting the ADA's statutory predecessor, Section 504 of the Rehabilitation Act of 1973, opined that it had "no flexibility within the statutory definition [of individual with a disability] to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps[,]" 45 C.F.R. pt. 84, app. A § 84 (1997).

The practical effect of restricting coverage to those impairments existing only on a continuous, long-term basis is extensive. The purported scope of the ADA under time-restrictive jurisprudence has excluded breast cancer necessitating radiation treatment, *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996), arthritis hampering the ability to walk, *Hamm v. Runyon*, 51 F.3d 721 (7th Cir. 1995), and severe abdominal pain needing stomach surgery, *McDonald v. Pennsylvania*, 62 F.3d 92 (3d Cir. 1995). These exclusions contort the term "disabled" by excluding individuals who were in fact

significantly impaired in their major life activities when the alleged discrimination took place. As one scholar has observed:

> [I] is difficult to understand why an employer is permitted to fire a person if a temporary disability will cause the worker to miss some work, but not permitted to fire a person if the condition will force the worker to be out of work for a much longer period of time. Given the purpose of the ADA, this seems to be a distinction without a difference. After all, why should any qualified individual with a disability (no matter the length) be precluded from recourse against discrimination on the basis of disability?

Areheart, *supra* at 223 (footnotes omitted).

2. Allergies should be evaluated by severity of the reaction and not discounted because the effects are intermittent.

Just as temporal limitations in general are unwarranted, so too is the specific exclusion of severe conditions activated on an intermittent basis. Prior to Ms. Meade's case, the Court of Special Appeals ignored whether or not an impairment was intermittent, holding in *Boyd* that while the plaintiff's BFP was only activated when the plaintiff shaved, the condition nonetheless substantially limited his major life activity of socializing. 93 Md. App. at 318. Numerous jurisdictions have followed suit and held that a severe allergy having a profound effect on an individual's life when activated generated a triable question of fact as to whether or not the plaintiff was disabled.

For example, in *Service v. Union Pac. R.R. Co.*, the Eastern District of California found a genuine issue of fact as to whether or not the plaintiff with asthma was disabled in breathing when he suffered "symptoms such as chest tightness, coughing, and shortness of breath when exposed to smoke and smoke residue and that he suffered six severe attacks between June 1994 and May 1997. Moreover, plaintiff's treating physician

considers his attacks life threatening." 153 F. Supp. 2d 1187, 1192 (E.D. Cal. 2001). The court reasoned that there is no rational basis for requiring the plaintiff to be "in a constant state of distress or suffer an asthmatic attack to qualify as disabled under the ADA." *Id.* at 1192.

Similarly, in *E.E.O.C. v. United Parcel Service, Inc.*, the Sixth Circuit held that the employee generated a factual dispute as to whether he was disabled by showing that his breathing was limited by his reaction to an allergen specific to the environs of Central Texas. 249 F.3d 557, 562-63 (6th Cir. 2001), *cert. denied*, 535 U.S. 904 (2002). The employee suffered "severe nasal and bronchial congestion, swollen eyes and nose, rashes and fever blisters over large areas of his body, fatigue, fever, and depression" when his allergy was activated, but his employer had denied his request for a transfer out of Texas. *Id.* The Sixth Circuit concluded that whether the plaintiff was substantially limited in his breathing was a question of fact for the jury, even though employee had been able to work his regular hours at the Texas office and his reaction disappeared when he later moved to Kentucky. *Id.*

In *Campbell v. North Carolina Dept. of Transp., Div. of Motor Vehicles*, the Court of Appeals of North Carolina concluded that an employee who had asthma and a severe dust and paint fumes allergy was disabled within the meaning of a North Carolina anti-discrimination statute that closely tracked ADA's "substantially limits" language. 155 N.C.App. 652, 663-64, *review denied*, 357 N.C. 62 (2003). The plaintiff's only evidence of how the allergy affected her life was the fact that she had suffered a severe respiratory

attack at work requiring immediate hospitalization due to the paint fumes and dust present in her office. *Id.*

Finally, in *Bell v. Elmhurst Chicago Stone Co.*, the Northern District of Illinois concluded that the plaintiff, who had severe allergies and asthma, generated a question of fact as to whether he was disabled by adducing evidence that he endured bronchial spasms when exposed to cigarette smoke and was thus substantially limited in his ability to breathe and work because his employer allowed employees to smoke at the office. 919 F. Supp. 308, 309 (N.D. Ill. 1996). The court did not require that the plaintiff show that he suffered these spasms every day at work, nor that his life activities outside of work were substantially limited by cigarette smoke. *Id.*; *see also Albert v. Smith's Food & Drug Centers, Inc.*, 356 F.3d 1242, 1250-51 (10th Cir. 2004) (asthma substantially limited major life activities); *Alley v. Charleston Area Medical Center, Inc.*, 602 S.E.2d 506 (W. Va. 2004) (same).

The commonality of these intermittent impairments cases is twofold: a dangerous and debilitating reaction endured by the individual upon exposure to an allergen, and, many times although not always, an alteration of the individual's major life activities to *avoid* the allergen. That is, while a dangerous reaction may not limit the individual on a daily basis, the individual's major life activities will often have to be restricted to avoid a seriously debilitating reaction. This is simply one form of restriction on major life activities, *i.e.*, the need to restrict activities in order to avoid an allergen. *See Land v. Baptist Medical Center*, 164 F.3d 423, 426-27 (8th Cir. 1999) (Arnold, J. dissenting) (fact question should have been found for girl with severe, potentially deadly peanut allergy as

to whether she was substantially limited in major life activity of eating due to restriction of avoiding all contact with peanut products).

Both the U.S. Department of Justice and U.S. Department of Agriculture regulations support the general principle that intermittent impairments should be evaluated primarily by the severity of the individual's reaction to the purported allergen. The Department of Justice recognizes that an allergy to cigarette smoke may constitute a disability depending on the severity of the affect of smoke on a major life function such as breathing. 28 C.F.R. § 36.104, pt. 36, app. B, p. 620 (1999); *see* Mary Kate Kearney, *The ADA, Respiratory Disabilities And Smoking: Can Smokers At Burger King Really Have It Their Way?* 50 Syracuse L. Rev. 1, 62 (2000). With regard to food allergies, the Department of Agriculture's "Meal Substitutions for Medical or Other Special Dietary Reasons, Food and Nutrition Service Instruction" provides:

> Generally, participants with food allergies or intolerances, or obese participants are not "handicapped persons," as defined in 7 C.F.R. 15b.3(i), and school food authorities, institutions and sponsors are not required to make substitutions for them. However, when in the physician's assessment food allergies may result in severe, life-threatening reactions (anaphylactic reactions) or the obesity is severe enough to substantially limit a major life activity, the participant then meets the definition of "handicapped person," and the food service personnel must make the substitutions prescribed by the physician.

No. 783-2, Rev. 2 (Oct. 14, 1994).

There is no principled reason to exclude from statutory coverage individuals who have a severe reaction to a specific allergen and whose life activities are of necessity restricted to avoid the allergen, merely because the impact occurs upon exposure, intermittently. Like the consideration of mitigation and the failure to examine an

impairment in the context of activities major to the individual plaintiff, the exclusion of a significant impairment solely because the impairment is activated on an intermittent basis, instead of daily or constantly, imposes an artificial and arbitrary restriction on an anti-discrimination statute that is intended to be given broad, remedial effect. The exclusion of severe allergies from the definition of "disability" ignores the profound impact these impairments wreak on individual lives, exacerbates the Goldilocks dilemma of plaintiffs, and allows employers and service providers to discriminate with impunity against individuals with serious impairments.

III. AMICI'S PROPOSED INTEPRETATION WOULD NOT RESULT IN A SURGE OF NEW CLAIMS BUT WOULD SHIFT THE FOCUS OF EXISTING CLAIMS TO WHETHER THE DEFENDANT'S CONDUCT WAS DISCRIMINATORY.

Adoption of the proposed interpretive framework would bring a number of previously excluded individuals within the statute's protected class. While these changes could result in an increase in successful disability discrimination claims, any increase should be consistent with legislative intent described *supra*. Additionally, recent research indicates that any increase in the number of new filings, if at all, would be modest since plaintiffs must still overcome significant hurdles and prove that the defendant's conduct was discriminatory. Thus, the primary impact of the proposed interpretation would be to shift the focus of judicial proceedings from whether the plaintiff is "disabled enough" to the more salient issue that is the statute's intended focus: whether the defendant's conduct was discriminatory on the basis of the plaintiff's impairment.

Proponents of a restrictive definition of "disability" have argued that a failure to utilize the tenets described above will unleash a flood of new lawsuits. Empirical research, however, suggests that those fears are groundless. For instance, in response to *Sutton*, California in 2001 enacted legislation known as "A.B. 2222" (CAL. GOV'T CODE § 12926.1(c) (West 2005)) to reverse the effect of *Sutton*'s holding on California's disability anti-discrimination ordinance. *See* Katherine Hsu Hagmann-Borenstein, *Much Ado About Nothing: Has The U.S. Supreme Court's* Sutton *Decision Thwarted A Flood Of Frivolous Litigation?*, 37 Conn. L. Rev. 1121, 1124 (2005). A.B. 2222 instructed courts to evaluate whether plaintiffs were substantially impaired in a major life activity in their unmitigated state. *Id.* Contrary to opponents' predictions, however, no massive influx of litigation has resulted. A 2005 study of A.B. 2222's impact concluded that the law had little impact on the number of disability-based discrimination claims filed in California. While the total number of disability discrimination claims rose after passage, the rate of increase was consistent with population increases and increases in claims based on race, gender, age, etc., during the same time period. *Id.* at 1139-41.

Similarly, in *Dahill v. Police Dept. of Boston*, the Supreme Judicial Court of Massachusetts broke with *Sutton*, concluding that whether a plaintiff is disabled under Massachusetts' anti-discrimination provision is analyzed without regard to mitigating measures. 434 Mass. 233, 240 (2001).[8] Yet, as in California, Massachusetts did not

[8] The court took note of the anomalous consequences flowing from consideration of the individual in a mitigated state:

endure an overwhelming surge in disability discrimination claims after 2001. While such claims increased 2.4% in 2002, claims in 2003 actually decreased to an eight year low for the state. *See* Hagmann-Borenstein, *supra* at 1143. Nor did the Massachusetts agency charged with disability law enforcement experience a significant increase in claims. *Id.*

Fears of a dramatic surge in disability litigation by adoption of a more reasonable definition of disabled are unfounded primarily because individuals with serious impairments do not bring a claim of discrimination merely because they suffer some slight in everyday life. There are still significant barriers to recovery for any plaintiff even if the plaintiff manages to navigate the initial Goldilocks dilemma. As the *Dahill* court observed:

> If [plaintiff] meets that threshold test [of being disabled], he must still prove that he can perform the essential functions of [the job], with or without reasonable accommodations. . . . Reasonable accommodation by the department to his handicap need only be made if it would impose no "undue hardship" on the employer. . . . [The plaintiff] must also demonstrate that his handicap was the cause of the department's allegedly unlawful discrimination. . . . These legislative criteria constrain any possibility that recovery for [the plaintiff] will be automatic. *See Arnold v. United Parcel Serv., Inc*., 136 F.3d 854, 861 (1st Cir.1998) (under analogous Federal provisions, even with earlier "broad view" of disability, concerns and interests of employers are still "amply protected").

Id. at 243-44 (footnotes and additional citation omitted).

> The [*Sutton*] interpretation. . . would protect an employee who cannot afford to buy medication to correct an impairment, but the same employee, once able to obtain treatment under his employer's health plan, would no longer be "handicapped" and could be lawfully fired based on his impairment. . . . Two individuals with the same hearing impairment might be treated differently under the statute because one can afford a hearing aid and one cannot.

Id. at 240 n. 11 (citation omitted).

Thus, while some increase in the number of filings may or may not occur due to a proper definition of the statutorily-protected class, the primary impact of the proposed interpretive framework would be to allow seriously impaired individuals to proceed beyond the threshold question of whether they are disabled and shift the bulk of judicial proceedings to the question of whether the defendant discriminated against the plaintiff on the basis of her serious impairment. Amici respectfully suggest that such a focus comports with the intended focal point of the Howard County Code and similar statutes.

IV. THE IMPORTANCE OF A REASONABLE DEFINITION OF "HANDICAPPED" IS MAGNIFIED BY THE POTENTIALLY DESTRUCTIVE IMPACT OF SEVERE LATEX ALLERGIES ON AMERICAN HEALTHCARE PROFESSIONALS AND HEALTHCARE DELIVERY.

Latex allergies affect a significant number of Americans with debilitating impact. From one to six percent of the population of the United States is affected by latex allergies. *See* National Institute for Occupational Safety and Health, *Preventing Allergic Reactions to Natural Rubber Latex in the Workplace*, NIOSH Pub. No. 97-135 (June 1997), *available at* http://www.cdc.gov/niosh/latexalt.html [hereinafter *Preventing Allergic Reactions*]. According to the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), there are three types of latex allergies, and reactions vary "from localized redness and rash; to nasal, sinus, and eye symptoms; to . . . severe systemic reactions with swelling of the face, lips, and airways that may progress rapidly to shock and, potentially, death." OSHA, *Potential for Sensitization and Possible Allergic Reaction To Natural Rubber Latex Gloves and other Natural Rubber Products*, Safety Health and Information Bulletin No. 01-28-2008 (January 28, 2008), *available at*

http://www.osha.gov/dts/shib/shib012808.html [hereinafter *Potential for Sensitization*]. The "most serious" reaction to latex stems from the "IgE/histamine-mediated" type of allergy. *Id.* As OSHA explains, a "type I reaction" for individuals with an IgE/histamine-mediated allergy can be potentially deadly:

> [The reaction] can occur within seconds to minutes of exposure to the allergen . . . either by touching a product with the allergen (e.g., gloves) or by inhaling the allergen (e.g., powder to which natural rubber proteins from gloves have adsorbed). When such a reaction begins in highly sensitive individuals, it can progress rapidly from swelling of the lips and airways to shortness of breath, and may progress to shock and death, sometimes within minutes.

Id. In 2001, it was estimated that over 200 cases of anaphylaxis and 10 deaths each year are attributable solely to latex allergies. Asthma and Allergy Foundation of America, Allergy Facts and Figures, http://www.aafa.org/display.cfm?id=9&sub=30#_ftnref6 (last visited Feb. 22, 2009).

Unfortunately, an allergy to latex is oftentimes a progressive condition, meaning that individuals who are frequently exposed to latex develop an initial sensitivity to the latex allergen, which then worsens from further, repeat exposures. *See Potential for Sensitization*; Lynn Cherne-Breckner, *The Latex Allergy Crisis: Proposing A Healthy Solution To The Dilemma Facing The Medical Community*, 18 J.L. & Health 135, 168 (2003-04) ("Once exposed, every additional work exposure, as well as every exposure outside the workplace, may cause greater harm to those with a severe latex allergy, leading to incurable, possibly life threatening health problems."). Thus, U.S. healthcare workers who began utilizing latex gloves more frequently in the 1980's are especially

plagued by the allergy. *Preventing Allergic Reactions.* It is estimated that between eight and twelve percent of healthcare workers are presently affected by a latex sensitivity. *Id.*

This rapid growth in latex allergies can be traced to both an increased usage of latex gloves among healthcare professionals as a result of universal precautions instituted to combat HIV transmission and the concomitant decrease in the quality of latex gloves being mass produced, thereby elevating "the amount of allergy inducing proteins excreted to wearers." Cherne-Breckner, *supra* at 137. Acutely affected are "operating room personnel, dental patient care staff, special-procedure and general-medical nurses, laboratory technicians, and hospital housekeeping personnel," who repeatedly utilize powdered latex gloves. *Preventing Allergic Reactions.* The powder present in many latex gloves (used to ease donning and doffing) is particularly troublesome since latex proteins easily bind to the powder molecules, and the powder is launched into the air whenever the gloves are used. *Potential for Sensitization*.

Because of the progressive nature of latex allergies, and the increasing prevalence of latex allergies among healthcare professionals, unaccommodated latex allergies threaten to exacerbate this nation's shortage of nurses and other highly qualified healthcare professionals. As at least one scholar has noted, healthcare employers presently find it more cost effective to terminate an employee or force the employee to quit by refusing to accommodate the employee's latex allergy, than to accommodate the allergy. Cherne-Breckner, *supra* at 168-70. Thus, it is estimated than an increasing number of critical healthcare employees are leaving the profession at a time when the need for their skills in society is all the more pressing. *Id.* at 170 ("With the recent

nursing and healthcare employment shortages, it seems that providing a safe environment and keeping existing health care workers safe would be most cost beneficial to all involved"). Nonetheless, simple, fairly inexpensive steps in education, prevention, and accommodation could effectively mitigate the significant allergies of some healthcare workers and prevent any further aggravation of the sensitization of numerous employees who have not yet experienced severe reactions. *Id.*

A failure to recognize the debilitating nature of a latex allergy for certain individuals runs the risk of further aggravating any shortfall of healthcare workers. On the other hand, a ruling that recognizes the severe, progressive nature of latex allergies may encourage healthcare employers to work with employees who suffer from the allergy to find a reasonable accommodation and thereby avoid the exit of numerous highly skilled professionals from the healthcare industry.

CONCLUSION

Applying tenets of statutory interpretation to exclude individuals from the intended protection of a broad, remedial anti-discrimination statute are arbitrary and unsound. Under the remedial statute at issue here, there is no compelling rationale for declaring that an individual is not disabled solely because that person uses mitigating measures to control her impairment, or because that person is not restricted in a broad enough class of major life activities in the same way as other people practice those activities, or because the person's disability is only activated on an intermittent basis due to the diligent efforts of the individual to avoid the activating agent. These restrictions render many seriously impaired plaintiffs either not disabled enough or too disabled to

claim statutory protection. Yet, any fear that a more liberal construction would give rise to too many spurious new claims is baseless. While some new claims may result, because of the additional elements that plaintiffs must still prove in a successful action, the primary effect of the changed interpretation would be only to shift the bulk of judicial analysis to whether the defendant's conduct was discriminatory. Finally, a failure by this Court to recognize that severe latex allergies may be substantially limiting will only condone discrimination against employees with latex allergies and thereby exacerbate this country's shortage of qualified healthcare professionals. For these reasons, Amici urge this Court to reverse the Court of Special Appeals and reinstate the jury verdict in favor of Ms. Meade.

Respectfully Submitted,

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