No. 97-1008

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CAROLYN C. CLEVELAND,
Petitioner,

v.

POLICY MANAGEMENT SYSTEMS CORP., ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF OF AIDS POLICY CENTER FOR CHILDREN; YOUTH AND FAMILIES; AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN ASSOCIATION ON MENTAL RETARDATION; AMERICAN MEDICAL STUDENT ASSOCIATION; AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES; AMERICAN PUBLIC HEALTH ASSOCIATION; THE ARC OF THE UNITED STATES; ASSOCIATION OF NURSES IN AIDS CARE; ASSOCIATION FOR PERSONS IN SUPPORTED EMPLOYMENT; BRAIN INJURY ASSOCIATION, INC.; CENTER FOR INDEPENDENCE OF THE DISABLED IN NEW YORK; CENTER FOR WOMEN POLICY STUDIES; CENTER ON DISABILITY AND HEALTH; COALITION FOR THE HOMELESS; COALITION ON HUMAN NEEDS, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

[Additional *Amici Curiae* Listed Inside Cover]

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CONGREGATIONS; YWCA OF THE U.S.A.

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INTEREST OF THE AMICI CURIAE[1]

This *amici curiae* brief is submitted on behalf of AIDS Policy Center for Children, Youth and Families; American Association of Retired Persons; American Association on Mental Retardation; American Medical Student Association; American Network of Community Options and Resources; American Public Health Association; Arc of the United States; Association of Nurses in AIDS Care; Association for Persons in Supported Employment; Brain Injury Association, Inc.; Center for Independence of the Disabled in New York; Center for Women Policy Studies; Center on Disability and Health; Coalition for the Homeless; Coalition on Human Needs; Commission on Rehabilitation Counselor Certification; Committee for Children; Disability Rights Education and Defense Fund, Inc.; Disabled in Action of Metropolitan New York, Inc.; Employment Law Center; Epilepsy Foundation; Friends Committee on National Legislation; Gay and Lesbian Medical Association; HIV Law Project; Housing Works; International Association of Psychosocial Rehabilitation; Justice for All; Lambda Legal Defense and Education Fund, Inc.; Legal Action Center; LLEGÓ (The National Latina/o Lesbian, Gay, Bisexual & Transgender Organization); Mental Disability Law Clinic of Touro College; National AIDS Fund; National Association for People with AIDS; National Association of Protection and Advocacy Systems; National Association of Orthopaedic Nurses; National Council for Community Behavioral Healthcare; National Council of Jewish Women; National Health Law Program; National Minority Aids Council; National Native American AIDS Prevention Center; National

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[1] This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

Partnership for Women and Families; National Senior Citizens Law Center; NETWORK; New York Lawyers for the Public Interest, Inc.; NISH; Parents, Families and Friends of Lesbians and Gays; Rehabilitation Engineering and Assistive Technology Society of North America; San Francisco AIDS Foundation; Title II Community AIDS National Network; Union of American Hebrew Congregations; and YWCA of the U.S.A. ("Disability, Medical, Public Health and Civil Rights Organizations"). The statements of interest of *amici* are included in the appendix to this brief.

Amici believe that this Court's ruling on the weight assigned to statements made by ADA Title I plaintiffs in applications for Social Security disability benefits will have a profound effect on the viability of the ADA as a tool to end pervasive job discrimination against persons with disabilities. The Fifth Circuit's application of a nearly insurmountable "rebuttable presumption" standard to such statements effectively bars millions of individuals with disabilities from ever showing, in the event of employment discrimination, that they are "otherwise qualified to perform the essential functions of the job."

By written consent of the parties,[2] *amici curiae* Disability, Medical, Public Health and Civil Rights Organizations submit this brief in support of Petitioner Carolyn C. Cleveland.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA) represents a fundamental evolution in policy affecting persons with disabilities. Explicitly rejecting the entrenched perception that persons with significant disabilities can never

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[2] Letters of consent from all parties have been filed separately with the Clerk of the Court.

be fully independent participants in the national economy, the ADA protects employment opportunities for individuals with disabilities who are able to perform the jobs they hold or seek, and mandates that employers offer reasonable accommodations to assist in removing unnecessary impediments to employment.

The disability benefits programs of the Social Security Act (SSA), 42 U.S.C. 423, serve a social welfare purpose which complements the employment goals of Title I of the ADA. Offering benefits to those unable to engage in "substantial gainful activity" due to a serious physical or mental impairment, the Social Security Administration extends benefits to such individuals even if reasonable accommodations in a workplace would make employment possible.

The definitions and standards which determine eligibility for protection under Title I of the ADA, and for Social Security disability benefits, are quite different yet completely compatible. The ADA exists to remove barriers to the employment of people with disabilities while the SSA creates an economic support system for them in recognition of the continued existence of these barriers. While both statutes serve distinct purposes, their targeted beneficiaries overlap.

The Court of Appeals decision in this case undermines the policy and intent of the Americans with Disabilities Act by severely undercutting the ability of those with disabilities to enforce the ADA's promise of job equity. The ruling is at odds with those of other circuits, and with the position of the EEOC and the SSA, which are charged with administering the statutory provisions at issue. Under the Fifth Circuit's analysis, individuals with disabilities who are terminated under circumstances which include a refusal to reasonably accommodate them forfeit the possible return to employment or other remedies for discrimination that an ADA claim would provide, merely by filing for subsistence benefits through SSA.

The Court of Appeals' decision skews the focus of the ADA's principal inquiry away from an employer's discriminatory conduct and onto a plaintiff's statements in an unrelated process with no bearing on the employer's conduct. Under the Court's "rebuttable presumption" standard, it is only "theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive," 120 F.3d 513, 517. This standard is only superficially distinguishable from an absolute bar to an ADA claim, a distinction of no consequence to plaintiffs like Carolyn Cleveland, whose identification of specific accommodations that would allow her to perform her job was excluded from the Court's analysis.

Fair enforcement of the ADA remains the most viable tool for allowing individuals with disabilities who are capable of maintaining employment to avoid reliance on publicly-funded benefits programs. The "rebuttable presumption" standard employed here reduces the ADA's promised employment protections to a mere theoretical option for millions of individuals whose disabilities may periodically necessitate obtaining such benefits to survive. It also represents a radical misapplication of the principle of judicial estoppel and the standard for summary judgment.

There are important social implications of failing to recognize and disaggregate the distinct policies each statute advances. Rather than promoting attempts by individuals with disabilities to remain at or return to work, a goal shared by both systems, the Court of Appeals' holding re-erects barriers for employable individuals with disabilities by barring their enforcement of ADA rights when their attempts to move out of the benefits system into gainful employment result in discrimination.

Eligibility for the benefits of both the SSA and the ADA are not inherently inconsistent. Evidence of statements in support of claims under the SSA therefore warrant no special weight, and should be weighed equally with other

relevant evidence, in determining the viability of an ADA claim.

ARGUMENT

I. IT UNDERMINES THE GOALS OF BOTH THE ADA AND THE SSA TO CREATE A PRESUMPTION OF ADA CLAIM ESTOPPEL ON THE BASIS OF A PLAINTIFF'S APPLICATION FOR SOCIAL SECURITY DISABILITY BENEFITS.

The purposes of the Social Security Act (SSA) and the Americans With Disabilities Act (ADA), while clearly distinct from each other, are complementary rather than conflicting. The SSA's method for qualifying applicants for benefits, and the ADA's determination of disability, diverge significantly in their approach, legal standards and statutory intent. At the same time, both statutes promote integration of people with disabilities into the economy whenever possible, a fundamental policy which the Court of Appeals' ruling implicitly overrides.

A. The ADA is a Civil Rights Law Designed to Eliminate Discriminatory Barriers to the Employment of People with Disabilities.

The Americans with Disabilities Act of 1990 is a landmark civil rights enactment for people with disabilities. It promotes a vision of the significant contributions that people with disabilities can make when given a fair chance to participate fully in society.

The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities *and for the integration of persons with disabilities into the economic and social mainstream* of

American life." *Id.*, quoting S. REP. No. 116, at 20; H.R. REP. No. 485(II), at 50 (emphasis in original).[3] The Act expanded coverage of the nondiscrimination principle to private employers and included an expansive list of potential reasonable accommodations to which people with disabilities might be entitled. *See* 42 U.S.C. § 12111(9) (listing possible reasonable accommodations under the ADA).

In its requirement that there be an "individualized assessment" of each claim that a particular individual with a disability is "otherwise qualified to perform the essential functions of the job," the ADA does not include the concepts of "total" disability and explicitly rejects generalized assumptions about the ability of a particular person with a disability to work. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 Tex.L.Rev. 1003, 1028 (1998). While the regulations recognize that there are some impairments which, by their nature, may qualify as *per se* disabilities under the ADA[4], there are no presumptions about the effect of any impairment

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[3] The ADA's preliminary statement of findings concluded, in part that:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42.U.S.C. §12101(a)(7).

[4] *See* 29 C.F.R. Appendix to Part 1630, §1630.2(j) (EEOC Interpretive Guidance to Title I)(hereinafter "Interpretive Guidance") ("Other impairments...such as HIV infection, are inherently substantially limiting.")

on an individual's ability to work.[5]

Congress' inclusion of reasonable accommodations in the ADA's definition of an "otherwise qualified individual" is a cornerstone of the ADA's attempt to assist individuals whose disabilities may impede, though not wholly foreclose, their ability to work. As the ADA's legislative history emphasizes, "the provision of various types of reasonable accommodations for individuals with various types of disabilities is essential to accomplishing the critical goal of this legislation - to allow individuals with disabilities to be part of the economic mainstream of our society." H.R. REP. No. 485(II), at 34.

By contrast, Social Security Administration policy prohibits hypothetical inquiries into possible reasonable accommodations in determining whether someone is unable to perform a range of jobs in the national economy.[6] Indeed,

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[5] Indeed, the ADA contemplates that an individual can establish coverage under the Act with an impairment that *substantially limits* the major life activity of *working*. Under the ADA, a "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). The term "substantially limits" means "an inability to perform or a significant restriction on the ability to perform as compared to the average person in the general population;" "major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(j)(1) and 16.30.2(i); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998).

[6] Social Security determinations effectively operate on the assumption that reasonable accommodations are not available as a matter of course. A Social Security Administration Memorandum addressing the effect of the ADA on SSA's disability determination process states:

> The fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant to the issue(s) to be resolved at the fourth step [addressing ability to perform past work] of the sequential evaluation process. . . . [H]ypothetical inquiries about whether an

in 1994 the Social Security Administration directly addressed the question of the relevancy of the ADA to its determinations of disability and concluded that "the ADA defines `disability' in relation to the ability to perform what it describes as `major life activities.' Consequently, the term is not synonymous with `disability' as defined in the Social Security Act."[7] The SSA proposed and then rejected incorporation of ADA criteria into its determination of eligibility for benefits.[8]

Herein lies a fundamental difference between the ADA and the Social Security Act: an individual's general

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> employer would or could make accommodations that would allow return to a prior job would not be appropriate.

"Americans with Disabilities Act of 1990 -- INFORMATION," Memorandum from the Associate Commissioner, Social Security Administration 1 (Jun. 2, 1993).

[7] "Americans with Disabilities Act of 1990 -- INFORMATION," Memorandum from the Associate Commissioner, Social Security Administration 1 (Jun. 2, 1993).

[8] In hearings on the SSA "Reengineering" proposal, which would have required that beneficiaries be unable to work "regardless of any reasonable accommodation that an employer might make," commentators pointed out that the term:

> indicate[s] a basic misunderstanding of the relationship between the ADA and the disability standards under the Social Security Act. . . . [T]o establish a standard which assumes reasonable accommodations for the purpose of establishing eligibility for Social Security disability programs may potentially establish barriers for the individual by, in effect, *shifting the employer's burden of compliance with the ADA* onto the claimant or potential employee.

A Proposal to Restructure the Social Security Administration's Disability Determination Process: Hearing Before the Subcomm. on Social Security of the House Committee on Ways and Means, 103rd Cong., 2nd Sess. 83 (1994) (statement of Martha E. Ford, Cochairperson, Consortium for Persons with Disabilities) (emphasis added). *See also id.* at 89-91 (statement of Professor Matthew Diller, Fordham University School of Law).

inability to work due to a disability (the point at which the SSA inquiry ends) triggers a subsequent inquiry under the ADA as to whether that inability can be remedied by an employer's reasonable accommodation. It is the very people who would be unable to work without reasonable accommodations -- thereby qualifying as disabled under the SSA's definition -- whom the ADA seeks to benefit by requiring their employers to provide accommodations.

The majority of jurists addressing the issue have recognized the differences between the two statutes. Most courts have concluded that while a plaintiff's experience with the SSA disability claims process may be relevant to the factual determination of her qualifications to perform the essential functions of the job at issue, it deserves no greater weight than other relevant evidence.

The Sixth, Seventh, Ninth, and D.C. Circuits all have rejected grants of summary judgment for employers which were based on the district courts' treatment of plaintiffs' applications for disability benefits as dispositive of a claim as a "qualified individual with a disability" under the ADA. *See Blanton v. Inco Alloys Int'l*, 123 F.3d 916 (6th Cir. 1997) (rejection of judicial estoppel and reversal of summary judgment); *Griffith v. Wal-Mart Stores, Inc.*, 930 F.Supp. 1167 (E.D. Ky. 1996), *rev'd on other grounds*, 135 F.3d 376 (6th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997) (citing "fundamental differences between the SSA's definition of disability and the ADA's definition of 'qualified individual with a disability,'"); *McCreary v. Libbey-Owens Ford Co.*, 132 F.3d 1159 (7th Cir. 1997); *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992) (refusing to dispose of fired employee's Rehabilitation Act claim on summary judgment; plaintiff's qualification for disability benefits did not mean he was not qualified to perform his job); *Johnson v. Oregon*, 141 F.3d 1361 (9th Cir. 1998); *Taylor v. Food World, Inc.*, 133 F.3d 1419 (11th Cir. 1998); *Talavera v. School Board,* 129 F.3d 1214, 1220 (11th Cir.

1998)("We agree with the majority of our sister circuits that a certification of total disability on an SSD benefits application is not inherently inconsistent with being a 'qualified individual with a disability' under the ADA."); *Whitbeck v. Vital Signs*, 116 F.3d 588, 591 (D.C. Cir. 1997) (application for benefits did not bar ADA claim where employer indicated unwillingness to accommodate); *Swanks* v. WMATA, 116 F.3d 582 (D.C. Cir. 1997). *See also D'Aprile v. Fleet Services Corp.*, 92 F.3d 1 (1st Cir. 1996) ("*August* stands for a much narrower proposition" that a plaintiff's ability to work, with reasonable accommodation if necessary, is an element of a disability discrimination claim."); *Anzalone v. Allstate Ins. Co.*, 1995 U.S. Dist. LEXIS 1272 (E.D. La. 1995), *aff'd*, 74 F.3d 1236, (5th Cir. 1995) (no summary judgment where plaintiff could perform job with accommodation).[9]

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[9] Numerous district courts have considered, and rejected, the argument that disability benefits applications provide overwhelming evidence of an ADA plaintiff's inability to work. *See, e.g., Sumner v. Michelin North America*, 966 F.Supp. 1567 (M.D. Ala. June 13, 1997) ("the simple fact that Sumner claimed he was disabled under the Social Security Act and permanently and totally disabled under Alabama's Worker's Compensation Act is not necessarily inconsistent with his claim for relief under the ADA") (granting summary judgment on other grounds); *Gilhuly v. Consolidated Rail Corp.*, 1997 U.S. Dist. LEXIS 13454, at *23 (E.D. Mich. 1997) (no judicial estoppel where employer failed to engage in interactive, reasonable accommodation process); *Kacher v. Houston Community College System*, 974 F. Supp. 615 (S.D. Tex. 1997) (receipt of insurance benefits during period of incapacity not inconsistent with subsequent ability to work); *Norris v. Allied-Sysco Food Services, Inc.*, 948 F. Supp. 1418 (N.D. Cal. 1996) (application for long-term disability insurance benefits not inconsistent with plaintiff's claim that she subsequently recovered and was qualified to return to work); *Pressman v. Brigham Medical Group, Inc.*, 919 F. Supp. 516 (D. Mass. 1996) (genuine issue of fact as to whether "total disability" for the purposes of disability insurance meant plaintiff was unable to perform the essential functions of medical practice); *Harrison v. Delaware*, No. 95-406-SLR, 1996 U.S. Dist LEXIS 20541 (D. Del. 1996) (plaintiff's claim not barred by application for disability pension filed after employer's failure to respond

The 10th Circuit repeatedly has rejected the doctrine of judicial estoppel altogether. *See, e.g., Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998); *Rascon v. U S West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998). Referencing its long-standing refusal to adopt the doctrine, the court in *Rascon* "join[ed] the majority of circuits [in holding] that statements made in connection with an application for social security disability benefits cannot be an automatic bar to a disability discrimination claim under the ADA." 143 F.3d at 1331.

The 10th Circuit *Rascon* and *Aldrich* decisions provide a reasonable and well-supported model for determining the weight courts should give to an individual's statements in an application for disability benefits when that individual asserts in an ADA employment discrimination claim that she is a "qualified individual with a disability." In rejecting the applicability of both the *per se* judicial estoppel rule of *McNemar v. The Disney Store,* 91 F.3d 610 (3rd Cir. 1996), *cert. denied* 117 S.Ct. 958 (1997), and the Fifth Circuit's use of a rebuttable presumption of judicial estoppel in this case, the 10th Circuit did not bar the introduction of such statements at trial, nor did it otherwise alter the burden on plaintiff in establishing her *prima facie* case as set forth in this Court's decision in *McDonnell Douglass Corp. V. Green*, 411 U.S. 792, 802 (1973). In *Aldrich*, the court explained why it found unpersuasive the defendants argument that Kenneth Aldrich should be estopped from pursuing his ADA claim due to his

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to accommodation request); *Mohamed v. Marriott Int'l, Inc.*, 944 F. Supp. 277, 280-84 (S.D.N.Y. 1996) ("uncritical application of judicial estoppel" fails to recognize significant differences in ADA's and Social Security Act's applicable legal standards, and the differences between ADA forum and procedures, and SSDI administrative determinations and policy goals); *Parish v. Consolidated Engineering Lab*, No. C96-4213 MMC, 1997 U.S. Dist. LEXIS 15879 (N.D. Cal. Oct. 6, 1997) (receipt of state disability benefits not inconsistent with claim of improved health while on leave) (summary judgment granted on other grounds).

testimony at a workers' compensation hearing that he could not perform his job with or without reasonable accommodation:

> Were we to adopt [defendant's] approach...we would "discourage the determination of cases on the basis of the true facts as they might be established ultimately." *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986)(quoting *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956)). The Federal Rules of Evidence well provide the means with which to confront plaintiff with such inconsistency. *See* Fed.R.Evid. 801(d)(2)(permitting introduction in evidence of prior admission by party-opponent). Thus Aldrich's testimony "may constitute evidence relevant to a determination of whether the plaintiff is a 'qualified individual with a disability,'" *Rascon* at 1332, but it is not dispositive.

146 F.3d at 1268-69.

The persistent confusion among some courts as to the appropriate consideration of disability benefits claims prompted the EEOC to issue Enforcement Guidance on benefits applications and the ADA.[10] In a comprehensive analysis of the differing purposes of the ADA and the SSA and other public and private disability benefits programs, the EEOC concluded that representations made in an application for disability benefits are *never* dispositive of whether a claimant is a "qualified individual with a disability" under the ADA. EEOC Enforcement Guidance at 26. Based on the

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[10] EEOC, *Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990 (ADA)*, ADA Compliance Manual Section 915.002 (Feb.12, 1997)(hereinafter "EEOC Enforcement Guidance").

distinct yet complementary purposes, standards and defining terms of the ADA and the SSA, the EEOC reasoned that application of judicial estoppel or summary judgment to dispose of an ADA claim based on a plaintiff's benefits claims experience is inappropriate. *See* EEOC Enforcement Guidance at 27-30.

Similarly, the Social Security Administration, which undoubtedly has a significant interest in preventing fraud in SSA disability benefits claims, made it clear in *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997), that it agreed with the EEOC that the receipt of Social Security disability benefits does not bar ADA claims. Remarkably, the Court of Appeals' *Cleveland* decision below, issued months after publication of the EEOC Enforcement Guidance and the *Swanks* decision, does not even acknowledge the existence of either the Guidance or the Social Security Administration's position taken in *Swanks*.

This Court's recent decision in *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998) provides clear guidance on the weight to be afforded relevant federal authorities in resolving conflicts as to the proper interpretation of the ADA. In *Bragdon*, this Court observed that "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Id.* at 2206, *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). The EEOC is the agency directed by Congress to issue regulations implementing Title I of the ADA, *see* 42 U.S.C. §12116, to render technical assistance explaining the responsibilities of covered individuals and institutions, *see* 42 U.S.C. §12206(a) and (c), and to enforce Title I in the courts, *see* 42 U.S.C. §12117(a). Accordingly, its views are entitled to deference. *Bragdon*, 118 S.Ct. at 2208.

The ADA's requirement of an "individualized assessment" of each plaintiff's ability to do the job in question, and its overarching purpose of providing a real

remedy to disability-based discrimination in employment, clearly militate against adoption of judicial estoppel based on "rebuttable presumptions" to foreclose the weighing of disputed facts which are central to ADA claims.

B. Social Security Disability Benefits Are Part of a Broad Social Welfare Program Whose Eligibility Standards and Determinations Differ From the ADA's.

Congress has enacted two programs designed to provide income to those whose impairments interfere with their ability to work: the Social Security Disability Insurance program ("SSDI")[11] and the Supplemental Security Income program ("SSI").[12] The aim of both programs is to provide a federally financed floor of income to those whose impairments prevent them from maintaining economic independence and self-support.[13]

There are important differences between the SSA and the ADA in the criteria used to determine coverage under each statute. The Social Security Administration considers whether an individual's overall functional capacity renders him or her unable to perform any jobs that exist "in

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[11] Codified at 42 U.S.C. §§413-415. SSDI, like earlier Social Security benefit programs, bases eligibility in part on an individual's work record. 42 U.S.C. §423(c).

[12] Codified at 42 U.S.C. §§1381-1383d. SSI is a needs-based program that considers income and resources, in addition to level of impairment, in determining eligibility.

[13] "Federal disability payments, even when supplemented by other forms of disability compensation, provide families of disabled persons with the basic means of getting by." *Richardson v. Belcher*, 404 U.S. 78, 91 (1971) (Marshall, J., dissenting); *see also* 42 U.S.C. §1381 (SSI program statement of purpose).

substantial numbers in the national economy."[14] The SSA considers the ordinary work requirements of entire classes of jobs, without allowing for individualized modifications that could accommodate the disability in question.[15]

In contrast, the ADA provides protection from discrimination in the terms or conditions of employment based on the individual's substantially limiting condition, a history of the same, or an employer's perception of an individual as disabled.[16] It also differs from the SSA in two additional, and critical, respects. First, when evaluating whether an individual suffered prohibited workplace discrimination, the ADA considers exclusively a *particular*

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[14] Determination of eligibility for Social Security disability benefits is generally based on a sequential, five-step process of evaluation, i.e., 1) whether the claimant is currently engaged in substantial gainful employment; 2) whether the claimant has a severe impairment; 3) whether the impairment is equivalent in severity to one included on the SSA's "Listing of Impairments," set forth in 20 C.F.R. Part 404, Subpart P, App. 1; 4) whether the claimant can perform past relevant work; and 5) whether the claimant is able to engage in other forms of employment which exist in significant numbers in the national economy. 42 U.S.C. §423 (d)(2)(A); 20 C.F.R. 404.1520 (b), .1520 (c), .1521, .1520 (d), .1525, .1526, .1520 (e), .1520 (f), .1520 (c). If the claimant's impairment is equivalent to one included in the Listing, SSA awards benefits without further inquiry, in steps 4 and 5, into the claimant's ability to work. *See Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987) and discussion at I.D., *infra*.

[15] *Compare* 20 C.F.R. § 404.1566 (defining "work which exists in the national economy") *with* 29 C.F.R. § 1630.2(o)(1)(ii) (defining reasonable accommodation to include modifications of jobs as they are customarily performed).

[16] 42 U.S.C. § 12102(2).

job,[17] its essential functions,[18] and an individual's demonstrated qualifications to perform them.[19] Second, if the individual's disability interferes with the ability to perform a job's essential functions in the manner they routinely are done, the ADA requires consideration of whether reasonable accommodations will facilitate performance of these functions.

C. The Presumption That an SSA Benefit Claimant Cannot Be a "Qualified Individual" Under the ADA Undermines Both Systems' Shared Goal of Encouraging the Employment of People with Disabilities Whenever Possible.

Even though the definitions, inquiries and requirements of the two statutes differ markedly, they share the common policy goal of encouraging people with

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[17] The ADA defines a "qualified individual with a disability" with reference to the "employment position such individual holds or desires." 42 U.S.C. § 12111(8).

[18] 42 U.S.C. § 12111(8). The employer's judgment as to what are the "essential functions" of a job are not dispositive, *id.*; a court's determination of the issue "should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." *Hall v. United States Postal Service*, 857 F.2d 1073 (6th Cir. 1988) (interpreting the term under the Rehabilitation Act §§ 501 and 503).

[19] Only in rare circumstances would capacity to do other jobs in the national economy be a relevant consideration under the ADA. Inquiry as to a plaintiff's ability to perform other jobs is generally limited to the geographic area to which he or she lives or works, and arises only when the plaintiff argues that working itself is the sole "major life activity" in which he or she is "substantially limited" by a disability. *See* 29 C.F.R. § 1630.2(j)(3).

disabilities to work whenever possible. Federal disability assistance, while recognizing that thousands of Americans require public support when disabilities prevent them from working, simultaneously incorporates a variety of rehabilitative and work-incentive programs. In fact, in the Social Security Administration's manual of instructions to staff completing and processing SSI and SSDI application forms, staff are required during their interview with each claimant to explain that "work activity will not necessarily stop or reduce benefits."[20] It is manifestly unfounded to suggest, as the *Cleveland* decision does, that plaintiffs such as Carolyn Cleveland who rely on the explicit guidance of federal agency personnel are perpetrating a fraud on the courts. For example, disability payments may continue where recipients participate in vocational rehabilitation programs which the Commissioner determines "will increase the likelihood that such individual may . . . be permanently removed from the disability benefit rolls." 42 U.S.C. § 425(b)(2). In publicizing the availability of its various work incentive options, the Social Security Administration warrants that "[e]nabling beneficiaries with disabilities to achieve a better and more independent lifestyle by helping them take advantage of employment opportunities is one of SSA's

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[20] Social Security Administration, Program Operations Manual System ("POMS") DI 10005.001 (K). The relevant section of the POMS states:

> Explain to claimants that work activity will not necessarily stop or reduce benefits. There are program rules which exist to encourage people to return to work by allowing them to keep all or part of their benefits for a reasonable time. Give the individual a copy of the leaflet, "Disability Benefits and Work" . . . Point out that some of these rules will, in effect, allow the program to cover some of the costs of returning to work . . .

Id.

highest priorities."[21] Inasmuch as the safety-net system of the SSA does not attach a permanent presumption of unemployability to its benefits recipients, it is patently inappropriate for the federal courts to do so.

The Social Security Act's numerous work incentive provisions include 1) the Trial Work Period, which allows beneficiaries to work for nine months while their benefits entitlement and payment levels remain unchanged; 2) the Extended Period of Eligibility, which provides individuals who return to work with benefits in any month in which earnings fall below a statutory level; 3) the Plans for Achieving Self Support, which exempts income and resources set aside for an approved work goal, such as education, from counting toward statutory minima for SSI eligibility; 4) the Impairment-Related Work Expenses provisions, which allow deductions against earnings for participants with impairment-related expenses which are necessary to return to work; and 5) the continuation of cash payments and Medicaid coverage to individuals who return to work whose earnings would otherwise remove them from coverage. Other provisions eliminate waiting periods for people who go off disability as a result of a work attempt but later find they need to re-enroll

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[21] Dep't of Health and Human Services, Social Security Administration RED BOOK ON WORK INCENTIVES, SSA Pub. No. 64-030 (1994). SSA's "Red Book" states further:

> The SSDI and SSI programs should not be viewed as exclusive and permanent sources of income to the person with disabilities. They should, in every case possible, be used as stepping stones to improving a person's economic condition.
>
> Work incentives are intended to give beneficiaries the support they need to move from benefit dependence to self-sufficiency.
>
> [W]ork incentives . . . are designed to help people with disabilities enter or reenter the workforce by protecting their entitlement to cash payments and/or Medicaid or Medicare protection, until they can support themselves.

Id. at 2, 3.

for benefits; and extend Medicare eligibility for people successfully returning to work.[22] Program beneficiaries utilize these programs widely: one study found that a *full twenty-two percent* of SSI recipients worked in some capacity after they applied for disability payments.[23] Contrary to the Court of Appeals' presumption, participating in the working world when feasible with maintaining one's determination of eligibility as "disabled" under the Social Security system. In fact, it is actively encouraged and rewarded by the Social Security Administration.

Placing rights under the ADA and the SSA in conflict has profound consequences for the larger public interest in employing those able to move from subsidy to work. If a worker or job applicant is accommodated in a job that constitutes "substantial gainful activity," he or she will become ineligible for benefits under SSA regulations. *See* 20 C.F.R. § 404.316. Thus, if applied as intended, the ADA can decrease the number of individuals receiving disability benefits.[24] More importantly, maintaining employment is

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[22] *See* L. Scott Muller, *Disability Beneficiaries Who Work and Their Experience Under Program Work Incentives*, 55 SOC. SEC. BULL. 2, 16-17 (Summer 1992); Donald E. Rigby, *Note, SSI Work Incentive Participants, September 1991*, 54 SOC. SEC. BULL. 22, 22-23 (Dec. 1991).

[23] Charles G. Scott, *Disabled SSI Recipients Who Work*, 55 SOC. SEC. BULL. 26, 34 (Spring 1992).

[24] Frank S. Ravitch, *Balancing Fundamental Disability Policies: The Relationship Between the Americans with Disabilities Act and Social Security Disability*, 1 GEO. J. ON FIGHTING POV. 240, 247-48 (1994). It has been estimated that work disability costs the economy approximately $111.6 billion annually in direct and indirect medical costs and lost wages alone. Centers for Disease Control and Prevention, *Prevalence of Work Disability -- United States, 1990*, 270 JAMA 1921 (Oct. 27, 1993). The express purposes of the ADA include elimination of "unnecessary expenses resulting from dependency and non-productivity. 42 U.S.C. §12101(a)(9). Senator Harkin predicted that "enactment of the ADA will

both important and possible for people with chronic diseases and episodic periods of debilitation. For those whose symptoms of their disability ebb and flow, an employer's provision of reasonable accommodations may be pivotal in enabling them to continue working after diagnosis.[25] In this case, Carolyn Cleveland's post-termination application for disability benefits, used by defendant to "prove" that Cleveland was not qualified for her job, was necessitated by a deterioration in her condition allegedly triggered by defendant's denial of accommodations and firing of her. *See* 120 F.3d at 514-515. In fact, a credible claim of changed circumstances, particularly when caused by the employer, is an independent reason not to preclude proof of changes in the ability to work in an ADA claim. *D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4 (1st Cir. 1996).

The Fifth Circuit appears to assume, however, that reasonable accommodations rarely make the difference between ability to work and inability to work -- that such circumstances are only "theoretically conceivable" and "limited and highly unusual." 120 F.3d at 517. On the contrary, Social Security Administration research shows that 42% of SSDI recipients who went to work while receiving

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save billions of dollars per year that are currently being expended on social welfare programs," 135 CONG. REC. S10713 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin), due to increased employment and reduced dependence on Social Security for financial support.

[25] Researchers have found that when such employees are able to control the pace and schedule of their work, one possible reasonable accommodation, they are less liable to be forced to leave employment due to the effects of their illness than those who cannot. Edward H. Yelin, *The Recent History and Immediate Future of Employment Among Persons with Disabilities*, 69 MILBANK Q. 129, 142 (1991).

benefits had some kind of accommodation.[26] The approach endorsed in *Cleveland* likely will discourage compliance with the reasonable accommodation and nondiscrimination mandates of the ADA, as employers recognize that many people with the financial and medical needs of a disability have to resort to Social Security in order to avoid the dire consequences of job loss on health and solvency.[27]

The Court of Appeals' decision directly undermines the goal of both systems to foster employment opportunity. It undercuts employers' responsibilities to help integrate and retain people with disabilities in the workplace and fosters dependence on government entitlements, despite the drafters' clear intention that people receiving disability benefits who wish to work are the very individuals who most need the protection and intervention of the law when seeking economic self-sufficiency. Congressional creation of vocational rehabilitation and work incentive programs for those with disabilities are rendered futile when discrimination persists in preventing gainful employment.[28]

D. Most SSA Benefits Awards Do Not Hinge on an Individual Assessment of An Applicant's

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[26] John C. Hennessey & L. Scott Muller, Work Efforts of Disabled-Worker Beneficiaries, 57 Social Security Bulletin 42 (1994). A copy will be lodged with the Clerk. *See also* Diller at 1046-47 and 1055-56.

[27] In 1995, over seven million of the forty-two million Americans with disabilities received either SSI or SSDI. *See Hearing on Growth in Social Security Programs Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. (1995).

[28] As this Court noted when commenting on the enactment of §504 of the Rehabilitation Act, "Congress recognized that vocational rehabilitation of the handicapped would be futile if those who were rehabilitated could not obtain jobs because of discrimination. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 633 n. 12 (1984).

Ability to do Past or Current Work.

An important aspect of the *Cleveland* court's apparent misapprehension of the SSA disability benefits award process is its failure to recognize the Social Security Administration's reliance on a "Listings of Impairments," 20 C.F.R. Pt. 404, Subpt. P, App. 1, to determine a claimant's ability to work without an individualized assessment of the extent to which a particular claimant's impairment actually limits the ability to work.

The ADA largely repudiated a system of presumptions; Congress instead adopted a functional analysis of ability to work that requires a fact-specific, case-by-case determination. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)-(l). Under SSA regulations, however, an individual who currently is not working or producing an average monthly wage of $500, and who has an impairment equal in severity to one included in the Listings, is deemed eligible for disability benefits without a further assessment of the individual's ability to work. 20 C.F.R. §404.1520(d) (1998).[29] The Social Security Administration relies on a catalogue of severe impairments which, when medically documented, *replaces* an assessment of the impairment's impact on an applicant's ability to work. Diller, *infra*, *Dissonant Disability Policies* at 1038.

The award of SSA disability benefits in such cases does not amount to a finding that the individual is unable to work. Rather, the award of benefits reflects the underlying policy that individuals whose impairments are sufficiently

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[29] The listings consist of medical criteria for certain disorders for each of the major body systems, identifying more than 150 categories of medical conditions that are sufficiently severe in SSA's view to ordinarily prevent a person from engaging in "substantial gainful activity." 20 C.F.R. §404.1525(d); *see also* EEOC Enforcement Guidance at 11, fn 41.

severe warrant an exemption from the societal obligation to maintain economic independence through "substantial gainful employment." While a court should consider approval of benefits powerful support for the first part of an ADA plaintiff's prima facie case — that the person is an individual with a disability — the benefits application or approval gives no indication of whether that individual is qualified to perform the essential job functions of a particular job with or without a reasonable accommodation. According to a 1993 Congressional publication, more than *half* of all SSA disability benefits awards are based on the Listings. *See* Committee on Ways and Means, 103rd Cong., Overview of Entitlement Programs: 1993 Green Book 57 (Comm. Print 1993). In most cases in which benefits are awarded, then, SSA has not considered the applicant's ability to work. *See* Diller, *infra*, Dissonant Disability Policies at 1039. This system of presumed disabling impairments, unlike the ADA, combines the medical criteria of certain long-term impairments with the presumption of an inability to work.

Consideration of some of those conditions which SSA includes in its Listing of Impairments helps to illustrate both those types of conditions which SSA deems sufficiently severe to relieve an affected individual of the obligation to work, and the compatibility between a finding of benefits eligibility and an ability to work with or without accommodations. For example, paraplegia (the loss of use of both hands or feet), blindness (e.g., central visual acuity of 20/200 or less with correcting lenses), severe hearing loss and loss of speech all are "listed" impairments which qualify one for presumptive eligibility for disability benefits under SSA regulations, *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §1.09, 2.02, 2.04, 2.08, 2.09, yet clearly individuals with one or more of these conditions might be a "qualified individual with a disability" with or without reasonable accommodations under the ADA. *See also* EEOC Enforcement Guidance at 11-12, fn 41. A person with chronic anemia requiring a blood

transfusion once every two months also is presumed eligible for Social Security disability benefits, *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §7.02; such a person, however, might secure accommodation of transfusion needs and fluctuating energy levels and consequently maintain employment. Mental retardation (determined in part by an IQ score of less than 59) also is included in the Listings, *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §9.09, yet a person with this degree of mental retardation is able to work in many cases.

Presumptive determinations under Social Security also include many people with AIDS. 20 C.F.R. Pt. 404, Subpt. P, App. 1. At the same time, a basic aspect of HIV-related disease remains its unpredictability, and the ability of a person with AIDS to work may fluctuate. After an opportunistic infection or other illness has passed, the same person whom Social Security defines as totally "disabled" under its presumptive criteria may once again be able to work, with or without reasonable accommodation.

Much like the impairment Carolyn Cleveland suffered, sensory or motor aphasia which interferes with effective communication following a central nervous system vascular accident, also qualifies for presumptive eligibility for benefits. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §11.04. Cerebral palsy and epilepsy also can satisfy the requirements of the Listings for presumptive eligibility. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§11.02, 11.07. All individuals with any of these conditions at the listed level of severity are presumed, under SSA, unable to maintain self-sufficiency and eligible for disability benefits; *none* are presumed unable to work under the ADA.

Because "disability" is a term of art which differs under the two statutes, a claim that an individual is disabled for the purposes of one statute cannot be determinative of whether that individual is also disabled for purposes of the

other.[30]

II. IMPOSING PRESUMPTIVE INELIGIBILITY FOR ADA PROTECTIONS ON THOSE WHO APPLY FOR DISABILITY BENEFITS CREATES BARRIERS TO FAIR ENFORCEMENT OF THE ADA THROUGH A DISTORTION OF THE PRINCIPLE OF ESTOPPEL AND THE STANDARD FOR SUMMARY JUDGMENT.

Traditionally, the doctrine of judicial estoppel has been confined to situations in which the same litigant takes opposing factual positions before the same tribunal, to prevent litigants from "playing fast and loose with the courts."[31] The Court of Appeals and the court decisions it parallels have significantly stretched the doctrine beyond its supportable boundaries.

Relying on an estoppel theory to preclude claimants

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[30] *See, e.g.*, *Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992)("[A] finding [of disability] is consistent with a claim that the disabled person is `qualified' to do his job under the Rehab Act. First, the SSA may award disability benefits on a finding that the claimant meets the criteria for a listed disability, without inquiring into his ability to find work in the national economy. . . . Second, even if the SSA had looked into Overton's ability to find work in the national economy, its inquiry would necessarily be generalized. The SSA may determine that a claimant is unlikely to find a job, but that does not mean that there is no work the claimant can do.").

[31] For example, the Third Circuit's *pre-McNemar* standard for judicial estoppel enunciated in *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953), requires contrary positions taken by the same litigant, in front of the same court and the same adversary from which she already obtained relief. Because the doctrine seeks to protect the integrity of the judicial system, *id.*, only statements made in front of adjudicative tribunals should be relevant.

from presenting supporting evidence to a jury on a central issue of fact -- their ability to perform, with reasonable accommodation, the essential functions of the job in question -- is especially inappropriate. The standard for a summary judgment motion, that there be "no genuine issue as to any material fact," Fed. R. Civ. P. 56(c), certainly is not met when plaintiff and defendant are in dispute over whether the plaintiff is otherwise qualified for the job, a question of fact which is central to the outcome of the proceedings. Statements which, at most, may appear to the Court to controvert the employee's current position are no different than the vast array of impeachment evidence presented at trial which the fact finder must weigh.

A fundamental principle of Fed. R. Civ. P. 56 is that the evidence, and inferences that may be drawn from it, must be construed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Fifth Circuit's rebuttable presumption of estoppel turns this principle on its head. It construes the inferences that may be drawn by the plaintiff's statements in support of disability benefits as fatal to her *prima facie* case, allowing plaintiff to overcome presumptive estoppel in only the rarest of cases. The rebuttable presumption that Carolyn Cleveland's statements related to her SSA claim estop her from making her ADA case also is at odds with the view expressed by other circuits, and this Court, that the larger goal of rooting out employment discrimination dictates caution in disposing of such cases at summary judgment. The reasoning of the D.C. Circuit in *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997) is instructive:

> Our review of grants of summary judgment on claims of employment discrimination involves two further considerations. First, because employment discrimination claims center on the issue of an employer's intent, and "writings directly supporting a

> claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers," an added measure of "rigor," or "caution," is appropriate in applying this standard to motions for summary judgment in employment discrimination cases. Courts reviewing such motions must bear in mind that a fact finder could infer intentional discrimination even in the absence of crystal-clear documentary evidence filed at the summary judgment stage. [citations omitted].

Id. at 879-880. The Ninth Circuit relied on similar reasoning when it reversed summary judgment for defendant in an age discrimination claim in *Schnidrig v. Columbia Mach.*, 80 F.3d 1406 (9th Cir. 1996). Noting it's high standard for the grant of summary judgment against plaintiffs in employment discrimination cases, the court explained that it requires "very little evidence" to survive summary judgment in such cases "because the ultimate question is one that can only be resolved through a 'searching inquiry' — one that is most appropriately conducted by the fact finder, upon a full record."[citations omitted] *Id*. at 1410. This Court also has recognized the overarching public policy reflected in federal antidiscrimination laws that should guide courts in summary dismissal of cases. In *McKennon v. Nashville Banner Publishing Co.* 513 U.S. 352 (1995), the trial court had dismissed an ADEA claim based on the employer's discovery, after the plaintiff's discharge, that the latter had committed misconduct sufficiently serious to provide an independent basis for her firing. In a unanimous opinion reversing the dismissal, Justice Kennedy stated:

> The ADEA, enacted in 1967 as part of an ongoing Congressional effort to end discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA

> is but part of a wider statutory scheme to protect employees in the workplace nationwide. *See* Title VII...; the Americans with Disabilities Act...; the National Labor Relations Act...; the Equal Pay Act...[citations omitted]
>
> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of ...practices which violate national policies is itself important...The efficacy of its enforcement mechanisms becomes one measure of the success of the Act.

Id. At 884-85.

Where the record, as here, contains evidence that the plaintiff has a disability and is capable of performing her job duties with reasonable accommodation, statements made to the Social Security Administration that she has a disabling condition which has precluded her employment do not support a motion for summary judgment.[32] To use a vague and contextually dependent statement that an individual is "totally disabled" or "unable to work" under a different scheme to grant summary judgment on an ADA claim divests the jury of a critical function, the weighing of evidence.

Utilization of judicial estoppel should reflect its original and limited objective -- the elimination of intentionally fraudulent behavior before judicial tribunals. Requiring that courts rely on an individualized factual determination of plaintiff's ability to satisfy the essential requirements of a particular job does not deprive the fact finder of the opportunity to consider the plaintiff's experience with disability benefits programs. *Amici*'s position here is not

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[32] *See Talavera v. School Board*, 129 F.3d 1214 (11th Cir. 1997); *Aldrich v. Boeing*, 146 F.3d 1265 (10th Cir. 1998).

that the application for or receipt of SSA disability benefits is irrelevant to a determination of a plaintiff's prima facie case; rather, it is *amici*'s position that a plaintiff's experience with disability benefits claims cannot be *dispositive* of the case.

Legal constructions such as the Fifth Circuit's "rebuttable" presumption that disability benefit claimants are estopped from challenging workplace discrimination have stunted any significant development of legal protection for people with disabilities. In a report released earlier this year, the American Bar Association's Commission on Mental and Physical Disability Law found that employers prevailed in 92% of the court rulings under the ADA where a final decision was reached. *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints,* Mental and Physical Disability Law Reporter at 407 (May-June 1998). As the ABA reports, "The facts strongly suggest . . . [that] employees are treated unfairly under the act due to myriad legal technicalities that more often than not prevent the issue of employment discrimination from ever being considered on the merits by an administrative or judicial tribunal." *Id.* This Court's reversal of the decision below is necessary to avert reformulation of the ADA as a theoretical tool, rather than an actual one, for redressing the systemic discrimination which qualified individuals continue to confront.

CONCLUSION

The decision of the Court of Appeals should be reversed and remanded, and the fact finder permitted to hear and weigh all of the evidence relevant to Cleveland's Title I claim.

Respectfully Submitted,

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APPENDIX

AIDS Policy Center for Children, Youth & Families is a non-profit organization founded in 1994 to help respond to the unique concerns of HIV positive and at-risk children, youth, women and families and their service providers. AIDS Policy Center conducts policy research, education and advocacy on a broad range of HIV/AIDS prevention, care and research issues. Organizational members include over 350 community-based agencies in 27 states, the District of Columbia and Puerto Rico. Individual members include young people, women and family members throughout the United States. Many of AIDS Policy Center's members provide or receive services funded by Title IV of the Ryan White CARE Act.

American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-two million members are employed. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has, since 1985, filed more than 150 *amicus* briefs before this Court and the Federal appellate and district courts.

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals who work with people with mental retardation and other developmental disabilities in both institutional and community settings. AAMR develops human resources and leadership, promotes high quality services and supports that enable full community inclusion and participation, encourages research and its dissemination and application, advocates for progressive public policies, and

influences public awareness and attitudes. The mission of the AAMR is to enhance the opportunities, human rights and choices of people with mental retardation and their families by exchanging information that advances the skills and knowledge of individuals in the field.

The American Medical Student Association ("AMSA") is an independent student-run organization of nearly 30,000 physicians-in-training members from 143 allopathic and 17 osteopathic medical schools across the country. Founded in 1950, AMSA is committed to improving health care and health care delivery to all people, promoting active improvement in medical education, involving its members in the social, moral and ethical obligations of the profession of medicine, assisting in the improvements and understanding of world health problems, contributing to the welfare of medical students, interns, residents and post MD/DO trainees, and advancing the profession of medicine. AMSA believes the burden of proof of judgment, reliability, capability, or entitlement to a position for individuals with a disability should not be greater than or different from that placed on other persons.

The American Network of Community Options and Resources ("ANCOR") is the national organization representing 650 private providers of supports and services to more than 150,000 people with mental retardation and other disabilities in assisting them to live, work, and recreate in the community. Many of the individuals to whom ANCOR members provide supports depend upon Supplemental Security Income and Social Security Disability Income as their sole source of income in order to ensure appropriate housing, health coverage, and other needed supports. Although there are increasing opportunities for more people with disabilities to obtain some level of employment, their disability is not eliminated by part-time or full-time

employment.

The American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health. APHA supports the goal of equalization of opportunities for mentally and physically disabled persons in every facet of life.

The Arc of the United States, a national organization on mental retardation, is an open membership organization made up of people with mental retardation and their families, friends, interested citizens, and professionals in the disability field. With 140,000 members in 1,100 state and local chapters nationwide, The Arc is the largest voluntary organization devoted solely to working on behalf of the estimated seven million people with mental retardation in the United States and their families. The Arc has been intensely involved in pursuing federal legislation which supports the rights of people with mental retardation, including enactment of the ADA and eligibility for Social Security Disability benefits.

The Association of Nurses in AIDS Care is a nonprofit professional nursing organization committed to fostering the individual and collective professional development involved in the delivery of health care to persons infected or affected by HIV and to promoting the health, welfare, and rights of all HIV infected persons.

The Association for Persons in Supported Employment ("APSE") is a rapidly growing national organization formed to improve and expand integrated employment services and outcomes through supported

employment (SE) for persons experiencing disabilities. APSE members are SE professionals, consumers, family members, employers, rehabilitation counselors, advocates, and state and federal agency officials. The outcome of the Cleveland brief will have a dramatic impact on the lives of each of these individuals, most especially those who are supported employees.

The Brain Injury Association, Inc. ("BIA") is the only national non-profit organization dedicated to improving the quality of life of persons with brain injury, as well as promoting research, education and prevention of brain injuries. BIA has 42 state associations and serves persons with brain injury, their families and care givers in all 50 states and territories. BIA represents and advocates with and on behalf of the estimated 2.5 to 6.5 million persons with moderate to severe brain injuries in the United States. Many persons with brain injury are recipients of Social Security Disability Insurance ("SSDI") and/or Supplemental Security Income ("SSI"). As a result of changes in rehabilitation programs, an increasing number of persons with brain injury are gainfully employed. Part of BIA's mission is to assure that all persons with brain injury are afforded the protections of the Americans with Disabilities Act. The disposition of this case will affect the ability of persons with brain injury to have access to and security in employment without losing their entitlement to SSDI and/or SSI.

The Center for Independence of the Disabled in New York ("CIDNY") is one of the network of federally-authorized independent living centers. *See*, 29 U.S.C. §796 *et seq*. Founded in 1979, CIDNY is the oldest such center in New York State. It is organized as a not-for-profit corporation. CIDNY's core mission is to empower people with disabilities to function as independently and effectively as possible. It assists people with disabilities to acquire

independent living skills and to obtain the services they need to live independently in the community. Its missions include "system advocacy," 29 U.S.C. §796. Many of CIDNY's staff and board of directors are people with significant disabilities.

The Center for Women Policy Studies ("CWPS") is a national non-profit, multiethnic and multicultural feminist policy research and advocacy institution founded in 1972. In 1987 the Center founded the National Resource Center on Women and AIDS Policy and has been a leader in addressing critical AIDS policy issues from women's diverse perspectives. The Resource Center has produced more than 30 research, advocacy and policy reports since its inception, including an analysis of the Social Security Administration rules for determining eligibility for HIV-related disability in women. CWPS's Metro DC Collaborative for Women with HIV/AIDS project works directly with low income women living with HIV who will be directly impacted by the ruling in this case.

The Center on Disability and Health is a not-for-profit, Washington, D.C. based research, education and advocacy organization founded in 1994 with a national board of directors representing different sectors of the disability community. A strategic mission of the Center has been using the protected status of persons with disabilities under the Americans with Disabilities Act to challenge discrimination in health care delivery where persons with disabilities are denied an equal opportunity to benefit from covered services. The center supports the amicus brief in *Cleveland v. Policy Management Systems* in order to protect the right of persons with disabilities to challenge discrimination in the workplace when reasonable accommodations are not provided even though they later qualify for Social Security disability benefits.

The Coalition for the Homeless ("Coalition") was founded in 1980 on the principle that decent shelter, sufficient food and affordable housing are fundamental rights in a civilized society. The Coalition educates, advocates for and provides direct services to homeless persons. The Coalition's Scattered Site Housing Program provides apartments, personal support, medical assistance, and vital services to homeless people living with HIV and AIDS.

The Coalition on Human Needs ("Coalition"), founded in 1981, is an alliance of over 170 national organizations working together to promote public policies which address the needs of lower income and other vulnerable populations. The Coalition's members include civil rights, religious, labor, and professional organizations and those concerned with the well-being of children, women, the elderly and people with disabilities. The Coalition also works with grassroots groups across the country that share an interest in the human needs agenda.

The Commission on Rehabilitation Counselor Certification is the national credentialing organization that sets certification standards for Certified Rehabilitation Counselors ("CRCs"). CRCs provide services to individuals with disabilities to facilitate their independence, integration and inclusion in employment and the community.

The Committee For Children is a national advocacy group with an interest in all aspects of child protection, health, education, and fighting the exploitation of children.

Disability Rights Education and Defense Fund, Inc., ("DREDF") is a national disability civil rights law and policy organization dedicated to securing equal citizenship for Americans with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy

and law reform efforts. Nationally recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF has consistently worked to promote the full integration of citizens with disabilities into the American mainstream, and to ensure that the civil rights of persons with disabilities are protected and advanced.

Disabled in Action of Metropolitan New York, Inc., ("DIA") is a not-for-profit membership organization founded in 1970. Its approximately 400 members are primarily people with disabilities who live or work in New York City. They have a wide range of disabilities. DIA is dedicated to improving the legal, social and economic conditions of people with disabilities, so that they may achieve full integration into society. It works to ensure that people with disabilities receive equal access to employment, health care, public entitlements, education, housing, public accommodations, transportation and other services. It publishes a newsletter and engages in advocacy on a broad range of disability rights issues. It worked to secure passage of §504 of the Rehabilitation Act of 1973, the disability rights provisions of the New York State Human Rights Law, and the Americans with Disabilities Act.

The Employment Law Center (ELC) is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The Center's interest in the legal rights of those with disabilities is longstanding. The ELC has and is representing clients faced with discrimination on the basis of their disabilities, including clients with claims brought under Title II of the Americans with Disabilities Act. The Center has

also filed *amicus* briefs in cases of importance to disabled persons.

The Epilepsy Foundation ("EF") is the sole national, charitable voluntary health organization dedicated to promoting optimal quality of life and independence for the more than two million Americans with a seizure disorder. The Foundation and its network of affiliates work to accomplish this mission through education, research, advocacy and the provision of services. EF has had a long-standing commitment to ensuring that people with epilepsy or seizures are given the opportunity to do so, and conducts both national and state employment programs in order to reach its goal. As part of its commitment to the fullest participation in life and employment possible for people with epilepsy, the Foundation also had put considerable energy into the passage and implementation of laws such as the Americans with Disabilities Act.

The Friends Committee on National Legislation ("FCNL"), since its creation in 1943, has endeavored to bring Quaker values to bear on national policy. Through Congressional testimony, Capitol Hill visits, educational activities, publications, and grassroots lobbying, FCNL works for social and economic justice, peace, and good government. FCNL supports vigorous enforcement of the Americans with Disabilities Act ("ADA") and advocates providing income support to families and individuals, including those who are disabled and those who are unable to meet their basic needs through employment.

The Gay and Lesbian Medical Association ("GLMA") is an organization of lesbian, gay, bisexual and transgendered physicians, medical students, and their supporters. GLMA works to maximize the quality of health and health services for lesbian, gay, bisexual and transgendered people, to

promote full civil rights, and to foster a professional climate in which our diverse members can achieve their full potential. We strive to achieve our goals by: educating health care professionals about our unique health care needs; helping to develop equitable health care policy; promoting relevant research in health; and supporting our members who are challenged by discrimination on the basis of sexual orientation.

The HIV Law Project ("Law Project"), founded in 1989, is a not-for-profit organization which provides legal representation and advocacy to low-income, HIV-positive individuals residing in Manhattan and the Bronx, or who are homeless. During its nine years of operation, the HIV Law Project has directly assisted close to 10,000 HIV-positive individuals, including thousands of low-income, HIV-positive women. We offer free, quality legal assistance and advocacy, primarily in the areas of family law, entitlements, immigration, and housing. In 1997, the Law Project has played a significant role in the development and improvement of local, state, and national public policies affecting HIV-positive women. Through its efforts to ensure that the needs of HIV-positive women and other underserved HIV-positive persons are considered by policy makers, the Law Project has assisted tens and thousands of HIV-positive individuals across the country.

Housing Works is a minority-controlled, community based, nonprofit agency providing housing, health care, advocacy, job training, and vital supportive services to homeless New Yorkers living with HIV and AIDS. Their mission is to reach the most vulnerable and underserved among those affected by the AIDS epidemic: people who, in addition to struggling with homelessness and AIDS, are also burdened with histories of chronic mental illness and chemical dependence. Housing Works has designed a

comprehensive range of services designed to meet the complex, multiple needs of our clients; services intended specifically to help them gain stability, security, and independence so that they can live longer, healthier lives with hope and dignity.

International Association of Psychosocial Rehabilitation ("IAPR") was formed in 1975 to bring together programs and agencies, mental health practitioners, policy makers, families and consumers to strengthen and improve the quality of community based psychosocial rehabilitation services throughout the world. IAPR fosters public policy discussions on mental health, provides education and training for practitioners, families, and consumers, and publishes the Psychiatric Rehabilitation Journal as a forum for research and critical thought.

Justice For All ("JFA") is a not-for-profit entity created in 1994. JFA serves as an advocate for the disability community and is dedicated to protecting, implementing, and strengthening the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and all existing programs and policies that empower people with disabilities. The JFA works in cooperation with other organizations to facilitate the coordination of advocacy and the exchange of information among all national, state and local disability groups.

Lambda Legal Defense and Education Fund, Inc. (Lambda) is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns. In 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or

amicus curiae in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities, including, in part, *Bragdon v. Abbott,* 107 F.3d 934, *cert. granted* 118 S.Ct. 554 (1997); *Doe & Smith v. Mutual of Omaha Insurance* Company, 1998 WL 166856 (N.D. Ill. April 3, 1998); *School Bd. for Nassau Cty. v. Arline*, 107 S. Ct. 1123 (1987); Chalk *v. U.S. District Court* 814 F.2d 701 (9th Cir. 1988); *McGann v. H&H Music Co.,* 946 F.2d 401 (5th Cir. 1991); and *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (1996). Lambda is particularly familiar with the unique barriers confronting persons with HIV, AIDS and other disabilities who attempt to secure equal employment opportunities.

The Legal Action Center is a nonprofit law and policy organization specializing in AIDS, alcohol and drug issues. The Center's attorneys, who helped draft the ADA protections at stake in Cleveland v. Policy Management Systems, represent individuals with alcoholism, drug dependence and HIV disease and the programs that serve them to resolve discriminatory practices in employment, health care, housing, and zoning.

LLEGÓ, The National Latina/o Lesbian, Gay, Bisexual & Transgender Organization, is committed to organizing and strengthening the Latina/o Lesbian, Gay, Bisexual and Transgender communities at a local, national and international levels by facilitating access to cultural, political and community development resources. One of LLEGÓs goals is to bring to the attention of the local, state and federal governments the glaring disparities in health care and health education between non-minority Americans and Latina/o Americans, and thus, obtain proportionate funding levels.

The Mental Disability Law Clinic of Touro College,

Jacob D. Fuchsberg Law Center, is a legal services Protection and Advocacy office established under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §10805(a)(1)(B), to ensure the protection of the legal rights of individuals labeled mentally ill. It receives federal funding through a contract with the New York State Commission on Quality of Care for the Mentally Disabled.

The National AIDS Fund ("Fund") is the leading business and pioneering philanthropic response to the HIV/AIDS epidemic. Based in Washington, D.C., the Fund represents more than 1,500 companies, foundations, community groups and citizens whose contributions have generated more than $70 million over the past decade to combat the AIDS epidemic in communities across the country. The Fund is marking its 10th anniversary in 1998. The Fund provides national grants to 32 "Community Partners" in 25 states. Partners match the grants with their own fundraising and make grants to community organizations that provide prevention, education, care and services. In 1997, the Fund and its Partners awarded grants totaling over $10 million to more than 450 community groups. The Fund is also a strategic resource for key information and services on HIV/AIDS, and a pioneer in stimulating positive, practical responses from business and labor, both domestically and globally.

The National Association of People with AIDS ("NAPWA"), founded in 1983, advocates on behalf of all people living with HIV and AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is a membership organization for the nationwide system of protection and advocacy ("P&A") agencies. P&As are

mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq*., the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. 10801 *et seq*., and the Protection and Advocacy for Individual Rights Program, 29 U.S.C. 794e, to provide legal representation and related advocacy services on behalf of all persons with disabilities. In fiscal year 1996, P&As served over 1,000,000 people with disabilities through a variety of mechanisms: individual case representation, systemic advocacy, information and referral and education efforts. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance and represents their interests before the Executive and Legislative Branches of government.

The National Association of Orthopedic Nurses ("NAON") has 8,000 members in the United States. NAON's members treat individuals suffering from musculoskeletal illnesses, including arthritis. Arthritis is the leading cause of disability in the United States.

The National Council for Community Behavioral Health care ("NCCBH") is the nation's oldest and largest trade association representing direct care providers, state associations, county authorities, integrated delivery systems, and associations. Founded in 1970, NCCBH is dedicated to the pursuit of accessible, effective, and cost-effective behavioral health care services for all Americans.

The National Council of Jewish Women ("NCJW"), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1983, the NCJW has 90,000 members in over 500 communities

nationwide. Given NCJW's historical commitment to civil rights issues and active involvement in passage of the Americans with Disabilities Act, we join this brief.

The National Health Law Program ("NHeLP") is a national public Interest firm that seeks to improve health care for America's working and unemployed poor, minorities, elderly and people with disabilities. NHeLP serves legal services programs, protection and advocacy offices, community-based organizations, the private bar, providers, and individuals who work to maintain a health care safety net for the millions of uninsured or underinsured low income people. NHeLP monitors Medicare, Medicaid and other publicly-funded health care programs, seeks remedies when laws and policies are ignored, and helps Americans receive needed medical care.

The National Minority AIDS Council ("NMAC"), established in 1987 is the premier national organization dedicated to developing leadership within communities of color to address the challenge of HIV/AIDS. MAC's Public Policy Division works to promote sound national HIV/AIDS health and social policies which are responsive to the needs of the diverse communities of color impacted by HIV/AIDS and to increase the participation of people of color in policy-making bodies.

The National Native American AIDS Prevention Center's ("NNAAPC") mission is to prevent the spread of HIV and related diseases in American Indian, Alaska Native, and Native Hawaiian communities, and to improve the quality of life of those in our communities infected and affected by HIV. NNAAPC provides technical assistance, training, case management services, research and policy advocacy to and for Native Americans throughout the United States.

The National Partnership for Women & Families (National Partnership) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and The Pregnancy Discrimination Act.

The National Senior Citizens Law Center ("NSCLC") advocates nationwide to promote the independence and well-being of low-income elderly individuals, as well as persons with disabilities, with particular emphasis on women and racial and ethnic minorities. Much of NSCLC's work focuses on federal benefit programs, including Social Security and Supplemental Security Income. To achieve its goals, NSCLC engages in various advocacy efforts, including litigation, policy analysis, and administrative and legislative advocacy. Established in 1972, NSCLC maintains offices in Washington, DC, and Los Angeles, CA.

NETWORK, a national Catholic social justice lobby, works for federal legislation that favors the poor and powerless and promotes world peace and global justice. NETWORK lobbies and organizes for socially just legislation including securing just access to economic resources, reordering federal budget priorities, and obtaining global economic justice. NETWORK educates on NETWORK's legislative issues and the political process for structural changes.

New York Lawyers for the Public Interest, Inc.,

("NYLPI") is a non-profit public interest law office founded in 1977 which practices disability, health and environmental justice law. Under contracts with the New York State Commission on Quality of Care for the Mentally Disabled, it operates four federally-authorized Protection and Advocacy programs in New York City, and serves people with all types of disabilities in a wide variety of issues. *See* 29 U.S.C. §732; 42 U.S.C. §§6041 *et seq.*; 42 U.S.C. §§10801 *et seq*; and 29 U.S.C. §794e. NYLPI handles a broad array of matters involving the Americans with Disabilities Act and similar laws.

NISH (formerly National Industries for the Severely Handicapped) maximizes employment opportunities for people with severe disabilities through providing professional and technical assistance to not-for-profit community rehabilitation programs (CRPs) to encourage and assist their participation in the Javits-Wagner-O'Day (JWOD) Program and other employment or training activities as appropriate. NISH is the central nonprofit agency designated by the Committee for Purchase from People who are Blind or Severely Disabled to provide assistance to CRPs interested in obtaining federal contracts under the JWOD Program. It is one of NISH's goals to expand employment, personal advancement and placement of people with disabilities by maximizing opportunities created by the JWOD program while taking advantage of other employment opportunities. The civil rights of people with severe disabilities are of utmost priority to NISH primarily for the protection of employment rights. However, NISH also supports the protection of civil rights for people with disabilities in all areas to promote independent living and greatest opportunities for an integrated life with the rest of society.

Parents, Families and Friends of Lesbians and Gays ("PFLAG") was created in 1972 to promote the health and

well-being of gay, lesbian, bisexual and transgendered persons, their families and friends through support, to cope with an adverse society; education, to enlighten an ill-informed society; and advocacy, to end discrimination and to secure equal civil rights. PFLAG also provides opportunity for dialogue about sexual orientation and gender identity, and acts to create a society that is healthy and respectful of human diversity. Today, PFLAG's membership includes more than 70,000 households in 400-plus communities in the U.S. and Puerto Rico and in 11 other countries.

RESNA is the Rehabilitation Engineering and Assistive Technology Society of North America. RESNA is an interdisciplinary association whose purpose is to improve the potential of people with disabilities to achieve their goals through the use of technology. The association serves that purpose by promoting research, development, education, advocacy and the provision of technology and by supporting the people engaged in these activities. RESNA's members are dedicated to promoting the exchange of ideas and information for the advancement of assistive technology. RESNA seeks to participate as amicus curiae in this case because it believes that the Plaintiff's rights to seek remedies under the ADA, including reasonable accommodations which may include technologies, should not be impinged because she received or applied for Social Security Disability Insurance.

Founded in 1983, the San Francisco AIDS Foundation is a non-profit community based AIDS service organization that has been at the forefront of the battle against HIV disease for fifteen years. The San Francisco AIDS Foundation is the largest community-based service organization in Northern California providing an array of direct services to people living with HIV/AIDS and at risk of HIV infection.

The Title II Community AIDS National Network, Inc. ("T-II CANN") is incorporated as a not-for-profit corporation and represents the interests of service providers and their clients who receive services funded under Title II of the Ryan White CARE Act. T-II CANN provides technical assistance, information, communications, publications and advocacy training in issues ranging from the AIDS Drug Assistance Program, Medicaid, Medicare, AIDS related health insurance, and benefits. T-II CANN supports finding a cure for HIV/AIDS and ensuring that access to that cure is available for all people living with HIV/AIDS. Until a cure is discovered, T-II CANN will advocate for effective treatments for HIV/AIDS and universal access to those treatments for all people living with HIV/AIDS.

The Union of American Hebrew Congregations ("UAHC") is the synagogue arm of the Reform Jewish movement, representing some 850 congregations and 1.5 million members nationwide. For over a century, the UAHC has fought passionately for religious liberty and tolerance for all Americans, believing these to be among the greatest gifts America has bestowed upon its citizens of the world. The UAHC played an active role in securing the passage of the ADA.

The YWCA of the U.S.A. is the oldest national women's membership organization in the nation. Its mission is to empower women and to eliminate racism. Founded in 1958, it currently serves over two million women and girls and their families through 340 YWCAs operating in 4,000 locations in all 50 states. Strengthened by diversity, the Association draws together members who strive to create opportunities for women's growth, leadership and power in order to attain a common vision: peace, justice, freedom and dignity for all people. YWCA supports the position taken in this amicus curiae brief because of (1) their commitment to

confronting racism and bias at all levels in society and (2) a public policy priority adopted at the YWCA's 1998 convention: health care policies that promote wellness and provide access to quality affordable health care for all women and girls.