Billy Williams
1419 Creekview Drive
Lewisville, Texas

April 14, 2016

The Honorable Ted Cruz
The United States Senate
404 Russell
Washington, DC 20510

Dear Senator Cruz:

Re: Introduction of legislation to amend the Americans with Disabilities Act to resolve a conflict of interpretation of 42 U.S.C. § 12201(b) by the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Fifth Circuit

There is a conflict of interpretation of 42 U.S.C. 42 § 12201(b) by the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Fifth Circuit and this conflict should be resolved by amending the Americans with Disabilities Act (ADA) to concur with the interpretation of 42 U.S.C. § 12201(b) by the U.S. Court of Appeals for the Second Circuit in *Staron v. McDonald's Corp.*, 51 F.3d 353 (2nd Cir. 1994).

PURPOSE OF THE AMERICANS WITH DISABILITIES ACT

Congress stated the purpose of the Americans with Disabilities Act when Congress enacted 42 U.S.C. § 12101(b) Purpose, which states:

> It is the purpose of this chapter (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

And, in the following cited cases, the U.S. Supreme Court held that:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous this first cannon is also the last.[1]
>
> In order for an agency interpretation to be granted, it must be consistent with the Congressional purpose.[2]
>
> "We cannot interpret federal statutes to negate their own stated purposes."[3]
>
> But it is a commonplace of statutory construction that the specific governs the general.[4]
>
> Our duty, after all, is "to construe statutes, not isolated provisions."[5]
>
> We have held that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[6]
>
> Anyway, we "must do our best, bearing in mind the fundamental rule of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[7]
>
> In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—"to say what the law is." That is easier in some cases than others. <u>But in every case we must respect</u>

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[1] *Connecticut National Bank v. Germain,* 503 U.S. 249, 253-254 (1992).
[2] *Morton v. Ruiz,* 415 U.S. 199, 237 (1974).
[3] *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 419-420 (1973).
[4] *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992).
[5] *Graham County Soil & Water Conservation District v. United States ex rel. Wilson,* 559 U.S. 280, 290 (2010) (internal quotation marks omitted).
[6] *Whitman v. American Trucking Association Inc.,* 531 U.S. 457, 468 (2001).
[7] *Utility Air Group v. E.P.A.,* 523 U.S. __ (2014) (slip op. at 15) (internal quotation marks omitted).

> the role of the Legislature, and take care not to undo what it has done. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.[8] (emphasis added).

Therefore, it is well-settled that 42 U.S.C. § 12101(b) Purpose, which states: "It is the purpose of this chapter (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" cannot be negated by 42 U.S.C. § 12201(b).

Furthermore, in *Bragdon v. Abbott*,[9] the U.S. Supreme Court, in interpreting the ADA, held that:

> When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.[10]

And, the amendments to the ADA, enacted by Congress in 2008, left the language of 42 U.S.C. § 12201(b) without change. Therefore, the Department of Justice regulations which state that § 12201(b) "merely clarifies that the Act does not require public accommodations to accommodate smokers by permitting them to smoke" leaves no doubt that smoking policies and smoking bans are subject to the same burdens of proof as all other requested modifications.[11]

TEXT OF 42 U.S.C. § 12201(b)

The text of 42 U.S.C. § 12201(b) states:

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[8] *King v. Burwell,* 576 U.S. __(2015) (slip op. at 21).
[9] 524 U.S. 666 (1988).
[10] 524 U.S. 645.
[11] See notes 12, 13, and 14, 28 C.F.R. § 35.132 and 28 C.F.R. § 36.210.

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision … that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

INTERPRETATION OF 42 U.S.C. § 12201(b) BY THE SECOND CIRCUIT

In *Staron v. McDonald's Corp.* the U.S. Court of Appeals for the Second Circuit held that:

> It is plain to us that Congress did not intend to isolate the effects of smoking from the protections of the ADA. The first sentence of §501(b) simply indicates that Congress, states, and municipalities remain free to offer greater protection than the ADA provides. The passage does not state, and it does not follow, that violations of the ADA should go unredressed because a state has chosen to provide some degree of protection to those with disabilities.[12]
>
> As to the second sentence of § 501(b), the Department of Justice regulations state that it "merely clarifies that the Act does not require public accommodations to accommodate smokers by permitting them to smoke. 28 C.F.R. Pt. 36, App. B, 56 Fed.Reg. 35544, 35562."[13]

The *Staron* court reversed and remanded the case to the district court to allow the plaintiffs' the opportunity to prove that their requested modification, a smoking ban, was a reasonable modification.[14]

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[12] 51 F.3d 357.
[13] 51 F.3d 357.
[14] *See, e.g. Johnson v. Gambrinus Company/Spoetzl Brewery,* 116 F.3d 1052, 1059 (5th Cir. 1997).

DEFERENCE TO AGENCY REGULATIONS

In reviewing federal regulations, the U.S. Supreme Court has held that:

> "In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"[15]
>
> We must give substantial deference to an agency's interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"[16] (citations omitted).

Therefore, the Department of Justice's interpretation of its own regulations is of controlling weight rather than the interpretation of 42 U.S.C. § 12201(b) that the Department presented to the U.S. District Court for the Northern District of Texas in *Williams v. Holder.*[17]

DEPARTMENT OF JUSTICE INTERPRETION OF ITS ADA REGULATIONS

1991 Section-by-Section Analysis

28 C.F.R. § 35.104 Definitions
28 C.F.R. § 36.104 Definitions

> Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are

[15] United States v. Larionoff, 431 U.S. 864, 872 (1977).
[16] *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (1992).
[17] Case 3:13-cv-02179-O-BH (2014), Document 8, Defendants Motion to Dismiss.

> disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarding as such an effect).
>
> Sometimes respiratory or neurological functioning is so severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all the protections afforded by the Act and this part. (emphasis added).

28 C.F.R. § 35.132 Smoking

> Section 35.132 restates the clarification in section 501(b) of the Act [42 U.S.C. § 12201(b)] that the Act does not preclude the prohibition of, or imposition of restrictions on smoking in transportation covered by title II. . . . The reference to smoking in section 501, however, merely clarifies that the Act does not require public entities to accommodate smokers by permitting them to smoke in transportation facilities.

28 C.F.R. § 36.210

> Section 36.210 restates the clarification in section 501(b) of the Act [42 U.S.C. § 12201(b)] that the Act does not preclude the prohibition of, or imposition of restrictions on smoking. . . . The reference to smoking in section 501, however, merely clarifies that the Act does not require public accommodations to accommodate smokers by permitting them to smoke in places of public accommodation.

INTERPRETATION OF 42 U.S.C. § 12201(b) BY THE DEPARTMENT OF JUSTICE IN THE U.S. DISTRICT COURT FOR THE NORTHEN DISTRICT OF TEXAS IN *WILLIAMS v. HOLDER*

In *Williams v. Holder*,[18] the Department of Justice interpreted 42 U.S.C. § 12201(b) for the U.S. District Court for the Northern District of Texas, stating:

> With respect to disabled persons affected by smoking, the ADA provides:
>
> > Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II of this chapter, or in places of public accommodation covered by subchapter III of this chapter. 42 U.S.C. § 12201(b).

The Department of Justice interpreted the language of 42 U.S.C. § 12201(b), stating:

> This language makes clear that while covered entities are permitted to prohibit smoking in their facilities, they are not required to do so. Instead, it may be a reasonable modification to merely place certain restrictions on smoking. A reasonable modification of policy on behalf of an individual with a disability such as asthma or other condition that affects his or her respiratory functioning may include restrictions on smoking in a covered facility. But a ban on smoking is not the only possible modification, and each covered facility is entitled to explore the available alternatives to identify a modification that is reasonable. The ADA requires evaluation of requests for modifications on a case-by-case basis. It does not, however, authorize the Federal government to ban or prohibit smoking—across the board—in all facilities covered by the ADA. (emphasis added).

The under-lined text above leaves no doubt that the Department of Justice has interpreted 42 U.S.C. § 12201(b) as excepting smoking policies and smoking ban modifications from the burdens of proof required of all other policies and

[18] Case 3:13-cv-02179-O-BH (2014), Document 8, Defendants Motion to Dismiss.

reasonable modifications. This interpretation is inconsistent with the Department's own interpretation of its regulations, its own interpretation of the burdens of proof in its *amicus curiae* brief in *Martin v. PGA Tour, Inc*[19]. and inconsistent with the decision of the U.S. Supreme Court in *PGA Tour, Inc. v. Martin.*[20]

BURDENS OF PROOF UNDER TITLE II AND III OF THE ADA

In *Johnson v. Gambrinus Company/Spoetzl Brewery*,[21] the U.S. Court of Appeals for the Fifth Circuit defined the burdens of proof under Title III of the ADA, stating:

> The plaintiff has the burden of proof that a modification was requested and that the requested modification is reasonable. The plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, reasonable in the run of cases. . . . If the plaintiff meets this burden, the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation.[22]

And, in its *Amicus Curiae* Brief to the U.S. Court of Appeals for the Ninth Circuit, in *Martin v. PGA Tour, Inc.*,[23] the Department of Justice cited *Johnson v. Gambrinus Company/Spoetzl Brewery*, stating:

> Thus, under Title III the PGA must make the requested modification unless it meets its burden of establishing that the requested modification would fundamentally alter the nature of its program. See, e.g., Johnson v. Gambrinus Company/Spoetzl Brewery, 116 F.3d 1052, 1059-1060 (5th Cir. 1997) (defendant has the burden of

[19] https//www.justice.gov/sites/default/files/crt/legacy/2010/12/14/martinp.pdf
[20] 532 U.S. 661, 688 (2001).
[21] 116 F.3d 1052 (5th Cir. 1997).
[22] 116 F.3d 1059.
[23] Case No. 98-35309, August 18, 1998.

> showing that requested modification would result in fundamental alteration).[24]

Moreover, in *PGA Tour, Inc. v. Martin,*[25] U.S. Supreme Court held that:

> As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, 42 U.S.C. § 12101(b)(1), and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered, § 12182(b)(A)(ii). To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time and not work a fundamental alteration.[26] (emphasis added).

Therefore, it is extremely clear that smoking policies and smoking bans are subject to the same burdens of proof as all other requested modifications. And, that a public entity or public accommodation must make the requested smoking ban modification unless it can show that the requested smoking ban would be a fundamental alteration.

THE DISTRICT COURT'S INTERPRETATION OF 42 U.S.C. § 12201(b)

In *Williams v. Holder*, the District held that:

> Plaintiff also objects to the Magistrate Judge's interpretation of the construction provision of the ADA, 42 U.S.C. § 12201(b). The Court's deference, in which the Supreme Court instructed courts to defer to agency interpretation, is guided by *Chevron*

[24] *See* note 19.
[25] 532 U.S. 661 (2001).
[26] 532 U.S 688.

> deference, in which the Supreme Court instructed courts to defer to agency interpretation of such statutes unless they are unreasonable. *Chevron v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 844-45 (1984). Section 12201(b) states, in relevant part, "Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision … that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II of this chapter, or in places of public accommodation covered by subchapter III of this chapter." 42 U.S.C. § 12201(b). The Government's interpretation of § 12201(b) as being permissive instead of mandatory is not unreasonable under *Chevron.* The Magistrate Judge correctly deferred to the Government's interpretation of the statute. Accordingly, the objection is overruled, and the Court accepts the Magistrate Judge's remaining findings, conclusions and her recommendations.[27] (emphasis added).

ERRORS IN REVIEW BY THE DISTRICT COURT AND THE COURT OF APPEALS IN *WILLIAMS v. HOLDER*

There were four fatal errors by the U.S. District Court for the Northern District of Texas and the U.S. Court of Appeals for the Fifth Circuit in *Williams v. Holder.*

1. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,*[28] the U.S. Supreme Court held that:

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[27] ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE, Case 3:13-cv-02179-O-BH, Document 27, pages 7-8, page ID 174-175 (September 23, 2014), affirmed, Case no. 14-11122 (5th Cir. March 30, 2015), cert. denied, Case No. 14-1456 (October 5, 2015).

[28] 467 U.S. 837 (1984).

> When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the ambiguously expressed intent of Congress.[29]

A review of the decisions of the district court and the court of appeals reveals that neither court considered the intent of Congress which was stated in 42 U.S.C. § 12101(b) Purpose.

2. In *Disabled in Action of Pennsylvania v. Sykes,*[30] the U.S. Third Circuit Court of Appeals held that:

> On review, the appellate court is required to apply the same test the district court should have utilized initially. In determining the applicable law, the appellate court must first examine the district court's interpretation of the agency's regulations. Furthermore, in construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations.[31]

A review of the decisions of the district court and the court of appeals reveals that neither court conducted a review of the Department of Justice ADA regulations.

3. In *Jama v. Immigration and Customs Enforcement,*[32] the U.S. Supreme Court held that:

> We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.[33]

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[29] 467 U.S. 842-843. *See also notes* 1, 2, 3, 4, 5, 6, 7, 8, 10, and 11.
[30] 833 F.2d 1113 (3d Cir. 1987).
[31] 833 F.2d 1117, *citing, United States v. Larionoff,* 431 U.S. 864 (1977).
[32] 543 U.S. 335 (2005).
[33] 543 U.S. 341

Congress demonstrated that it knew how to make exceptions to the ADA manifest when it enacted 42 U.S.C. § 12181(10), which states:

> The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis. (emphasis added).

And, neither the Department of Justice nor the district court had the authority to except smoking and smoking bans from the burdens of proof required of all other reasonable modification requests,[34]

4. In *School Board of Nassau County, Fla. v. Arline,*[35] the U.S. Supreme Court held that:

> Congress' desire to prohibit discrimination based on the effects of a person's handicap may have on others was evident from the inception of the [Rehabilitation] Act.[36]

In *Bragdon v. Abbott,* the U.S. Supreme Court, citing 42 U.S.C. § 12201(a), held that:

> The directive requires that we construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.[37]

The Department of Justice ADA Title III regulations interpretation is consistent with the interpretation of the Rehabilitation Act as held by the U.S. Supreme Court in *School Board of Nassau County, Fla. v. Arline.*

As stated by the Department of Justice:

> The wishes, tastes, or other preferences of other customers may not be asserted to justify criteria that would exclude or segregate individuals with disabilities.[38]

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[34] *See* notes 6, 26 and 29.
[35] 480 U.S. 273 (1987).
[36] 480 U.S. 282, n.9.
[37] 524 U.S. 632.

The interpretation by the Department of Justice and the district court that smoking and smoking bans are excepted from the burdens of proof applicable to all other request for reasonable modifications is inconsistent with the decision in *School Board of Nassau County, Fla. v. Arline* and 28 C.F.R. §36.301 *Eligibility Criteria*

CONCLUSION

The Department of Justice has not just totally abandoned its duty to enforce the Americans with Disabilities Act; the Department has actively promoted discrimination against individuals with respiratory disabilities with its technical assistance and its conduct in *Williams v. Holder.*

And, the federal courts, in *Williams v. Holder,* have been derelict in their duty to interpret the Americans with Americans Act in accordance with the intent of Congress.

Therefore, it is essential for the Americans with Disabilities Act to be amended so that it overrules the interpretations of the Department of Justice and the courts in *Williams v. Holder*.

PROPOSED AMENDMENT TO THE AMERICANS WITH DISABILITIES ACT

42 U.S.C. § 1201 Note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, Sept. 25, 2008, Stat. 3553, provided that—

(b)

The purposes of this the Act are—

At this point in the Act, Congress listed six purposes of the ADA Amendments Act of 2008.

Congress should add additional purposes of the Act, which would state:

> (7) to reject the Department of Justice interpretation of 42 U.S.C. § 12201(b), that § 12201(b) excepts smoking policies and smoking bans from the protections of the ADA, specifically, excepting smoking

[38] 28 C.F.R. Part 36, 1991 Section-by-Section Analysis, Section 36.301 *Eligibility Criteria* (7-1 -10 Edition).

policies and smoking bans from the burdens of proof required for all other requested reasonable modifications, as stated by the U.S. Supreme Court in *PGA Tour, Inc. v. Martin,* 532 U.S. 661, 688 (2001).[39]

(8)To convey Congressional intent that the burdens of proof standard for smoking policies and smoking bans, and all other reasonable modifications, is that stated in *Johnson v. Gambrinus Company/Spoetzl Brewery*,116 F.3d 1052, 1059 (5th Cir. 1997).[40]

Respectfully submitted,

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Billy Williams

[39] *See, e.g.,* notes 25 and 26.
[40] *See, e.g.,* notes 21, 22, 23 and 24.