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March 2016

## Sutton v. United Airlines, Inc.: The Supreme Court "Substantially Limits" The Americans With Disabilities Act

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### Recommended Citation

Beige, Stephanie (2016) "Sutton v. United Airlines, Inc.: The Supreme Court "Substantially Limits" The Americans With Disabilities Act," *Touro Law Review*: Vol. 16: No. 4, Article 16.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol16/iss4/16>

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Beige: Sutton v. United Airlines, Inc.  
**SUTTON v. UNITED AIR LINES, INC.**  
**THE SUPREME COURT "SUBSTANTIALLY  
LIMITS" THE AMERICANS WITH  
DISABILITIES ACT**

Stephanie Beige<sup>1</sup>

## I. INTRODUCTION

Twin sisters Karen Sutton and Kimberly Hinton shared "a life long goal to fly for a major air carrier."<sup>2</sup> While employed as commercial airline pilots for regional commuter airlines, the sisters were denied commercial airline pilot positions with United Air Lines, Inc. (hereinafter, "United"), after satisfying United's basic age, education, experience, and FAA certification qualifications.<sup>3</sup> The denials were based on United's policy mandating that pilots under their employ possess uncorrected vision of 20/100 or greater.<sup>4</sup> The sisters both suffered from uncorrected vision of 20/200 in the right eye and 20/400 in the left eye.<sup>5</sup> The sisters claimed United's denial of employment based on its minimum vision requirement was in violation of the Americans with Disabilities Act<sup>6</sup> (hereinafter, "ADA"), which prohibits employers from discriminating against individuals on the basis of their disabilities.<sup>7</sup> Specifically, petitioners alleged they were entitled to the protection of the ADA because the respondent discriminated against them on the basis of their disability, and the respondent "regarded" the petitioners as having a disability.<sup>8</sup> The critical issue was whether the

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<sup>1</sup> Stephanie Beige is a recent alumna of Touro College Jacob D. Fuchsberg Law Center and was a senior staff member on the *Touro Law Review*. Her paper was recognized as one of the two most outstanding papers written for the Spring 1999 Law Review competition. Ms. Beige graduated in December 2000.

<sup>2</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 475, 476 (1999).

<sup>3</sup> *Id.* at 475.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> 42 U.S.C. §§12101-12213 (1994).

<sup>7</sup> *Sutton*, 527 U.S. at 475.

<sup>8</sup> *Id.*

petitioners' vision should be evaluated with or without corrective contact lenses when determining if their impairments rose to the level of a disability. The United States district court dismissed the action for failure to state a claim upon which relief could be granted, holding that the petitioners' vision must be evaluated with the use of corrective measures, and the Court of Appeals for the Tenth Circuit affirmed.<sup>9</sup> Petitioners appealed to the Supreme Court, which also affirmed. The Court held petitioners were not covered individuals under the ADA because they were not substantially limited in any major life activity when they used corrective lenses, and therefore were not disabled.<sup>10</sup>

Entitlement to the protection of the ADA requires a showing of a "physical or mental impairment that substantially limits one or more of the major life activities."<sup>11</sup> The first portion of Supreme Court's decision in *Sutton*, establishes that an evaluation of the petitioners' vision shall be made with the use of mitigating measures, such as corrective lenses. Prior to this decision, the issue of mitigating measures had caused much controversy among the circuit courts of the United States.<sup>12</sup>

The Supreme Court granted certiorari in *Sutton* to resolve two issues: 1) should the determination of whether an impairment is substantially limiting be determined without regard to corrective measures,<sup>13</sup> and 2) whether the petitioners were "regarded" by the respondent as having a disability.<sup>14</sup> Since the former had resulted in a split among the circuit courts, this note

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<sup>9</sup> *Sutton v. United Air Lines, Inc.*, 1996 U.S. Dist. LEXIS 15106 (D. Colo. August 30, 1996); *see also Sutton v. United Air Lines, Inc.* 130 F.3d 893 (10th Cir. 1997).

<sup>10</sup> *Sutton*, 527 U.S. at 481.

<sup>11</sup> 42 U.S.C. §12102(2). Section 12102(2) provides in pertinent part that "[t]he term 'disability' means with respect to the individual - - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such and impairment; or (C) being regarded as having such an impairment." *Id.*

<sup>12</sup> *See Sutton*, 130 F.3d 893; *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997); *but see Arnold v. United Postal Service, Inc.*, 136 F.3d 854 (1st Cir. 1998); *compare Washington v. HCA Health Serv. of Tex., Inc.*, 152 F.3d 464 (5th Cir. 1998).

<sup>13</sup> *Sutton*, 527 U.S. at 481.

<sup>14</sup> *Id.* at 489.

will primarily focus on the use of mitigating measures in the determination of disability under the ADA and the impact of the *Sutton* decision.

## II. BACKGROUND

One of the fundamental purposes of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>15</sup> However, one particular provision of the ADA has proven to be less than clear and comprehensive.<sup>16</sup> Consequently, prior to the Supreme Court’s decision in *Sutton*,<sup>17</sup> such ambiguity had caused a split in the circuits that resulted in a varying application of the ADA.<sup>18</sup>

The ADA, as amended in 1994, was originally enacted to provide a level playing field for disabled persons by making it possible for them to participate in community activities as well as compete for employment opportunities without being unfairly disadvantaged.<sup>19</sup> Accordingly, the Act prohibits employers from engaging in employment practices that discriminate against individuals with disabilities. Discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for the disabled.<sup>20</sup> The Equal Employment Opportunity Commission (hereinafter, “EEOC”) is the

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<sup>15</sup> See *Kirkinburg v. Alberston’s Inc.*, 143 F.3d 1228, 1231 (9th Cir. 1998) (discussing the purpose of the ADA); see also *Arnold v. United Postal Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (explaining the purpose of the ADA was to protect individuals with impairments who are capable of doing a job with or without accommodations).

<sup>16</sup> 42 U.S.C. §12102(2). See *supra* note 11 and accompanying text.

<sup>17</sup> *Sutton*, 527 U.S. 471.

<sup>18</sup> See *Sutton*, 130 F.3d at 893; see also *supra* note 12.

<sup>19</sup> 42 U.S.C. §12112 (1994). Section 12112(a) provides in pertinent part that “No employer may discriminate “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.” *Id.*

<sup>20</sup> See *id.*

administrative agency charged with the responsibility of overseeing actions arising under the ADA, and has promulgated regulations including definitions in furtherance of the Act.<sup>21</sup>

As a threshold issue, an individual seeking the protection of the ADA must suffer from a disability as defined by the Act.<sup>22</sup> The ADA defines disability as “a physical or mental impairment that substantially limits one or more of the major life activities.”<sup>23</sup> Conflicting interpretation of this definition had caused disagreement among the circuit courts. Although the regulations of the ADA adopt the EEOC’s definitions of “major life activity,”<sup>24</sup> “substantially limits”<sup>25</sup> and “physical impairment,”<sup>26</sup> the Act does not specify whether, when determining if an individual’s impairment substantially limits a major life activity, the impairment should be viewed without the

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<sup>21</sup> 29 C.F.R. §§1630.

<sup>22</sup> 42 U.S.C. §12102(2). *See supra* note 11 and accompanying text.

<sup>23</sup> *Id.*

<sup>24</sup> 29 C.F.R. §1630.2(i). Section 1630.2(i) defines major life activities as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” *Id.*

<sup>25</sup> 29 C.F.R. §1630.2(j)(1). Section 1630.2(j)(1) defines substantially limits as:

unable to perform a major life activity that the average person in the general population can perform; or (ii) is significantly restricted as to the condition, manner or duration under which and individual can perform a particular life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

*Id.*

<sup>26</sup> 29 C.F.R. §1630.2(h). Section 1630.2(h) defines physical or mental impairment as:

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

*Id.*

aid of mitigating or corrective measures.<sup>27</sup> As a result, the statute's inherent lack of clarity has caused the courts to decide for themselves which approach they interpret to be most proper, concluding with the Supreme Court and the *Sutton* decision.

This note discusses the split in the circuit courts concerning the use of mitigating measures in the determination of whether an individual is disabled under the ADA. In addition, the author will analyze the Supreme Court's decision in *Sutton* and its future impact on those who seek the protection of the ADA.

### III. THE VARYING OPINIONS OF THE CIRCUIT COURTS OF APPEAL

The determination of whether mitigating measures are to be taken into account when determining if an individual is disabled under the ADA has been addressed by many of the circuit courts.<sup>28</sup> The disagreement centered mainly on the level of deference that should be afforded to the EEOC's Interpretive Guidance Section 1630.2(j).<sup>29</sup> The relevant section states, "a determination of whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices."<sup>30</sup> The Interpretive Guidance is not a component of the EEOC's regulations issued under the express authority of Congress, but rather is the EEOC's own interpretation of their rules.<sup>31</sup> Therefore, the circuit courts have utilized contrasting

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<sup>27</sup> See *Arnold*, 136 F.3d at 858 (stating that the statutory language is not clear with respect to whether mitigating measures should be considered when determining if an individual is disabled).

<sup>28</sup> See *supra* note 12.

<sup>29</sup> See *Sutton*, 130 F.3d at 899 (holding no special deference is given to the EEOC's Interpretive Guidance); but see *Taylor v. Phoenixville School Dist.*, 184 F.3d 296 (3d Cir. 1999) (reiterating its prior holding that the EEOC's interpretations should be afforded deference).

<sup>30</sup> 29 C.F.R. §1630.2(j).

<sup>31</sup> See *Washington*, 152 F.3d at 46 (recognizing the EEOC's Interpretive Guidance was not promulgated pursuant to any delegated authority).

levels of deference with regard to the EEOC's Interpretive Guidance.<sup>32</sup>

For example, the Tenth Circuit in *Sutton v. United Air Lines, Inc.*,<sup>33</sup> rejected the interpretation of the EEOC's Interpretive Guidance when it addressed the issue of whether an individual's uncorrected vision resulted in a substantial limitation of one or more of the major life activities.<sup>34</sup> Afflicted with uncorrected vision that substantially limited them in the major life activity of seeing, the petitioners claimed to have qualified as "individuals with a disability" within the meaning of the ADA.<sup>35</sup> Respondent, in opposition, argued that the petitioners' minor, relatively common condition did not constitute a legitimate impairment pursuant to the ADA.<sup>36</sup> The airline reasoned that the petitioners were able "to function identically to individuals without a similar impairment" when they wore their glasses.<sup>37</sup> Holding that the EEOC's Interpretive Guidance Section 1630.2(j) directly conflicts with the language of the ADA, the Tenth Circuit concluded it was not bound to the EEOC's definition and affirmed the district court's ruling.<sup>38</sup> In dismissing the complaint, the Court reasoned that neither petitioner was substantially limited in the major life activity of seeing when they used corrective lenses, and therefore neither were "disabled" under the Act.<sup>39</sup>

The interpretation of the Tenth Circuit was followed by only a minority of the circuit courts. Justification for this position hinges on the express authority granted to the EEOC by Congress. Since the EEOC's Interpretive Guidance was not promulgated under the express authority of Congress, the Interpretive Guidance is not entitled to the same level of

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<sup>32</sup> See *supra* note 29.

<sup>33</sup> 130 F.3d 893 (10th Cir. 1997) *cert. granted*, 119 S. Ct. 790.

<sup>34</sup> *Sutton*, 130 F.3d at 902 (holding Section 1630.2(j) of the EEOC's Interpretive Guidance is in direct conflict with the language of the ADA).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 896.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 902.

<sup>39</sup> *Id.* at 906

deference afforded to the EEOC's regulations.<sup>40</sup> A court reviewing the issue may decline to follow the Interpretive Guidance if such rules were not found to be a permissible construction of the ADA.<sup>41</sup> The Tenth Circuit in *Sutton* reasoned that the EEOC's Interpretive Guidance Section 1630.2(j) was in direct conflict with the language of the ADA which requires that the physical or mental impairment "substantially limit" a major life activity.<sup>42</sup> The court reasoned that to evaluate whether an individual was impaired without regard to mitigating measures would effectively read out the requirement that the impairment be "substantially limiting."<sup>43</sup> Therefore, if an individual uses glasses or other corrective measures they may no longer be substantially limited in a major life activity and should not be considered disabled under the ADA.<sup>44</sup>

Further justification for the Tenth Circuit's rejection of the EEOC's Interpretive Guidance is that Section 1630.2(j) is inconsistent with other statements found in the Interpretive Guidance.<sup>45</sup> For example, the court noted that the determination of whether an individual has a disability is not based only on the name or diagnosis of the impairment, but rather on the effect of that impairment on the life of the individual.<sup>46</sup> In the court's view, the actual effect on the individual is important, not the underlying condition.<sup>47</sup> Therefore, the impairment should be evaluated with the aid of corrective measures.<sup>48</sup>

This interpretation was also followed by the Sixth Circuit, when it addressed the issue of whether 'an individual who

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<sup>40</sup> See *Washington*, 152 F.3d at 46.

<sup>41</sup> See *Arnold*, 136 F.3d at 864.

<sup>42</sup> See *Sutton*, 130 F.3d at 902 (holding that a determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual).

<sup>43</sup> *Id.* at 901.

<sup>44</sup> *Id.* at 902.

<sup>45</sup> *Id.* (asserting that the EEOC's Interpretive Guidance in discussing "substantially limits" does not attempt a "laundry list" of impairments that are to be considered "disabilities," indicating that some impairments may be disabling for some individuals and not for others).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Sutton*, 130 F.3d at 902.

suffered from non-insulin dependent diabetes, was disabled under the ADA.<sup>49</sup> In *Gilday v. Mecosta County* the plaintiff, an emergency medical technician, sued his employer claiming that his diabetes constituted a disability and he was not reasonably accommodated with respect to his disability.<sup>50</sup> Although the court remanded the case for further proceedings, the majority opinion delivered by Judge Kennedy stated that the EEOC's rule on mitigating circumstances conflicted with the text of the ADA and therefore was not a permissible construction of the statute.<sup>51</sup> The majority reasoned that the acceptance of the EEOC's Interpretive Guidance Section 1630.2(j) would allow an individual to be considered disabled even if such a person were not substantially limited in a major life activity with the benefit of medication.<sup>52</sup> Since the court found the statutory text to be clear as to the term "substantially limits," it declined to review the vast legislative history supporting the EEOC's position.<sup>53</sup> In addition, the court concluded that the EEOC's Interpretive Guidance Section 1630.2(j) was inconsistent with the section of the EEOC's regulations concerning "disability."<sup>54</sup> The relevant section generally states that when making a determination of whether an individual is substantially limited, an individualized comparison to an average person in the general population must be made.<sup>55</sup> However, the EEOC's Interpretive Guidance Section 1630.2(j) does not require such a comparison.<sup>56</sup> The court reasoned that the negation of such a comparison may result in the creation of "substantial limitations" in cases where none might

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<sup>49</sup> See *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 766 (holding that the EEOC's Interpretive Guidance conflicts with the statutory requirement under the ADA that a disability "substantially limit" one or more of an individual's major life activities).

<sup>52</sup> *Id.* at 767.

<sup>53</sup> *Id.* (recognizing that the legislative history lends some support to the EEOC's position, the court nevertheless held the statutory text was unambiguous and it was therefore unnecessary to consult the legislative history).

<sup>54</sup> *Id.* at 767.

<sup>55</sup> 29 C.F.R. §1630.2(j). See *surpa* note 25.

<sup>56</sup> See *Gilday*, 124 F.3d at 767.

exist.<sup>57</sup> The court further supported its rejection of the EEOC's Interpretive Guidance by noting that the purpose of the ADA was not to provide protection for just anyone with a physical or mental impairment, but rather only for those persons with impairments which substantially limit an individual's life.<sup>58</sup> Therefore, it could not have been the intent of Congress to protect individuals whose life activities would only hypothetically be substantially limited were they to stop taking their medications.<sup>59</sup>

Similarly, in *Cline v. Fort Howard Corp.*,<sup>60</sup> the U.S. district court determined that an employee's nearsightedness and difficulties with peripheral vision did not substantially limit the major life activities of seeing or working.<sup>61</sup> The court reviewed decisions from other jurisdictions involving ADA claims based on vision impairments and noted that in the area of vision a more efficient approach would be to evaluate the limitation with regard to the use and effectiveness of corrective devices.<sup>62</sup>

However, the First Circuit in *Arnold v. United Parcel Service, Inc.*,<sup>63</sup> held that the ADA protects individuals based on their underlying disability without regard to whether some of the limitations are ameliorated by the use of medication or other treatment.<sup>64</sup> The *Arnold* case involved a job applicant who alleged that he was not hired by the United Parcel Service, Inc., because of his disability, diabetes mellitus, in violation of the ADA.<sup>65</sup> The district court dismissed the claim because the plaintiff had successfully controlled his diabetes with the use of

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (determining that Congress did not intend the ADA to protect as "disabled" all individuals whose life activities would hypothetically be substantially limited, were they to stop taking medication).

<sup>59</sup> *Id.*

<sup>60</sup> 963 F. Supp. 1075 (E.D. Okla. 1997).

<sup>61</sup> *Cline*, 963 F. Supp. at 1081.

<sup>62</sup> *Id.* at 1080 (evaluating the current theme running through visual impairment cases as a finding that a visual impairment which hinders, or makes it more difficult to function at full visual capacity does not amount to a substantial limitation on one's ability to see).

<sup>63</sup> 136 F.3d 854 (1st Cir. 1998).

<sup>64</sup> *Arnold*, 136 F.3d at 866.

<sup>65</sup> *Id.* at 857.

insulin for twenty-five years and, as a result, was not substantially limited in any major life activity.<sup>66</sup> The First Circuit reversed the dismissal, basing its decision on legislative history in determining the intent of Congress when enacting the ADA.<sup>67</sup> The *Arnold* court acknowledged that the statutory language is less than clear with respect to whether an individual's impairment should be viewed in his untreated condition or his condition after treatment with mitigating measures.<sup>68</sup> The court reasoned that when the statute itself is unclear courts should defer to the interpretation utilized by the agency charged with enforcement of the statute.<sup>69</sup> Such deference should be afforded as long as the interpretation "flows rationally from a permissible construction of the statute."<sup>70</sup> Beginning with a review of the legislative history, the court concluded that both the language and illustrative examples included in the ADA's legislative history made it clear that Congress intended the analysis to be made on the basis of the underlying condition without considering the ameliorative effects of medication, prostheses, or other mitigating measures.<sup>71</sup> The court noted that the House and Senate Committee reports explicitly stated that a determination of whether an impairment substantially limits a major life activity should be assessed without the consideration of the mitigating measures.<sup>72</sup> When interpreting statutory construction, the courts must interpret the language of the statute taking into

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 859 (holding that the ADA's legislative history makes it abundantly clear that Congress intended the analysis of an impairment and the question of whether it substantially limits a major life activity to be made on the basis of the underlying condition).

<sup>68</sup> *Id.* at 858.

<sup>69</sup> *Id.*

<sup>70</sup> *Arnold*, 136 F.3d at 858.

<sup>71</sup> *Id.* at 859.

<sup>72</sup> *Id.* at 860 (citing S. REP. NO. 101-116, at 23 (1989) determining whether an individual has a disability within the scope of ADA coverage "should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids").

consideration the purposes Congress sought to serve.<sup>73</sup> Consequently, the court further noted that the ADA is a broad remedial statute and it would be more consistent with its goals to interpret the words "individual with a disability" broadly so that the Act's coverage would protect a larger segment of society from the effects of discrimination.<sup>74</sup> The First Circuit also noted the policy reasons favoring the EEOC's position.<sup>75</sup> If an individual's impairment were to be evaluated on the basis of any corrective measures, those who could not afford such treatment would be protected by the ADA from discrimination in hiring.<sup>76</sup> Accordingly, once an individual was hired and received health care benefits, the individual would lose such protection.<sup>77</sup> Similarly, the ADA would treat differently two individuals with the same impairment, by distinguishing between one who takes medication and one who does not.<sup>78</sup> The court found this result to be inconsistent with the remedial goal of the statute.<sup>79</sup> For example, the court noted that an individual who has taken corrective measures and has successfully mitigated the effects of his impairment is precisely the type of individual the statute seeks to protect.<sup>80</sup> If an individual is otherwise qualified for the position, his or her disability cannot be a factor in the hiring process.<sup>81</sup> The court reviewed the EEOC's interpretation and found it to be entirely consistent with the ADA's legislative history and broad remedial purpose.<sup>82</sup> In addition, the court

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<sup>73</sup> *Id.* at 861 (noting that in cases of statutory construction, the courts must interpret the words of the statute in light of the purposes Congress sought to serve).

<sup>74</sup> *Id.* at 861 (noting that even with such a broad view of 'disability' the concerns and interests of employers are still protected through the Act's other provisions).

<sup>75</sup> *Id.* at 863.

<sup>76</sup> *Arnold*, 136 F.3d at 863.

<sup>77</sup> *Id.* at 862.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 862 (noting that plaintiff was prevented from obtaining a commercial license because he had diabetes, with no consideration of the fact that he had controlled his diabetes, and therefore was entitled to an accommodation).

<sup>81</sup> *Id.*

noted that the EEOC's interpretation was virtually identical to that of the United States Department of Justice, which was charged with enforcing the ADA's prohibition of discrimination based on disability on the part of state and local government entities.<sup>83</sup>

Similarly, in *Harris v. H&W Contracting Co.*,<sup>84</sup> the Eleventh Circuit held that a plaintiff suffering from the impairment Graves' disease should be evaluated in the absence of any mitigating measures, such as medication.<sup>85</sup> The Eleventh Circuit's analysis mirrored the analysis set forth by the First Circuit in *Arnold*, reviewing both the legislative history of the ADA and the EEOC's Interpretive Guidance.<sup>86</sup>

Interestingly, there has been an assertion of a third view in addition to those set forth in *Sutton* and *Arnold*. This interpretation was set forth by the Fifth Circuit in *Washington v. HCA Health Services of Texas, Inc.*<sup>87</sup> The court held that the question of whether an individual's impairment should be evaluated without regard to mitigating measures depends on the nature of the impairment and should be determined on a case-by-case basis.<sup>88</sup> At issue in *Washington* was whether an individual suffering from Adult Sills Disease, but who was able to control the effects of the disease through medication was substantially limited in a major life activity.<sup>89</sup> Similar to the First Circuit in *Arnold*, the *Washington* court reviewed the EEOC's Interpretive Guidance and the legislative history of the ADA to determine if

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<sup>82</sup> *Arnold*, 136 F.3d at 864 (holding that the EEOC's interpretation is not merely 'permissible,' it is entirely consistent with the ADA's legislative history and broad remedial purposes).

<sup>83</sup> *Id.* at 864 (noting that the reasonableness of the EEOC's interpretation is bolstered by an identical interpretation by the U.S. Department of Justice).

<sup>84</sup> 102 F.3d 516 (11th Cir. 1997).

<sup>85</sup> *Id.* at 524.

<sup>86</sup> *Id.* at 521 (holding that there was no direct conflict between the interpretation contained in the EEOC guidelines and the language of the statute).

<sup>87</sup> 152 F.3d 464 (5th Cir. 1998).

<sup>88</sup> *Washington*, 152 F.3d at 470 (holding that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history will be considered in their unmitigated state).

<sup>89</sup> *Id.* at 466.

mitigating measures should be taken into account when evaluating an impairment.<sup>90</sup> The court decided that the Tenth Circuit's reading of the ADA in *Sutton* was the most reasonable.<sup>91</sup> Therefore, acknowledging that the legislative history and the EEOC could not be ignored, the court alternatively held that they could be read narrowly.<sup>92</sup> The court recognized that there was nothing in the EEOC's Interpretive Guidance or the legislative history that suggested that all impairments be considered in their unmitigated states or that mitigating measures never be taken into account.<sup>93</sup> Accordingly, the Fifth Circuit held that only serious impairments analogous to those mentioned in the EEOC's Guidance should be considered in their unmitigated states.<sup>94</sup> The court addressed the requirements for these impairments, holding that such impairments must be serious in common parlance, requiring the individual to use mitigating measures on a frequent basis, and those mitigating measures must be continuous and recurring.<sup>95</sup> If mitigating measures amount to permanent corrections, they may be taken into consideration.<sup>96</sup>

#### IV. THE SUPREME COURT'S INTERPRETATION OF THE ADA, AND ITS REPERCUSSIONS

The judicial dissent between the circuit courts concluded on June 22, 1999 with the Supreme Court decision denying ADA coverage to the petitioners in *Sutton*.<sup>97</sup> The Supreme Court decided both issues raised by petitioners: 1) should the

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<sup>90</sup> *Id.* at 476 (stating that the EEOC's interpretation is consistent with much of the legislative history of the ADA).

<sup>91</sup> *Id.* at 469 (stating that the court is not unsympathetic to the reasoning set forth by the minority of the circuit courts, that mitigating measures must be taken into account).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Washington*, 152 F.3d at 470.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 471 (holding that mitigating measures that amount to permanent corrections or ameliorations may be taken into account).

<sup>97</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

determination of whether an individual is disabled be made with reference to mitigating measures, and 2) whether the petitioners were regarded as “disabled” within the meaning of the ADA.<sup>98</sup>

In connection with the first and most important issue, the Supreme Court held that the effects of corrective measures, both positive and negative, must be taken into account when determining whether a person is “substantially limited” in a major life activity and therefore disabled under the ADA.<sup>99</sup> The Court did not decide this issue on the basis of the persuasive force of the EEOC’s Interpretive Guidance, as disputed by the circuit courts, but rather, by viewing three separate provisions of the Act itself.<sup>100</sup>

The Court began by analyzing the language used in the Act to define “disability.”<sup>101</sup> The Court noted that the phrase “substantially limits” appears in the present indicative form, and therefore requires an individual to be presently disabled, rather than hypothetically or potentially disabled.<sup>102</sup> Accordingly, an individual who suffers from a physical or mental impairment may not be substantially limited when his condition is treated with mitigating measures.

The second provision relied on by the Court also concerns the definition of “disability” under the Act. Specifically, the Court noted that the ADA requires that “disabilities be evaluated ‘with respect to the individual’ and be determined based on whether an impairment substantially limits the ‘major life

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<sup>98</sup> *Id.* at 475.

<sup>99</sup> *Id.* at 482.

<sup>100</sup> *Id.* The majority noted that Justice Stevens came to the opposite conclusion in his dissent by relying on the legislative history of the ADA. *Id.* at 482. The majority further stated that they had no need to consider the legislative history since the terms of the ADA precluded such an interpretation. *Id.*

<sup>101</sup> *Id.* at 482. The Court noted that the Act defines disability as a “physical or mental impairment that substantially limits one or more of the major life activities.” *Id.*

<sup>102</sup> *Id.* (reasoning that “a ‘disability’ exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.”)

activities of such individual.”<sup>103</sup> The majority concluded that the EEOC’s Interpretive Guidance runs directly counter to this individualized inquiry.<sup>104</sup> The Court held that the individualized approach called for by the Act prevents the disabled from being judged on the basis of group characteristics, which would be “contrary to both the letter and spirit of the ADA.”<sup>105</sup> Justice Stevens in his dissent strongly disagreed with the majority interpretation.<sup>106</sup> Specifically, Justice Stevens noted that viewing an impairment in its unmitigated state would still comply with the individualized inquiry under the Act.<sup>107</sup> Justice Stevens argued that limitations of similar impairments in their unmitigated states differ in each individual depending on the severity of the condition and the physical and personal characteristics of the individual.<sup>108</sup>

Lastly, the Court reasoned that Congress did not intend to include all uncorrected conditions in the definition of disability by focusing on the findings of Congress when enacting the ADA.<sup>109</sup> Specifically, the Court pointed to the Congressional finding that some forty-three million (43,000,000) Americans have one or more physical or mental disabilities.<sup>110</sup> Based on a report by the National Council on Disability issued in 1988, the estimated number of disabled Americans was approximately one-

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<sup>103</sup> *Sutton*, 527 U.S. at 483; see also *Bragdon v. Abbott*, 524 U.S. 624 (1998), wherein the Court held that the determination of whether a person has a disability under the ADA is an individualized inquiry. *Id.*

<sup>104</sup> *Sutton*, 527 U.S. at 483. The EEOC would require individuals to be evaluated in their unmitigated state. This would result in generalizations of certain disabilities and their limitations, without an inquiry into how that disability actually affects each individual. *Id.*

<sup>105</sup> *Id.* Further, the Court noted that the individualized approach would also allow employers and courts to consider negative side effects suffered by mitigating measures. Such a consideration would be precluded by the EEOC’s Interpretive Guidance. *Id.*

<sup>106</sup> *Id.* at 508 (Stevens, J., dissenting). Justice Stevens noted “The Court’s mantra regarding the Act’s ‘individualized approach,’ however fails to support its holding.” *Id.*

<sup>107</sup> *Id.* at 509 (Stevens, J., dissenting).

<sup>108</sup> *Id.*

<sup>109</sup> *Sutton*, 527 U.S. at 486.

<sup>110</sup> *Id.*; see also 42 U.S.C. §12101(a)(1).

hundred sixty million (160,000,000) under what is known as the "health conditions approach."<sup>111</sup> The 'health conditions approach' looks at "all conditions that impair the health or normal functional abilities of an individual."<sup>112</sup> Accordingly, the Court held that if Congress had intended individuals with corrected impairments to be covered by the Act, they would have cited a much larger number of disabled persons in the findings.<sup>113</sup>

However, Justice Stevens in his dissent came to the opposite conclusion, basing his decision on customary tools of statutory construction.<sup>114</sup> Although Congress may not have foreseen that it's definition of "disability" might encompass a far larger number of individuals than originally estimated, in order to be faithful to the remedial purpose of the ADA, the definition should be given a generous construction.<sup>115</sup> Justice Stevens argued that the forty-three million cited by Congress was not intended to by a cap on the Act's protected class.<sup>116</sup> Moreover, the dissent noted that eight of the nine circuit courts that had addressed the issue, and all three of the executive agencies that had issued regulations in furtherance of the ADA, concluded that the definition of "disability" required an evaluation of the individual's unmitigated state.<sup>117</sup>

Justice Stevens centered his position on the entire definition of disability under the ADA.<sup>118</sup> The definition consisted of three overlapping provisions, which the dissent

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<sup>111</sup> *Sutton*, 527 U.S. at 485.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 487.

<sup>114</sup> *Id.* at 495 (Stevens, J., dissenting).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 511-12 (Stevens, J., dissenting). The dissent argued that Congress would not have included the "regarded as" or "record of" categories in the definition of disability if they did not intend to cover those who lack "actual disabilities." *Id.*

<sup>117</sup> *Sutton*, 527 U.S. at 502 (Stevens, J., dissenting). The dissent notes the EEOC, The Department of Justice and the Department of Transportation have all adopted the same definition of "disability." *Id.* All three agencies share the view that the determination of whether an individual is substantially limited in a major life activity must be made without regard to mitigating measures. *Id.*

<sup>118</sup> *Id.* at 497-98 (Stevens, J., dissenting).

argued were “aimed at ensuring that individuals who now have, or ever had a substantially limiting impairment are covered by the Act.”<sup>119</sup> Specifically, Justice Stevens noted that Subsection (B) of the definition, which states that an individual is covered under the Act if “there is a record of such impairment,” would be unnecessary if determinations are to be made on the individual’s present, mitigated state.<sup>120</sup> Subsection (B) specifically protects a class of individuals that were at one time disabled, but for some reason are no longer.<sup>121</sup> The majority position that only the person’s actual, current impairment status be relevant is inconsistent with subsection (B) of the Act.<sup>122</sup> Moreover, the Supreme Court in *School Board of Nassau County v. Arline* previously held that a similar section of the Rehabilitation Act, the predecessor to the ADA, covered a person who previously had a serious hearing impairment but had since been completely cured.<sup>123</sup> Because the definition of “disability” under the Rehabilitation Act is virtually identical to that in the ADA,<sup>124</sup> Justice Stevens concluded that under the majority’s holding in *Sutton*, fully cured impairments were covered by the Act, while merely treatable ones were not.<sup>125</sup> That result, Stevens argued, surely could not have been the intent of Congress when enacting the ADA.<sup>126</sup>

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<sup>119</sup> *Id.* Justice Stevens refers to the three provisions set forth in 42 U.S.C. §12102(2). See *supra* note 11 and accompanying text.

<sup>120</sup> *Sutton*, 527 U.S. at 498 (Stevens, J., dissenting) (noting if the drafters intended to exclude past impairments that are no longer substantially limiting, they would not have included “a record of having such an impairment” in the definition of disability).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The issue was whether an individual was considered handicapped under the Rehabilitation Act of 1973. *Id.* at 275. The Rehabilitation Act was the predecessor to the ADA and the definition of disability under the ADA is “almost verbatim” from the Rehabilitation Act. *Sutton*, 527 U.S. at 497 (citing 29 U.S.C. §706(8)(B); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998)).

<sup>124</sup> *Sutton*, 527 U.S. at 497-98 (Stevens, J., dissenting).

<sup>125</sup> *Id.* at 498.

<sup>126</sup> *Id.*

Rather than adopting the majority position that the definition of disability under the statute is limited to the present status of the impairment, the dissent argued that read together, the three subsections of the Act “inquire into the existence of an impairment – present or past – that substantially limits, or did so limit, the individual before amelioration.”<sup>127</sup> In coming to this conclusion, the dissent relied on the legislative history and concluded that both the Senate Report on the bill and the House of Representatives Report indicated the intent of Congress not to include mitigating measures when evaluating impairments.<sup>128</sup> Justice Stevens further argued that respect should be accorded to the three executive agencies charged with implementing the Act, all of which mandate the unmitigated state is the basis for disability determinations.<sup>129</sup>

Lastly, Justice Stevens referred to prior decisions in which the Court has interpreted anti-discrimination statutes when certain classes of individuals or types of discrimination fell outside the core prohibitions of the statute.<sup>130</sup> In these situations the Court expanded the coverage of the remedial statutes even when the type of discrimination was not the principle evil

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<sup>127</sup> *Id.* at 499.

<sup>128</sup> *Id.* at 499-500 (Stevens, J., dissenting) (noting that the authoritative source for finding the legislatures intent is the Committee Reports on the bill).

<sup>129</sup> *Id.* at 502-03 (Stevens, J., dissenting). The EEOC’s Interpretive Guidance, the Department of Justice and the Department of Transportation have all taken the position that the determination of whether and individual is disabled should be made without regard to mitigating measures. *Id.*

<sup>130</sup> *Id.* at 505-06 (Stevens, J., dissenting). Justice Stevens referred to two particular statutes the Supreme Court was called upon to interpret, Title VII of the Civil Rights Act of 1964 and more recently Title VII in connection with same-sex sexual harassment. *Id.* Justice Steven noted that although the Civil Rights Act of 1964 was enacted primarily in response to Congress’ desire to prohibit discrimination against African-Americans the Court held it would be unreasonable to narrow its coverage and deny its protection to Hispanic-Americans or Asian-Americans. *Id.* Justice Stevens noted the Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where the Court expanded the coverage of Title VII to cover same-sex sexual harassment cases. *Id.* Justice Stevens pointed out that “the statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principles of our legislators by which we are governed.” *Id.* at 79, 80.

Congress was concerned with when enacting the statute.<sup>131</sup> Justice Stevens argued that the same statutory interpretation should be applied to the definition of disability, thereby expanding the ADA's coverage rather than limiting it.<sup>132</sup>

The last issue before the Court concerned the third situation in which "disability" is defined by the ADA, when a person is regarded as having a disability by an employer.<sup>133</sup> Petitioners alleged that respondent had mistakenly regarded them as having a disability which substantially limited them in the major life activity of working.<sup>134</sup> The Court quickly dispensed with the petitioners' argument that the respondent's vision requirement substantially limited their ability to engage in the major life activity of working by precluding them from obtaining the job of a global airline pilot.<sup>135</sup> The Court held that when the major life activity is that of working, the petitioners must allege that they are unable to work in a broad class of jobs, and global airline pilot is not such a class.<sup>136</sup> Since global airline pilot is a

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<sup>131</sup> *Sutton*, 527 U.S. at 506 (Stevens, J., dissenting).

<sup>132</sup> *Id.* (Stevens, J., dissenting). Justice Steven argues that the nature of visual impairments should be judged by the same standard as any other medically controllable condition. *Id.*

<sup>133</sup> *Id.* at 492 (citing 42 U.S.C. §12102(2)).

<sup>134</sup> *Sutton*, 527 U.S. at 489. The petitioners alleged one of the two ways in which the "regarded as" situation arises. The second situation is when "a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." *Id.* The Court further declined to decide whether working is major life activity on account of the petitioners having failed to allege their claim adequately. *Id.* at 492.

<sup>135</sup> *Id.* at 490-91. The Court stressed that the ADA allows employers to prefer certain physical characteristics over others to make sure that the job candidate is best suited for the job. *Id.* Further, the Court noted, the employer "is just as free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job." *Id.*

<sup>136</sup> *Id.* at 491. The Court reasoned that the "substantially limits" language requires that the job be a broad class of jobs rather than a single job. *Id.* The Court additionally cited to the EEOC and its definition of the term "substantially limits" when referring to the major life activity of working. *Id.*; 29 C.F.R. §1630.2(j)(3)(i) provides in pertinent part:

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training,

single job, the allegation that the petitioners' poor vision was regarded by the respondent as substantially limiting them in the major life activity of working was unsupported.<sup>137</sup>

The *Sutton* decision has had an immediate impact on individuals suffering from impairments, seeking accommodations from their employers. An illustration is the recent decision of the Third Circuit in *Taylor v. Phoenixville School District*.<sup>138</sup> The *Taylor* case concerned a school employee who sued her former employer under the ADA alleging that her former employer failed to provide her with reasonable accommodations for her mental illness.<sup>139</sup> The district court dismissed the complaint reasoning that the plaintiff's illness, bipolar disorder and/or manic depression, although an impairment under the ADA, did not substantially limit one of her major life activities.<sup>140</sup> The Third Circuit, upon an extensive review of the legislative history relating to the ADA, reversed the district court's dismissal on April 5, 1999, finding that the plaintiff was substantially limited in the major life activities of caring for herself, thinking, and interacting with others when viewed in her unmedicated state.<sup>141</sup> This decision however, was vacated on August 19, 1999 in light of the Supreme Court's determination in *Sutton*.<sup>142</sup>

Although vacating their prior opinion, the Third Circuit, applying *Sutton*, again reversed the district court's grant of summary judgment.<sup>143</sup> The court concluded that although the

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skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

*Id.*

<sup>137</sup> *Id.* at 493. The Court also denied the petitioners' claim that if a substantial number of airline carriers had the same vision restrictions they would be substantially limited in the major life activity of working. *Id.* at 493-94. The Court reasoned that employers are permitted to have valid job requirements regardless of how many employers adopted similar restrictions. *Id.*

<sup>138</sup> 184 F.3d. 296 (3d Cir. 1999).

<sup>139</sup> *Id.* at 301.

<sup>140</sup> *Id.* at 301-02.

<sup>141</sup> *Id.* at 302.

<sup>142</sup> *Taylor v. Phoenixville School Dist.*, 1999 U.S. App. LEXIS 19572 (3d Cir. 1999).

<sup>143</sup> *Taylor*, 184 F.3d. at 302.

plaintiff's disability had to be viewed in her mitigated state, there were genuine issues of fact regarding whether the plaintiff's bipolar disorder substantially limited a major life activity while she was taking lithium.<sup>144</sup> The plaintiff in *Taylor* claimed that although she had been able to reduce the risk of serious psychotic episodes with the aid of lithium, the drug had not perfectly controlled her symptoms, leaving her still substantially limited in her ability to think.<sup>145</sup> The court held that drug side effects can be important in determining whether someone is disabled and found that the plaintiff had presented sufficient evidence to require a trial on the issue of whether she continued to be substantially limited while taking medication.<sup>146</sup> This decision however, is of limited benefit to those seeking protection of the ADA. It is only in the exceptional cases that corrective measures themselves will substantially limit major life activities, leaving the majority of individuals unprotected.

## V. CONCLUSION

The Supreme Court's decision, which disqualifies individuals who have taken efforts to correct or mitigate their disabilities to the extent that they are no longer substantially limited in any major life activities, will leave unprotected the class of individuals the ADA was enacted to protect.<sup>147</sup> The majority supported its position with the present indicative form of the language in subsection (A) of the Act's definition of disability.<sup>148</sup> However, in doing so, the Court ignores the language used in subsection (B) and (C), which directly refer to

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 308.

<sup>146</sup> *Id.* at 309 (noting that the Supreme Court has held that drug side effects can be important in evaluating disability).

<sup>147</sup> *Id.* at 509 (Stevens, J., dissenting). The majority decision "would seem to allow an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication." *Id.*

<sup>148</sup> *Id.* at 482-83. The majority state "because the phrase 'substantially limits' appears in the Act in the present indicative form, we think the language is properly read as requiring that person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability." *Id.*

past impairments.<sup>149</sup> The Court further concluded that the Congressional finding in 1988 that forty-three million Americans suffered from disabilities is a basis for denying coverage to those whom otherwise would be protected.<sup>150</sup> Justice Stevens in his dissent, cited to the Brief for the United States and EEOC as Amicus Curiae, which stated, "it is quite wrong for the Court to confine the coverage of the Act simply because an interpretation of 'disability' that adheres to Congress' method of defining the class it intended to benefit may also provide protection for 'significantly larger numbers' of individuals than estimated in the Act's findings."<sup>151</sup>

Although generally persuasive, these arguments are lacking in light of the legislative history and remedial purposes of the ADA. When faced with the two alternatives -- allowing the ADA to cover a larger scope of the population than Congress intended, or limiting the Act's coverage so that some who should be entitled are not -- the former is the more desirable approach. The fear which accompanies the expansion of the definition to cover those with trivial or minor impairments is unfounded. The protection of the ADA merely forbids an employer from discriminating on the basis of stereotype or fear.<sup>152</sup> The individual still must establish the employer has no legitimate explanation for not hiring him or her.<sup>153</sup> The ADA by its terms allows employers to establish physical criteria as long as it is necessary for the job requirements.<sup>154</sup> Accordingly, the protection afforded by the ADA will not force employers to hire those who are truly not qualified due to their impairment, and will not result in the always feared 'floodgate of litigation.'

The *Sutton* decision will have a chilling effect on the disabled who have taken efforts to become active members of society. The Supreme Court has essentially taken away coverage

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<sup>149</sup> See *supra* note 11.

<sup>150</sup> *Sutton*, 527 U.S. at 484-85.

<sup>151</sup> *Id.* at 504 (Stevens, J., dissenting).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 490. "Under the EEOC's regulations an employer may make employment decisions based on physical characteristics." *Id.*

from the very individuals the ADA was enacted to protect. These very individuals can now be discriminated against by employers without fear of prosecution under the ADA. Ironically, the petitioners in Sutton were disqualified from job positions because of their unmitigated vision impairment, yet denied coverage under the ADA based on their mitigated condition. This surely could not have been the intent of Congress when seeking to prevent employers from discriminating against those who are otherwise qualified for a job position

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