ACLU + others

TABLE OF CONTENTS

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Over the last four decades, the ACLU has appeared before this Court in numerous cases involving the proper interpretation of those civil rights laws, both as direct counsel and as *amicus curiae*. The ACLU has advocated for interpretations of civil rights laws, including the Americans with Disabilities Act (ADA), that will ensure that all individuals have equal access to the workplace and are not disadvantaged because of protected characteristics such as race, sex, or disability. This case involves the scope of the protections afforded by the ADA. The proper resolution of that question is a matter of significant concern to the ACLU and its members throughout the country.

Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has undertaken difficult impact litigation that has resulted in establishing new law and provided significant benefits to large groups of women. ERA has litigated significant gender-based discrimination cases in-

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[1] Counsel for respondents have informed counsel for *amici* that the parties have filed blanket letters of consent with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

cluding *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), as well as appearing as *amicus curiae* in numerous Supreme Court cases involving the interpretation of Title VII. ERA believes that individuals' freedom to decide what social or physical risks they will assume in their employment or other aspects of their lives is a core civil rights principle. If this principle can be eliminated in the context of disability discrimination under the ADA, it can be challenged in other civil rights arenas as well, and may weaken the very foundation of other major civil rights statutes, such as Title VII and Title IX, which underlie ERA's litigation goals and objectives.

The National Women's Law Center (NWLC) is a non-profit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as *amicus curiae* in numerous cases involving employment law and civil rights issues.

The Northwest Women's Law Center (NWWLC) is a nonprofit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, the NWWLC has been dedicated to advocating for women's rights in many realms, including the workplace. The NWWLC has worked to eliminate barriers that block women's full participation in the workplace and has fought to ensure equal economic opportunities for women. Towards these ends, the NWWLC has participated as counsel and as *amicus curie* in cases throughout the Northwest and the country. The NWWLC continues to

serve as a regional expert and leading advocate on these issues.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national nonprofit civil rights organization that uses the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Bowman v. Heller*, 420 Mass. 517, *cert. denied*, 516 U.S. 1032 (1995). NOW Legal Defense participated as *amicus* in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993), and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) is a national civil rights organization founded in 1972. It seeks to ensure equal protection of the laws and to protect the civil rights of Puerto Ricans and other Latinos. Since its inception, PRLDEF has worked to secure equal employment opportunities through full enforcement of the civil rights laws.

Women Employed is a national association of working women based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed maintains that it is an individual's freedom, not an employer's, to assess the risks and benefits of particular employment for the individual. This fundamental freedom is protected under

federal employment discrimination laws and federal civil rights law in general.

The Women's Law Project (WLP) is a nonprofit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past twenty-eight years, WLP's activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of illegal discrimination in the workplace and the availability of strong and effective remedies under anti-discrimination statutes, including the Americans with Disabilities Act.

STATEMENT OF THE CASE

Mario Echazabal worked for various subcontractors at a Chevron oil refinery in El Segundo, California, for many years, including working in and around the refinery's coker unit. In 1992, and again in 1995, Echazabal applied to work directly for Chevron in the coker unit. Finding him qualified for the position both times, Chevron offered Echazabal employment, conditioned on his passing a physical examination. When the examination indicated that Echazabal had chronic liver disease, Chevron concluded that exposure to the chemicals in the coker unit might harm Echazabal, and rescinded its offers of employment. J.A. 172-77.

Echazabal challenged Chevron's refusal to hire him under the Americans with Disabilities Act (ADA). After the district court granted Chevron summary judgment, Echazabal appealed. The United States Court of Appeals for the Ninth Circuit reversed, holding that a threat to a worker's own health, with no threat to anyone else in the workplace, does not constitute a defense to liability under the ADA.

Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1072 (9th Cir. 2000). This Court then granted Chevron's petition for *certiorari.*

SUMMARY OF ARGUMENT

Exclusionary rules and practices, such as those keeping women out of certain professions and segregating the races in education and marriage, were long justified by assertions that they actually benefited those excluded. Since the middle of the 20th century, however, such paternalistic exclusions have been recognized as discriminatory, even where the harms they seek to avoid are real rather than pretextual. Both the courts and Congress have recognized that people should not be disadvantaged "for their own good" because of their race, sex, or disability. The "direct threat" provision of the ADA exemplifies this cardinal civil rights principle. Congress provided that no employer need hire someone whose disability may harm others in the workplace. But that exception to the ADA's general nondiscrimination principle does not apply where the individual's disability poses a risk of harm only to the individual. Where a person with a disability faces such a risk of harm to himself, the decision whether to accept that risk belongs to the individual rather than to his employer. When Chevron refused to hire Echazabal because it believed that, due to his disability, the job posed a threat to him, it violated the ADA.

ARGUMENT

I. ALLOWING INDIVIDUALS TO DECIDE WHAT PHYSICAL OR SOCIAL RISKS THEY THEMSELVES WILL UNDERTAKE IS A CORE CIVIL RIGHTS PRINCIPLE

American anti-discrimination law seeks to enable each individual to participate fully in civic life, ensuring equal access for everyone to the workplace, to housing, and to places of public accommodation. The Constitution and civil rights laws accomplish this end in at least two ways: First, they protect against discriminatory exclusions based on invidious prejudice. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423 (1968)(Civil Rights Act of 1866 meant to end discrimination based on "custom or prejudice"). Second, the civil rights laws take aim at paternalism or mistaken beneficence -- the decision to exclude an employee from a job, a housing applicant from an apartment, or a student from a school, because of her race, sex or disability, based on the assertion that the exclusion will actually help the excluded person. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977). This second principle is no less a core principle of civil rights than the first.

Paternalistic exclusions were routinely upheld in many contexts prior to the second half of the 20th century, but such restrictions have since been recognized as discrimination itself. This reversal results from the recognition that individuals should have the freedom to decide what physical or social risks they will assume in their employment or in other aspects of their lives, rather than allowing others to make such decisions for them based on race, sex, or disability, no matter how well- or ill-intentioned these decisions may be.

A. Paternalism Has Often Been Invoked To Justify Discrimination

Historically, paternalism has often been invoked in support of discrimination. Employers, landlords, and educators have asserted that treating certain people differently because of their race or sex was done "for their own good." Such superficially well-meaning restrictions have appeared in numerous situations. For example, in one of the earliest school desegregation cases, the Massachusetts Supreme Judicial Court dismissed a constitutional challenge to a segregated primary school by asserting that racial separation benefited black students. Indeed, the court adopted the view of the primary school committee that the "continuance of separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to promote the instruction of that class of the population." *Roberts v. City of Boston*, 59 Mass. 198, 1849 WL 2756, at *3, *8 (1849).

Almost a century later, when Heman Sweatt challenged the constitutionality of Texas's separate law school for African Americans, he was met with substantially the same response: Texas argued, and the Texas courts agreed, that the race-segregated law school benefited African Americans because the smaller classes in the "Negro Law School" would provide black students with "better experience and education; they would be called on more frequently, would be more 'on their toes'." *Sweatt v. Painter*, 210 S.W.2d 442, 449 (Tex. Civ. App. 1948)(noting testimony of law school dean that "in the Negro Law School he (Sweatt) would have gotten a good deal more personal attention from the faculty than he would have had he been in the large entering class in The University of Texas"), *rev'd*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *see also Davis v. County Sch. Bd.*, 103 F.Supp. 337, 340 (E.D. Va. 1952)("maintenance of the separated system [of schools by race] . . . in practice has begotten greater opportunities for the

Negro"), *rev'd*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

Even after this Court repudiated purportedly "separate-but-equal" race-segregated educational facilities in *Brown*, arguments persisted that mandating separate schools benefited African Americans. For example, in *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F.Supp. 667 (S.D. Ga. 1963), *rev'd*, 333 F.2d 55 (5th Cir. 1964), the trial court found that a racially mixed classroom would be detrimental to both black and white students, and that segregation was beneficial for both as well. It reasoned that "[f]ailure to attain the existing white standards would create serious psychological problems of frustration on the part of the Negro child, which would require compensation by attention-creating antisocial behavior." *Id.* at 683. The court determined that "[t]otal group integration as requested by plaintiffs would seriously injure both white and Negro students . . . and adversely affect the educational standards and accomplishments of the public school system." *Id.* at 684. The district court concluded that even a partial integration of students would be damaging to African-American pupils, reasoning that:

> Negro children so transferred would not only lose their right of achievement in their own group but would move to a class where they would be inescapably conscious of total social rejection by the dominant group. Such children must try to identify themselves with the white children while unable to free themselves from continuing identification with other Negro children. Additionally, the children involved, while able to maintain the rate of the white class at first, would, according to all of the [IQ] test results [presented by the witnesses], thereafter tend to fall further back in each succeeding term.

> The effects on the remaining Negro children would be even more injurious. The loss of the better group members would greatly increase any existing sense of inferiority. The competitive drive to educational accomplishment for those not transferred would be taken away. The Court finds that selective integration would cause substantial and irremovable psychological injury both to the individual transferee and to other Negro children.

Id.; *see also id.* ("damaging assumptions of inferiority increase whenever the [Negro] child is brought into forced association with white children"). For that court, racial segregation in the schools was justified because the court found that it benefited black students.

Even laws prohibiting interracial marriage were justified by assertions that they actually helped African Americans and other non-Caucasian individuals. In *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), the Virginia high court upheld the state's anti-miscegenation law, observing that "it is for the peace and happiness of the colored race, as well as of the white, that laws prohibiting intermarriage of the races should exist." *Id.* at 752 (citing *Green v. State*, 58 Ala. 190 (1877)).

Discrimination against women was also justified by assertions that excluding them from various situations protected women's physical well-being. For example, in the early 20th century, statutes restricting women's access to the workplace were defended as protecting women from the physical rigors of manual labor. In upholding a statute that limited women to ten hours of work a day, the Supreme Court at that time cited the need to safeguard the physical constitution of women and their role as mothers. The Court reasoned:

> That women's physical structure and the performance of maternal functions place her at a

> disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . . [and] justif[ies] legislation to protect her from the greed as well as the passion of man.

Muller v. Oregon, 208 U.S. 412, 421-22 (1908). Other courts readily approved similar restrictions on a woman's ability to work based on the asserted need to protect women from physical harm. *See, e.g.*, *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695, 697 (Ill. 1910)(upholding 10-hour workdays for women but not men as necessary "to protect . . . women from the consequences induced by long, continuous manual labor," which would render women "weakly and sick" and unable to be the "mothers of vigorous children"); *Wenham v. State*, 91 N.W. 421, 424 (Neb. 1902)(upholding 10-hour workdays for women because longer workdays would "wreck the constitutions and destroy the health of women, and render them incapable of bearing their share of the burden of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition"); *Commonwealth v. Beatty*, 15 Pa. Super. 5, 9 (Pa. 1900)(upholding a statute that prohibited women from working more than twelve hours per day in certain jobs and agreeing with the lower court that "an act which prevents the mothers of our race from being tempted to endanger their life and health can be condemned by none").

Similarly paternalistic arguments were advanced based on a purported concern for women's moral, rather than physical, well-being. For example, in *Bradwell v. Illinois*, 83 U.S. 130 (1872), Myra Bradwell applied to practice law. In upholding the state's refusal to admit Bradwell to the bar, Justice Bradley, concurring in the judgment, observed that:

> the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.

Id. at 141. The Wisconsin Supreme Court relied on like reasoning in *In re Goodell*, 39 Wis. 232, 1875 WL 3615 (1875), when it too refused a woman admission to the bar:

> It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman . . . that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape . . ., all the nameless catalogue of indecencies . . . with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold [women] in too high reverence . . . voluntarily to commit [them] to such studies and such occupations.

Id., 1875 WL 3615, at *8-9.

Courts' acceptance of paternalistic justifications for excluding women is not a thing of the distant past, but endured at least into the 1960s. Women were excluded from jury service, or allowed to serve on a solely voluntary basis, in order to insulate them from the "filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a trial." *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966) (holding that the "legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers"); *see also Near v. Commonwealth of Va.*, 116 S.E.2d 85, 91 (Va. 1960)(upholding exclusion of women from juries in order to prevent their exposure to "court trials, which often involve facts and circumstances of a filthy, indecent, and loathsome nature, references to intimate sexual relations, and other elements likely to prove humiliating and embarrassing to a lady"); *Bjorlin v. United Steamship Co.*, 10 F.R.D. 42, 42 (N.D. Ohio 1950)(excluding female juror from case involving discussion of venereal disease because it would "be potentially embarrassing to a mixed jury").

B. Such Paternalistic Rationales Have Since Been Recognized As Discriminatory

Since the middle of the 20th century, however, there has been a growing recognition that such paternalistic justifications themselves are discriminatory. In the passage of various civil rights acts by Congress, and in court decisions interpreting those civil rights acts and the Constitution, both Congress and the courts have repudiated the notion that employers, landlords, or schools can justify excluding individuals based on race, sex, or other protected characteristics where the exclusion is purportedly "for their own good."

For example, the Fifth Circuit reversed the trial court's approval of race-segregated schools in *Stell*, acknowledging that separation of the races was *per se* discriminatory under *Brown v. Board of Education*, 347 U.S. 483, despite the

proffered evidence that it might actually help at least some black children. *Stell v. Savannah-Chatham County Bd. of Educ.*, 333 F.2d at 61-62. Even before *Brown*, this Court reversed the state court ruling in *Sweatt v. Painter*, holding that black students did not benefit from the separate "Negro Law School," even if the faculty-student ratio was better. *Sweatt v. Painter*, 339 U.S. at 634-35. And the ban on interracial marriages was declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1, 2 (1967), regardless of whatever harm some may have argued miscegenation might cause.

As courts have rejected these paternalistic rationales, they have increasingly recognized that a central part of implementing civil rights protections is ensuring that individuals can decide whether they themselves will take on a given physical or social risk, rather than having such decisions made for them based on their race, sex, disability, or other protected criteria. For example, in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), an employer denied women positions as switchmen, arguing that its restriction was necessary to protect women from the demanding physical requirements of the position, which included working late hours and the possibility of having to lift a 34-pound fire extinguisher. The court rejected the argument that these requirements rendered being male a bona fide occupational qualification for the position.[2] As the court explained:

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide wheth-

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[2] Under 42 U.S.C. §2000e-2(e)(1), an employer may discriminate on the basis of sex "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." It therefore provides a limited defense to a claim of sex discrimination under Title VII of the Civil Rights Act of 1964.

> er or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.

Id. at 236. *See also Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980)(holding that, "in the area of civil rights, personal risk decisions not affecting business operations are best left to individuals who are targets of discrimination," and thus invalidating requirement that all flight attendants commence leave immediately upon becoming pregnant in order to ensure their safety). Civil rights law gives individual women the opportunity to make these choices for themselves in part because of a recognition that the old paternalistic rules were as likely to harm women as help them, by restricting their opportunities and making them second-class and undesirable workers. As this Court observed in *Frontiero v. Richardson*, 411 U.S. 677, 684

(1973), the nation's history of sex discrimination was often "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 & n.10 (1982)(discussing history of legislation aimed at protecting women).

In holding that individuals should be free to choose what educational opportunities are most appropriate for them, this Court in *United States v. Virginia,* 518 U.S. 515 (1996), reaffirmed the principle that it is up to the individual, not a third party, to decide whether to take on specific social or educational risks. Virginia limited enrollment at the Virginia Military Institute (VMI) to men and established a separate school, the Virginia Women's Institute for Leadership (VWIL), for women. VMI operated on an "adversative" educational model, designed to break the individual spirit of men and instill in them certain values; VWIL operated on a different model that sought to build confidence in women. *Id.* at 523, 527. Lower courts held that purported differences in how women and men would respond to the contrasting educational models justified the sex-based admission restrictions. *Id.* at 528; *see United States v. Commonwealth of Virginia*, 852 F.Supp. 471, 476 (1994)(finding VWIL to be appropriate for women in part based on evidence that "an adversative method of teaching in an all-female school would not only be inappropriate for most women, but counter-productive," according to research that shows "that most women reaching college generally have less confidence than men"); *id.* at 480 (citing evidence of widespread depression and eating disorders among college-age women stemming from their lack of confidence and overabundance of self-control). Rejecting the argument that all women should be excluded from VMI because many women would not find its approach to be beneficial, this Court explained that the issue "is not whether women -- or men -- should be forced to attend

VMI; rather the issue is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords." 518 U.S. at 542. In other words, individual women must be allowed to decide for themselves whether they want to attend an "adversative" educational institution, even if some may claim it would be harmful to women.

C. Even Where A Paternalistic Exclusion Seeks To Avoid Actual Harm, It Is Still Prohibited Discrimination

It does not matter that an exclusionary policy purportedly seeks to protect individuals from an actual, rather than imaginary, physical or social harm; the civil rights laws recognize that decisions about whether to risk that harm are for the individual to make, not for an employer, landlord, or school board to make on the basis of a protected characteristic. In *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), this Court made the principle explicit: even the prospect of actual harm to an individual does not justify empowering an employer to deny equal employment opportunity based on what it thinks is best for the individual because of her race, sex, or disability.

In *Johnson Controls*, this Court held that the goal of avoiding potential injury to a woman and her fetus from exposure to lead, while understandable, was insufficient to justify a sex-based exclusion from work. Johnson Controls, which operated a battery plant, prohibited all women capable of bearing children from taking jobs that could expose them to lead. The employer argued that this exclusion was necessary in order to protect women and their fetuses, but this Court responded: "Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman

to make for herself." *Id.* at 206. "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make." *Id.* at 211.

Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321, this Court distinguished between a risk of harm to an individual herself, which could not justify the person's exclusion from the workplace, and a risk of harm to others, which could. In *Dothard*, Alabama prohibited women from serving as prison guards where they would be in "contact" positions involving close physical proximity to male prisoners. In discussing whether that rule violated Title VII's ban on sex discrimination, this Court held that the fact that contact positions might involve potential harm to a woman guard herself was irrelevant. As the Court explained, "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." *Id.* at 335. If *Dothard* had involved no more than "an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum-security male prison," the restriction would have been stricken despite the potential physical danger the female guards faced. *Id.* This Court upheld the prohibition against women guards in contact positions only because the "likelihood that inmates would assault a woman because she was a woman" posed "a real threat . . . to the basic control of the penitentiary and protection of its inmates and the other security personnel." *Id.* at 336. Thus, while the threat of harm to the female guard herself would not justify a sex-discriminatory restriction, the threat of harm to others would.[3]

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[3] Age discrimination cases draw a similar line, recognizing that age can be (continued...)

Despite the prospect of an acknowledged and avoidable harm to an individual in these cases, this Court reaffirmed the basic principle that decisions about risks to oneself are reserved to the individual and are not for third parties to make based on the individual's membership in a protected class, no matter how serious the risk of harm may be and no matter how well-intentioned the proposed exclusion.

Today it may seem implausible that the exclusion of women and African Americans that was accepted in the early cases was actually believed to be for their own benefit. But at the time, the rationales that justified segregated schools in *Roberts*, the ban on interracial marriage in *Naim*, and the prohibition against women lawyers in *Bradwell*, may well have been accepted by many as truths. The proponents of these positions certainly could have cited widespread social acceptance of, and scientific bases for, their conclusions.

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[3] (...continued)
a bona fide occupational qualification (BFOQ) on grounds of safety where the employee may endanger the safety of others, but implicitly rejecting the notion that an individual may be excluded because of her age based on the risk of harm to the individual herself. *See, e.g., Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 423 (1985)(holding that mandatory retirement age for flight engineers would be lawful only where advanced age would impair the engineer's ability to carry out his job functions, thereby threatening the safety of passengers and crew members); *EEOC v. Missouri State Hwy. Patrol*, 748 F.2d 447, 453-56 (8th Cir. 1984)(upholding maximum hiring age for patrolmen based on threat to safety of public); *Usery v. Tamiami Trails Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976)(finding that a maximum hiring age for bus drivers was a BFOQ because it was "reasonably necessary to the essence of his business -- here, the safe transportation of bus passengers from one point to another").

See, e.g., *United States v. Virginia*, 518 U.S. at 537 & n.9 (noting that, in 1839, "[h]igher education . . . was considered dangerous for women" on physical grounds, since the science of the day held that educating women would "interfere with the development of girls' reproductive organs"); *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F.Supp. at 683 (accepting expert testimony that racially integrating schools would cause significant educational harm to African Americans). But even where today's science suggests that actual harm may result, where that potential harm threatens only the individual, it is now the law that the individual has the right to decide whether to take the risk rather than being "protected" from the harm based on race, sex, or disability. This is part of the fundamental guarantee of civil rights laws.

II. THE AMERICANS WITH DISABILITIES ACT EMBODIES THIS CORE CIVIL RIGHTS PRINCIPLE

The Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, embodies the principle that individual employees, rather than their employers, should be free to decide what risks they themselves will undertake in the workplace.

The ADA was intended to eradicate discrimination against people with disabilities, including paternalistic restrictions such as "overprotective rules and policies." 42 U.S.C. §12101(a)(5). This purpose of the ADA is reflected not only in the text of the statute, but in its legislative history. The House Report states plainly: "It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant." H. R. Rep. No. 101-485, pt. 2, at 72, *reprinted in* 1990 U.S.C.C.A.N. 303, 354. And, as Representative Waxman explained, "[t]he ADA precludes an employer from denying an employment opportunity to an individual with HIV disease

based on paternalistic concerns that the employee might be exposed to additional health risks." 136 Cong. Rec. H4626 (July 12, 1990).[4]

As part of the ADA's overall focus on preventing people with disabilities from being excluded from participation in society for their "own good," Congress distinguished between a threat that an individual poses to other people, which may justify excluding her from employment, and a threat that she may pose solely to herself, which does not. The text of the ADA provides that an employer may validly adopt as a qualification standard "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals." 42 U.S.C. §12113(b) (emphasis added). A "direct threat," in turn, is specifically limited to "a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation." 42 U.S.C. §12111(3) (emphasis added). The distinction between threat to self and threat to others also appears in the legislative

[4] The ADA's focus on eliminating protective policies is typical of other civil rights acts, including the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (the "PDA"). *See, e.g.*, Legislative History of the Pregnancy Discrimination Act of 1978, at 130-31 (1980)("Under S. 955, the treatment of pregnant women in covered employment must focus not on their condition alone, but on the actual effects of that condition on their ability to do work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees")(Statement of Sen. Cranston); *id.* at 208 ("The legal status of the past often forced women to choose between having children and working. For many, wanting children could not outweigh the economic realities that her income was essential. This legislation gives her the right to choose both, to be financially and legally protected before, during, and after her pregnancy")(Statement of Rep. Sarasin).

history. Senator Kennedy, one of the co-sponsors of the ADA, stated:

> [t]he ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace -- that is, to other coworkers or customers . . . . It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.

136 Cong. Rec. S9684-03, at S9697 (July 13, 1990).[5]

In limiting the direct threat defense to situations involving a threat to others, Congress made the ADA a consistent part of American civil rights law. As discussed above, exclusions based on protected characteristics are not justified based simply on the risk that an individual may

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[5] *Amici* understand that the implications of the ADA's direct threat provision, along with the direct threat regulations promulgated by the Equal Employment Opportunity Commission, are discussed in greater detail in the Brief for Respondent.

suffer harm to herself, without causing harm to others. Just as the threat of personal injury to female guards themselves did not justify excluding women from contact positions in *Dothard*, 433 U.S. at 335; and just as the threat of physical injury to a woman and her fetus from working around lead did not justify excluding women of child-bearing age from the workplace in *Johnson Controls*, 499 U.S. at 211, so too, the ADA makes the individual the proper arbiter of risk, the person in command of his or her own fate.

III. CHEVRON VIOLATED THE ADA BY REFUSING TO HIRE ECHAZABAL BECAUSE OF HIS DISABILITY

When Chevron refused to hire Echazabal because it believed that working in the coker unit would pose a threat to his health, it engaged in impermissible discrimination. Chevron asserts that it has not engaged in disability discrimination because it based its employment decision upon an evaluation of Echazabal's individual medical condition. Brief for Petitioner at 36-37 n.15, 39. This assertion is specious, since it was Echazabal's disability itself that constituted the very "medical condition" that caused Chevron not to hire him. Chevron excluded Echazabal from the coker unit because he has chronic liver disease, which is what Chevron has conceded makes him an individual with a disability protected under the ADA. That Chevron considered Echazabal's individual physical condition[6] does not make Chevron's actions any less discriminatory; on the contrary, it is precisely Chevron's reliance on Echazabal's particular medical condition that links the company's employment decision to his disability and renders that decision unlawful.

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[6] *Amici* understand that the degree to which Chevron conducted an "individualized" inquiry is very much in dispute.

Chevron in effect usurped a choice that under the ADA belongs to Echazabal. As this Court clarified in *Johnson Controls*, whether to take risks with one's own health or welfare is a decision reserved to the individual himself, not one for an employer to make based on characteristics protected by the civil rights laws.[7]

Chevron's proposed distinction, between relying on Echazabal's medical condition as opposed to relying on his disability, was recognized as irrelevant in *Johnson Controls*. There, this Court held not only that the company was precluded from excluding all women capable of bearing children from working in the battery plant, but also that it could not exclude specific women who were actually pregnant. 499 U.S. at 206. Thus, even if Johnson Controls had considered the actual health risks faced by its female employees one by one, as Chevron considered Echazabal's medical condition here, the result would have been the same. Indeed, cases since *Johnson Controls* have made clear that even where an employer fears for the safety of a particular worker, firing her because she is actually pregnant is unlawful sex discrimination. *See, e.g.*, *EEOC v. Corinth*, 824 F.Supp. 1302, 1306, 1308-1309 (N.D. Ind. 1993)(firing of pregnant waitress out of concern that she was "too big"

[7] Indeed, one reason the individual should decide what risks to take is because the individual has the incentive to secure the most comprehensive information about the risks he faces. Here, for example, Echazabal vigorously disagrees with Chevron about the nature of the harm he would face by working in the coker unit and his doctors say he faces no significant health threat from working there. J.A. 99-116, 122-26.

and "might fall down" and hurt herself or her fetus was sex discrimination). Chevron's notion that an individualized determination is somehow inherently nondiscriminatory is just wrong; a decision to exclude a particular individual for discriminatory reasons is still discriminatory. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 456 (1982)("Every *individual* employee is protected against . . . discriminatory treatment")(emphasis in original).

Chevron contends it has not discriminated against Echazabal because its decision was not based on stereotypes. *See* Brief for Petitioner at 36-37 n.15. But Chevron's liability is not determined by whether or not it relied on stereotypes, since civil rights laws simply prohibit discrimination, whether based on stereotypes, protective rationales, or individualized assessments. For example, in *Johnson Controls*, the company's rationale for excluding all women capable of bearing children was a threat of actual harm to women and their fetuses, not only a stereotype about the proper role of women in society. 499 U.S. at 206. And while the *Dothard* Court held that "it is impermissible under Title VII to refuse to hire [on] the basis of stereotyped characterizations of the sexes," 433 U.S. at 333, neither the Court's holding (a) that women could not be excluded from contact positions based on a threat of harm to themselves, nor (b) that they could be excluded based on a threat to others, depended on whether or not the prison had acted solely on the basis of stereotypes. *Id.* at 335-36.

CONCLUSION

It is a core principle of civil rights that individuals should be able to decide whether to risk harm to themselves, rather than allowing others to decide to "protect" them from such harm based specifically on their protected characteristics such as race, sex, or disability. Because the clear language of the ADA limiting the direct threat defense to threats to others embodies this fundamental principle, the decision the court of appeals should be affirmed.

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No. 00-1406

IN THE

Supreme Court of the United States

CHEVRON U.S.A. INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* FOR THE AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, THE WESTERN OCCUPATIONAL AND ENVIRONMENTAL MEDICAL ASSOCIATION, AND THE CALIFORNIA SOCIETY OF INDUSTRIAL MEDICINE AND SURGERY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a person who is unable to carry out the essential functions of a job without incurring significant risks to the person's own health or life is a "qualified individual" who satisfies "qualification standards" for that job within the meaning of the Americans with Disabilities Act.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Cited Authorities

INTEREST OF THE AMICI CURIAE[1]

The American College of Occupational and Environmental Medicine is the nation's largest medical society dedicated to promoting the health of workers through preventive medicine, clinical care, research, and education. It was founded in 1916 and represents over 6,000 physicians specializing in the field of occupational and environmental medicine. ACOEM members are trained in treating job-related diseases, recognizing and resolving workplace hazards, instituting rehabilitation methods, and providing well-managed care.

The Western Occupational and Environmental Medical Association represents physicians specializing in occupational and environmental medicine in California, Arizona, Nevada, Utah, and Hawaii. It was founded in 1941. Its mission is to be a resource to and represent members in the profession and practice of occupational and environmental medicine and to enhance their efforts to promote and improve health in the workplace and the community. WOEMA is a component society of ACOEM.

The California Society of Industrial Medicine and Surgery represents California physicians who treat and evaluate industrial injury patients. It was organized in 1980 to promote the highest standards of professional service in the field of industrial medicine and surgery; to increase public awareness of the role of medicine in the workers'

1. The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to its preparation and submission.

compensation system; to promote health and safety; to provide continuing education in the field of industrial medicine and to set standards of professional conduct for those in the system.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling that the Americans with Disabilities Act requires employers to employ persons whose medical condition creates a significant risk that they will be seriously injured or killed on the job is erroneous. It flies in the face of long-standing public and private policy in favor of protecting worker health, including a policy of protecting workers from risks to themselves from their own medical conditions. Congress has enacted numerous laws to prevent workplace injury and illness, and the occupational medicine profession has played an important role in giving effect to those laws. Workplace injuries and illnesses — and the devastation they cause to all concerned — have been significantly reduced in recent years. The Ninth Circuit's erroneous interpretation of the ADA undermines this progress and should be rejected.

Allowing employers to rely on the medical judgments of occupational medicine physicians is fully consistent with the principles of the ADA. Employers who exclude workers based on a medical diagnosis that employment would seriously injure or kill the worker are not engaging in discrimination based on stereotypic assumptions or prejudices against which the ADA is directed. Rather, they are acting on the basis of expert advice of trained professionals who are ethically bound to protect worker health and render opinions based on sound medical and scientific principles.

For the same reason, employers should not be subjected to suits under the ADA based on after-the-fact efforts to dispute in court the validity of the reasonable medical opinions available at the time the employment decision was made. Proper reliance on facially reasonable opinions rendered by trained physicians does not become unlawful discrimination merely because allegedly conflicting opinions are later produced.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH FUNDAMENTAL PUBLIC AND PRIVATE POLICY IN FAVOR OF PROTECTING THE HEALTH AND SAFETY OF WORKERS.

The health and safety of workers has long been a concern of both law and medicine. According to the federal Bureau of Labor Statistics, 5.7 million injuries and illnesses were reported in private industry workplaces in just the year 2000 alone. This was an incidence rate of 6.1 cases per 100 equivalent full-time workers. Nearly half of these incidents required recuperation away from work, restricted duties at work, or both. *See* "Workplace Injuries and Illnesses in 2000," *News*, Bureau of Labor Statistics, Department of Labor (Dec. 18, 2001), http://stats.bls.gov/iif/oshwc/osh/os/osnr0013.pdf. The federal government reports that each day an average of 9,000 workers in this country sustain disabling injuries on the job, 16 workers die from an injury sustained at work, and 137 workers die from work-related diseases. *See* http://www.cdc.gov/niosh/about.html.

As a leading medical journal has noted, the effects of workplace injury and illness are devastating:

> Occupational illness, injuries, and deaths are costly events, responsible for direct medical costs; for indirect costs resulting from lost production, postponed opportunities and diminished investment; and for noneconomic costs, resulting from pain and suffering, disrupted careers, and devastated families.

Linda Rosenstock, et al., *Occupational and Environmental Medicine: Meeting the Growing Need for Clinical Services*, 325 New England J. of Med. 924, 924 (Sept. 26, 1991).

To reduce workplace injury and illness, Congress enacted in 1970 the Occupational Safety and Health Act. 29 U.S.C. § 651, *et seq.* This statute reflects the nation's fundamental interest in protecting the health and safety of workers. The stated purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *Id.* § 651(b). Among other things, Congress acted to assure "insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience." *Id.* § 651(b)(7). To accomplish this, the Act requires that "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a)(1). The Act also requires the Occupational Safety and Health Administration ("OSHA") to promulgate occupational safety and health standards to protect worker health. *Id.* §§ 654(a)(2), 655.

In compliance with this mandate, OSHA has promulgated numerous standards to protect workers from threats to their own health from workplace conditions, including requirements that workers medically diagnosed with certain conditions be removed from areas where substances injurious to their health are present. *See, e.g.*, 29 C.F.R. § 1910.1028(i)(8) (medical removal to prevent exposure to benzene); *id.* § 1910.1025(k) (medical removal to prevent exposure to lead).

As part of the Act, Congress also created the National Institute for Occupational Safety and Health ("NIOSH"). 29 U.S.C. § 671. Its statutory charge is to conduct research and experimental programs to improve occupational health and safety and to make recommendations for new or improved health and safety standards. *Id.* § 671(d). To fulfill this charge, NIOSH has prepared and released literally hundreds of publications related to occupational health and safety issues, including research studies, information on occupational illnesses and injuries, training materials and guidelines for prevention and treatment.

One of the illnesses NIOSH has addressed is Hepatitis C (HCV), the disease contracted by the plaintiff in this case. *See* http://www.cdc.gov/niosh/bbppg.html. HCV is the most common bloodborne infection in the United States. Persons infected with HCV are at risk for chronic liver disease, the tenth leading cause of death in the United States. The Centers for Disease Control (of which NIOSH is a part) estimates that HCV-related chronic liver disease results in 8,000 to 10,000 deaths each year. Although the rate of new infection has decreased in recent years, CDC believes that the number of deaths attributable to HCV-related liver disease may substantially increase in the next 10-20 years as the infected

population reaches the age at which complications from chronic liver disease typically occur. As CDC notes, "the course of chronic liver disease is usually insidious, progressing at a slow rate without symptoms or physical signs in the majority of patients during the first two or more decades after infection." *See* http://www.cdc.gov/ncidod/diseases/hepatitis/C_Trainng/edu/3/default.htm. NIOSH has published occupational health guidelines indicating that persons with impaired liver function should not be exposed to toxic substances present in certain workplaces, such as the refinery involved here. *See* http://www.cdc.gov/niosh/chem-inx.html.

The medical profession shares the government's strong interest in protecting the health of the nation's workers by reducing the risk of occupational illness and injury. This interest has led many physicians to specialize in occupational medicine and to the creation of numerous associations dedicated to occupational and environmental medicine. These organizations exist to enhance the profession's ability to prevent workplace injury and illness, as well as to prevent a worker's existing illnesses from being exacerbated by workplace conditions.

Like other medical professionals, occupational medicine physicians follow as a fundamental tenet of their practice the need to protect individual health. The first principle of ACOEM's Code of Ethical Conduct is to "accord the highest priority to the health and safety of individuals in both the workplace and the environment." *See* ACOEM Code of Ethical Conduct, http://www.acoem.org/code/code.htm.

The combined effort of government, medical professionals, employers and employees has resulted in significant progress. The rate of workplace injury and illness

reported for 2000 is the lowest since the Bureau of Labor Statistics began reporting such information in 1973. *See* http://stats.bls.gov/iif/oshwc/osh/os/osnr0013.pdf at 3. According to NIOSH, from 1970 to 1995, the rate of workplace fatalities fell by 78%, and the number of workplace deaths declined by 62%. Similarly, between 1973 and 1994, the rate of occupational injuries and illnesses dropped by 25%. *See* http://www.cdc.gov/niosh/gpran1a.html#bkg.

The Ninth Circuit's ruling that the ADA requires an employer to place a worker in a job that will likely cause significant injury or death to that employee is contrary to the fundamental public policy principles that have guided this progress. The right of individuals to make their own decisions regarding medical treatment and their own safety has never been understood to require that employers — on pain of liability for unlawful discrimination — knowingly contribute to the degradation of an employee's health. The policy judgments in the area of workplace safety have consistently been to the contrary.

Moreover, imposing liability in these circumstances will inevitably weaken the concerted efforts of the government and the medical profession to enhance worker safety and reduce illness and injury on the job. If employers may not deny or limit a person's employment to protect his or her health without being sued under the ADA, employers will have an incentive not to require employees to undergo medical testing and not to seek out competent medical advice from trained professionals regarding potentially deadly health risks. The result will be that work-related illness and injury will increase and workers who wish to be fully informed of the risks they face and to take steps to avoid those risks may be deprived of the full opportunity to do so. There is no basis

for the Ninth Circuit's conclusion that Congress intended such a perverse result that runs so directly contrary to long-standing public policy and the hard-fought progress made in this area.

II. OCCUPATIONAL MEDICINE PHYSICIANS ARE TRAINED AND ETHICALLY OBLIGATED TO RENDER OPINIONS BASED SOLELY ON MEDICAL EVIDENCE.

Permitting employers to decline employment based on medical advice that an applicant's health would be seriously at risk is also consistent with the underlying purpose of the ADA. The ADA prohibits "discrimination" against persons with disabilities. 42 U.S.C. § 12112. Congress was concerned about "purposeful unequal treatment" based on "stereotypic assumptions." 42 U.S.C. § 12101(7). It wanted to bar decisionmaking premised on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, [and] pernicious mythologies." 1 House Comm. On Education and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. 101-336, Americans with Disabilities Act 125 (Comm. Print 1991).

An employer that relies on opinions rendered by an occupational medicine physician is not relying on "stereotypic assumptions" or "irrational fears." Both by their training and the ethical principles that govern them, occupational medicine physicians are required to act in the best interest of the individual and on the basis of the best available scientific medical evidence.

ACOEM's Code of Ethical Conduct provides that occupational medicine physicians must "practice on a

scientific basis with integrity." *See* http://www.acoem.org/code/code.htm. The Code likewise requires occupational medicine physicians to "strive to acquire and maintain adequate knowledge and expertise upon which to render professional service." *Id.* The American Medical Association's ethics code similarly provides that physicians performing work-related independent medical examinations must "evaluate objectively the patient's health or disability" and "should not be influenced by the preferences of the patient-employee, employer, or insurance company when making a diagnosis." American Medical Association, Code of Medical Ethics: Current Opinions, E-10.03 Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations, http://www.ama-assn.org/ama/pub/category/2503.html.

Occupational medicine physicians draw upon a variety of resources to enable them to provide this expert, objective care. In addition to basic medical training, at least 35 medical and public health schools around the country offer approved residency programs in occupational medicine. *See* http://www.acoem.org/courses/acgme.htm. Various universities, schools of public health and associations such as ACOEM offer short courses (ranging from several days to one year) and mini-residencies in occupational medicine. The American Board of Preventive Medicine recognizes and certifies qualified physicians in the occupational medicine specialty. Approximately 2,900 physicians have been "board certified" in occupational medicine within the United States. The AMA estimates that about 15,000 physicians in the United States practice either full- or part-time as occupational medicine physicians.

Occupational medicine physicians also have available to them a large body of research, texts, and journals dedicated to occupational medicine issues, including extensive material published by NIOSH and other governmental agencies. Since 1981, ACOEM has published a list of recommended occupational medicine materials, including a core set of reference works. *See* http://www.acoem.org/pubs/reclib.htm#toplist. ACOEM also publishes the Journal of Occupational and Environmental Medicine and co-sponsors each year the American Occupational Health Conference. ACOEM's Code of Ethical Conduct encourages physicians "to strive to expand and disseminate medical knowledge" and to communicate "significant observations and recommendations concerning . . . health or safety." *See* http://www.acoem.org/code/code.htm. ACOEM recently released a formal position statement emphasizing the importance of complying with these provisions to further the health of workers. *See* http://www.acoem.org/paprguid/papers/dissemin.htm.

As result of their training, occupational medicine physicians gain special expertise in the prevention, evaluation, and management of conditions that are either commonly or uniquely experienced by workers or persons exposed to hazardous environmental agents. Of particular value is the expert knowledge occupational medicine physicians possess regarding the particular conditions at a given workplace or the hazards facing employees in a particular industry, such as the petroleum refining industry at issue here. Occupational medicine physicians recognize the importance of understanding an employee's occupational history (in the context of the employee's general health and medical history) and the hazards present on the employee's job when determining whether employment may be causing or exacerbating an illness or injury. William N. Rom, ENVIRONMENTAL AND OCCUPATIONAL MEDICINE 5 (1998).

Amici urge the Court to make clear that employers are entitled to rely upon the expert advice they receive from trained medical practitioners regarding workplace hazards, including threats to an employee's own health arising from illnesses specific to that employee.

III. EMPLOYERS SHOULD BE PERMITTED TO RELY UPON THE MEDICAL OPINIONS REASONABLY AVAILABLE TO THEM AT THE TIME THE EMPLOYMENT DECISION IS MADE.

The EEOC's regulations provide that whether an employee poses a "direct threat" requires an "individualized assessment" based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). Amici believe that this standard must be applied in a manner that permits employers to rely on the opinions of physicians available at the time the employment decision is made, so long as there is nothing about the opinions or the attendant circumstances that would render them suspect. An employer should not be required, on pain of being held liable for violating the ADA, to second-guess the facially reasonable opinions of competent physicians or to conduct its own full trial of the relevant medical issues each time it is required to assess whether an employee is qualified or poses a "direct threat."

The district court found that Chevron properly relied upon the medical opinions available to it in concluding that Echazabal's health would be endangered if he were employed in the refinery.[2] In doing so, the court recognized that the focus

2. This case does not involve any question whether plaintiff was entitled to a reasonable accommodation, as plaintiff did not raise that issue in the courts below.

must be on the information available to the employer at the time the employment decision is made and that the employer cannot be held liable for violating the ADA based on allegedly contrary, after-the-fact medical opinions presented only in later litigation.

The district court's ruling is consistent with the decisions of other lower courts on this issue. For example, in *Knapp v. Northwestern University*, 101 F.3d 473 (7th Cir. 1996), the Seventh Circuit ruled that the defendant university properly relied on the unanimous medical opinions available to it at the time in finding that plaintiff faced a serious risk of substantial harm, even though conflicting medical opinions were later introduced at trial. The court reasoned:

> We do not believe that, in cases where medical experts disagree in their assessment of the extent of a real risk of serious harm or death, Congress intended that the courts — neutral arbiters but generally less skilled in medicine than the experts involved — should make the final medical decision. Instead, in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court's place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence.

101 F.3d at 485.

Similarly, in *Walker v. Attorney General*, 572 F. Supp. 100 (D.D.C. 1983), the court held that the FBI acted properly in relying upon the diagnosis of the plaintiff's own physician, which was confirmed by an examination at the Naval Medical

Center, even though it was later determined that these diagnoses were erroneous. *Id.* at 101-02. The court concluded that the employer cannot be found to have engaged in discrimination "where the only facts before the employer establish without contradiction that plaintiff is not 'otherwise qualified.' " *Id.* at 102. Likewise, *Bento v. I.T.O. Corp.*, 599 F. Supp. 731 (D.R.I. 1984), held that the employer properly found an employee not to be otherwise qualified where all available medical opinions showed him unfit to work, even though the employee offered contrary opinion at the time of trial:

> An employer in such circumstances may surely be required to assess the nature and extent of an employee's disability in reasonable and realistic terms. Once this is done, however, the assessment itself need not reach a medically unassailable conclusion; the law does not demand either omniscience or deuteroscopy.

Id. at 744-45; *see also Smith v. Chrysler Corp.*, 155 F.3d 799, 807-08 (6th Cir. 1998) (employer "made a reasonably informed and considered decision" based on "medically informed opinions of those with knowledge," including employee's treating physician); *Chiari v. City of League City*, 920 F.2d 311, 316, 317 (5th Cir. 1991) (employer properly relied on medical opinions of two employer-retained physicians, which were agreed with by employee's physician); *Pahulu v. University of Kansas*, 897 F. Supp. 1387, 1394 (D. Kan. 1995) (despite conflicting medical evidence at trial, court found that employer's decision "has a rational and reasonable basis and is supported by substantial competent evidence for which the court is unwilling to substitute its judgment").

The district court's ruling here is also consistent with the decisions of this Court. In recognizing the propriety of a "direct threat" defense in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Court emphasized the need for an "individualized inquiry" to prevent "deprivations based on prejudice, stereotypes, or unfounded fear." *Id.* at 287. These concerns are fully satisfied when an employer relies on facially reasonable and uncontradicted opinions rendered by physicians trained in occupational medicine who have examined the prospective employee.

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court held that, where the defendant was himself a medical professional, the defendant's own conclusion that a significant risk of harm existed was not entitled to any special deference. *Id.* at 649. The defendant was instead obligated to "assess the risk . . . based on the objective, scientific evidence available to him and others in his profession" and his opinion was required to meet a standard of "objective reasonableness." *Id.* at 649-50. When the defendant is not a medical practitioner, and thus is not in a position to itself independently evaluate the medical evidence, the defendant fulfills this duty to "assess the risk" when it consults trained medical professionals and receives their uniform advice that a significant risk of harm exists. As the Court recognized, "[t]he existence, or nonexistence, of a significant risk must be determined from the standpoint of the person" whose action is being challenged. *Id.* at 649. From the standpoint of a lay employer, the employer has done all that it can reasonably be expected to do to "assess the risk . . . based on the objective, scientific evidence available" to it when it obtains facially reasonable individualized opinions from physicians whose competence it has no reason to doubt.

The district court's decision is also consistent with the basic purpose of the ADA to prevent discrimination based on "stereotypic assumptions." 42 U.S.C. § 12101(7). An employer's decision not to hire an applicant does not become unlawful discrimination based on "stereotypic assumptions" merely because the applicant later produces medical opinions that allegedly conflict with the uncontradicted expert diagnoses available to the employer at the time it made its decision. Subjecting an employer to liability under the ADA (including for substantial monetary remedies and attorneys' fees) based on a post hoc introduction of evidence not made available to the employer at the time it was required to act would be patently unfair and would not further any legitimate purpose.

Nor should an employer's liability turn on a *de novo* reevaluation in court of the expert medical evidence upon which the employer relied. Such a rule would take the assessment of medical risk out of the hands of physicians with the training and expertise to evaluate such risk and relegate it instead to the vagaries of the litigation process, to be decided after-the-fact by a judge or jury with no such expertise. The employer would be put in the position of second-guessing the diagnoses it receives and declining to follow them for fear that a judge or jury might later disagree. Amici believe that this result would undermine the ability of physicians to carry out their critical function of independently evaluating their patients' health risks and rendering their expert opinion in the best interest of the patient.

Permitting an employer to rely on contemporaneously available and facially reasonable medical opinions does not leave employees powerless against mistaken diagnoses. If the diagnosis is based on erroneous or incomplete information, the employee remains free to present the correct information to the

physicians who examined him. The employee is also free to contemporaneously seek the opinions of other specialists and to provide that information to the employer, thus provoking a dialogue with the employer and the original examining physicians that might result in agreement that no significant risk of substantial harm exists. The applicable rule here should be drawn in such a way that gives the employee the incentive to seek out and present relevant medical evidence at the time the decision is made — not months or years after-the-fact in the context of burdensome and expensive litigation.

Similarly, to the extent the relevant medical evidence becomes available only after the decision is made, the employee is free to present it to the employer at that time. Should the employer unreasonably persist in an adverse employment decision after receiving information that would make clear to a lay person that the earlier diagnoses were incorrect, liability under the ADA might be proper. But such liability would be imposed for the later adverse action, not for the original decision. *See Bento*, 599 F. Supp. at 744 n.15 (employer could not be held liable based on previously unavailable testimony rendered at trial that plaintiff was fit for work, but such testimony prospectively put employer on notice of plaintiff's fitness should plaintiff re-apply).

Employees are also protected in the event the employer's reliance on medical opinion is not justifiable. In *Lowe v. Alabama Power Co.*, 244 F.3d 1305 (11th Cir. 2001), for example, the court denied summary judgment to the employer because the medical opinion on which the employer relied was not based on a "timely, particularized assessment" of the plaintiff's capabilities. *Id.* at 1306. The physician had performed only one "cursory" examination of the plaintiff

seventeen months before the employment decision at issue and had restricted the plaintiff on an "assumption that all double amputees have the same limitation." *Id.* at 1309; *see also Dipol v. New York City Transit Authority*, 999 F. Supp. 309, 316 (E.D.N.Y. 1998) (employer's reliance not justifiable where physicians had not "performed an individualized assessment of plaintiff's condition").

But where an employer obtains facially reasonable medical opinions based on an individualized assessment by competent medical professionals, no legitimate purpose is served by subjecting the employer to litigation and potential liability for relying on such opinions. As the medical practitioners who render such opinions in compliance with their ethical obligation to provide objective evaluations and to protect individual health, amici urge the Court to make clear that employers may rely on such opinions without fear of later being found to have violated the ADA for having done so.

CONCLUSION

The judgment of the court of appeals should be reversed.

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This cannot be. As noted above, the ADA's legislative history is replete with references to the proper use of job-related standards designed to protect the safety and security of the general public. Congress unmistakably intended for employers to use properly-crafted job qualifications to ensure that the public would not be placed at risk. Indeed, if the ADA were read to preclude employers from imposing these requirements, the potential impact on public safety would be significant, to say nothing of the consequent damage to the employer's business, such as potential tort liability and loss of public favor.

2. The EEOC's regulation applying the "direct threat" analysis to all safety-related issues incorrectly contradicts the statutory language governing the use of more broadly crafted safety standards

One of the EEOC's regulations interpreting the ADA describes the "direct threat" defense as applicable to all safety-related medical standards, regardless of whether the hazard is to the individual's own safety or that of others. 29 C.F.R. § 1630.2(r) (2001). The regulation does not explicitly present the "direct threat" defense as the *sole* method for defending a safety standard, but the agency's interpretations do.[9] Despite its own regulatory language quoted above, listing "safety" as a basis for a qualification standard generally, 29 C.F.R. § 1630.2(q) (2001), the EEOC's Interpretive Guidance issued in conjunction with its regulations expresses the view that the "direct threat" provision is the *only* avenue for an employer to show that a

[9] Indeed, if the agency viewed it as merely an option, it would not be an unreasonable one. As shown above, an employer who shows that placing a particular person with a disability into a particular position would impose a "direct threat" to that person's health certainly has shown that the person is not qualified for the job. The EEOC does not see it as optional, however.

safety-related qualification standard is "job-related and consistent with business necessity." 29 C.F.R. pt. 1630, App. §§ 1630.15(b) and (c) (2001).[10] *See also Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999) (citing Brief for United States *et al.* as *Amici Curiae*).

As this Court observed in *Albertson's,* since the EEOC's construction may place a greater burden on safety standards than, for example, a typing test, there is a very real question whether the agency's interpretation is valid. *See* 527 U.S. at 569 n.15 (noting that "it might be questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one"). The Fifth Circuit already has conclusively ruled the EEOC's construction *unsound. EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000) (holding that across-the-board safety based qualification standards need not be subjected to the "direct threat" analysis). As shown above, and as the Fifth Circuit ruled in *Exxon*, a general safety-based qualification standard is properly analyzed under 42 U.S.C. § 12113(a), while "[t]he direct threat test applies in cases in which an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard." 203 F.3d at 875.

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[10] Although the Interpretive Guidance was published for notice and comment at the same time as the EEOC's regulations interpreting Title I of the ADA, it is explicitly labeled "Interpretive Guidance" and therefore is not subject to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference").

D. Public Policy Dictates That Employers Be Permitted To Develop and Apply Adequate Safety Standards

Employers must be allowed to develop and apply safety standards to determine if an employee is qualified. In today's workplace, health and safety on the job is a top priority. The Occupational Safety and Health Act of 1970 requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees [and to] comply with occupational safety and health standards promulgated under this [Act]." 29 U.S.C. § 654(a). In this safety-conscious atmosphere, an employer simply cannot assign a person to a job knowing that serious injury or death is the likely result. In many work environments, there will be factors present that, while posing no particular risk to healthy employees, present a grave danger to someone with a specific medical condition. Therefore, when considering whether an employee or applicant is "qualified' to perform a job, any reasonable employer will consider, where appropriate, the effect of hazards posed by the combination of the individual's particular sensitivities and likely exposures on the job.

It simply does not make sense to ignore a medically-established prediction of future harm merely because the individual is willing to risk his or her health. Indeed, the basic purposes of the ADA proceed from the premise that it is in society's interest to make use of all human resources. Allowing individuals to endanger their health—and future role as productive citizens—by allowing them to make incautious judgments regarding what they can and cannot do in the face of contrary expert medical opinion, would contradict this premise directly. Recognizing that injuries impose a cost on society, it makes sense not to so squander our resources. Many states have reached a similar conclu-

sion, adopting laws requiring motorcyclists to wear helmets and automobile drivers and passengers to wear seat belts.

Employers know this already. In addition to fundamental human reasons for not wanting their employees to be hurt, employers have a considerable business obligation to protect their valuable workforce capital. A safer workforce is a more efficient and productive one and, ultimately, more profitable.

Accordingly, keeping their workers alive and safe is the highest priority for conscientious businesses today. Besides the human price, each workplace injury costs the employer a significant amount in lost productivity as well as the time and expense of recruiting, placing, and training a replacement. For example, one safety-conscious construction firm, whose lost-time injury rate was one in 5,000,000 hours, well below the national rate of 9 in 200,000 hours, reported that "the vast majority of [its] projects come in at least 10 percent ahead of schedule and under budget, much of it a direct result of the company's stellar safety performance. Since 1997, the firm has saved $6.9 million as a result of cost underruns." William Atkinson, *On-the-job safety starts at the top*, Business & Health (Sept. 1999).

For all of these reasons, businesses proudly count and display the number of injury-free workdays at a site. Many place enormous emphasis on safety incentive awards. The typical American workplace today displays a gallery of safety placards—not only those mandated by regulatory agencies, but safety reminders that convey the commitment of the employer itself, such as "Safety *is* our business."

While some individuals may be courageous or reckless enough to ignore a doctor's warning, the employee is not the only one with a stake in the matter. Employers must take preventive measures to ensure that employees are able to perform the essential functions of their jobs in a safe manner—that is, without being killed or injured because of an

increased risk formed by the juxtaposition of on-the-job hazards and the employee's own medical condition. An employer that fails to do so will have a difficult time convincing anyone, be it a jury or the Occupational Safety and Health Administration, that it should not be accountable because it was fulfilling its obligation under the ADA. While compliance with the ADA, as a federal law, may in theory preempt other claims, once an accident has occurred, it will be difficult for an employer to justify its actions where, as here, consistent medical advice from both the employer's and the employee's physicians counseled against placing the individual in the job.

It is difficult to believe that Congress intended the ADA to discourage the development and use of safety standards in the workplace. The Ninth Circuit's ruling that employers cannot establish safety as a qualification standard achieves just such a result.

As Judge Trott said in his dissenting opinion, "the majority's holding leads to absurd results." Pet. App. 23a. To the extent that it could force employers to place individuals with disabilities in positions they cannot perform safely, the results could be more than just absurd—they could be tragic.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and National Association of Manufacturers respectfully submit that the decision below should be reversed.

Respectfully submitted,

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No. 00-1406

IN THE

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

—v.—

MARIO ECHAZABAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE AMERICAN ASSOCIATION FOR THE STUDY OF LIVER DISEASE, THE HEPATITIS C ACTION AND ADVOCACY COALITION, THE HEPATITIS C ASSOCIATION, THE HEPATITIS C OUTREACH PROJECT, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INTEREST OF THE *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of the American Public Health Association, The American Association for the Study of Liver Disease, the Hepatitis C Association, the Hepatitis C Action and Advocacy Coalition, the Hepatitis C Outreach Project, and Lambda Legal Defense and Education Fund, Inc.[1] Together, the *amici* offer expertise in public health policy and workplace safety standards, with specialized knowledge regarding the particular health and safety requirements of those with chronic hepatitis C. Each of the *amici* has a significant interest in the issues of workplace safety and the appropriate treatment of workers with hepatitis and other disabilities. Those workers need not and cannot lawfully face exclusion from employment due to disease markers or predispositions that have no impact on their current ability to work.

By written consent of the parties,[2] *amici curiae* submit this brief in support of Respondent, Mario Echazabal.

SUMMARY OF ARGUMENT

An employer's exclusion of a currently qualified individual with a disability because the work environment may pose a future harm to that individual does nothing to advance worker safety or public health policy. To the contrary, allowing exclusion of these workers undercuts

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[1] Statements of interest of each of the *amici* organizations are included in the Appendix to this brief.

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

employer incentives to improve workplace safety for *all* employees, and is at odds with the ADA and federal and state OSHA guidelines.

The facts of this case illustrate the danger of extending the text of the ADA to permit a "threat-to-self" defense to exclude workers with disabilities. Contrary to the determination of Chevron's in-house medical staff, the expert testimony offered by Echazabal's witnesses and guidelines of the Centers for Disease Control and Prevention's (CDC) Occupational Safety and Health Administration (OSHA) establish that if chemicals in Chevron's refinery pose a threat to Echazabal, they pose a threat to all workers. These same expert sources confirm that protection of Echazabal and other workers is accomplished best through reduction of workplace hazards and use of protective equipment, not through their exclusion from the workforce.

Allowing a threat-to-self defense on the basis of a worker's medical condition and the risk of future harm would create a huge loophole in the ADA through which employers could justify the exclusion of skilled workers with a broad range of disabilities. In contrast to the rare situation in which an imminent harm posed by a medical condition compromises an individual's present capacity to do the job, exclusion of workers with the current ability to perform the essential functions of the job, based on an asserted risk of *future* harm, conflicts with the ADA's requirement of an individualized assessment of *present* ability to safely perform the functions of the job. It also undermines the fundamental goal of the ADA – to remove from dependency and bring into the workplace all those with disabilities who are able to work, regardless of projections about their future capabilities. Consistent with this goal, the ADA permits the exclusion only of those who pose a direct threat to others, and only if the risk of harm cannot be reduced or eliminated by a reasonable accommodation, which Chevron failed to show.

The ADA does not permit unsupported predictions

about economic consequences as a defense to discrimination, as Chevron attempts here. Instead, the ADA restricts consideration of economic consequences to the evaluation of an undue hardship defense, based on concrete, quantifiable factors such as employer size and the relative significance of the cost of an accommodation. Congress struck this balance to address an employer's legitimate business concerns while protecting individuals with disabilities from exclusion based on generalized expectations that they are more expensive to employ.

Finally, the employer bears the burden of establishing any direct threat defense, based on the best medical and scientific evidence reasonably available to a qualified and objective professional. Contrary to Chevron's position, nothing in the ADA or in this Court's decisions suggests that "available" evidence is defined to exclude sound, highly relevant evidence that was easily available to a defendant but that the defendant failed to seek or rely upon. Moreover, an employer cannot avoid this burden simply by attempting to fold the issue of direct threat into the plaintiff's *prima facie* case of proving that he is a qualified individual with a disability. To permit otherwise would render meaningless the statute's provisions requiring employers to justify qualification standards that screen out those with disabilities as a business necessity, a requirement uniquely within an employer's ability to demonstrate.

Consequently, even if a threat-to-self defense were available to Chevron, it utterly failed to establish it. Echazabal was able at the time of his employment application to perform the essential functions of the job; and even if he had posed a significant risk, Chevron failed to offer a reasonable accommodation or to justify the failure through concrete evidence of costs constituting an undue hardship. For these reasons, Chevron violated the ADA when it excluded Echazabal from employment.

ARGUMENT

III. WORKER SAFETY AND PUBLIC HEALTH PRINCIPLES DO NOT SUPPORT THE REFUSAL TO HIRE QUALIFIED INDIVIDUALS WITH DISABILITIES BASED ON ASSERTED CONCERNS THAT A JOB POSES RISKS TO THEIR FUTURE HEALTH.

A. Worker and Public Health Concerns Are Appropriately Addressed Through Uniform Policies That Maintain the Health and Employability of All Currently Qualified Workers.

Employers have a federally-enforceable obligation to create a safe workplace for all their employees.[3] This obligation extends to ensuring that worker exposure to chemical toxins remains at safe levels. Nothing in public health or safety guidelines, let alone the record in this case, supports an approach to worker safety that automatically disqualifies those workers who – by virtue of a long-term work exposure, a disability, or a genetic predisposition – may be statistically more likely to develop serious health conditions and claim workers compensation. Instead, the correct approach is to keep toxins at safe levels for all.

Chevron's suggestion that exposure to industrial

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[3] Occupational Safety and Health Administration Act of 1970 (OSHA), 29 U.S.C. § 654(a)(1) (1994) (requiring that employers maintain workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to any employee); *see also* 29 U.S.C. § 655(b)(5) (directing the U.S. Secretary of Labor to develop standards ensuring, as possible, "that no employee will suffer material impairment of health or functional capacity").

chemicals associated with toxic hepatitis is a danger only to those with elevated liver enzymes is either ill-informed or disingenuous. Occupational exposure to high levels of some chemicals, such as naphthalene, can cause acute hepatic injury resulting in severe illness or death to *anyone*, including a completely healthy person, after a single occupational exposure in a confined space without respiratory protection.[4] The same is true for other classes of hepatotoxic chemicals, such as toluene, which Chevron identifies as present in its refinery. Injury is a product, again, of *unprotected* occupational exposure.[5] Any Chevron worker, with or without hepatitis C,[6] is likely to show elevated liver enzymes after such an exposure.[7]

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[4] *Industrial Chemicals Associated With Acute Liver Injury as the Primary Toxic Effect*, at http://www.haz-map.com/heptox1.htm (Jan. 7, 2002).

[5] *Chemicals Associated with Liver Injury as a Secondary Toxic Effect: Elevated Liver Enzyme Levels*, at http://www.haz-map.com/heptox2A.htm (Jan. 7, 2002).

[6] Hepatitis C virus infection is the most common chronic blood-borne infection in the United States. Most of those with hepatitis C are chronically infected and might not be aware of their infection because they are not clinically ill. CDC, Recommendations for Prevention and Control of Hepatitis C Virus (HCV) Infection and HCV-Related Chronic Disease, 47 MMWR (No. RR-19) 1 (1998).

[7] *See* http://www.haz-map.com/heptox1.htm; http://www.haz-map.com/heptox2A.htm. In his declaration on behalf of Chevron, Michael Nyeholt, an industrial hygienist at the Chevron El Segundo refinery, makes the remarkable revelation that a test for lead exposure for a welder in the coker unit measured a lead exposure of 210 micrograms per cubic meter of air, an exposure that exceeded the permissible exposure by more than four times, which he believed to be dangerous to the liver. Declaration of Michael J. Nyeholt, ¶ 5, Joint Appendix at 29. Treating Nyeholt's representations as accurate, there should be little question that a lead exposure level so significantly over that allowed

If, in fact, Chevron is correct in its assertion that exposures to chemicals in its workplace are hepatotoxic to Echazabal, then those chemicals pose a risk to thousands of other workers that is in no way mitigated by rendering Echazabal unemployed. For all the remaining workers who have yet to manifest abnormalities sufficient to produce detectably elevated liver enzymes, unprotected exposure to known carcinogens such as benzene, for example, still poses health risks, even if the threat of a workers compensation claim is more distant. In fact, unprotected exposure to high concentrations of toluene may result in central nervous system depression, dizziness and disturbed vision.[8] Xylene also may cause unusual skin sensations, tremors, impaired memory, vertigo, anorexia, nausea, anemia, and mucosal bleeding as well as liver or kidney damage. However, according to the CDC, prophylaxis – not the removal of "susceptible" workers – is the appropriate response to health threats posed by workplace chemicals such as these.[9]

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under federal work safety regulations poses a risk to all workers; Chevron's apparent unconcern for this fact, or its blatant violation of applicable work safety regulations, provides an important context in which to consider its protestations that concern for Echazabal's welfare motivated its exclusion of him from any employment at its refinery business.

[8] *See Fact Sheet: Safe Substitutes at Home: Non-toxic Household Products* at http://es.epa.gov/techinfo/facts/safe-fs.html (also confirming that petroleum hydrocarbons, ingredients of gasoline, motor oils, and benzene are associated with skin and lung cancer).

[9] "If substitution, administrative, and engineering controls do not reduce an employee's benzene, toluene or xylene exposure below the PEL then respiratory protection must be used." The CDC reference Chevron cites, *see* Brief of Petitioner at 6-7, indicates that at certain levels the refinery chemicals pose dangers, including potentially fatal dangers at first exposure, to *anyone* exposed, without reference to any preexisting condition. Moreover, CDC guidelines specifically say that a pre-existing

In his dissent, Judge Trott predicted that the majority ruling in this case will impose an "unconscionable...moral burden" on employers by "requir[ing them] knowingly to endanger workers."[10] To the contrary, the potentially unsafe conditions left in place through a policy that simply excludes workers such as Echazabal ensures further incapacitation of other workers, particularly long-term employees. Dressed in the sheep's clothing of "concern for worker safety," Chevron's approach ensures the continuation of high rates of occupational disease while inflicting unemployment and forced dependency on a targeted few who, like Echazabal, have the potential to remain healthy and productive for the remainder of their working lives.

For decades, *amicus curiae* American Public Health Association (APHA) has advocated for the development of standards to study and monitor the impact of workplace chemical exposure, and has called for increased training and involvement of public health professionals in addressing occupational health needs.[11] APHA long has supported better training and reliance on occupational health professionals in

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condition should not be treated as an absolute contraindication to employment. *See* Occupational Safety and Health Guideline for Ethylene Glycol at http://www.ohsa-slc.gov/SLTC/healthguides/ethylenedibromide/recognition.html.

[10] *Echazabal v. Chevron*, 226 F.3d 1063, 1074 (9th Cir. 2000).

[11] *See, e.g.*, APHA Policy Statement 7415, Prevention of Occupational Cancer (1974), APHA Public Policy Statements at 153, 1948 to present, cumulative, Washington, D.C. (urging, in part, the creation of stringent standards to protect workers from exposure to materials believed to be human carcinogens). APHA Policy Statements 7415, Prevention of Occupational Cancer (1974); 7418, Surveillance for Occupational Disease (1974); 8115, Emergency Temporary Standard for Worker Exposure to Ethylene Oxide (1981); 8309, Benzene Regulation (1983); and 8311, Environmental/Occupational Preparation of Public Health Personnel (1983) APHA Public Policy Statements, Washington, D.C.

the workplace. The goal, as it has been for all responsible public health professionals, has been to use occupational health surveillance for early identification and reduction of workplace hazards, and for better protection and compensation for workers exposed to risk of serious injury on the job. [12]

Public health principles dictate incorporating into worker compensation programs "strong incentives and penalties aimed at prevention of disease" through the control of workplace hazards to avoid the "danger of institutionalizing occupational disease."[13] Nowhere do public health experts suggest that the remedy for occupational injury is the exclusion of those workers whom the employer deems at higher risk for injury. Indeed, such an approach serves to "institutionalize" occupational disease and defies basic public health principles, by focusing not on the reduction or elimination of risk but on the removal of currently qualified workers at a point on the continuum of risk where they may be statistically closer to incapacity from occupationally-triggered illness and eligibility for worker compensation and disability benefits. Allowing employers to rely on the ADA to remove these workers with impunity actually provides an incentive to avoid costs associated with improving workplace safety in favor of removing employees as they show signs of disease. Congress clearly intended nothing so perverse, and public health principles demand a different approach to

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[12] *See* APHA Policy Statement 8329(PP), Compensation for and Prevention of Occupational Disease (1983), APHA Public Policy Statements at 326-29, Washington, D.C. (stating that "occupational disease is at epidemic proportions" and calling for the enactment of more effective occupational disease legislation.)

[13] *Id.*, APHA Policy Statement 8329(PP), Compensation for and Prevention of Occupational Disease (1983), APHA Public Policy Statements at 326.

worker safety.

B. A Threat-to-Self Defense Would Be Prone To, and Difficult to Insulate From, Employer Abuse.

Recognition of a threat-to-self defense to disability-based discrimination in the workplace puts the legitimate employment opportunities of many of the most marginalized, stigmatized individuals with disabilities at risk. The extrapolation of a worker's current medical condition, however severe, to a projected point of incapacity based on assumptions, however seemingly reasonable, about that disease simply provides employers an end-run around discrimination protections for those most likely to be feared and targeted in the workplace.

Most business groups and insurance organizations have not supported the development of stronger protections for worker health and safety,[14] tending to prioritize immediate fiscal concerns over these protections. Public health professionals, aware of this tendency, were among the first to recognize the potential dangers that newer health screening technology could pose. Employers now could target vulnerable workers for exclusion, in the name of concern for worker safety, as a way to reduce monetary outlays for injured workers.[15]

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[14] *See, e.g.*, APHA Policy Statement 8329(PP) (1983), APHA Public Policy Statements at 326 (identifying business and insurance industry opposition as a major factor in preventing earlier passage of legislation improving the compensation for and prevention of occupational disease).

[15] For example, when the APHA proposed guidelines for industry use of genetic testing, it explained that some workplace screening and testing "has been conducted primarily to benefit the company rather than the individual." APHA Policy Statement 8310, Guidelines for Genetic Testing in Industry, APHA Public Policy Statements at 315-316.

Through years of experience with workplace safety standards, the APHA has learned that while "new technological developments in microbiology and genetics by industry may aid in the identification of populations at increased risk of cancer or other toxic effects," these same technologies have been used to discriminate against individuals with apparent predispositions for diseases.[16] Because technologies such as genetic testing "*may be used to exclude 'susceptible' workers, rather than reducing the exposures for all workers through cleanup of the workplace,*" the APHA called for the establishment of scientific and ethical guidelines to control the use of genetic testing for clinical diagnosis and the discontinuation of industry's use of such testing "for the purpose of job exclusion."[17]

Endorsement of Chevron's brand of workplace safety through recognition of a threat-to-self defense would imperil the job security of many qualified people with disabilities. Individuals with HIV, for example, who continue to confront a level of stigma and fear that parallels that of prior decades,[18] regularly have been excluded from the workplace because of their susceptibility to opportunistic infections and an inclination to "protect" them from exposure to illness. A TB outbreak in a small community could be used to exclude a teacher with HIV, or someone with a history of drug-resistant tuberculosis, on the belief that such individuals are far more likely to contract the disease. A worker who develops a severe hearing impairment in a high-noise work environment

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[16] *Id.* at 315.

[17] *Id.* (emphasis added).

[18] *See, e.g.*, G.M. Herek, J.P. Capitanio, *AIDS Stigma and Sexual Prejudice*, 42 AMERICAN BEHAVIORAL SCIENTIST at 1126 (1999); G.M. Herek, *The Psychology of Sexual Prejudice*, 9 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, at 19 (2000).

could be discharged because the worker faces a significantly higher risk of dying in a fire or other work accident due to the inability to hear alarms. An individual who is blind or in a wheelchair might pose a severe "risk to self" in the event of a fire or other tragedy, and thus could be excluded from consideration for employment in a skyscraper. Firefighters and other rescue workers who develop respiratory problems as a consequence of months of recovery efforts at the site of the World Trade Center could be at significantly increased risk of harm if exposed to smoke and toxins and could be excluded from future work in these professions. A Nobel Prize-winning mathematician with a history of severe mental illness, including a past diagnosis of schizophrenia, could be deemed particularly sensitive to the pressures of academic life and unusually prone to further debilitating mental disease and consequently excluded from all such employment. None of these individuals are currently unable to work; all are at some risk of severe injury or death in the event of occurrences which are common in their respective professions.

The ever increasing ability to screen for markers for disease only increases the risk of such exclusions. As the APHA has pointed out, this ability has been used in the past to discriminate against individuals.[19] The ADA explicitly forbids this use of standards – here, reliance on liver enzyme tests – "that have the effect of discrimination on the basis of disability."[20]

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[19] APHA Policy Statement 8310, Guidelines for Genetic Testing in Industry (1983), APHA Public Policy Statements at 315, Washington, D.C. (noting, for example, the "previous exclusion of persons with sickle cell trait with hemoglobins less than 14 gm/dl of blood from work involving nitro or amino compounds at DuPont's Chambers Works plant.").

[20] 42 U.S.C. § 12112(b)(3)A.

II. THE AMERICANS WITH DISABILITIES ACT DOES NOT PERMIT RELIANCE ON THE RISK OF FUTURE HARMS OR GENERALIZED FEARS OF FUTURE COSTS TO EXCLUDE QUALIFIED INDIVIDUALS PRESENTLY ABLE TO PERFORM A JOB WITH OR WITHOUT REASONABLE ACCOMMODATIONS.

The ADA does not require the employment of an otherwise qualified individual with a disability if the presence of that individual would pose a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). The dispute here is whether this defense can be expanded beyond its text to allow the additional exclusion of workers whom the employer believes may encounter risks to their own future health as a consequence of their jobs.

There is nothing in the text, legislative history, or overarching purpose of the ADA to support such an extrapolation. As demonstrated below, the ADA prohibits an employer from dismissing job applicants as unqualified on the basis that they have predispositions for illness that may be triggered by the work environment. This case provides ample illustration of why this Court should not add to the ADA a defense that so significantly stretches the text and approach Congress chose.

A. The ADA Requires That Employers Focus on an Individual's "Present Ability" to Perform a Job.

The ADA's implementing regulations state that in order to determine whether a person poses a "direct threat," an employer must make "an individualized assessment of the individual's *present* ability to safely perform the essential

functions of the job...based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). Unlike the creation in the EEOC regulations of a threat-to-self defense, this provision is rooted in the ADA's legislative history.[21] This "present ability" requirement precludes reliance on projections, however seemingly reasonable, about future incapacitation of currently qualified employees.[22]

In defense of its regulatory expansion of the "direct threat" defense to include risk to self, the Solicitor General reasons that "[w]hen there is a high probability that an employee will suffer serious injury or death in the near future because of his performance of the job, there is a significant risk that the employee will not be able to perform the essential functions of the job on an on-going basis.[23] This

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[21] For example, the Senate Judiciary Report on the ADA underscores this present ability requirement, stating that "[t]he term 'qualified' refers to whether the individual is qualified at the time of the job action in question; the mere possibility of future incapacity does not by itself render the person not qualified." S. Rep. No. 101-116 at 26.

[22] For the statement of this principle in the regulations implementing the employment provisions of the ADA, *see* 29 C.F.R. § 1630.2(r) ("The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job."); *see also id.* pt. 1630, app. § 1630.2(r) ("Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual."). For the similar statement in the regulations implementing the public accommodations provisions of the ADA, *see* 28 C.F.R. § 36.208(c) (2000); *id.* pt. 36, app. B § 36.208.

[23] Brief of the U.S. in Support of the Petition for Certiorari at 14-15; *see also* Brief of the U.S. and the EEOC at 16-17 ("When there is a high probability that an employee will suffer serious injury or death in the near future...there is necessarily a related risk that the employee will miss work due to injury.").

rationale is at direct odds with the text and spirit of the ADA, which prohibits consideration of possible future work limitations in determining a covered worker's current qualifications and ability to do the job.

The very facts of this case make the point, and reveal the inaccuracy of Chevron's assessment of the risk to Echazabal. Despite its litigation position that Echazabal faced the near-certainty of imminent death in its refinery, Chevron's withdrawal of an offer of employment was based on its examining physician's conclusions about "what might happen" through Echazabal's exposure to workplace toxins.[24] In fact, nothing happened, and Echazabal continued to work without incident or deterioration in his health for an additional four years following Chevron's initial rejection of him due to high liver enzyme levels, and for several additional months after Chevron's final decision to withdraw employment for the same reason, until Irwin refused him continued employment as well.[25] There is no real dispute that Echazabal is qualified to perform the actual elements of the job nor is there any evidence in the record that his past consistent ability to perform his job, including in the years since Chevron used a liver enzyme test to disqualify him, has deteriorated into a current inability to work.

Congress' decision to limit the direct threat defense to situations where there is a significant risk of substantial harm to others in no way compromises an employer's legitimate interest in a sound, productive workforce. In the rare situation in which an individual's disability currently

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[24] Deposition of William Saner, J.A. at 145.

[25] The analogy cited in Chevron's and the Solicitor General's briefs comparing this case to that of a carpenter with narcolepsy is inapposite. In the latter, the carpenter is *currently* symptomatic with a condition that *currently* renders him unable to do the job (and likely also poses a threat to others).

compromises the ability to perform a job's essential functions – the construction worker with vertigo who loses his balance at heights, for example – that person is not a qualified individual with a disability and a refusal to hire is not discriminatory. That simply is not the situation in this case.

B. The ADA Requires Primary Reliance on Reasonable Accommodations Rather Than Exclusions to Address the Needs of Individuals with Disabilities.

Chevron's citation to a section of the House Judiciary Committee's report on the ADA, stating "that an employer would have an obligation to provide a reasonable accommodation to protect the health of 'a person...employed as a painter [who] is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures,' such as by reassignment to a different job"[26] provides no support for its advocacy for creation of a threat-to-self defense. To the contrary, the House report underscores a central defect in Chevron's reliance on any form of a "direct threat" defense – its complete failure to explore, let alone offer, a reasonable accommodation to reduce or eliminate any special threat it believed its work environment posed for Echazabal.

The ADA defines a "direct threat" to mean "a significant risk to the health or safety of others *that cannot be eliminated by reasonable accommodation.*" 42 U.S.C. §12111(3) (emphasis added). Chevron's portrayal of the source of the threat as a criterion of the job – the "ability" to withstand exposure to toxic chemicals[27] – fails to

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[26] Brief of Petitioner at 38, citing H.R. Rep. Pt. 3, 1 Leg. Hist 469.

[27] Contrary to Chevron's representations, the relevant job description does not identify the ability to tolerate exposure to liver-damaging

acknowledge its reasonable accommodation obligation. As the House Judiciary Committee noted at the ADA's adoption:

> If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion...must be carefully tailored to measure the actual ability of a person to perform an essential function of the job... If the legitimate criterion can be satisfied by the applicant with a reasonable accommodation, then the reasonable accommodation must be provided under Section 102(b)(5) [42 U.S.C. § 12112(b)(5)].

H.R. Rep. No. 101-485, pt. 3, at 32, *reprinted* in 1990 U.S.C.C.A.N. 445, 454-55. With the insufficiency even of the addition of a threat-to-self defense to excuse its discrimination, Chevron also would have this Court delete from the statute's text the remaining half of the direct threat definition.

According to the testimony of Dr. Marion Joseph Fedoruk, who is board certified in occupational medicine, preventive medicine, industrial hygiene and toxicology, a number of the air quality tests that Chevron conducted of the coker area of the Chevron refinery revealed nondetectable levels of hydrocarbons. Affidavit of Marion Joseph Fedoruk, ¶ 13, Joint Appendix at 103. However, were Echazabal, or any other employee, to work in the presence of the concentrations of toxic materials such as that to which

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chemicals as an actual job requirement. *See* J.A. at 65-66. Regardless, under the ADA, such "screening criteria" are acceptable only as long as they address an applicant's current ability to do the job, *see* discussion in II.C., *supra,* and at all times in question in this case Echazabal had the current ability to work in Chevron's refinery.

Chevron's industrial hygienist Charles Nyeholt testified, the use of proper respiratory and other protective equipment would be mandated by California OSHA regulations. Affidavit of Marion J. Fedoruk, ¶21, Joint Appendix at 107. In the presence of dangerous chemicals, "[t]he use of respirators and appropriate personal protective equipment and work practices would eliminate the lead hazard for any worker, including Mr. Echazabal." *Id.*[28]

Contrary to its obligation under the ADA, Chevron never considered an alternative to excluding Echazabal from employment. There was no apparent consideration of the extent to which the wide range of respiratory protections available would eliminate or reduce to a negligible level any theoretical risk to which Echazabal would be exposed. A huge corporation with numerous plants and operations in which exposure to potentially toxic materials varied significantly with a particular job,[29] Chevron nonetheless apparently never contemplated offering Echazabal a different position either in its El Segundo Refinery or elsewhere.

In the context of a direct threat defense, the burden is

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[28] Even if any of the materials did represent a clinically significant risk of hepatic injury to Echazabal – which Echazabal's expert witnesses unequivocally refute – "given the protective clothing that is available and is worn, the theoretical risk of hepatic injury to Mr. Echazabal based on a potential exposure to these substances is insignificant." Affidavit of Marion J. Fedoruk, M.D., ¶ 25, Joint Appendix at 108. *See also* ¶26, Joint Appendix at 109 ("[T]he adverse health effects of many exposures can be adequately controlled through the use of personal protective equipment, such as the use of respirators, other equipment, and following proper work practices.").

[29] The task identified by Nyeholt, Chevron's environmental hygienist, as involving extreme levels of exposure to lead, was not one that ever had been or would be performed by Echazabal, and in fact was performed by a contract employee. Affidavit of Marion J Fedoruk, M.D., ¶ 21, Joint Appendix at 107.

on Chevron to demonstrate that no reasonable accommodation is possible before refusing to allow Echazabal to move from a contractor position to a direct employment relationship. Chevron cannot avoid this responsibility by claiming that Echazabal never asked for an accommodation. *See, e.g., Hendricks-Robinson v. Excel Corp.,* 154 F.3d 684, 694 (7th Cir. 1998) ("A request as straightforward as asking for continued employment is a sufficient request for accommodation.").

The only option Chevron entertained when it learned of Echazabal's elevated enzyme test results was to exclude him from any employment altogether, without income or benefits. Chevron's insistence that this decision was motivated by the ADA's purpose "to bring persons with disabilities into the economic and social mainstream of American life," to ensure that people like Echazabal "enjoy 'full participation' in the workplace on an ongoing basis" and have "every 'opportunity to compete on an equal basis,' to enjoy 'independent living,' and to achieve 'economic self-sufficiency,'" rings hollow. Brief of Petitioner at 39-40, *citing* 42 U.S.C. §§ 12101(a)(8), 12101(a)(7)-(9).

III. POTENTIAL COSTS ASSOCIATED WITH THE EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES ARE RELEVANT UNDER THE ADA ONLY TO THE EXTENT THAT THEY CONSTITUTE AN UNDUE HARDSHIP IN PROVIDING A REASONABLE ACCOMMODATION.

With a complete absence of evidence to support its alarmist claims, Chevron paints a picture of broad economic consequences that would result from the hiring of Echazabal or those with a similar condition. Chevron's list of harms includes the need to use temporary or new workers to replace Echazabal, a consequent loss of efficiency, "the cost to a

team culture when even one experienced and valued person leaves," lower employee morale, and unnecessary workers compensation claims. Brief of Petitioner at 22-24.[30]

In a similar vein, the Solicitor General represents that "individuals [such as Echazabal] typically would not be able to perform the job on an ongoing, long-term, and reliable basis. Employers would then bear the costs and disruption of filling the gap left by sick or deceased workers." Brief of the United States and the EEOC at 22. Regardless of how these theoretical costs are characterized, generalized predictions about the costs of allowing individuals with disabilities to work merit no more consideration than would generalized assertions about an individual's status as a qualified individual with a particular disability.

Arguments such as those advanced in this case have been a hallmark of the exclusion of individuals with severe impairments.[31] Acceptance of arguments about costs and other administrative difficulties generated in the event of an employee's future inability to work would be at odds with the EEOC's own regulations, which provide that decisions about hiring or retaining a worker with a disability must be based "on an individualized assessment of the individual's *present* ability to safely perform the essential functions of the job." 29 C.F.R. § 1630.2(r). In fact, EEOC regulations further

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[30] Chevron also cites to a fear of violating OSHA, and other possible civil and criminal liabilities. Brief of Petitioner at 24-27. The problem with this argument is that it relies on a serious misrepresentation of the facts of this case – there is in fact no sound evidence that Echazabal was at any risk of imminent, serious harm in the refinery, any more were other workers. Moreover, OSHA and CDC guidelines require the employer to ensure that the workplace is safe for all workers, not to exclude those such as Echazabal who can be protected from harm while keeping their jobs.

[31] *See* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279 (2001).

state that employment decisions "should not be based on speculation that the employee may become unable [sic] in the future or may cause increased health insurance premiums or workers compensation costs." 29 C.F.R. app. § 1630.2(m). Cost arguments, particularly when offered with no evidence to support them, could justify the exclusion of virtually any individual with a disability, as many such individuals at least in theory are more likely to experience a worsening of health or an on-the-job accident than an individual without such impairments. The executive with cancer in remission, or a genetic marker for cancer, for example, is more likely than one without this history to have cancer in the future and a consequent interruption of a business schedule; the individual with AIDS that currently is controlled by antiretroviral therapy could develop resistance to that treatment and experience a temporary interruption in health and the ability to work.

Congress anticipated this rationale against hiring individuals with disabilities, and responded not only by limiting the scope of the direct threat defense, but also by restricting consideration of employer costs under the ADA to those that constitute an "undue hardship" in the provision of a presently necessary reasonable accommodation.[32] This requirement furthers "[t]he underlying premise of [Title I]...that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job." H.R. Rep. No 101-485, pt. 3, at 31 (1990), *reprinted* in 1990 U.S.C.C.A.N. 445, 454. The House Judiciary Committee emphasized that "[t]he requirement that job criteria actually measure skills required by the job is a critical

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[32] *See* 42 U.S.C. § 12112(b)(5)(A)(it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship..."); 42 U.S.C. § 12111(10) (defining "undue hardship" based on factors assessing cost and difficulty).

protection... Discrimination occurs against persons with disabilities because of stereotypes...*and fears about increased costs and decreased productivity*." *Id.* (emphasis added).

An "undue hardship" consists of evidence that an action would impose "significant difficulty or expense" on the employer, in light of factors that take into account the overall financial resources of the facilities involved and of the covered entity; the overall size of the business with respect to the number of employees and the number and location of its facilities; and the effect on expenses and resources of the facility. *See* 42 U.S.C. §§ 12111(10)(A) and (B)(i)-(iv). As the EEOC has emphasized in the Enforcement Guidance to its regulations, "[g]eneralized conclusions will not suffice to support a claim of undue hardship," but instead "must be based on an individualized assessment of *current circumstances*."[33] Speculations about the impact the hiring of an individual such as Echazabal might have on the morale of other employees provide no defense to refuse employment or accommodations to better secure that employment.[34]

While Congress clearly provided for factoring employers' legitimate, documentable interests, including

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[33] Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, at http://www.eeoc.gov/docs/accomodation.html (Jan. 30, 2002)(emphasis added). *See also* 29 C.F.R. pt. 1630 app. 1630.15(d); *Stone v. Mount Vernon*, 118 F.3d 92, 101 (2nd Cir. 1997)(an employer who refuses to hire individuals with disabilities cannot defend their exclusion as an undue hardship based on speculation that if it were to hire workers with disabilities it may not have sufficient staff to perform certain tasks).

[34] See EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act at 2 (undue hardship cannot be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees).

actual costs, into the analysis of what constitutes a reasonable accommodation, it prohibited employers' reliance on unsupported "common-sense" views of possible costs. Congress had full knowledge that employers' inclination to avoid additional risks through the exclusion of those with disabilities had exacted a far greater, quantifiable cost on American society as a whole, "cost[ing] the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9).

IV. ANY DIRECT THREAT DEFENSE TO AN ADA CLAIM MUST BE BASED ON THE BEST MEDICAL AND SCIENTIFIC EVIDENCE REASONABLY AVAILABLE TO AN EMPLOYER AT THE TIME OF THE ADVERSE EMPLOYMENT ACTION.

A. An Employer Must Rely on the Best Medical and Scientific Evidence Reasonably Available to an Objective, Qualified Professional.

Chevron argues that it relied on the medical opinions of its doctors and the knowledge of responsible employees that Echazabal would be seriously harmed or killed by performing a job in its refinery through exposure to hepatotoxic chemicals, and that these opinions specific to the plant helper job represent the best evidence available to it. Chevron also argues that, consequently, the opinions of Echazabal's witnesses, Dr. Marion Joseph Fedoruk and Dr. Gary Gitnick, both highly credentialed experts in their fields who flatly refute the opinions of Chevron's staff, must be ignored. Chevron's reach for a standard that limits permissible evidence on which to exclude a qualified worker to the evidence, however incomplete or inaccurate, in the hands of its own employees is far afield of what the ADA and

the courts interpreting it have required.

This Court was far more exacting in assessing the quality of evidence necessary to establish the existence of a direct threat in *Bragdon v. Abbott*, 524 U.S. 624 (1998) and in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In *Bragdon*, this Court repeated the critical criterion that any risk assessment be based on the *objective* evidence available to those in the health care profession, not simply the evidence (or lack of it) on hand:

> [T]he risk assessment must be based on medical or other *objective* evidence ... As a health care professional, petitioner had the duty to assess the risk of infection based on the scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability ... [He] receives no special deference simply because he is a health care professional. It is true that Arline reserved "the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied ... At most, this statement reserved the possibility that employers could consult with individual physicians as *objective* third-party experts.

Bragdon, supra, 524 U.S. at 649-650 (citations omitted) (emphasis added). Consequently, proof of a direct threat cannot consist solely of self-serving statements or assessments by the employer or its agents. Nor did this Court suggest that "available" evidence could be defined as that which the employer had on hand at the time of the

employment action, as Chevron argues.[35]

The deficiencies inherent in exclusive reliance on the staff of an employer's medical services program are manifest. While the representations of the Association of Occupational Physicians in their brief on the overall qualifications of those in their profession generally may be correct, the presumably high level of skill typical of certified occupational physicians is irrelevant to the issue and even the facts of this case. Most employer screening programs, including the one that excluded Mr. Echazabal in 1996, are not overseen and staffed by trained occupational physicians.[36] Physicians without training in occupational or preventive medicine can misdiagnose or "overrely on laboratory screening procedures which are easier and less time consuming than a thorough history and clinical evaluation."[37] Inadequately trained physicians also "may not accurately evaluate the scientific limitations on the predictive value of screening procedures."[38]

The economic considerations that are likely to inform the staffing of in-house medical screening services also pose a risk to the independence of an employer's staff physician:

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[35] The district court consequently erred in accepting Chevron's definition of "available" evidence, and this error was the sole basis for its refusal to consider the affidavits of Echazabal's expert medical witnesses which, at the least, should have precluded the grant of summary judgment to Chevron. J.A. at 174, 186-87.

[36] Mark A. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH.L.REV. 1379, 1409-1410 (1983) [hereinafter "Rothstein"]("Of the estimated 10,000 physicians in the United States practicing occupational medicine, only 800 are certified by the American Board of Preventive Medicine.").

[37] Rothstein, *supra*, at 1410.

[38] *Id.*

> Even the most knowledgeable and dedicated occupational physicians may face ethical dilemmas caused by their conflicting loyalties. Economic concerns of employers, unfortunately, may outweigh the health concerns of the patient-employees. In the context of employee selection, management may pressure physicians to develop increasingly extensive medical screening techniques and to supply personnel departments with medical data for employment decisionmaking.[39]

Finally, even independent and skilled certified occupational physicians cannot overcome the inherent limitation in employment medical screening, which can be "grossly inaccurate in attempting to screen for high-risk workers."[40]

The facts in this case offer an apt illustration of the problems in limiting the controlling determination of who can have or maintain a job to an employer or its agents. Chevron represents that medical staff experienced in occupational medicine determined that allowing Echazabal employment in the refinery would place him at imminent risk of serious harm or death. In fact, the medical evaluation, the assessment of risk, and the ultimate decision to exclude Echazabal from employment with Chevron in 1996 was made by a former general practitioner with no training in occupational medicine and little or no experience in evaluating or treating individuals with chronic liver disease. Certification of Kenneth J. McGill, J.A. at 36-46.[41] William

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[39] *Id.* at 1410-11.

[40] *Id.* at 1417.

[41] Dr. McGill subsequently spoke to Chevron's medical director in San Francisco, who concurred, and then informed Chevron's human resources manager, William Saner, of his assessment; Saner in turn withdrew the

Saner, the Chevron employee who withdrew the offer, did so without any information that is was more likely than not that Echazabal's health condition would deteriorate if he worked in the refinery.[42]

Both Dr. Marion Joseph Fedoruk and Dr. Gary Gitnick flatly dispute the conclusion that Echazabal is at risk of harm in the refinery and the medical opinion on which that conclusion was based. Affidavit of Marion J. Fedoruk, M.D., ¶¶ 7-9, 26, 29, J.A. at 101-102, 108-110; Affidavit of Gary Gitnick, M.D., F.A.C.G., ¶¶ 7-14. J.A. at 113-116. In fact, they authoritatively dismiss the conclusions and speculations of Chevron's and Irwin's employees about Echazabal's current health, his general prognosis as an individual with chronic hepatitis C, and the level of risk to his health through refinery work as inconsistent with medical or scientific evidence and as "simply without support in the medical literature." *See* Affidavit of Gary Gitnick, M.D., F.A.C.G., ¶¶ 11, 14, J.A. at 115-116.

As noted above, the CDC's Occupational Safety and Health Guidelines for every chemical Chevron has identified as present in its refinery and posing a unique risk to Echazabal also provide Chevron no such support. Any risk through exposure to chemicals in Chevron's refineries is a risk borne by *all* employees, and all of the guidelines either state that pre-existing conditions are not a contraindication to employment or are silent on that point.[43]

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offer of employment to Echazabal. Brief of Petitioner at 10-11.

[42] Deposition of William Saner, J.A. at 145.

[43]Benzene: U.S. Department of Health and Human Services, Occupational Safety and Health Guideline for Benzene; Potential Human Carcinogen (1988); Ethylenediamine: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Ethylenediamine (1978); Ethylene Glycol: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational

Neither the ADA nor this Court in *Bragdon* remotely suggests that "available" evidence on which to rest a determination of direct threat should be defined so narrowly as to exclude sound and highly relevant scientific evidence that was easily available but that the defendant failed to seek, let alone rely upon.[44]

B. As An Affirmative Defense to a Charge of Discrimination Under the ADA, the Burden of Proving That a Potential or Current Employee Poses a Direct Threat Always Is On the Employer.

Safety and Health Guideline for Ethylene Glycol (1995); Heptane: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Heptane (1978); Inorganic Lead: U.S. Department of Health and Human Services, Occupational Safety and Health Guideline for Inorganic Lead (1988); Manganese: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Manganese (1978); Naphtha: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Naphtha (Coal Tar) (1978); Naphthalene: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Naphthalene (1978); Octane: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Octane (1978); Phenol: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Phenol (1978); Toluene: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Toluene (1978); Xylene: U.S. Department of Health and Human Services/U.S. Department of Labor, Occupational Health Guideline for Xylene (1978). http://www.cdc.gov/niosh/chem-inx.html.

[44] Dr. McGill conceded that he had not read, nor was he familiar with, scientific texts which supported his assessment of Echazabal's medical condition and the nature of the risk exposure to chemicals in the El Segundo refinery would cause. In fact, he was unable to describe what those chemicals are, or the levels at which they become toxic. Deposition of Dr. McGill, J.A. at 131-33, 139-40.

As the Solicitor General correctly recognizes, the standard for maintaining a direct threat defense is a demanding one, requiring the employer to prove significant risk of substantial harm to the health or safety of those in the workplace. Brief of the United States and the EEOC at 25-27. "If the employee had the burden of disproving any threat...to establish qualified individual status, the business necessity and direct threat provision would be rendered superfluous." Brief of the U.S. and the EEOC at 25.

It is axiomatic that an employer would bear the burden of proof on what constitutes a defense, rather than a qualification for protection, under the ADA.[45] Criteria which purportedly exclude individuals who pose a direct threat, which must be "job-related and consistent with business necessity," are within the sole ability of the employer to prove. *See* 29 C.F.R § 1630, App. § 1630.15(b) (noting that employers with qualification standards based upon safety must satisfy the direct threat standard "in order to show that the requirement is job-related and consistent with business necessity.").

After essentially conceding this point as to the employer's "demanding" burden in proving direct threat, *see* Petitioner's Brief at 33-34, Chevron nonetheless attempts to argue that Echazabal failed to satisfy his burden to prove that he is a qualified individual by demonstrating, through "evidence reasonably available to Chevron when it made its decision...that he could perform the essential functions of the job without posing a significant risk of serious injury to himself or to others." Brief of Petitioner at 49. Chevron's suggestion that Congress would create a demanding direct threat defense but allow the employer to flip this burden onto

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[45] "A statutorily-designated 'defense' for threats to others cannot be made part of a plaintiff's case in chief without turning the Act on its head." Brief of the U.S. and the EEOC at 26.

the excluded employee simply by characterizing the issue of direct threat as a "qualification standard" that the plaintiff must prove defies logic.

It also defies the statute's terms. The first paragraph under "Defenses" in the ADA, 42 U.S.C. § 12113(a) states that "'[i]t may be a *defense to a charge of discrimination* under the Act" that "a qualification standard" that "screen[s] out or tend[s] to screen out ... an individual with a disability" is permissible when it "has been shown to be job-related and consistent with business necessity." (Emphasis added). The second paragraph under "Defenses," which sets out the availability of the "direct threat" defense, refers back to and clarifies § 12113(a) by providing "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). Congress could not have intended a different assignment of the burden of proof for paragraph § 12113(a) than for § 12113(b). *See also* H.R. Report No. 101-485, pt. E, at 42 (1990), *reprinted* in 1990 U.S.C.C.A.N. 445, 465 (the employer in an ADA cases is required to "demonstrate that...a facially neutral qualification standard [that has a] discriminatory effect on persons with disabilities...is job related and required by business necessity).

Congress had sound reasons to exclude incorporation of threat-to-self in the ADA's direct threat defense. Even were a threat-to-self-defense available to Chevron, however, it utterly failed to meet its burden in establishing it. Despite Echazabal's present ability to perform the functions of the job, Chevron failed to offer a reasonable accommodation to ameliorate any perceived risk or to justify the failure through concrete evidence of an undue hardship. A fair reading of the ADA, work safety and public health policies, and the facts of the case force the conclusion that Chevron violated the ADA when it excluded Echazabal from employment.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

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Dated: February 1, 2002

APPENDIX

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 oldest and largest public health organization in the world, representing over 50,000 public health professionals from more than 50 disciplines. APHA supports the goal of equalization of opportunities for mentally and physically disabled persons in every facet of life. In an extensive body of public policy statements, APHA members have applied their expertise toward achievement of this goal.

The **American Association for the Study of Liver Diseases** ("AASLD") was founded in 1950 to bring together professionals in the field of hepatology. With a membership of more than 2,300 physicians, surgeons and researchers, AASLD serves both its members and the public by increasing the understanding and knowledge of liver disease, fostering funding for research, and enhancing education and practice.

The **Hepatitis C Action & Advocacy Coalition** ("HAAC") is a grassroots, volunteer organization of individuals committed to non-violent, direct action to end the Hepatitis C crisis. HAAC works to provide access to life-extending treatments to people with Hepatitis C, foster effective prevention efforts, encourage sound public health policies, and ensure adequate funding and resources for the care, treatment, and prevention of Hepatitis C. HAAC supports the equalization of opportunities for all disabled persons, and particularly those living with Hepatitis C, in every facet of life, including the workplace.

The **Hepatitis C Association** ("HCA") is a non-profit organization that seeks to educate the public about the hepatitis C virus (HCV). Through educational programs, support materials, and the internet, HCA provides factual information, promotes awareness of hepatitis C, and works to de-stigmatize the disease. Since the majority of new cases of hepatitis C arise from substance abuse, HCA focuses its efforts on educating clinicians in methadone clinics and patients in recovery. HCA is concerned that lack of understanding of hepatitis C may lead to unjustified discrimination against those living with HCV.

The **Hepatitis C Outreach Project** ("HCOP") is a national, non-profit educational organization dedicated to helping those whose lives are affected by the hepatitis C virus. HCOP's mission is to inspire, support and enhance community efforts toward prevention awareness, education, and treatment of hepatitis C and to promote organ donation. HCOP seeks to develop partnerships resulting in good public decision-making based on accurate information regarding hepatitis C. HCOP is vitally concerned that people living with hepatitis C be able to lead as normal a life as possible and not be subjected to discrimination in employment, housing or access to services.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national non-profit 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, *Albertsons, Inc. v. Hallie Kirkingburg,* 119 S.Ct. 2162

(1999); *Cleveland v. Policy Management Systems, Inc.,* 119 S.Ct. 1597 (1999); *Bragdon v. Abbott,* 118 S.Ct. 2196 (1998); *Doe & Smith v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (1999), *cert denied* 120 S.Ct. 845 (2000); *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); *Raytheon v. Fair Emp. & Housing Comm'n*, 212 Cal. App. 3d 1242 (1989); *McGann v. H&H Music Co.,* 946 F.2d 401 (5th Cir. 1991); *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied*; *Wood v. Garner Food Services, Inc.*, 117 S.Ct. 1822 (1997); and *Mason Tenders Dist. Council Welfare Fund v. Donaghey*, Civ. Action No. 93-1154, 1993 WL 596313, 2 A.D. Cases 1745 (S.D.N.Y. Nov. 19, 1993). Lambda is particularly familiar with unique barriers confronting persons with HIV and other stigmatized disabilities who are excluded from the workplace on the basis of exaggerated fears about their health status and related costs of employing them.

HOW THE U.S. SUPREME COURT DEFINES THE AMERICANS WITH DISABILITIES ACT

Hosted by Georgetown University Law School's Supreme Court Institute and the Bazelon Center for Mental Health Law
Washington D.C., February 22, 2002

JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

AMICUS CURIAE (FRIEND OF THE COURT) BRIEFS IN SUPPORT OF MARIO ECHAZABAL

◆ **Twenty-two national organizations*** represent people with various types of disability. As such, they "are intimately familiar with the role that paternalism has played in the lives of people with disabilities." They express concern that affirmation of "Chevron's protectionist arguments" would support limitation in other contexts of "the ability of people with disabilities to be full, participating members of their communities, contrary to the primary goal of the ADA." In addition to supporting the respondent's arguments that "threat to self" does not justify exclusion, the brief argues that to lower the standard for evaluating any medical judgments related to an employee's qualifications to perform a job, as proposed by Chevron and its amici, "would frustrate the purposes of the ADA" by giving an employer's doctors "virtually unreviewable discretion to exclude individuals with disabilities from the workplace." A link to the brief is at www.bazelon.org/echazabal.html

* The 22 organizations are: American Association of People with Disabilities, AARP, American Council of the Blind, American Diabetes Association, ADAPT, Brain Injury Association of America, Disability Rights Education and Defense Fund, Epilepsy Foundation, HalfthePlanet Foundation, Bazelon Center for Mental Health Law, Legal Aid Society—Employment Law Center, National Alliance for the Mentally Ill, National Association of the Deaf Law Center, National Association of Developmental Disabilities Councils, National Association of Protection and Advocacy Systems, National Association of Rights Protection and Advocacy, National Council on Independent Living, National Mental Health Association, National Mental Health Consumers' Self-Help Clearinghouse, Polio Society, The Arc of the United States and United Cerebral Palsy Association.

◆ **The National Council on Disability** writes on the basis of its deep understanding of the ADA's origins, purpose and implementation. NCD is an independent federal agency whose members are appointed by the President and confirmed by the Senate. It was instrumental in creating the legislative record that Congress considered in enacting the ADA and has monitored its implementation over two decades. Reversing the circuit court's ruling, NCD contends, would endorse "the assumption that people with disabilities are not competent to make informed, wise, or safe life choices," which is "the most long-standing and insidious aspect" of the discrimination that is banned by the ADA. In passing the ADA, the brief points out, Congress replaced the "medical model" focusing on an individual's infirmity with the civil rights model it had applied to African Americans and women. Under the ADA, "health and safety concerns are reviewed in the context of employer defenses" (especially as regards danger to other employees) and "are *not* an appropriate part of the analysis of whether a person is a 'qualified individual with a disability.'" Brief at www.its.uiowa.edu/law/press/2002/Echazabal_amicus.htm

◆ **The American Civil Liberties Union** brief reviews the history of paternalism as exclusionary, illustrated by historic cases supporting

[more]

No. 00-1406

IN THE

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

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BRIEF FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT[1]

INTEREST OF THE *AMICI CURIAE*

This brief is filed on behalf of the American Association of People with Disabilities ("AAPD"), AARP, the American Council of the Blind ("ACB"), the American Diabetes Association ("ADA"), ADAPT, the Brain Injury Association of America, the Disability Rights Education and Defense Fund, ("DREDF"), Epilepsy Foundation®, HalftthePlanet Foundation, the Judge David L. Bazelon Center for Mental Health Law, the Legal Aid Society–Employment Law Center ("LAS-ELC"), the National Alliance for the Mentally Ill ("NAMI"), the

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of all *amicus* briefs are on file with the Clerk of the Court.

National Association of the Deaf Law Center, the National Association of Developmental Disabilities Councils ("NADDC"), the National Association of Protection and Advocacy Systems ("NAPAS"), the National Association of Rights Protection and Advocacy ("NARPA"), the National Council on Independent Living ("NCIL"), the National Mental Health Association, the National Mental Health Consumers' Self-Help Clearinghouse, the Polio Society, The Arc of the United States ("The Arc"), and the United Cerebral Palsy Associations, Inc. ("UCP"). These organizations have worked for years on behalf of persons with disabilities and have brought, supported, or participated in numerous lawsuits on behalf of such persons. They all have strong institutional interests in the correct interpretation of the Americans with Disabilities Act ("ADA") and in vindicating the principles of equality and fair opportunity embodied in that Act. Their interests are described in more detail in the Appendix to this brief.

With particular reference to this case, the *amici* organizations are intimately familiar with the role that paternalism has played in the lives of people with disabilities. For too long people with disabilities were considered incompetent to direct their own lives. The hallmark of the ADA is the recognition that people with disabilities can live independent lives. Key to this principle is the right to make decisions about risks that are worth taking. That is why the ADA does not allow employers to decide which jobs are too risky for people with disabilities. If Chevron's protectionist arguments were to prevail here, they could also be raised in other contexts to limit the ability of people with disabilities to be full, participating members of their communities, contrary to the primary goal of the ADA.

INTRODUCTION

This case presents the question whether Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. ch. 126, subch. I, §§ 12101–12117, permits an employer to defend the refusal to hire or retain an employee who is a person with a "disability" (as defined in the Act) by proving that the conditions of employment pose a "direct threat" to the health or safety of that person. One of the provisions that addresses employers' defenses expressly states that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," Section 103(b) of the ADA, 42 U.S.C. § 12113(b), and that provision conspicuously fails to mention direct threats to the health or safety of the individual employee. The EEOC regulation at issue in this case, however, provides that "[t]he term 'qualification standard may include a requirement that an individual shall not pose a direct threat to the health or safety *of the individual* or others in the workplace." 29 C.F.R. § 1630.15(b)(2) (emphasis added).

Amici are concerned at the prospect of employers terminating and declining to hire otherwise qualified persons with disabilities on the ground that the job may pose a "direct threat" to the health or safety, not of other employees, customers, or others in or around the workplace, but of the individual himself or herself. The danger is not simply that employers will use safety as a cover for unwillingness to employ persons with disabilities based on prejudice (although that danger exists). Employers may also, in an excess of concern for the individual, exclude the person "for his or her own good," when the individual has a very different understanding and view about what is best for himself or herself. In addition, employers may conclude that employing a particular individual with a particular kind of disability—regardless of his or her knowledge, skills, experiences, and abilities—will add to their costs, whether in terms of

anticipated impact on employee morale, efficiency, increased workers' compensation insurance payments, or other costs, and want to exclude the individual from the job for that reason. These assessments will often be unsound, if only because of the uncertainties of prediction. Even if based on acceptable evidence, however, these judgments may unfairly and inappropriately exclude individuals from jobs they are fully capable of performing.

In *amici*'s view, the ADA addresses these dangers and imposes significant restraints on the extent to which employers may exclude employees or potential employees with disabilities for such health or safety reasons. As recognized through the legislative history, the ADA marked a major shift in public policy relating to disability, from dependence to independence, from social welfare to civil rights.[2] Essential to this shift is the concept of self-determination.[3] As people with disabilities know all too well, the "road to discrimination is paved with good intentions."[4] *Amici* agree that employers have a legitimate interest in worker health and safety issues. But the overarching purpose of the ADA is to ensure that individuals with disabilities who *can* work are not inappropriately or unnecessarily kept out of the workplace—both for their own benefit and for the benefit of society. Permitting employers to exclude them unnecessarily whenever there is a concern about

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[2] See H.R. Rep. No. 101-485, pt. 3 at 25–26 (1990). "Federal disability programs reflect an overemphasis on income support and an underemphasis on initiatives for equal opportunity, independence, prevention and self-sufficiency." 135 Cong. Rec. S10793 (Sept. 7, 1989) (statement of Sen. Biden).

[3] "Living independently and with dignity means opportunity to participate fully in every activity of daily life * * *. The ADA offers such opportunity to persons with disabilities." 136 Cong. Rec. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole).

[4] 135 Cong. Rec. S10717 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

endangering their health deprives them of the dignity of making rational choices concerning their own lives, deprives society of their productive labor, and shifts to taxpayers, charities, or family members the costs of providing for them.

SUMMARY OF ARGUMENT

Amici support the arguments in the Brief for Respondent and will not repeat those arguments. This brief addresses three issues raised by the case or by *amici* supporting Chevron that are of general importance to the disability community.

First, an individual may be a "qualified individual with a disability"—and therefore entitled to ADA protection from discrimination—even if performing the job in question would pose a direct threat to his or her health or safety. An individual is a "qualified individual with a disability" under the ADA if he or she "can perform the essential functions of the employment position" in question. Section 101(8) of the ADA, 42 U.S.C. § 12111(8). Under the relevant EEOC regulations, a job "function" is a performance-related task that employees are required to perform. See, *e.g.*, 29 C.F.R. § 1630.2(n). An individual's ability to perform essential job functions without risk to his or her safety is neither a job function nor an otherwise required element of the term "qualified individual with a disability." Whether or not "threat to self" has a place elsewhere in the statute (and *amici* do not believe it does), it does not fit here.

Second, *amici* agree with Mr. Echazabal that "direct threat to self" is not a defense to liability under Section 103(a) of the ADA, 42 U.S.C. § 12113(a), and that Section 103(a) permits employers to exclude qualified individuals with disabilities from an employment position based on neutral qualification standards, only if they meet the stringent test of being job-related and consistent with business necessity. It is important to add, however, that an employer may exclude a qualified individual with a disability only if no "reasonable

accommodation" is available that may mitigate the impact of such neutral standards on the particular individual with a disability. Such accommodations are to be determined on a case-by-case basis, and may require an employer to *modify* a neutral qualification standard if such modification does not impose an "undue hardship" on the employer. This important protection for persons with disabilities should not be overlooked.

Third, *amici* urge this Court not to lower the standard for evaluating medical judgments concerning "threat to self" or concerning any medical judgments that may be relevant to the satisfaction of neutral qualification standards, as a group of *amici* in support of Chevron, consisting of three occupational medicine groups, propose. The occupational medicine groups argue that an "employer should not be required, on pain of being held liable for violating the ADA, to second-guess the facially reasonable opinions of competent physicians." Brief for *Amici* Am. Coll. of Occupational & Envtl. Med. *et al.* at 11. The "facially reasonable" standard that the occupational medicine groups propose does not adhere to rulings by both the EEOC and this Court that employers must rely on "objectively reasonable" medical evidence when they decide whether an individual is a "threat" for purposes of the ADA. 29 C.F.R. § 1630.2(r); *Bragdon* v. *Abbott*, 524 U.S. 624 (1998). Lowering the standard to "facially reasonable" judgments would frustrate the purposes of the ADA by giving the medical experts on whom employers rely virtually unreviewable discretion to exclude individuals with disabilities from the workforce. To the extent that the Court addresses the evidence required to establish "threat to self" at all, it should not set forth a lower standard than the "objectively reasonable" standard that both it and the EEOC have already adopted.

ARGUMENT

I. An Individual May be "Qualified" For a Job Even If Performing the Job Poses a Direct Threat to His or Her Health or Safety.

Under the ADA, an individual with a disability is a "qualified individual with a disability," and therefore entitled to protection from discrimination, if he or she "can perform the essential functions of the employment position that such individual holds or desires." Section 101(8), 42 U.S.C. § 12111(8). Chevron seeks to alter this standard, arguing that an individual is not a "qualified individual with a disability" if he or she "cannot perform the essential functions of a job without exacerbating a serious medical condition." Pet. Br. at 43. That added restriction—which conflates essential job functions with concerns about an individual's safety—is inconsistent with the ADA. It is not an essential job function to be able to perform the job without risk to one's own health or safety. Such concerns do not affect an individual's entitlement to ADA protection.

A. An Employee Is a "Qualified Individual With a Disability" If He or She Can Perform the Essential Functions of a Job, Even If that Performance Risks His or Her Health or Safety.

Chevron and several of its *amici* argue that a person is not a "qualified individual with a disability" under § 101(8) of the ADA, 42 U.S.C. § 12111(8), if employment at the job in question would pose a direct threat to that person's health or safety. *E.g.*, Pet. Br. at 42. That argument, if correct, would shift the burden of proof from the employer to the employee. That argument, however, is not correct. The ability to perform job functions without risk to one's health is not itself an essential job function and therefore does not affect a person's entitlement to ADA protection.

The plain text of the ADA directly supports this conclusion. Title I of the ADA prohibits employment discrimination against a "qualified individual with a disability," Section 102(a), 42 U.S.C. § 12112(a). Such an individual is defined as an individual "who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires." Section 101(8), 42 U.S.C. § 12111(8) (emphasis added).[5] The Act does not provide that an individual with a disability is qualified only if he or she can perform essential job functions without risk to his or her health or safety.

The EEOC regulations concerning the ADA clarify the intended scope of essential job functions. The regulations state that the "essential functions" of a job are "the fundamental job duties of the employment position the individual with a disability holds or desires," rather than "the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). See also 29 C.F.R. pt. 1630 App. § 1630.2(n) ("essential functions are those functions that the individual who holds the position must be able to perform"); JA 209, 226 F.3d at 1071 ("Job functions are those acts or actions that constitute a part of the performance of the job."). Therefore, job "functions" are those "duties" that employees "must be able to perform." The EEOC regulations

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[5] Notably, this standard is written in the present tense (*i.e.*, "can perform"), indicating that job qualifications are to be determined based on qualifications at the time of the employment decision, not qualifications after the individual has performed the job for some time. See 29 C.F.R. pt. 1630 App. § 1630.2(m) ("[t]he determination of whether an individual with a disability is qualified * * * should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future"); S. Rep. No. 101-116, at 26 (1989) ("The term 'qualified' refers to whether the individual is qualified at the time of the job action in question; the * * * possibility of future incapacity does not by itself render the person not qualified."); H.R. Rep. No. 101-485, pt. 2, at 55 (1990) (same).

add that "[a] job function may be considered essential for any of several reasons," including (i) that "the reason the position exists is to perform that function," (ii) "the limited number of employees available among whom the performance of that job function can be distributed," and (iii) that "[t]he function may be highly specialized." 29 C.F.R. § 1630.2(n)(2). Other evidence of which job functions are essential includes "[t]he amount of time spent on the job performing the function." *Id.* § 1630.2(n)(3). All of these regulations view job "functions" as the tasks required to perform a job, and none logically includes safety concerns as an independent job function. This conclusion is confirmed by the House and Senate reports concerning the ADA, which distinguish between safety concerns and job qualifications and state that it is "critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant." S. Rep. No. 101-116, at 38 (1989); H.R. Rep. No. 101-485, pt. 2, at 72 (1990) (same).

Chevron argues that despite the EEOC regulations and legislative history, Mr. Echazabal is nonetheless not a "qualified individual with a disability" because working at the Chevron refinery risks harm to his health. Pet. Br. at 43. That distinction, which seeks to transform concerns for Mr. Echazabal's safety into a job qualification, is mere "word play." *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 207 (1991) ("'It is word play to say that "the job" at Johnson [Controls] is to make batteries without risk to fetuses in the same way "the job" at Western Air Lines is to fly planes without crashing.'") (quoting the court of appeals, which was referring to the facts of *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985)) (citation omitted). The essential function of Mr. Echazabal's job in Chevron's coker unit was to "extract usable petroleum products from the crude oil that remains after other refining processes." JA 209, 226 F.3d at 1071. At no time was Mr. Echazabal unable to perform that function. See JA 211, 226 F.3d at 1072 (Chevron "has never contended that

the risk Echazabal allegedly poses to his own health renders him unable to perform [job] duties."). It would defy logic to argue that an individual cannot perform the essential functions of a job that he has satisfactorily performed for many years. Chevron's stated concern was for Mr. Echazabal's health, not his ability to perform the essential functions of the refinery job. Under the ADA, that concern is for Mr. Echazabal—and not his employer—to evaluate.[6]

Chevron's resort to dictionary definitions is therefore irrelevant, given that the ADA defines the relevant term—"qualified individual with a disability"—for purposes of the Act. Moreover, Chevron's first definition of "qualified," meaning "'fitted' by 'endowments * * * for a given purpose,'" Pet. Br. at 44 (citation omitted), does not render "safety to self in the performance of a job" into a job *function.* Mr. Echazabal was "fitted" for employment with Chevron because, given his lengthy service in the coker unit, he had demonstrated that he had the necessary "endowments" to do that job. See Brief for the United States and the EEOC as *Amici Curiae* at 24–25.

Chevron's second dictionary definition—which defines "qualified" as "'having complied with the specific requirements [for] employment'"—is similarly inapposite. Pet. Br. at 45 (citation omitted). Chevron argues that an employer may choose to require safety to self as a job qualification, and that "[t]here is no sign that Congress meant to preclude an employer from stipulating that an element of each essential function of a position is the ability to perform it safely." *Id.* In fact, the ADA does not permit employers to "stipulat[e]" which job functions are essential, but merely permits "consideration" of an employer's view thereof. Section 101(8), 42 U.S.C.

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[6] See S. Rep. No. 101-116, at 28 (1989) ("[I]t would be a violation of this legislation if an employer were to limit the duties of an individual with a disability based on a presumption of what was best for such individual."); H.R. Rep. No. 101-485, pt. 2, at 58 (1990) (same).

§ 12111(8). To allow an employer's *preference* for job performance that does not pose a safety risk to the employee to determine which job functions are *essential* would render meaningless the requirement that employers only be permitted to require that individuals with disabilities be able to perform "essential" job functions. See JA 209, 226 F.3d at 1071 ("[A]n employer may not turn every condition of employment which it elects to adopt into a job function * * * merely by including it in a job description.").

The cases cited by Chevron do not rebut this conclusion. For example, Chevron relies upon *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999). Pet. Br. at 46. But in *Koshinski* the plaintiff admitted that, at the time of the employment decision, he "could no longer operate the cupola" (a blast furnace), which his job required. 177 F.3d at 602–03. That holding is not relevant where, as here, the individual with a disability is physically capable of performing the essential functions of the job in question.[7] Similarly, in *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), which involved a suicidal individual who suffered from depression and whose job required her to administer medication to patients, the court found that the individual's disability prevented her from "perform[ing] an essential function" of her job—"overseeing and administering medication"—and that "[w]here those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others." *Id.* at 144. That decision is inapplicable where, as here, the employee can perform all of the tasks that the job requires, and where such performance is not alleged to affect the safety of others. See

[7] The court in *Koshinski* indicated that it might have reached a contrary result under these circumstances, as, for example, "[i]t would be hard to imagine * * * that a court would sanction an employer's decision to fire a qualified employee simply because his degenerative heart disease makes a future heart attack inevitable." *Id.* at 603.

also, *e.g.*, *Turco* v. *Hoechst Celanese Corp.*, 101 F.3d 1090, 1093–94 (5th Cir. 1996) (worker with diabetes employed in position requiring "walking," "climbing," and "good concentration" not qualified because he could "hardly walk," "couldn't climb," and "lost his concentration").

Therefore, under the ADA an individual may be a "qualified individual with a disability" regardless of whether he or she can perform the job in question without posing a risk to his or her own safety.

B. In Section 101(8) of the ADA, Congress Declined to Follow the Rehabilitation Act Regulations That Included "Health" of the Individual in the Definition of an "Otherwise Qualified Individual with a Disability."

Chevron argues that the ADA definition of a "qualified individual with a disability" must parallel the definition of an "otherwise qualified individual with a disability" under Section 504 the Rehabilitation Act, 29 U.S.C. § 794. Pet. Br. at 47. Chevron further argues that because regulations interpreting the Rehabilitation Act state that an individual is not qualified if he or she cannot "perform the essential functions of the position in question without endangering the health and safety of the individual or others," 29 C.F.R. § 1614.203(a)(6), such a safety requirement should also be imposed on individuals claiming ADA protection. Pet. Br. at 47. That argument is not supported by the text of the ADA or by the applicable EEOC regulations, which were drafted *after* the Rehabilitation Act regulation in question but do not define "qualified individual with a disability" to include health or safety considerations.

As discussed above, under the ADA a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such

individual holds or desires." Section 101(8), 42 U.S.C. § 12111(8). That definition conspicuously fails to mention the additional requirement in the Rehabilitation Act regulation that an individual with a disability be able to perform essential job functions "without endangering the health and safety of the individual or others." Despite Chevron's assertion that the Rehabilitation Act regulation should control the interpretation of the plain text of the ADA, the Rehabilitation Act regulation and the ADA definition materially differ on this issue. The ADA's statutory definition—drafted with full knowledge of the Rehabilitation Act regulation—obviously controls over the different definition in the Rehabilitation Act regulation. See JA 211, 226 F.3d at 1072 n.10 ("the ADA's statutory definition * * * supercedes the Rehabilitation Act's definition of the analogous term").

That the ADA generally incorporates the protections of the Rehabilitation Act does not alter this conclusion. Section 501(a) of the ADA provides that the ADA should not be interpreted to provide *less* protection than the Rehabilitation Act provides. See 42 U.S.C. § 12201(a) ("[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act * * * or the regulations issued by Federal agencies pursuant to such title."). The ADA does not require, nor would it make any sense to require, that if a person is *not protected* under the Rehabilitation Act then he or she is also not entitled to protection under the ADA.[8] Therefore the Rehabilitation Act regulations do not inject safety considerations into the ADA's

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[8] *Amici* Chamber of Commerce of the United States *et al.* make this same error and thus misstate the relationship between the ADA and the Rehabilitation Act. For example, they argue (at 11) that the "1992 Amendments to the Rehabilitation Act" state that "the standards under [the Rehabilitation Act and the ADA] are the same." In fact, that amendment provided that the Rehabilitation Act would employ the standards of the ADA, not vice versa. See 29 U.S.C. §§ 791(g), 794(d).

definition of "qualified individual with a disability," which, by its terms does not include such a requirement.

II. A Neutral Qualification Standard That Is ~~Job-~~ Related and Consistent With Business Necessity May Provide a Defense to Liability Under the ADA Only If No Reasonable Accommodation is Available.

We agree with and support Respondent's interpretation of § 103(a) of the ADA, 42 U.S.C. § 12113(a).[9] An employer cannot exclude a qualified individual with a disability simply because it can demonstrate that the conditions of employment pose a "direct threat" to the health or safety of the individual. Instead, the employer must rely on a neutral qualification standard or selection criterion that "has been shown to be job-related and consistent with business necessity" within the meaning of Section 103(a). That is a stringent requirement. "Selection criteria that * * * do not concern an essential function of the job would not be consistent with business necessity." 29 C.F.R. pt. 1630, App. § 1630.10 (2d ¶). The requirement does not permit an employer to justify an allegedly neutral qualification by reference to alleged impact on employee morale, business reputation, added efficiency, or extra cost, unless those can be directly tied to an essential function of the specific job in question.[10]

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[9] That subsection provides: "It may be a defense to a charge of discrimination under this chapter [of 42 U.S.C.] that an alleged application of qualification standards * * * that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter [of 42 U.S.C. ch. 126]."

[10] In connection with alleged efficiency concerns, the ADA's legislative history shows that Congress had evidence that workers with disabilities did not damage employer efficiency. A comprehensive study concerning physically impaired employees of E.I. DuPont de Nemours and Company, discussed at S. Rep. No. 101-116, at 28–29 (1989), concluded that "Du Pont

We add, however, that to focus only on the job-related/ business-necessity requirement of Section 103(a) ignores one of its basic additional requirements: that the ADA's defense for neutral "qualification standards, tests, or selection criteria" that are "job-related and consistent with business necessity" must be viewed in light of any available "reasonable accommodation" that may mitigate the exclusionary impact of such qualification standards. 42 U.S.C. § 12113(a). The applicability of a facially neutral qualification standard is no defense to liability under the ADA if a reasonable accommodation would mitigate the impact of the selection criteria on a particular individual with a disability.

The facts of each case determine whether a particular accommodation is reasonable for a particular individual with a disability at a particular job. See 29 C.F.R. § 1630.2(o)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."); S. Rep. No. 101-116, at 31 (1989) ("The decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case."); H.R. Rep. No. 101-485, pt. 2, at 62 (1990) (same). An accommodation is not reasonable if, under the circumstances, it would impose an "undue hardship" on the employer, Section 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A), under the definition and the factors

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has had no increase in [insurance] compensation costs as a result of hiring the handicapped and no lost-time injuries of the handicapped have been experienced." *Id.* at 29. With respect to other concerns, "the study showed that the disabled worker performed as well as or better than their non-disabled co-workers," and "[t]he fears of safety and absenteeism were unfounded." *Id.* Specifically, for example, "[o]nly four percent of the workers with disabilities were below average in safety records; more than half were above average," and that "[n]inety-three percent of the workers with disabilities rated average or better with regard to job stability (turnover rate)." *Id.*

specified in Section 101(10), 42 U.S.C. 12111(10). The determination of "undue hardship" itself requires an individualized inquiry. See H.R. Rep. No. 101-485, pt. 2, at 70 (1990) ("the ultimate determination" of what constitutes undue hardship "is a factual one which must be made on a case-by-case basis").

It is clear, moreover, that a reasonable accommodation may in some cases include requiring an employer to adopt alternative qualification standards or selection criteria to minimize the impact of the neutral qualification standards on the individual with a disability. See S. Rep. No. 101-116, at 38 (1989) (Even neutral selection criteria "may not be used to exclude an applicant with a disability if the criteria can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion."); H.R. Rep. No. 101-485, pt. 2, at 70–71 (1990).[11] Therefore, where an individual with a disability can perform all essential job functions, but qualification standards serve to exclude that individual from an employment position, the ADA requires the employer to consider, in consultation with the individual, whether a reasonable accommodation in the form of an alternative qualification standard would assist the individual without imposing an undue hardship on the employer.[12] If the

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[11] See also 29 C.F.R. § 1630.2(o)(1) ("*reasonable accommodation* means: (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires").

[12] Factors used to determine whether an accommodation poses an undue hardship to employers include (i) "the nature and cost of the accommodation"; (ii) "the overall financial resources of the facility" and "the impact otherwise of such accommodation upon the operation of the facility"; (iii) "the overall financial resources of the covered entity"; and (iv) "the type of operation or operations of the covered entity." Section 101(10)(B), 42 U.S.C. § 12111(10)(B).

qualification standard can be modified without causing such an "undue hardship" for the employer, the ADA requires the employer to make such an accommodation.

Chevron has defended the EEOC's direct-threat regulation as lawful under the job-related/business-necessity standard of Section 103(a), referring to a number of employer interests, including those of avoiding the "moral dilemma" of employing at-risk individuals, "lower employee morale," and "adverse publicity." Pet. Br. at 22–23. It is highly unlikely that an allegedly neutral qualification standard could be justified on as job-related and consistent with business necessity because of such employer concerns. Likewise, concerns about such matters should rarely, if ever, be relevant to proving "undue hardship" in response to a claim that a lawful qualification standard must be modified to provide a reasonable accommodation. Permitting such vague concerns in connection with "undue hardship" would vitiate the reasonable accommodation requirement and would permit mistaken beliefs about persons with disabilities among other employees or members of the public to veto a reasonable accommodation that the employer has no good reason to refuse. Congress could not have intended such a result.[13]

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[13] Both the House and Senate reports concerning the ADA recognize the applicability of the reasonable accommodation requirement in this context. See H.R. Rep. No. 101-485, pt. 2, at 74 (1990); S. Rep. No. 101-116, at 27 (1989). Both reports cite *Strathie* v. *Department of Transportation*, 716 F.2d 227 (3d Cir. 1983), in which a school bus driver brought a Rehabilitation Act challenge against a state requirement that drivers be able to hear at certain levels without using a hearing aid. *Id.* at 228–29. A bus driver who used a hearing aid was excluded because of fear that the aid would become dislodged. The court held that the state must alter that qualification standard to accommodate individuals who wear hearing aids (*e.g.*, by requiring them to use a hearing aid that will not fall out) if the alteration would not impose an undue hardship on the state. While *Strathie* concerns the danger of a threat to others (such as students on the bus), its invocation of the reasonable accommodation requirement would be equally applicable

III. The Standard for the Medical Evidence on Which Employers Rely Should Not Be Lowered from the "Objectively Reasonable" Standard that the EEOC and this Court Have Already Adopted.

Amici support Respondent's position that "threat to self" is not a defense under the ADA. *Amici* address here an important issue concerning the standard under which medical judgments concerning "threat to self" would be evaluated and under which any medical judgments that may be relevant to the satisfaction of neutral qualification standards would in any event be addressed. Specifically, *amici* urge this Court not to accept an invitation, extended by a group of *amici* in support of Petitioner, to lower the standard for such evidence below the standard of "objective reasonableness" that both this Court and the EEOC have adopted.

A group of *amici* consisting of the American College of Occupational and Environmental Medicine, the Western Occupational and Environmental Medical Association, and the California Society of Industrial Medicine and Surgery (the "Occupational Medicine Groups") argue that the district court should defer to the medical evidence on which Chevron

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in a case in which an employer claimed that it would be an undue hardship to modify a neutral qualification standard, by expressing concern about the health or safety of the individual.

relied.[14] Specifically, the Occupational Medicine Groups argue that:

> "[a]n employer should not be required, on pain of being held liable for violating the ADA, to second-guess the facially reasonable opinions of competent physicians or to conduct its own full trial of the relevant medical issues each time it is required to assess whether an employee is qualified or poses a 'direct threat.'" Brief for *Amici* Am. Coll. of Occupational & Envtl. Med. *et al.* at 11.

Under the Occupational Medicine Groups' standard, an employer's determination that an individual poses a threat to his or her own health would be unassailable as long as evidence from the employer's own medical expert was "facially reasonable." The employer's duty would be limited to ensuring—often with a medically-untrained eye—that nothing was apparently unreasonable with the expert opinions on which it relied. After fulfilling this duty, the employer could rely on its own experts' opinions—both in making the decision and in court—without regard to whether those opinions were objectively reasonable and supported by the most recent research and prevailing medical opinion.

That standard does not adhere to rulings by both the EEOC and this Court that employers must rely on "objectively reasonable" medical evidence when they decide whether an

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[14] In its brief, Chevron describes its physicians' examinations and findings and states that "[i]n these circumstances Chevron was entitled to base its decision on the opinions of its doctors * * *." Pet. Br. at 41. Chevron does not set forth a standard for the medical evidence on which employers rely. To the extent that the "circumstances" in this case do not comport with the "objective reasonableness" standard, *amici* direct this argument to Chevron's argument that it was "entitled" to rely on its doctors' opinions.

individual constitutes a "threat" for the purposes of the ADA. In its Title I regulations, the EEOC provided that the "determination that an individual poses a 'direct threat' * * * shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). Similarly, in *Bragdon* v. *Abbott*, 524 U.S. 624 (1998), this Court stated, in a related context, that determinations about whether an individual is a direct threat must be "based on the objective, scientific information available to [the medical expert] and others in his profession," and that courts should "assess the objective reasonableness" of medical determinations by determining whether they were "reasonable in light of the available medical evidence." 524 U.S. at 649–50. Although in *Bragdon* this Court interpreted the "direct threat" defense of Section 302(b)(3), 42 U.S.C. § 12182(b)(3),[15] the "objectively reasonable" standard—and certainly no lower standard—should apply to "threat to self" under Title I, if the Court concludes that Title I permits such a defense. That is true regardless of whether "threat to self" is treated as a defense pursuant to 29 C.F.R. §§ 1630.15(b)(2) and 1630.2(r) or, without regard to those regulations, pursuant to a neutral qualification standard under Section 103(a).

Under this standard, employers may rely only on objectively reasonable medical evidence. Contrary to the Occupational Medicine Groups' proposal, employers are not immune from challenge merely because they were not presented with any

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[15] That subsection provides: "Nothing in this subchapter [of 42 U.S.C. ch. 126] shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."

alternative opinions and because the opinions on which they relied appeared reasonable. The onus is on employers to ensure that the opinions on which they rely are "objectively reasonable." This does not mean that employers are faced with the impossible task of ensuring that those opinions are not subject to disagreement or debate, or that courts must engage in the business of deciding whether the employers' doctor reached the "correct" medical conclusion. It does mean, however, that employers must be able to demonstrate that the opinions and evidence on which they rely are supported by more than good faith, "facially reasonable" assessments. As the EEOC provided, such opinions and evidence must be based on "the most current knowledge and/or on the best available objective evidence." And plaintiffs must be able to introduce evidence in court addressing whether the medical evidence on which the employer relied was "objectively reasonable."

Adopting the Occupational Medicine Groups' proposed standard would frustrate the purposes of the ADA by giving the medical experts on whom employers rely virtually unreviewable discretion to exclude individuals with disabilities from the workforce. Under that standard, plaintiffs who did not present their employers with medical evidence at the time the employers made their determination would not be able to introduce that evidence in court to counter the opinions on which the employers relied. Employers, in turn, could exclude individuals with disabilities from the workforce without ensuring that their reasons for doing so were objectively reasonable. Congress demanded more of employers and gave greater rights to plaintiffs.

That later-acquired medical evidence be admitted into evidence is particularly important in the light of the practical difficulties that individuals with disabilities face in countering an employer's medical determination. Unrepresented individuals with disabilities—like most people—may be predisposed towards accepting a medical doctor's opinion, even

when that opinion comes from a doctor hired by an employer. Moreover, even if they are inclined to question the employer's medical opinion on the merits, they may be uninsured or underinsured and may otherwise lack the resources to obtain a medical opinion that would both contradict that of the doctor hired by the employer and be of such a nature as to raise a question about the objective reasonableness of the opinion of the employer's doctor. Under the Occupational Medicine Group's standard, such individuals would never be able to recover under the ADA, even if, by the time of a lawsuit, they had gathered evidence to attack the objective reasonableness of the decision by the employer's doctor. Such a harsh result could not have been intended by Congress.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

The *Amici* Organizations

The American Association of People with Disabilities ("AAPD") is a non-profit membership organization of children and adults with disabilities, their family members, and their supporters. AAPD's mission is to promote political and economic empowerment for the more than 56 million Americans with disabilities. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act (ADA). AAPD works to ensure effective enforcement and implementation of the ADA and other civil rights laws.

AARP is a nonprofit membership organization serving more than thirty-four million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. 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 200 *amicus* briefs before this Court and the federal appellate and district courts. More than forty percent of AARP's members are employed, and many of those with disabilities rely on the American's with Disabilities Act to create a work place free from discrimination. The protections of the Americans with Disabilities Act are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The American Council of the Blind ("ACB") is a leading national consumer organization of the blind, which strives to improve the quality of life, equality of opportunity, and independence of all persons who are blind. To that end, ACB seeks to educate policy-makers about the needs and capabilities of people who are blind, to assist individuals and organizations wishing to advocate for the needs of people who are blind, and to disseminate information to both the blind and sighted public.

ACB was at the forefront of the activity which led to the enactment of the ADA. Efforts to preserve the rights gained through that statute and to strengthen its protections for people who are blind continue through ACB's legislative and advocacy activities aimed at increasing the accessibility of employment, information, public transportation, and programs and services of state and local governments. As a result, ACB is deeply concerned that these rights may now be in jeopardy. Further, ACB is concerned that, if the ADA is weakened, there will be a return to previous patterns of consistent and pervasive discrimination against persons with disabilities, and particularly persons who are blind. Therefore, we believe that efforts to preserve and strengthen the ADA are of paramount importance.

The American Diabetes Association ("ADA") is the nation's leading nonprofit health organization providing diabetes research, information, and advocacy. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. As part of its mission, the ADA advocates for the rights of people with diabetes and supports strong public policies and laws to protect persons with diabetes against discrimination. The ADA has over 400,000 general members and over 17,000 professional members.

ADAPT is a national organization, most of whose members have severe disabilities and have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the ADA.

The Brain Injury Association of America is the only national nonprofit organization working on behalf of the more than 1.5 million Americans who sustain a brain injury each year and the estimated 5.3 million Americans who live with permanent disabilities resulting from a brain injury and their families.

With its network of more than 45 Chartered State Affiliates and hundreds of local chapters and support groups across the country, the Association's mission is to create a better future through brain injury prevention, research, education and advocacy.

The Disability Rights Education and Defense Fund, Inc., ("DREDF") based in Berkeley, California, is a national law and policy center dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote to full integration of citizens with disabilities into the American mainstream, DREDF has represented or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination. DREDF is nationally recognized for its expertise in the interpretation of disability civil rights laws.

Epilepsy Foundation® is the sole national voluntary health organization dedicated to advancing the interests of the more than 2.3 million Americans with epilepsy. Epilepsy is a chronic neurological condition manifested by recurring seizures. While medical and scientific advances have made it possible for many people with epilepsy to control, to varying degrees, their seizures, and participate in a wide variety of activities, many of these people are unable to obtain employment because of the stigma associated with the condition and misfounded fear that the individual will harm himself or others. For this reason, the Foundation has worked hard for the passage of laws like the Americans with Disabilities Act, and continues to advocate for their enforcement.

HalfthePlanet Foundation is a non-profit organization that offers comprehensive, reliable information, products, and services to people with disabilities, their families and friends.

The Foundation administers a well-known website—halftheplanet.com—the most comprehensive disability resource on the Web, created by people with disabilities for people whose lives are touched by disability. HalfthePlanet Foundation supports the application of technology to promote the values of the Americans with Disabilities Act—independent living, social inclusion, equality of opportunity, economic self-sufficiency, and empowerment.

The Judge David L. Bazelon Center for Mental Health Law is a national legal advocacy organization dedicated to advancing the rights and dignity of individuals with mental disabilities. The Center has litigated several cases involving employment of individuals with mental disabilities under the Americans with Disabilities Act and has an interest in ensuring that people with mental disabilities are able to continue to contribute to society and to maintain employment through changes in the work environment that allow them to successfully do their jobs.

The Legal Aid Society–Employment Law Center ("LAS-ELC") is a private, non-profit organization. The primary goal of the LAS-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 LAS-ELC has represented and continues to represent clients faced with discrimination on the basis on their disabilities, including those with claims brought under the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to disabled persons.

The National Alliance for the Mentally Ill ("NAMI"), with more than 200,000 members and 1200 state and local affiliates, is the nation's leading grassroots advocacy organization dedicated exclusively to improving the lives of persons with

severe mental illnesses, including schizophrenia, bipolar disorder (manic-depressive illness), major depression, obsessive-compulsive
disorder, and severe anxiety disorders.

The National Association of the Deaf, whose members are deaf and hard-of-hearing adults, parents of deaf and hard-of-hearing children, and professionals, works to safeguard the civil rights of deaf and hard-of-hearing Americans.

The National Association of Developmental Disabilities Councils ("NADDC") is a national, non-profit organization representing State Councils on Developmental Disabilities that work for change on behalf of people with developmental disabilities and their families. It promotes national policy to enhance the quality of life for all people with developmental disabilities, enabling them to exercise self-determination, be independent, productive, integrated and included in all facets of community life. NADDC is strongly committed to the proper interpretation and enforcement of the Americans with Disabilities Act.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is the 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.*, and the Protection and Advocacy for Individual Rights Program, 29 U.S.C. § 794e. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities, using a variety of mechanisms including individual case representation, systemic advocacy, information and referral, and education and training. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance, and represents their interests before the federal government. As such, it has a strong interest in ensuring that

employment options are not restricted for people with disabilities.

The National Association of Rights Protection and Advocacy ("NARPA") was formed in 1981 to provide support and education for advocates working in the mental health arena. It monitors developing trends in mental health law and identifies systemic issues and alternative strategies in mental health service delivery on a national scale. Members are attorneys, people with psychiatric histories, mental health professionals and administrators, academics, and non-legal advocates—with many people in roles that overlap. Central to NARPA's mission is the promotion of those policies and strategies that represent the preferred options of people who have been diagnosed with mental disabilities. Approximately 40 percent of NARPA's members are current or former patients of the mental health system. NARPA has submitted *amicus* briefs in many cases in federal and state courts in cases affecting the lives of persons with psychiatric disabilities, including *Olmstead* v. *L. C.*, 527 U.S. 581 (1999); *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001); *Godinez* v. *Moran*, 509 U.S. 389 (1993); *Washington* v. *Harper*, 494 U.S. 210 (1990); *T.D.* v. *New York State Office of Mental Health*, 91 N.Y.2d 860, 668 N.Y.S.2d 153, 690 N.E.2d 1259 (1997); *Phoebe G.* v. *Solnit*, 252 Conn. 68, 743 A.2d 606 (1999). NARPA members were key advocates for the passage of Federal legislation such as the Americans with Disabilities Act and the Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. §§ 10801–51.

The National Council on Independent Living ("NCIL") is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of a nationwide network of centers for independent living, statewide independent living councils, people with disabilities, and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to

advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

Established in 1909, the National Mental Health Association, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity and the opportunity to achieve their full potential free from stigma and prejudice.

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The Polio Society serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The Americans with Disabilities Act is a key element of the Polio Society's advocacy. The members are persons with disabilities as a result of polio and post-polio syndrome ("P.P.S.").

The Arc of the United States ("The Arc"), through its nearly 1000 state and local chapters, is the largest national voluntary

organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

United Cerebral Palsy Associations, Inc., ("UCP") is a Washington, D.C.-based non-for-profit corporation incorporated in 1948. The mission of UCP is to advance the independence, productivity and full citizenship of people with cerebral palsy and other disabilities, through its commitment to the principles of independence, inclusion and self-determination. UCP is the leading source of information on cerebral palsy and is a pivotal advocate for the rights of all people with disabilities. UCP and its nationwide network of over 100 affiliates in 39 dates strive to ensure the inclusion of persons with disabilities in every facet of society—from the web to the workplace, from the classroom to the community. The UCP family serves 30,000 children and adults with disabilities a day, or over 1,000,000 each year.

No. 00-1406

IN THE

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CHEVRON U.S.A. INC., PETITIONER v.

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ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIEF FOR PHYSICIANS WHO TEACH OCCUPATIONAL MEDICINE, **Dr. Mark Cullen, Yale University Medical School** Department of Occupational and Environmental Medicine and **Dr. Tee L Guidotti, The George Washington University** Department of Occupational and Environmental Health

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SUPPORTING NEITHER PARTY

MOTION REQUESTING LEAVE TO FILE BRIEF OUT OF TIME AND

BRIEF AMICUS CURIAE

REQUESTING INVALIDATION OF EEOC REGULATIONS AND WRIT OF MANDAMUS TO THE SECRETARY OF LABOR FOR OSHA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

Feitshans, Ilise L. Review of "From Chance to Choice: Genetics and Justice" *New England Journal of Medicine Sept 14 2000 p 15*

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INTEREST OF *AMICUS CURIAE*

Dr. Mark Cullen, Yale University Medical School, Department of Occupational and Environmental Medicine and Dr. Tee L Guidotti, The George Washington University Department of Occupational and Environmental Health enjoy the unique expertise required to train physicians who will ultimately administer and decide how to implement the decisions of this Court in workplace medical practice that will apply legal principles prohibiting discrimination against the disabled. They have each written several books and articles that are well respected in this field. As professors of occupational medicine, Amici have each lectured and engaged in clinical practice in occupational health for over two decades. Amici are uniquely positioned to speak with expertise and objectivity; looking to the public good and feasibility of implementing Americans With Disabilities Act (ADA) goals from the standpoint of students, former students and prospective students. Amici therefore express their concern that excessive attention to the role of legal determinations of discrimination, required of occupational physicians in the field, without clarification of the importance if not primacy of attention to risk involved in workplace exposures, may lose sight of the nation's goals, articulated by the US Congress in the Occupational Safety and Health Act (OSH Act) of 1970 29 USC 651 et seq and the ACOEM Code of Ethics [Reprinted in Appendix 1]that govern their work.

REQUEST TO FILE BRIEF AMICUS CURIAE PURSUANT TO RULE 37 of THIS COURT

A blanket consent to Briefs Amicus Curiae was filed by both parties. Leave is requested to file under Rule 37 in order to amplify points made by Amicus Curaie American College of Occupational and Environmental Medicine (ACOEM). Amicus here expresses concurrence with the concerns raised ACOEM. ACOEM correctly raised a red flag about the pivotal role of occupational physicians who make on the spot determinations that may later be reviewed in post-hoc litigation while they endeavor to address and cure occupational illness. Without proporting to represent the views or opinions of ACOEM the Amicus here wish to underscore certain points made and to request of this Court that jurisdiction for matters of occupational health be restored to the appropriate agencies for administering occupational health laws and regulations.

MOTION TO REQUEST LEAVE FOR FILING OUT OF TIME DUE TO EXTRAORDINARY CIRCUMSTANCES

Amici here request leave to file this Brief out of time because the extraordinary circumstances of this point in litigation raise subtle issues of occupational medicine practice that may benefit from insights gleaned from their knowledge and experience. Their training and professional endeavors involve application of an unusual confluence of information from a variety of medical, scientific and technical systems whose outcomes have an impact on the validity of decisions that will test the mettle of physicians who seek to synthesize two essential but divergent goals of social policy. The principles discussed before this Court in the matter at Bar will actually be applied in daily life by doctors, whose professional judgement will later be reviewed to determine whether their work comports with both: notions of occupational health and discrimination prevention under law. Physicians who teach others how to ethically and accurately examine the causes and methods for preventing occupational injury therefore have a special perspective of rarified knowledge to contribute to this discourse, but were not moved to speak until they read the ACOEM brief , in which they concur in part. They also wish to elaborate on subtle points.

Counsel of Record is aware of the lateness of this filing and therefore wishes to underscore that Amici are not litigants in this case and therefore have no personal or financial interest in this case or in its specific outcome. They simply hope to refine public understanding of certain technical points for the benefit of improving public health policies. Amici do not request any waiver of statutes of limitations for any cause of action that would be time barred; they simply request that at this technically difficult moment in the decisional process, their information regarding technical matters be heard.

Furthermore, it could be argued that any prior comment by Amici regarding this case, before the maturation of the discourse to its present level, would have been premature. Occupational physicians have often been inappropriately accused of acting as simply a rubber stamp for employer desires to remove people with expensive or complex illnesses from arguably risky working conditions. At the same time, a fundamental tenet of occupational medicine requires each physician to prevent harm, exemplified by ACOEM's Code of Ethics [Appendix 1].Amici hope their sincere concern for the public good will dispel myths about disability and will engender public trust for their

profession.

ADA has become the new mantra for occupational and environmental medicine practice, because it has changed the demographics of the USA's working population by making it illegal to exclude applicants who have disability or to ask about previous injury or illness experience unless one can reasonably demonstrate that such information was not used to discriminate in employment or placement decisionmaking. Cause of injury does not matter when applying, during pre-employment screening or medical screening process from the standpoint of ADA, but it may be at times controlling for specific workplace health outcomes. Under current practices, the determinations of whether any job has too high a risk to be acceptable for any applicant's health is a difficult question of medical ethics, faced by many occupational physicians daily; on the other hand, myths and fears that are not based in sound medical evidence can keep employable citizens unemployed. Because job hazards vary across worksites and susceptibility, science medicine and genomic information increasingly suggests, risk may vary greatly from one individual to the next without regard to prior health status. Occupational physicians who sign off on work assignments daily balance both sets of concerns: respecting genuine risks and teasing apart myths and fears about potential harm from the circumstances in a workplace. Thus, the question whether a job is acceptably safe or too dangerous given specific risks to one individual involves complex evaluation, best made by physicians, following OSHA regulations.

In such matters, the best medical minds may disagree, but none can escape their awkward position that places them on the horns of a professional dilemma: their medical opinion regarding the match between job applicant and placement in a particular assignment must be reasonable and justified when taking into account not only the social need for preventing and ending workplace discrimination against disabled people, but also by examining scientific and medical parameters such as ambient exposures in the work environment; as well as job description, industrial category and individual variations in the response to risk. When the confluence of job hazard and individual risk is too great for one to ethically advise that a person accept the work assignment, the occupational physician who signs off risks malpractice liability and fosters non-compliance with health laws; and the occupational physician who signs off on a refusal to hire or place the same person may unwittingly become a link in the chain of an

employer's pattern of practice of discrimination. Therefore, acting with professional integrity for those who practice occupational medicine is fraught with personal and professional liability where there is no safe or neutral ground upon which they can confidently rest their opinion.

In sum, because of the sophistication and complexity of these issues as they have ultimately unfolded in this matter, Amici who are practicing physicians in academia, without legal training and without scientific concern for any specific outcome feel their unique understanding and experience governing the daily practice of these issues should, for the public good, be made available to enlighten the public and inform this Court of potential ramifications reflected in their concerns. It is therefore necessary and appropriate that Amici add their information to the discourse at this time and respectfully request that this Brief be accepted.

QUESTIONS PRESENTED

Whether the "direct threat" defense available to employers under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but pose no risk to the health or safety of other people in the workplace

Whether the Equal Employment Opportunity Commission (EEOC) in administering ADA has the requisite legislative mandate and expertise to determine that an employee who is at risk of harm from workplace exposures is a "direct threat of harm to oneself" although the US Congress had already spoken about science matters in other laws and delegated authority to promulgate standards regulating workplace health risks under OSH Act, two decades before it wrote the ADA.

SUMMARY OF ARGUMENT

Two powerful drivers in contemporary social policy are on a collision course: health law and discrimination law. Both drivers are the source of remedial statutes, designed by the US Congress to prevent and end evil that threatens to rot the core of society, if left unchecked. Discrimination law seeks to overcome and replace the barriers to human achievement of individual potential that are rooted in myths, stigma and prejudice about the immutable characteristics of individuals. Health law seeks protect the well-being of individuals,

even when that requires a prospective evaluation of risk. Risk, however, is inherently unequal to different individuals who may be confronted with the same set of tasks. Furthermore, as scientists study in greater detail the relationship between toxicology and genetics, pharmacology and a variety of host-environmental interactions, it is clear that risk analysis can become more complex but many risks nonetheless cluster around the identical characteristics that are the red flag for concerns of discrimination under law: science finds that human risk differs by race, ethnicity, national origin, age, health status or functional disability, and sex.

Thus, the social desire to remove or overcome barriers to discrimination must, at times, yield when individual scrutiny of a patient's needs reveals natural barriers to health, in order to preserve life and prevent human suffering, which is an ultimate obstacle to human achievement and civilization's survival.

This Court has recently stated in *Toyota v Williams*__ US__ (2002) 2002 WL 15402(2002) that special protections accorded to disabled individuals under the Americans With Disabilities Act (ADA) require the protected individual to demonstrate "substantial impairment" in the performance of one or more major life activities. The Court so determined, without commenting on the attendant issues of risk that may color a disabled individual's ability to perform certain tasks. Yet, risk is endemic in the human condition and more importantly, no set of tasks, at work or elsewhere, can be performed without any risk to oneself. Sound principles of industrial hygiene and occupational medicine will, on occasion, dictate that individuals refrain from engaging in an activity due to risk, regardless whether that person is healthy or disabled. The fundamental social goal of protecting human life from risk was addressed by the US Congress two decades before the writing of the ADA, as codified in the Occupational Safety and Health Act of 1970 (OSH Act). Thus, questions regarding the relative risk of prospective harm for individuals in a given workplace who are not substantially impaired and may be otherwise qualified for employment is subject to OSH Act jurisdiction, not ADA. This Court cannot allow overzealous desire to prevent discrimination to render politically incorrect long-standing health values that must be promoted in order to ensure the survival of our society. Therefore the EEOC regulations concerning the "threat of harm" to oneself are the ***ultra vires product of an agency that has exceeded its delegated authority***.Said regulations therefore are invalid.

ARGUMENT

I. Discrimination Law Can Not Adequately Address the Problems of Risk To Oneself At Work Inherent in Human Activity, Regardless of Disability

In the case at bar, this Court grapples with an ancient and unresolved human conundrum that goes to the essence of work, health and survival of human society. The Americans With Disabilities Act (ADA) of 1990 was written by the U.S. Congress to prevent the harms, caused by discrimination in the workplace, that arise because of unfounded stereotypes about disability and the nature of illness in society in general. Neither ADA nor its antecedent statute, Title VII was designed to address issues of health and welfare. Cases that have tested the limits of such jurisdiction have allowed workers to continue their exposure to risks in the workplace, without regard to the Occupational Safety and Health Act's health and welfare rationale. This was noted by the Ninth Circuit, which cited with approval the concept that "danger to a woman herself does not justify discrimination" *Echazabal v Chevron*, 226 F3d 1063 (2000) citing *IUAW v Johnson Controls*, 499 US 202 (1991) citing *Dothard v. Rawlinson* 433 U.S. 321, at 328 (1977).

The Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 et seq., with respect to private employers and is authorized to issue regulations under that Title. This case concerns whether Title I authorizes an affirmative defense for cases in which an individual will pose a direct threat to the health or safety of that individual. The Ninth Circuit Court of Appeals in this case invalidated the EEOC regulations that recognized this affirmative defense. Title I of the ADA prohibits an employer from discriminating against a "qualified individual with a disability." 42 U.S.C. 12112(a). A "qualified individual with a disability" is a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. 12111(8). ADA states "[i]t may be a defense to a charge of discrimination under [the ADA] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation."

42 U.S.C. 12113(a).

The US Supreme Court case *Toyota v Williams* ___ US ___ (2002) 2002 WL 15402(2002) held that merely having an impairment does not make one disabled for the purposes of ADA. In *Toyota*, the Court held that 42 USC 12102(2)(a) requires demonstrated substantial impairment of a major life activity, and not the mere diagnosis or evidence of impairment (slip op 13 and 14). Thus, a worker whose workplace practices could be altered to reduce injury did not enjoy discrimination protections as a "disabled person" under ADA, because she did not suffer substantial impairment of the ability to perform one or more major life activities even though she suffered a documented case of carpal tunnel syndrome. Significantly, her case, had she succeeded, would have brought her monetary relief, not health care, to relieve her suffering. More significantly, from the standpoint of public policy and the practice of occupational medicine, nothing in ADA or the EEOC regulations there at bar would have mandated a change in workplace practices or procedures that would prevent her colleagues from suffering the pains of preventable injury.

A. Sound Occupational Medicine Practice May Require that Certain Individuals Avoid Certain Risks to Preserve Life, Health and Avoid Liability

Respondent Mario Echazabal began working at an oil refinery owned by petitioner Chevron U.S.A., Inc. in 1972. Employed by various contractors, respondent worked at different times for petitioner as a laborer, helper, pipefitter, and on the fire watch. Respondent worked primarily in the refinery's coker unit. Pet. App. 2a. In 1992, respondent applied to work directly for petitioner in the refinery's coker unit. Petitioner made respondent an offer of employment contingent upon his passing a physical examination. Said examination by petitioner's physician revealed that respondent's liver was releasing certain enzymes at a higher than normal level. Based on that examination, petitioner concluded that respondent's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. Petitioner therefore rescinded the job offer. Pet. App. 2a. After respondent consulted several doctors, he was diagnosed with asymptomatic, chronic active Hepatitis C, a viral infection of the liver. Pet. App. 3a, 35a. Respondent continued to work as an employee of petitioner's maintenance contractor. Id. at 2a. In 1995, respondent again

applied to petitioner for a position as a plant helper in the coker unit. Petitioner again made respondent an offer contingent on a physical examination. Pet. App. 3a, 35a. Petitioner's examining physician concluded that further exposure to chemicals and solvents like those used in the coker unit would seriously endanger respondent's health and, in certain circumstances, could be fatal. Id. at 38a; C.A. E.R. 81-82. Petitioner's medical director agreed that respondent could not work in the coker unit without risk to his own health. Pet. App. 38a. Based on the those findings, petitioner refused to hire respondent. Id. at 3a. Petitioner also instructed its maintenance contractor to ensure that respondent was not exposed to solvents and chemicals; and, as a result, respondent could no longer work at the refinery. Ibid.

Respondent brought an action in state court alleging discrimination on the basis of a disability that violated ADA. Pet. App. 3a. Petitioner removed the case to the United States District Court for the Central District of California. Id. at 32a. The district court granted summary judgment in favor of petitioner on all of respondent's claims. Id. at 32a-57a. On the ADA claim, the district court found that petitioner's refusal to hire respondent was lawful because, as a result of respondent's liver condition, his working in the refinery would have posed a direct threat to his health. Id. at 46a-52a. The district court stayed the proceedings against the maintenance contractor, and certified several issues for appeal, including the propriety of the grant of summary judgment on the ADA claim. Id. at 3a-4a. Because the risks are prospective, and speculative at best, and there is no substantial impairment of the ability to perform one or more major life activities, (*Toyota v Williams* _US__(2002) 2002 WL 15402(2002)) this individual can only enjoy ADA protection if this Court were to find that the protected worker suffers from stigma for illness that is "not manifest" (*School System School Bd. of Nassau County v. Arline,* 480 U.S. 273, 287 (1987) ("an individualized inquiry" protects disabled individuals "from deprivations based on prejudice, stereotypes, or unfounded fear"). This determination is irrelevant, however, if the affirmative defense itself is invalid, as are the regulations at bar for the reasons set forth below.

B. ADA Does Not Address Issues of "Threat to Harm" That Impact Workplace Safety and Health

Cursory application of medical knowledge embedded in EEOC regulations cannot rise to the level of prospective, preventive

legislation that is the essence of the authority to protect the health and safety of all workers and provide "employment and places of employment that are free of recognized hazards" in the USA OSH Act Sec 5(a)(1), 29 USC 654(a)(1). In no case could ADA provide the risk assessment criteria or a statutory basis for prospective alteration of working conditions that could actually minimize risk or reduce the likelihood of injury or harm. As noted by Judge Trott in dissent in *Echazabal v Chevron* 226 F3d 1063 (2000) (dissent), "Our law books, both state and federal, overflow with statutes and rules designed by representative governments to protect workers from harm. Long ago we rejected the idea that workers toil at their own peril in the workplace....In many jurisdictions, it is a crime knowingly to subject workers to life-endangering conditions. California Labor Code S 6402 expressly forbids an employer from putting an employee in harms way. In Arizona, an employer who fails to provide a safe workplace commits a felony. Ariz. Rev. Stats. Annot., Labor S 24-403, S 23-418. In effect, we repeal these laws with respect to this appellant, and to other workers in similar situations. So much for OSHA. Now, our laws give less protection to workers known to be in danger than they afford to those who are not. That seems upside down and backwards." *Echazabal v Chevron,* 226 F3d 1063 (2000), Trott, J. Dissenting (Citations in original)

II. Government Authority Exists to Protect Health Without Reaching ADA's Civil Rights Issues

Judge Trott wisely asked in his dissent, "Did Congress really intend to nullify state and federal workplace safety laws and render them impotent to protect workers in identifiable harms way?" ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation." 42 U.S.C. 12111(3), without commenting upon the criteria for diagnosis or medical determination of the severity, prognosis or treatment of the disabling condition. When passing the ADA, the US Congress required the EEOC to issue regulations to carry out the provisions of Title I, and the EEOC, following public notice and comment has issued regulations pursuant to that mandate, 56 Fed. Reg. 35,726 (1991). Consistent with the statutory text, the regulations provide that an employer may defend against a charge that a qualification standard improperly screens out a disabled individual by showing that the standard is "job-related and consistent with business

necessity, and such performance cannot be accomplished with reasonable accommodation." 29 C.F.R. 1630.15(b)(1). In elaborating on that defense, the regulations state that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. 1630.15(b)(2). The regulations define direct threat to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r).

A. The Government's Obligation To Protect Health Has Primacy Under the Doctrine of *Parens Patriae.*

Public health preventive strategies typically categorize individuals in sub-groups according to risk in order to prevent avoidable or foreseeable harms. Under the doctrine of *parens patriae*, state and federal governments have consistently recognized the need on occasion to abridge or modify legal views of individual rights, in order to preserve the public health. Examples abound, including but not limited to: abrogation of privacy rights in order to collect and preserve personal data in vital records, (births, deaths and specified diseases); restriction of the person, quarantine; and restriction in the use of private property without constituting a "taking" in cases of zoning to prevent pollution or public nuisances. Grad, Frank P., *Public Health Law Manual*, Amer. Public Health Assoc. , Wash. D.C. (1990)

B. There is Precedent in the Federal Law Providing Special Occupational Health Regulations to Address Risk and Preserve Life Without Demonstrating Substantial Impairment or Qualification as "Disabled"

Federal law regulations already exist that divide groups of workers according to sub-populations. For example, the Nuclear Regulatory Commission (NRC) has different standards for workers under age 18 compared to other workers. NRC also instituted regulations with different standards for the general public, for exposed employees, and for "fetal exposure" in the event of so-called "declared pregnancy" Nuclear Regulatory Commission Regulations, 10 CFR Sections 19.12-19.32;20.1 et. seq.. U. S. Congress has also spoken to other important occupational safety and health issues: The Occupational Safety and Health Act of 1970 grants the Secretary of

Labor authority to protect workers "functional capacity" against "recognized hazards", including health hazards in the workplace and a host of compensation laws provide compensation for work-related disabilities, such as black lung and harms to federal employees. This Petitioner has not violated the relevant OSHA regulations, nor been cited by OSHA for unacceptable practices regarding health hazards. And, weaknesses in OSHA regulations or an agency's reluctance to grapple with these issues should not give rise to any inference that others hold the proper venue for regulating these important risks. Rather, there is ample authority under OSH Act for OSHA to play a more active role in this area.

One fundamental tenet of occupational medicine requires that physicians prevent harm, as exemplified by the ACOEM Code of Ethics. ADA has become the new mantra for occupational and environmental medicine practice, because it has revolutionized the workforce by making it illegal to exclude applicants who have disability or to ask about previous injury or illness experience, regardless of the cause of harm– whether from prior exposures in the workplace, leisure activities , sports or home. Feitshans, Ilise L. ; ACOEM Continuing Medicial Education (CME) Materials "Law and Ethics of Occupational and Environmental Medicine Programs (San Antonio 1999, Philadelphia 2000 and San Francisco 2001. Furthermore, determinations of access to medical records, transfer of information between employers and insurers, and relevant data regarding fitness to work are routinely trafficked trough the offices of occupational physicians. Their pivotal role in the employment process involves deciding on a daily basis, whether any job has too high a risk to be acceptable for any applicant's health. This raises difficult ethical questions, faced by many occupational physicians daily, because job hazards vary across worksites. Thus, the question whether a job is acceptably safe or too dangerous for the risks to be acceptable is a subtle and complex evaluation that can best be made by occupational physicians following OSHA regulations. On such matters, the best medical minds may disagree about the implementation of specific recommendations on a patient by patient basis, but none can escape their awkward position that places them on the horns of a professional dilemma: their medical opinion regarding the match between job applicant and placement in a particular assignment must be reasonable and justified when taking into account not only the social need for

preventing and ending workplace discrimination against disabled people, but also by examining scientific and medical parameters such as ambient exposures in the work environment; as well as job description, industrial category and individual variations in the response to risk.

Once the confluence of job hazard and individual risk is too great for them to ethically advise that person accept the work assignment, the occupational physician who signs off risks malpractice liability and fosters non-compliance with health laws; and the occupational physician who signs off on a refusal to hire or place the same person may unwittingly become a link in the chain of an employer's pattern of practice of discrimination. Therefore, acting with professional integrity for those who practice occupational medicine is fraught with personal and professional liability where there is no safe or neutral ground upon which they can confidently rest their opinion.

Thus, many physicians pro-actively foster the employment of workers against the employer's desire to reject them on grounds of ill-health that is awkward in the worksite although not so severe that it substantially impairs the performance of one or more major life activities. Such doctors have an ethical obligation to support a decision by an employer to deny assignment in cases of high risk and high probability of harm. See: Feitshans, I.L. Bringing Health to Work (1997) at 127-129. Examples include: disabled individuals who applies to an industrial firefighting and rescue brigade in an oil refinery and chemical plant, or people with asthma whose occasionally experienced bronchospasm made them ill-advised for firefighting; these cases present a situation where an individual should not be placed because of the risk of harm to oneself or others. In such contexts, there is a valid concern, as expressed by the medical director of the company was that the applicant was at high risk for getting into a situation that he could not get out of. Not only might his asthma be aggravated in an emergency situation with smoke and airborne irritant exposure, but his exercise capacity would drop abruptly and unpredictably and he could easily find himself trapped. Determining when such rare instances raise valid concerns, however, is not so easy in the daily practice found in offices of occupational physicians, where the rubber of implementation of ADA prohibitions against discrimination meets the road of commerce. Many lawyers and other professionals may subsequently second guess the decision of

occupational physicians, who err on the side of caution and desire to do no harm. This is where it is imperative, however, that the actual determinations about job hazard analysis be made by experienced medical staff who are bound by the personal liability of their standing as professionals, and where they be given the best scientific evidence in order to implement protective programs. In these instances, the US Congress spoke to three different agencies, the Occupational Safety and Health Administration (OSHA) the National Institute of Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Review Commission (OSHRC) two decades before it wrote ADA.

Fundamentally, the normal operation of a workplace should be governed by occupational health and safety standards. If a worker qualifies for the work under ADA, the proper rule governing their safety is occupational health regulations. ADA was also not intended to cover the situation when a worker belongs to a small subset of the general population with an uncommon health problem and by virtue of this problem is exquisitely more susceptible to injury than the majority of people. Occupational exposure limits are not set to take into account the tail of the curve or subsets of people who are more susceptible by orders of magnitude, but can be handled under standards recognized by the scientific community as reasonable and appropriate. The usual PEL may be expected to injure a very small fraction of the general population (e.g. the 90 dB TWA noise standard, with an 85 dB action level, is still associated with something on the order of 5% noise-induced hearing loss in occupations with consistently high noise levels approximating the PEL). Another common situation involves people who have become sensitized to workplace chemicals; the sensitization may occur well below the PEL and screening out workers by virtue of a history of allergies is not useful because their risk of becoming sensitized to any one exposure is only slightly higher than anybody else.

In such cases, the physician who overlooks medical criteria not contemplated by Congress within the four corners of ADA overlooks also the enforcement and threshold health requirements to provide "employment and places of employment that are free of recognized hazards", OSH Act 29 USC 654.

At the same time, certain types of illnesses that can be aggravated by workplace exposure may be clustered by genetic factors, race, family history, ethnicity or sex. Thus, sound medical reasoning

may not always comport with legal efforts to prevent discrimination, unless one completely overlooks efforts to prevent disability. Many of these conditions, however, have their greatest impact upon populations who face potential risk which can be minimized through sound industrial hygiene practice or engineering controls, custom tailored to meet the needs of the patient who is an applicant for employment. The solution, therefore, requires opening up OSH Act authority to promulgate health standards and enforce preventive regulations, which must be crafted with due regard to discrimination parameters. This does not, however, mean use of an affirmative defense by employers who are concerned about a risk of threat of harm to oneself, which ultimately would render unemployable, by definition, most people who are subject to special allergies or particularly vulnerable to opportunistic infections.

C. These Issues Will Emerge Again As New Technologies Uncover Risks and Propensities Using Genomic, Toxicogenomic, Protenomic Profiles and New Techniques of Medical Care

The laws of nature do not know legal boundaries drawn by humans. Some occupations necessarily require acceptance of unpredictable risk. For example, firefighters presenting to an occupational physician might require that the legal concept of essential functions of the job must include the capacity to perform in extreme situations. A second concern is that an unacceptable future risk of injury or death, even if the person can do the job under normal circumstances, must be ethically be viewed as a reasonable disqualification from the perspective of the physician who seeks to prevent harm. . When rooted in medical evidence that can be reviewed by peers or in cases of imminent danger, distinct risk factors can be distinguished from the circumstances where prejudiced views of tuberculosis that was in remission and was not a threat to others in *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 (1987) ("an individualized inquiry" protects disabled individuals "from deprivations based on prejudice, stereotypes, or unfounded fear"). There is no blanket judge-made rule, however, that can govern such situations, or to prevent a rule of caution from becoming a slippery slope that ultimately becomes arbitrary and capricious in its application, with discriminatory results.

This problem will become greatly exacerbated as the human

genome project uncovers the benefits of genetic testing in the workplace. Feitshans, Ilise L. GENETIC DESTINY: TODAY's LAWS, TOMORROW's TECHNOLOGY (MCLE for the Moseley Institute 1999); "Spider Silk Jeans or Spider Silk Genes: Genetic Testing in the Workplace"; New York Law School Journal of Human Rights, February 2002 ; Review of "From Chance to Choice: Genetics and Justice" *New England Journal of Medicine Sept 14 2000.* Genetic preconditions and other high-tech biological profiles cluster in families and thus are immutably linked to characteristics such as sex, race ethnicity or national origin, the use of which as criteria in employment might resemble prohibited demarkations for polices under the law of discrimination.

The "discrimination prohibitions" in OSH Act Sec 11 c 29 U.S.C. 661(c) has been interpreted by this Court to provide a right to refuse hazardous work in the face of imminent danger . This right applies without regard to race, sex, age, ethnicity or disability. But it does not on its face comport with the notion, articulated in IUAW v Johnson Controls as approved by the Ninth Circuit. Citing the *Johnson Controls-Dothard* precedents, the *Echazabal* court characterized these cases as standing for the proposition that "threats of lead exposure to female employees' own reproductive health did not justify the employer's decision to exclude women from certain positions at a battery manufacturing plant." It cannot make sense however, that Congress's decision in the Title VII context to allow all individuals to decide for themselves whether to put their own health and safety at risk, it would enact legislation allowing the same freedom of choice to disabled individuals.

The specialized expertise of administrative standard setting and regulations is required to be even-handed while applying the best available scientific and medical evidence. Because such situations do not involve accommodation to a normal job, with static work requirements, and given that the worker is rarely disabled from activities of daily living or usual tasks in this situation, one could argue that it is not a situation ADA was designed to cover, but nonetheless an extreme case of the usual fitness-to-work requirement imposed by employers. It is at this commonplace point in the worksite, however, where the view of the majority can be synthesized with the view of the dissent, by taking judicial notice of OSH Act's vital role "to preserve

the health of working men and women and protect our Nation's human resources" in OSH Act's stated purposes.

As Judge Trott correctly noted in his dissent, "Because the job most probably will endanger his life. I do not understand how we can claim he can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him. To ignore this reality is bizarre"*Echazabal v Chevron*, 226 F3d 1063 (2000). Trott, J., dissent).

In the prior cases that visited this matter a decade ago, this Court ruled that fetal protection policies constitute prima facie discrimination, with the awkward result that employers are compelled to allow women into high risk workplaces, without the benefits of risk assessment, medical surveillance or other scientific evidence that health-related administrative agencies, can best review. Ruling otherwise would have required unduly stretching the narrow exceptions in Title VII, inconsistent with case law and its legislative history, and also without providing employers or employees the benefits of sound scientific evaluation of conditions on a case-by-case basis. Neither approach provided a viable solution to high-risk exposures that may affect men and/or women, or addressed posterity's need to protect fetal health. HR 4420, 101st Congress, 2d Sess., (1990) "The Employee Protection Act of 1990", introduced by Rep. Pat Williams, (D-Montana) Furthermore, each of those approaches is antithetical to good industrial hygiene practices or public health strategies. (outlined below).

In this regard, the Ninth Circuit Court of Appeals was correct to state that the US Congress, in writing ADA, deliberately parsed its language to express concern for a disabled person's risk of injury to others (as in the case of mental patients or people with contagious diseases) but not to harm to oneself, since the safety net for determining the acceptable level of risk in the workplace is determined by a pre-existing regulatory agency, OSHA, which has both the statutory mandate and regulatory history to promulgate and enforce standards that reduce risk. Armed with NIOSH research, OSHA has the power to alter working conditions. Such standards that are even-handed and applied in the workplace are subject to administrative and judicial review, having withstood the tests of OSHRC and this Court.

III. The US Congress Has Clearly Expressed Its Intention to Address these Issues

A. Legislative Intent Exists Jurisdiction Under OSH Act For OSHA, NIOSH and OSHRC to Promulgate Standards Using Their Expertise

Fortunately for the case at bar, the US Congress has spoken loudly and often on these subjects, with ample authority delegated to its agencies who have, in the nearly three and a half decades since the passage of OSH Act in 1970. Under this statute, there has developed a body of the requisite administrative expertise to approach these questions. Several principles of legislative drafting discussed by the Ninth Circuit Court of Appeals in the case at bar point to the seminal importance of this void in the ADA that Congress not only knew about, but had already filled under health law. Under OSHA regulations that already exist, however, if a worker can be proven to have a risk much greater than the average person at a given PEL, they should not be allowed to work in an occupation where the exposure may lead to this risk. The argument then becomes what risk is acceptable (>50%?) and is this a violation of the usual principle that we do not deny employment on the basis of future prognosis or risk, as in the case of hiring asymptomatic HIV-positive individuals or individuals with Hepatitis C?

This Court must therefore take judicial notice of the fundamental and inevitable character of the health concerns in the case at bar, and thereby determine that although an individual who is otherwise qualified for employment may nonetheless present too great a risk to oneself ethically, morally, or legally be placed in a toxic workplace, but that the proper agency to apply its expertise in making such a determination is the Occupational Safety and Health Administration that promulgates health standards under the OSH Act and which also has the authority to promulgate health standards, inspect, and enforce abatement of working conditions, rather than the EEOC that enforces the ADA.

B. Occupational Health Issues, Unlike Policies that Prevent Discrimination, Require a Careful Weighing of Epidemiological Evidence on a Substance by Substance and Worksite by Worksite Basis As Specific Job Hazards Impact Individual Employees.

Risk and the attendant effects of known or recognized hazards

encompass all agents which have an adverse effect health. Risk assessment attempts to describe the causal relationship between adverse effects and environmental factors such as chemicals, radiation, stress, and pathogens, Lowrence, W.W., *Of Acceptable Risk: Science and the Determination of Safety*, William Kaufman, Inc., Los Altos, Ca. (1976). Reliance is placed upon toxicological and epidemiological studies which relate specific agents to adverse outcomes. U.S. Congress, Office of Technology Assessment, *Preventing Illness and Injury in the Workplace,* Washington D.C. 1985, Ch. 3. The unprecedented scientific discoveries regarding medical treatment and the natural history of disease have caused an inevitable but useful overlap in the use of risk assessment in many areas of the law in recent years. See: Susan Rose and Tee Guidotti, Science on the Witness Stand, OEM Press Mass. 2001, in particular Chapter 17, Ilise L. Feitshans, "Evidentiary Standards in Occupational Health Law".

The objective of risk assessment is not simply to identify a connection between a hazardous agent and an adverse effect. Exposure to the agent must be quantified in the form of a measurable index such as air contaminant concentration, absorbed dose, or blood chemistry. Sound industrial hygiene practice recognizes a hierarchy of controls to reduce or eliminate workplace hazards, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC 1985, Ch.3. The preferred approach, where feasible, is to redesign a work process to eliminate or reduce hazards by substituting materials, curtailing harmful emissions, or isolating the worker from the hazardous process.

As noted by Former Secretary of Labor for OSHA, Dr. Morton Corn, the nature and severity of effects is characterized at varying levels of exposure, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC , 1985, Ch.3. Previous attempts by EEOC to provide meaningful criteria in areas of health law have proven to be inadequate. For example, on October 3, 1988, the EEOC issued a Policy Statement on Reproductive and Fetal Hazards Under Title VII, "Policy Statement on Reproductive and Fetal Hazards Under Title VII" *Fair Employment Practices Manual (BNA)* 401:6013. The EEOC criteria for a fetal protection policy, as restated by the Court of Appeals in *Wright v Olin* 697 F2d 1172 (1982) can be summarized as: (1) substantial risk of reproductive harm; (2) risk via exposure of one sex but not the other sex; and (3) ability of the policy to eliminate risk,

IUAW v. Johnson Controls, 886 F2d 871 at 886. These criteria do not reflect the quantitative aspect of scientific risk assessment, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC 1985, Ch.3. Furthermore, risk assessment could not be easily reviewed by a court without prior administrative review by an agency that has expertise in the application of scientific evidence to occupational health criteria. Using the results of such analysis without considering the scientific context in which they were developed could cause equal or greater harm than the risk to be avoided. Application of industrial hygiene controls would constitute such an alternative, but could not be easily evaluated by an administrative agency that is not familiar with issues of occupational safety and health.

The next option is work practice controls, which involve training employees to work more safely, or administrative controls, which limit the duration of an employee's exposure. Using exposure monitoring, medical surveillance and enhanced industrial hygiene controls, it is possible to create alternatives for control. A final resort is the use of personal protective equipment such as respirators. The rationale for this hierarchy is a preference for the most reliable method among feasible controls, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC , 1985, Ch. 9.

The ability to implement any good industrial hygiene program depends upon the hygienist's ability to tailor required programs to the substances, exposures and working population in a given workplace, *Id.* Feasibility depends upon the configuration of the workplace; the cost and availability of necessary technology; the effectiveness of worker training; and the willingness of the employer to commit resources toward developing new control technology, *Id.* Recognizing that the feasibility of controls is not a static parameter, men and women have occupational exposure to a variety of job specific risks would be enrolled in programs that meet their individual needs.

C. EEOC Lacks OSH Act 's Delegated Authority and Expertise To Determine Individual Risk at Work

ADA's theoretical antecedent, as cited in its legislative history is Title VII of the Civil Rights Act of 1964 42 USC S 703. Under Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate

invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Dothard v. Rawlinson* 433 U.S. 321, at 328 (1977). In *International Union of United Auto Workers (IUAW) v. Johnson Controls,* 886 F2d 871 (7th Cir. 1989); 499 US 202 (1991) this Court ruled that any Fetal Protection Policy constitutes *prima facie* discrimination in violation of Title VII, because it prohibits employment of fertile women in high-exposure jobs in lead battery production. It was undisputed that lead is one of the most dangerous environmental toxins and that transplacental transfer of lead in a pregnant woman to her unborn child can cause a significant risk of damage but discrimination analysis mandated that women be allowed to work, without the benefit of medical surveillance, scientific criteria regarding risk or risk assessment reflected in the best industrial hygiene, occupational medicine practice or engineering controls.

It cannot be, however, that this Court or Congress intended a result that does not limit individual harm without regard to the independent views of regulators and occupational physicians. Any level of risk from exposure that prevents an exclusionary policy, regardless of its harsh working conditions, or the large class of workers that are affected by it, could be justified under this view. In the case at bar, there is no evidence that the risk respondent allegedly poses to his own health renders him unable to perform his job. But, if applied here, the Johnson Controls criterion will foster an approach that will allow all workers to obtain employment without regard to particular high-risk exposures. This approach runs the greater risk of paying nominal deference to discrimination concerns, without guaranteeing adequate industrial hygiene protection; it therefore is antithetical to good industrial hygiene practices and sound public health strategies.

All work has risks. As Chief Justice Burger noted in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 646, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980), there is no such thing as a "risk-free" environment. Thus, when writing ADA, Congress wisely looked to the notion of undue hardship when a disabled person's illness presents a risk of harm to others, as in the case of unmanagable mental illness or communicable disease, but wisely made the deliberate choice to exclude criteria that would address the notion of risk of harm to oneself, lest this frustrate the purposes of OSH Act.

Since all work has risks, all disabled people who work would,

by definition, face a risk of harm to oneself by working. As in the fetal protection cases, a blanket determination that employers independently may determine the risk undertaken by each individual without a regulatory standard to guide them leaves two nagging questions at each of the policy's logical extremes: (1) what minimum requirements for demonstrating to the court that an exclusionary decision, in lieu of alternative protections, is justified? and (2) which circumstances place limits on the level of risk involved, to determine when an job's hazards and attendant risk goes too far?. Leaving such constructs at the discretion of the employer would, by definition, make it possible for employers to include a class of applicants among the disabled and then draw job descriptions that feature undue burdens of risk, thereby excluding them from the actual workforce and granting jobs only to healthy applicants and healthy workers. This "harm to oneself" affirmative defense therefore gives no blueprint for drawing a distinction between impermissible harms that threaten workers' health, but must be corrected immediately through engineering controls, in contrast to cases where the employer's policy can be justified, although discriminatory in its effect. More importantly, this standard does not place a clear limit on employer policies that may unfairly harm workers, even though such outcomes may breach an employer responsibility to protect workers.

IV. Conclusion.

A. EEOC's "Threat of Harm to Oneself" Regulation Is Ultra Vires and Therefore Invalid

When there is a high probability that an employee will suffer significant injury or death in the near future because of his performance of the job, there is risk that the employee will miss work due to injury with attendant unnecessary costs and disruption for all parties. As both the Solicitor General and the Amicus ACOEM, noted, losses in efficiency and productivity due to the disruption of its operations and the need to find a replacement and retrain a new worker, Citing Rosenstock and also Haig Neville, 40 Industrial Management, Workplace accidents: they cost more than you think 7 (Jan.-Feb. 1998) (workplace injuries have "immeasurable costs of lost production and efficiency on a company-wide basis")(Brief of Amicus ACOEM and Brief of Solicitor General of the US).

The Ninth Circuit Court of Appeals correctly applied the canon of statutory construction ***expressio unius est exclusio alterius.***

The court reasoned that the statutory specification of a "direct threat" defense for the risk of harm to others implicitly precludes a direct threat defense for the risk of harm to self. See Pet. App. 6a-7a. The court of appeals' reliance on the ***expressio unius*** principle was appropriate because the relevant statutory language is found in another law, OSH Act. It is deceptively easy to overstate the EEOC's expertise in this narrow and carefully defined area of medicine as it is currently practiced under USA law. Although it is correct that ADA's legislative history does not foreclose a threat-to-self defense", the true and correct repository for administrative review of these decisions lies with the Occupational Safety and Health Administration (OSHA) as established along with two other agencies, the National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Review Commission (OSHRC). The Chevron decision would support the rule of reason that Congress has clearly and directly articulated its desire to delegate this authority not to EEOC but another agency, OSHA, under the OSH Act, which was written two full decades before the passage of ADA and was doubtlessly well known to the sitting members of Congress.

Even though the precise solution to these problems is not found within the four corners of the ADA, the US Congress has not been silent about important questions of occupational health policy. The legislature had no need to address this question when writing ADA, having spoken before through the OSH Act. Thus, EEOC's over-reaching in this area of regulation exceeded the scope of its statutory mandate and violates the delegation doctrine. Its rules that are written beyond the scope of this authority are ultra vires and are, by definition, invalid.

In *Whitman, V. American Trucking Associations, Inc.*, 531 US. 457 (2001) the US Supreme Court confronted for the first time in over half a century the issues surrounding delegation of authority by the US Congress to administrative agencies *Whitman, V. American Trucking Associations, Inc.*, 531 U.s. 457 (2001). Jurisprudes everywhere in the USA breathed a sign of relief as the US Supreme Court held that Clean Air Act's delegation of authority to Environmental Protection Agency (EPA) to set national ambient air quality standards (NAAQS) at level "requisite to protect public health" was not unconstitutional delegation of legislative power under the Clean Air Act (CAA) Clean Air Act, 172(a)(1)(C), (a)(2)(D), 181(a), as amended, 42 U.S.C.A. ' 7502(a)(1)(C), (a)(2)(D), 7511(a) In 1990,

over 600 pages of Congressional legislation set forth amendments to Clean Air Act. The complex provisions were criticized at the time of their writing as an undue exercise of oversight capabilities by the US Congress, who had authority but lacked the expertise to understand the subtle but important ramifications of the legislative text as it attempted to write law governing science. Significantly, the law was written at the same time as ADA, demonstrating once again that had the US Congress wished EEOC to exercise such medical and scientific expertise as required to develop and enforce health standards at the workplace, the US Congress would have done so. Such microscopic scrutiny of Congressional regulations for health applying scientific principles and the experience of environmental medicine under Clean Air Act (CAA) Clean Air Act, ' 307(b), as amended, 42 U.S.C.A. ' 7607(b) upheld the Environmental Protection Agency's (EPA) implementation policy for revised national ambient air quality standards (NAAQS) for ozone in "nonattainment". *Whitman* shows once again that the US Congress knew, understood and actually has employed highly technical scientific language when drafting statutes if it so desires for the statutes to address health issues. By 1990, Congress had spoken about many questions of law, health policy environmental health and occupational medicine.

This Court based this crucial finding on the principle that "in a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, ' 1, of the Constitution vests "[a]ll legislative Powers herein granted ... in a Congress of the United States." . This Court repeatedly has said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, (1928). , see, *e.g., Panama Refining Co. v. Ryan,* 293 U.S. 388, (1935). Whether the statute delegates legislative power is a question for the courts. When invalidating the EEOC's regulations, the Ninth Circuit stated that, when the term "direct threat" was used in the "various committee reports" and "floor debate," there was no explicit reference to "threats to the disabled person himself." Pet. App. 7a-8a. "For example," Senator Kennedy explained, "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed." Ibid. But this does

not make occupational health sense. Fortunately, "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," Solicitor General citing Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979). Short of speculative determination of prospective risk, this analysis requires more detailed expertise in medicine and occupational health than a EEOC is authorized to possess.

It does not matter therefore that ADA did not expressly address the special risks of disabled individuals, because Congress has removed those questions from the realm of EEOC and into labor relations between employers and individuals. Instead, OSHA has enforcement authority to inspect and require modifications of working conditions under OSH Act that will abate hazards and render a safer and healthier workplace for all employees. EEOC regulations correctly prohibit employment decisions based on "[g]eneralized fears about risks from the employment environment." 29 C.F.R. Pt. 1630, App. § 1630.2(r); see also 29 C.F.R. Pt. 1630, App. § 1630.15(a). But this situation sits on the border between "generalized fear" and sound medical insight, which will vary on a case-by-case basis involving an assessment of job hazards, attendant risks and the natural history of disease after diagnosis.

B. This Court Should Issue a Writ of Mandamus Requiring the Secretary of Labor for OSHA to Promulgate Regulations About Disabled Workers

OSH Act's expressly written realm of expertise was envisioned by the US Congress two decades before it wrote the ADA. OS H Act requires that OSHA " 'set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health' "--which the Court upheld in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 646, (1980), and which then- Justice Rehnquist, in that case thought the statute violated the nondelegation doctrine, see id., at 671, 100 S.Ct. 2844 (opinion concurring in judgment) . The Occupational Safety and Health Act prohibits employers from exposing employees to "recognized hazards" that are likely to cause "death or serious physical harm," and imposes a "general duty" to furnish a safe workplace. 29 U.S.C. 654(a)(1). OSHRC enforcement procedures also recognize the implicit limit on employer responsibility in this regard, by offering the "Employee

Misconduct" defense to employers who demonstrate that their safety and health rules were violated and by requiring that all employees follow workplace safety and health rules in OSH Act Section 5 (B).

For this reason, it does not matter whether this Court finds that respondent is a "qualified individual" under the ADA. As a threshold matter, an individual poses a direct threat, the regulations require the employer to consider "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." 29 C.F.R. 1630.2(r). The regulations require that those factors be assessed "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence," ibid., and "not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes," 29 C.F.R. Pt. 1630, App. § 1630.2(r). The regulations merely require an employer to conduct an "individualized" and "objective" assessment of whether the individual's performance of the job raises a "significant risk of substantial harm to the health or safety of the individual." 29 C.F.R. 1630.2(r). EEOC regulations are thus superficial and cannot reach the hard scientific issues of in which OSHA, NIOSH and OSHRC have decades more administrative expertise. The Ninth Circuit correctly held that the ADA does not provide an affirmative defense permitting an employer "to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety." , finding language of the ADA "dispositive" of that question. Congress, two decades before the passage of ADA recognized that ensuring worker safety reduces injuries and the resulting absences of critical employees. Such over-reaching cannot be entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Public awareness of occupational health concerns aided by stronger enforcement of OSH Act would effectively address these issues. OSHA and its sister agencies were delegated authority by the US Congress to develop expertise and promulgate health standards, two decades before the passage of the ADA. Plaintiffs in discrimination cases can enjoy financial rewards if they win, as they did in Johnson Controls, which are not available to those who prevail in OSHA enforcement actions. Although weak, the preventive powers embedded in OSH Act remain the injured worker's best friend.

Furthermore, the OSH Act is the only statute that creates an agency with the expertise to prevent harms prospectively. Even though the OSH Act statute suffers from its almost castrating weakness of disempowering individuals, because unlike discrimination laws, there is no individual right of action, only OSH Act can alter the course of actual working conditions that are linked to injury and harm. To realize this Congressional goal requires rethinking our priorities and approaches to occupational health in relation to other areas of preventive policy and employment-based medicine, but does not require rewriting our statutes as set forth by the US Congress or using band-aid approaches to craft a saving clause where legislation deliberately ends.

Understanding the pivotal role of occupational health laws also requires educating labor organizations to understand that not every harm is a form of discrimination. Applying OSH Act enforcement and the training programs may ultimately have been a better use of legal talents and of corporate resources, because only OSH Act and not ADA can make employers implement the programs that prevent the harms of carpal tunnel syndrome, excposures that uniquely confront the most vulnerable and sensitive workers, or other workplace exposures to risk of harm.

Employers have a legitimate interest in preventing workers from taking jobs that have a high probability of causing injury to themselves. Employers therefore have a right to protect themselves against avoidable workers' compensation and health care-related costs of retraining and substitution. But, there will be some cases for which regulatory medical protection must be imposed in order to avoid a slippery slope in which the susceptible or disabled would feel obliged to take any job, unable to refuse reassignment to a job that was uniquely dangerous to them without losing their employment. The US Congress has, in OSH Act and many other statutes, already struck the balance favoring prospective measures that protect health when confronted with these questions. The fact that few people like OSH Act's inartful statute does not render legitimate a set of regulations from another agency that acts beyond the scope of its own delegated authority making rules in OSHA's stead

CONCLUSION

The judgment of the court of appeals should be upheld regarding its determination that EEOC regulations allowing an

affirmative defense to discrimination claims based on "threat of harm"to oneself are invalid. A Writ of Mandamus is requested, requiring the Secretary of Labor for OSHA to promulgate standards that will address the needs of disabled individuals in the workplace.

Respectfully submitted.

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CERTIFICATE OF SERVICE

A true and valid copy of this Brief Amicus Curiae has been served by certified mail to all parties in this proceeding

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(over to next page for appendix One)

Appendix 1. Text of the ACOEM Code of Ethics

This code establishes standards of professional ethical conduct with which each member of the American College of Occupational and Environmental Medicine (ACOEM) is expected to comply. These standards are intended to guide occupational and environmental medicine physicians in their relationships with the individuals they serve, employers and workers representatives, colleagues in the health professions, the public, and all levels of government including the judiciary.

Physicians should:

1. Accord the highest priority to the health and safety of individuals in both the workplace and the environment.

2. Practice on scientific basis with integrity and strive to acquire and strive to acquire and maintain adequate knowledge and expertise upon which to render professional service.

3. Relate honestly and ethically in all professional relationships.

4. Strive to expand and disseminate medical knowledge and participate in ethical research efforts as appropriate.

5. Keep confidential all individual medical information, releasing such information only when required by law or overriding public health considerations, or to other physicians according to accepted medical practice, or to others at the request of the individual.

6. Recognize that employers may be entitled to counsel about an individuals medical work fitness, but not to diagnoses or specific details, except in compliance with laws and regulations.

7. Communicate to individuals and/or groups and significant observations and recommendations concerning their health or safety.

8.Recognize those medical impairments in oneself and others, including chemical dependency and abusive personal practices, which interfere with ones ability to follow the above principles, and take appropriate measures.

No. 00-1406

In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER,

v.

MARIO ECHAZABAL, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Americans with Disabilities Act requires an employer to hire an individual whose medical condition makes performing the job an imminent threat to his own life or safety.

RULE 29.6 STATEMENT

On October 9, 2001, Chevron Corporation merged with Texaco, Inc., and was renamed ChevronTexaco Corporation. ChevronTexaco Corporation is the parent of petitioner Chevron U.S.A., Inc. No other publicly held company owns 10 percent or more of petitioner's stock.

Irwin Industries, Inc., was a defendant in the district court but was not a party to the proceeding in the court of appeals and is not a petitioner here.

TABLE OF CONTENTS

TABLE OF CONTENTS-Continued

Page

TABLE OF CONTENTS-Continued

Page

TABLE OF AUTHORITIES

Cases: **Page**

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

Statutes:

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

Regulations:

TABLE OF AUTHORITIES-Continued

Page

Miscellaneous:

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

TABLE OF AUTHORITIES-Continued

Page

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The amended opinion of the court of appeals (J.A. 196-217) is reported at 226 F.3d 1063 (superseding the opinion reported at 213 F.3d 1098). The court of appeals' opinion addressing respondent's state law intentional interference with contract claim (J.A. 218-221) is unreported. The opinion of the district court (J.A. 171-195) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2000. Petitioner filed a timely petition for rehearing and rehearing en banc on June 9, 2000. The court of appeals denied the petition for rehearing on December 12, 2000. Pet. App. 30a. The petition for certiorari was filed on March 9, 2001, and granted on October 29, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, together with pertinent parts of the regulations implementing those statutes, 29 C.F.R. § 1614.203 and Part 1630, are reproduced at Pet. App. 58a-61a.

STATEMENT

Chevron U.S.A., Inc. (Chevron) withdrew an offer to employ respondent Mario Echazabal in a refinery job in which he inevitably would have been exposed to liver-toxic substances after Chevron's physicians determined that respondent had a "history of a long term liver problem, [a] diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes over a period of years." J.A. 39. Chevron's physicians concluded that the "exposure to hepatotoxic chemicals" involved in the job "would further damage [respondent's] already reduced liver capacity," "seriously endanger his health," and

"potentially cause [his] death." J.A. 39-40. Respondent's own doctor advised Chevron that respondent should not be exposed to hepatotoxins. J.A. 98, 163-164.

The question in this case is whether the Americans with Disabilities Act (ADA) permits an employer to refuse employment to a person who it determines, based on the reasonable, individualized, and objective conclusions of physicians, would face a substantial risk of significant harm or death in carrying out the essential functions of the job. Striking down a contrary regulation of the Equal Employment Opportunity Commission (EEOC), the Ninth Circuit majority (Reinhardt and Bright, JJ.) concluded that it is not a defense to ADA liability that doing the job would threaten the health or life of the applicant or employee. The court also concluded that a person who will likely suffer injury or death on the job because of a medical condition is nevertheless a "qualified individual" entitled to the protection of the ADA. As Judge Trott explained in dissent and as other courts of appeals have concluded, those "bizarre" rulings (J.A. 215) are inconsistent with the text of the ADA, are contrary to Congress's intent, and fail to give due deference to EEOC regulations, which recognize the business necessity of excluding persons from jobs that will harm them.

A. The Statutory Scheme And EEOC's Regulations.

Title I of the ADA prohibits an employer from discriminating against a "qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is a person with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). In determining "what functions of a job are essential," the ADA provides that "consideration shall be given to the employer's judgment." The employer's preparation of a "written descrip-

tion" of the job "shall be considered evidence of the essential functions of the job." *Ibid.*; see also 29 C.F.R. § 1630.2(n).[1]

Discrimination prohibited by the ADA includes "using qualification standards * * * that screen out or tend to screen out" persons with disabilities "unless the standard * * * is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). Accordingly, the Act specifies that it is "a defense to a charge of discrimination" that "qualification standards" that screen out persons with disabilities are "shown to be job-related and consistent with business necessity." *Id.* § 12113(a).

The ADA supplies one example of an acceptable "qualification standard," providing that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

Shortly after the ADA was adopted, the EEOC promulgated regulations providing, in accordance with sections 12112(b)(6) and 12113(a) of the Act, that an employer may defend against a charge that a qualification standard is discriminatory by showing that the standard is "job-related and consistent with business necessity." 29 C.F.R. § 1630.15(b)(1). The regulations define "qualification standards" as "personal and professional

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[1] For purposes of its summary judgment motion, Chevron did not dispute that Echazabal has a "disability" within the meaning of the ADA, 42 U.S.C. § 12102(2), and that issue accordingly is not before this Court. J.A. 184 n.6. Whether a "reasonable accommodation" could protect respondent from exposure to liver-toxic substances also is not at issue here, for in the courts below "plaintiff [did not] argue that 'reasonable accommodation' could or should have been made by Chevron." *Ibid.*

attributes including * * * physical, medical, safety and other requirements" established by an employer as eligibility requirements for the job. *Id.* § 1630.2(q).

In elucidating the "qualification standards" defense, the EEOC specified that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety *of the individual* or others in the workplace." 29 C.F.R. § 1630.15(b)(2) (emphasis added). The regulations accordingly define "direct threat" to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." *Id.* § 1630.2(r). To determine whether a person poses a "direct threat," an employer must make "an individualized assessment of the individual's present ability to safely perform the essential functions of the job * * * based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Ibid.*

The EEOC further elaborated upon the direct threat qualification standard in Interpretive Guidance promulgated contemporaneously with its regulations. 29 C.F.R. Part 1630, App. EEOC's Guidance reiterates that "[a]n employer may require, as a qualification standard, that an individual not pose a direct threat to the health and safety of himself/herself." The determination whether a person poses a direct threat to self "must be based on individualized factual data" and "valid medical analyses" or "other objective evidence," not on "subjective perceptions," "[g]eneralized fears," or "stereotypic or patronizing assumptions." As an example of this qualification standard, the Guidance states that an employer need not hire a person with narcolepsy "who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment." *Ibid.*; see also EEOC, A Technical Assistance

Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IV-14 (Jan. 1992), E.R. 549.[2]

B. The Plant Helper Job.

This case involves respondent Mario Echazabal's 1995 application for the position of plant helper in the Coker/Sulfur Acid Division ("coker unit") at Chevron's El Segundo, California refinery. E.R. 116; J.A. 53-54, 59-67. Chevron had prepared a written description of the "physical abilities" required for the plant helper job and of the position's "environmental demands." Chevron specified the "ability/demand" of working in an environment containing "contaminants and chemicals," identified as "hydrocarbon liquids & vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases, [and] chlorine bleach." J.A. 65-66.

The coker unit at the El Segundo refinery processes residium oil to extract useful byproducts. Operators heat the residium in furnaces, then pump it into coke drums. Under heat and pressure in these 100-foot-tall, 30-foot diameter drums, hydrocarbon distillates like naphthas, as well as recyclable oils, are separated out and taken away. Corrosion inhibitors and antifoaming agents are used during this process. Once distillation is complete, the sealed coke drums are flushed with water. As the drums drain, plant helpers remove the top and bottom heads from the drums (using solvents to loosen bolt heads), which exposes the helpers to steam contaminated by the coke. A plant helper then uses a high pressure water spray to cut the coke away from the drums so that it falls into an open coke pit (which can result in a blowback of coke dust to the plant helper's work station). Plant helpers use a crane to lift coke from the pit onto a conveyer belt for removal. Plant helpers are also responsible for cleaning heads, inlet lines, and other

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[2] "E.R." refers to Echazabal's Excerpts of Record filed in the court of appeals.

equipment, greasing valves, resealing the drum heads using greases and oils, and cleaning coke from the coke pit and conveyer system. J.A. 46-49, 59-66.

The materials produced by the distillation process and the chemical ingredients of products used in the coker unit include hydrocarbons and solvents such as naphtha, naphthalene, benzene, ethylenediamine, ethylene glycol, phenol, toluene, octane, xylene, and heptane. J.A. 30-31, 68-74. In addition, fumes and gases from welding operations in the unit include manganese, lead, and other metals. J.A. 29, 48-49, 75-78. Though these chemicals are present in the coker unit at concentrations deemed permissible by government agencies, monitoring has shown that concentrations occasionally exceed permissible levels, and it is uncontradicted that a "major event, *e.g.*, major leak, fire or explosion" can result in a "major exposure." J.A. 29, 47.[3]

Occupational health guidelines compiled by the National Institute for Occupational Safety and Health (NIOSH)—"OSHA's research arm" and part of the Centers for Disease Control and Prevention (CDC)—indicate that each of these substances present in the coker unit raises health concerns for persons with impaired liver function. See NIOSH, *Master Index*

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[3] Government exposure standards do "not attempt to deal with the problem of susceptible workers" like Echazabal, whose preexisting medical conditions place them at greater risk. MARK ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 95 (4th ed. 1998); see *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 641 (1980) (exposure levels set by these standards and enforced by the OSH Act are "not designed to require employers to provide absolutely risk-free workplaces"). Because "all humans vary in their susceptibility to illness[,] only zero exposure limits could protect all employees from the risk of occupational disease." Mark Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379, 1426 (1983).

of Occupational Health Guidelines for Chemical Hazards (Index 1981, Supp. I-IV 1988-1995), http://www.cdc.gov/niosh/chem-inx.html (visited Nov. 2, 2001); *Industrial Union*, 448 U.S. at 619 & n.10.[4] See also LINDA ROSENSTOCK & MARK R. CULLEN, TEXTBOOK OF CLINICAL OCCUPATIONAL AND ENVIRONMENTAL MEDICINE 431-432 (1994) (toluene, benzene and other solvents, hydrocarbons, and lead are "major human hepatotoxins" dangerous to persons with liver disease).

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[4] See U.S. Dep't of Health and Human Services and Dep't of Labor, *Occupational Safety and Health Guideline for Benzene* 2 (1988) (recommending pre-employment tests for the "function and integrity of the ** * liver" before "placing a worker in a job with a potential for exposure to benzene"); *Occupational Health Guideline for Toluene* 1 (1978) ("Examination of the * * * liver * * * should be stressed" in order "to detect pre-existing conditions that might place the exposed employee at increased risk"); *Occupational Health Guideline for Naphtha (Coal Tar)* 1 (1978) ("coal tar naphtha" could be dangerous for "persons with impaired liver function"); *Occupational Health Guideline for Octane* 1 (1978) (same); *Occupational Health Guideline for Heptane* 1 (1978) (same); *Occupational Health Guideline for Naphthalene* 1 (1978) (naphthalene exposure "may cause * * * liver damage"); *Occupational Safety and Health Guideline for Ethylene Glycol* 3 (1995) ("By ingestion or percutaneous absorption, ethylene glycol causes * * * liver * * * damage"); *Occupational Health Guideline for Ethylenediamine* 1 (1978) ("Liver * * * damage may occur from repeated exposure to this chemical"); *Occupational Health Guideline for Xylene* 1 (1978) ("xylene vapor" linked to "reversible [liver] damage"); *Occupational Health Guideline for Phenol* 1 (1978) ("liver damage has been observed in humans exposed to phenol"); *Occupational Safety and Health Guideline for Inorganic Lead* 2 (1988) ("the highest accumulation" of inhaled or ingested lead occurs "in the liver and kidneys, and elimination is slow"); *Occupational Safety and Health Guideline for Manganese* 1 (1978) ("Persons with a history of * * * liver dysfunction" are "at increased risk from exposure").

C. Chevron's Determination That Respondent Was Not Qualified For The Plant Helper Job.

Mario Echazabal worked at the El Segundo refinery from 1972-1975 and 1979-1996. J.A. 117, 197. Throughout that time he was employed by independent contractors, most recently by Irwin Industries, Inc. (Irwin). For Irwin, he "worked throughout the Refinery" as a "laborer, helper, and pipefitter" and on the "fire watch." J.A. 117.

In 1992, Echazabal applied to work directly for Chevron in the coker unit and was offered the job contingent on a satisfactory medical examination. Chevron's regional physician, Dr. Philip Baily, who had studied toxicology and was Board Certified in preventive occupational medicine, conducted that examination. J.A. 157, 212. After a blood test showed that Echazabal had significantly elevated liver enzymes, Dr. Baily concluded that he had "an uncorrectable liver abnormality, and should avoid exposure to solvents or other liver toxic chemicals in order not to exacerbate his liver problems." J.A. 157-158, 172-173. In 1993, Dr. Baily's successor, Dr. Kenneth McGill, agreed with that assessment. On that basis, Chevron rescinded its offer of employment to Echazabal, who continued to work at the refinery for Irwin. J.A. 173. Chevron's doctors advised Echazabal to follow up with his own physicians, who subsequently confirmed that Echazabal had "abnormal liver function tests," diagnosed him with chronic active Hepatitis C, and treated his condition with the drug Interferon. J.A. 118, 122-125. Chronic active Hepatitis C is "a progressive disorder that can lead to cirrhosis, liver failure, and death." 2 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1744 (E. Braunwald *et al.*, eds., 15th ed. 2001).

In late 1995, Echazabal applied again to Chevron for a position as plant helper in the coker unit. E.R. 116; J.A. 53-54. Chevron's official "job summary" outlined the duties and "physical/environmental demands" of that job, including the

requirement that the applicant be able to work in an environment containing hydrocarbons, solvents, and other chemicals. J.A. 65-66. Chevron again offered Echazabal the job contingent upon his passing a medical examination. J.A. 55.

In connection with Echazabal's medical examination, Dr. McGill—a physician in Chevron's refinery clinic who has practiced industrial medicine since 1980—reviewed the results of eight blood tests performed between 1992 and 1996. J.A. 37. All of those tests showed that Echazabal had significantly elevated levels of multiple liver enzymes. J.A. 41-44.[5] Dr. McGill concluded from those tests and Echazabal's diagnosis of chronic active Hepatitis C that Echazabal's "liver ha[d] already suffered significant damage," resulting in "a greatly decreased capacity to process toxins," and that continued

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[5] Echazabal's aspartate aminotransferase (AST or SGOT) level was 147 units/liter in January 1996, three times higher than the normal level of 50. His alanine aminotransferase (ALT or SGPT) level was 329, six times the normal maximum of 55. Other test results that Dr. McGill reviewed showed Echazabal's ALT in the 490s and 500s, eight to ten times the norm, and his AST in the 200s, four times the norm. J.A. 41-43. These "markers of hepatocellular necrosis" provide the "[b]est available test" for "cytotoxic injury" to the liver. ROSENSTOCK & CULLEN, *supra*, at 425-426. The National Institutes of Health (NIH) describe the disease indicated by ALT levels like Echazabal's that are more than five times the norm as "severe." NIH Consensus Development Conference on Management of Hepatitis C 21 (Mar. 1997). Echazabal's reliance on his normal level of albumin and normal prothrombin time ignores NIH's warning that those tests "are normal until late-stage disease." National Digestive Diseases Information Clearinghouse, *Chronic Hepatitis C: Current Disease Management*, http://www.niddk.nih.gov/health/digest/pubs/chrnhepc/chrnhepc.htm (visited Oct. 31, 2001). Both "tests are limited clinically by poor sensitivity" because "[o]ver 90%" of "[h]epatic function" "must be destroyed before measurable changes * * * occur." ROSENSTOCK & CULLEN, *supra*, at 427.

exposure to liver toxins would "degrade his liver's ability to function" in a "serious" way. J.A. 41. Dr. McGill understood from Chevron's job description and his own knowledge of the coker unit that Echazabal would be exposed to hepatotoxic chemicals and solvents as a plant helper. He concluded that exposure to those substances would "seriously endanger [Echazabal's] health." J.A. 39. "Small exposures over a long period of time would pose a health hazard for him." "[A] single event large exposure," such as "a ruptured pipe, a relief valve popping and venting, a fire, explosion or other emergency situation," could "by itself significantly injure him and potentially cause death." Moreover, Echazabal's "impaired liver would be less able to detoxify" exposure to chemicals that are "not specifically liver toxic," which also "carries the risk of serious injury or death." J.A. 39-40.

Echazabal's personal physician, Dr. Zelman Weingarten, wrote Chevron on January 10, 1996, that Echazabal's chronic active Hepatitis C had "been treated [for] extended periods with Interferon without clearance of the problem," but that Echazabal was not "contagious" and could "return to his usual duties at work." J.A. 95. Because Dr. Weingarten's letter did not address the advisability of Echazabal's being exposed to liver toxic chemicals, Dr. McGill called Dr. Weingarten. J.A. 175. Dr. Weingarten told Dr. McGill that Echazabal should not be exposed to hepatotoxins, and later confirmed in writing that such exposure, "of course, is recommended not to be the case." J.A. 98, 163-164, 175-176.

Chevron's medical director, Dr. T.L. Bridge, agreed with Dr. McGill's assessment that Echazabal could not safely work in the plant helper position. Dr. McGill then informed Chevron's human resources manager, William Saner, that if Echazabal were hired it should be subject to a work limitation: "No exposure to solvents or other liver toxic chemicals." Saner determined that such exposure is "a necessary and inseparable

part of the plant helper position," and accordingly withdrew Echazabal's conditional job offer. J.A. 32-33, 44-45, 56, 177.

Chevron sent a letter to Irwin asking that, because of Echazabal's medical condition, Irwin remove him "from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." J.A. 57-58, 178. Irwin consulted Dr. Charles Tang, who is Board Certified in occupational medicine and teaches that subject at the University of Southern California School of Medicine. J.A. 89-90, 179. After reviewing Echazabal's test results, Dr. Tang "concluded that exposure to liver toxins would harm and probably kill" him. J.A. 91, 179. Dr. Tang stated that Echazabal's "markedly elevated" liver enzymes showed that he had "a chronic destruction of his liver going on," and that there was a "high probability" that his "chronic illness" would be "severely worsened" by exposure to even "trace" or "small amount[s]" of hepatotoxins. J.A. 86-87, 92-93. After exposure, he explained, "some people have died of massive hepatic failure in a few hours, and [it] can also occur over months and years." J.A. 83. Accordingly, Dr. Tang concluded, "[i]f he's exposed to hepatotoxins, he should not be there." J.A. 92. Irwin then laid off Echazabal. J.A. 178-180.

D. Respondent's Suit And The District Court's Grant Of Summary Judgment To Chevron.

Echazabal filed this action in state court alleging that Chevron's withdrawal of his 1995 employment offer violated the ADA, the Rehabilitation Act, and California's Fair Employment and Housing Act, Cal. Gov't Code § 12940 ("FEHA"), and that Chevron intentionally interfered with Echazabal's contractual relations with Irwin. Echazabal sought punitive as well as actual damages for each claim. After Chevron removed the action to federal court, the district court (Baird, J.) granted summary judgment to Chevron on all of Echazabal's claims.

The district court held that under the ADA an employer may refuse to hire a person for a job that "poses a direct threat to the health of the employee himself." J.A. 184. It carefully reviewed the medical evidence and evidence concerning environmental conditions in Chevron's refinery and concluded that Chevron's employment decision rested on a reasonable, individualized medical judgment based on available evidence. J.A. 185. The court also found that "[a]ll the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision * * *, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed in the position of plant helper, as posing a serious, immediate risk to him." *Ibid.*[6] The district court denied summary judgment to Irwin on Echazabal's similar discrimination claims against the contractor, but certified its ruling as to Chevron for immediate appeal. J.A. 198.

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[6] For the first time at the summary judgment stage, Echazabal presented declarations from two doctors retained for this litigation who disputed whether his high enzyme levels reflect liver damage or reduced liver function and whether exposure to substances at the refinery would endanger Echazabal. See J.A. 174-175, 186; but see *supra*, p. 7 n.4 & p. 9 n.5. The district court correctly held that the relevant inquiry under the ADA and its implementing regulations is whether Chevron reached a "reasonable medical judgment" based on "the best available objective evidence" at the time the employment decision was made. J.A. 186-187; see 29 C.F.R. § 1630.2(r). The court held that Echazabal's belated expert opinions, "even if correct, were not available to Chevron" when it withdrew its offer, and that "the evidence which was available to defendants supported [Chevron's] decisions." J.A. 186-187.

E. The Ninth Circuit's Divided Decision.

A divided panel of the Ninth Circuit reversed. Striking down the EEOC's contrary regulation, Judges Reinhardt and Bright concluded that the ADA's "qualification standards" defense does not apply to persons who pose a threat to their own health or safety but not to the health or safety of others in the workplace. J.A. 207-208. The majority also rejected Chevron's argument that Echazabal was not "qualified" to perform "essential functions" of the plant helper job because of the risks the job posed to him. J.A. 212.[7]

Dissenting, Judge Trott observed that the majority's "Pickwickian ruling" "leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper." J.A. 215-216. It also has the "pernicious" effect of "dislodg[ing] longstanding laws mandating workplace safety." J.A. 215.

Judge Trott would have affirmed on two independent grounds. First, a person is not "qualified" to "perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him."

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[7] The Ninth Circuit vacated the grant of summary judgment for Chevron as to Echazabal's Rehabilitation Act and FEHA claims and remanded those claims for reconsideration because "the district court treated the substantive standards for liability under [the ADA and those two] statutes as identical." J.A. 212 n.12. In a separate opinion, the court reversed the grant of summary judgment for Chevron on Echazabal's state law interference with contract claim. J.A. 218-221. The court made clear, however, that its ruling as to that count also turned on its interpretation of the ADA. Chevron's letter to Irwin was not "justified" under the ADA, the court held, so Chevron had not made out the affirmative defense to tortious interference of justification. J.A. 221; see *infra*, p. 50 n.17.

Second, Chevron satisfied the "direct threat" qualification standards defense as set forth in EEOC regulations, to which Judge Trott would have deferred. J.A. 216. Judge Trott protested that the majority's decision will "require employers knowingly to endanger workers," imposing an "unconscionable" "moral burden" on employers. It will also result in "long, expensive, and unpredictable litigation" over "conflicting responsibilities under different labor laws," placing employers in considerable "legal peril." J.A. 216-217.

SUMMARY OF ARGUMENT

I. Acting pursuant to express congressional authority, the EEOC promulgated regulations in 1991 providing that an employer may defend against an ADA claim by showing that a job applicant would be placed at significant risk of serious harm to his own health or safety by carrying out essential functions of the job. Those regulations are a reasonable interpretation of the ADA and are entitled to deference.

EEOC's threat-to-self regulations comport with the plain meaning of section 12113(a), which provides that an employer may establish "qualification standards" that are "job-related and consistent with business necessity." A qualification standard requiring that every applicant be able to perform essential job tasks without endangering his health or life satisfies that test. Individuals who will become sick or die from doing the job cannot work on an ongoing and reliable basis, leaving employers with disruption and the expense of hiring and training replacements. Workplace injuries and deaths cause lower employee morale, reduced productivity, adverse publicity, diversion of company resources, and increased workers' compensation claims. Knowingly hiring an employee who will be harmed on the job also puts the employer at risk of enforcement actions for violations of OSHA and state worker safety laws, state tort claims, and state criminal prosecutions, which the employer has no assurance will be held to be

preempted by the ADA. Employers should not be placed in the dilemma of hiring workers who will be hurt or killed doing the job—something worker safety laws seek to prevent—or violating the ADA.

Nothing in the ADA prohibits the EEOC from recognizing personal safety as a valid qualification standard. In providing that a qualification standard "may include" a requirement that a person not pose a threat to others in the workplace, section 12113(b) merely provides one example of a valid standard, not (as the Ninth Circuit held) an exclusive definition of all permissible safety-related standards. This Court has held that the *expressio unius* maxim has no application to an inclusive provision like section 12113(b). Examples in the Committee Reports on the ADA show that Congress intended that the safety of an employee himself would continue to be a valid employment consideration, as it was under the Rehabilitation Act.

Uncontradicted evidence showed that Chevron satisfied the threat-to-self defense here. Chevron's written job requirements specified that plant helpers must have the ability to withstand exposure to hydrocarbons, solvents, and other liver-toxic chemicals. Chevron physicians experienced in industrial medicine, as well as Echazabal's own doctor, advised that Echazabal's liver disease would be exacerbated by exposure to hepatotoxins, and that he could be quickly killed by a leak. Chevron was entitled to rely on the reasonable conclusions of physicians available to it at the time it made its decision.

II. It is an independent ground for reversal that Echazabal did not prove that he was a "qualified individual" entitled to the protection of the ADA under section 12112(a). A "qualified individual" is defined in section 12111(8) as one who "can perform" the essential functions of the job. A person who will be made sick or be killed performing a job cannot perform that job on a continuing basis. The ordinary meaning of "qualified" does not encompass a person whose medical condition means

that he would be seriously endangered by the job and who, as a result, fails to meet the employer's written job requirements. In addition, Congress expressly intended that the concept of a qualified individual under the ADA would be the same as under Rehabilitation Act regulations and precedents. Cases interpreting the Rehabilitation Act, as well as the EEOC's regulations, establish that a disabled individual who cannot perform a job without facing serious injury is not qualified. Because Echazabal failed to produce any evidence, reasonably available to Chevron at the time it made its decision, that he could perform the plant helper job without posing a significant risk of serious injury to himself, he failed to establish that he was a qualified individual protected by the ADA.

ARGUMENT

I. THREAT TO SELF IS A DEFENSE TO LIABILITY UNDER THE ADA.

The Ninth Circuit erred when it held that Chevron could not refuse to hire respondent for a job that would seriously harm or kill him because threats to the life or health of job applicants themselves are not a defense to liability under the ADA. The court of appeals should have deferred to the EEOC's longstanding regulation recognizing a threat-to-self defense. The EEOC's regulation is consistent with the plain language and legislative history of the Act, reasonably balances employment opportunities for individuals with disabilities against the business needs of employers, comports with the prevailing legal and ethical norm that businesses must protect workers from harm, and plainly is entitled to judicial deference. There is no basis to suppose that Congress—counter to a century of legislation strengthening protections for worker safety—meant to force employers to hire disabled persons for jobs that would harm or kill them. The district court properly held that the EEOC's threat-to-self regulation, applied to the

uncontradicted facts here, mandates summary judgment for Chevron.

A. The EEOC's Threat-To-Self Regulations Are Entitled To Deference.

Title I of the ADA permits an employer to use "qualification standards" that screen out individuals with disabilities if "the standard * * * is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). Accordingly, section 12113(a) provides that it is a defense to a charge that a qualification standard discriminatorily denies a job to an individual with a disability that the standard "has been shown to be job-related and consistent with business necessity." The statute supplies one example of a valid qualification standard, providing that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). It defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

As this Court has recognized, the ADA commanded the EEOC to "issue regulations * * * to carry out" the employment provisions of Title I within a year of the Act's adoption. 42 U.S.C. § 12116; see *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 478 (1999). Exercising that express authority, the EEOC promulgated regulations implementing Title I through notice-and-comment rulemaking. 56 Fed. Reg. 35726 (July 26, 1991). The EEOC's regulations interpret section 12113 to authorize an employer to use qualification standards that screen out individuals who in carrying out the essential functions of the job would pose a significant risk of serious harm to their own health or safety, as well as individuals who would pose a direct threat to the health or safety of others. See 29 C.F.R. § 1630.15(b)(2) ("The term 'qualification standard' may

include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace"); *id.* § 1630.2(r) (a "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation"); *id.* § 1630.2(q) ("qualification standards" are any "personal and professional attributes including * * * medical [and] safety * * * requirements" established by an employer as eligibility requirements for the job).

The EEOC's regulations also specify conditions that employers must satisfy to establish a section 12113 defense in any case in which qualification standards relate to health or safety, regardless of whether the relevant risk is to the employee or to others in the workplace. An employer's conclusion that a job applicant or employee poses a "direct threat" to self or others must rest on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job," and that assessment must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). Factors relevant to that determination—the same factors this Court held are relevant to determining whether a direct threat exists under the Rehabilitation Act (*School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 288 (1987))—include "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." 29 C.F.R. § 1630.2(r).

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)), the more so where, as here, the construction was adopted contemporaneously with passage of the statute and has been consistently maintained. See *Davis* v.

United States, 495 U.S. 472, 484 (1990) ("we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use"); *Watt* v. *Alaska*, 451 U.S. 259, 272-273 (1981). The Court reaffirmed last Term that in a case such as this one, where "Congress delegated authority to the agency generally to make rules carrying the force of law" and the agency exercised that authority through the "formal administrative procedure" of notice-and-comment rulemaking, the "administrative implementation of a particular statutory provision qualifies for *Chevron* deference." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). The EEOC's regulations implementing section 12113 are therefore entitled to deference unless they are at odds with "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. Insofar as those regulations fill a gap left by the ADA because it "is silent or ambiguous with respect to the specific issue," a court may not substitute its own construction for the agency's if the agency's interpretation is "reasonable." *Id.* at 843-844; see *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988) ("EEOC's interpretation [of a statute] for which it has primary enforcement responsibility * * * need only be reasonable to be entitled to deference"); *Mead*, 121 S. Ct. at 2172.

Furthermore, because "existing language and standards from the Rehabilitation Act were incorporated into the ADA" (Statement of President George Bush, 1990 U.S.C.C.A.N. 601 (July 26, 1990)), the "administrative and judicial interpretation" of the Rehabilitation Act is essential to understanding the ADA. *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). As we discuss in detail in Part II, *infra*, EEOC's regulations and case law under section 504 of the Rehabilitation Act, 29 U.S.C. § 794, consistently interpreted that statute to disqualify from employment a disabled person who would be seriously harmed on the job. Congress in the ADA affirmatively embraced these Rehabilitation Act authorities. The fact that EEOC's regulations

interpreting section 12113 are consistent with regulations and case law interpreting the Rehabilitation Act, as the EEOC noted at the time of their adoption (56 Fed. Reg. at 35745), confirms that they are reasonable and entitled to deference.

The Ninth Circuit violated the most basic principles governing judicial review of agency action when it refused to defer to the EEOC's regulations. The EEOC's conclusion that not posing a threat to self is a proper "qualification standard" is fully consistent with section 12113(a)'s plain language. Contrary to the Ninth Circuit's faulty analysis, nothing in sections 12113(b) or 12111(3) casts any doubt on the EEOC's interpretation. The EEOC's regulations also comport with the ADA's legislative history.

B. The EEOC's Threat-To-Self Regulations Comport With The Plain Language Of Section 12113(a).

The "qualification standards" defense prescribed by section 12113(a) is general in scope. It applies to *all* "qualification standards," without restriction, that are both "job-related" and "consistent with business necessity." Section 12113(a)'s broad language on its face authorizes the EEOC's determination that appropriate qualification standards include "medical [and] safety" related "personal attributes" that are essential to avoiding serious harm on the job. 29 C.F.R. § 1630.2(q), (r).

A requirement that the individual be able to perform the essential functions of the particular job without risking serious injury or death is obviously "job-related." In addition, there are important business reasons why employers would not knowingly place an employee in harm's way. If the EEOC had concluded that it is *not* a "business necessity" to avoid significant and objectively documented risks of serious injury to self (see 29 C.F.R. § 1630.2(r)), that conclusion would have been arbitrary and capricious.

On Echazabal's and the Ninth Circuit's reading of the ADA —which no other court of appeals has accepted—an individual with a life-threatening allergy to inks and dyes could insist on a job printing banknotes at the Federal Bureau of Engraving and Printing even if he would not survive a week on the job (see *Patterson* v. *Summers*, 2000 WL 366113 (E.E.O.C. 2000)); a narcoleptic power saw operator could remain in her position, though she could maim or kill herself at any time (see 29 C.F.R. Part 1630, App.); a person subject to uncontrolled seizures could claim a job working "on a platform above fast-moving press rollers" and "next to exposed machinery that reached temperatures of 350 degrees" (see *Moses* v. *American Nonwovens*, 97 F.3d 446, 447-448 (11th Cir. 1996)); and a person who depends on a heart pacemaker could insist on a job working with high voltage electrical equipment that would cause the pacemaker to malfunction. See *Foreman* v. *Babcock & Wilcox Co.*, 117 F.3d 800, 803, 807-808 (5th Cir. 1997). Someone like Echazabal who has a serious, progressive medical disorder that would be made substantially worse by on-the-job exposures to chemicals, and who risks sudden death in the event of a large scale chemical leak, would be able to insist on taking that risk. Employers' business reasons for excluding such persons from jobs that will harm or kill them, however, are compelling.[8]

"[S]afety and efficiency," this Court has recognized, are "legitimate employment goals." *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979); see also *Fitzpatrick* v.

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[8] Echazabal's situation is not unique. One commentator has noted that individuals with "ischemic heart disease, such as angina pectoris and myocardial infarction, have an increased risk of serious cardiovascular illness when exposed to dinitrotoluene, carbon dioxide, methylene chloride, nitroglycerine, and carbon disulphide." Mark Rothstein, *supra*, 81 MICH. L. REV. at 1404. In Echazabal's case, of course, there are innumerable jobs that he could safely perform without exacerbating his potentially deadly medical condition.

City of Atlanta, 2 F.3d 1112, 1119, 1127 (11th Cir. 1993) ("protecting employees from workplace hazards * * * qualif[ies] as an important business goal"; "[m]easures demonstrably necessary to meeting the goal of ensuring worker safety are * * * 'required by business necessity'"). A legal duty to hire employees whose health would be compromised simply by doing the job, and who may even die as a result (as Echazabal could be quickly killed by a leak), would not only place employers in a moral dilemma but also threaten serious adverse practical consequences. Such individuals typically would not be able to perform the job on an ongoing, long-term, and reliable basis. Employers would then bear the costs and disruption of filling the gap left by sick or deceased workers, using "temporary workers, overtime," or "new workers" who require "training." Veronica Hellwig, *Integrating Disability Management to Help Improve the Bottom Line*, 15 COMPENSATION & BENEFITS MGMT. 43, 45 (1999).

The breakup of an existing team or crew and introduction of new employees also leads to a loss of efficiency, which can disrupt production schedules. Hellwig, *supra*, at 46. "As competitive pressures force organizations to operate more efficiently and with leaner workforces," these adverse consequences are magnified. *Ibid.*; see also Dwight Harshbarger, *Managing Safety from the Executive Suite*, 70 OCCUPATIONAL HEALTH & SAFETY 28, 33 (2001) (noting "the costs of replacement and retraining" and "the cost to a team culture when even one experienced and valued person leaves"). Efficient staffing is a modern business necessity, and it cannot be achieved if an employer is forced to hire individuals who will become sick from the effects of the job. See R. WAYNE MONDY, ROBERT M. NOE & SHANE R. PREMEAUX, HUMAN RESOURCE MANAGEMENT 396 (8th ed. 2002) (workplace injuries cause loss of "reputation," "difficulty in recruitment," strained "[e]mployee relations," difficulty maintaining a "stable workforce," and the need to pay "premium" compensation to attract staff).

Within the workplace, moreover, job-related illnesses or deaths cause "lower employee morale," which leads to "reduced productivity." Michael Blotzer, *OSHA Recordkeeping and Workers' Compensation*, 56 OCCUPATIONAL HAZARDS 67, 67 (1994). In the language of management experts, avoidable workplace illnesses and deaths have a highly negative impact on "motivational issues of alignment and focus of the organization, [employees'] sense of trust or lack thereof, and the discretionary effort of employees who know their organization is focused on their well-being," and they "diver[t management] from the achievement of other priority targets." Dwight Harshbarger, *supra*, at 28, 35.

Adverse publicity is another risk for businesses forced to hire workers who would be in danger on the job. A newspaper headline reading "Employee Dies of Chemical Poisoning" would be highly injurious to a company's reputation among customers, its employee relations, and the morale of its employees. See MARION K. PINSDORF, COMMUNICATING WHEN YOUR COMPANY IS UNDER SIEGE: SURVIVING PUBLIC CRISIS 255 (3d ed. 1999). A small employer could be driven out of business by such an event

Avoiding unnecessary workers' compensation claims is also a business necessity. Under state workers' compensation laws, job-related aggravation of a preexisting nonoccupational illness may be a basis for an award of compensation. See 3 LARSON'S WORKERS' COMPENSATION LAW 52-49 to 52-50 (2001) ("most courts * * * hold that when distinctive employment hazards act upon * * * preexisting conditions to produce a disabling disease, the result is [a compensable] occupational disease"); *Anderson* v. *Brinkhoff*, 859 P.2d 819 (Colo. 1993); *Sandusky* v. *Workmen's Comp. Appeal Bd.*, 487 A.2d 1019 (Pa. Commw. 1985); *Smith* v. *I.R. Equip. Corp.*, 400 N.Y.S.2d 900 (App. Div. 1977). Workers' compensation and other insurance claims attributable to workplace illness can in turn have a negative effect on "the insurance rating of the company" or even lead to

a "total loss of insurability." Steven Van Yoder, *Retailers Target Hidden Costs of On-the-Job Injuries*, STORES 62, 62 (Dec. 1999).

Workers' compensation claims may be the least significant of the legal risks facing a business that hires workers who endanger themselves. As Judge Trott pointed out, "law books * * * overflow with statutes and rules designed by representative governments to protect workers from harm." J.A. 215. Knowingly putting workers in jobs that will harm them may result in administrative fines for violation of safety laws, civil tort claims for huge amounts of actual and punitive damages, and criminal prosecution carrying the risk of fines against the enterprise or imprisonment of its officers. Even if liability is avoided in such actions, they can inflict years of expensive and unsettling litigation and adverse publicity for the business.

Substantial legal risks arise from the federal Occupational Safety and Health Act, which imposes a general duty on every employer to "furnish to *each* of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a) (emphasis added). The Occupational Health and Safety Administration has explained that this obligation applies to the employment of disabled persons. See OSHA, Standards Interpretation, Employment of Individuals with Disabilities (Aug. 27, 1997), at www.osha-slc.gov/OshDoc/Interp_data/I19970827.html ("OSHA's policy is [that] if [employees] can perform their job functions *in a manner which does not pose a safety hazard to themselves* or others, the fact they have a disability is irrelevant") (emphasis added). While it is clear that OSHA safety obligations trump "application of the ADA as a matter of law" (*Albertsons, Inc.* v. *Kirkingburg*, 527 U.S. 555, 573 (1999); 29 C.F.R. § 1630.15(e)), the precise nature of OSHA obligations in a particular case is often uncertain. See 29 C.F.R. Part 1630, App., Guidance on Section 1630.15(e) (describing

strict limitations on the ADA defense of compliance with OSHA). That leaves employers at risk of having to defend against OSHA complaints if they knowingly employ workers in jobs that are dangerous for them, or to defend against ADA claims if they refuse to do so.[9]

Also of great concern to employers is the risk that employing a disabled person who will be harmed on the job will result in state administrative, tort, or criminal actions. See Deborah Bender, *Echazabal v. Chevron: A Direct Threat to Employers in the Ninth Circuit*, 76 WASH. L. REV. 859, 886 (2001) (examining an employer's legal risks and concluding that "[e]nsuring the personal safety of employees is a business necessity"). California laws governing Chevron's El Segundo refinery, for example, provide that "[n]o employer shall * * * permit *any* employee to go or be in any employment or place of employment which is not safe and healthful." Cal. Labor Code

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[9] A basic principle of health and safety regulation under the OSH Act is that only the "feasible" elimination of substantial risks of harm is required; the Act "was not designed to require employers to provide absolutely risk-free workplaces." *Industrial Union*, 448 U.S. at 641. OSHA exposure standards therefore "will not provide a completely risk-free work environment for all workers," and in particular, workers who are "highly susceptible" to toxins at levels below those regulated by OSHA "will not be safeguarded by the exposure standards." David Mahoney & Jeffrey Kendall, *OSHA's Medical Surveillance and Removal Programs*, 42 U. PITT. L. REV. 779, 780-781 (1981). Nevertheless, an employer who *knows* that a worker is hypersusceptible to toxic exposures below OSHA-mandated levels because of a pre-existing medical condition may be at risk under OSHA's general duty clause. See 29 U.S.C. § 654(a) (imposing obligation to avoid "recognized hazards" to workers); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980). In this case, OSHA's standards indicate that many of the chemicals in Chevron's refinery are dangerous to persons with liver disease, creating further legal risk. See *supra*, p. 7 n.4.

§ 6402 (emphasis added). An employer is therefore required to do everything "reasonably necessary to protect the life, safety, and health of employees." *Id.* § 6403; see also *id.* § 6406(b). If it appears that a job "is not safe or is injurious to the welfare of *any* employee," the enforcement agency is authorized to take administrative action against the employer. *Id.* § 6409.5 (emphasis added). Violation of these employee-protection duties may also result in a wrongful death or other tort suit against the employer by the worker or his family, seeking an award of actual and punitive damages. *E.g.*, *Harris* v. *Chisamore*, 85 Cal. Rptr. 223, 225 (Ct. App. 1970) (violation of the Labor Code's safety provisions "gives rise to a rebuttable presumption of negligence"); *Jamison* v. *GSL Enters., Inc.*, 711 N.Y.S.2d 413, 415 (App. Div. 2000) (wrongful death action against employer based on breach of statutory duty to protect the safety of "all persons employed" and common law negligence); *Russell* v. *Bush & Burchett, Inc.*, 2001 WL 1524554, at *2 (W. Va. 2001) (personal injury action against employer who knew of dangerous condition).[10]

In addition, an employer who violates state worker safety laws risks criminal sanctions, including fines and imprisonment. See Cal. Labor Code §§ 6423, 6432 (a knowing or negligent violation of the Labor Code that results in a "substantial probability that death or serious physical harm could result" is a misdemeanor). If an employee like Echazabal died as a result of workplace chemical exposures, the employer

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[10] There are a myriad of statutory and common law exceptions to the general principle that workers' compensation is the exclusive remedy for workplace injuries. See, *e.g.*, 2 DAN B. DOBBS, THE LAW OF TORTS 1105-1106 (2001) (the availability of workers' compensation often does not bar a tort suit alleging intentional or reckless conduct by the employer that is substantially certain to cause injury or death); John Burnett, *The Enigma of Workers' Compensation Immunity*, 28 FLA. ST. U. L. REV. 491, 498-500 (2001) (managerial and supervisory workers have no immunity for gross negligence).

could even be convicted of involuntary manslaughter if a jury found that it had acted "without due caution and circumspection" in a manner "which might produce death." Cal. Penal Code § 192(b); see, *e.g.*, *Granite Constr. Co.* v. *Superior Court*, 197 Cal. Rptr. 3, 4 (Ct. App. 1983) (upholding prosecution for manslaughter in death of employee). Similar prosecutions have occurred around the country. See, *e.g.*, *Illinois* v. *Chicago Magnet Wire Corp.*, 534 N.E.2d 962, 966-967 (Ill. 1989) (upholding state criminal indictments of corporate officials for recklessly exposing workers to the risk of "serious physical injury or death" from poisonous substances); *People* v. *Pymm*, 563 N.E.2d 1 (N.Y. 1990) (upholding prosecution of corporate officers for state criminal offenses arising from mercury contamination in the workplace).

An employer faced with the choice between violating the ADA and risking criminal and civil sanctions under state law could take little comfort from the Ninth Circuit's casual suggestion that state law would be preempted by the ADA. J.A. 207. Many cases have held that federal worker protection laws do not preempt state laws, especially state criminal laws. See, *e.g.*, *Chicago Magnet Wire Corp.*, 534 N.E.2d at 966-968 (criminal charges for exposing workers to toxins were not preempted by OSHA even though "the conduct sought to be regulated * * * is identical"; the power to prosecute criminally and to regulate health and safety are "'primarily, and historically' * * * matter[s] of local concern"); *Pymm*, 563 N.E.2d at 2 (OSHA did not preempt criminal prosecution); *People* v. *Hegedus*, 443 N.W.2d 127, 131-139 (Mich. 1989) (OSHA did not preempt state involuntary manslaughter prosecution). Indeed, this Court has recognized a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). Litigants opposing preemption surely would argue that employers *could* comply with both state and federal law by placing susceptible individuals in dangerous jobs but taking

steps to protect them that would not be required by the ADA because they are not "reasonable accommodations." The employer's preemption challenge would have to be pursued through state courts traditionally hostile to federal preemption claims. No rational employer could assume that it would, through this "long, expensive, and unpredictable litigation road," avoid the civil and criminal state law consequences of knowingly putting an employee in harm's way. J.A. 217.[11]

No less important than operational burdens and legal risk is the ethical quandary faced by employers required by law to place employees in jobs that would cause them serious harm. Many employers had "excellent safety programs years before OSHA existed" because they believed worker safety is a moral and "[s]ocial responsibility." MONDY, NOE & PREMEAUX, *supra*, at 396. By "requir[ing] employers knowingly to endanger workers," as Judge Trott observed, the Ninth Circuit's rule imposes an "unconscionable" "moral burden" on employers. J.A. 216-217; see Robert Eckhardt, *The Moral Duty to Provide Workplace Safety*, PROFESSIONAL SAFETY 36 (Aug.

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[11] Because Title VII and the ADA prescribe different obligations and defenses, this Court's suggestion in *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 208-211 (1991), that state tort law that impeded Title VII's goals would be preempted has no application here. See J.A. 207. The Ninth Circuit's heavy reliance on the preemption discussion in *Johnson Controls* also ignores the fact that states may bring criminal prosecutions for endangering worker safety and that state courts routinely hold that those prosecutions are *not* preempted. Risks of criminal prosecution were not at issue in *Johnson Controls*. Regardless of whether avoiding the monetary costs of paying damages judgments is properly considered a business necessity (see 499 U.S. at 210), avoiding criminal prosecution *is* such a necessity. Furthermore, businesses legitimately need to avoid the disruption to operations, uncertainty, and bad publicity that are the inevitable result of civil or criminal suits alleging that the business is responsible for employee deaths.

2001). This Court has held that the state's concern to preserve human life outweighs the individual's "self-sovereignty" interest in assisted suicide. *Washington* v. *Glucksberg*, 521 U.S. 702, 724, 731-732 (1997). Likewise, the moral concerns of employers asked to abet a worker's irrevocable decision to forfeit health and life for temporary economic benefits should not be ignored. See *id.* at 740-741 ("life is far too precious to allow * * * complete autonomy in making a decision to end that life") (Stevens, J., concurring); *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 293 (1990) (unlawful suicide includes "refusing to take appropriate measures necessary to preserve one's life") (Scalia, J., concurring).

Given the plethora of significant adverse effects that businesses suffer as a result of workplace illness, injury, or death, the EEOC's interpretation of the term "business necessity" to avoid placing workers in jobs that would destroy their health or kill them is undoubtedly correct. No plausible reading of section 12113(a) could fail to include as a valid qualification standard the absence of significant threats to job applicants and employees themselves. But even if subsection (a)'s "business necessity" requirement did not compel the EEOC's threat-to-self regulation, that would only mean that Congress did not say one way or the other in section 12113(a) whether threat to self is a proper qualification standard. "Against this background of legislative silence," the EEOC's "interpretative regulation [clearly] constitutes a permissible gloss on the Act." *Whirlpool Corp.*, 445 U.S. at 11. On either analysis, the EEOC's threat-to-self regulations are entitled to *Chevron* deference and should be upheld.

C. No Other Provision Of The ADA Precludes A Threat-To-Self Defense.

Contrary to the Ninth Circuit's conclusion, section 12113(b) in no way limits the generality of the section 12113(a) defense so as to exclude from its scope qualification standards requiring

that individuals not pose a threat to self. In specifying in subsection (b) that "[t]he term 'qualification standards' *may include* a requirement that an individual shall not pose a direct threat to the health or safety of *other individuals* in the workplace," Congress merely provided *one example* of an acceptable qualification standard. Indeed, Congress described subsection (b) "as a subset of [the broader qualification standards] defense." H.R. Rep. No. 101-485, Pt. 2 (1990), 1 House Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. 101-336, Americans with Disabilities Act 423 (Comm. Print 1991) ("Leg. Hist."). Subsection (b) removes any doubt that an employer may require that an applicant or employee not pose "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). It shows that Congress understood workplace health and safety issues to be "job-related" and matters of "business necessity." By its plain terms, however, it *does not limit* the relevance of health and safety to preserving the well-being only of *others* in the workplace.[12]

This Court's precedents confirm this reading. As this Court recently observed, section 12113(b) on its face is "a permissive provision." *Albertsons*, 527 U.S. at 569; see also *Christensen* v. *Harris County*, 529 U.S. 576, 587-588 (2000) ("may include" is "plainly permissive"). By using the term "may include,"

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[12] That Congress singled out direct threats to other people for special mention in section 12113(b) is consistent with its adoption of another special provision that permits an employer to deny "a job involving food handling" to "an individual [who] has an infectious or communicable disease that is transmitted to others through the handling of food." 42 U.S.C. § 12113(d). Congress intended by its explicit treatment of threat to others in section 12113(b)—as it expressly intended by its adoption of the food handler provision—to "reassure the American public" that its safety was not being compromised. H.R. Conf. Rep. No. 101-596 (1990), 1 Leg. Hist. 68.

Congress signaled that what followed was not an exhaustive statement of permissible safety-related qualification standards, but merely an example of one valid standard. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 (1977) (a phrase introduced by the words "to include" does "not restrict or purport to exhaustively enumerate"); *Chickasaw Nation* v. *United States*, 122 S. Ct. 528, 532 (2001) (the word "including" introduces an "illustrative list" without "any suggestion that Congress intended [it] to be complete").

Congress's carefully differentiated use of the verbs "to mean" and "to include" in the ADA shows that its choice of words in section 12113(b) was not accidental. Employing the words in their plain and ordinary sense, Congress in the ADA used the verb "to mean" when it intended to provide an exhaustive definition and the verb "to include" when it intended to furnish a non-exclusive illustration. Thus, Congress provided that "[t]he term 'disability' means" being impaired, having a record of impairment, or being regarded as having an impairment. 42 U.S.C. § 12102(2); see also *id.* §§ 12102(3), 12111(1)-(8) (each defining what a term used in the Act "means"). This Court has held that Congress thereby intended to define exhaustively the ways in which a person may be determined to have a "disability" for purposes of the Act. See *Sutton*, 527 U.S. at 478 ("to fall within this definition one *must*" fit into one of the three listed categories) (emphasis added); *Beck* v. *Prupis*, 529 U.S. 494, 497 n.2 (2000) (term "means" introduces an "exhaustive" definition).

In contrast, where a categorical definition would have been too inflexible, Congress used the verb "to include." Thus, unable to foresee every aid or accommodation that might enable a disabled person to do a job—given the enormous variety of jobs and wide range of disabilities—Congress defined those

concepts non-restrictively. The term "auxiliary aids and services," Congress provided, "includes" interpreters, readers, and new equipment. 42 U.S.C. § 12102(1). "Reasonable accommodation," it stated, "may include" making facilities accessible, job restructuring, modified work schedules, and job reassignment. *Id.* § 12111(9). By explaining what reasonable accommodation "may include," Congress intended to provide "illustrations of accommodations" and "general guidance"—"not * * * to be exhaustive." S. Rep. No. 101-116 (1990), 1 Leg. Hist. 129; see also H.R. Rep. Pt. 2, 1 Leg. Hist. 330 (definition of reasonable accommodation "sets forth examples").

This sort of deliberate "distinction in th[e] use" of "[t]he terms 'means' and 'includes'" shows that "these words [have] a different sense." *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934). "[W]here 'means' is employed, the term and its definition are to be interchangeable equivalents," whereas "the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Ibid.* "[R]ead as a whole," the ADA leaves no doubt that Congress reserved the term "means" for exhaustive definitions and used the terms "includes" or "may include" to introduce non-exclusive illustrations. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); see *New York Tel. Co.*, 434 U.S. at 169 n.15 ("Where the definition of a term * * * was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"). To ignore this distinction *throughout* the ADA would be a singular disservice to the disabled, turning illustrations of aids and accommodations (for example) into exhaustive lists limiting employers' obligations. See 42 U.S.C. §§ 12102(1), 12111(9). To ignore it solely in the case of section 12113(b) would fly in the face of the "'basic canon of statutory construction'" that "'identical terms within an Act bear the same meaning.'" *Reno* v. *Koray*, 515 U.S. 50, 58 (1995).

Citing none of the relevant authorities, paying no heed to the nonexclusive nature of the phrase "may include," engaging in no analysis of Congress's differential use of the terms "means" and "include," and seemingly unaware of how its interpretation of the term "may include" would alter the effect of other important provisions of the Act, the Ninth Circuit held that section 12113(b) implicitly precludes a threat-to-self defense, relying on the canon of construction *expressio unius est exclusio alterius*, "*i.e.*, the expression of one is the exclusion of others." J.A. 201; *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 357 (1988). According to the Ninth Circuit, "by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the defense." J.A. 201.

The Ninth Circuit's use of the *expressio unius* maxim does violence to the language of the statute. That canon "serves only as an aid in discovering the legislative intent when that is not otherwise manifest." *United States* v. *Barnes*, 222 U.S. 513, 519 (1912). It cannot override plain language making clear that Congress intended a specified example to be illustrative, not exhaustive. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 703 (1991); *Burns* v. *United States*, 501 U.S. 129, 136 (1991); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.23, at 316 (6th ed. 2000) ("When 'include' is utilized, it is generally improper to conclude [using the *expressio unius* inference] that entities not specifically enumerated are excluded"). Here, the maxim may not properly be applied to convert an explicitly non-restrictive example of one kind of permissible safety-based qualification standard into the only permissible safety-based qualification standard; "[t]he language of the statute is too strong to bend" in that way. *Chickasaw Nation*, 122 S. Ct. at 532.

The Ninth Circuit was likewise incorrect in asserting that the ADA's definition of "direct threat" as "a significant risk to

the health or safety of others" undermines the EEOC's interpretation. 42 U.S.C. § 12111(3); J.A. 201. The term "direct threat" appears nowhere in section 12113(a) and therefore obviously does not limit the generality of the qualification standards defense. Nor does this statutory definition preclude the EEOC in its regulations from using the term "direct threat" more expansively to encompass all safety-related instances of the business necessity defense, whether they involve threat to self or to others. Rather than treat threat to self and threat to others separately in its regulations, the EEOC simply elected to subject *all* medical and safety qualification standards to the same substantive and evidentiary rules, using the "direct threat" rubric. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). That decision of convenience by the agency Congress charged with implementing these provisions—a decision that avoids a potentially confusing proliferation of rules that would overlap, since some individuals with medical conditions that create safety risks pose a threat to others as well as to themselves—is reasonable and entitled to deference under *Chevron*.[13]

D. The EEOC's Threat-To-Self Regulations Are Consistent With The ADA's History And Design.

The EEOC pointed out when it promulgated its regulations in 1991 that a threat-to-self defense is "consistent with the legislative history of the ADA." 56 Fed. Reg. at 35730, 35745. Congress aimed in the ADA to bar employers from making employment decisions about persons with disabilities based on "generalizations, misperceptions, ignorance, irrational fears,

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[13] Because of the generality of section 12113(a) and the nonexclusive nature of section 12113(b), the alternative to deference here is not, as the Ninth Circuit supposed, a scheme in which threat to self is no defense at all. Rather it is a scheme in which threat to self is analyzed under the general § 12113(a) business-necessity defense rather than under the § 12113(b) direct-threat defense and the EEOC's demanding direct-threat regulations.

patronizing attitudes, [and] pernicious mythologies." S. Rep., 1 Leg. Hist. at 125; see H.R. Rep. Pt. 2, 1 Leg. Hist. at 306 (the ADA targeted "refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by others"). Congress did not, however, bar the application of legitimate, safety-based qualification standards to disabled persons on an individualized basis. Thus, while Congress intended to prohibit an employer from adopting "overprotective rules and policies" (42 U.S.C. § 12101(a)(5)) and from refusing to hire "based on generalized fears about the safety of the applicant" that rested "on averages and group-based predictions," Congress was equally clear that "individualized assessments" about employee safety are permissible. S. Rep., 1 Leg. Hist. 126; see H.R. Rep. Pt. 2, 1 Leg. Hist. 331. The EEOC's regulations comply with these aims, limiting the use of personal safety concerns as a disqualifying factor to cases of "business necessity" when an individual would face a "significant risk of substantial harm," as determined by an "individualized assessment" based on a "reasonable medical judgment." 29 C.F.R. § 1630.2(q).

In contrast to the Ninth Circuit, which simplistically labeled the EEOC's threat-to-self regulations "paternalistic" and therefore impermissible (J.A. 204-205), Congress carefully distinguished between mere "paternalistic concerns for the disabled person's own safety" and "job selection procedures [that are] 'job-related and consistent with business necessity.'" H.R. Rep. Pt. 2, 1 Leg. Hist. at 345. Three examples in the House Report from the Committee on Education and Labor show beyond question that Congress understood that a *real* and *significant* risk to an applicant's or employee's safety in doing the particular job falls into the latter category.[14]

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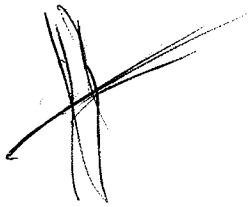
[14] The House Education and Labor Committee was "a key committee" with responsibility for the ADA because it "had jurisdiction over the Rehabilitation Act" on which the ADA was modeled and was the

First, the Committee drew a distinction between an employment decision "based on paternalistic views about what is best for a person with a disability"—which is impermissible—and a "physical or mental employment criterion * * * used to disqualify a person with a disability" that "has a direct impact on the ability of the person to do their actual job duties *without imminent, substantial threat of harm*"—which is proper. H.R. Rep. Pt. 2, 1 Leg. Hist. at 347 (emphasis added). That the "threat of harm" Congress had in mind here is a threat to self is shown by the Committee's clarification in the next sentence that "*[g]eneralized* fear about risks from the employment environment, *such as exacerbation of the disability caused by stress*, cannot be used by an employer to disqualify a person with a disability." *Ibid.* (emphasis added). The clear import of this passage is that an individualized and sufficiently serious "exacerbation of [a preexisting] disability" *could* amount to an "imminent, substantial threat of harm" that would disqualify the applicant from employment.[15]



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venue the "party leaderships [had selected] to negotiate a refined ADA that would garner broad support." Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act*, 64 TEMP. L. REV. 521, 529 n.58 (1991).

[15] Because Congress in the ADA made a sharp distinction between "paternalism" and the "business necessity" to exclude a disabled person from a particular job that threatens the individual with serious harm, the Ninth Circuit's observation that this Court interprets Title VII "to prohibit paternalistic employment policies" is beside the point. J.A. 204, citing *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), and *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991). In *Dothard*—which held that women *may* be excluded from contact positions in a high-security male prison—this Court stated that "it is impermissible under Title VII to refuse to hire [on] the basis of stereotyped characterizations of the sexes." 433 U.S. at 333. Chevron's refusal to hire Echazabal was based not on stereotypes, but

The Committee also explained that while a candidate "may not be excluded * * * solely on the basis of an abnormality on an x-ray," he or she may be excluded "if the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job." H.R. Rep. Pt. 2, 1 Leg. Hist. at 346. Because many lung abnormalities detectable by x-ray would involve conditions that carry no threat to others but that could be exacerbated by some work conditions (for example, lung cancer or emphysema), this example obviously includes threats solely to self.

Finally, in explaining that "the assessment that there exists a high probability of substantial harm must be strictly based on valid medical analyses," the Committee gave as an example of inadequate medical documentation "back x-rays which reveal anomalies in asymptomatic persons," because these "usually have largely low predictive value." H.R. Rep. Pt. 2, 1 Leg. Hist. at 346. Because back disorders cause great pain and discomfort to the individual, but very rarely put others at risk, this example again demonstrates that Congress intended that personal safety may be a valid employment consideration.

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on individualized consideration of Echazabal's medical condition. *Johnson Controls* held that an employer violated Title VII when it barred women from jobs working with lead to protect their fertility and fetuses. Unlike serious liver disease, chemical injuries to fertility and fetuses do not interfere with a person's ability to perform the job. In addition, singling out women was blatantly discriminatory because lead also has a "debilitating effect" on male fertility; another federal statute prohibited discrimination based on the potential for pregnancy; and OSHA had concluded that there was no scientific basis for excluding women of childbearing age from jobs involving lead exposure. 499 U.S. at 198-199, 208. None of these factors is present here. The employment decision here rested on specific, individualized medical advice to Chevron that exposure to toxins in its refinery would exacerbate Echazabal's liver condition and probably kill him.

That this was Congress's intent is confirmed by the explanation in the House Judiciary Committee's report that an employer would have an obligation to provide a reasonable accommodation to protect the health of "a person * * * employed as a painter [who] is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures," such as by reassignment to a different job. H.R. Rep. Pt. 3, 1 Leg. Hist. 469. Clearly Congress, consistent with its development of worker-safety laws such as the OSH Act, remained concerned in the ADA that job applicants not be placed in danger.

The Ninth Circuit's contention (J.A. 202) that Congress made no reference to threats to disabled persons themselves in the ADA's legislative history is therefore erroneous. The House Report makes clear that an employer may consider the risk of harm to self. That the legislative history uses the term "direct threat" only in connection with harm to others (*ibid.*) is no more illuminating than the inclusion of a direct-threat-to-others defense in section 12113(b), for the same reasons discussed in Part I.C, *supra*. As the United States has pointed out, the Ninth Circuit's reliance on that usage inappropriately applies "the *expressio unius* canon to the legislative history." Br. for the United States as *Amicus Curiae* in Support of Ptn. for Cert. 13; see H.R. Rep. Pt. 3, 1 Leg. Hist. at 485 (a qualification standard "may also include" a requirement that the individual pose no threat to others).

The Ninth Circuit placed great weight on a single floor statement by Senator Kennedy, who was one of 34 Senate consponsors of the law. Chai Feldblum, *supra*, 64 TEMP. L. REV. at 526. Senator Kennedy stated that "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." J.A. 203 (quoting 136 Cong. Rec. 17377 (1990)). Senator Kennedy gave as an example that "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the

employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician." *Ibid.*

The example Senator Kennedy gave of a paternalistic fear that a person with HIV would contract opportunistic infections —a generalized and speculative fear that could bar the worker from *any* job—is far removed from the threat-to-self defense set forth in the EEOC's regulations, which recognize the business necessity of excluding persons who are found after careful, individualized medical inquiry to be at real and substantial risk from a particular work environment. To the extent that Senator Kennedy's statement suggests (if at all) that employers have no business necessity to deny employment to such persons, it is at odds with the language of the ADA and with the more authoritative committee reports discussed above. Such personal and "frankly partisan statements about the meaning of" the qualification standards defense "cannot plausibly be read as reflecting any general agreement." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 262 (1994); see *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling").

The court of appeals' interpretation of the ADA defeats Congress's avowed purpose "to bring persons with disabilities into the economic and social mainstream of American life." H.R. Rep. Pt. 2, 1 Leg. Hist. at 295. The goal of ensuring that persons with disabilities enjoy "full participation" in the workplace on an ongoing basis is defeated if they take jobs that expose them to serious harm, even death. 42 U.S.C. § 12101(a)(8). In outlawing sweeping paternalistic judgments while allowing employers a threat-to-self defense "to assure * * * an applicant's actual ability" to do and keep doing the job (H.R. Rep. Pt. 2, 1 Leg. Hist. at 344), Congress and the EEOC have protected disabled individuals from discrimination based

on "stereotypic assumptions" and given them every "opportunity to compete on an equal basis," to enjoy "independent living," and to achieve "economic self-sufficiency," while also meeting the needs of American business. 42 U.S.C. § 12101(a)(7)-(9). Respondent would destroy that careful balance.

E. Chevron Satisfied The Requirements Of The Threat-To-Self Defense.

Carefully applying section 12113 and the EEOC's elaboration of the threat-to-self defense in 29 C.F.R. § 1630.2(r), the district court granted summary judgment to Chevron. The court held that "undisputed" record evidence showed that the company had exercised a high "degree of diligence" in making an "individualized assessment" of the threat the plant helper job posed to Echazabal, acting "reasonably on the basis of the medical evidence * * * before it," which was the "best available objective evidence." J.A. 185, 188-189. That evidence included the judgments of three Chevron doctors experienced in industrial medicine, who concluded on the basis of Echazabal's medical history and test results that he would be harmed or killed by exposure to liver toxins; the recommendation of Echazabal's own physician that "of course" Echazabal should not be exposed to hepatotoxins; and the description in Chevron's job summaries, along with the responsible employees' own knowledge, of the toxic chemicals to which a plant helper would be exposed. J.A. 172-177, 185, 189; *supra*, pp. 8-11. The "deliberative process" in which Chevron engaged refutes "any argument that [it] based its decision as to qualifications on stereotypes about disability." *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 146 (1st Cir. 1997).

The district court correctly held that declarations from a toxicologist and a liver specialist that Echazabal obtained in connection with this litigation in November 1997, nearly two years after the events at issue, raised no genuine issue of

material fact. J.A. 186-187. Those declarations, which questioned the uniform conclusion of Chevron's doctors that Echazabal's liver enzyme tests showed reduced liver function and disputed that Echazabal would in fact have been endangered by the plant helper job, were not reasonably available to Chevron when it made its decision.[16] All the medical opinions specific to the plant helper job that *were* "relied upon and available to Chevron at the time of its decision" concluded that "any exposure" to the hepatotoxins in the refinery would pose a "serious" and "immediate" risk to Echazabal. J.A. 185; *supra*, pp. 8-11; *Bragdon*, 524 U.S. at 649, 662 ("significant risk must be determined from the standpoint of" the employer "as of the time the [employment] decision is made").

In these circumstances Chevron was entitled to base its decision on the opinions of its doctors that Echazabal would be seriously harmed or killed by performing the plant helper job. If post-hoc opinions prepared for purposes of litigation were enough to create a triable issue of fact as to whether Chevron relied on "a reasonable medical judgment," employers could never safely rely on the judgments of internists or physicians practicing occupational medicine. They instead would in every case have to seek out the opinions of other practitioners in the particular medical specialty or sub-specialty at issue before making a decision to deny employment based on a threat to self

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[16] The views of plaintiff's doctors retained for this litigation are in any event contradicted by the NIH, which has explained that albumin and prothrombin tests show no change until late-stage liver disease and that enzyme levels like Echazabal's are a sign of severe disease; by the CDC's NIOSH, which has stated that specific chemicals found in the refinery are liver toxic; and by authoritative medical textbooks. See *supra*, p. 7 n.4 & p. 9 n.5; *Bragdon*, 524 U.S. at 650 (attaching "special weight and authority" in the direct threat inquiry to "the views of public health authorities," including the "CDC, and the National Institutes of Health").

(or others). Employers have no such obligation. They may rely on the reasonable opinions of competent physicians, including company-employed or retained physicians or the employee's own physician. See, *e.g.*, *Knapp* v. *Northwestern Univ.*, 101 F.3d 473, 484 (7th Cir. 1996) (university was entitled to bar student with heart defect from basketball team; "medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality * * * regardless whether conflicting medical opinions exist"); *Lowe* v. *Alabama Power Co.*, 244 F.3d 1305, 1308 (11th Cir. 2001) ("The key inquiry is whether the employer made a reasonably informed and considered decision"; "justifiable reliance on a physician's diagnosis" is enough); *Foreman*, 117 F.3d at 803 (relying on medical restriction imposed by employee's physician).

The ADA is designed to provide disabled persons with equal opportunities in the workplace. That goal is best served by legal rules that encourage applicants and employees to present medical evidence to the employer in a timely manner so that the employer may take it into consideration in making a decision. Permitting an applicant like Echazabal to remain silent as to his qualification at the time his employment is under consideration, only to produce doctors with different views in the course of an ADA lawsuit years later, would defeat the purposes of the Act and unfairly punish employers for reasonably relying on medical expertise.

II. A PERSON WHO POSES A SERIOUS THREAT TO SELF IN PERFORMING ESSENTIAL FUNCTIONS OF A JOB IS NOT A "QUALIFIED INDIVIDUAL."

This Court need not go beyond the section 12113 "qualification standards" defense to decide this case in Chevron's favor. However, whether an individual with a disability is qualified for a job is relevant not only to an employer's "qualification standards" defense, but also to the

question whether the individual is "a qualified individual with a disability" within the coverage of the ADA in the first place. Only a "qualified individual with a disability"—someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position"—is protected by section 12112(a)'s antidiscrimination rule. 42 U.S.C. § 12111(8). The plain language of the ADA, as well as Rehabilitation Act precedents upon which the ADA was based, contradict the Ninth Circuit's ruling that a person who will be seriously harmed or killed performing the essential functions of the job is a "qualified individual." As the Seventh Circuit has correctly held, a person who cannot perform the essential functions of a job without exacerbating a serious medical condition is not "qualified to do the job" and is not "entitled to protection under the ADA." *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599, 603 (7th Cir. 1999). The issue whether a person who poses a serious threat to self is a "qualified individual" was decided below, is encompassed in the question presented, and is ripe for decision.

A. Under The Plain Language Of Section 12112(a), An Individual Who Poses A Serious Threat To Self Is Not "Qualified."

The Ninth Circuit incorrectly held that the section 12113(b) defense is "the exclusive way" in which safety-based qualifications may be taken into account under the ADA. J.A. 208-210. This Court has previously "questioned whether [this interpretation] is a sound one" (*Albertsons*, 527 U.S. at 569-570 n.15), and Justice Thomas has pointed out that a person's inability to perform a job safely may mean that he or she is not "a qualified individual" with respect to the job sought. *Id.* at 578-580 (Thomas, J., concurring). This Court's doubts in *Albertsons* were fully justified. Plain statutory language shows that a disabled individual's qualifications to do a job are relevant not only to the section 12113 defense, but also to the logically prior question whether a person is "a qualified

individual." See *Koshinski*, 177 F.3d at 603 ("The 'direct threat' issue arises * * * only after an ADA plaintiff has made out a prima facie case * * * that he was entitled to protection under the ADA"). Like other concepts that Congress used in overlapping ways in a number of different provisions of the ADA, a person's qualifications are relevant at more than one level of the ADA analysis. See, *e.g.*, 42 U.S.C. §§ 12111(8), 12112(a) ("reasonable accommodation" is an element in determining if a person is "a qualified individual"); *id.* § 12112(b)(5)(A) ("reasonable accommodation" is an element in the definition of "discriminate"); *ibid.*; § 12111(10) ("reasonable accommodation" is an element in the employer's "undue hardship" defense").

The term "qualified" means "fitted" by "endowments * * * for a given purpose." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1996). It is contrary to common usage and common sense to suggest that a person whose medical condition threatens injury or death in a particular job is "fitted" for that job; he is plainly *unfitted*. Moreover, the language in which the term "qualified individual" is defined in section 12111(8)—a person who "can perform the essential functions" of the job—is prospective in focus. An individual who will be injured or killed by performing the essential functions of a job *cannot* perform those functions on a continuing basis. See Br. for the United States as *Amicus Curiae* in Support of Ptn. for Cert. 14-15 ("When there is a high probability that an employee will suffer serious injury or death in the near future because of his performance of the job, there is a significant risk that the employee will not be able to perform the essential functions of the job on an on-going basis"); David Mahoney & Jeffrey Kendall, *supra*, 42 U. PITT. L. REV. at 794 (when "there is a high probability of future harm, [courts should] find that the employee does not have the present ability to perform the job"). Respondent would rewrite the law to say that a person is "qualified" if he "can perform the essential functions of the job,

whether or not those functions would kill or injure him." Congress did not so declare.

The term "qualified" also means "having complied with the specific requirements [for] employment." WEBSTER'S, *supra*. In accordance with that ordinary usage, section 12111(8) mandates consideration of "the employer's judgment as to what functions of a job are essential," especially as evidenced by a written job description. See 29 C.F.R. § 1630.2(n)(3). Here, Chevron prepared a description of the plant helper position that detailed, among other things, the physical demands of the job and the physical abilities a person had to have to be qualified to perform the job, including the ability to withstand exposure to hydrocarbons, solvents, and other chemicals. See *supra*, p. 5; J.A. 65-66. There is no sign that Congress meant to preclude an employer from stipulating that an element of each essential function of a position is the ability to perform it safely. See *Amego*, 110 F.3d at 143 (Congress did not intend "to preclude the consideration of essential job functions that implicate the safety of others as part of the 'qualifications' analysis").

To the contrary, the EEOC has recognized that an employer may insist that a prospective employee have qualifications that go beyond "skill, experience, [and] education" to include any other job-related requirements of the employment position, including "physical, medical, [and] safety" requirements. 29 C.F.R. § 1630.2(q); see *id.* § 1630.2(m) (a "qualified individual" is a person who "satisfies the requisite skill, experience, education, and other job-related requirements" of the position). There is no basis in the statutory language for restricting consideration of safety-related qualifications to the "qualifications standards" defense. If an employer's "physical, medical, [and] safety" requirements for a position are proper "qualification standards," as the EEOC's regulations state, then they must also be relevant to the question whether a person is "qualified" within the meaning of sections 12112(a) and 12111(8).

Accordingly, courts applying the plain language of the ADA have frequently held that individuals with disabilities are not "qualified" if they cannot perform essential job functions without seriously endangering themselves or others. See *Koshinski*, 177 F.3d at 602-603 (plaintiff with degenerative osteoarthritis was not "qualified" to operate blast furnace because "there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from"); *Amego*, 110 F.3d at 144-147 (suicidally depressed individual was not "qualified" for position dispensing dangerous drugs); *Turco* v. *Hoechst Celanese Corp.*, 101 F.3d 1090, 1093-1094 (5th Cir. 1996) (diabetic plaintiff who worked "with complicated machinery and dangerous chemicals" was not a qualified individual "due to the safety risk that he imposed upon himself and others"); *Foreman*, 117 F.3d at 809 (employee's "pacemaker rendered him medically unqualified to perform th[e] essential function" of working close to power lines and welding equipment that would interfere with the pacemaker's operation); *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284, 1292, 1294 (10th Cir. 2000) (employee "who worked with explosives" and "threatened suicide and perhaps injury to others" was not "qualified").

B. To Be "Qualified," Individuals Must Show That They Can Perform Essential Job Functions Safely.

That a disabled individual who would be injured or killed performing a job is not "qualified" for the position is strongly confirmed by Rehabilitation Act regulations and caselaw, on which the ADA was closely modeled. H.R. Rep. Pt. 3, 1 Leg. Hist. 485 (the ADA "is based on the same standard for 'qualified' person with a disability that has existed for years under the Rehabilitation Act"); see also 1 Leg. Hist. 71, 100, 124, 328; 42 U.S.C. § 12201(a); 29 U.S.C. § 794(d); Statement of President George Bush, 1990 U.S.C.C.A.N. 601 (July 26, 1990) ("existing language and standards from the Rehabilitation Act were incorporated into the ADA"); *Bragdon*, 524 U.S. at

645 (relying on "administrative and judicial interpretation" of the Rehabilitation Act to construe the ADA); Chai Feldblum, *supra*, 64 TEMP. L. REV. at 542-543 (the ADA's "guiding principle * * * was to track the section 504 approach," in particular "section 504 regulations and caselaw").

Section 504 of the Rehabilitation Act protects from discrimination any "otherwise qualified individual with a disability." 29 U.S.C. § 794. As under the ADA, to be "otherwise qualified" under the Rehabilitation Act a disabled person must be able to "perform 'the essential functions' of the job in question." *Arline*, 480 U.S. at 287 n.17; see 29 C.F.R. § 1614.203(a)(6). Prior to passage of the ADA, this Court held that a person who cannot perform a job without posing a "significant risk" to health and safety "will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." *Arline*, 480 U.S. at 287 n.16; see also *Chiari* v. *League City*, 920 F.2d 311, 316-317 (5th Cir. 1991) (under the Rehabilitation Act, "a significant risk of personal injury" that cannot be eliminated renders a person not "otherwise qualified"). Likewise, since 1978 the EEOC's regulations interpreting section 504 have defined a "qualified individual" to exclude a person who cannot "perform the essential functions of the position in question without endangering the health and safety of the individual or others." 43 Fed. Reg. 12293, 12295 (Mar. 24, 1978); 29 C.F.R. § 1614.203(a)(6) (2001). It was thus well settled prior to passage of the ADA that a person who posed a safety risk to himself or others was not "otherwise qualified" under the Rehabilitation Act. More recent cases take the same approach. *E.g.*, *Knapp*, 101 F.3d at 482-485; *Chandler* v. *Dallas*, 2 F.3d 1385, 1393-1395 (5th Cir. 1991).

Courts also have long held that it is the job applicant who has the burden under the Rehabilitation Act to prove that he or she was "otherwise qualified" for the position in question. See, *e.g.*, *D'Amico* v. *New York*, 132 F.3d 145, 149 (2d Cir. 1998) (a

Rehabilitation Act "plaintiff bears the ultimate burden of proving by a preponderance of the evidence that he is qualified for the position") (citing *Teahan* v. *Metro-North Commuter R.R.*, 951 F.2d 511, 515 (2d Cir. 1991)); *Doe* v. *New York Univ.*, 666 F.2d 761, 774, 777-779 (2d Cir. 1981) ("a plaintiff must prove * * * that she is 'otherwise qualified' for the position sought" and failed to do so when she "pose[d] a significant risk of harm to [herself] or others"); *Chiari*, 920 F.2d at 315-317 (a plaintiff "must prove that * * * he is 'otherwise qualified' to be a construction inspector" and failed to do so when the evidence showed that because of his Parkinson's disease he would be at "significant risk of personal injury" and also endanger others); *Strathie* v. *Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) (plaintiff "bears the ultimate burden of proof" as to "whether [plaintiff] is 'otherwise qualified'"); *American Fed'n of Gov't Employees* v. *Skinner*, 885 F.2d 884, 897 (D.C. Cir. 1989) (same).

Congress intended to adopt in the ADA the burdens of proof established under the Rehabilitation Act. See S. Rep., 1 Leg. Hist. 136 ("The Committee intends that the burden of proof * * * be construed in the same manner in which parallel agency provisions are construed under Section 504 of the Rehabilitation Act"); H.R. Rep. Pt. 2, 1 Leg. Hist. 345 (same). Unsurprisingly, therefore, courts interpreting the ADA have imposed the burden on plaintiffs to prove that they are "qualified" under section 12112(a) and 12111(8). See, *e.g.*, *Koshinski*, 177 F.3d at 602-603 (the "plaintiff bears the burden of establishing that he is a 'qualified individual with a disability'" and had not done so where "there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from"); *Amego*, 110 F.3d at 142-143 ("It is generally accepted that, in a Title I [ADA] case, the plaintiff bears the burden of showing she is a 'qualified' individual," including the burden "to show that he or she is qualified in the sense of not posing a direct threat");

Borgialli, 235 F.3d at 1292; *Turco*, 101 F.3d at 1093-1094; *Foreman*, 117 F.3d at 810.

This allocation of the burden of persuasion to the plaintiff seeking compensatory and punitive damages is consistent with the longstanding rule that the burden on an issue lies "upon him who must assert it as the ground of the recovery which he seeks." *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 110 (1941). The ADA plaintiff has access to information relevant to his own medical condition (see *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 626 (1993)), and is properly allocated the burden of proof on all elements of his cause of action.

C. Echazabal Failed To Satisfy His Burden To Prove That He Is A Qualified Individual.

Consistent with these precedents, Echazabal had the burden to prove that, at the time Chevron denied him employment, he was a "qualified individual" within the scope of ADA sections 12112(a) and 12111(8). In order to meet that burden, Echazabal had to show that there was evidence, reasonably available to Chevron when it made its decision, demonstrating that he could perform the essential functions of the job without posing a significant risk of serious injury to himself or to others.

As we have explained in Part I.E, *supra*, Echazabal produced *no* medical evidence reasonably available to Chevron when it made its decision that casts doubt on the conclusions of Echazabal's own physician and three experienced Chevron doctors that Echazabal's life would be endangered by working with hydrocarbons and solvents. Two years after he was denied a job, Echazabal produced declarations of two physicians, hired for purposes of this litigation, who disagreed with Chevron's and Echazabal's doctors. Those litigation reports were not available to Chevron when it made its decision not to hire Echazabal. Every medical opinion that was "relied upon and available to Chevron" at that time concluded that "any

exposure" to the toxins in the refinery would put Echazabal at "immediate" and "serious" risk. J.A. 185.

In these circumstances, Echazabal failed to meet his burden to demonstrate that he was a "qualified individual" with respect to the plant helper job. Because he failed to bring himself within the scope of the ADA's protections in the first place, the section 12113 defense does not come into play. Even if Echazabal had brought himself within the Act, Chevron amply made out a "qualification standards" defense under section 12113, as we demonstrated above. See *supra*, Part I.E.

CONCLUSION

The judgment of the court of appeals should be reversed.[17]

Respectfully submitted.

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[17] Because the Ninth Circuit's erroneous interpretation of the ADA infected its ruling as to each count (see *supra*, p. 13 n.7), this Court should reverse as to *all* of Echazabal's claims.

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DECEMBER 2001

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No. 00-1406

In The

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Americans with Disabilities Act permits an employer to deny a job to an individual with a disability who is able to perform all essential job tasks and who poses no threat to the health or safety of others, but who the employer believes will be harmed by the job at issue.

SEQ 003 JOB 11260IN3- 000-01 PAGE-002 MINSKY
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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

SEQ 006 JOB 11260IN3-000-01 PAGE-005 MINSKY
REVISED 31JAN02 AT 07:51 BY DW DEPTH: 44 PICAS WIDTH 28 PICAS

TABLE OF AUTHORITIES – Continued

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EQ 007 JOB 11260IN3• 000-01 PAGE-006 MINSKY
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TABLE OF AUTHORITIES – Continued

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SEQ 039 JOB 11260IN4 000-02 PAGE-008 MINSKY
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TABLE OF AUTHORITIES – Continued

Page

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SEQ 010 JOB 11280BA2- 000-02 PAGE-001 MINSKY
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STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Americans with Disabilities Act are reproduced in an appendix to this brief.

STATEMENT

A. Chevron's Exclusion of Echazabal

This case involves Chevron's admittedly disability-based decision to exclude Mario Echazabal in early 1996 from employment at its El Segundo, California, refinery – a decision that was motivated solely by the fear that Echazabal himself would suffer harm on the job in the future. The issue first arose in 1992, when Echazabal applied for a job with Chevron in the coker unit of the El Segundo refinery. J.A. 117. When he filed that application, Echazabal had worked at the refinery since 1972 (with a three-year break from 1976 through 1978), albeit for various contractors retained by Chevron rather than for the company itself. J.A. 117. During that time – and "steadily for approximately 12 to 13 years" – Echazabal had worked primarily at the coker unit. J.A. 117.

When Echazabal applied to Chevron in 1992, the company extended him an offer of employment conditioned on the results of a physical examination. J.A. 118. Philip Baily, the company doctor who performed the examination, concluded that Echazabal had an uncorrectable liver abnormality and should not be exposed "to solvents or other liver toxic chemicals in order not to exacerbate [that] problem." J.A. 157. Baily reached that conclusion on the basis of blood tests that showed elevated levels of three specific enzymes that are released into the bloodstream when liver cells are damaged. J.A. 158. But Baily made no attempt to ascertain what specific

SEQ 011 JOB 11260BA2+000-02 PAGE-002 MINSKY
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hepatotoxic substances were present in the refinery, at what levels, nor did he seek to determine whether those substances, at those levels, would be harmful to a person with Echazabal's condition. J.A. 159-160. He simply determined that Echazabal should not be exposed to *any* hepatotoxins or solvents, J.A. 157-160, and Echazabal was never hired, J.A. 197.

Although Chevron refused to place Echazabal on its payroll, it made no effort to remove Echazabal from his position working for Chevron's contractor in the coker unit. J.A. 118. Echazabal thus remained in the same position as before, exposed to the same substances to which he would have been exposed had Chevron hired him. J.A. 109, 118.[1] In the meantime, Echazabal sought medical treatment. J.A. 118. His blood tests continued to show high levels of enzymes released due to liver damage, and his doctors ultimately identified an infection with the Hepatitis C virus as the source of the problem. J.A. 124.[2]

In the fall of 1995, Chevron advertised openings for "plant helpers" in its El Segundo coker unit. J.A. 53-54. Echazabal applied for this job and Chevron again

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[1] In 1994, Echazabal transferred to a plantwide "fire watch" position for the same contractor. J.A. 117. In that position, Echazabal worked throughout the refinery, including in the coker unit. *Ibid.*

[2] In April 1993, after it had become clear that Echazabal's enzyme levels were persistently high, but before Hepatitis C had been identified as the source of the problem, one of Echazabal's doctors, Nga Ha, informed Chevron that Echazabal was now "capable of carrying on with the work that he has applied for and there is no restriction on his activity at work as outlined by the working condition sheet GO-308 that was sent to me." J.A. 123. Chevron took no action to hire Echazabal after this letter, however.

SEQ 012 JOB 11260BA2-000-02 PAGE-003 MINSKY
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extended him an offer of employment conditioned on the results of a physical examination. J.A. 55-56. In early January 1996, Kenneth McGill (who had replaced Baily as the company doctor), performed the examination. J.A. 38. McGill was a self-described "generalist" with no board certification whatsoever, who was "doing industrial medicine just through self-training." J.A. 134; see also J.A. 36-37 (summarizing McGill's resume). He concluded that exposure to the hydrocarbons and other hepatotoxic substances at the refinery "could be fatal" to Echazabal – whether through a single, catastrophic exposure as might result from an explosion or fire, or on the basis of small exposures over time. J.A. 39-40.[3]

McGill reached this conclusion without knowing what specific chemicals were present, at what levels, in the coker unit environment. J.A. 131-132, 139. He did not consult the refinery's industrial hygiene department or anyone else to determine "what the actual exposures would be to somebody employed as a plant helper working at the coker." J.A. 132-133. Nor did he attempt to determine what level of hydrocarbon exposure would be safe for an individual with Echazabal's condition – despite the fact that hydrocarbons are ubiquitous in the environment. J.A. 108, 140-141. Nor, despite his lack of

[3] As for the long-term risk based on small exposures, McGill could not predict when that risk might eventuate, if ever. See J.A. 141 (declining to identify any "specific period of time" in response to a question whether the risk would eventuate in "Three weeks? Three months? Three years? Three decades?"). The most McGill could say was his response when asked whether he thought Echazabal's "liver condition would change in any manner if he continued to work in the refinery for the rest of the year 1996": "Yes, I thought it could." J.A. 142.

SEQ 013 JOB 11260BA2-000-02 PAGE-004 MINSKY
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training and experience in the area, did McGill contact a doctor knowledgeable in liver disease.[4] Based solely on McGill's recommendation, which McGill cleared with Chevron's medical director in San Francisco, J.A. 44, the human resources manager at the El Segundo refinery decided in early February 1996 to withdraw the conditional offer of employment. J.A. 32-33. The manager, William Saner, did not know what chemicals were present, in what concentrations, at the coker unit. J.A. 143-144, 148-152.

After Chevron rescinded the job offer, the company requested that Irwin Industries (the contractor for whom

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[4] McGill did contact Zelman Weingarten, the HMO physician then assigned to Echazabal – though McGill did so only *after* he had decided that Echazabal should not work in the refinery. J.A. 142-143. McGill informed Weingarten generally that Echazabal sought a position that "may entail exposure to hepatotoxic hydrocarbons." J.A. 97; see also J.A. 164 (McGill stating that, in telephone conversation with Weingarten, McGill "had verbally either read the paragraph in my letter or paraphrased it asking him to respond to our concern"). Weingarten responded, equally generally, in two sentences: "In your letter, it is mentioned that Mr. Echazabal has applied for return of his job and it [is] mentioned that 'this may entail exposure to hepatotoxic hydrocarbons.' This, of course, is recommended not to be the case." J.A. 98; see also J.A. 142 (stating that, in telephone conversation, Weingarten made "[t]he same statement that's in his letter"). But Weingarten did not state that exposure to the hydrocarbons at the refinery – the identity and concentrations of which he could not have known – would pose a significant risk to Echazabal's health. His statement is entirely consistent with a simple desire that, all other things being equal, his patient would generally take a conservative approach to avoiding unnecessary exposures to hydrocarbons. Because Chevron is the party that moved for summary judgment, this ambiguity must be resolved in Echazabal's favor.

EQ 014 JOB 11260BA2- 000-02 PAGE-005 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.07 PICAS WIDTH 28 PICAS

Echazabal was then working) "immediately remove Mr. Echazabal from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." J.A. 58. In response, Irwin sent Echazabal to be examined at the office of Dr. Brian Tang. J.A. 119-120. Tang determined on the basis of the elevated liver enzyme levels that Echazabal should not work in a position in which he would be exposed to any amount of any hepatotoxic substances. J.A. 80-82, 87, 89, 92-93. Like Chevron's doctors, Tang did not determine which precise hepatotoxins were present, in which concentrations, in the refinery, for he believed that even "trace amounts could blow out [Echazabal's] liver." J.A. 87. But he could not quantify the probability that Echazabal would experience such a harmful result, J.A. 86-88, or even put a general time frame on when it might occur. J.A. 83-84. Nonetheless, Irwin removed Echazabal from the refinery in late February 1996. J.A. 198.

B. What a Reasonable Inquiry Would Have Revealed

In early 1997, Echazabal filed this suit in state court. The complaint alleged, *inter alia*, that Chevron's 1996 decision to exclude Echazabal from the refinery violated the Americans with Disabilities Act (ADA). J.A. 15-16. Chevron removed the suit to federal court and soon moved for summary judgment. J.A. 1. On the ADA claim, Chevron's motion argued that the company was entitled to exclude Echazabal because his employment would pose a "direct threat" to his own health or safety. J.A. 184 & n.6.

In response, Echazabal presented declarations from two expert witnesses to describe what Chevron would

EQ 015 JOB 11260BA2- 000-02 PAGE-006 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 29 PICAS

have learned had it examined information in its own possession regarding the hepatotoxins in its coker unit and conducted an inquiry into medical knowledge available at the time of its 1996 decision to exclude him from the refinery. J.A. 99-116. One of these experts, Marion Fedoruk, was a physician board certified in Occupational Medicine, Industrial Hygiene, and Toxicology who had taught at several medical and public health schools. J.A. 99-100. The other, Gary Gitnick, was chief of the Division of Digestive Diseases at the UCLA School of Medicine and a leading authority on liver disease who had been a member of an early research team that described the "non-A, non-B hepatitis later known as hepatitis C." J.A. 110-111. Fedoruk and Gitnick testified that Chevron could not reasonably have concluded that Echazabal would pose a risk to himself in the coker unit. J.A. 99-116.

Fedoruk and Gitnick made two major points. The first concerned Echazabal's liver function. Although Hepatitis C begins to cause damage to liver cells soon after infection, a chronic case like Echazabal's can take decades before it impairs liver *function*. J.A. 101, 112. The persistently high levels of enzymes in Echazabal's blood indicated that cells in Echazabal's liver were continuing to be injured – that is, that Echazabal had a *chronic* case of Hepatitis C. J.A. 102, 113-114. But those enzyme levels could not indicate whether his liver was *functioning* properly in eliminating toxins from the body. J.A. 102, 113-114. Rather, tests of blood albumin levels and prothrombin time (the time it takes blood to form clots) represent "the best and only true indicators of liver function." J.A. 113.[5]

[5] Relying on a web page that is not in the record, Chevron states that the NIH has "warn[ed]" against reliance on albumin

EQ 016 JOB 11260BA2-000-02 PAGE-007 MINSKY
EVISED 31JAN02 AT 07:56 BY DW DEPTH: 44 PICAS WIDTH 28 PICAS

Those tests consistently showed "that Mr. Echazabal's liver is functioning properly." J.A. 113; see J.A. 101, 114. Gitnick thus concluded that "Mr. Echazabal's liver is as capable of detoxifying or metabolizing toxins that enter his body as is any other person['s]" and that "Mr. Echazabal is in no greater risk of injuring himself and specifically his l[i]ver by working in the refinery than other employee[s]." J.A. 115.

The second point concerned the level of hepatotoxins present in the refinery generally and the coker unit specifically. A number of substances at the refinery might be dangerous to Echazabal's (or any employee's) liver if present in high enough concentrations. See Pet. Br. 5-7. But Fedoruk concluded, based on Chevron's own records and information available at its refinery, that *none* of these substances were present in high enough concentrations to cause a significant risk to Echazabal or any other employee. J.A. 102-110. He also concluded that Echazabal faced no greater risk from catastrophic exposures such as fires and explosions than did any other employee. J.A. 109.

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levels and prothrombin time, because "those tests 'are normal until late-stage disease.'" Pet. Br. 9 n.5 (quoting National Digestive Diseases Information Clearinghouse, *Chronic Hepatitis C: Current Disease Management* (available at http://www.niddk.nih.gov/health/digest/pubs/chrnhepc/chrnhepc.htm)). But the NIH does not warn against using such tests to determine liver *function*; rather, it says that they should not be used to *diagnose* Hepatitis C. That is because liver function (including the ability to process toxins – the function of concern here) remains normal until late-stage disease. See National Digestive Diseases Information Clearinghouse, *supra*.

EQ 017 JOB 11260EA2- 000-02 PAGE-008 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

C. The District Court and Court of Appeals Opinions

The district court recognized that the Fedoruk and Gitnick declarations "rais[ed] a genuine issue that despite elevated liver enzyme levels, plaintiff's liver function was normal, and that the substances to which he would be exposed in the position of plant helper posed no greater a danger to Echazabal than to other workers." J.A. 186. But because those declarations were not prepared "until after the acts by Chevron and Irwin complained of by plaintiff," J.A. 186, the district court held that they could not be considered to rebut the testimony of Dr. McGill, on whose opinion Chevron had relied in rejecting Echazabal. J.A. 186-190. Accordingly, the district court granted summary judgment to Chevron. J.A. 190.

On appeal, Echazabal argued that the district court had improperly excluded the Fedoruk and Gitnick declarations, which declarations established that he would not have posed a significant risk to his own health or safety had he continued working at the refinery. But the court of appeals did not reach that question, because it concluded that the ADA does not permit an employer to exclude an individual with a disability based on a fear of on-the-job harm to that individual. J.A. 207-212. It accordingly reversed the grant of summary judgment to Chevron. J.A. 212. Judge Trott dissented. J.A. 213-217.

SUMMARY OF ARGUMENT

I. This case presents the question whether an employer may refuse to hire an individual with a disability because it believes that his disability poses too great a risk to his *own* health or safety. When Congress adopted the Americans with Disabilities Act, it specifically

SEQ 018 JOB 11260BA2-000-02 PAGE-009 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

rejected any such threat-to-self justification for excluding individuals with disabilities. The "direct threat" defense of 42 U.S.C. § 12113(b) is by its terms limited to cases in which the excluded individual "pose[s] a direct threat to the health or safety of *other individuals* in the workplace." 42 U.S.C. § 12113(b) (emphasis added). This language marks a significant departure from the EEOC's prior regulations implementing the Rehabilitation Act. By removing safety risk questions from the "qualified individual" prong of the plaintiff's case, and expressly limiting any safety risk defense to cases involving risks to others, Congress plainly rejected the EEOC's earlier approval of exclusions of individuals with disabilities based on risks they may pose to themselves.

Congress's rejection of a threat-to-self defense reflects a general prohibition on paternalistic discrimination. Like similar restrictions imposed on women, restrictions imposed on individuals with disabilities for their own "protection" have historically been a significant means by which those individuals have been deprived of opportunities. In its jurisprudence under Title VII of the Civil Rights Act of 1964, this Court has held that employers may not exclude women based solely on concerns for their own safety. The ADA adopts the same rule in the context of disability discrimination. Congress made no exception for cases in which an employer's paternalistic concern for the safety of an individual with a disability rests on a purportedly individualized medical judgment.

II. Chevron relies on the ADA's general defense for "qualification standards" that are "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). But the general "qualification standards" defense, of which the

SEQ 019 JOB 11260BA2-000-02 PAGE-010 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

"direct threat" defense is a subset, cannot be read to undermine the specific limitations that Congress wrote into the "direct threat" provision. To recognize this is not, contrary to Chevron's argument, to ignore the inclusive language of the direct threat provision. It is simply to recognize that inclusive language is not necessarily all-inclusive. Whatever else it embraces, the general "qualification standards" defense cannot justify an employer's decision to single out an individual with a disability for exclusion based on risks he poses to himself, for that would render meaningless the specific threat-to-others limitation that Congress carefully placed in the direct threat provision.

Even if Congress had not foreclosed a threat-to-self defense in the "direct threat" provision, the ADA's text and structure would not permit Chevron to assert such a defense under the general "qualification standards" provision. First, Congress limited the "business necessity" defense to cases where the application of *neutral* selection criteria screens out an individual with a disability. There is no business necessity defense to disparate treatment, as occurred here when Chevron concluded, solely because of his disabling impairment, that Echazabal posed too great a risk to be hired. Second, the impact of injuries and absences necessarily varies greatly from business to business, and the ADA requires any business necessity defense to be established on a job-specific, employer-specific basis. But Chevron has made no attempt to explain why a no-threat-to-self condition is necessary to serve the interests of its particular business. Finally, Chevron's fears of liability for hiring an individual like Echazabal are groundless.

For all of these reasons, the EEOC regulation that adopts a threat-to-self defense is not a permissible construction of the statute. Even under that regulation, however, Chevron was not entitled to summary judgment. The record makes clear that Chevron did not conduct the required inquiry into the most current medical knowledge and the best available objective evidence when it decided to exclude Echazabal. Had Chevron conducted such an inquiry, it would have been forced to conclude that Echazabal faced no significant risk from working at the coker unit.

III. There is no doubt that Echazabal is a "qualified individual with a disability." The ADA defines "qualified individual" solely in terms of an individual's current ability to perform tasks that are required of incumbents in the job he seeks. Echazabal was fully capable of performing all of the job tasks of the position for which he applied in the coker unit. The chance that he might, at some indeterminate point in the future, become unable to perform those tasks because of a workplace illness simply has no place in the "qualified individual" inquiry.

ARGUMENT

I. In Crafting the "Direct Threat" Provision, Congress Plainly Rejected Any Defense Based on a Risk to the Employee's Own Health or Safety

A. The ADA's Text Makes Plain the Decision to Eschew any Threat-to-Self Defense

Title I of the ADA generally prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). On its face, this prohibition clearly

EQ 021 JOB 11260BA2-000-02 PAGE-012 MINSKY
EVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

embraces Chevron's exclusion of Echazabal from employment based solely on his chronic liver disease – an impairment that Chevron has conceded for present purposes to be a "disability" (Pet. Br. 3 n.1). In defense of that action, Chevron invokes the EEOC's regulation that permits an employer to exclude an individual with disabilities who "pose[s] a direct threat to the health or safety of *the individual* or others in the workplace." 29 C.F.R. § 1630.15(b)(2) (emphasis added). But that regulation is squarely inconsistent with the statute it purports to implement. When Congress crafted the *statutory* "direct threat" provision – which permits an employer to exclude an individual with disabilities who "pose[s] a direct threat to the health or safety of *other individuals* in the workplace," 42 U.S.C. § 12113(b) (emphasis added) – it plainly rejected discrimination based on an asserted threat to the individual with disabilities himself.

1. As this Court has observed, Congress modeled the ADA to a significant extent on the Rehabilitation Act of 1973 and its implementing regulations. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998). Contrary to Chevron's suggestion (Pet. Br. 19-20), however, Congress did not incorporate the prior Rehabilitation Act rules wholesale. Congress intended the new statute to "grant *at least as much* protection as provided by the regulations implementing the Rehabilitation Act." *Id.* at 632 (emphasis added) (citing 42 U.S.C. § 12201(a), which provides that nothing in the ADA "shall be construed to apply a lesser standard" than the Rehabilitation Act or its regulations). Where the ADA's provisions accord greater protection to people with disabilities than had been available under the earlier law, it is those provisions, and not prior interpretations of the Rehabilitation Act, that govern.

SEQ 022 JOB 11260BA2- 000-02 PAGE-013 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 44 PICAS WIDTH 26 PICAS

At the time the ADA was enacted, neither the Rehabilitation Act nor its implementing regulations contained any specific defense for employers who could show that an individual with a disability would pose a safety risk. Instead, the statute and regulations addressed the issue in the context of the plaintiff's obligation to prove that he was an "otherwise qualified individual with handicaps." 29 U.S.C. § 794(a) (1988). The statute itself did not define the crucial term "qualified," but it expressly excluded from the definition of "individual with handicaps" two classes of people who posed a risk to *others*: (a) alcoholics or drug abusers "whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others," 29 U.S.C. § 706(8)(B) (1988); and (b) individuals with a "currently contagious disease or infection," who, "by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals," 29 U.S.C. § 706(8)(C) (1988).[6]

These two provisions aside, the Rehabilitation Act contained no more general discussion of safety risks in employment, and the implementing regulations adopted by various federal agencies differed in their treatment of the question. For purposes of employment *by agencies of the federal government itself*, EEOC regulations defined "qualified handicapped person" to mean "a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in

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[6] The latter provision effectively codified *School Board v. Arline*, 480 U.S. 273, 287 n.16 (1987) ("A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.").

EQ 023 JOB 11280BA2- 000-02 PAGE-014 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

question without endangering the health or safety of *the individual* or others." 29 C.F.R. § 1613.702(f) (1990) (emphasis added). As Chevron's amicus points out, a number of lower-court cases paid lip service to the EEOC's threat-to-self disqualification (see Chamber Br. 13), though none of the cited cases actually upheld the exclusion of an individual based solely on a threat he posed to himself.

In contrast to the EEOC, regulations issued by the Departments of Justice, Labor, and Health and Human Services to govern employment *by recipients of federal financial assistance* contained no such "health or safety of the individual" language. They simply defined "qualified handicapped person" to mean "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 28 C.F.R. 42.540(*l*)(1) (1990) (Department of Justice); accord 45 C.F.R. § 84.3(k)(1) (1990) (Department of Health and Human Services); see also 29 C.F.R. § 32.3 (1990) (Department of Labor) (similar "essential functions" language).

2. Given this unsettled background, Congress could not simply have carried forward prior understandings of the Rehabilitation Act, for there was no single, consistent understanding of how the statute treated safety risks. Instead, Congress chose to address the issue of safety risks squarely in the text of the ADA. It did so in a way that plainly foreclosed a threat-to-self defense.

First, Congress added a new definition of "qualified individual with a disability." 42 U.S.C. § 12111(8). That provision tracked the Rehabilitation Act regulations of the Departments of Justice, Labor, and Health and Human Services – but *not* those of the EEOC – by defining "qualified" solely in terms of the ability to "perform

EQ 024 JOB 11260BA2- 000-02 PAGE-015 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

the essential functions" of the job. *Ibid.* Congress thus largely removed considerations of potential safety risks from the "qualified individual" element of the plaintiff's case and instead required the plaintiff to show only that he is capable of performing the tasks required of employees in the position he seeks. See Part III, *infra.*

Second, Congress added a new "direct threat" provision that explicitly permitted employers to justify discrimination based on purported safety risks, but only as an affirmative defense. See 42 U.S.C. § 12113(b). Congress limited application of that defense to instances where the employer could show a "significant risk" that could not "be eliminated through reasonable accommodation." 42 U.S.C. § 12111(3). And most pertinent here, it eliminated the language of the prior EEOC regulations that permitted discrimination against an individual who posed a risk to *his own* safety. Instead, Congress limited the safety risk defense to those individuals who would "pose a direct threat to the health or safety of *other individuals* in the workplace." 42 U.S.C. § 12113(b) (emphasis added). Congress repeated this limitation in its definition of "direct threat," which defined the term as "a significant risk to the health or safety of *others*." 42 U.S.C. § 12111(3) (emphasis added).

Congress thus plainly rejected any "threat to self" defense in the ADA. This Court has recently reemphasized that it "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language." *Chickasaw Nation* v. *United States*, 122 S. Ct. 528, 534 (2001) (internal quotation marks omitted). And this is not a case where Congress merely failed to enact a legislative proposal containing a "threat to self" defense. Congress made an affirmative

SEQ 025 JOB 11260BA2-000-02 PAGE-016 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.05 PICAS WIDTH 28 PICAS

change to the existing statutory and regulatory definitions of "qualified individual" under the Rehabilitation Act – a change that closed the definitional gap that had permitted the EEOC to define "qualified" to exclude individuals who might endanger their *own* health or safety and substituted a new statutory "direct threat" defense that was expressly limited to risks to "others." These actions are plainly inconsistent with the recognition of a "threat to self" defense in the ADA.

B. The Omission of a Threat-to-Self Defense Reflects Congress's Rejection of Paternalistic Discrimination Against Individuals with Disabilities

1. The clear textual difference between the EEOC's Rehabilitation Act regulations (which specifically permitted exclusion based on threats to self) and the ADA's "direct threat" provision (which is limited to threats to others) demonstrates that the omission of threat-to-self language from the ADA did not reflect a merely cosmetic desire to reassure the public that the statute would protect against threats to public safety. Cf. Pet. Br. 30 n.12. That omission also reflected a substantive decision that no threat-to-self defense would be permitted under the ADA. Consideration of Congress's articulated purposes for the ADA bolsters this conclusion.

As Congress recognized, restrictions placed on individuals with disabilities for their own "protection" have often led to unnecessary denial of opportunities. In the hearings that preceded enactment of the ADA, witnesses repeatedly identified paternalistic practices as one of the most significant means by which people with disabilities

SEQ 026 JOB 112608A2-000-02 PAGE-017 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 44 PICAS WIDTH 28 PICAS

had experienced disadvantage.[7] Consistent with that testimony, the statutory findings list "overprotective rules and policies" as among the "forms of discrimination" against people with disabilities that "continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2), (5).

As this Court has noted, women have also been deprived of countless opportunities because of restrictions imposed on them for their own "protection." See, *e.g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 & n.10 (1982); *Frontiero* v. *Richardson*, 411 U.S. 677, 684-685 (1973) (plurality opinion). Title VII of the Civil Rights Act

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[7] See, *e.g.*, *Americans with Disabilities Act: Hearing Before the House Committee on Small Business*, 101st Cong., 2d Sess. 126 (Feb. 22, 1990) (testimony of Arlene Mayerson) ("[L]ike women, disabled people have identified 'paternalism' as a major obstacle to economic and social advancement."); *Americans with Disabilities Act: Hearings Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation*, 101st Cong., 1st Sess. 288 (Sept. 20, 1989) [hereinafter *Public Works Hearing*] (testimony of James Gashel) ("Paternalism is the most common form of discrimination against blind people."); *Americans with Disabilities Act of 1989: Hearings Before the Senate Committee on Labor and Human Resources*, 101st Cong., 1st Sess. 12 (May 9, 1989) (testimony of Dr. I. King Jordan) ("For deaf people, the problem was not so much one of segregation, but one of paternalism and communication isolation."); see also *Americans with Disabilities Act of 1989: Hearings Before the House Committee on the Judiciary*, 101st Cong., 1st Sess. 41 (Aug. 3, 1989) (testimony of James Brady); *Public Works Hearing*, *supra*, at 49 (testimony of Justin Dart); *Americans with Disabilities Act of 1988: Joint Hearing Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources and the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong., 2d Sess. 75 (Sept. 27, 1988) (testimony of Judith Heumann).

SEQ 027 JOB 11260BA2-000-02 PAGE-018 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

of 1964 – one of the models for ADA Title I – responds to that problem by prohibiting an employer from excluding women based on concerns for their own safety. Where an employer has discriminated against women based on well-established risks to the health or safety of *others*, that conduct has often been upheld under Title VII's bona fide occupational qualification (BFOQ) defense. See *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 202-203 (1991) (citing cases); *Dothard* v. *Rawlinson*, 433 U.S. 321, 335-336 (1977) (upholding discrimination against female prison guards on ground that the likelihood of inmate assaults on such guards would pose a threat "to the basic control of the penitentiary and protection of its inmates and other security personnel"). But where an employer excludes women based solely on concerns for their *own* safety, the statute provides no defense. See *Dothard*, 433 U.S. at 335 ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."); see also *Johnson Controls*, 499 U.S. at 202 (reiterating *Dothard*'s suggestion that "danger to a woman herself does not justify discrimination"). Given Congress's recognition of the role of paternalism in limiting opportunities for people with disabilities, the omission of threat-to-self language from the ADA's "direct threat" provision plainly reflects a decision to hew to the same risk-to-self/risk-to-others distinction as applies under Title VII – for the same reasons that it applies under Title VII.

2. Contesting this point, Chevron devotes nearly six pages of its brief (Pet. Br. 34-40) to a parsing of the ADA's legislative history. But Chevron cannot overcome the fact

SEQ 028 JOB 11260BA2-000-02 PAGE-019 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 26 PICAS

that the several *specific* references to the threat-to-self issue in the legislative history confirm what the text of the statute makes clear: Because "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals," these references emphasize that "[i]t is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant." H. R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 72, 74 (1990); accord H.R. Rep. No. 485, Part 3, 101st Cong., 2d Sess. 34, 42 (1990); S. Rep. No. 116, 101st Cong., 1st Sess. 38 (1989); see also, *e.g.*, 136 Cong. Rec. S9697 (July 13, 1990) (statement of Sen. Kennedy); 136 Cong. Rec. H4623 (July 12, 1990) (statement of Rep. Owens); see also 136 Cong. Rec. E1914 (June 13, 1990) (statement of Rep. Hoyer).

Chevron suggests that Congress would not have considered an exclusion "paternalistic" if it was based on a reasonable and individualized assessment of the plaintiff's medical condition. Pet. Br. 35-38. But a decision can be paternalistic – an effort by one person to decide what is in the interest of another – without being wrong on the merits. Had Congress wished to permit paternalistic discrimination in cases where an employer could satisfy a court that the exclusion of a particular individual with a disability was medically justified, it would have included threat-to-self language in the "direct threat" provision, which requires just such an individualized medical justification. See *Bragdon*, 524 U.S. at 649 (direct threat analysis requires a risk assessment "based on medical or other objective evidence"); *Arline*, 480 U.S. at 287 (requiring an individualized assessment). Chevron's tenuous inferences from a handful of passages in the legislative

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EQ 029 JOB 11260BA2- 000-02 PAGE-020 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 44 PICAS WIDTH 28 PICAS

history[8] cannot overcome Congress's clear decision to omit such threat-to-self language from the statute.

To be sure, Congress's prohibition of paternalistic discrimination reflects a conclusion that such conduct is often "*over*protective" – that it often rests on an incorrect assessment of the risks that individuals with disabilities would face. 42 U.S.C. § 12101(a)(5) (emphasis added). But Congress soundly decided not to permit employers to seek to persuade courts in individual cases that their

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[8] Chevron relies (Pet. Br. 36) on the statement that "[g]eneralized fear about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify a person with a disability." H.R. Rep. No. 485, Part 2, *supra*, at 74. But that passage merely emphasizes that generalized fears of self-injury are among the paternalistic concerns that may not be used to justify discrimination; it does not say that particularized fears of self-injury *may* justify discrimination. Chevron also reads two passages suggesting that employers may sometimes exclude applicants based on x-ray results (one of which refers to a risk of "substantial harm" without clarifying whether harm to self or harm to others was at issue) as supporting the existence of a threat-to-self defense (see H.R. Rep. No. 485, Part 2, *supra*, at 73), for, Chevron contends, x-rays will rarely reveal conditions that pose a risk to others (Pet. Br. 37). But x-rays will reveal some conditions, such as tuberculosis, that can pose a risk to others, and they can also reveal conditions that will prevent an employee from performing the productive functions of the job and thus make him un-"qualified." Finally, Chevron points (Pet. Br. 38) to a statement in the House Judiciary Committee report that an individual with a serious allergy to a particular paint would be entitled to demand, as a reasonable accommodation, that his employer not assign him to work with that paint. See H.R. Rep. No. 485, Part 3, *supra*, at 29. That passage says nothing about a case where the individual with a disability *seeks* to work under conditions that his employer believes would pose a risk to him. Cf. 42 U.S.C. § 12201(d).

SEQ 060 JOB 11260BA3- 000-02 PAGE-021 MINSKY
REVISED 31JAN02 AT 10:00 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

protectivist determinations were correct. Even the most "individualized" assessments of future safety risks are typically probabilistic. It is the rarest of cases in which a doctor can say, with absolute certainty, that a particular individual with a particular diagnosis *will* experience death or disabling injury within a given period of time – and none of Chevron's doctors ever made such a statement here (see pp. 1-5, *supra*). The most a physician can typically do is reach an intuitive or statistical conclusion, based on experience with other individuals with the same diagnosis in similar environments, that the individual is more likely to experience such harm. See William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 Psychol. Pub. Pol'y & L. 293, 305-309, 314 (1996). For this and other reasons, "the assessment of risk to a given applicant or employee, even by the most experienced physician, is no more than an educated guess." Mark A. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 Mich. L. Rev. 1379, 1417 (1983) (internal quotation marks omitted).

While it might be acceptable to rely on such probabilistic judgments where risks to *others* are at issue, here it is the individual with a disability himself who bears the most direct and significant costs of an incorrect determination that a job is safe for him. When an individual with a disability takes a job that his employer believes to pose a risk to him, he is not, contrary to Chevron's suggestion (Pet. Br. 29), seeking the employer's complicity in "suicide." At most, like an individual who refuses to give up fatty foods or to quit smoking, he is simply making a choice about the risks he is willing to tolerate.

SEQ 031 JOB 11260BA2-000-02 PAGE-022 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.11 PICAS WIDTH 28 PICAS

Congress sensibly trusted people with disabilities not to make suicidal decisions,[9] and it sensibly refused to permit employers to use an employee's disability as a justification for overriding his choices about the risks he is willing to accept.

II. The General "Qualification Standards" Defense Cannot Justify Singling Out an Individual for Exclusion Because of a Concern That His Disability Poses Risks to His Own Safety

A. The General "Qualification Standards" Provision May Not be Read to Undermine the Specific Limitations Congress Placed on the "Direct Threat" Defense

Chevron does not rely on the statutory "direct threat" provision to defend its exclusion of Echazabal. The company instead stakes its case on the general "qualification standards" defense in 42 U.S.C. § 12113(a), of which Section 12113(b)'s "direct threat" defense is a subset. Chevron argues (Pet. Br. 20-29) that the refusal to hire an individual whose disability will pose a significant risk

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[9] Both the record in this case and the examples cited by Chevron (Pet. Br. 21) reveal what common sense suggests: People with disabilities are no more likely than anyone else to seek employment that will kill them. See, *e.g.*, *Foreman* v. *Babcock & Wilcox Co.*, 117 F.3d 800, 803-804, 809-810 (5th Cir. 1997) (employee whose pacemaker would malfunction if he worked too close to high-voltage equipment requested, as a reasonable accommodation, that he be assigned to a position that did *not* require dangerous proximity to such equipment); *Patterson* v. *Summers*, 2000 WL 366113 (E.E.O.C. 2000) (individual with serious allergy to inks and dyes requested, as a reasonable accommodation, that he be transferred to position that would *keep him away* from those substances and permitted to use a respirator when he was required to be near them).

SEQ 032 JOB 11260BA2-000-02 PAGE-023 MINSKY
REVISED 31JAN02 AT 07:56 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

to himself is a "qualification standard[ ]" that is inherently "job-related and consistent with business necessity." *Ibid.* That argument is fundamentally flawed.

As we have shown, Congress in the "direct threat" provision squarely rejected any defense that would permit an employer to exclude an individual with a disability based solely on a threat to that individual himself. Given the specific attention Congress gave to the risk-to-self issue in crafting the direct threat provision of Section 12113(b), Congress surely did not intend to permit employers to evade the limitations of that provision by asserting a threat-to-self defense under the general "qualification standards" language of Section 12113(a). It is "a commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That is particularly true where, as here, the specific and the general provisions "are interrelated and closely positioned" as part of the same section of the statute, *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981) (*per curiam*), and applying the general provision "would undermine limitations created by a more specific provision." *Verity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996).

To recognize this point is not to disregard the inclusive language of Section 12113(b). Cf. Pet. Br. 29-33. Inclusive language is not necessarily *all*-inclusive. A provision listing examples of what Congress included can also illustrate what it excluded. For example, lower courts have consistently interpreted 42 U.S.C. § 12111(9), which provides that reasonable accommodations "*may include* . . . reassignment to a *vacant* position" (emphasis added),

SEQ 034 JOB 11260BB3- 000-03 PAGE-002 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

as implying that – whatever else the term "reasonable accommodation" includes – it does not include accommodations that would remove other employees from their jobs "in order to accommodate a disabled coworker." *E.g.*, *Eckles* v. *Consolidated Rail Corp.*, 94 F.3d 1041, 1047 (7th Cir. 1996), cert. denied, 520 U.S. 1146 (1997).

The threat-to-others language in Section 12113(b) serves a similar function. Section 12113(b)'s "direct threat" provision plainly does not set forth the *only* "qualification standard" that may be asserted under Section 12113(a). Even if it set forth the only *safety-based* qualification standard that an employer could assert, the general Section 12113(a) defense would still be available for a wide range of qualification standards employers impose for reasons of productivity rather than safety (such as a requirement that applicants be able to lift 50 pounds). And Section 12113(a) might also provide a defense for the application of safety-based selection criteria that are facially neutral (such as a requirement that applicants for a lifeguard position tread water for thirty minutes). That is the import of the inclusive language of Section 12113(b)'s "direct threat" provision. But the general "qualification standards" provision could not justify the singling out of an individual for exclusion based on a safety risk assertedly caused by his disability where the terms of the statutory "direct threat" defense are not satisfied. If it could, the limitations Congress specifically wrote into that defense would be rendered meaningless.

An analogy illustrates the point. In addition to limiting the "direct threat" defense to cases involving risks to "others," Congress also limited that defense to cases involving "significant" risks. 42 U.S.C. § 12111(3). Hiring an individual who poses an entirely fanciful risk to others

SEQ 035 JOB 11260BB3-000-03 PAGE-003 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

may, because of the irrational fears of co-workers, harm company morale and impair workplace efficiency. Cf. Pet. Br. 22-23 (arguing that harms to morale and efficiency justify a threat-to-self defense). But surely an employer could not justify exclusion of an individual who posed an insignificant risk under the general "qualification standards" defense, for to do so would render meaningless the specific "significant risk" limitation Congress carefully placed in the "direct threat" provision. So too with individuals who pose risks only to themselves: To permit discrimination against such individuals would render meaningless the specific threat-to-others limitation Congress carefully placed in the "direct threat" provision.

Indeed, Chevron's broad interpretation of the "qualification standards" provision turns the Section 12113(b) direct threat provision into nothing more than surplus language. If the refusal to hire someone whose disability poses a direct threat to *himself* can always be justified under Section 12113(a)'s general language as a "qualification standard" that is "job-related and consistent with business necessity," then the refusal to hire someone whose disability poses a direct threat to *others* can be justified in exactly the same way. Employers plainly have a stronger business interest in preventing their employees from creating risks to others than they do in protecting individual employees from themselves. See *Johnson Controls*, 499 U.S. at 202-203; *Dothard*, 433 U.S. at 335. It is a substantial strike against Chevron's broad reading of the general qualification standards provision that such a reading would "in practical effect render" the specific and carefully crafted direct threat provision "entirely superfluous." *TRW Inc.* v. *Andrews*, 122 S. Ct. 441, 447 (2001).

SEQ 036 JOB 11260BB3- 000-03 PAGE-004 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.08 PICAS WIDTH 26 PICAS

B. By Its Terms, the General "Qualification Standards" Defense Does Not Apply to an Employer's Decision to Single Out an Individual with a Disability for Exclusion Based on Asserted Safety Risks

Even if Congress had not addressed the question in the "direct threat" provision, an employer still could not use the general "qualification standards" defense to justify the kind of conduct Chevron engaged in here – intentional exclusion of an individual with a disability because of a concern that his disability created a risk to himself. The statute makes clear that Section 12113(a)'s "qualification standards" provision affords a "business necessity" defense only for neutral selection criteria that incidentally exclude individuals with disabilities. That provision affords no defense for an employer's decision to single out an individual for exclusion on the basis of his disabling impairment.

1. Chevron's exclusion of Echazabal was a classic case of disparate treatment. Although the motivation for that exclusion may have been to protect Echazabal's safety, his diagnosis with a disabling impairment was the *only* reason that Chevron believed Echazabal would be in danger. Chevron's action "does not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's [diagnosis with a disabling impairment] would be different." *City of Los Angeles, Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978) (internal quotation marks omitted).[10] Chevron

[10] Chevron's attempt to distinguish *Johnson Controls* (Pet. Br. 37 n.15) thus fails. The conclusion that the employer had engaged in disparate treatment was the linchpin of the *Johnson Controls* Court's analysis. See 499 U.S. at 197-200.

SEQ 037 JOB 11250863-000-03 PAGE-005 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.08 PICAS WIDTH 28 PICAS

thus violated the ADA's general prohibition on discriminating against an individual "because of the disability of such individual." 42 U.S.C. § 12112(a); see also 42 U.S.C. § 12112(b)(1) (prohibiting actions "that adversely affect[ ] the opportunities or status of" an applicant or employee "because of" that individual's disability). This is true even if Hepatitis C is not invariably a statutory "disability." *Echazabal's* Hepatitis C is a "disability," Chevron has conceded, so the company's exclusion was plainly "because of" an "impairment" – that disease – that "substantially limits one or more of the major life activities of [Echazabal as an] individual." 42 U.S.C. § 12102(2)(A); see *Arline*, 480 U.S. at 278, 281-286 (exclusion based on feared risks of contagion was "solely by reason of [plaintiff's] handicap" under the then-current language of the Rehabilitation Act, when plaintiff's infection with a "handicap"-ing case of tuberculosis was the sole basis for the fear of contagion).

The ADA Title I provisions that prohibit discrimination "because of" disability, Sections 12112(a) and 12112(b)(1), contain no exception for discrimination that is "job-related and consistent with business necessity." Such an exception appears only in the statute's screening-out provision, which defines discrimination to include (42 U.S.C. § 12112(b)(6) (emphasis added)):

> using qualification standards, employment tests or other selection criteria that *screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

SEQ 119 JOB 11260BB4- 000-04 PAGE-006 MINSKY
REVISED 31JAN02 AT 11:11 BY DW DEPTH: 43.07 PICAS WIDTH 28 PICAS

This provision targets cases where a generally applied, facially neutral job criterion has the effect of denying an opportunity to an individual with a disability. Congress's use of the term "screen out" (instead of the "because of" language that appears in the disparate treatment provisions) makes this clear. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 428 n.3 (1971) (using "screen out" language in describing practices that have the *effect* of excluding particular individuals or classes). The paradigm case is of "a physical criterion that an applicant be able to lift fifty pounds." H.R. Rep. No. 485, Part 2, *supra*, at 56. Such a criterion does not reflect disparate treatment, for the question whether an applicant has a disabling impairment plays no part in the employer's decisionmaking process – unlike here, where the employer believed the plaintiff disqualified solely because of his diagnosis with such an impairment. But the criterion may nevertheless exclude an individual who, as a result of a disability, is unable to satisfy it. The screening-out provision in Section 12112(b)(6) makes clear that such an exclusion is unlawful under the ADA unless the criterion is job-related and consistent with business necessity.

As both Chevron and the Solicitor General recognize (Pet. Br. 3, 17; U.S. Br. 8-9), the Section 12113(a) "qualification standards" defense walks in tandem with Section 12112(b)(6)'s screening-out prohibition. Both provisions extend only to cases involving an application of "qualification standards, tests, or selection criteria." And both provisions use the "screen out or tend to screen out" language of discriminatory effect rather than the "because of" language of the statute's disparate treatment provisions. Section 12113(a) adds to the earlier provision by clarifying that the showing of job-relatedness and business necessity is a "defense" on which the employer

SEQ 039 JOB 11260883- 000-09 PAGE-007 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.08 PICAS WIDTH 29 PICAS

bears the burden of proof. 42 U.S.C. § 12113(a). Had Congress not made that clarification, courts might well have concluded, in light of this Court's holding in *Wards Cove Packing Co., Inc.* v. *Atonio*, 490 U.S. 642, 659 (1989) (plaintiff bears the burden of persuasion on the business justification issue in a Title VII disparate impact case), that the burden of proof on that issue rested on the plaintiff. Section 12113(a) thus simply establishes the burden of proof on the "business necessity" issue in a case where an individual has been screened out by a facially neutral qualification standard. It provides no defense for disparate treatment. The EEOC's own regulations appear to recognize this point. See 29 C.F.R. § 1630.15(b)(1), (c) (limiting "business necessity" defense to cases of discriminatory effect); 29 C.F.R. Pt. 1630 App. (interpretive guidance to § 1630.15(b) and (c) headed "Disparate Impact Defenses").

2. This is not a mere technical point. Instead, it shows why Chevron's actions lie near the heart of the conduct Congress sought to prohibit in the ADA. As Congress was aware, "the fear of injury, as well as increased insurance or worker's compensation costs" – precisely the fears on which Chevron relies (Pet. Br. 23-24) – are "common barriers to employment for persons with disabilities." H.R. Rep. No. 485, Part 3, *supra*, at 31. Such fears may well be justified for various classes of people with disabilities in the aggregate. See Craig Zwerling, et al., *Occupational Injuries among Workers with Disabilities*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 315, 325 (Peter David Blanck, ed., 2000) (results of four nationally representative studies "strongly support" the conclusion that "workers with a range of disabilities are at increased risk for occupational

SEQ 040 JOB 11260BB3- 000-03 PAGE-008 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 44 PICAS WIDTH 28 PICAS

injuries"). But they will not eventuate for all of the *individuals* in those classes. If employers had been permitted to rely on generalizations about the likely injury costs that would attend hiring people with particular impairments as a "business necessity" justification for excluding them, the ADA's protections would have been eviscerated – as the statute's key supporters recognized.[11] Cf. *Morse* v. *Republican Party of Virginia*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring in the judgment) (concluding that Voting Rights Act covers political parties because "[i]n 1965, to have read this Act as excluding all political party activity would have opened a loophole in the statute the size of a mountain").

Accordingly, when Congress crafted the ADA's general nondiscrimination provision, it used language that, like the language of Title VII, is unambiguously "focus[ed] on the individual." *Manhart*, 435 U.S. at 708; compare *ibid.* ("The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.") (quoting 42 U.S.C. § 2000e-2(a)(1); emphasis in *Manhart*), with 42 U.S.C. § 12112(a) (making it unlawful to "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

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[11] See 136 Cong. Rec. H4624 (July 12, 1990) (statement of Rep. Edwards); 136 Cong. Rec. S9697 (July 13, 1990) (statement of Sen. Kennedy).

SEQ 041 JOB 11260BB3-000-03 PAGE-009 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

privileges of employment") (emphasis added). This language prohibits employers from excluding people with a given disabling impairment based on the probabilistic risks faced by all individuals with the same diagnosis. As under Title VII, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 708.

This case provides a perfect example of what Congress sought to prohibit. Although Chevron claims to have engaged in an "individualized" analysis (Pet. Br. 35), *none* of its witnesses could testify that Echazabal was certain to experience a debilitating illness or death as a result of working at the refinery. The most credentialed witness to whom Chevron points, Dr. Tang, could not even state that there was anything more than a one per cent chance of such a result, and he could not say whether it would occur in "a few hours" or in "months and years." J.A. 83-84, 86-88. The most he could say was that "it's individualistic, and it's – all I know [is] it occurs, and when it occurs, it's the person that suffers that gets hurt." J.A. 86. But the fact (if it is one) that *some* people with uncontrolled Hepatitis C will get hurt cannot justify excluding *all* people with that condition. As with women's generally longer life expectancy, which *Manhart* held insufficient to justify an employer's assumption that any individual woman would live longer than most men, "there is no assurance that any individual" with Hepatitis C "will actually fit [Dr. Tang's] generalization." *Manhart*, 435 U.S. at 708.

3. Recognizing that Congress limited the general "qualification standards" defense to cases involving neutral employment criteria also helps to explain why

Congress saw the need to state, in Section 12113(b), that the "qualification standards" defense can be satisfied by a showing that the plaintiff "pose[s] a direct threat to the health or safety of other individuals." 42 U.S.C. § 12113(b). Cf. p. 25, *supra* (noting that Chevron's reading gives the direct threat provision no independent meaning). Although the general Section 12113(a) defense applies only when employers enforce neutral job criteria that apply to all employees regardless of impairment status, the "direct threat" provision extends that defense to a limited class of cases in which employers intentionally discriminate based on the "individual" plaintiff's disabling impairment, 42 U.S.C. § 12113(b). See *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000) (difference in language between Section 12113(a) and Section 12113(b) suggests that "business necessity applies to across-the-board rules, while direct threat addresses a standard imposed on a particular individual").[12] Had Congress not enacted Section 12113(b), employers could not have justified singling out individuals for disabilities for exclusion based on proven safety risks to others. But in no event can employers justify singling out individuals with disabilities for exclusion based on purported risks to themselves.

[12] To the extent that the Fifth Circuit's opinion in *Exxon* suggests that blanket exclusions of *all* individuals with a given disability may be justified under the general "qualification standards" provision (cf. *Exxon*, 203 F.3d at 875), that is incorrect. Such exclusions are "because of" disability and thus would violate the ADA's disparate treatment provisions, to which the "qualification standards" defense does not apply.

SEQ 043 JOB 11260883-000-03 PAGE-011 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.06 PICAS WIDTH 28 PICAS

C. The Desire to Protect Employees from Posing Risks to Themselves Cannot Be Justified as "Job-Related and Consistent with Business Necessity"

The EEOC's threat-to-self defense has another fatal flaw. As this Court has explained under Title VII, the "business necessity" determination must be based on an examination of the *specific* requirements of the job at issue and the *particular* exigencies of the employer's business. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 427 (1975) (stating that the "question of job relatedness must be viewed in the context of the [defendant's] plant's operation"); *Griggs*, 401 U.S. at 431 (requiring, under business necessity defense, that challenged test "bear a demonstrable relationship to successful performance of the jobs for which it was used"). The ADA similarly provides that qualification standards that exclude individuals with disabilities are impermissibly discriminatory unless they are, at a minimum, "job-related *for the position in question*." 42 U.S.C. § 12112(b)(6) (emphasis added). But Chevron does not point to any imperatives *specific to its own business* that justify excluding individuals who pose a threat to themselves. Instead, relying on various articles from human resources publications that refer generally to the costs of workplace injuries (Pet. Br. 22-24, 28-29), Chevron argues in the abstract that a no-threat-to-self condition is *always* job-related and consistent with business necessity. But examination of the business justifications proffered for the threat-to-self defense demonstrates that such a defense is not *always* – and has not been proven here to be – "job-related and consistent with business necessity."

The "ethical quandary" (Pet. Br. 28) faced by an employer who believes that an individual with a disability

SEQ 044 JOB 11260BB3- 000-03 PAGE-012 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

will harm himself by performing the job simply does not satisfy the statutory test. The ADA "does not prevent the employer from having a conscience." *Johnson Controls*, 499 U.S. at 208. But it does prohibit exclusionary criteria that are not "job-related." A fear that an employee will injure himself or become ill is not inherently "job-related," because injuries and illnesses do not necessarily "affect an employee's ability to do the job." *Id.* at 201-202 (interpreting "occupational" element of Title VII's "bona fide occupational qualification" defense, which element the Court described as limited to "job-related" qualifications).

Of course, in a particular case an injury may affect the ability of an employee to perform the job by rendering him permanently unable to return to the job. Chevron argues (Pet. Br. 22) that the threat-to-self defense is justified by the imperative to avoid the costs of job turnover in such circumstances. But many injuries that would create sufficiently "substantial harm" to trigger the EEOC's threat-to-self defense (see 29 C.F.R. § 1630.2(r)) – losing a foot, for example, or contracting a chronic disease – would not likely render an employee unable to do the job. And even as applied to injuries and illnesses that would make an employee unable to return to work, the interest in assuring consistency in the workforce could not satisfy the stringent "job-related and consistent with business necessity" test unless the employer could show, by reference to the operations of its own business, a particularized need to assure that employees do not leave their jobs within the time frame during which the risk to the plaintiff would likely eventuate.

Employees constantly leave their jobs for reasons that have nothing to do with workplace injuries. See Philip

EQ 045 JOB 11260BB3- 000-03 PAGE-013 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 44 PICAS WIDTH 28 PICAS

Harvey, *An Analysis of the Principal Strategies That Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 BERKELEY J. EMPLOYMENT & LAB. L. 677, 733-737 (2000) (collecting statistics showing rampant job turnover in the United States). And workplace injuries are themselves widespread: 5,100 workers died and 3.8 million experienced disabling injuries on the job in 1998. NATIONAL SAFETY COUNCIL, INJURY FACTS 54 (1999). Employees in that year missed a total of 125 million days of work due to on-the-job injuries. *Id.* at 51.

The impact – whether on overall efficiency, on corporate reputation and morale, or on worker's compensation premiums[13] (cf. Pet. Br. 22-24) – of hiring an employee with a disability who subsequently misses work because of an injury is thus likely to vary widely. In some businesses (where job turnover and injury rates are low and production processes do not readily accommodate changes in or absences of employees), an employee who misses work or cannot return to work could have a significant effect. In other businesses, an employee who misses

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[13] Worker's compensation is not a liability regime but an insurance scheme that guarantees a small benefit – far less than in tort – to injured workers. See 1 ARTHUR LARSON & LEX K. LARSON, WORKER'S COMPENSATION 1-9 to 1-11 (Desk ed. 2001). Several features of the worker's compensation system cushion the already limited financial impact of an award in this context: notably, the institutionalized availability of insurance, see 3 *id.* at 150-2 to 150-3, with regulation of the degree of experience rating, see 3 *id.* at 150-17 to 150-19; and the availability of "second-injury funds" and other devices to protect an employer against full responsibility for providing compensation where an on-the-job injury exacerbates a pre-existing disability, see 2 *id.* at 91-1 to 91-48.

SEQ 046 JOB 11260BB3- 000-03 PAGE-014 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.04 PICAS WIDTH 28 PICAS

work or cannot return to work may hardly be noticed. The costs of employee injuries simply cannot justify the EEOC's threat-to-self defense across the board. Cf. *Garcia-Ayala* v. *Lederle Parenterals, Inc.*, 212 F.3d 638, 647-648 (1st Cir. 2000) (whether an extended absence from work makes the plaintiff unable to perform essential job functions must be determined based on all the facts of the case).

D. The Fear of Liability Does Not Justify Singling Out Individuals with Disabilities for Exclusion Based on Risks They Might Pose to Themselves

Nor can Chevron's speculative fears of liability justify the EEOC's threat-to-self defense. Chevron places significant reliance (Pet. Br. 24-25) on the requirements of the Occupational Safety and Health Act (OSH Act). If a specific rule adopted by the Occupational Safety and Health Administration (OSHA) required Chevron to exclude people with Hepatitis C from areas containing hydrocarbons, that rule would prevail. See *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 570-578 (1999). But there is no such OSHA rule here.[14]

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[14] The general statement of "policy" issued by an OSHA regional administrator in 1997 to the effect that "if an employee can perform their job functions in a manner which does not pose a safety hazard to themselves or others, the fact they have a disability is irrelevant," is not such a standard. Memorandum for Area Directors and District Supervisors from Linda R. Anku (Aug. 27, 1997) (available at http://www.osha-slc.gov/OshDoc/Interp_data/I19970827.html) (cited at Pet. Br. 24). Nor do the various guidelines issued by the National Institute for Occupational Safety and Health (NIOSH), which are not OSHA rules carrying the force of law, support Chevron's exclusion of Echazabal. See Pet. Br. 6-7 & n.4 (citing various guidelines

SEQ 047 JOB 11260BB9-000-03 PAGE-015 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 44 PICAS WIDTH 28 PICAS

Instead, Chevron relies on the OSH Act's "general duty" clause, 29 U.S.C. § 654(a)(1). But the general duty clause, like the OSH Act generally (see *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 641 (1980) (plurality opinion)), imposes only a duty of *feasible* prevention. See MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 207-208, 213-214, 215-216 (4th ed. 1998). Where the ADA prevents an employer from excluding an employee with increased susceptibility to occupational harm, and the employer discloses the relevant risks to that employee and takes all feasible steps to mitigate those risks, the employer will face no prospect of liability

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available at http://www.cdc.gov/niosh/chem-inx.html). *Not a single one* of these guidelines states that people with chronic liver disease should be excluded from all positions entailing exposure to the substances that are present at the El Segundo refinery. Some state that a determination of risk depends on "the probable frequency, intensity, and duration of exposure, as well as the nature and degree of the condition." *E.g.*, *Benzene Guideline* 2 (1988); accord *Inorganic Lead Guideline* 2 (1988); see also *Napthalene Guideline* 1 (1978) (describing "liver damage" as a risk of "overexposure"); *Ethylenediamine Guideline* 1 (1978) (same); *Xylene Guideline* 1 (1978) (same). Others state that the relevant chemical "is not known as a liver toxin in humans," but that "the importance of this organ in the biotransformation and detoxification of foreign substances should be considered before exposing persons with impaired liver function." *Naptha (Coal Tar) Guideline* 1 (1978); accord *Octane Guideline* 1 (1978); *Heptane Guideline* 1 (1978). Still others state that liver function should be examined in a preplacement examination in order to obtain a baseline for future monitoring. *E.g.*, *Toluene Guideline* 1 (1978); *Phenol Guideline* 1 (1978); *Manganese Guideline* 1 (1978). None of these guidelines justifies Chevron's categorical exclusion of Echazabal from *any* exposure to *any* of these substances.

SEQ 048 JOB 11260BB3- 000-03 PAGE-016 MINSKY
REVISED 31JAN02 AT 08:05 BY DW DEPTH: 43.09 PICAS WIDTH 28 PICAS

under that clause. Indeed, neither Chevron nor the government has identified a single case in which OSHA has initiated a general duty clause enforcement action in such circumstances.

Chevron's fear of state-law liability that would override the exclusivity of worker's compensation (Pet. Br. 25-28) is equally groundless. None of the cases cited by Chevron addresses a fact setting that is even remotely comparable to the one presented here. And none of the state workplace safety statutes cited by Chevron would make an employer strictly liable simply because it hired an employee whose disability presented a known risk to himself and who was subsequently injured on the job. To the contrary, *all* of these cases and statutes limit liability to instances where the employer is at *fault* for failing to eliminate the risk to the employee.[15] Where an employer,

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[15] Chevron (Pet. Br. 25-26) points to the California Labor Code, which provides administrative, civil, and potentially criminal sanctions for the failure to provide employees with an employment setting that is "safe and healthful." Cal. Labor Code § 6402. But the code defines "safe" and "health" in fault-based terms, as "such freedom from danger to the life, safety, or health of employees as the nature of the employment *reasonably* permits," *Id.* § 6306(a) (emphasis added), and it requires employers to take only those steps "*reasonably* necessary to protect the life, safety, and health of employees," *Id.* §§ 6401, 6403(c), 6406(d) (emphasis added). The New York workplace safety statute, applied in *Jamison* v. *GSL Enters., Inc.*, 711 N.Y.S.2d 413 (App. Div. 2000) (cited at Pet. Br. 26), is to similar effect: Employers must provide "reasonable and adequate protection" to their employees. N.Y. Labor Law § 200(1). And prosecutions for manslaughter also require fault, as *Granite Constr. Co.* v. *Superior Court*, 197 Cal. Rptr. 3, 5 (Ct. App. 1983) (applying statute that criminalizes death caused by action taken "without due caution and circumspection") (cited at Pet. Br. 27),

SEQ 049 JOB 11260B93-000-03 PAGE-017 MINSKY
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complying with the ADA's general prohibition on discrimination against employees with disabilities, hires an individual whose disability poses a risk to himself, informs the individual of that risk, and takes all reasonable steps to safeguard that individual's health, a court would have no basis for finding any fault on the part of the employer. In precisely parallel circumstances, this Court found the prospect of employer liability for fetal harm "remote at best" and insufficient to justify excluding fertile women from jobs that might damage their fetuses. *Johnson Controls*, 499 U.S. at 208.

In short, Chevron has not identified a single provision of state law that an employer would violate simply by hiring an individual whose disability creates an increased risk of workplace injury. If such a state law did exist, it would be preempted, for a state cannot make illegal a practice that is required by federal law. See *Johnson Controls*, 499 U.S. at 209 ("When it is impossible for an employer to comply with both state and federal

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makes clear. Two criminal cases cited by Chevron do not deal with the substantive standard of *liability* at all; they hold only that the OSH Act does not preempt otherwise proper state criminal prosecutions. See Pet. Br. 27 (citing *People* v. *Chicago Magnet Wire Corp.*, 534 N.E.2d 962, 965 (Ill. 1989); *People* v. *Pymm*, 563 N.E.2d 1, 8 (N.Y. 1990)). Finally, the decision in *Russell* v. *Bush & Burchett, Inc.*, 2001 WL 1524554 (W.Va. 2001) (cited at Pet. Br. 26), similarly does not address the standard for employer liability. It simply reiterates that worker's compensation is not the exclusive remedy in cases where the employer has acted with "deliberate intention" to cause the injury. *Id.* at *4. Contrary to Chevron's suggestion (Pet. Br. 26 n.10), such intentional-injury exceptions to worker's compensation exclusivity are generally read extremely narrowly. See 2 LARSON & LARSON, *supra*, at 100-2 to 100-12, 103-1 to 103-46.

SEQ 050 JOB 11260BBS- 000-03 PAGE-018 MINSKY
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requirements, this Court has ruled that federal law preempts that of the States.").

Chevron effectively concedes that it *can* comply with both the ADA's nondiscrimination requirement and the mandates of workplace safety laws. See Pet. Br. 27-28. Its argument reduces to one of cost: Because the law imposes on it a general obligation to take reasonable or feasible steps to assure the safety of each individual it hires, Chevron believes it would be cheaper simply to exclude individuals whose disabilities might create an increased risk of workplace injury than to hire those individuals and take the steps the law requires to protect them. See *ibid.* If Echazabal were seeking a reasonable accommodation of general work rules, such cost concerns would at least be relevant – though Chevron would still have an obligation to establish an "undue hardship" by reference to the particulars of its operations, 42 U.S.C. §§ 12111(10), 12112(b)(5)(A). But where, as here, an individual with a disability seeks to perform exactly the same job as his coworkers, an employer cannot use a fear of the increased costs of protection to justify singling him out for exclusion on the basis of his disabling condition. As in *Johnson Controls*, Chevron may not "resort[ ] to an exclusionary policy" as "a method of diverting attention from [its] obligation to police the workplace." 499 U.S. at 210.

E. The EEOC's Threat-to-Self Regulation is Not Entitled to Deference

For all of these reasons, the EEOC's interpretation of the statutory "qualification standards" language to authorize a threat-to-self defense must be rejected. An agency interpretation of a statute is entitled to deference only where the statute is ambiguous. *Chevron U.S.A., Inc.*

SEQ 051 JOB 11260883-000-03 PAGE-019 MINSKY
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v. *Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Even if the term "qualification standards" could, in the abstract, embrace a requirement that an employee pose no risk to his own health or safety, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). To read the ADA's "qualification standards" provision as incorporating a threat-to-self defense is to ignore several crucial features of the statutory context here: (1) Congress's clear decision, plainly expressed in the text of the "qualified individual" provision, to eliminate the basis on which the EEOC had earlier adopted a no-threat-to-self condition for recovery under the Rehabilitation Act; (2) Congress's clear decision to limit the specific "direct threat" defense to cases involving threats to *others*; (3) the limitation of the statutory "qualification standards" defense to cases that do not involve disparate treatment – a limitation the EEOC itself recognizes elsewhere in its regulations; and (4) the clear statutory command that the "business necessity" issue must be resolved on an employer- and job-specific basis.

"In sum, the text and reasonable inferences from it give a clear answer against the Government, and that, as [this Court has] said, is the end of the matter." *Brown* v. *Gardner*, 513 U.S. at 120 (internal quotation marks omitted). Regardless of the level of deference generally accorded to EEOC regulations interpreting the ADA, the threat-to-self regulation incorporates an "impermissible interpretation" of that statute and is not entitled to deference. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

SEQ 082 JOB 11260884-000-03 PAGE-020 MINSKY
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F. Even Under the EEOC's "Threat-to-Self" Regulation, Chevron Has Not Established that Echazabal Would Pose a Direct Threat to His Own Safety

In its brief on the merits (Pet. Br. 40-42), Chevron argues that this Court should affirm the district court's conclusion that Echazabal's continued employment would pose a "direct threat" to his own safety. But Chevron's petition for certiorari presented only the *legal* question "[w]hether a person who is unable to carry out the essential functions of a job without incurring substantial risks to the person's own health or life is a 'qualified individual' who satisfies 'qualification standards' for that job within the meaning of the Americans with Disabilities Act." Pet. i. It did not pose the factbound question – one that divided the parties below but that the court of appeals did not reach – whether the district court correctly determined at summary judgment that Echazabal was such a person. Indeed, Chevron's reply brief in support of its petition (at 1) argued that, precisely because the only question presented was the legal one of whether an employer could exclude an employee based on a significant risk to self, "nothing in the procedural posture of this case requires this Court to accept as true" Echazabal's evidence, presented to overcome summary judgment, that he in fact faced no significant risk. Accordingly, "[t]he question whether petitioner was entitled to summary judgment on the [direct threat] issue" was not " 'fairly included' " within the question presented and is "not properly before" this Court. *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams*, 122 S. Ct. 681, 694 (2002) (quoting S. Ct. R. 14(1)(a)).

SEQ 083 JOB 11260BB4-000-03 PAGE-021 MINSKY
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In any event, the district court improperly granted summary judgment to Chevron on the threat-to-self issue. The EEOC regulation on which Chevron relies requires that any "direct threat" determination be made on the basis of "a reasonable medical judgment that relies on the *most current* medical knowledge and/or on the *best available* objective evidence." 29 C.F.R. § 1630.2(r) (emphasis added). This language plainly imposes a duty of inquiry on employers who seek to exclude individuals based on asserted safety risks. It is not enough that the employer believe in good faith that the employee would pose a risk. This Court applied a similar analysis in *Bragdon*, where it held that an individual health care professional "had the duty to assess the risk of infection based on the objective, scientific information available to him *and others in his profession*." 524 U.S. at 649 (emphasis added). Although employers may be able to "consult with individual physicians as objective third-party experts," *id.* at 650, they may not evade their obligation to rely on the "most current medical knowledge" and "best available objective evidence" simply by hiring doctors who lack the training, expertise, or inclination to seek out that knowledge and evidence.

Chevron did not conduct the required inquiry when it excluded Echazabal from its plant. See pp. 5-7, *supra*. First, Chevron failed to examine the objective evidence in its possession regarding the levels of hepatotoxins in the coker unit. Had the company done so, Dr. Fedoruk testified, it would have been forced to conclude that "[t]he potential for exposure to hepatotoxins that could cause liver injury is clinically insignificant and is the same for Mr. Echazabal as it is for others performing similar tasks at the Refinery." J.A. 103. Nor did Dr. McGill, Chevron's

SEQ 084 JOB 11260BB4- 000-03 PAGE-022 MINSKY
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non-board-certified company physician "doing industrial medicine just through self-training" (J.A. 134), examine the medical literature which showed that liver enzyme tests are not a proper measure of liver functioning. J.A. 113-114. Had Dr. McGill done so, Dr. Gitnick testified, he would have been forced to recognize that "[t]here is no medical or scientific evidence which supports the conclusion . . . that Mr. Echazabal's health, and specifically his liver condition, were or would be placed at any appreciable or clinically significant degree of risk" in the plant helper job. J.A. 116.[16]

Contrary to Chevron's argument, Echazabal had no burden to present the Fedoruk and Gitnick declarations to the company before it excluded him from the refinery.[17] It is Chevron's burden to establish, as an affirmative defense, that the company conducted a full inquiry into the most current medical knowledge and the best available objective evidence before it made its decision. The Fedoruk and Gitnick declarations did not point to any new scientific discoveries since Chevron's decision in early 1996. They simply established that Chevron's decision to exclude Echazabal was plainly unreasonable

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[16] The Fedoruk and Gitnick declarations establish that even without any accommodation, Echazabal faced no significant risk. Even if Chevron could overcome those declarations, it would still have to establish that no "reasonable accommodation" (such as medical monitoring or the use of personal protective equipment) could eliminate the risk. 29 C.F.R. § 1630.2(r). This Chevron has not done.

[17] Chevron argues, for the first time in this Court, that the Fedoruk and Gitnick declarations are contradicted by the pronouncements of public health agencies. Pet. Br. 41 n.16. But Chevron is incorrect, as we have explained. See pp. 6-7 n.5, pp. 36-37 n.14, *supra*.

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SEQ 055 JOB 11260BB3-000-03 PAGE-023 MINSKY
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based on medical knowledge and objective evidence available at the time of the exclusion.[18] The district court thus incorrectly refused to consider those declarations and improperly granted summary judgment to Chevron.

III. Echazabal is a Qualified Individual with a Disability

Chevron contends (Pet. Br. 42-50) that, wholly independent of the affirmative "qualification standards" defense set forth in Section 12113, an employee who poses a risk to his own health or safety on the job cannot satisfy the "qualified individual" element of the plaintiff's case under ADA Title I. That argument ignores the statutory definition of "qualified individual with a disability," 42 U.S.C. § 12111(8), and treats the affirmative "qualification standards" defense as entirely superfluous.

Title I defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Two crucial aspects of this statutory text are evident. First, the "qualified individual" inquiry is limited to examination of the plaintiff's ability to perform the actual tasks – "functions" – that incumbent employees perform in the position the

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[18] Although Chevron argues that the Fedoruk and Gitnick declarations are irrelevant because they "were not reasonably available to Chevron when it made its decision" (Pet. Br. 41), the company continues to rely on the testimony of Dr. Tang, who rendered no medical opinion until after Chevron made its exclusion decision. See Pet. Br. 11. And it now cites publications issued by public health agencies in 1997 and 1999. *Id.* at 9 n.5. Chevron cannot have it both ways.

SEQ 056 JOB 11260883- 000-03 PAGE-024 MINSKY
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plaintiff seeks. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 472 (10th ed. 1993) ("FUNCTION implies a definite end or purpose that the one in question serves or a particular kind of work it is intended to perform."); see also J.A. 209 ("Job functions are those acts or actions that constitute a part of the performance of the job"). An employer may impose other requirements on applicants for a particular position – involving, for example, "the physical abilities a person [has] to have to be qualified to perform the job," Pet. Br. 45 – but those requirements are not "essential functions" of the job. A "function" of the job is something incumbent employees do at work for their employer, not a characteristic applicants must possess to satisfy the employer that they will be able to perform the work if hired. The latter are quintessential "selection criteria," which an employer must justify under the "job-related and consistent with business necessity" defense afforded by Section 12113(a). See 42 U.S.C. § 12113(a) (referring to "qualification standards, tests, or other selection criteria").[19] If they were considered as part of the "qualified individual" inquiry, on

[19] Chevron thus places entirely too much weight (Pet. Br. 45) on its written job description. To the extent that the description sets forth the tasks incumbent employees perform, it is relevant to the "qualified individual" inquiry – though only as "evidence of the essential functions of the job," not as something that is presumptively entitled to deference. 42 U.S.C. § 12111(8). To the extent that the job description sets forth physical criteria that Chevron believes are correlated to the ability to perform job tasks, it is relevant only to the "job-related and consistent with business necessity" defense for "qualification standards" and other "selection criteria."

SEQ 057 JOB 11260883-000-03 PAGE-025 MINSKY
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which the plaintiff bears the burden of proof, the affirmative "qualification standards" defense of Section 12113(a) would be rendered entirely irrelevant.

Second, the language of the "qualified" definition is phrased in the present tense. The provision asks whether the plaintiff "can perform" the essential functions. Contrary to Chevron's suggestion that a plaintiff must show that he will continue to be able to perform essential job functions indefinitely into the future (Pet. Br. 44), the plaintiff satisfies his burden under the plain text of the statute by showing that he "can," at the time of the challenged exclusion, perform essential functions (though perhaps only with reasonable accommodation). Cf. *Sutton*, 527 U.S. at 482 ("Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability.").

The court of appeals was thus correct when it held that "not posing a risk to one's own health or safety cannot in and of itself constitute an essential job function." J.A. 211. Such an absence of risk is not a "function" of the job at all. Cf. *Johnson Controls*, 499 U.S. at 207 (" 'It is word play to say that "the job" at Johnson [Controls] is to make batteries without risk to fetuses in the same way "the job" at Western Air Lines is to fly planes without crashing.' ") (quoting *International Union* v. *Johnson Controls*, 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting)). It is simply a characteristic that employers find desirable in employees. If used as a criterion for selecting employees, it may be defended, if at all, only

SEQ: 098 JOB: 11260BB4-000-09 PAGE-026 MINSKY
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under the "job-related and consistent with business necessity" test of Section 12113(a).

Given the statute's focus on whether the plaintiff can currently perform the essential functions of the job, a risk that an employee will become injured on the job in the future could make him un-"qualified" in only two classes of cases. First, if an employee seeks a job in which he will immediately die or suffer serious injury, he "cannot" perform essential job tasks because the imminent death or injury will prevent him from completing those tasks. More realistically, an employee may refuse to perform essential job tasks because they would pose too great a risk to his health or safety. See *Foreman*, 117 F.3d at 809-810; *Patterson*, 2000 WL 366113. In such cases, the plaintiff's refusal to perform essential job functions renders him un-"qualified."[20] But where the plaintiff is currently willing and able to perform essential job functions, and the employer's only concern is that those functions might, at some future point, cause injury that requires the plaintiff to leave his job, the plaintiff has plainly satisfied

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[20] Contrary to the Chamber of Commerce's imaginative argument (Chamber Br. 19-20), such an individual could not first seek a job that poses an irreducible risk to his own health and then turn around and invoke OSHA's work-refusal regulation (29 C.F.R. § 1977.12(b)(2)) to shield himself from adverse consequences for refusing to perform essential functions of that job. As this Court made clear in *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 21 (1980), the work-refusal regulation applies only when the employee acts reasonably and in good faith. Where an employer has taken all feasible steps to protect an employee short of excluding him, and the employee is the one who demands to be placed in the environment that presents a risk to himself, the employee's subsequent refusal to work could not reflect a reasonable, good-faith belief that the employer is violating the OSH Act. See pp. 37-38, *supra*.

SEQ: 089 JOB: 11260B54- 000-09 PAGE-027 MINSKY
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the statutory burden to show that he "can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). Such a person, contrary to the Chamber of Commerce's argument, would never say, " 'I can't do [the job] because I would hurt myself if I did.' " Chamber Br. 7-8. Any concern about whether such a person may become unable to work in the future must be addressed pursuant to a neutral qualification standard, which the employer must defend as "job-related and consistent with business necessity."

At the time Chevron rejected him, Echazabal was willing and able to perform the essential functions of the plant helper position. As the court of appeals observed, "Echazabal worked for Irwin at the coker unit, performing work similar to the job for which he applied, long after he was diagnosed with hepatitis. There is no evidence that the health of his liver ever affected his ability to do the job." J.A. 211. The most that Chevron can show, even on the most generous reading of its evidence, is that at some indeterminate point in the future – perhaps years in the future – Echazabal might become seriously ill or die on the job and thus no longer be able to work at his position. See pp. 1-5, *supra*. But that prognostication does not detract from Echazabal's present ability to perform the essential functions of the job. Accordingly, Echazabal established that he is a "qualified individual" under the ADA.

SEQ 060 JOB 11260BBS-000-01 PAGE-028 MINSKY
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CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX
Relevant Statutory Provisions

42 U.S.C. § 12101:

(a) Findings

The Congress finds that –

* * *

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

* * *

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

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SEQ 062 JOB 11260AA1-000-02 PAGE-002 MINSKY
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App. 2

42 U.S.C. § 12111:

As used in this subchapter:

* * *

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

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42 U.S.C. § 12112:

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of

EQ 063 JOB 11250AA1- 000-02 PAGE-003 MINSKY
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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.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

* * *

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

* * *

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42 U.S.C. § 12113:

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or

tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

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42 U.S.C. § 12201:

* * *

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

HHS News

U.S. Department of Health and Human Services www.hhs.gov/news

FOR IMMEDIATE RELEASE
Wednesday, Feb. 6, 2002

Contact: CMS Press Office
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SCHIP COVERS 4.6 MILLION CHILDREN IN 2001
38 Percent Increase Reflects Increased Flexibility, Expanded Outreach To Help Uninsured

About 4.6 million children who otherwise would not have access to health care were covered under the State Children's Health Insurance Program (SCHIP) during fiscal year 2001 - a 38 percent increase from the previous year, HHS Secretary Tommy G. Thompson announced today.

"Working with governors, we've made tremendous progress in our efforts to reach millions of children with needed health coverage under SCHIP," Secretary Thompson said. "Since President Bush took office, we have given states more flexibility and freedom to develop SCHIP plans that best meet the needs of their residents. The numbers released today show our strategy is working for children and families across America."

During fiscal year 2001, a total of 4.6 million children were enrolled in SCHIP at some point, according to the latest figures from all 50 states and the District of Columbia. That compares with 3.3 million children in fiscal year 2000. In addition, more than 230,000 adults were enrolled in fiscal year 2001 under approved SCHIP Section 1115 demonstration projects. HHS did not approve any such demonstrations until January 2001, so there were not any adults covered under the SCHIP program in fiscal year 2000.

Created in 1997 with bipartisan support in Congress, SCHIP is a state and federal partnership designed to help children without health insurance, many of whom come from working families with incomes too high to qualify for Medicaid but too low to afford private health insurance. The SCHIP law appropriated $40 billion in federal funds over 10 years to improve children's access to health coverage.

Since taking office, Secretary Thompson has worked to improve access to health care through innovative coverage programs in the SCHIP and Medicaid programs. Since January 2001, HHS has approved more than 1,500 SCHIP and Medicaid waivers and plan amendments that have expanded eligibility to about 1.8 million people and enhanced benefits for about 4.5 million people. In August 2001, HHS launched the Health Insurance Flexibility and Accountability Demonstration Initiative to make it simpler and easier for states to coordinate SCHIP and Medicaid plans and to submit waiver requests and to have those requests promptly considered.

Today's SCHIP enrollment report, prepared by the Centers for Medicare & Medicaid Services (CMS), finds that the increase stems primarily from expansions of state SCHIP programs, program maturity

and streamlined enrollment procedures.

"We have worked with states to improve outreach efforts and to make it simpler for families to enroll," said Tom Scully, CMS administrator. "As a result, we are now seeing more children with access to health care. Secretary Thompson and I will continue to do all we can to strengthen this program so states can cover more children in the future."

Coverage is now available for children whose family income is 200 percent of the federal poverty level (FPL) or higher in 38 states and the District of Columbia. (The FPL is $17,650 for a family of four.) Prior to this legislation, only six states had Medicaid income eligibility levels at or above 200 percent of FPL and that was for infants only. The SCHIP program covers children up to age 19.

States report that more than 75 percent of children enrolled in SCHIP in 2001 were between the ages of 6 and 18. Medicaid generally covers younger children at higher income eligibility levels.

Under the new Title XXI of the Social Security Act, states were given the option to set up a separate child health program, expand their existing Medicaid programs, or a combination of both. The report shows that the majority of children in the program -- 69 percent -- were enrolled in states with combination programs.

To further strengthen SCHIP, President Bush's fiscal year 2003 budget would make available to states an estimated $3.2 billion in unused SCHIP funds that otherwise would return to the federal treasury. The SCHIP law originally required that funds be taken from states that did not use their full SCHIP allotment during the previous three years. Extending the availability of expiring funds will enable all states to expand coverage to the uninsured.

CMS' report on SCHIP enrollment will be available later today at *http://www.hcfa.gov/init/children.htm*.

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No. 00-

In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER,

v.

MARIO ECHAZABAL, RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent, who has chronic hepatitis C, a debilitating liver condition, applied for a job at Chevron's refinery that would have exposed him to a range of liver-toxic chemicals. After Chevron's doctors and respondent's own physician agreed that daily exposure to these chemicals would accelerate the deterioration of respondent's liver and that a large-scale exposure from a burst pipe, fire, or other emergency could quickly kill him, Chevron declined to hire him. In conflict with decisions of other courts of appeals as well as with EEOC regulations and guidelines squarely on point, the Ninth Circuit, in an opinion by Judge Reinhardt, held that under the Americans with Disabilities Act, an employer may not refuse to hire an employee whose medical condition would make the particular position he seeks dangerous to his health or life. Judge Trott dissented.

The question presented is:

Whether a person who is unable to carry out the essential functions of a job without incurring significant risks to the person's own health or life is a "qualified individual" who satisfies "qualification standards" for that job within the meaning of the Americans with Disabilities Act.

RULES 14.1 AND 29.6 STATEMENT

The parent of petitioner Chevron U.S.A., Inc., is Chevron Corporation. No other publicly held company owns 10 percent or more of petitioner's stock.

Irwin Industries, Inc., was a defendant in the district court but was not a party to the proceeding in the court of appeals and is not a petitioner here.

TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

Page

TABLE OF AUTHORITIES

Cases: **Page**

TABLE OF AUTHORITIES — Continued

Page

TABLE OF AUTHORITIES — Continued

Page

Statutes:

TABLE OF AUTHORITIES — Continued

Page

Regulations:

Miscellaneous:

TABLE OF AUTHORITIES — Continued

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner Chevron U.S.A., Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 226 F.3d 1063 (superseding the opinion reported at 213 F.3d 1098). The court of appeals' opinion addressing respondent's state law intentional interference with contract claim (App, *infra*, 25a-29a) is unreported. The opinion of the district court (App., *infra*, 32a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2000. Petitioner filed a timely petition for rehearing and rehearing en banc on June 9, 2000. The court of appeals issued an amended opinion on September 26, 2000. It denied Chevron's rehearing petition on December 12, 2000. App., *infra*, 30a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12111, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, together with relevant portions of the regulations implementing those statutes, are reproduced at App., *infra*, 58a-61a.

STATEMENT

Chevron withdrew an offer to employ respondent in a refinery job in which he inevitably would have been exposed to liver-toxic substances after Chevron's physicians determined that respondent had a "history of a long term liver problem, [a] diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes." C.A. App. 81. Chevron's physicians concluded that the "exposure to hepatotoxic chemicals"

involved in the job "would further damage [respondent's] already reduced liver capacity," "seriously endanger his health," and "potentially cause [his] death." *Id.* at 81-82. Respondent's own doctor advised Chevron that respondent should not be exposed to hepatotoxins. App., *infra*, 37a, 47a.

The Ninth Circuit majority (Reinhardt and Bright, JJ.) nevertheless held that respondent was "qualified" for the refinery job within the meaning of the Americans with Disabilities Act ("ADA") because he posed no "direct threat" to other people. Chevron could not refuse to hire respondent on the ground that doing the job "most probably will endanger his life." App., *infra*, 21a.

That "bizarre" result, as Judge Trott described it (App., *infra*, 21a), creates numerous conflicts with other courts of appeals. The Ninth Circuit's ruling conflicts with the holding of the Seventh Circuit that an employee is not a "qualified individual" under the ADA if there is "no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from." *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599, 601, 603 (7th Cir. 1999). It conflicts with decisions that recognize a "direct threat" defense to ADA liability where an employee's "assigned tasks presented grave risks to [the] employee" as a result of a medical condition. *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996); see also *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284, 1288-1294 (10th Cir. 2000). It conflicts with decisions that safety requirements may be included in the "qualification standards" for a position. *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873-874 (5th Cir. 2000); *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 143 (1st Cir. 1997). And it is at odds with cases interpreting virtually identical language in the Rehabilitation Act, which hold that persons who "pose a significant risk of harm to themselves" are not "qualified." *Doe* v. *New York Univ.*, 666 F.2d 761, 777 (2d Cir. 1981); see also *Daugherty* v. *City of El*

Paso, 56 F.3d 695, 697-698 (5th Cir. 1995); *Knapp* v. *Northwestern Univ.*, 101 F.3d 473, 482-484 (7th Cir. 1996).

Beyond creating sharp conflicts among the circuits, the court of appeals' decision expressly overrides regulations of the Equal Employment Opportunity Commission, the expert agency Congress charged with implementing the ADA's employment provisions. App., *infra*, 11a-12a. Those regulations provide that an employer may establish as a "qualification standard" "medical" and "safety" requirements that an applicant must meet, and that such standards may exclude an applicant who would pose a "significant risk of substantial harm to the health or safety of the individual or others." 29 C.F.R. §§ 1630.2(q), (r), 1630.15(b)(2). The court of appeals' ruling also is inconsistent with the command of the Occupational Safety and Health Act (as well as state worker protection laws) that employers provide a safe workplace for all employees. 29 U.S.C. § 654.

The "absurd" result in this case—one that will cost workers' lives and force unwilling employers to be complicit in their injuries—is not what Congress had in mind when it enacted the ADA, as the plain language and legislative history demonstrate. App., *infra*, 23a. Absent this Court's intervention, businesses will face intolerable uncertainty in determining how to comply with the requirements of the ADA in the face of conflicting judicial and regulatory commands, while also complying with OSHA and state worker protection laws. These factors have led commentators to describe the Ninth Circuit's ruling as "one of the most important decisions under the ADA during the 10 years since it has been in effect," and to observe that it "cries out for Supreme Court review." Hudson, *Paternalism is Out*, ABA Journal, Feb. 2001, at 30.

The full articulation of competing views in the opinions below makes this the ideal case in which to resolve the important question presented. This case also presents the Court

with an opportunity to address the issue left unresolved in *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 & n.15 (1999)—whether all safety-related qualification standards "must satisfy the ADA's 'direct threat' criterion" to be valid.

A. The Statutory And Regulatory Scheme

The Americans with Disabilities Act of 1990 prohibits an employer from discriminating in employment decisions "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is someone with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). The ADA provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential," and that an employer's "written description" of the job is evidence of its essential functions. *Ibid.*

It is "a defense to a charge of discrimination" under the ADA that an individual was denied employment as the result of the employer's "application of qualification standards" that are "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). The statute provides one example of a qualification standard: "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

The responsibility of an employer who denies employment to an applicant because the job would endanger his health or life may be analyzed in terms of whether the applicant is a "qualified individual" pursuant to ADA sections 12111(8) and 12112(a), or in terms of whether the absence of such danger is a proper "qualification standard" and therefore a defense to

ADA liability under section 12113(a). The EEOC's regulation expressly recognizes a defense where there is "a significant risk of substantial harm to the health or safety *of the individual* or others," and describes the basis on which it may be determined that such a threat exists. 29 C.F.R. § 1630.2(r) (emphasis added).

B. Chevron's Determination That Respondent Was Not Qualified For The Plant Helper Job

Respondent Mario Echazabal worked at Chevron's oil refinery in El Segundo, California from 1972 until 1996, employed by independent maintenance contractors, most recently by Irwin Industries, Inc. ("Irwin"). In 1992, Echazabal applied to work directly for Chevron in the refinery's coker unit. Chevron offered him the job, contingent on a satisfactory medical examination. Chevron's regional physician, Dr. Baily, conducted that examination and concluded from the results of tests showing elevated levels of liver enzymes in Echazabal's blood that he had "an uncorrectable liver abnormality, and should avoid exposure to solvents and other liver toxic chemicals in order not to exacerbate his liver problems." Dr. Baily's successor, Dr. McGill, agreed with this conclusion. On that basis, Chevron rescinded its offer of employment to Echazabal, who continued to work at the refinery for Irwin. Thereafter, Echazabal's own doctors diagnosed him with chronic active hepatitis C and treated him with the drug Interferon. App., *infra*, 34a, 36a; C.A. App. 86.

In late 1995 Echazabal again applied to Chevron for a position as plant helper in the refinery's coker unit. Chevron's official "job summary" (C.A. App. 156-159) included a description of the "physical/environmental demands" of the plant helper job and of worker abilities necessary to withstand those demands. *Id.* at 159. That description identified as "airborne contaminants and chemicals in work environment" "hydrocarbon liquids and vapors, acid, caustic, refinery waste

water and sludge, petroleum solvents, oils, greases, [and] chlorine bleach." *Ibid.*; App., *infra*, 36a-37a.

Chevron offered Echazabal the plant helper job contingent upon his passing a medical examination. In conducting that examination, Chevron's Dr. McGill—who has practiced industrial medicine since 1980—reviewed results of eight blood tests taken between 1992 and 1996. All of those tests showed that Echazabal had significantly elevated levels of liver enzymes, which had not improved despite treatment with Interferon. App., *infra*, 35a-36a. Dr. McGill also reviewed the written job summary of the plant helper position identifying environmental conditions to which a plant helper is exposed, including "several that are hepatotoxic." C.A. App. 80-81; App., *infra*, 36a-37a. He concluded that Echazabal "faced a significant risk of substantial harm" in the plant helper position and "could not safely perform that job." C.A. App. 85.

Given Echazabal's "long term liver problem, his diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes over a period of years" evidencing "a reduced liver function" and "progressive liver disease," Dr. McGill concluded that "further exposure to hepatotoxic chemicals and solvents would * * * seriously endanger [Echazabal's] health" and "could be fatal." "Small exposures over a long period of time" would compromise his health. "[A] single event large exposure (for example, as a result of a ruptured pipe, a relief valve popping and venting, a fire, explosion or other emergency situation)" could "potentially cause death." C.A. App. 81-82. Dr. McGill was also informed by Echazabal's own physician, orally and in writing, that Echazabal should not be exposed to hepatotoxic substances. App., *infra*, 37a; C.A. App. 195.

Chevron's medical director, Dr. Bridge, agreed with Dr. McGill's assessment that Echazabal could not safely work in the plant helper position. Dr. McGill then informed Chevron's personnel director that if Echazabal were hired, it should be

subject to a work limitation: "No exposure to solvents or other liver toxic chemicals." The personnel director determined that such exposure is "a necessary and inseparable part of the plant helper position," and accordingly withdrew Echazabal's conditional job offer. App., *infra*, 38a-39a.

Shortly thereafter, Chevron sent a letter to Irwin explaining Echazabal's medical condition and asking Irwin to "remove Mr. Echazabal from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." App., *infra*, 39a. Irwin removed Echazabal from Chevron's refinery and had him examined by a physician. Dr. Tang, who is board certified in occupational medicine and teaches that subject, reviewed Echazabal's test results for Irwin and "concluded that exposure to liver toxins would harm and probably kill" him. *Id.* at 40a. After such exposures, "some people have died of massive hepatic failure in a few hours, and [it] can also occur over months and years." C.A. Supp. App. 23. Dr. Tang stated that Echazabal "has a condition that will be worsened by [exposure to hepatotoxins], causing probable death. * * * If he's exposed to hepatotoxins, he should not be there." *Id.* at 27. Echazabal was laid off by Irwin, though there are factual disputes concerning the course of events involving Irwin and Echazabal. App., *infra*, 41a-42a.[1]

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[1] Echazabal produced testimony from two doctors retained for purposes of this litigation who dispute whether his elevated enzyme levels reflect liver damage or reduced liver function and also dispute the determination of Chevron's doctors that exposure to substances at the refinery would endanger Echazabal's life and health. See App., *infra*, 36a, 48a. The district court correctly held that the legally relevant inquiry for the purpose of Echazabal's claims is whether Chevron reached a "reasonable medical judgment" based on "the best available objective evidence" at the time the employment decision was made. *Id.* at 48a-49a. See 29 C.F.R. § 1630.2(r) (establishing that test); *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599, 602 (7th Cir. 1999) (determination "must be made 'as of the time of the

C. Respondent's Suit And The District Court's Grant Of Summary Judgment To Chevron

Echazabal filed suit against Chevron in April 1997 alleging that Chevron's withdrawal of his employment offer violated the Americans with Disabilities Act, the Rehabilitation Act, and California's Fair Employment and Housing Act, Cal. Gov't Code § 12940 ("FEHA"), and that Chevron intentionally interfered with Echazabal's contractual relations with Irwin. Echazabal sought punitive as well as actual damages for each claim.[2] The district court (Baird, J.) granted summary judgment to Chevron on each of those counts.

The district court carefully reviewed the relevant statutes, regulations, and case law, concluding that under the ADA, Rehabilitation Act, and FEHA, "an employer may lawfully refuse to hire a disabled individual who is not otherwise qualified because the proposed employment poses a direct threat to the health of the employee himself." App., *infra*, 46a. The court engaged in a detailed review of the medical evidence and evidence concerning environmental conditions in Chevron's refinery. The court found it "undisputed" that Chevron's determination that Echazabal posed a direct threat to

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employment decision'"). The court held that the evaluations of Echazabal's expert witnesses, "even if correct, were not available to Chevron" when it withdrew its offer, and that "the evidence which was available to [Chevron] supported [its] decisions." App., *infra*, at 49a. The difference of opinion between Echazabal's and Chevron's physicians, on the one hand, and Echazabal's expert witnesses on the other, was not mentioned in the Ninth Circuit majority's opinion. It has no bearing on the legal issues decided by the court of appeals and presented in this petition.

[2] Respondent also alleged that Irwin violated the ADA, Rehabilitation Act, and FEHA. The district court denied Irwin's summary judgment motion and the claims against Irwin are not at issue here.

his own health and safety was based on an individualized assessment by Dr. McGill supported by consultation with other Chevron doctors and Echazabal's own physician. *Id.* at 47a. The court also found that "[a]ll the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision * * *, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed, as posing a serious, immediate risk to him." *Ibid.*

Because Chevron had made a reasonable medical judgment based on available evidence that the plant helper job would endanger Echazabal's health and life, the court granted Chevron summary judgment on Echazabal's ADA, Rehabilitation Act, and FEHA claims. App., *infra*, 52a. The court also granted Chevron summary judgment on Echazabal's intentional interference with contractual relations claim, because he had presented no evidence that Chevron intended that his relation with Irwin be terminated. *Id.* at 53a. The district court certified its grant of summary judgment to Chevron for immediate appeal under Fed. R. Civ. P. 54(b). C.A. App. 646-652.

D. The Ninth Circuit's Divided Decision

In his appeal, Echazabal argued that whether Chevron had adequately established that Echazabal would pose a direct threat to his own safety could not properly be resolved on summary judgment. Echazabal did not initially challenge the district court's ruling that the "direct threat" defense applies when the threat is to an applicant's or employee's own health. Instead, the issue was raised by the panel, *sua sponte*, in a request for supplemental briefing. App., *infra*, 5a n.3.[3]

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[3] The EEOC declined the court of appeals' invitation to file a brief on the question whether the "direct threat" defense applies to threats to self. App., *infra*, 11a n.7. The Chamber of Commerce of the United

The Ninth Circuit reversed the district court's grant of summary judgment on the ADA claim. The majority concluded that the ADA's "direct threat" defense does not apply to applicants or employees who pose a direct threat to their own health or safety but not to the health or safety of others in the workplace. App., *infra*, 13a. The majority also rejected Chevron's argument that Echazabal was not "qualified" to perform "essential functions" of the plant helper job because of the risks the job posed to him, holding as a matter of law that "not posing a risk to one's own health or safety cannot in itself constitute an essential job function." *Id.* at 17a. The majority reasoned that in specifying a "direct threat to others" defense in section 12113(b), Congress intended "to exclude a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work," and also intended to preclude "a personal safety requirement [as] a valid qualification standard." *Id.* at 16a & n.10. The majority acknowledged that these rulings are in conflict with the decisions of other courts of appeals. *Id.* at 6a, 17a n.11. Furthermore, in reaching its decision the majority expressly "reject[ed] the EEOC's contrary interpretation" of the ADA, even though it recognized that "Congress explicitly required the EEOC to issue regulations implementing Title I" of the ADA (which includes the employment provisions at issue here). *Id.* at 11a-12a & n.8.

Judge Trott dissented. He stated that the majority's "Pickwickian ruling" is "bizarre" and "leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with

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States and Equal Employment Advisory Council filed a supplemental amicus brief in support of Chevron explaining that the "direct threat" defense is not the only way of showing that an individual is not "qualified" for the job, and that an individual who cannot perform the job without incurring serious injury is not a "qualified individual."

narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper." App., *infra*, 21a, 23a. He observed that the majority's decision also has the "pernicious" effect of "dislodg[ing] longstanding laws mandating workplace safety. * * * So much for OSHA" and state safe-workplace laws. *Ibid.*

Judge Trott would have affirmed the grant of summary judgment to Chevron on two grounds. First, a person is not "qualified" to "perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him." Second, Chevron satisfied the ADA's "direct threat" defense, as interpreted by the EEOC to apply to workers who pose a threat to their own safety—an interpretation to which Judge Trott would have deferred under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). App., *infra*, 21a-23a.

Judge Trott protested that the majority's decision will "require employers knowingly to endanger workers," will generate obvious "legal peril" for employers, and will impose an "unconscionable" "moral burden" on them. App., *infra*, 23a. He predicted that "conflicting responsibilities under different labor laws" would now engender "long, expensive, and unpredictable litigation." *Ibid.* Judge Trott expressed hope that the clear conflict among the circuits "will compel Supreme Court review." *Id.* at 23a-24a.

REASONS FOR GRANTING THE PETITION

This Court should review the Ninth Circuit's decision because the circuits are split over the recurring issue whether a person who will suffer serious injury or death as a result of carrying out the essential functions of a job is "qualified" for that job within the meaning of the Americans with Disabilities Act, and because the Ninth Circuit rejected the interpretation set forth in regulations of the agency Congress charged with implementing the law. In addition, the Ninth Circuit's ruling

creates inconsistent obligations for employers under the ADA and federal and state worker-protection laws such as the Occupational Safety and Health Act. By forcing employers to be complicit in injury to their employees—a result that Congress plainly did not intend—the Ninth Circuit's decision opens businesses up to liability not only under these worker protection statutes, but also in state tort suits, and it creates debilitating practical problems in the workplace.

The Ninth Circuit's decision, which is incorrect under well established principles of statutory interpretation, throws businesses' efforts to comply with the ADA into confusion. This Court should grant certiorari to restore sensible and certain rules to this important area of disability and employment law, and to avoid the absurd result that an employer within the Ninth Circuit cannot now deny a job handling dangerous machinery to an epileptic who suffers uncontrollable seizures, remove an employee with uncontrollable vertigo from a job scaling high structures, or keep any employee from work that will certainly kill him because of his medical condition.

I. THE NINTH CIRCUIT'S DECISION CREATES MULTIPLE CONFLICTS WITH OTHER COURTS OF APPEALS AND CONTRADICTS EEOC RULES

Courts of appeals have recognized no fewer than three statutory bases under the ADA for a business to refuse to employ a person who would incur substantial harm to life or health in performing the essential functions of a job. First, a person who cannot perform essential job functions without endangering his health or life is not a "qualified individual" under section 12112(a), and so is not within the ADA's protections at all. Second, an employer's insistence that a person not pose a "direct threat" to his own safety is a permissible "qualification standard" for a job under section 12113(b), as interpreted by the EEOC in regulations and guidance. 29 C.F.R. § 1630.2(r). Third, an employer is more

generally entitled under section 12113(a) to establish and enforce "qualification standards" for a position that are "job-related and consistent with business necessity," including specifically "medical" and "safety" standards. 29 C.F.R. § 1630.2(q). The Ninth Circuit rejected each of these grounds for denying employment to someone whose condition makes the job he seeks dangerous to his health or life. Its decision also conflicts with directly relevant authority interpreting virtually identical provisions of the Rehabilitation Act, which increases the unsettling impact of this "bizarre" ruling. App., *infra*, 21a.

1. *Qualified individual.* The Ninth Circuit held that Echazabal was "qualified" for the plant helper position despite the fact that Echazabal's and Chevron's doctors agreed that the substances he would be exposed to on the job would harm or kill him. App., *infra*, 14a-18a. That holding is squarely in conflict with the Seventh Circuit's decision in *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999).

In *Koshinski*, the plaintiff was fired from his job operating a blast furnace after he was diagnosed with degenerative osteoarthritis and his own and his employer's doctors concluded that he should not be exposed to the vibrations and high force, repetitive tasks involved in the job because that would "exacerbate his condition." 177 F.3d at 601. Relying on the medical opinions available to the employer at the time it made its decision, the Seventh Circuit rejected "Koshinski's self-destructive wish to return to this particular job" because "there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from." *Id.* at 602-603. Koshinski therefore "could not perform the essential functions" of the position and was not "qualified to do the job." *Id.* at 603.

The Seventh Circuit found it unnecessary to address whether Koshinski's employer had a "direct threat" defense in these circumstances, because "[t]he 'direct threat' issue arises * * *

only after an ADA plaintiff has made out a prima facie case, as an employer's defense to the challenged adverse employment decision." Koshinski had not shown "that he was entitled to protection under the ADA" as a "qualified individual" in the first place. 177 F.3d at 603. See also *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 142-144 (1st Cir. 1997) (holding that risks to the safety of others could be considered "as part of the 'qualifications' analysis").

Clearly, the reasoning and result in *Koshinski* are at odds with the Ninth Circuit's decision here. The Seventh Circuit would have held that Echazabal—who produced no contemporaneous medical evidence that he could do the plant helper job without harm to himself—had failed to make out a *prima facie* case that he was "qualified," and hence was outside the scope of the ADA's protection.

2. *Direct threat.* As the Ninth Circuit acknowledged (App., *infra*, 5a, 11a-12a), its holding that an employer may not require as a "qualification standard" that a person not pose a "direct threat" to his own health or safety conflicts with EEOC regulations and with decisions of other circuits applying the EEOC's regulations.

The EEOC "has authority to issue regulations to carry out the employment provisions in Title I of the ADA." *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 478 (1999). Exercising that authority in 1991 shortly after the ADA was adopted, the EEOC promulgated regulations interpreting sections 12113(a) and (b), which create a defense to liability when an applicant or employee fails to satisfy appropriate "qualification standards." 56 Fed. Reg. 35726, 35730 (July 26, 1991). Those regulations define "qualification standards" to mean "personal and professional attributes including * * * physical, medical, safety and other requirements established by a covered entity" as eligibility requirements for the job. 29 C.F.R. § 1630.2(q). These regulations also provide that the qualification standard

defense is satisfied where an applicant or employee poses "a significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated or reduced by reasonable accommodation." *Id.* § 1630.2(r) (emphasis added). The EEOC explained that including threats to the "health or safety of the individual" as a defense "is consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act." 56 Fed. Reg. at 35730.

The EEOC has also emphasized in guidance that "[a]n employer may require that an individual not pose a direct threat of harm to his or her own safety or health." EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IV-14 (Jan. 1992), C.A. App. 549. The determination that such a direct threat exists must be based—like Chevron's determination here—on "valid medical analyses" showing "specific risk" to the "particular individual," not on "stereotypes, patronizing assumptions," or "generalized fears." *Ibid.* Hence, for example, an employer is not required "to hire an individual disabled by narcolepsy who frequently and unexpectedly loses consciousness to operate a power saw or other dangerous equipment." *Ibid.*

The Ninth Circuit majority recognized that "Title I contains an explicit grant of regulatory authority to the EEOC," acknowledged that the EEOC's "implementing regulations * * * state that an employer may assert a 'direct threat' defense with respect to individuals who pose a threat only to their own health or safety," but "reject[ed]" that interpretation on the theory that it is inconsistent with the ADA's language and legislative history. App., *infra*, 11a-12a & n.8. The Ninth Circuit's rejection of a consistent, decade-old interpretation, formally promulgated by the agency Congress charged with implementing the ADA, itself warrants this Court's intervention.

Unlike the Ninth Circuit, other courts of appeals have explicitly followed the EEOC's regulations. For example, relying on ADA section 12113 and 29 C.F.R. § 1630.2(r), the Eleventh Circuit has held that "[a]n employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety." *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996). Applying that standard, the court affirmed the award of summary judgment against an epileptic employee. The court observed that the employee, who was at "significant risk" of having "seizures on the job" that were not controlled by medication, "sat on a platform above fast-moving press rollers" and "worked next to exposed machinery that reached temperatures of 350 degrees." *Id.* at 447-448. See also *LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832, 834-836 (11th Cir. 1998) (a line cook who used hot equipment and slicing machines and who experienced epileptic seizures on the job was a "direct threat" to himself and others; summary judgment for employer); *EEOC* v. *Blue Cross Blue Shield*, 30 F. Supp. 2d 296, 306-307 (D. Conn. 1998) (an employer who reasonably determined that an applicant for a burdensome kitchen job would face "potentially serious health risks, including stroke, heart attack, or death," could "appropriately rescin[d]" its job offer pursuant to 29 C.F.R.. § 1630.2(r)).

The Tenth Circuit reached the same conclusion in *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000). There, the defendant fired an employee with psychiatric disorders "who worked with explosives and who harbored a grudge against his supervisor, threatened suicide and perhaps injury to others." *Id.* at 1294. Citing 29 C.F.R. § 1630.2(r) and the Eleventh Circuit's decision in *Moses*, the court affirmed summary judgment in favor of the employer because "[u]nder the ADA it is a defense to a charge of discrimination if an employee poses a direct threat to the health or safety of himself *or* others," and because the employer's doctors had reasonably concluded that the employee presented "a direct safety threat to

himself and to the other workers." *Id.* at 1288, 1290, 1292 (emphasis added).

3. *Safety-based qualification standards.* The EEOC has taken the position that threats to self or others must be analyzed in terms of the "direct threat" defense and are not otherwise relevant under the ADA. See *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 (1999). This Court in *Albertson's* "questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one," but had "no need to confront the validity of th[at] reading." *Id.* at 569 n.15; see also *id.* at 578 (Thomas, J., concurring) (suggesting that safety issues "might also be relevant to the question whether respondent was a 'qualified individual'"). This case squarely presents the issue reserved for future decision in *Albertson's*, as to which the circuits are in conflict.

The Ninth Circuit held that satisfying the demands of the "direct threat" defense is the "exclusive" way in which employers may take account of safety concerns, reasoning that otherwise "definitional sleight-of-hand" would "circumvent" the limits of the defense, including Congress's supposed "decision to exclude a paternalistic risk-to-self defense." App., *infra*, 14a, 16a. The Ninth Circuit noted, however (*id.* at 17a n.11), that other courts of appeals disagree. As we have already demonstrated (*supra*, pp. 13-14), the First and Seventh Circuits held in *Amego* and *Koshinski* that safety risks may prevent a person from being a "qualified individual" within the meaning of ADA section 12112(a), precluding any need to consider the "direct threat" defense. Recently, the Fifth Circuit agreed that "safety requirements are not exclusively cabined into the direct threat test." *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000). Rather, "[i]n cases where an employer has developed a general safety requirement for a position"—as Chevron did with regard to its plant helper position—"safety is a qualifi-

cation standard no different from other requirements defended under the ADA's business necessity provision," section 12113(a). *Id.* at 874.

Unlike the Ninth Circuit, the First, Fifth, and Seventh Circuits thus recognize that safety issues may be addressed either as part of the section 12112(a) inquiry into whether a person is a "qualified individual" (*Amego*, *Koshinski*) or as part of a "qualification standard" authorized by section 12113(a) (*Exxon*). This case presents an ideal vehicle to address the issue left open in *Albertson's* and to end confusion in the lower courts over how safety requirements fit into the ADA's scheme.[4]

4. *Rehabilitation Act precedents.* This Court has made clear that construction of the ADA is to be "informed by interpretations of parallel definitions" in the Rehabilitation Act, because Congress' repetition of those provisions in the ADA indicates its "intent to incorporate [those provisions'] administrative and

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[4] The Ninth Circuit majority purported to distinguish *Amego* and *Exxon* on the ground that both involved claims that an individual posed a threat to others, not himself. App., *infra*, 17a n.11. In fact, that makes the conflict even more compelling. The First and Fifth Circuits held that qualification standards requiring that a person not pose a risk to others are not cabined by the "direct threat" defense, even though the statute describes the defense in terms of "a direct threat to the health or safety of other individuals in the workplace" (§ 12113(b)). Those circuits would hardly treat qualification standards requiring that a person not pose a risk to *himself* as restricted to the "direct threat" defense when the statutory provision creating that defense makes no mention at all of threats to self. As we discuss below, *infra*, Part II, the fact that threats to self are *not* mentioned in section 12113(b) strongly suggests that they should be analyzed instead under sections 12112(a) and 12113(a). The Ninth Circuit's attempted distinction in any event does not account for *Koshinski*, which analyzed a threat to self under section 12112(a)'s "qualified individual" rubric, and ignores the fact that the suicidal plaintiff in *Amego* also posed a threat to herself.

judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 631, 645 (1998); see also 42 U.S.C. § 12201(a); 29 U.S.C. § 794(d). The Ninth Circuit's ruling, however, contradicts other courts of appeals' and the EEOC's interpretation of virtually identical provisions of the Rehabilitation Act.

Like ADA section 12112(a), section 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a), extends protection to "qualified" individuals with a disability. Since 1978, EEOC regulations have defined that term to mean a person who "can perform the essential functions of the position in question without endangering the health and safety *of the individual* or others." 43 Fed. Reg. 12293, 12295 (Mar. 24, 1978) (emphasis added); 29 C.F.R. § 1614.203(a)(6) (2000). Courts of appeals prior to passage of the ADA likewise interpreted section 504's "qualified individual" language to exclude persons who posed a significant risk to themselves. *E.g.*, *Doe* v. *New York Univ.*, 666 F.2d 761, 777 (2d Cir. 1981) (if a student's mental disorder would result in a relapse into "behavior harmful to herself and others," including suicidal and other self-destructive acts, she would not be "qualified" for admission to medical school; Congress did not intend "to force institutions to accept * * * persons who pose a significant risk of harm to themselves or others"). Thus, when Congress enacted ADA section 12112(a), the terms it used had a settled regulatory and judicial interpretation, which Congress "inten[ded] to incorporate." *Bragdon*, 524 U.S. at 645; see 1 House Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. 101-336, Americans with Disabilities Act 485 (Comm. Print 1991) ("Leg. Hist.") (the ADA "is based on the same standard for 'qualified' person with a disability that has existed for years under the Rehabilitation Act"); see also *id.* at 71, 100, 124.

The courts of appeals continue consistently to hold that persons who would harm themselves in carrying out the essential functions of the job are not "qualified individuals" within the meaning of Rehabilitation Act section 504(a). See,

e.g., *Knapp* v. *Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996) (student with heart condition who would risk death playing basketball was not qualified for university's basketball program); *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1393-1395 (5th Cir. 1993) (person with diabetes or uncorrectably impaired vision is not "qualified" for a driver's job that "presents a genuine substantial risk that he could injure himself or others"); *Chiari* v. *City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (a person with Parkinson's disease was not "qualified" to be a construction inspector; "a significant risk of personal injury can disqualify a handicapped individual from a job if the employer cannot eliminate the risk"). The Ninth Circuit erroneously dismissed this line of cases and the EEOC's regulation as "irrelevant to [its] inquiry" because they interpret the Rehabilitation Act rather than the ADA. App., *infra*, 16a n.10. This Court squarely held in *Bragdon* that judicial and regulatory interpretations of Rehabilitation Act language repeated in the ADA are highly pertinent to understanding the ADA. The conflict between the Ninth Circuit's interpretation of the term "qualified individual" in the ADA and the EEOC's and other courts of appeals' interpretation of the same provision in the Rehabilitation Act warrants this Court's review.[5]

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[5] Contrary to the Ninth Circuit's ruling (App., *infra*, 16a n.10), Congress' inclusion of the "direct threat defense" in ADA section 12113(b) does not show that it intended to depart from the Rehabilitation Act understanding of the term "qualified." Had that been Congress' intent, it would have said so, rather than simply reenacting the "qualified individual" language of the Rehabilitation Act that had consistently been interpreted to permit exclusion of persons whose performance of the job would cause harm to themselves. Moreover, a 1988 amendment added an explicit "direct threat" provision to the Rehabilitation Act that denied protection to persons with communicable diseases who "would constitute a direct threat to the health or safety of other individuals." 29 U.S.C. § 705(20)(D). As the decisions cited in the text demonstrate, courts understood that the existence of this provision did not change the meaning of the term "qualified."

5. Unless this Court resolves these serious conflicts now, employers in the Tenth and Eleventh Circuits will be able to rely on EEOC regulations defining the "direct threat" defense to encompass threats to self; employers in the First, Fifth, and Seventh Circuits will be able to deny employment to persons who pose a threat to themselves because they are not "qualified" or fail safety-based "qualification standards"; but businesses in the Ninth Circuit will have to employ workers who will suffer injury or death on the job. Nationwide businesses with unified employment policies will as a practical matter have to comply with the Ninth Circuit's ruling everywhere. Moreover, any company doing business within the Ninth Circuit may be sued there for ADA violations, wherever those violations are alleged to have occurred, and so will potentially be subject to the Ninth Circuit's misconstruction of the Act. Wasteful litigation over the question presented also is sure to occur in circuits that have not yet addressed the issue. This Court should grant certiorari to end this confusion and ensure uniform application of the ADA throughout the Nation.

II. THE NINTH CIRCUIT'S DECISION DISREGARDS THE ADA'S PLAIN LANGUAGE AND NULLIFIES CONGRESSIONAL INTENT

According to the Ninth Circuit majority, threats to a worker's own health have no relevance under the ADA: the "direct threat" defense is the "exclusive way" in which threats to health may be taken into account, and that defense applies only when harm is threatened to *others*. App., *infra*, 14a. That faulty interpretation does not fit the plain language of the ADA, is contradicted by well established canons of statutory interpretation, and is refuted by the legislative history. It fails to give deference to the EEOC's reasonable interpretation to the contrary. It also relies on a patent misreading of this Court's Title VII jurisprudence. Absent this Court's intervention, the Ninth Circuit's "Pickwickian" decision will lead to "absurd results" that undermine worker protection laws and force

unwilling employers to assist workers in disruptive and demoralizing acts of self-destruction. *Id.* at 23a.

1. Three provisions of the ADA deal with a person's qualification for employment. First, the statute's primary bar on discrimination against the disabled, section 12112(a), extends protection only to a "qualified individual with a disability," defined as a disabled person who "can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). Second, the Act provides that it is a defense to liability that a disabled person has been screened out of a job by the application of "qualification standards" that are "job-related and consistent with business necessity." *Id.* § 12113(a). Finally, the Act addresses a particular "qualification standard," specifying that an employer "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b); see also § 12111(3) (defining "direct threat" as a "significant risk to the health or safety of others").

The sum total of the Ninth Circuit's textual analysis was to observe that section 12113(b) does not mention threats to self, and to conclude under the canon of interpretation *expressio unius est exclusio alterius* that threats to self therefore cannot be included within the "direct threat" defense. App., *infra*, 6a-7a. The *expressio unius* maxim, however, "serves only as an aid in discovering the legislative intent when that is not otherwise manifest," and here "too much is claimed for it." *United States* v. *Barnes*, 222 U.S. 513, 519 (1912).

By its plain terms, section 12113(b) sets forth only one example of a permissible qualification standard: a qualification standard *"may include"* a requirement that others not be put at risk. The provision therefore does not purport to be an exclusive list of safety-related qualification standards; it merely removes doubt that avoiding harm to others is *one* valid qualification standard. Section 12113(b) says *nothing else* about the meaning

of the terms "qualification standard" and "qualified individual" in the Act's other provisions. See *Albertson's*, 527 U.S. at 569 (section 12113(b) "appears to be a permissive provision"); *Christensen* v. *Harris County*, 529 U.S. 576, 587-588 (2000) (the term "may include" is "plainly permissive"); *Smith* v. *United States*, 508 U.S. 223, 230 (1993) ("It is one thing to say that [a phrase] *includes* [one use]. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use") (emphasis in original). Because section 12113(b) expressly is *not* exclusive and in no way limits the scope of sections 12112(a) or 12113(a), the Ninth's Circuit's reliance on the *expressio unius* maxim was misplaced.

2. The plain language of the ADA shows that posing a danger to self may disqualify a person for employment. The term "qualified" means "fitted" by "endowments * * * for a given purpose" or "having complied with the specific requirements * * * for an * * *employment." Webster's Third New Int'l Dictionary (1971). It is contrary to common usage and common sense to suggest that a person whose medical condition threatens injury or death at a particular job is "fitted" for that job; he is plainly *unfitted*. Also, where an employer has specified the environmental conditions an employee must be able to tolerate to do a job—as the ADA expressly permits (42 U.S.C. § 12111(8)) and as Chevron did here—an employee who will be injured or killed by those conditions obviously has not "complied with the specific requirements" for the job. Similarly, the term "qualification standards" in section 12113(a) is broad enough to encompass a "standard" requiring that a person be able to do the job in question without suffering serious harm or death. The EEOC has recognized as much by interpreting "[q]ualification standards" to include "personal * * * attributes" including "medical [and] safety" requirements established by an employer "which an individual must meet in order to be eligible for the position" (29 C.F.R. § 1630.2(q)), an interpretation that is entitled to deference under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984).

3. Well established canons of statutory construction confirm that a person who would pose a serious risk to his own health or life in a job is not qualified for that job. First, as we have already explained (*supra*, pp. 18-19), this Court has held that the ADA is to be construed in light of judicial and regulatory interpretations of the Rehabilitation Act. Congress clearly intended that the ADA incorporate principles embodied in the Rehabilitation Act and its regulations, and that the two laws be construed to avoid "inconsistent, conflicting standards." 1 Leg. Hist. 71, 100, 124. Accordingly, the ADA and Rehabilitation Act are to be construed *in pari materia*. See 2B N. Singer, Statutes and Statutory Construction § 51.03 (6th ed. 2000).

Both before and after passage of the ADA, courts of appeals have interpreted the concept of a "qualified individual" in the Rehabilitation Act to exclude a person who will be seriously harmed by the job as the result of a medical condition. See *supra*, pp. 19-20. The EEOC likewise has long defined a "qualified" person for purposes of the Rehabilitation Act as a person who can do the job "without endangering the health and safety of the individual." 43 Fed. Reg. at 12295. Interpreting the ADA's "qualified individual" provision *in pari materia* with the virtually identical provisions of the Rehabilitation Act and its implementing regulation confirms that a person who poses a significant risk to self is not "qualified" and therefore is outside the protection of the ADA. See *Koshinski*, 177 F.3d at 603.

In addition, it is well settled that courts should not interpret statutes to needlessly conflict with other federal laws or to produce absurd consequences. *E.g.*, *Moragne* v. *States Marine Lines*, 398 U.S. 375, 400-402 (1970); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994); 2B N. Singer, *supra*, § 53.03. The Ninth Circuit's construction of the ADA does lead to "absurd results." App., *infra*, 23a. To begin with, it conflicts with "longstanding laws mandating workplace safety." *Id.* at 22a. The Occupational Safety and Health Act imposes a duty on every employer to "furnish to *each* of his

employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a) (emphasis added). The Occupational Health and Safety Administration has explained that this obligation applies equally to the employment of disabled persons. See OSHA, Standards Interpretation, Employment of Individuals with Disabilities (Aug. 27, 1997), at www.osha-slc.gov/OshDoc/Interp_data/I19970827.html ("OSHA's policy is [that] *if* an employee can perform their job functions *in a manner which does not pose a safety hazard to themselves* or others, the fact they have a disability is irrelevant") (emphasis added).

For example, OSHA standards limit the employment of a fireman with heart disease, epilepsy, or emphysema; require that employees with sores not work in spray-finishing operations; and mandate removal of employees who exceed specified blood levels of lead and other substances from jobs involving exposure to those substances. See 1 OSHA Comp. Guide (CCH) ¶ 1161, at 1585-1586 (2000). State laws likewise impose obligations on employers to keep all of their workers safe, often providing criminal as well as civil penalties for failing to do so. See App., *infra*, 21a-22a; Cal. Lab. Code § 6402 ("No employer shall * * * permit any employee to go or be in any employment or place of employment which is not safe and healthful"). Yet the Ninth Circuit labels such worker protection policies "paternalistic," and allows an employer to deny a sick worker employment only when he reaches the point of being "unable to perform [the job's] duties." App., *infra*, 16a-17a. Given that "law books * * * overflow with statutes and rules designed by representative governments to protect workers from harm," this cannot be a correct interpretation of the ADA. *Id.* at 21a; *Albertson's*, 527 U.S. at 573 ("federal safety rules * * * limit application of the ADA as a matter of law"); 29 C.F.R. § 1630.15(e).

The Ninth Circuit's interpretation has other harmful consequences. It would expose employers to tort suits by injured workers and their families. The majority dismissed that risk on the ground that state tort laws inconsistent with ADA obligations would be impliedly preempted. App., *infra*, 13a. Judge Trott correctly observed, however, that relying on "the long, expensive, and unpredictable litigation road" to preempt state laws is "highly pernicious" when the issue can be avoided by a plain-language interpretation of the ADA, and is "a thin reed at best." *Id.* at 23a. As Judge Trott also noted, the Ninth Circuit's rule "requir[ing] employers knowingly to endanger workers" imposes an "unconscionable" "moral burden" on employers. *Ibid.* No reasonable interpretation of the ADA would impose a legal obligation on an employer knowingly to put a worker in the way of serious or fatal harm.

4. The ADA's legislative history contradicts the Ninth Circuit's ruling. The court relied on *a single floor statement* by Senator Kennedy that "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." App., *infra*, 8a, quoting 136 Cong. Rec. 17377 (1990). Senator Kennedy commented that "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician." *Ibid.*

The Ninth Circuit attached too much weight to Senator Kennedy's personal and "frankly partisan statements about the meaning of" the direct threat defense, which "cannot plausibly be read as reflecting any general agreement." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 262 (1994); see, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history"). Senator Kennedy's example of

paternalistic fear that a person with HIV would contract opportunistic infections—a speculative fear that could bar a worker from *any* job—is in any event far removed from the situation here. Chevron had specific, unanimous medical advice that documented conditions in the refinery would exacerbate Echazabal's liver disease and probably kill him.

"[T]he House and Senate commitee reports on the ADA flatly contradict" the court of appeals' reading of the statute. *Board of Trustees* v. *Garrett*, No. 99-1240, slip op. at 13 (Feb. 21, 2001). Congress aimed in the ADA to bar decisionmaking about employment of disabled persons based on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, [and] pernicious mythologies." 1 Leg. Hist. 125 (Senate Report). None of those improper motives formed the basis for Chevron's decision. It had specific, unrebutted medical reports that Echazabal would be seriously endangered by performing the plant helper job. Congress fully recognized that the results of a post-offer medical examination might "mak[e] the individual not qualified for the job." *Id.* at 137. The House Report thus states that, while "[g]eneralized fear about risks from the employment environment, such as exacerbation of the disability caused by stress," do not disqualify a person from employment, an employer may deny work based on "a direct impact on the ability of the person to do their actual job duties without imminent, substantial threat of harm." *Id.* at 347. The clear import of this passage is that a real and substantial risk of "exacerbation of the disability" is a proper ground to deny employment.[6]

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[6] The Ninth Circuit also incorrectly relied on *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), and *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991). App., *infra*, 13a, 15a n.9. In *Dothard*—which held that women *may* be excluded from contact positions in a high-security male prison—this Court stated that "it is impermissible under Title VII to refuse to hire [on] the basis of

5. Once the relationship between sections 12113(a) and (b) is understood—the "direct threat" defense is a "subset" of the more general "qualifications standards" defense (1 Leg. Hist. 423)—the logic of the EEOC's "direct threat" regulation is evident. The EEOC determined in 1991, immediately after the ADA was adopted, that section 12113(a) "qualification standards" may properly include "personal attributes" including "medical [and] safety" requirements. 29 C.F.R. § 1630.2(q). Rather than treat those requirements separately from the "threat to others" qualification standard set forth in section 12113(b), the EEOC treated *all* medical and safety standards—whether directed to avoiding harm to others or to self—as subject to the same set of substantive and evidentiary rules, using the "direct threat" rubric. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). Although the threat to self and threat to others qualification standards have different statutory sources—sections 12113(b) and (a)

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stereotyped characterizations of the sexes." 433 U.S. at 333. Chevron's decision not to hire Echazabal was based not on stereotypes but individualized consideration of Echazabal's medical condition. *Johnson Controls* held that an employer violated Title VII when it barred women of childbearing age from jobs that involved contact with lead to protect their fertility and fetuses. Because lead also has a "debilitating effect * * * on the male reproductive system," singling out women was blatantly discriminatory. 499 U.S. at 198. Another federal statute prohibited discrimination based on the potential for pregnancy. *Id.* at 198-199. In addition, OSHA had concluded that there was no scientific basis to exclude women of childbearing age from jobs involving lead exposure, and the employer kept lead exposure levels below the maximum amount recommended by OSHA. *Id.* at 208. None of those factors is involved here. Speculative future harm to speculative future pregnancies of fertile women as a class is far removed from the specific, individualized medical advice given to Chevron that exposure to toxins in its refinery would exacerbate Echazabal's liver condition and probably kill him. The Ninth Circuit's misconstruction of *Dothard* and *Johnson Controls* is itself a reason to grant review.

respectively—the EEOC has elected to make them subject to a single set of regulatory requirements. That reasonable decision by the agency Congress specifically charged with implementing these provisions is entitled to deference under *Chevron*. The Ninth Circuit erred in refusing to defer to the EEOC's interpretation of the ADA's qualification standards provisions.

6. The remaining question is whether the Ninth Circuit erred in holding that the "direct threat" defense is the *exclusive* means to defend a decision not to hire a person because of medical risks. App., *infra*, 14a. The EEOC has taken the litigating position that threats to self and others are relevant only as a defense to liability and play no role in determining whether a person is "qualified" in the first place. This Court questioned that position in *Albertson's*, 527 U.S. at 569 n.15, because it irrationally "impose[s] a higher burden on employers to justify safety-related qualification standards than other job requirements." The Seventh Circuit has rejected efforts to cabin all safety-related inquiries within the "direct threat" defense, holding that an employee fails to make a *prima facie* showing that he is a "qualified individual" under section 12112(a) if he does not produce evidence "as of the time of the employment decision" that he would not be harmed by doing the job. *Koshinski*, 177 F.3d at 602-603. In such a case, there is no need to "reach the question of whether the [employer] had a valid defense": the employee simply is outside the Act's protections. *Id.* at 603. See also *Albertson's*, 527 U.S. at 578 (an ADA plaintiff "bears the burden of proving * * * that he is a qualified individual") (Thomas, J., concurring).

How threats to self and others are to be analyzed under the ADA is of exceptional practical importance in many suits filed in federal courts throughout the country. We believe that the correct analysis is the one adopted by the Seventh Circuit in *Koshinski*. Once the employer has determined by medical testing or otherwise that an applicant poses a significant risk of harm to self or others in performing the essential functions of

the job, the applicant has the burden of coming forward with evidence, reasonably available to the employer when the employment decision was made, that the applicant could perform those tasks safely. If the applicant fails to produce such evidence, he has failed to make out a *prima facie* case that he is a "qualified individual." If the applicant does satisfy his initial burden, the question then becomes whether the "direct threat to self or others" defense applies. This interpretation ensures that, before an applicant may pursue actual and punitive damages claims against an employer for an ADA violation, there is evidence that the employer had reason to believe the applicant could do the job without injuring or killing himself or others. Like the scheme used in Title VII disparate treatment cases, this "division of intermediate evidentiary burdens" would bring the "litigants and the court expeditiously and fairly" to the ultimate question whether unlawful discrimination has occurred. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted.[7]

Respectfully submitted.

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[7] The court of appeals vacated the judgment as to Echazabal's Rehabilitation Act and FEHA claims and remanded those claims for reconsideration because "the district court treated the substantive standards for liability under [the ADA and those two] statutes as identical." App., *infra*, 18a n.12. In a separate opinion, the court reversed the grant of summary judgment to Chevron on Echazabal's state law interference with contract claim. *Id.* at 25a-29a. The court made clear, however, that its ruling as to that count too turned on its interpretation of the ADA: Chevron's letter to Irwin was not "justified" under the ADA, so Chevron had not made out the affirmative defense of justification. *Id.* at 28a-29a. Accordingly, reversal of the Ninth Circuit on the question presented would require a remand as to all of respondent's claims.

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No. 00-1406

In the Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE CALIFORNIA CHAMBER OF COMMERCE, AND THE ASSOCIATION OF WASHINGTON BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Regulations

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of business companies and associations, with an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court by filing *amicus curiae* briefs in cases involving issues of concern to American business.

The California Chamber of Commerce is a voluntary, non-profit, California-wide business association with more than 12,000 members, both individual and corporate, who represent virtually every economic interest in the state. Ninety percent of the California Chamber's members are small or medium-sized businesses that it represents before the Legislature, local governing bodies, and the courts on a broad range of issues affecting business.

The Association of Washington Business ("AWB") has a membership consisting of businesses large and small, urban and rural, and from all parts of the state. AWB is the oldest and most influential business organization in the state, and serves as Washington's chamber of commerce. Of 3,700 members, 75 percent are businesses with fewer than 50 employees. AWB's membership also includes some of the nation's largest and most influential companies. AWB serves as the principal voice of the business community. An important function of AWB is to represent the interests of its members by filing amicus briefs in cases presenting issues of statewide concern to businesses.

Many members of the U.S. Chamber, the California Chamber, and AWB are employers subject to Title I of the

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Counsel for *amici curiae* wrote this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and other employment statutes and regulations. As employers, and as potential respondents to ADA charges, *amici*'s members have a direct interest in the Court's determination whether an employer may, consistent with the ADA, refuse to hire an individual with a disability when the individual is unable to perform the essential functions of the job without posing a substantial risk to his own health or safety.

As employers, *amici*'s members are also required to comply with the Occupational Safety and Health Act (the "OSH Act"), 29 U.S.C. § 651 *et seq.*. Under that act, they have a general duty to maintain a work environment free of hazards that may cause death or serious physical harm to their employees. *Amici*'s members therefore also have a substantial interest in the determination whether their duties under the OSH Act must give way to the Ninth Circuit's interpretation of the ADA.

Like many employers, many of *amici*'s members prepare job descriptions specifying the duties associated with a particular job, the skills required to perform the job, and the educational and other job-related requisites for the job. Under the ADA, in determining whether a person is a "qualified" for a particular job, consideration should be given to an employer's written description of a job and to the employer's judgment as to what job functions are essential. 42 U.S.C. § 12111(8). Here, Chevron has prepared a written description of the requirements of the job at its coker unit, a description that "incorporated the need for an employee to be able to tolerate an environment" that included toxins and chemicals (Pet. App. 15a), but the majority opinion rejected that definition in favor of its own belief as to what constituted the essential functions of the job. *Ibid.* *Amici*'s members have a strong interest in understanding the extent of their potential liability under the ADA for adhering to their own pre-existing decisions regarding the requirements for their job positions.

Additionally, many of *amici*'s members employ physicians. Among their duties, which generally involve mainte-

nance of the health and safety of the workforce, these company physicians provide medical advice and guidance as to whether or not a particular individual can perform a particular job. Here, Chevron's doctors (in consultation with respondent's personal physician) concluded that respondent's disability rendered him unable to perform the job he sought without seriously endangering his health. Chevron relied on this advice to withdraw respondent's conditional job offer. *Amici*'s members therefore also have a direct interest in ensuring that they can rely on the professional medical opinion of their physicians in determining whether a job applicant is qualified.

Accordingly, *amici* have both an interest in, and familiarity with, the issues presented to the Court in this case. Because of their significant experience in these matters, *amici* are well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit majority concluded that threat to self is completely irrelevant under the ADA. Petitioner Chevron contends (as did Judge Trott in dissent) that threat to self is relevant to both whether an individual is "qualified" within the meaning of the ADA and the so-called "direct threat defense." The Solicitor General's position, as expressed in his *amicus* brief filed at the Court's invitation, is that petitioner is right about the latter contention but not necessarily the former.

Amici believe that Chevron and Judge Trott are right about both positions. Because the merits briefs of petitioner and the Solicitor General (as well as other *amici* supporting petitioner) will fully address the "direct threat defense" issue, *amici* will not. Rather, this brief demonstrates that threat to self must be taken into account in deciding who is a "qualified individual with a disability." 42 U.S.C. § 12112(a).

I. The ADA prohibits discrimination only against those individuals with a disability who are otherwise qualified to perform the essential functions of the job. 42 U.S.C.

§ 12112(a). An individual whose performance of essential job functions will seriously endanger his own health is not a "qualified" individual with a disability. *Ibid.*

A. Neither the text of the ADA, nor the regulations implementing the ADA, expressly permit or forbid consideration of the health risks to the employee (or others) in determining whether a job applicant is "qualified." The reasonable reading of the statute, however, is that a person who cannot perform a job without posing a substantial risk to his health is not qualified to do that job, especially if the employer's written job description, which *must* receive consideration under the statute (42 U.S.C. § 12111(8)), makes safe performance an essential function of the job.

B. The Rehabilitation Act definition of "qualified" carries over to the ADA. In both the ADA (42 U.S.C. § 12201(a)) and the 1992 amendments to the Rehabilitation Act (29 U.S.C. §§ 791(g), 794(d)), Congress explicitly stated that the same standards are to be applied under the two Acts. As Judge Lynch's opinion for a unanimous panel of the First Circuit concluded in *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997), so construing the statutes compels the conclusion that a substantial health risk resulting from an individual's performance of a job renders that individual not "qualified" under the ADA.

The regulations under the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, explicitly address this issue. They provide that a "qualified individual" is one who "can perform the essential functions of the position in question *without endangering the health and safety of the individual* or others * * *." 29 C.F.R. § 1614.203(a)(6) (emphasis added). The regulation is consistent with EEOC adjudications under the Rehabilitation Act, as well as case law under the Rehabilitation Act. The Rehabilitation Act regulation should be followed, and the plaintiff should bear the burden of proving that he or she can perform the job safely as part of the showing that the plaintiff is a "qualified individual with a disability."

C. The Rehabilitation Act regulation is entitled to deference. This Court so held in *Bragdon* v. *Abbott*, 524 U.S. 624, 638-39 (1998), relying on the Rehabilitation Act's definition of "handicapped individual" to interpret the term "disability" under the ADA. The regulation deserves substantially more deference than the EEOC's litigating position with regard to the ADA: the EEOC argues that the health of the individual is limited to the applicability of the "direct threat defense," and has no relevance to the determination whether the individual is qualified. The First Circuit properly rejected that position in *Amego* and instead relied on the Rehabilitation Act regulation. 110 F.3d at 142, 144.

II. Even without regard to Rehabilitation Act regulations, the only appropriate construction of the term "qualified" is one that takes into account the risk to an employee's health.

A. The ADA should be read as part of the total corpus of federal employment law. An integral part of this body of legislation is the OSH Act, which requires the protection of employee health and safety and the prevention of employee injury. The OSH Act's policies and mandates (it should go without saying) apply to the employment of disabled persons. An individual is not "qualified" for employment, then, if his employment would vitiate the goals of the OSH Act. Time and again, this Court has instructed the lower federal courts to read the entire United States Code as a harmonious whole. Even in the absence of a specific OSH Act regulation governing respondent's precise situation, a construction of the ADA that needlessly creates the very kind of danger to employees that the OSH Act seeks to avoid creates a sharp tension in federal law. That tension can and should be avoided by construing the ADA to take account of whether a particular position would endanger an employee as part of the inquiry whether he or she is "qualified" for the position. Furthermore, there *is* an OSH Act regulation that would permit respondent, if hired, to refuse to perform his job on the ground that it would endanger him, and would protect him from retaliation. 29 C.F.R. § 1977.12(b)(2). There

is no reason why the ADA should be construed to command petitioner to hire respondent for a job he could then lawfully refuse to perform.

B. Contrary to the majority opinion below (Pet. App. 9a-10a), such a construction of the statute is not "paternalistic" in any legally consequential sense. Reference to Title VII precedents to arrive at such a conclusion is inappropriate, given that issues involving an employee's health and safety are better resolved by reference to the federal statute — the OSH Act — that addresses this very issue. The OSH Act itself is "paternalistic" in a sense, but the function of a court construing the intent of Congress is to distinguish those respects in which Congress *wished* to act paternalistically from those in which it did not. It takes little imagination to realize that Congress wished to protect employees from workplace hazards.

C. It is possible to construe the requirement that the employee be "qualified" and the availability of a "direct threat" defense to the employer so that each takes account of the threat the employee might pose to himself or herself, yet they are not redundant. The "not onerous" burden generally imposed on employment discrimination plaintiffs, for example, could be applied to the threshold inquiry, with a more searching inquiry applied at the defense stage. The more persuasive analysis, however, recognizes that it simply does not matter if the two provisions are redundant. The ADA, undeniably, is filled with such redundancies. The presumption that Congress does not write redundant provisions – powerful but not irrebuttable in most cases, and demonstrably fictional in this case – should not be allowed to overcome the strong indications that Congress did wish safety to be taken into account at the stage of determining whether the plaintiff is a "qualified individual."

ARGUMENT

I. AN INDIVIDUAL WHO WILL SERIOUSLY ENDANGER HIS OWN HEALTH BY PERFORMING ESSENTIAL JOB FUNCTIONS IS NOT A "QUALIFIED INDIVIDUAL WITH A DISABILITY"

The Ninth Circuit concluded that being "qualified" for a job must mean only being able to perform its physical tasks. But nothing in the ADA's definition of "qualified individual with a disability" compelled that conclusion, and other sections of the ADA, which the Ninth Circuit had no warrant to disregard, suggest that it was perfectly proper for petitioner to define the qualifications for respondent's job more broadly. Rehabilitation Act regulations, which should apply with equal force to ADA cases, also make it clear that being "qualified" includes not endangering one's own health or safety or that of others. The Ninth Circuit likewise had no warrant to disregard those regulations. Indeed, under *Bragdon* v. *Abbott*, they were entitled to some level of deference. Because neither the ADA's text and structure nor any ADA regulation contradicts those Rehabilitation Act regulations, they should be dispositive.

A. To Be Qualified For A Job Entails More Than Being Able To Perform Its Physical Tasks

The ADA prohibits discrimination against any "qualified individual with a disability." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is "[a]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Is a person "qualified" – "can" he or she "perform the essential functions" of a job – if doing so will result in serious injury or death to that person? As a purely linguistic matter, without resort to any of the other sources that inform statutory interpretation, the section surely could be read either way. "I can't

do *X* because I would hurt myself if I did," and "I can do *X*, but I would hurt myself if I did," are equally natural English usages.

The EEOC regulations interpreting the ADA state simply that "[q]ualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). The regulation is no less ambiguous than the statutory language itself.

Other sections of the ADA, however, do shed significant light on the issue. The ADA requires that courts give consideration to an employer's judgment as to what is required to perform the job in question. 42 U.S.C. § 12111(8) ("consideration shall be given to the employer's judgment as to what functions of the job are essential"); see also 29 C.F.R. § 1630.2(n)(3) ("[e]vidence of whether a particular function is essential includes * * * (ii) [w]ritten job descriptions prepared before advertising or interviewing applicants for the job"). And under the Rehabilitation Act this Court has accorded deference to the decisions of federal agencies regarding the criteria that must be met for a plaintiff to be considered "qualified." See *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979) (deferring to Department of Health, Education, and Welfare regulation defining a "qualified handicapped person" with regard to education services). As the First Circuit has stated, "[w]here the plaintiff has presented no evidence of discriminatory intent, animus, or even pretext, we think there should be special sensitivity to the danger of the court becoming a super-employment committee." *EEOC* v. *Amego, Inc.*, 110 F.3d at 145.

Chevron prepared a written description of the job for which respondent applied (as well as every other position at the refinery). Pet. App. 36a-37a. The descriptions listed not only the tasks involved in performing the job, but also the specific

chemicals, solvents, and liquids to which an employee would be exposed. *Ibid.* The job description, therefore, made clear that the employee must "*be able to tolerate* an environment including, among other things, hydrocarbon liquids and vapors, petroleum, solvents and oils." Pet. App. 15a (emphasis added). The doctors who evaluated respondent's condition relied on that job description in determining that performance of the job would endanger respondent's health. Pet. App. 36a-39a.

Nonetheless, the majority below discarded Chevron's description, substituting its own definition of essential job functions. Judge Reinhardt's opinion for the majority held that those functions comprised only the physical aspects of the job and that respondent was capable of performing those functions. Pet. App. 15a-16a. In reaching that conclusion, the majority simply gave no weight to the consideration that respondent's performance of those tasks would seriously endanger respondent's health, and possibly cause him to die.[2] Substituting epithet for analysis, the majority described that concern as "a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work." *Id.* at 16a.

The majority's reasoning is absurd. Certainly, if exposure to toxins in the workplace would cause respondent to pass out or suffer seizures while at work, all would agree that respondent is unable to perform the essential functions of the job. But, because exposure to those toxins does not prevent respondent from surviving the workday, and, instead will "only" seri-

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[2] We assume for purposes of this *amicus* brief, as did the panel majority below for purposes of its decision, that the threat to respondent's health is severe. Although respondent has disputed that proposition in his brief in opposition in this Court, petitioner and perhaps other *amici* will address that issue; we will not address it in this brief. For reasons stated in the *amicus* brief the U.S. Chamber joined in the Ninth Circuit, the U.S. Chamber disagrees with respondent's position on that issue.

ously injure him at a later date, under the majority's view, respondent can do the job. The better view is aptly stated in Judge Trott's dissent: "[T]he job most probably will endanger his life. I do not understand how we can claim he can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him." *Id.* at 21a.

The dubious logic of the majority below was appropriately rejected by the Seventh Circuit in *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999). In that case, the medical testimony established that, although the plaintiff could currently perform the tasks associated with his job as a cupola operator, plaintiff's degenerative wrist disease would eventually cause him to "wear out" and no longer be able to perform heavy labor. *Id.* at 601. The Seventh Circuit concluded that the plaintiff was not qualified: "[Plaintiff] may have shown that he wanted to return to work despite the risk of pain and harm, but that is not the test. He had to show that he was qualified to do the job." *Id.* at 603.

The Seventh Circuit's reasoning is correct, especially as applied to a case in which the employer included tolerance to specific chemicals in its written job description. It certainly does not contradict the *language* of the ADA to conclude that being "qualified" for a position entails more than the ability to perform the physical tasks associated with that position.

B. Under The EEOC Regulations Implementing the Rehabilitation Act, Which Apply With Equal Force to the ADA, Respondent Is Not Qualified

1. Section 504 of the Rehabilitation Act and the ADA both prohibit discrimination against qualified individuals with a disability. Compare 29 U.S.C. § 794(a) ("[n]o otherwise qualified individual with a disability * * * shall * * * be subjected to discrimination") with 42 U.S.C. § 12112(a) ("[n]o covered entity shall discriminate against a qualified individual with a disability * * *").

The definition of "qualified individual" under the Rehabilitation Act regulations applies with equal force to the ADA. Congress has expressly stated that the ADA and the Rehabilitation Act are to be read together. In enacting the ADA, Congress provided that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). The ADA's legislative history states more specifically that the definition of "qualified individual with a disability" "is comparable to the definition used in regulations implementing section 501 and section 504 of the Rehabilitation Act of 1973." H.R. Rep. No. 101-485 (II), *55 (May 15, 1990), *reprinted in* 1990 U.S.C.C.A.N. 303.

In the 1992 amendments to the Rehabilitation Act, Congress reaffirmed that the standards under the two statutes are the same, mandating that the standards to be used in determining whether the Act has been violated "shall be the standards applied in title I of the Americans with Disabilities Act." 29 U.S.C. §§ 791(g) (employment by federal entities), 794(d) (employment by programs or activities receiving federal assistance).

In a case in which an explicit command of the ADA contradicted prior interpretations of the Rehabilitation Act, and perhaps even in a case in which an ADA regulation entitled to *Chevron* deference contradicted prior interpretations of the Rehabilitation Act, these statutory provisions would likely require that the Rehabilitation Act interpretation be conformed to the ADA, not the other way around. In a case in which the Rehabilitation Act provides a *definitive* answer, however, and the ADA's language and regulations do *nothing* to contradict that answer, surely there is no warrant for a court to depart from settled interpretation of the Rehabilitation Act. Rather, Congress's intent that the two statutes be interpreted identically leads logically to the conclusion that settled Rehabilitation Act precedents and regulations should be applied to cases under the

ADA except in cases of palpable conflict. And in fact the Court has done just that. See *Bragdon* v. *Abbott*, 524 U.S. at 631, 638-639, 645.

2. Although the EEOC regulations under the ADA defining "qualified individual with a disability" do not explicitly address the impact of a threat to an individual's health, the regulations implementing the Rehabilitation Act speak directly to the issue: "Qualified individual with handicaps means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question *without endangering the health and safety of the individual* or others * * *." 29 C.F.R. § 1614.203(a)(6) (emphasis added). In other words, under the Rehabilitation Act, if an individual will endanger his or her own health or safety in the course of performing the essential functions of a job, the individual is not qualified.

The EEOC has adhered to this definition of "qualified individual" in its adjudications. In *Burkey* v. *Reno*, 1996 WL 28646 (E.E.O.C. Jan. 19, 1996), the EEOC determined that the Rehabilitation Act did not prohibit the removal of a correctional officer from her position on the ground that her disability — severe, chronic asthma — placed her at a substantial risk of contracting tuberculosis or and other infectious diseases.

Cases interpreting the Rehabilitation Act uniformly use the same definition of "qualified individual." In *Knapp* v. *Northwestern University*, 101 F.3d 473 (7th Cir. 1996), for example, the Seventh Circuit held that a college student was not "qualified" to play intercollegiate basketball because the student's heart condition made it probable that he would suffer a fatal heart attack if he played on the defendant university's basketball team. *Id.* at 482-483; see also *id.* at 483 ("A significant risk of personal physical injury can disqualify a person from a position if the risk cannot be eliminated."). Similarly, in *Chiari* v. *City of League City*, 920 F.2d 311, 317 (5th Cir. 1991), the Fifth Circuit concluded that a construction inspector

was not qualified for his position because the effects of Parkinson's disease posed a risk that he would injure himself.

Courts that considered the issue before the enactment of the ADA are in accord. See *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422-24 (9th Cir. 1985) (job applicant would not be qualified if she were unable to perform the essential functions of the job without a probability of substantial injury to herself); *Doe* v. *New York University*, 666 F.2d 761, 777 (2d Cir. 1981) (applicant for admission to medical school would not be qualified if there were a "risk that her mental disturbances will recur, resulting in behavior harmful to herself and others"); *Milkucki* v. *United States Postal Service*, 1986 WL 10516, *7 (D. Mass. Sept. 22, 1986) (applicant for a position as a mail handler would not be qualified if there were a reasonable probability that her scoliosis would cause her substantial harm); *E.E. Black, Ltd.* v. *Marshall*, 497 F. Supp. 1088, 1103 n.16 (D. Haw. 1980) (recognizing that in some instances the risk of injury to an employee renders the employee not qualified for a particular job).

3. Both at the time the ADA was enacted, and currently, the Rehabilitation Act regulations' definition of "qualified individual" has provided that an individual is not qualified if he cannot perform the essential functions of the job without endangering himself.[3] And numerous courts had stated, before the ADA was enacted, that an individual whose handicap posed a risk that the person would seriously injure himself while performing the functions of a job was not qualified for that job. See *Doe*, 666 F.2d at 777; *Milkucki*, 1986 WL 10516, at *7; *E.E. Black, Ltd.*, 497 F. Supp. at 1103 n.16. "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with preexisting regulatory interpretations." *Bragdon*, 524 U.S. at 631.

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[3] The regulation was originally codified at 29 C.F.R. § 1614.702. See 43 Fed. Reg. 12295 (Mar. 24, 1978). This provision was redesignated as 29 C.F.R. § 1614.203 in 1992. See 57 Fed. Reg. 12634 (Apr. 10, 1992).

Accordingly, when Congress stated that the ADA was to be read in conjunction with the Rehabilitation Act, Congress intended that the EEOC's (and the courts') interpretation of the Rehabilitation Act apply to the ADA. See *Amego*, 110 F.3d at 144 (in a case brought under the ADA, acknowledging that EEOC regulations under the ADA defining "qualified individual" do not address risk posed to others, and relying on Rehabilitation Act regulations to take that factor into account in determining whether the plaintiff was qualified).

The Ninth Circuit's opinion, however, simply ignores the congressional mandate that the ADA be read in conjunction with the Rehabilitation Act. The majority conceded that, under the Rehabilitation Act regulations, a disabled person is not "qualified" if his disability poses a reasonable possibility of substantial harm to him. Pet. App. 16a-17a n.10 (citing *Mantolete*, 1422-24). Nonetheless, the majority asserted that the "Rehabilitation Act regulation [] is irrelevant to our inquiry" (*ibid.*) because, according to the majority, the ADA's definition of "qualified individual" speaks directly to the issue. As petitioner will explain in its merits brief and as the Solicitor General convincingly showed in his petition-stage *amicus* brief (at 12-13), only the most blatant misuse of the *expressio unius* principle could lead to the conclusion that the ADA reflects an explicit congressional intent to require that threats to oneself be disregarded.[4] See also *Chickasaw Nation* v. *United States*, 122

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[4] *Amici* agree with the Solicitor General to the extent that he shows that the decision below is indefensible and that threat to self must be taken into account *at least* as a defense available to the employer. But *amici* disagree, for the reasons stated in this brief, with the Solicitor General to the extent that he asserts that the EEOC's regulations under the ADA "appropriately place the burden of proof on employers" because they "analyz[e] employer concerns about threat to self as a defense (rather than part of the employee's prima facie demonstration that he or she is 'qualified' under 42 U.S.C. 12112(a))." U.S. Br. 16 (Sept. 26, 2001). Just as is true under the Rehabilitation Act, threat to self should be considered as part of *both* the showing the employee

S. Ct. 528, 532 (2001) (explaining that "to 'include'" something in a statute is *not* necessarily to exclude everything else given the ordinary meaning of the word). In the absence of any reliable indication in the text of the ADA, or even its implementing regulations, that threats to oneself are to be disregarded, the Rehabilitation Act regulations should be controlling.

4. As is the case in every action brought under the Rehabilitation Act, the plaintiff bears the burden of establishing that he is "qualified" for the job in question, including that he will not endanger the health of himself or others. See *Amego*, 110 F.3d at 142 ("It is generally accepted that * * * the plaintiff bears the burden of showing she is a 'qualified' individual.") (quoting *Jacques* v. *Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996)). In *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), a case brought under the Rehabilitation Act, the Court considered whether it was appropriate to dismiss a school teacher who was susceptible to tuberculosis on the ground that the contagious disease could endanger the health of others. Remanding the case to the trial court, the Court held that it was appropriate to consider, as part of whether the plaintiff was "*otherwise qualified*," the potential of harm to third parties. *Id.* at 287-88 (emphasis added). In other words, the Court indicated that the question whether a plaintiff would endanger the health of others (the issue of endangering one's own health was not at issue in that case) was part of plaintiff's *prima facie* burden, not part of the employer's "direct threat" defense. See also *Albertsons, Inc.* v. *Kirkingburg*, 527 U.S. 555, 578 (1999) (Thomas, J., concurring) ("Presumably, then, a plaintiff claiming a cause of action under the ADA bears the burden of proving, *inter alia*, that he is a qualified individual.").

Specifically, in numerous cases in which the risk to an employee's own health was at issue, the courts have confirmed that it is the plaintiff's burden to establish that he is "qualified." For example, in *Amego*, the First Circuit held that summary

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must make that he or she is "qualified" *and* the employer's defenses.

judgment for the employer was appropriate because plaintiff "did not meet her burden of demonstrating that she is qualified." 110 F.3d at 144. And in *Chiari*, the Fifth Circuit stated that "[t]o qualify for relief under this statute [the Rehabilitation Act], Chiari must prove that * * * he is 'otherwise qualified' to be a construction inspector." 920 F.2d at 315. Other circuits are in accord. See *D'Amico* v. *City of New York*, 132 F.3d 145, 149 (2d Cir. 1998) ("The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that he is qualified for the position despite his disability."); *Knapp*, 101 F.3d at 478 ("[t]o prevail on his claim for discrimination under the [Rehabilitation] Act, Knapp must prove that * * * he is otherwise qualified for the position sought"); *Mantolete*, 767 F.2d at 1423 ("the plaintiff bears the burden in the first instance of showing she is qualified to perform the essential functions of the job") (citing *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981)).

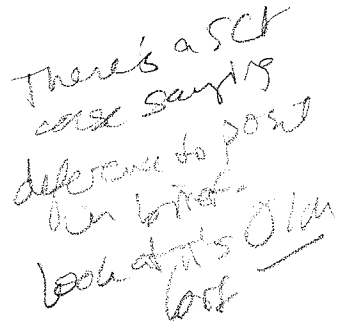
It is certainly true that, in many cases, it may be the employer who first articulates the reason why an employee may not be qualified for a position. See, *e.g.*, *Amego*, 110 F.3d at 141 (employer argued that plaintiff was not qualified because of diagnosed depression), *Chiari*, 920 F.2d at 315-16 (defendant justified not hiring plaintiff because performance of job would endanger his safety). Nonetheless, whichever party first raises the issue, it remains the plaintiff's burden under the Rehabilitation Act to prove that he is can perform the essential functions of the job without endangering the health or safety of himself or others.

C. The Rehabilitation Act Regulations Are Entitled to Deference

1. In *Bragdon* v. *Abbott*, 524 U.S. at 638-639, this Court relied on the Rehabilitation Act regulations to determine what is and is not a "major life activity" under the ADA. See 42 U.S.C. § 12102(2)(A) (defining a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"). In according def-

erence to the Rehabilitation Act regulations, the Court noted (*id.* at 642) that "[r]esponsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984)." Instead, the Court observed, "[i]t is enough to observe 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.'" *Ibid.* (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)). Similarly, here, the regulations defining "qualified individual with handicaps" are entitled to deference.

Not all EEOC pronouncements, however, are entitled to deference. Notably, the EEOC has taken the litigating position in this case and others that the health and safety of an individual are properly considered *only* with regard to the "direct threat defense" (see 29 C.F.R. § 1630.2(r)), and are not relevant to whether an individual is qualified. *E.g.*, *Amego*, 110 F.3d at 142-144. But litigating positions taken by agencies are not accorded the same deference as regulations implemented after notice and comment, as were the Rehabilitation Act regulations on which we rely. See 57 Fed. Reg. 12634 (Apr. 10, 1992). As this Court noted in *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2177 (2001), not all agency pronouncements are entitled to the same level of deference. In particular, an "interpretation advanced for the first time in a litigation brief" receives deference at the lowest end of the spectrum of judicial responses, "near indifference." *Id.* at 2172 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)).



One circuit has expressly rejected the EEOC's litigating position on this issue. In *EEOC* v. *Amego, Inc.*, *supra*, the EEOC argued that the issue of the health or safety of others must be analyzed under the "direct threat" defense, and had no relevance to the resolution of whether plaintiff was qualified for the position in question. 110 F.3d at 142. The First Circuit

disagreed, ultimately concluding that plaintiff was not qualified because she posed a direct threat to others. *Id.* at 144; see also *Albertsons*, 527 U.S. at 578-80 (Thomas, J., concurring) (employee's failure to meet qualification standards establishes that the employee is not qualified for the job).

Accordingly, in order to read the ADA and the Rehabilitation Act together — as Congress intended — the Court must follow either the regulation (and judicial interpretations) under the Rehabilitation Act or the EEOC's litigating position vis-à-vis the ADA. The choice is simple; the regulation that is entitled to deference must trump a litigating position meriting "near indifference."

II. EVEN WITHOUT REGARD TO REHABILITATION ACT REGULATIONS, AN INDIVIDUAL WHOSE HEALTH IS ENDANGERED BY PERFORMING THE JOB IN QUESTION IS NOT QUALIFIED UNDER THE ADA

A. The ADA cannot be read in a vacuum. As we have explained, the ADA and the Rehabilitation Act are to be construed alike. But the Rehabilitation Act is not the only statute to be considered in interpreting the ADA; to the contrary, the ADA should be read in the context of the total body of federal employment law, particularly "longstanding laws mandating workplace safety." Pet. App. 22a.

It is a "familiar principle of statutory construction that, when possible, courts should construe statutes * * * to foster harmony with other statutory and constitutional law." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994); accord *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). "Statutory interpretation requires more than concentration on isolated words; rather, consideration must be given to the total corpus of pertinent law * * *." *Boys Market, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970) (harmonizing provision of Norris-LaGuardia Act, 29 U.S.C.

§ 104, and provision of Labor Management Relations Act, 29 U.S.C. § 185(a)).

The core policies underlying the OSH Act are the protection of employee health and safety and the prevention of injury: "The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(a). The OSH Act's general duty clause therefore imposes a duty on every employer to "furnish to *each* of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1) (emphasis added). "[T]his provision * * * was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary [of Labor]." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980).

The OSH Act's mandates are not to be simply cast aside when it comes to the employment of disabled persons. The U.S. Department of Labor, the agency charged with administering the OSH Act, has implemented interepretive guidance describing how the OSH Act and the ADA are to work together. OSHA, Standards of Interpretation and Guidance, Employment of Individuals with Disabilities (Aug. 27, 1997), at www.osha-slc.gov/OshDoc/Interp_data/I19970827.html. Significantly, this guidance recognizes that an employer may take into account the risk to the employee associated with the performance of a job: "[I]f an employee can perform their [*sic*] job functions in a manner *which does not pose a safety hazard to themselves* [*sic*] or others, the fact that they [*sic*] have a disability is irrelevant * * *." (Emphasis added.)

What is more, under the OSH Act, respondent could have refused to perform the job at the coker unit on the ground

that performance of the job would endanger his health. The OSH Act regulations provide that:

> [O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.

29 C.F.R. § 1977.12(b)(2).[5] This Court unanimously upheld Section 1977.12(b)(2) in *Whirlpool Corp.* v. *Marshall, supra.*

Accordingly, if the decision below is correct, petitioner must hire respondent, *despite* the interplay between his disability and hazardous chemicals, under the ADA, but then respondent could refuse to do the job, *because of* the interplay between his disability and hazardous chemicals, under the OSH Act. This is nonsensical, and the majority erred in producing such an illogical result: "[I]t our role to make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991). See also *ibid.* ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.").

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[5] The result should be the same under the ADA. "[I]f a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder. * * * In such a case, a reasonable accommodation to the employee may include assignment to other areas where the particular paint is not used." H.R. Rep. No. 101-485(III), *29 (May 15, 1990), *reprinted in* 1990 U.S.C.C.A.N. 445.

When the ADA is read in conjunction with the OSH Act, then, any possible ambiguity in the ADA's statutory text disappears. An individual cannot be "qualified" for a job if performing its functions would vitiate the very policies underlying the OSH Act. And an individual cannot be qualified for a job under the ADA that he could refuse to accept or to perform under the OSH Act.

For this reason, we disagree with the Solicitor General's suggestion that "Congress has not 'directly spoken to the precise question' whether an employer may require a prospective employee be able to perform the job he seeks without posing a threat to his own health or safety." U.S. Br. 11 (Sept. 26, 2001) (quoting *Chevron*, 467 U.S. at 842). The conclusion that a statute is ambiguous and that *Chevron* deference applies can be reached only *after*, not before, traditional tools of statutory interpretation are applied to determine whether Congress's intent is clear. *Chevron*, 467 U.S. at 843 n.9; see generally Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829 (1990). In this instance, the incompatibility the Ninth Circuit's ruling would create between the ADA and the OSH Act forecloses any conclusion that the ADA is sufficiently ambiguous to permit the Ninth Circuit's interpretation. *Chevron* deference is unnecessary to decide this case.

As it happens, applying *Chevron* deference in this case would also result in reversal of the decision below, because the EEOC regulation directly on point favors petitioner. See U.S. Br. 14-16 (Sept. 26, 2001). And, as we argued in Part I, the relevant EEOC regulation under the Rehabilitation Act *also* favors petitioner, and does so on the precise ground *amici* urge, so that deference would produce what *amici* believe to be the appropriate result here. Because the government or others often urge deference to EEOC pronouncements that *amici* believe to be inconsistent with the proper interpretation of the statute,[6]

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[6] *E.g.*, *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999)

however, it is important that the Court not jump too readily to the conclusion that the ADA is ambiguous and means whatever the EEOC says it means.

B. Because petitioner's refusal to hire respondent is entirely consistent with the policies underlying the OSH Act (policies that are nowhere disavowed in the ADA), the majority was wrong in concluding that petitioner's actions were "paternalistic" in any legally consequential sense (Pet. App. 9a-10a). Certainly, the ADA does not sanction employment decisions based on stereotypical notions regarding whether an individual's condition "'might,' 'could,' or 'would'" affect him if he were to perform the functions of a job. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482 (1999). But the ADA condones precisely the type of "individualized inquiry" (*id.* at 483) undertaken in this case; that is, an analysis of the impact of the particular job applicant's disability on the functions of the specific job in question.

For this reason, the Ninth Circuit's reliance on *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), is misplaced. In *Dothard*, the Court rejected an Alabama regulation setting height and weight restrictions for correctional officers, which had the effect

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(EEOC Interpretive Guidance under the ADA); *EEOC* v. *Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000) (EEOC Interpretive Guidance under the ADA); *National Railroad Passenger Corp.* v. *Morgan*, No. 00-1614 (to be argued Jan. 9, 2002) (EEOC regulations under Title VII). There are grounds other than incompatibility with the statute for rejecting deference in each of the cited cases: in *Sutton* and *Exxon*, Interpretive Guidance rather than a regulation was at issue, and in *Morgan* the regulation for which the respondent seeks deference is inapplicable to the private sector. Nevertheless, in each case either the EEOC or a private party claimed or is claiming that the EEOC's pronouncement should receive *Chevron* deference. *Sutton* is particularly instructive, because the Court assumed for purposes of its decision that full *Chevron* deference might apply, yet still rejected the EEOC's interpretation as incompatible with the ADA, applying tools of statutory construction rather than merely parsing the single section at issue to see whether its bare words were ambiguous.

of discriminating against women, noting that a "refus[al] to hire an individual woman or man" may not be "on the basis of *stereotyped characterizations* of the sexes." 433 U.S. at 333 (emphasis added). That is not a concern here, where "the threat of injury to the [disabled] person is not based on unfounded fears or stereotypes," but instead is "veritable." *Chiari*, 920 F.2d at 317 (employer's judgment that there was a substantial risk that plaintiff would injure himself established that plaintiff was not qualified).[7] And, in *Dothard*, the Court let stand the regulation prohibiting women from working as correctional officers in high-security all-male prisons. In so doing, the Court emphasized that it would be an "oversimplification to characterize [the regulation at issue] as an exercise in romantic paternalism." 433 U.S. at 335. So too, in the case of an employee who poses a substantial risk to his own health, is it an "oversimplification" to describe the employer's decision as "paternalism."[8]

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[7] In *Chiari*, the Fifth Circuit rejected the plaintiff's argument, explicitly based on *Dothard*, that he "should be free to make his own choices regarding his personal safety." 920 F.2d at 316-17. In so doing, the court questioned whether Title VII precedents were relevant to interpreting the Rehabilitation Act. *Id.* at 316 & n.5.

[8] To be sure, all worker-protective legislation, and all worker-protective interpretations of legislation, are "paternalistic" in *some* sense. But, even though "paternalistic" legislation is often controversial, the Court recognized long ago that it does not have a roving commission to strike down all such legislation because it conflicts with the freedom of contract. Compare *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923) (holding minimum-wage law unconstitutional), with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) (overruling *Adkins*). "Paternalism" comes in many varieties, and the task of a court interpreting a statute is to distinguish the paternalism that Congress approved from the paternalism that Congress condemned, not to use "paternalistic" as an epithet to condemn a result without analyzing it. In the present case, the OSH Act forcefully shows that Congress remains "paternalistically" concerned about protecting workers from workplace hazards, and the ADA does not even remotely suggest that

Nor is the Ninth Circuit majority's reliance on *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), any more persuasive. There, the employer prohibited all women — but not men — of child-bearing age from employment in jobs exposing them to lead, even though that exposure to lead also has a "debilitating effect * * * on the male reproductive system." *Id.* at 198. By treating *similarly situated* men and women differently, the employer's policy ran contrary to the central purpose of Title VII to "prohibit[] sex-based classifications * * * in hiring and discharge decisions * * *." *Id.* at 197 (citing 42 U.S.C. § 2000e-2(a)). Here, Chevron has not treated respondent differently from similarly situated persons without disabilities; persons without respondent's disability do not pose a substantial risk to their own health by performing the job in question. Moreover, in *Johnson Controls*, OSHA had concluded that "'there is no basis whatsoever'" to exclude women of child-bearing age from jobs involving lead exposure. *Id.* at 208 (quoting 43 Fed. Reg. 52592, 52966 (1978)). In this case, on the other hand, the OSH Act would permit respondent to refuse to perform the job in question because it would endanger his health. 29 C.F.R. § 1977.12(b)(2).

In short, if Chevron's decision not to hire respondent was impermissibly "paternalistic," then so is the OSH Act. Only by misconstruing this Court's precedents under a less relevant statute — Title VII — could the Ninth Circuit majority reach the result it did.[9]

Congress wished to condemn individualized judgments about whether particular workers are especially susceptible to workplace hazards.

[9] The incompatibility between the OSH Act and the Ninth Circuit's interpretation of the ADA is unavoidable, given that it cannot be seriously maintained that the ADA repeals any relevant part of the OSH Act by implication, and is a powerful reason to reject the Ninth Circuit's construction of the ADA. Petitioner's fear (Pet. 26) of state tort law stands on a slightly different footing. We agree completely with petitioner that, *unless* state law is *unambiguously* preempted by

C. Perhaps the most forceful objection to our analysis is that it arguably renders 42 U.S.C. § 12113(b) superfluous. According to that section, "qualification standards" (whose application may give rise to an affirmative defense if they are job related and consistent with business necessity) "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." Why, one might ask rhetorically, would Congress bother to say – even as an example – that "direct threat" can be a defense if the same direct threat will always be relevant at an earlier stage of the analysis, when the employee must show that he or she is a "qualified individual with a disability"?

There are many answers. One is that the showing required of the employee at the threshold may be a weaker one than the showing required ultimately to prevail over the employer's affirmative defense. Courts frequently describe the plaintiff's initial burden under employment discrimination

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the ADA, the Ninth Circuit's interpretation would cause employers to be attacked from both sides – sued under the ADA when they protect disabled workers and sued or even prosecuted under state law when they fail to do so. We further agree with petitioner that that the process of litigating preemption issues would be both burdensome and uncertain if this Court affirmed the Ninth Circuit without including in its opinion a powerful statement about the need for state law protecting disabled workers to be preempted in cases in which the ADA impels employers to ignore worker safety. The problem could be solved, however, by a powerful statement from this Court – which, unlike the Ninth Circuit's casual (and perhaps insincere) reassurance, Pet. App. 13a, would bind all lower courts – recognizing the preemptive implications of its decision. See *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 884-85 (2000) ("[O]ne can assume that Congress or an agency would not intend to permit a significant conflict" between federal regulations and state tort law liability.). Accordingly, although we strongly urge reversal of the decision below, we place less reliance than does petitioner on state law as a reason to reverse. In the unlikely event that this Court affirms the decision below, it should address preemption fully in its decision.

statute as "not onerous,"[10] and perhaps the same analysis should be applied in this case to avoid a redundancy.

The more persuasive analysis in our estimation, however, does not labor to avoid a redundancy between the "qualified individual" showing and the "direct threat" defense, but rather frankly recognizes that the ADA is a statute full of redundancies.[11] When Congress has written a statute in a way that makes it obviously fictional to engage in the ordinary presumption that it does not write redundant provisions, and when there are powerful indications that Congress intended a factor be taken into account under each of two statutory provisions, the anti-redundancy canon is not a sufficient reason to disregard those indications. See *CFTC* v. *Schor*, 467 U.S. 833, 841 (1986) (a "canon of construction does not give a court the prerogative to ignore legislative will"); *Chapman* v. *United*

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[10] *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

[11] For example, the ADA excludes from the definition of "discrimination" the application of qualification standards, tests, or selection criteria that are job related and consistent with business necessity. 42 U.S.C. § 12112(b)(6); see also 29 C.F.R. § 1630.10. But the employer may also assert, as a *defense* to a charge of discrimination, that its qualification standards, tests, or selection criteria are job related and consistent with business necessity. 42 U.S.C. § 12113(a); see also 29 C.F.R. § 1630.15(b). Similarly, it is discrimination not to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled person (42 U.S.C. § 12112(b)(5)(A)), and being qualified is of course the bedrock showing every individual must make at the threshold (*id.* § 12112(a)), but it is also an affirmative defense that the individual could not perform the job even with accommodation (*id.* § 12113(a)). Undeniably, Congress's drafting technique in *this* statute – whatever may be presumed about its drafting techniques in other statutes – was to hammer its points home by repetition rather than to avoid redundancies.

States, 500 U.S. 453, 464 (1991) (although a canon "is useful in close cases," "it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" (quoting *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989)).

Twice already this Term the Court has decided cases in which one party's best argument was that the other party's construction of a statute would render some of its provisions, or the provisions of another statute, superfluous or redundant. In *Chickasaw Nation* v. *United States*, 122 S. Ct. at 532, the Court "agree[d] with the Tribes that rejecting their argument reduce[d] [a particular statutory phrase] to surplusage" but rejected the argument anyway because it could "find no other reasonable reading of the statute." The Court further explained that "canons are not mandatory rules" but merely "guides that 'need not be conclusive.'" *Id.* at 535 (quoting *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001)). "[O]ther circumstances evidencing congressional intent can overcome their force." *Ibid.* In *J.E.M. Ag Supply Inc.* v. *Pioneer Hi-Bred International, Inc.*, 70 U.S.L.W. 4032 (U.S. Dec. 10, 2001), the petitioners argued that the Plant Variety Protection Act of 1970 would have been unnecessary if the general patent statute, 35 U.S.C. § 101, already protected sexually reproduced plants. The Court rejected that argument for a number of reasons, among them that "[t]he PVPA itself * * * contains no statement that plant variety certificates were to be the exclusive means of protecting sexually reproduced plants." 70 U.S.L.W. at 4037; see also *id.* at 4038 ("this Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases"). The dissent read the intent of Congress differently but was, if anything, even more emphatic in its insistence that canons merely aid the search for legislative intent. *Id.* at 4042 (Breyer, J., dissenting) ("Those who write statutes seek to solve human problems. Fidelity to their aims requires us to approach an interpretive problem not as if it were a purely logical game, like a Rubik's Cube, but an effort to divine human intent that underlies the statute."). For the various reasons we have given, nothing about the non-superfluity canon

is forceful enough to overcome the many indications – including the Rehabilitation Act regulations and the policies of the OSH Act – that Congress intended threat to self to be considered as part of the determination whether a plaintiff is a "qualified individual."

In his concurrence in *Albertsons*, Justice Thomas recognized that the same issue could be relevant to both the determination whether an individual was "qualified," and the determination whether the employer's "qualification standards" were job related and consistent with business necessity. 527 U.S. at 578-580; see also *id.* at 580 ("I would prefer to hold that respondent, as a matter of law, was not qualified to perform the job he sought within the meaning of the ADA."). The First Circuit has reached the same conclusion. See *Amego*, 110 F.3d at 143 ("[W]e discern no congressional intent to preclude the consideration of essential job functions that implicate the safety of others as part of the 'qualifications' analysis."). Such is the case here. The fact that respondent cannot perform the job he seeks without endangering his health renders him "not qualified." It also is the basis for the permissible "qualification standard" that the employee not pose a direct threat to himself or others.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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No. 00-1406

In the Supreme Court of the United States

CHEVRON U.S.A. INC., PETITIONER

v.

MARIO ECHAZABAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, permits an employer to refuse to hire an individual because his performance of the job will, as a result of his disability, pose a direct threat to his own health or safety.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

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INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.*, with respect to private employers and is authorized to issue regulations under that Title. This case concerns whether Title I authorizes an affirmative defense for cases in which an individual will pose a direct threat to the health or safety of that individual. The court of appeals in this case invalidated the EEOC regulations that recognize such a defense. 29 C.F.R. 1630.2(r), 1630.15(b)(2). The EEOC is, of course, interested in the validity of its regulations. The United States filed an amicus curiae brief in this case at the petition stage in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title I of the ADA prohibits an employer from discriminating against a "qualified individual with a disability." 42 U.S.C. 12112(a). A "qualified individual with a disability" is a disabled individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. 12111(8). The ADA defines "discriminate" to include "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6).[1]

A section entitled "Defenses" clarifies that "[i]t may be a defense to a charge of discrimination under [the ADA] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). That section specifically provides that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). The ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be elimi-

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[1] The EEOC's Title I regulations define "[q]ualification standards" to mean "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. 1630.2(q).

nated or reduced by reasonable accommodation." 42 U.S.C. 12111(3).

The ADA requires the EEOC to issue regulations to carry out the provisions of Title I, and the EEOC, following public notice and comment, has issued regulations pursuant to that mandate, 56 Fed. Reg. 35,726 (1991). Consistent with the statutory text, the regulations provide that an employer may defend against a charge that a qualification standard improperly screens out a disabled individual by showing that the standard is "job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation." 29 C.F.R. 1630.15(b)(1). In elaborating on that defense, the regulations state that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. 1630.15(b)(2). The regulations define direct threat to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r).

2. Respondent Mario Echazabal first began working at an oil refinery owned by petitioner Chevron U.S.A., Inc. in 1972. Employed by various maintenance contractors, respondent worked continuously for petitioner as a laborer, helper, pipefitter, and as a worker on the fire watch (excluding one period between December 1975 and January 1979, when he was not working at the refinery). Respondent worked primarily in the refinery's coker unit. Pet. App. 2a.

In 1992, respondent applied to work directly for petitioner in the refinery's coker unit. Petitioner made respondent an offer of employment contingent upon his passing a physical examination. An examination by petitioner's physician revealed that respondent's liver was releasing certain enzymes at a higher than normal level. Based on that examination,

petitioner concluded that respondent's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. Petitioner therefore rescinded the job offer. Pet. App. 2a.

After learning of the enzyme test results, respondent consulted several doctors. He was eventually diagnosed with asymptomatic, chronic active Hepatitis C, a viral infection of the liver. Pet. App. 3a, 35a. Respondent continued to work throughout the refinery (including in the coker unit) as an employee of petitioner's maintenance contractor. *Id.* at 2a.

In 1995, respondent again applied to petitioner for a position as a plant helper in the coker unit. Petitioner again made respondent an offer contingent on a physical examination. Pet. App. 3a, 35a. Petitioner's examining physician concluded that further exposure to chemicals and solvents like those used in the coker unit would seriously endanger respondent's health and, in certain circumstances, could be fatal. *Id.* at 38a; C.A. E.R. 81-82. Petitioner's medical director agreed that respondent could not work in the coker unit without risk to his own health. Pet. App. 38a. Based on the those findings, petitioner refused to hire respondent. *Id.* at 3a. Petitioner also instructed its maintenance contractor to ensure that respondent was not exposed to solvents and chemicals; and, as a result, respondent could no longer work at the refinery. *Ibid.*

3. a. Respondent brought this action in state court alleging, among other things, that petitioner and its maintenance contractor had discriminated against him on the basis of a disability, in violation of the ADA. Pet. App. 3a. Petitioner removed the case to the United States District Court for the Central District of California. *Id.* at 32a. The district court granted summary judgment in favor of petitioner on all of respondent's claims. *Id.* at 32a-57a. On the ADA claim, the district court found that petitioner's refusal to hire respondent was lawful because, as a result of respon-

dent's liver condition, his working in the refinery would have posed a direct threat to his health. *Id.* at 46a-52a. The district court stayed the proceedings against the maintenance contractor, and certified several issues for appeal, including the propriety of the grant of summary judgment on the ADA claim. *Id.* at 3a-4a.

b. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 1a-18a. The court first held that the ADA does not provide an affirmative defense permitting an employer "to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety." *Id.* at 5a. The court found the language of the ADA "dispositive" of that question. *Id.* at 6a. The court noted that the statutory language provides that an employer may impose, as a qualification standard, a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Ibid.* (quoting 42 U.S.C. 12113(b)). Relying on the maxim of statutory construction *expressio unius est exclusio alterius*, the court reasoned that, "by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the defense." *Id.* at 6a-7a. The court accordingly invalidated the EEOC's regulations recognizing a threat-to-self defense. 29 C.F.R. 1630.2(r), 1630.15(b)(2).[2]

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[2] Because the Ninth Circuit invalidated the EEOC's regulations, the court of appeals did not address the EEOC's argument, set forth in a brief as amicus curiae, that the district court erred in granting petitioner summary judgment on the direct threat defense. The EEOC urged that "a reasonable jury could find that [petitioner] failed to consider the current medical knowledge and the best available objective evidence on [respondent's] condition, erred in concluding that [respondent] would have posed a direct threat, and ultimately failed to base its direct threat deter-

The court of appeals also addressed petitioner's contention that, "even if the direct threat provision does not provide it with a defense to its actions," respondent, "because of the risk of damage to his liver, * * * is not 'otherwise qualified' to perform the job at issue." Pet. App. 14a. The court acknowledged that an individual who, because of his disability, is unable to perform the "essential functions of the employment position that such individual holds or desires" (42 U.S.C. 12111(8)) is not a "qualified individual" (42 U.S.C. 12112(a)) under the ADA and, therefore, is not protected by the statute. Pet. App. 14a. In this case, however, the court explained, there is no evidence "that the risk [respondent] allegedly poses to his own health renders him unable to perform [the job] duties." *Id.* at 17a.

c. Judge Trott dissented, calling the majority's decision a "Pickwickian" ruling that "leads to absurd results." Pet. App. 23a. Judge Trott both disagreed with the majority's conclusion that respondent is a "qualified individual" and noted that "[petitioner] has a defense to this action, known as the 'direct threat' defense." *Id.* at 22a. He stressed that the "EEOC's implementing regulations, authorized by Congress, defin[e] a 'direct threat' to mean 'a significant risk of substantial harm to the health or safety of the individual * * * that cannot be reduced by reasonable accommodation.'" *Ibid.* (quoting 29 C.F.R. 1630.2(r)). Judge Trott would have deferred to the EEOC's implementing regulations because "the EEOC has rationally and humanely spoken." *Id.* at 22a.

SUMMARY OF ARGUMENT

I. A. The court of appeals erred in invalidating the EEOC's threat-to-self regulations. Those regulations were

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mination on a reasonable medical judgment." EEOC C.A. Br. 9. That argument would remain available in the event of a remand.

issued pursuant to the ADA's specific grant of rulemaking authority and are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Congress has not "directly spoken to the precise question" whether an employer may impose a qualification standard that requires an individual to be able to perform a job without posing a direct threat to his own health or safety. *Id.* at 842. The ADA permits an employer to establish a "qualification standard[]" that screens out disabled persons if the standard is "job-related and consistent with business necessity." 42 U.S.C. 12112(b)(6), 12113(a). The Act further specifies that such a qualification standard may "include" a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. 12113(b). Because the statutory text and structure plainly indicate that Congress established a threat-to-others qualification standard as only one example of a permissible qualification standard, the court of appeals erred in invalidating the EEOC's recognition of a closely related threat-to-self defense.

B. The EEOC's regulations are reasonable. The EEOC's recognition of a threat-to-self defense reflects an employer's legitimate interest in requiring that an individual's employment not pose a significant risk of injury or death to the individual. That requirement is both "job-related" and "consistent with business necessity." 42 U.S.C. 12112(b)(6), 12113(a). A threat-to-self defense also comports with judicial precedent under the Rehabilitation Act of 1973, and the EEOC's regulations interpreting that Act. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1421-1422 (9th Cir. 1985); *Bentivegna* v. *United States Dep't of Labor*, 694 F.2d 619, 621-623 (9th Cir. 1982); 29 C.F.R. 1613.702(f) (1979). At the same time, the EEOC's regulations guard against paternalistic employment decisions based on a generalized notion that individuals with certain disabilities pose a threat to self; the regulations

require the employer to prove a significant risk of imminent harm based on an individualized and objective assessment of the risk. 29 C.F.R. 1630.2(r); *id.* Pt. 1630, App. § 1630.2(r).

II. Although the court of appeals erred in invalidating the EEOC's regulations, it correctly determined that respondent is a "qualified individual" because respondent could "perform the essential functions of the employment position" that he sought. 42 U.S.C. 12111(8), 12112(a). Indeed, respondent successfully performed the duties of a plant helper for over 20 years as a contractor's employee in petitioner's coker unit. Once a plaintiff meets his burden of showing that he can perform the essential functions of a job, he does not bear the additional burden of showing that he would not pose a direct threat to the health and safety of himself or others. The Act clearly denotes valid qualifications standards, in general, and the threat-to-others provision, in particular, as "defenses" available to employers. 42 U.S.C. 12112(b)(6), 12113(a). Employers naturally bear the burden in establishing those defenses. Because the regulatory threat-to-self provision, like the statutory threat-to-others standard, is a defense, the EEOC has properly allocated the burden of proof to the employer.

ARGUMENT

I. THE EEOC'S REGULATORY THREAT-TO-SELF DEFENSE IS A VALID INTERPRETATION OF THE ADA

A. The EEOC's Threat-To-Self Regulations Are Entitled to *Chevron* Deference

Title I of the ADA prohibits an employer from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual

with a disability or a class of individuals with disabilities *unless* the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6) (emphasis added). The statute clarifies that "[i]t may be a defense to a charge of discrimination" if a challenged qualification standard or criterion "has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). The ADA specifies that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b), and defines "direct threat" in parallel terms, see 42 U.S.C. 12111(3).

The EEOC has interpreted those provisions to permit an employer to impose a qualification standard that screens out not only individuals who pose a direct threat to the health or safety of other individuals in the workplace but also individuals who pose such a threat to their own health or safety. Specifically, the EEOC has issued a regulation that provides that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of *the individual* or others in the workplace." 29 C.F.R. 1630.15(b)(2) (emphasis added). Another EEOC regulation defines "direct threat" as a "significant risk of substantial harm to the health or safety of *the individual* or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r) (emphasis added).

The EEOC promulgated those regulations through notice-and-comment rulemaking, see 56 Fed. Reg. 35,726 (1991), pursuant to an express delegation of authority to promulgate regulations to "carry out" the provisions of Title I of the ADA. 42 U.S.C. 12116. In delegating that authority to the

EEOC, Congress contemplated that the EEOC's regulations would "have the force and effect of law." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 82 (1990); S. Rep. No. 116, 101st Cong., 1st Sess. 43 (1989) (same). The EEOC's regulatory interpretation is therefore entitled to deference in accordance with *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

As this Court recently reaffirmed, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). It is "fair to assume" that "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure," such as the notice-and-comment rulemaking that the EEOC undertook in this case. *Id.* at 2172. Cf. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (reserving the question whether the EEOC's regulation interpreting the term "disability" is entitled to *Chevron* deference because that term is defined in other provisions of the ADA over which the EEOC has not been delegated rulemaking authority). Because the EEOC's regulations here interpret provisions over which the ADA expressly grants the EEOC rulemaking authority, the court of appeals was "obliged to accept the [EEOC]'s position if Congress has not previously spoken to the point at issue and the [EEOC]'s interpretation is reasonable." *Mead*, 121 S. Ct. at 2172 (citing *Chevron*, 467 U.S. at 842-845).

B. The ADA's Text and Structure Do Not Foreclose A Threat- To-Self Defense

1. The ADA does not speak directly to the validity of a threat-to-self defense, but the Act's text and structure support, rather than foreclose, such a defense. The ADA sets forth a general defense for "qualification standards" or "other selection criteria" that are "job-related and consistent with business necessity." 42 U.S.C. 12113(a); see 42 U.S.C. 12112(b)(6) (excluding such a qualification standard and selection criteria from the definition of discrimination). The statute specifies that a qualification standard "may *include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b) (emphasis added). The Act does not state that this requirement is the only permissible qualification standard concerning workplace threats to health or safety. To the contrary, Section 12113(a) provides a general defense for job-related qualification standards and selection criteria that are consistent with business necessity, and Section 12113(b) employs words of inclusion ("may include") when specifying a threat to others as an example of a permissible qualification standard.

Nothing in Title I of the ADA forecloses a qualification standard or selection criterion that requires that an individual not a pose a direct threat to his own health or safety. Rather, both the text and structure of the ADA leave ample room for the EEOC to issue regulations that define additional qualification standards that are job-related and consistent with business necessity. Under those circumstances, Congress has not "directly spoken to the precise question" whether an employer may require as a qualification standard that a prospective employee be able to perform the job he seeks without posing a direct threat to his own health or safety. *Chevron*, 467 U.S. at 842.

2. The court of appeals reached a contrary conclusion because of its mistaken reliance on the canon of statutory construction *expressio unius est exclusio alterius*. The court reasoned that the statutory specification of a "direct threat" defense for the risk of harm to others implicitly precludes a direct threat defense for the risk of harm to self. See Pet. App. 6a-7a.

That reasoning is flawed. The court of appeals' reliance on the *expressio unius* principle was inappropriate because the relevant statutory language is expressly inclusive. As noted above, the threat-to-others defense is included in the section of the ADA that sets forth a more general defense for qualification standards that are "job-related and consistent with business necessity." 42 U.S.C. 12113(a). The statutory language specifies one example of that defense—a permissible qualification standard may "include" a requirement that an individual not directly threaten the health or safety of other individuals in the workplace. 42 U.S.C. 12113(b). The use of the term "include" indicates that what follows is illustrative rather than exclusive. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (explaining that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 231 (6th ed. 2000); see, *e.g.*, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 (1977).[3]

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[3] The ADA's definition of "direct threat" to mean "a significant risk to the health or safety of others," 42 U.S.C. 12111(3), does not preclude the EEOC from using that term to describe another, similar example of the business necessity defense—a requirement that an employee's performance of the job not pose a significant risk to the health or safety of the employee himself. 29 C.F.R. 1630.2(r). The statutory definition of "direct threat" simply defines that term as it is used in the statute.

This Court has frequently cautioned against uncritical reliance on the *expressio unius* principle. See *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991); *Burns* v. *United States*, 501 U.S. 129, 136 (1991); *Ford* v. *United States*, 273 U.S. 593, 612 (1927). Moreover, courts have noted that the canon is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R.* v. *ICC*, 902 F.2d 66, 69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990). Because it relies on an inference rather than a direct statement, the canon "can rarely if ever be the 'direct[]' congressional answer required by *Chevron*." *Ibid.* See also *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (*expressio unius* maxim "is simply too thin a reed to support the conclusion that Congress has clearly resolved [the] issue"), cert. dismissed, 528 U.S. 1147 (2000).[4]

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[4] The court of appeals' reading of the statute also would lead to results that Congress could not have intended. The ADA's direct threat defense refers to "other individuals *in the workplace*." 42 U.S.C. 12113(b) (emphasis added). Under the court of appeals' holding, an employer could not defend a job-related qualification standard based on direct threats to third parties *outside the workplace*. Pet. App. 6a-7a; see also *Morton* v. *United Parcel Serv., Inc.*, No. 99-17447, 2001 WL 1518106, at *7 (9th Cir. Nov. 30, 2001) (direct threat defense does not apply where "asserted threat went * * * to the general public"). However, nothing indicates that Congress's concern with health or safety risks posed by an individual's job performance was limited to persons in the workplace. See S. Rep. No. 116, *supra*, at 27 ("It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety *of others* or poses a direct threat to *property*.") (emphasis added); accord H.R. Rep. No. 485, *supra*, Pt. 2, at 56. Rather, Congress provided a general defense for any qualification standard that is shown to be "job-related" and "consistent with business necessity." 42 U.S.C. 12112(b)(6), 12113(a).

C. The ADA's Legislative History Likewise Does Not Foreclose A Threat-To-Self Defense

1. The ADA's legislative history does not reveal a congressional intent to preclude the EEOC's interpretation. As the court of appeals acknowledged (Pet. App. 9a), the House Report recognizes that an employer may require a candidate to "undergo[] a post-offer, pre-employment medical examination." H.R. Rep. No. 485, *supra*, Pt. 2, at 73. The Report elaborates that, although the employer may not exclude the candidate "solely on the basis of an abnormality on an x-ray," "if the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate, unless the employer could make a reasonable accommodation to the candidate's condition that would avert such harm." *Ibid.*; see also *ibid.* (recognizing physicians should examine "the effects of the disability *on the individual being considered*") (emphasis added). Congress thus assumed that an employer, when determining whether to hire a disabled individual, could consider substantial job-related risks to the individual's *own* health or safety.

2. In invalidating the EEOC's regulations, the court of appeals stated that, when the term "direct threat" was used in the "various committee reports" and "floor debate," there was no explicit reference to "threats to the disabled person himself." Pet. App. 7a-8a. That reasoning, however, applies to the legislative history the same erroneous *expressio unius* analysis that the court of appeals applied to the statutory language. As discussed above, that principle is not applicable to the text of the ADA. It is particularly inappropriate to apply the *expressio unius* canon to the Act's legislative history, because "the language of a statute * * * is not to be regarded as modified by examples set forth in the

legislative history." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990) (not reasonable to assume that Congress intends a "list of examples" in legislative history to be "exhaustive"). In any event, the references in the legislative history to the direct threat defense are *not* limited to risks to persons in the workplace. See note 4, *supra*.

The court of appeals also relied upon a floor statement made by Senator Kennedy, one of the ADA's sponsors. Pet. App. 8a-9a. In those remarks, Senator Kennedy stated that, because "the ADA specifically refers to health and safety threats to others," "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." 136 Cong. Rec. S9684-03, S9697 (daily ed. July 13, 1990). "For example," Senator Kennedy explained, "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed." *Ibid.*

"The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979), and such remarks certainly do not provide the requisite clarity to foreclose an agency's reasonable interpretation of a statute's text. In any event, the EEOC's interpretation is consistent with Senator Kennedy's stated concern about paternalistic employment practices. See p. 21, *supra* (explaining that the EEOC's regulations do not permit an employer to base a threat-to-self defense on "[g]eneralized fears about risks from the employment environment," 29 C.F.R. Pt. 1630, App. § 1630.2(r)).

D. The EEOC's Threat-To-Self Regulations Reflect A Reasonable Interpretation Of The ADA

1. *A qualification standard that ensures that an individual's job performance will not directly threaten the individual's health and safety is job-related and consistent with business necessity*

Because Congress has not "directly addressed the precise question" at issue, the EEOC's threat-to-self regulations are valid so long as they constitute a "reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 843, 844. The EEOC reasonably has concluded that an employer's qualification requirement that an individual's employment not pose a significant risk of seriously injuring or contributing to the death of the individual is both job-related and consistent with business necessity. Maintaining a safe workplace is itself a business necessity.[5]

In the first place, ensuring worker safety reduces injuries and the resulting absences of critical employees. When there is a high probability that an employee will suffer significant injury or death in the near future because of his

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[5] Like the ADA, Title VII permits employment practices that are job-related and "consistent with business necessity." 42 U.S.C. 2000e-2(k). "Measures demonstrably necessary to meeting the goal of ensuring worker safety are * * * deemed to be 'required by business necessity' under Title VII." *Fitzpatrick* v. *City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993); see also *Smith* v. *City of Des Moines*, 99 F.3d 1466, 1472 (8th Cir. 1996) (applying business necessity defense under the Age Discrimination in Employment Act and noting employer's "legitimate interest in determining whether its employees can perform [job] duties safely."). This Court also has recognized under Title VII that business necessity may justify an employment practice "shown to be necessary to safe and efficient job performance." *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 n.14 (1977); see also *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979) (recognizing a business's "legitimate employment goals of safety and efficiency").

performance of the job, there is necessarily a related risk that the employee will miss work due to injury. In that event, the employer will likely sustain losses in efficiency and productivity due to the disruption of its operations and the need to find a replacement and retrain a new worker. See Haig Neville, 40 Industrial Management, *Workplace accidents: they cost more than you think* 7 (Jan.-Feb. 1998) (workplace injuries have "immeasurable costs of lost production and efficiency on a company-wide basis"); accord Valerie Overheul, 70 Occupational Health and Safety, *20 Years of Safety* 70 (June 2001); David W. Wilbanks, 63 Occupational Hazards, *Common Safety Myths* 13 (Oct. 2001).

Likewise, serious workplace injuries pose other unique costs on employers in terms of the decreased morale and productivity of employees who may question the employer's commitment to workplace safety upon hearing that an employee has suffered injury, or even died, on the job. H. Neville, *supra*, at 8 ("[E]ffective safety standards in the workplace boost employee morale by conveying the message that the company cares enough about its people to protect their health and safety."). It may be difficult to convince fellow workers that an employee's injury or death resulted from a disability that posed a unique threat to that employee, rather than from general conditions that threaten the entire workforce. In addition, requiring an employer to hire an individual who is likely to suffer injury or death on the job could expose the employer to substantial litigation costs in defending tort suits and other claims based on allegations that the employer intentionally ~~exposed~~ the individual to danger or failed to avert the risk of harm to the individual. See V. Overheul, *supra*, at 70 ("Accidents and injuries * * * costs come in the form of property damage, lost

worker productivity, lowered morale, worker's compensation costs, and even lawsuits.").[6]

The combined effect of those costs to the employer is significant and the costs are similar to those incurred by an employer forced to hire a disabled individual who poses a direct threat to the health or safety of *others*. The ADA expressly recognizes that an employer has a defense in refusing to hire such an applicant. 42 U.S.C. 12111(3), 12113(b). Many of the same reasons underlying that defense—efficiency, productivity, employee morale, and litigation costs—also justify recognition of a parallel defense based on the threat to the worker. In both instances, a business has a legitimate interest in not hiring an individual whose job performance poses a "significant risk of substantial harm" to "health or safety." 29 C.F.R. 1630.2(r); see *EEOC* v. *AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1283 (7th Cir. 1995) ("It would seem that a requirement that employees not pose a significant safety threat in the workplace

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[6] In *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991), discussed pp. 22-23, *infra*, the Court left open the question whether state tort suits stemming from workplace lead exposures to fetuses would be preempted by Title VII, stating that "the pre-emption question is not before us." The Court observed that, because the employer in that case had complied with OSHA lead exposure standards and the employer had advised women of the risks, "[w]ithout negligence, it would be difficult for a court to find liability on the part of the employer." *Id.* at 208. Here, the direct threat defense is applicable only when the employee actually faces a significant risk of workplace injury or death. If the ADA is interpreted to require an employer to hire an employee who poses a threat to self, the employer may be able to use the ADA as a shield against a claim that the employer intentionally exposed the worker to a significant risk of injury or death. On the other hand, a court could conclude that the ADA sets only a floor and that the employer could and should comply with both the ADA and state law obligations to protect the worker from harm. At a minimum, the employer would incur substantial litigation expenses until the issue is resolved.

would obviously be consistent with business necessity: a safe workplace is a paradigmatic necessity of operating a business.").

As this Court has recognized, an "enquiry [into statutory meaning] may be guided by the examples" given in a statute. *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (holding that parody constitutes fair use under Copyright Act because it shares the same purpose as statutory examples of fair use). It follows, a fortiori, that an agency's interpretation of a statute to cover situations similar to those covered by the text is reasonable. Accordingly, in light of the similar purposes animating a threat-to-others defense and a threats-to-self defense, the EEOC acted reasonably in including the latter in its business necessity regulations.[7]

2. *The EEOC reasonably modeled its regulations the Rehabilitation Act of 1973*

As the EEOC noted when it promulgated its regulations, 56 Fed. Reg. at 35,730, interpreting the ADA to include a threat-to-self defense is consistent with judicial precedent under the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, as well as the EEOC's regulations interpreting that Act. The Rehabilitation Act protects only "qualified" individuals with disabilities but does not define that term. See 29 U.S.C. 793(a), 794(a). In implementing Section 501 of that Act,

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[7] The Occupational Safety and Health Act prohibits employers from exposing exmployees to "recognized hazards" that are likely to cause "death or serious physical harm," and imposes a "general duty" to furnish a safe workplace. 29 U.S.C. 654(a)(1). This general duty clause has not been interpreted as rquiring employees to refuse employment to job applicants, but it is not clear how this clause would apply to an employer that hires a worker who posed a clear threat to his or her own safety on the job. Uncertainty over the employer's regulatory obligations to such an employee, along with the uncertainty over potential tort liability, reinforces the reasonableness of the EEOC's adoption of a threat-to-self defense.

which is applicable to public employers, the EEOC promulgated a regulation that defined a "[q]ualified handicapped person" as a "handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health or safety *of the individual* or others." 29 C.F.R. 1613.702(f) (1979) (emphasis added); see also 43 Fed. Reg. 12,295 (1978) (rules of Civil Service Commission).

Moreover, at the time the ADA was passed, courts applying Sections 501 and 504 of the Act had recognized that an employer could consider the safety of the individual in setting qualification standards. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1421-1422 (9th Cir. 1985); *Bentivegna* v. *United States Dep't of Labor*, 694 F.2d 619, 621-623 (9th Cir. 1982). Because the ADA is modeled on the Rehabilitation Act, it was reasonable for the EEOC to incorporate prior practice under the Rehabilitation Act into its regulations interpreting the distinct statutory language of the ADA. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632, 645 (1998); see also 42 U.S.C. 12201 (incorporating Rehabilitation Act standards into the ADA "[e]xcept as otherwise provided").[8]

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[8] In 1992, Congress completed the circular relationship between the ADA and the Rehabilitation Act by amending the latter to require that the standards used to determine whether that Act has been violated "shall be the standards applied" under the ADA's employment provisions. 29 U.S.C. 791(g). The EEOC has proposed regulations under Section 501 to provide that concerns about risks to health and safety from an individual's job performance will be governed by the EEOC's direct threat regulations under Title I of the ADA. See 65 Fed. Reg. 11,019 (2000). It would be ironic indeed if the invalidation of the threat-to-self defense under the ADA would thus result in invalidating threat-to-self concerns under the Rehabilitation Act.

3. *The regulations do not foster paternalistic employment practices*

At the same time that the EEOC's regulations accommodate legitimate business concerns, they also protect disabled employees from "overprotective rules and policies" (42 U.S.C. 12101(a)(5)) based on "stereotypic assumptions" (42 U.S.C. 12101(a)(7)). Under the regulations, employers do not have license to "deny a person an employment opportunity based on paternalistic concerns regarding the person's health." Pet. App. 8a (quoting 136 Cong. Rec. at S9697 (statement of Sen. Kennedy)). As with the statutory threat-to-others defense, there is some danger that employers could incorporate the very stereotypes the ADA guards against into generalized conclusions that individuals with certain disabilities pose a threat to themselves. The EEOC's regulations prohibit such generalizations and paternalism in the application of *both* defenses by requiring the employer to prove "significant risk of substantial harm to the health or safety of the individual or others," based "on an individualized assessment" of the individual's ability to safely perform the essential functions of the job. 29 C.F.R. 1630.2(r); see *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 (1987) ("an individualized inquiry" protects disabled individuals "from deprivations based on prejudice, stereotypes, or unfounded fear").

The regulations further prohibit employment decisions based on "[g]eneralized fears about risks from the employment environment." 29 C.F.R. Pt. 1630, App. § 1630.2(r); see also 29 C.F.R. Pt. 1630, App. § 1630.15(a) (An employer may not base an employment decision on a generalized concern that hiring disabled persons "would cause the employer's insurance premiums or workers' compensation costs to increase."); accord S. Rep. No. 116, *supra*, at 28 ("It would also be a violation to deny employment to an applicant based on

generalized fears about the safety of the applicant or higher rates of absenteeism. By definition, such fears are based on averages and group-based predictions. This legislation requires *individualized* assessments.") (emphases added); accord H.R. Rep. No. 485, *supra*, Pt. 2, at 58.

Thus, in considering whether an individual poses a direct threat, the regulations require the employer to consider "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." 29 C.F.R. 1630.2(r). The regulations require that those factors be assessed "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence," *ibid.*, and "not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes," 29 C.F.R. Pt. 1630, App. § 1630.2(r). See *Bragdon* v. *Abbott*, 524 U.S. at 649-652 (discussing direct threat defense under Title III of the ADA). In addition, by treating employer concerns about threat to self as a defense, the regulations appropriately place the burden of proof on employers. See pp. 25-27, *supra*.

For similar reasons, the court of appeals erred in relying on *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991), for its conclusion that Congress intended the ADA to "allow all individuals to decide for themselves whether to put their own health and safety at risk." Pet. App. 10a. *Johnson Controls* held that an employer's policy prohibiting all women of child-bearing age from certain jobs that involve exposure to lead violates Title VII because the policy could not be justified as a bona fide occupational qualification (BFOQ). 499 U.S. at 207.[9]

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[9] The Court in *Johnson Controls* observed that "[t]he business necessity standard is more lenient for the employer than the statutory BFOQ defense." 499 U.S. at 198. Because the court determined that the em-

The anti-paternalism principles recognized in that decision are consistent with, and indeed reflected in, the EEOC's threat-to-self defense regulations. As discussed above, the EEOC's regulations do not permit an employer to adopt policies, rooted in "general subjective standards," that "explicitly discriminate" against a class on the basis of a protected trait. 499 U.S. at 197, 201. Rather, the regulations require an employer to conduct an "individualized" and "objective" assessment of whether the individual's performance of the job raises a "significant risk of substantial harm to the health or safety of the individual." 29 C.F.R. 1630.2(r). That inquiry necessarily focuses on a particular individual's ability to perform the job safely, an inquiry that was missing from the employer's policy in *Johnson Controls*. 499 U.S. at 207 (noting that there was no "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved") (internal quotation marks omitted). Accordingly, the type of generalized and paternalistic employment policy invalidated in *Johnson Controls* would not satisfy the EEOC's direct threat regulations. The EEOC's regulations are thus eminently reasonable, and the court of appeals erred in invalidating them.[10]

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ployer's fetal-protection policy was facially discriminatory and therefore had to be justified as a BFOQ, *id.* at 200, the Court did not decide whether the employer's policy would satisfy a business necessity defense.

[10] The reasonableness of the EEOC's threat-to-self regulations is not undermined by the fact that the Department of Justice has issued regulations under the direct threat provision of Title III of the ADA, 42 U.S.C. 12182(b)(3), that do not refer to threats to self. See 28 C.F.R. 36.208(b). Title III protects against disability-based discrimination in public accommodations. By contrast, Title I authorizes a direct threat defense as a type of employment "qualification standard" that is job-related and consistent with business necessity. Such a business necessity defense, which does not exist under Title III, recognizes that an employer has a legiti-

II. RESPONDENT IS A "QUALIFIED INDIVIDUAL" UNDER THE ADA

A. Respondent Established That He Was A Qualified Individual

Although the court of appeals erred in invalidating the EEOC's direct threat regulations, it correctly determined that respondent is a "qualified individual" within the meaning of Title I of the ADA. Pet. App. 14a-18a. Title I prohibits an employer from discriminating against a "qualified individual with a disability." 42 U.S.C. 12112(a). To be a "qualified individual," an individual must be able, "with or without reasonable accommodation, [to] perform the essential functions of the employment position." 42 U.S.C. 12111(8).

The EEOC's regulations define "essential functions" to mean "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. 1630.2(n)(1); see also S. Rep. No. 116, *supra*, at 26 ("The phrase 'essential functions' means job tasks that are fundamental and not marginal."); H.R. Rep. No. 485, *supra*, Pt. 2, at 55 (same). The EEOC also has concluded that "[t]he determination of whether an individual * * * is qualified is to be made at the time of the employment decision." 29 C.F.R. Pt. 1630, App. § 1630.2(m); accord S. Rep. No. 116, *supra*, at 26; H.R. Rep. No. 485, *supra*, Pt. 2, at 55. The plaintiff bears the burden of demonstrating his ability to perform the essential functions of the job at issue. See, *e.g.*, *Webner* v. *Titan Distribution, Inc.*, 267 F.3d 828, 833 (8th Cir. 2001).

In this case, respondent met his burden of showing that he is a qualified individual under the ADA. Indeed, respon-

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mate interest in hiring workers whose performance on the job is not compromised by a condition that carries with it a significant risk of substantial, imminent harm to the health or safety of the worker.

dent's own work history demonstrates that he satisfies the qualified individual standard. There is undisputed evidence that respondent was capable of performing the essential duties of the plant helper position in the coker unit and, in fact, did so successfully as a contractor's employee for over 20 years (the latest three after respondent's doctors first diagnosed respondent's liver condition). C.A. E.R. 328-329; see also Pet. App. 17a (Petitioner "has never contended that the risk [respondent] allegedly poses to his own health renders him unable to perform [job] duties.").

B. The EEOC's Regulations Properly Place On The Employer The Burden Of Showing That An Employee Would Pose A Direct Threat To The Health Or Safety Of Himself Or Others

1. As previously stated, the ADA provides that, if an employer uses a qualification standard that screens out or tends to screen out an individual with a disability, the employer must demonstrate that the standard is job-related and consistent with business necessity. 42 U.S.C. 12112(b)(6). Consistent with that allocation of the burden of proof, the ADA denotes a valid qualification standard as a "defense" and includes it in 42 U.S.C. 12113 under the heading "Defenses." Under that same heading of "Defenses," the ADA specifically permits "a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace." 42 U.S.C. 12113(b).

The statutory text and structure of the ADA support the treatment of direct threat concerns as a defense with the burden on the employer. If the employee had the burden of disproving any threat to self or others to establish qualified individual status, the business necessity and direct threat provisions would be rendered superfluous. They would simply reiterate a requirement already found in the threshold definition of "qualified individual." General principles of

statutory interpretation prohibit such a construction. See, *e.g.*, *Dunn* v. *CFTC*, 519 U.S. 465, 472 (1997) (legislative enactments "should not be construed to render their provisions mere surplusage"). A statutorily-designated "*defense*" for threats to others cannot be made part of a plaintiff's case in chief without turning the Act on its head. In light of the EEOC's decision to interpret the business necessity defense to include a threat-to-self defense, the burden for meeting that defense likewise rests on the employer. The legislative history supports the same result.[11]

2. To be sure, there may be some instances in which the employer's qualification standard is so integral to a job that there will be substantial overlap between the issue whether an individual is qualified and whether the individual poses a threat to health and safety. For example, jobs in which safety concerns are paramount, such as an airline pilot or a firefighter, may demand an ability to perform the job safely, and so the individual's proof that he can perform essential job functions will necessarily implicate issues of safety. See 29 C.F.R. Pt. 1630, App. § 1630.2(n) (firefighter who could not "carry an unconscious adult out of a burning building" would not be qualified to perform the essential functions of the position); cf. *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 578-580 (1999) (Thomas, J., concurring). But it is not *always* true that an ability to perform a job safely is inextricably tied to the performance of essential job functions. This is a case in point. As noted, respondent performed this job successfully for decades. Although peti-

[11] See H.R. Rep. No. 485, *supra*, Pt. 3, at 42 (qualification standard that has discriminatory effect on disabled persons is unlawful "unless *the employer* can demonstrate that it is jobrelated and required by business necessity") (emphasis added); *id.* at 46 (an otherwise qualified applicant for a job "cannot be disqualified on the basis of a physical or mental condition unless *the employer* can demonstrate that the applicant's disability poses a direct threat to others in the workplace") (emphasis added).

tioner may have a valid threat-to-self defense, respondent can perform the essential tasks of the job. In other words, respondent may be disqualified by a valid qualification standard, but he is not unqualified to perform the job tasks at issue.

A contrary reading of the statute, incorporating the absence of a threat to self or others as a prerequisite for every job, would ignore Congress's choice to make qualification standards in general, and threat-to-others concerns in particular, a "defense" to liability. Congress's choice to label those provisions "[d]efenses," and the EEOC's parallel decision to create a threat-to-self defense, reflect the fact that the employer, not the employee, is in the superior position to prove whether the absence of a threat to self or others is required by business necessity.[12]

3. In arguing that respondent is not a "qualified individual," petitioner relies (Pet. 18, 24) on the fact that, under the Rehabilitation Act, concerns about threats to self and others are considered in the determination whether a plaintiff is a "qualified" individual. See pp. 19-20, *supra*. That fact, how-

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[12] In *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 (1999), this Court noted the EEOC's view that, "when an employer would impose any safety qualification standard, however specific, tending to screen out individuals with disabilities, the application of the requirement must satisfy the ADA's 'direct threat' criterion." See 29 C.F.R. Pt. 1630, App. § 1630.15(b) and (c). The Court stated that the "[g]overnment's interpretation * * * might impose a higher burden on employers to justify safety-related qualification standards than other job requirements." 527 U.S. at 569-570 n.15. Whether or not the appropriate burden is that reflected in the direct threat provision of Section 12113(b), or some different standard under Section 12113(a), it is clear that the burden of proof rests with the employer. Moreover, in this case, the direct threat burden properly would apply in light of the EEOC's decision to frame the threat-to-self defense in direct threat terms and the clear parallelism between the statutory threat-to-others defense and the regulatory threat-to-self defense.

ever, does not preclude the EEOC's interpretation of the ADA. The Rehabilitation Act, unlike the ADA, does not include a separate defense section and so concerns about threats to self and others are addressed under the general rubric of whether an individual is qualified. The Rehabilitation Act thus permits an employer to set a qualification standard that excludes a disabled person when the standard is necessary to avert a significant risk to health and safety. See *Arline*, 480 U.S. at 287 n.16 ("A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."). Moreover, at the time of the ADA's passage, courts and the EEOC recognized that the *employer* bore the burden on this issue.[13]

Congress in the ADA essentially codified that result, albeit under a modified statutory framework. See *Bragdon* v. *Abbott*, 524 U.S. at 649 ("The ADA direct threat provision stems from the recognition in *School Board of Nassau County* v. *Arline*, [*supra*], of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks."); S. Rep. No. 116, *supra*, at 76 (citing *Arline* in discussing

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[13] See *Mantolete*, 767 F.2d at 1421-1423; *Bentivegna*, 694 F.2d at 621-623; Federal Sector Equal Employment Law and Practice Ch. XIV, B(3)(f) and F(1)(f) (2001) (discussing EEOC's pre-ADA federal sector decisions under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791); see also H.R. Rep. No. 485, *supra*, Pt. 2, at 57, 74 (citing the *Mantolete* and *Bentivegna* decisions). Since the passage of the ADA, courts have not always been clear under the Rehabilitation Act as to which party bears the burden of showing a probability of substantial harm to the safety of the individual or others. Compare, *e.g.*, *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1394 (5th Cir. 1993) (burden on employee), with *Chiari* v. *City of League City*, 920 F.2d 311, 315-317 (5th Cir. 1991) (burden on employer).

ADA's direct-threat defense); H.R. Rep. No. 485, *supra*, Pt. 2, at 76 (same); H.R. Rep. No. 485, *supra*, Pt. 3, at 34, 45 (same). By including in the ADA a *defense* for qualification standards that are job-related and consistent with business necessity and specifically defining that defense to include a direct threat principle, Congress made explicit what was already implicit in the Rehabilitation Act and made abundantly clear that under the ADA the burden for proving a direct threat defense rests with the employer.

* * * * *

In short, the court of appeals correctly held that respondent is a "qualified individual" under Title I of the ADA, but the court erred in invalidating the EEOC's regulations and precluding petitioner's defense that respondent's performance of the job posed a direct threat to his own health or safety. By addressing threat-to-self concerns as a regulatory defense to liability, the EEOC struck a proper balance between the rights of disabled individuals to work free of discrimination and employers' need to maintain a safe workplace. Under the EEOC's regulations, an employer need not hire an employee who poses a threat to self, but only if the employer demonstrates, on an individualized basis, a real threat to the employee's health. The decision below pretermitted that inquiry. The case should therefore be remanded for the proper application of the direct threat standard as set forth in the EEOC's regulations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2001

No. 00-1406

In The

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER CHEVRON U.S.A., INC. ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST OF *AMICUS*[1]

Amicus Curiae Employers Group, formerly known as the Merchants Manufacturers Association and Federated Employers, is headquartered in California, and is one of the nation's oldest and largest human resources management associations. It represents nearly 5,000 companies of all sizes and in every industry, employing in the aggregate approximately 2.5 million employees. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases like this one.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion in *Echazabal v. Chevron U.S.A., Inc.* (App. 1a-24a), authored by Judge Reinhardt, places employers in an untenable position. After *Echazabal*, an employer must now choose between risking liability for disability discrimination or causing serious harm or even death to an applicant. The *Echazabal* opinion squarely holds that employers in the Ninth Circuit must hire a disabled applicant even though performing the essential functions of the position creates a risk of grave harm to that individual. According to the Ninth

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Circuit, the disabled individual, not the employer, decides whether to accept such risks. "Under the ADA," Judge Reinhardt stated, "an employer may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." *Id.* at 8a.

This conclusion, however, ignores two critical parts of the ADA analysis: (1) whether the disabled individual is "qualified" to perform the essential functions of the position and (2) whether safety, medical and other physical criteria that may screen out a disabled individual are nevertheless permissible because they are job-related and consistent with business necessity.

To be qualified, a disabled individual must be able to perform the job safely and without great risk to his or her health. Holding otherwise, as the Ninth Circuit did, carries anti-paternalism to the extreme. Employers would be forced to offer disabled applicants positions that could knowingly expose them to serious risk of harm, even if doing so would violate not only other federal and state safety laws but also common notions of good sense and decency. Surely, the ADA was not intended to lead to such a result.

The Ninth Circuit's decision in *Echazabal* is not only wrong as a matter of statutory interpretation but, as Judge Reinhardt himself recognized, it also creates a clear split among the Circuit Courts regarding whether an employer may use medical and safety standards that are job-related and consistent with business necessity to determine if a disabled applicant is qualified for a job without risking liability for disability discrimination.

App. 5a-6a n.4; *see also* Chevron U.S.A., Inc.'s Writ Petition at 12-21. While a nationwide employer such as Chevron U.S.A, Inc. may adopt and use such safety standards in most states, the *Echazabal* decision essentially precludes the employer's ability to use those very same standards at business locations within the Ninth Circuit. Neither disabled individuals nor employers should be placed at greater risk merely because of their physical location. Indeed, both groups would be better served by a uniform and consistent interpretation of these essential provisions of the ADA, an interpretation that only this Court can render.

ARGUMENT

I. AN INDIVIDUAL CANNOT BE DEEMED QUALIFIED UNDER THE ADA IF HE CANNOT PERFORM THE ESSENTIAL FUNCTIONS OF THE POSITION SAFELY.

From a statutory standpoint, Judge Reinhardt's opinion starts from the wrong premise. It analyzes the availability of the so-called "direct threat" defense without first establishing that the employer had discriminated against the employee in violation of the ADA. App. 4a-13a. Because the particular ADA provision reviewed by the Ninth Circuit does not specifically mention whether the safety of the applicant can be considered, the Court leaps to the conclusion that it may never be.

Almost as an after-thought, the Ninth Circuit considered the most fundamental question facing an employer under the ADA – whether the applicant is a qualified

individual with a disability. App. 14a-18a. Had the Ninth Circuit started its analysis by asking this threshold question, it would have determined, under the language of the ADA and the EEOC's implementing regulations, that Mr. Echazabal was not a qualified individual with a disability. Upon such a conclusion, it would not have been necessary to address the availability of the "direct threat" defense where the individual poses a threat only to himself and not to others.

To be liable under the ADA, an employer must have committed an act of discrimination. Section 12112(a) of the ADA states the general anti-discrimination rule: "No covered entity shall 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." 42 U.S.C. § 12112(a) (emphasis added). The term "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The EEOC regulations further refine the term "qualified." The disabled individual must also satisfy the requisite skill, experience, education and other job-related requirements of the employment position held or sought. 29 C.F.R. § 1630.2(m).

A disabled individual who cannot perform the essential functions of a position safely cannot be deemed qualified under any interpretation of the ADA. Federal cases throughout the country have concluded that it is not

enough for a disabled individual to be physically able to perform the essential functions of a position, with or without a reasonable accommodation; they must also be able to do so safely to be covered by the Act. *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998) (epileptic cook held not to be qualified individual with disability because he could not perform essential elements of the position safely); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447-48 (11th Cir. 1996) (epileptic employee could not safely perform job as product inspector or operator because both required work with fast moving machinery, some of which was heated to 350 degrees); *see also Huber v. Howard County*, 849 F. Supp. 407, 412-13 (D. Md. 1994), *aff'd*, 56 F.3d 61 (4th Cir. 1995) (asthmatic firefighter held not to be qualified individual with disability because of risk of incapacitation at scene of fire by allergens, variable weather conditions, and hazardous and toxic fumes and substances); *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (holding under Section 501 of the Rehabilitation Act of 1973 that construction inspector with Parkinson's disease was not qualified because of the risk to his own safety); *Davis v. Meese*, 692 F. Supp. 505, 519 (E.D. Pa. 1988) (holding under Rehabilitation Act, that diabetic was not qualified to be a special agent because certain assignments would be too risky for someone who is dependent on insulin), *aff'd*, 865 F.2d 592 (3d Cir. 1989). These holdings recognize that "a common sense element to any job is the ability to complete a task in a safe manner." *Jackson v. Boise Cascade Corp.*, 941 F. Supp. 1122, 1127 (S.D. Ala. 1996).

The Ninth Circuit's opinion disregards this common sense element. It would compel employers to hire the

blind ironworker, the claustrophobic miner and the asthmatic granary worker merely because those individuals were willing to accept the obvious risks that their employment would entail.

By this holding, the Ninth Circuit has essentially eviscerated the statutory right of the employer under the ADA to determine not only the essential functions of the position but also other job-related safety requirements that are consistent with business necessity. App. 14a-18a. Section 12111(8) of the ADA, which provides the statutory definition of "qualified individual with a disability," states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description *shall* be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8) (emphasis added); *see also* 29 C.F.R. § 1630.2(n)(3).

Judge Reinhardt, skeptical of Chevron's actions, refused to afford Chevron's job description the deference that the ADA requires. App. 15a. That description included a job-related safety condition required to successfully perform the plant helper position in the coker unit – namely physical tolerance for hydrocarbon liquids and vapors, petroleum, solvents and oils. App. 36a-37a. Although the Ninth Circuit recognized the employer's right to determine which functions are essential (App. 14a), the majority then reached the illogical conclusion that this job-related safety requirement does not (and cannot) become an "essential" function of the job simply because Chevron chose to describe it as such. App. 15a. This finding clearly contradicts congressional intent to

allow the employer – not the applicant or the employee or even the courts – to determine what functions are essential. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3).

The ability to perform the essential functions safely is no less important, and indeed may even be more important, to the employer than the disabled individual's ability to perform those same functions competently, with or without a reasonable accommodation. Such safety requirements are so fully integrated with the essential functions that they cannot be separated with the crude analysis employed by the Ninth Circuit. *Id.* This is not, as the Ninth Circuit assumes, an attempt to transform marginal functions into essential ones by adding them to a job description. App. 15a-16a n.9. Rather, it is a legitimate effort by an employer to ensure the safety of its employees as it is required to do under other federal and state laws and which it is permitted to do under the ADA. 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. § 1630.15(e); *see also* H.R. Rep. No. 101-485(III), at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 466, and H.R. Conf. Rep. No. 101-596, at 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 568. A disabled individual who cannot perform the essential functions of the position sought or held safely, with or without reasonable accommodation, should be no more qualified under the ADA than the individual who cannot perform those same functions competently. The Ninth Circuit, however, would find that the employer discriminated against the former, but not the latter, applicant. The ADA does not support such a distinction.

II. AN EMPLOYER DOES NOT DISCRIMINATE UNDER THE ADA BY USING QUALIFICATION STANDARDS, INCLUDING SAFETY STANDARDS, THAT ARE JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY.

By considering whether Chevron could establish a defense under the ADA before first establishing that it had discriminated against Mr. Echazabal, the Ninth Circuit placed the cart before the horse. The anti-discrimination provision of Title I of the ADA specifically defines prohibited acts of discrimination. 42 U.S.C. § 12112(b); 29 C.F.R. §§ 1630.7, 1630.10. Included on that list is the use of qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless* the standard, test or other selection criteria used by the covered entity is shown to be job-related for the position in question and is consistent with business necessity.[2] *Id.* The legislative history makes clear that "an employer may still devise physical and other job

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[2] The application of such a qualification standard is also a defense to a charge of discrimination. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The ADA excludes from the definition of "discrimination" the application of qualification standards, tests or selection criteria that are job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10. The employer may also assert, as a defense to a charge of discrimination, that its qualification standards, tests or selection criteria are job-related and consistent with business necessity. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The inclusion of the same standard in the definition of discrimination and as a defense to such a charge raises unique burden of proof issues under the ADA that are most appropriately resolved by this Court.

criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity." H.R. Rep. No. 101-485(II), at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338.

Not surprisingly, the EEOC itself recognizes that a qualification standard can include physical, medical and safety requirements. According to the EEOC regulations, qualification standards include "personal and professional attributes including the skill, experience, education, *physical, medical, safety* and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q) (emphasis added). This definition makes sense.

While the ADA is intended to promote employment opportunities for individuals with disabilities, it is not intended to do so at the risk of their health or safety. Each and every employer must comply with federal and state safety regulations. Not only must employers operate safe and healthful work places, they are also prohibited from engaging in any business practices that endanger the health and welfare of their employees. 29 U.S.C. § 654(a) (OSHA); *see also* Cal. Lab. Code § 6402 ("No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful"). The ADA was not intended "[t]o override any legitimate medical standards or requirements established by federal, state or local law. . . . " H.R. Rep. No. 101-485(III), at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 466, and H.R. Conf. Rep. No. 101-596, at 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 568.

The Ninth Circuit, however, rejected the application of Chevron's occupational safety requirement as a valid qualification standard without even analyzing how that term is defined under the ADA. *Id.* App. 16-17a n.10. Neither the statute nor its regulations nor the legislative history of the ADA support the Court's conclusion that safety-related criteria cannot be a valid qualification standard.

Employers must be allowed to balance their anti-discrimination obligations under the ADA with other legal obligations intended to promote the health and welfare of all employees. The EEOC regulations recognize and provide for such balance. 29 C.F.R. § 1630.15(e). Section 1630.15(e) states: "It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action . . . that would otherwise be required by this part." *Id.*

This sound principle ensures that an employer is not confronted with a charge of discrimination simply because it complied with its legal obligations, a principal that has been reaffirmed by this Court in its recent ADA jurisprudence.[3] *See Albertson's, Inc. v. Kirkingburg*, 527 U.S.

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[3] The Ninth Circuit's opinion dismisses the potential liability confronting an employer should a disabled employee be harmed by the conditions that the employer had believed to be unsafe. App. 12a-13a. The Ninth Circuit states, without any authority, that the employer would be shielded from liability because the ADA would preempt state tort law. *Id.* at 13a. However, the Ninth Circuit completely ignores that the

555, 570 (1999) (recognizing that employer has unconditional obligation to follow safety regulations and a consequent right to do so without committing act of discrimination). Clearly, the employers' duty to comply with such laws and regulations at the federal and state level is likely to "be critical" in their determination of whether an applicant is a "qualified individual with a disability." *Albertson's*, 527 U.S. at 580 (J. Thomas concurring opinion).

III. THE NINTH CIRCUIT CONSTRUES THE EMPLOYERS' DEFENSES TO CHARGES OF DISCRIMINATION UNDER THE ADA TOO NARROWLY.

Even assuming that the employee could establish that he or she is a qualified individual with a disability and that the employer committed a prohibited act, the ADA affords the employer several defenses to a charge of discrimination. Among those defenses is the employer's right to demonstrate that the qualification standards that have allegedly screened out the qualified individual with a disability are job-related and consistent with business necessity. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b). The ADA does not enumerate permissible "qualification standards" because such standards are unique to both the

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employer could face statutory liability for violating safety regulations by hiring an employee who will be harmed by the conditions of his or her employment simply because of the employee's particular disability. 29 U.S.C. § 654(a) (OSHA); *see also* Cal. Lab. Code § 6402. There is no basis to believe that the ADA would preempt federal and state safety regulations intended to protect all workers. *Id.*

particular job and employer. Section 12113(b), however, does elaborate on one such standard, stating: "The term 'qualification standards' *may include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b) (emphasis added).

The Ninth Circuit seized on the wrong word in this provision to justify its holding that employers may not consider the risk to the health or safety of the disabled individual when making employment decisions. App. 6a-7a. The Circuit Court concluded that the "direct threat" defense was only applicable where the individual creates a risk of harm to other individuals, but not where the individual's disability created a risk of harm to himself, given the nature of his disability and the particular requirements of the position he was seeking. *Id.*

The Ninth Circuit's conclusion hinges on the use of the word "shall" in section 12113(b) of the ADA but ironically ignores the words "may include" just before. *Id.* The Ninth Circuit stated:

> On its face, the provision does not include direct threats to the health or safety of the disabled individual himself. Moreover, by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons – including the disabled individual himself – are not included within the scope of the defense.

Id. at 6a. Based on what the Ninth Circuit concluded was an unambiguous expression of congressional intent, the Court rejected the EEOC's broader definition of the term "direct threat," which expanded the application of the

"direct threat defense" to cases where the individual posed a risk of harm to himself. *Id.* This rejection was unsound.

The legislative history indicates that the concept of "direct threat" is broad enough to cover the EEOC's regulations and might even stretch to a threat to property. The House Report for the Education and Labor Committee stated: "It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health and safety of others or poses a direct threat to property." H.R. Rep. No. 101-485(II), at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338. What is not acceptable, according to the House Labor and Education Committee, is for an employer to make such a determination based on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies." *Id.* Rather, the employer's decisions must be made on a case-by-case basis. *Id.* It would be ironic, indeed, if the ADA allowed an employer to deny an employment opportunity to protect its property but not to protect the safety of that applicant or employee based on individualized and objective medical recommendations. *See id.* at 57 (making direct threat determination requires a fact-specific individualized inquiry resulting in a "well-informed judgment grounded in a careful and open-minded weighing of risks and alternatives.") (citations omitted).

The EEOC's decision to combine an available defense to a charge of discrimination based on the threat to the health or safety of an individual with a defense based on the "direct threat" to others makes sense from both a

legislative and enforcement perspective. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). This combination ensures that employers make an "individualized assessment of the individual's present ability to safely perform the essential functions of the job" before determining that the individual is not a qualified individual with a disability. 29 C.F.R. § 1630.2(r). Such an assessment must be based on "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" and must consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur and the imminence of the potential harm. *Id.* By combining these two qualification standards, the EEOC ensures that the employer conducts the same level of individualized assessment regardless of whether the risk is to the individual alone or to others.

A broader interpretation of the direct threat defense is also consistent with the definition of that term under the Rehabilitation Act. While the Ninth Circuit did consider Rehabilitation Act precedents, it ultimately rejected the applicability of those precedents to the ADA because of differences in the statutory language. App. 16a-17a n.10 (citing *Mantolete v. Bolger*, 767 F.2d 1416, 1422-24 (9th Cir. 1985)). According to the Ninth Circuit Court's reasoning, because the Rehabilitation Act did not contain a definition of the term "qualified handicapped person," the EEOC regulations were controlling. *Id.* Those regulations stated that an individual who posed a direct threat to his or her own health or safety was not qualified. *Id.* The Ninth Circuit concluded that, in the ADA context, the EEOC regulations related to the term "direct threat" are

not entitled to such deference because they expand upon the statutory definition of "direct threat" in sections 12111(3) and 12113(b) of the ADA. *Id.*

The Ninth Circuit, however, appears to have disregarded the congressional directive in section 12117(b) to federal agencies processing charges of employment discrimination under the ADA and the Rehabilitation Act to ensure consistent and non-conflicting standards for the same requirements under the two Acts. 42 U.S.C. § 12117(b). Clearly, Congress sought to equate the protections of the ADA with those of the Rehabilitation Act. 42 U.S.C. § 12201; *see also* H.R. Conf. Rep. No. 101-596, at 66 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 575; Statement by President Bush, 26 Weekly Comp. Pres. Doc. 1165 (1990), *reprinted in* 1990 U.S.C.C.A.N. 601 ("The Administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA . . . [e]mployers can turn to these interpretations for guidance on how to meet their obligations under the ADA."). Therefore, Rehabilitation Act precedents, which have routinely recognized an employer's right to consider safety in determining whether a disabled individual is qualified, are instructive to interpreting the ADA and should be considered.

Even if the Ninth Circuit's holding reflects an accurate reading of the definition of the term "direct threat," though it seems decidedly too narrow considering the ADA legislative history, the Ninth Circuit still misconstrued the scope of the defenses available to an employer under the ADA. App. 6a.

Contrary to the suggestion of the Ninth Circuit, the statutory definition of "direct threat" in no way limits the other qualification standards that may be job-related and consistent with business necessity or other defenses that may be available under the EEOC regulations. 42 U.S.C. § 12113; 29 C.F.R. § 1630.15. Indeed, the language of Section 12113(b) is permissive and inclusive, not exclusive. 42 U.S.C. § 12113(b) ("[t]he term 'qualification standards' *may include* a requirement that an individual shall not pose a direct threat . . . ") (emphasis added); *EEOC v. Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000). Safety, medical and other physical requirements are not "exclusively cabined into the direct threat test." *Exxon Corp.*, 203 F.3d at 873 (rejecting EEOC's position that safety-requirements could only be justified if individual posed direct threat). Rather, as other Circuit Courts have found, "[s]afety-based qualification standards are an accepted ground for a defense" under the ADA. *EEOC v. Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000) (safety standards may be justified as job-related and consistent with business necessity).

The Ninth Circuit, however, disagrees. By misreading section 12113(b), the Ninth Circuit has unnecessarily and arbitrarily limited the defenses available to employers under the ADA. App. 6a-7a. Under its reasoning, an employer could almost never justify safety criteria even if they were job-related and consistent with business necessity. Such a holding contradicts the express language of sections 12112(b)(6) and 12113(a) of the ADA and therefore should not be permitted to stand.

IV. AN EMPLOYMENT DECISION BASED ON AN INDIVIDUALIZED ASSESSMENT OF THE DISABLED INDIVIDUAL'S ABILITY TO PERFORM THE POSITION WITH OR WITHOUT A REASONABLE ACCOMMODATION IS PERMISSIBLE, NOT PATERNALISTIC.

Despite the conclusions of the Ninth Circuit, paternalism is not the issue here. By sticking such a label on this case, the Ninth Circuit has failed to differentiate between the blanket exclusions condemned by the ADA (and this Court in its Title VII jurisprudence) and the type of careful individualized assessment that the ADA requires and sanctions. App. 10a. According to the legislative history, the Congress intended to require covered employers to make employment decisions "based on facts applicable to the individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do." H.R. Rep. No. 101-485(II), at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340. Similarly, an employer cannot make employment decisions based on generalized fears about the safety of the applicant or employee because "[b]y definition, such fears are based on averages and group-based predictions." *Id.* The Congress specifically sought to avoid the harmful effects of such stereotyping by requiring employers to make individualized assessments about the qualifications of a particular individual with a particular disability to perform a particular job. *Id.* at 340-41.

Chevron did not disqualify Mr. Echazabal based on stereotypical and misinformed assumptions about his qualifications for the job or concerns for his safety as an

individual with Hepatitis. App. 35a-39a. Rather, after having conducted an individualized inquiry and considering feedback from the applicant's own physician, Chevron weighed the objective medical evidence regarding Mr. Echazabal's condition in light of the demands of the job and considered the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm would occur and the imminence of the potential harm, as it was directed to do by the federal regulations and the EEOC guidance (29 C.F.R. § 1630.2(r)). App. 35a-39a. Based on that assessment, Chevron concluded that Mr. Echazabal could not perform the essential functions of the position sought without great risk to his health and safety. *Id.*

The post-offer, pre-employment medical examination conducted by Chevron operated just as Congress intended. Although medical inquiries of a disabled applicant are generally prohibited, the ADA allows employers to require medical examinations after a conditional job offer, provided that they are given to all entering employees in the same category. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b). According to the House Labor and Education Committee:

> This exception to the general rule [prohibiting medical inquiries] meets the employer's need to discover possible disabilities that do, in fact, limit the person's ability to do the job, i.e., those that are job-related and consistent with business necessity.

H.R. Rep. No. 101-485(II), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355. While an abnormality in an x-ray or test result alone would not be enough to disqualify an

otherwise qualified disabled applicant, the legislative history reflects that Congress not only permitted but expected that employers would consider tangible risks to an applicant's health and safety in making employment decisions:

> [I]f the examining physician found that there was a high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate, unless the employer could make a reasonable accommodation to the candidate's condition that would avert such harm and such accommodation would not cause an undue hardship.

H.R. Rep. No. 101-485(II), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355-356 (emphasis added).

This is precisely what Chevron did here. The physicians whom Chevron consulted found, after conducting thorough medical examinations and analyses of Mr. Echazabal's condition, that the sustained exposure to toxic chemicals required by the position that he was seeking created a "high probability of substantial harm to his health and safety because of the effects of Hepatitis C on his liver functioning." App. 35a-39a. Mr. Echazabal's personal physicians at the time agreed with these conclusions. App. 37a. Moreover, there is no question here regarding the availability of a reasonable accommodation that would have mitigated this "high probability of substantial harm," considering that "exposure to solvents and toxic chemicals were a necessary and inseparable part of the plant helper position." App. 38a-39a. Chevron, therefore, could reject Mr. Echazabal as being unqualified

for the position sought *without* committing an act of discrimination under the ADA. H.R. Rep. No. 101-485(II), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355-356.

The individualized medical assessment that informed Chevron's decision in this case is a far cry from the broad, generalized policies that this Court has scrutinized – including the "fetal protection policy" at issue in *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) and the gender-based prison assignment policy at issue in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). This Court concluded that those policies discriminated against women on their face. *Johnson Controls*, 499 U.S. at 198-200; *Dothard*, 433 U.S. at 332. Unlike those policies, the physical, medical and safety criteria at issue in this case are not facially discriminatory against disabled individuals. Instead, they are uniformly applied to all applicants seeking the plant helper position sought by Mr. Echazabal. Chevron's occupational safety standards disqualify only those few individuals, like Mr. Echazabal, whose particular disability makes them susceptible to serious harm or injury given the essential functions of the position that they are seeking. *See also* Chevron U.S.A., Inc.'s Writ Petition at 27-28 n.6. This uniform application of the safety criteria, coupled with statutorily permitted post-offer, pre-employment physical examination conducted by Chevron, clearly distinguishes this case from *Johnson Controls* and *Dothard*. Therefore, contrary to the Ninth Circuit's conclusions, the holdings of these Title VII cases should not be dispositive here.[4] App. 10a, 15a n.9.

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[4] In *Dothard*, this Court recognized that the application of facially neutral criteria may be prohibited where such criteria

Furthermore, requiring employers to assume a risk that the disabled individual is willing to ignore does not further the purposes of the ADA. Like other federal anti-discrimination statutes, the ADA requires the employer to "measure the person for the job and not the person in the abstract." *Dothard*, 433 U.S. at 332 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)). The objectives of the ADA would therefore be better served by ensuring that employers make employment decisions by assessing the individual's qualifications, the essential functions of the position and the objective medical evidence. *Chiari*, 920 F.2d at 317 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284-85 (1987)). As Congress intended, these individualized assessments minimize the possibility that unfounded assumptions about the risk to a disabled individual's health or safety factor into employment decisions and operate to exclude an otherwise qualified individual from the workforce solely because he is disabled. Chevron's use of this individualized assessment and its reliance on valid and objective medical findings, findings which were supported by Echazabal's own physicians, do not violate the ADA.

"select applicants for hire in a significantly discriminatory pattern." *Dothard*, 433 U.S. at 329 (holding that facially neutral height and weight requirement was discriminatory because it had a discriminatory impact on women and was not an accurate measure of an applicant's strength, the job-related quality that the employer had identified as being essential to working as a correctional counselor). Echazabal makes no such allegation here.

The ADA, without question, seeks to make disabled individuals more autonomous. 42 U.S.C. § 12101. Personal autonomy, however, should not take precedence over personal safety. Such autonomy must yield where the individual, regardless of whether he is disabled under the ADA, seeks to accept employment despite objective medical evidence confirming that the position will jeopardize his health or safety. *Dothard*, 433 U.S. at 335 (upholding a regulation prohibiting women from serving as guards in Alabama's male maximum-security prisons because the "environment of violence and disorganization" of those institutions would place female prison guards at particular risk). This Court reached the same conclusion in *Dothard*: "More is at stake in this case, however, than an individual . . . [applicant's] decision to weigh and accept the risks of employment. . . . " *Id.* In such a case, the employer should not be forced to assume that risk simply because the individual is willing to do so.

The employer has the right, and indeed the responsibility, to adopt and apply appropriate job-related physical, medical and safety criteria to protect the health and welfare of both prospective applicants and current employees regardless of disability. What is at issue here, quite simply, is whether a disabled applicant must be afforded the unfettered opportunity to decide for himself whether he wants to accept a position that may kill him. The Ninth Circuit, through tortured statutory analysis, answers this question affirmatively. Employers Group respectfully submits that the ADA does not compel American employers to accept the terrible burden of imposing what could well be a death sentence on a prospective employee.

CONCLUSION

For the reasons stated herein, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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No. 00-1406

IN THE

Supreme Court of the United States

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Petitioner,

v.

MARIO ECHAZABAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

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INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discrimination in employment. Its membership includes over 350 of the nation's largest private sector employers, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers ("NAM") is the nation's largest multi-industry trade association. NAM represents 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

All of EEAC's and NAM's members are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities.

In addition, EEAC's and NAM's members include chemical and other manufacturing companies, oil refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, and many others. Many if not all of these companies have adopted safety-based qualification standards addressing the risks presented by the

work environment. These standards are designed to prevent workers from being injured or killed on the job, or from killing or injuring others, either in the workplace or in the general public. They can—and sometimes will—screen out some individuals with disabilities because of potential hazards formed by the combination of particular aspects of the disability and some factor or factors present at the worksite.

Thus, EEAC's and NAM's members have a direct interest in the issue presented in this case—whether the ADA permits an employer to impose as a qualification standard a requirement that a job candidate be capable of performing the essential functions of a job safely, that is, without facing a risk of serious injury or death. The court below ruled that an employer can never defend against an ADA challenge either by showing that performing the job safely is an "essential function" rendering a particular individual unqualified due to the increased risk posed by his disability, or that the plaintiff, if placed in the job, would impose a "direct threat" to his own health. The Ninth Circuit's interpretation is contrary to the language and spirit of the ADA as well as the decisions of several other circuit courts of appeals.

Because of its interest in the proper application of the ADA, EEAC filed extensive comments in response to the Equal Employment Opportunity Commission's Notice of Proposed Rulemaking on its substantive regulations implementing the employment provisions of the ADA. 56 Fed. Reg. 8578 (Feb. 28, 1991) (codified at 29 C.F.R. Part 1630). EEAC also has participated as *amicus curiae* in the private sector ADA cases in this Court [2] as well as in the instant case below.

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[2] *Toyota Motor Mfg., Inc. v, Williams*, 121 S. Ct. 1600 (2001) (*cert. granted*), *US Airways v. Barnett*, 121 S. Ct. 1600 (2001) (*cert. granted*), *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United*

Thus, the *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, the *amici* are well situated to brief the Court on the concerns of the business community and the significance of this case to employers. The *amici* seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties.

STATEMENT OF THE CASE

Respondent Mario Echazabal worked for various independent maintenance contractors at a Chevron, U.S.A. refinery in El Segundo, California between 1972 and 1996. Pet. App. 2a. In 1992, Echazabal applied for a job with Chevron at the refinery. *Id.* During the pre-employment medical examination, Dr. Philip Baily, a Chevron in-house physician, determined that Echazabal had "an uncorrectable liver abnormality, and should avoid exposure to solvents or other liver toxic chemicals in order not to exacerbate his liver problems." Pet. App. 34a. Chevron rescinded its contingent job offer. Pet. App. 2a. Echazabal subsequently was diagnosed with "chronic Hepatitis C, a viral infection characterized by ongoing liver inflammation." Pet. App. 35a.

In 1995, Echazabal again applied for a job with Chevron. Pet. App. 3a. Dr. Baily's successor, Dr. Kenneth McGill, conducted another pre-employment medical examination. Pet. App. 35a. As part of this examination, Dr. McGill reviewed Echazabal's medical records, which revealed no improvement in Echazabal's condition. Pet. App. 35a-36a. Dr. McGill also reviewed the written "job summaries" which

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Parcel Serv., Inc., 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998).

Chevron prepares for every job, listing the functions of the position and the environmental conditions that will be experienced on the job. The summary for the plant helper job Echazabal sought listed "hydrocarbon liquids and vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases, and chlorine bleach in the work environment." Pet. App. 36a-37a.

Dr. McGill also spoke and corresponded with Dr. Zelman Weingarten, M.D., Echazabal's own physician. Dr. Weingarten told Dr. McGill that Echazabal "should not be exposed" to the substances in the refinery. Pet. App. 37a.

In addition, Dr. McGill reviewed Echazabal's medical history, including recent exposures in the refinery. Pet. App. 37a-38a. As a result, "Dr. McGill came to the conclusion that the hydrocarbons, chemicals, and solvents to which Echazabal would be exposed working as a plant helper in the coker unit would be dangerous to his health, or would aggravate his chronic liver condition." Pet. App. 38a. Dr. McGill reviewed his conclusions with Chevron's Medical Director, who agreed. *Id.*

Dr. McGill then reported to William Saner, Chevron Personnel Director, his opinion and that of Echazabal's own physician that Echazabal should not be exposed to liver toxic chemicals. Saner reviewed the same written job summaries as had Dr. McGill. Based on this information and his own knowledge of the job, Saner decided to withdraw the contingent job offer that had been made to Echazabal. Pet. App. 38a-39a.

Chevron notified Echazabal that it was withdrawing his job offer, and also asked Irwin Industries, the contractor that employed Echazabal, to remove him from the position in which he was working in Chevron's refinery, due to the chemical exposure. Pet. App. 39a. Irwin did so, and sent Echazabal to the Long Beach Medical Clinic for evaluation.

Pet. App. 40a. There, Dr. Brian Tang, who holds a board certification in occupational medicine and teaches occupational medicine at the University of Southern California Medical School, concluded that "exposure to liver toxins would harm and probably kill Echazabal." *Id.*

Echazabal sued Chevron and Irwin. The district court below granted summary judgment in favor of Chevron on Echazabal's claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the California Fair Employment and Housing Act, Cal. Gov't Code § 12940, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* Pet. App. 32a-57a.

The U.S. Court of Appeals for the Ninth Circuit reversed the district court's decision. Pet. App. 1a-29a. In a 2-1 decision, the Ninth Circuit ruled that Chevron could not defend its decision on the basis that Echazabal would be at great risk to his personal safety if it placed him in the job, nor could the company consider him unqualified for the job on that account. In dissent, Judge Trott called the majority's decision "Pickwickian," Pet. App. 23a, and "bizarre." Pet. App. 21a.

Chevron sought review by this Court, which was granted on October 29, 2001.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, which prohibits discrimination in employment against a *qualified* individual with a disability, permits an employer to exclude as unqualified an individual whose medical condition would place him at risk should he encounter the hazards presented on the job. Being able to perform a job without being seriously injured or killed may be the most basic necessary job qualification. *Cf. Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997); *Webb*

v. Clyde L. Choate Mental Health and Dev. Ctr., 230 F.3d 991 (7th Cir. 2000); *Reed v. Heil Co.*, 206 F.3d 1055 (11th Cir. 2000).

Accordingly, the ADA provides explicitly for the use of qualification standards and selection criteria that are "job-related" and "consistent with business necessity" even if they tend to screen out an individual with a disability. 42 U.S.C. §§ 12112(b)(6), 12113(a). Such qualification standards necessarily must include safety-based standards designed to protect the health of the individual employee, as well as others in the workplace and the general public. Thus, the Ninth Circuit's holding, that the employer has to place an at-risk employee in a job even though doing so contravenes its own safety standards and medical advice, is contrary both to the law and to common sense.

The statute also provides that an employer's qualification standards may include a requirement that an individual not pose a direct threat to others in the workplace. 42 U.S.C. § 12113(b). The Equal Employment Opportunity Commission's regulations interpreting the ADA make this analysis applicable not only to threats to others, but to threats to the individual as well. 29 C.F.R. § 1630.2(r). The agency's administrative interpretation making an individualized "direct threat" analysis the only way to justify a safety standard overreaches the statute, however.

As a practical matter, employers have a vested interest in protecting the health and safety of their employees. Beyond the fundamental considerations of decency and responsibility in not willingly placing another human being at risk, a company has a significant business interest in protecting its "workforce capital" in which it has invested considerable time and expense.

ARGUMENT

THE ADA PERMITS EMPLOYERS TO USE SAFETY-BASED, JOB-RELATED QUALIFICATION STANDARDS EVEN IF THEY SCREEN OUT INDIVIDUALS WITH DISABILITIES

A. The Capacity To Perform a Job Without Incurring Serious Injury or Death Is a Fundamental Qualification

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, prohibits discrimination in employment against a "*qualified* individual with a disability" because of the disability. 42 U.S.C. § 12112(a) (emphasis added). It defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added).[3] The statute is explicit that the employer's judgment as to what job functions are essential *must* be considered in making this determination. *Id.*

[3] The ADA does not define the term "essential functions." The concept derives from the regulations issued under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See, e.g.*, 45 C.F.R. § 84.3(k)(1). When the Department of Health and Human Services issued the Section 504 regulations, it explained that this term was used to emphasize that "handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a *marginal* relationship to a particular job." 45 C.F.R. pt. 84, App. A(a)(5) (emphasis added). The Committee Reports on the ADA similarly characterize "essential" functions as being "non-marginal." S. Rep. No. 101-116, at 26 (1989) (Senate Labor Committee); H.R. Rep. No. 101-485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 337 (Education and Labor Committee); H.R. Rep. No. 101-485, pt. 3, at 33 (1999), *reprinted in* 1990 U.S.C.C.A.N. at 455-56 (House Judiciary Committee).

Perhaps the most elemental qualification for a job is being able to perform its essential functions, whatever they may be, without seriously injuring or killing oneself. An individual may have the physical capabilities to do a job's tasks yet still not be "qualified" for the job, because the doing would be his undoing. *See, e.g., Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 807-09 (5th Cir. 1997) (holding that employee who could not perform the essential function of carrying materials into a shop area because the proximity to welding equipment could cause electromagnetic interference with his pacemaker was not "qualified" for the job); *Webb v. Clyde L. Choate Mental Health and Dev. Ctr.*, 230 F.3d 991, 999 (7th Cir. 2000) (holding that psychologist who could not perform essential function of interacting with contagious and/or violent patients because of risk of injury due to his asthma, osteoporosis and weakened immune system was not "qualified"); *Reed v. Heil Co.*, 206 F.3d 1055, 1063 (11th Cir. 2000) (holding that a plaintiff with a back condition could not perform essential functions of his job, in part because "test-driving the garbage trucks would painfully aggravate [his] back."). In each of these cases, the employee was physically capable, in the most basic sense, of doing the job in question, but could not as a practical matter do it safely because of the effect on his medical condition. *Cf. Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir. 2000) (upholding summary judgment for employer who discharged front loader operator with sleep apnea, noting that "an employee who is less than fully alert could harm himself and others if he is operating a front loader or many other kinds of heavy industrial equipment."). This is true even where the individual himself is willing to endure the pain and suffer the risk involved. *See, e.g., Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599, 602 (7th Cir. 1999) (holding employee unqualified despite his "self-destructive wish to return to this particular job. . . .").

The ADA's legislative history confirms this point. In its discussion of post-offer, pre-employment medical examinations, the Report of the House Education and Labor Committee clarifies that a candidate could be disqualified on the basis of potential future injury if the examining physician found that there was a "high probability of substantial harm" if the candidate performed the job in question. H.R. Rep. No. 101-485, pt. 2, at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 355.[4]

For this reason, the Ninth Circuit's reliance on this Court's decisions in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and *International Union, UAW, v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), both of which involved challenges under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, as amended, to broad-based rules disqualifying women from employment, is greatly misplaced. The Ninth Circuit read both cases as creating a federally-protected right for "all individuals to decide for themselves whether to put their own health and safety at risk," describing it as a type of "freedom of choice." Pet. App. 10a.

The Ninth Circuit erroneously confused general, speculative risks with specific, predictable ones. *Dothard* and *Johnson Controls* both involved comprehensive general rules excluding all, or nearly all, women.[5] If the instant case involved a rule disqualifying all individuals with disabilities from working at the refinery, then *Dothard* and *Johnson*

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[4] Of course, the candidate could not be rejected if reasonable accommodation could avert the harm without undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A). But ignoring the danger would be neither reasonable nor an accommodation.

[5] Indeed, even if *Dothard* is read as confirming a woman's general right to choose a potentially dangerous career, it ruled that women *could* be excluded from jobs as prison guards in "contact" positions because of "a substantial security problem, directly linked to the sex of the prison guard." 433 U.S. at 336.

Controls likely would be analogous. But safety standards such as the one in question here are far more narrowly drawn, excluding only those workers whose particular sensitivities make exposure to liver-toxic chemicals a substantial risk. Thus, Title VII's prohibition against broad gender-based exclusionary rules that cannot be justified as a bona fide occupational qualification has no bearing on the case at bar.

B. The Statutory Language Explicitly Permits Employers To Use "Job-Related" Qualification Standards, Which Necessarily Include Safety-Based Standards

Employer safety standards designed to preserve the health and safety of the individual employee, other employees and the public are necessarily "qualification standards" under the ADA. *Cf. Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999) ("By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria"). Indeed, the ADA states *twice* that employers may use qualification standards and other selection criteria that are "job-related" and "consistent with business necessity" even if they tend to screen out individuals with disabilities.

First, Section 102(b) of the ADA, which defines the term "discriminate" as used in the general prohibition of Section 102(a), states in relevant part that:

> (b) CONSTRUCTION—As used in subsection (a), the term "discriminate" includes—
>
> > (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.*

42 U.S.C. § 12112(b)(6) (emphasis added). Thus, the very statutory provision raising the possibility that a qualification

standard or selection criterion might discriminate on the basis of disability also expressly recognizes the legitimacy of such a standard or criterion if it "*is shown to be job-related for the position in question and is consistent with business necessity.*" *Id.*

Second, the statute provides a defense in much the same terms, stating:

> IN GENERAL—It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability *has been shown to be job-related and consistent with business necessity*, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(a) (emphasis added). The inclusion of this defense makes it doubly clear that qualification standards or selection criteria that are "job-related" and "consistent with business necessity" are permissible under the ADA even if they screen out individuals with disabilities.

The legislative history of the ADA confirms that "business necessity" can justify qualification standards that establish physical job criteria. Both congressional committees with direct authority over this part of the legislation, the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor, made this point.

> Under this legislation an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity. Thus, for example, an employer can adopt a physical criterion that an applicant be able to lift fifty pounds, if that ability is necessary to an individual's ability to perform the essential function in question.

S. Rep. No. 101-116, at 27 (1989). *See also* H.R. Rep. No. 101-485, pt. 2, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N.

303, 338. Both committees explained this provision as a "requirement that job criteria actually measure ability required by the job" to guard against employment decisions based on "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities . . . ." S. Rep. No. 101-116, at 37 (1989); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 353. They explained:

> If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do an essential function of the job. *If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation.*

S. Rep. No. 101-116, at 37-38 (1989); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 353-54 (emphasis added).[6] *See also* H.R. Rep. No. 101-485, pt. 3, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 454-55.

Importantly, the ADA's legislative history also confirms that Congress intended for safety-based medical standards to be evaluated under the "business necessity" rule. As the House Committee on the Judiciary stated, "The Committee does not intend for this Act to override any legitimate medical standards established by federal, state or local law, *or by employers* for applicants for safety or security sensitive positions, if the medical standards are consistent with [the

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[6] The explanation continues that "the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion." *Id.* The Committees, did not, however, suggest any standards for how such a criterion could or should be identified or evaluated.

ADA]." H.R. Rep. No. 101-485, pt. 3, at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 466 (emphasis added). *See also* H.R. Rep. No. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 356-57; H.R. Conf. Rep. No. 101-596, at 59-60 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 567-69. Indeed, the House Labor Committee focused specifically on safety-sensitive positions in explaining when medical examinations for employees might be "job-related" and "consistent with business necessity," stating:

> Section 102(c)(4) prohibits medical exams of employees unless job-related and consistent with business necessity. Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical. Those employees, for example, pilots, may have to meet medical standards established by Federal, State or local law or regulation, or otherwise fulfill requirements for obtaining a medical certificate, as a prerequisite for employment. In other instances, because a particular job function may have a significant impact on public safety, e.g. flight attendants, an employee's state of health is important in establishing job qualifications, even though a medical certificate might not be required by law.

H.R. Rep. No. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 356-57. Similarly, the Conference Report explains:

> [I]n certain industries, such as air transportation, applicants for security and safety related positions are normally chosen on the basis of many competitive factors, some of which are identified as a result of post-offer pre-employment medical examinations. Thus, after the employer receives the results of the post-offer medical examination for applicants for safety or security sensitive positions, only those applicants who meet *the*

> *employer's criteria* for the job must receive confirmed offers of employment, so long as the employer does not use those results of the exam to screen out qualified disabled individuals on the basis of disability.

H.R. Conf. Rep. No. 101-596, at 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 568 (emphasis added). Thus, the legislative history supports the appropriateness of the "business necessity" defense to respond to a challenge to a safety-based physical standard.

The Equal Employment Opportunity Commission's regulations interpreting the ADA define "qualification standards" appropriately as "the personal and professional attributes including the skill, experience, education, physical, medical, *safety* and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q) (2001) (emphasis added). Similarly, the agency's Interpretive Guidance regarding the statute's use of the term "qualification standards" states that "[t]his provision is applicable to all types of selection criteria, including *safety requirements* . . . ." 29 C.F.R. pt. 1630, App. § 1630.10 (2001) (emphasis added).

Similarly, in conforming to the ADA its regulations interpreting § 503 of the Rehabilitation Act of 1973, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) also indicated its view that safety is a "business necessity" issue. When it proposed deleting specific language stating that physical and mental job qualification standards must be "consistent with safe performance of the job," the agency explained that "OFCCP has determined it unnecessary to incorporate the reference to 'safe performance' in the proposal because that concept is

subsumed by the concept of business necessity." 57 Fed. Reg. 48,084, 48,098 (October 21, 1992).[7]

Accordingly, there appears to be a consistent, common-sense interpretation among both the congressional committees that passed on the ADA and the federal agencies that have interpreted it that safety-based qualification standards are appropriate selection criteria.

C. The Existence of the "Direct Threat" Defense Does Not Preclude the Application of Job-Related Safety Standards Designed To Prevent Harm to Individual Employees

1. The Ninth Circuit's inverted reading of the two "qualification standards" defenses is incorrect.

As noted, the ADA creates an explicit defense for employers who use "qualification standards" that are "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). As a subset to this defense, the statute also provides that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b).

Congress added this provision to codify a point this Court made in *School Board of Nassau County v. Arline*, that "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." 480 U.S. 273, 287 n.16 (1987). *See* S. Rep. No. 101-116, at 40 (1989); H.R. Rep. No. 101-485, pt. 2, at 76 (1990), *reprinted in* 1990

[7] The revised regulations adopted by the agency reflect this change. 61 Fed. Reg. 19,336, 19,538 (May 1, 1996) (codified as 41 C.F.R. § 60-741.44(c)) (formerly 41 C.F.R. § 60-741.6(c)).

U.S.C.C.A.N. at 358-59; H.R. Rep. No. 101-485, pt. 3, at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 468.[8] The defense thus addresses situations such as that presented in *Arline*, where an individual meets all of the employer's *other* qualification standards but still presents a risk to others. H.R. Rep. No. 101-485, pt. 3 at 45-46, *reprinted in* 1990 U.S.C.C.A.N. at 468-69.

Thus, under the plain language of § 12113(a), an employer may use any qualification standard that is "job-related and consistent with business necessity" even if it screens out an individual with a disability. 42 U.S.C. § 12113(a). One such standard may be that the individual not "pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). To use the "direct threat" provision, an employer must meet its specified threshold of proof, drawn directly from *Arline*—that placing the individual in the job would present "a significant risk to the health or safety of others, that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3).

The Ninth Circuit mistakenly read these two provisions as mutually exclusive, inferring that because the "direct threat" defense refers to threats to *others*, the broader language dealing with qualification standards cannot be utilized to address other safety risks, such as a risk to the individual him- or herself. This reading is simply wrong, for two reasons.

First, § 12113(b) states unequivocally that "the term 'qualification standards' may *include* a requirement that an individual shall not pose a direct threat . . ."; it says nothing about what the term does *not* include. 42 U.S.C. § 12113(b) (emphasis added).

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[8] In conference, the provision was expanded to cover all threats to others in the workplace. H.R. Conf. Rep. No. 101-596, at 60 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 569.

Accordingly, the existence of a specific "direct threat" defense applicable to risks to others does not preclude an employer from instituting and applying safety-based qualification standards that address situations in which an individual's medical condition, when combined with conditions on the job, poses a "significant risk" to the individual's health or safety. In *Moses v. American Nonwovens, Inc.*, for example, the Eleventh Circuit concluded that an individual with epilepsy was not qualified for his job as a product inspector in a manufacturing plant because "[e]ach of Moses's assigned tasks presented grave risks to an employee with a seizure disorder." 97 F.3d 446, 447 (11th Cir. 1996). *See also LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998) (holding that retaining an employee with epilepsy in his job as a line cook "would have posed a risk of harm to himself and others . . ."). In *Turco v. Hoechst Celanese Corporation*, 101 F.3d 1090 (5th Cir. 1996), the court mentioned the "direct threat" provision when holding that the plaintiff, who testified that his diabetes, among other things, caused occasional loss of concentration so severe that he could not remember his name, was "unqualified due to the safety risk that he imposes upon himself and others" at the chemical manufacturing plant where he worked. *Id.* at 1094. Noting that the job required "work with complicated machinery and dangerous chemicals," the Fifth Circuit described the situation as "a walking time bomb and woe unto the employer that places an employee in that position." *Id.*

Second, the Ninth Circuit's version simply defies common sense. 42 U.S.C. § 12113(b) mentions only "a direct threat to the health or safety of *other individuals in the workplace* . . ." (emphasis added); it says nothing about risks to others *outside* the workplace, *e.g.*, the general public. The Ninth Circuit's misplaced "*expressio unius est exclusio alterius*" analysis thus would foreclose not only those qualification standards designed to guard against risks to the individual, but those intended to prevent risks to the public as well.

This cannot be. As noted above, the ADA's legislative history is replete with references to the proper use of job-related standards designed to protect the safety and security of the general public. Congress unmistakably intended for employers to use properly-crafted job qualifications to ensure that the public would not be placed at risk. Indeed, if the ADA were read to preclude employers from imposing these requirements, the potential impact on public safety would be significant, to say nothing of the consequent damage to the employer's business, such as potential tort liability and loss of public favor.

2. The EEOC's regulation applying the "direct threat" analysis to all safety-related issues incorrectly contradicts the statutory language governing the use of more broadly crafted safety standards

One of the EEOC's regulations interpreting the ADA describes the "direct threat" defense as applicable to all safety-related medical standards, regardless of whether the hazard is to the individual's own safety or that of others. 29 C.F.R. § 1630.2(r) (2001). The regulation does not explicitly present the "direct threat" defense as the *sole* method for defending a safety standard, but the agency's interpretations do.[9] Despite its own regulatory language quoted above, listing "safety" as a basis for a qualification standard generally, 29 C.F.R. § 1630.2(q) (2001), the EEOC's Interpretive Guidance issued in conjunction with its regulations expresses the view that the "direct threat" provision is the *only* avenue for an employer to show that a

[9] Indeed, if the agency viewed it as merely an option, it would not be an unreasonable one. As shown above, an employer who shows that placing a particular person with a disability into a particular position would impose a "direct threat" to that person's health certainly has shown that the person is not qualified for the job. The EEOC does not see it as optional, however.

safety-related qualification standard is "job-related and consistent with business necessity." 29 C.F.R. pt. 1630, App. §§ 1630.15(b) and (c) (2001).[10] *See also Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999) (citing Brief for United States *et al.* as *Amici Curiae*).

As this Court observed in *Albertson's,* since the EEOC's construction may place a greater burden on safety standards than, for example, a typing test, there is a very real question whether the agency's interpretation is valid. *See* 527 U.S. at 569 n.15 (noting that "it might be questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one"). The Fifth Circuit already has conclusively ruled the EEOC's construction *unsound. EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000) (holding that across-the-board safety based qualification standards need not be subjected to the "direct threat" analysis). As shown above, and as the Fifth Circuit ruled in *Exxon*, a general safety-based qualification standard is properly analyzed under 42 U.S.C. § 12113(a), while "[t]he direct threat test applies in cases in which an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard." 203 F.3d at 875.

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[10] Although the Interpretive Guidance was published for notice and comment at the same time as the EEOC's regulations interpreting Title I of the ADA, it is explicitly labeled "Interpretive Guidance" and therefore is not subject to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference").

D. Public Policy Dictates That Employers Be Permitted To Develop and Apply Adequate Safety Standards

Employers must be allowed to develop and apply safety standards to determine if an employee is qualified. In today's workplace, health and safety on the job is a top priority. The Occupational Safety and Health Act of 1970 requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees [and to] comply with occupational safety and health standards promulgated under this [Act]." 29 U.S.C. § 654(a). In this safety-conscious atmosphere, an employer simply cannot assign a person to a job knowing that serious injury or death is the likely result. In many work environments, there will be factors present that, while posing no particular risk to healthy employees, present a grave danger to someone with a specific medical condition. Therefore, when considering whether an employee or applicant is "qualified' to perform a job, any reasonable employer will consider, where appropriate, the effect of hazards posed by the combination of the individual's particular sensitivities and likely exposures on the job.

It simply does not make sense to ignore a medically-established prediction of future harm merely because the individual is willing to risk his or her health. Indeed, the basic purposes of the ADA proceed from the premise that it is in society's interest to make use of all human resources. Allowing individuals to endanger their health—and future role as productive citizens—by allowing them to make incautious judgments regarding what they can and cannot do in the face of contrary expert medical opinion, would contradict this premise directly. Recognizing that injuries impose a cost on society, it makes sense not to so squander our resources. Many states have reached a similar conclu-

sion, adopting laws requiring motorcyclists to wear helmets and automobile drivers and passengers to wear seat belts.

Employers know this already. In addition to fundamental human reasons for not wanting their employees to be hurt, employers have a considerable business obligation to protect their valuable workforce capital. A safer workforce is a more efficient and productive one and, ultimately, more profitable.

Accordingly, keeping their workers alive and safe is the highest priority for conscientious businesses today. Besides the human price, each workplace injury costs the employer a significant amount in lost productivity as well as the time and expense of recruiting, placing, and training a replacement. For example, one safety-conscious construction firm, whose lost-time injury rate was one in 5,000,000 hours, well below the national rate of 9 in 200,000 hours, reported that "the vast majority of [its] projects come in at least 10 percent ahead of schedule and under budget, much of it a direct result of the company's stellar safety performance. Since 1997, the firm has saved $6.9 million as a result of cost underruns." William Atkinson, *On-the-job safety starts at the top*, Business & Health (Sept. 1999).

For all of these reasons, businesses proudly count and display the number of injury-free workdays at a site. Many place enormous emphasis on safety incentive awards. The typical American workplace today displays a gallery of safety placards—not only those mandated by regulatory agencies, but safety reminders that convey the commitment of the employer itself, such as "Safety *is* our business."

While some individuals may be courageous or reckless enough to ignore a doctor's warning, the employee is not the only one with a stake in the matter. Employers must take preventive measures to ensure that employees are able to perform the essential functions of their jobs in a safe manner—that is, without being killed or injured because of an

increased risk formed by the juxtaposition of on-the-job hazards and the employee's own medical condition. An employer that fails to do so will have a difficult time convincing anyone, be it a jury or the Occupational Safety and Health Administration, that it should not be accountable because it was fulfilling its obligation under the ADA. While compliance with the ADA, as a federal law, may in theory preempt other claims, once an accident has occurred, it will be difficult for an employer to justify its actions where, as here, consistent medical advice from both the employer's and the employee's physicians counseled against placing the individual in the job.

It is difficult to believe that Congress intended the ADA to discourage the development and use of safety standards in the workplace. The Ninth Circuit's ruling that employers cannot establish safety as a qualification standard achieves just such a result.

As Judge Trott said in his dissenting opinion, "the majority's holding leads to absurd results." Pet. App. 23a. To the extent that it could force employers to place individuals with disabilities in positions they cannot perform safely, the results could be more than just absurd—they could be tragic.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and National Association of Manufacturers respectfully submit that the decision below should be reversed.

Respectfully submitted,

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No. 00-1406

IN THE
Supreme Court of the United States

CHEVRON U.S.A. INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL COUNCIL ON DISABILITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

INTEREST OF *AMICUS CURIAE*[1]

The National Council on Disability (NCD), as this Court has recognized, provided the founding vision and the initial framework for the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA" or "the Act").[2] For more than two decades, the NCD has monitored and evaluated the state of America's disability-related civil rights laws and policies through research, town meetings, and intergovernmental collaboration.

Formerly the National Council on the Handicapped, the NCD is an independent federal agency composed of 15 members appointed by the President and confirmed by the Senate. It is charged by statute with reviewing federal laws, regulations, programs, and policies affecting people with disabilities. It is also required by law to make recommendations to the President, the Congress, and other federal officials and entities regarding ways to promote equal opportunity, economic self-sufficiency, inclusion and integration into all aspects of society for Americans with disabilities. 29 U.S.C. § 781 (1994).

The NCD was instrumental in creating the legislative record that Congress considered when deliberating the ADA, and it played a pivotal role in the passage of that landmark civil rights law. *See* H.R. Rep. No. 485, pt. 2, at 30-31, 34, *reprinted in* 1990 U.S.C.C.A.N. 303, 312, 316. Guided and informed by

1. The parties have consented to the filing of this brief. Letters of consent were lodged with the Clerk of Court on January 22, 2002. The following brief was not authored, in whole or in part, by counsel for either party. No person or entity, other than the *amicus curiae*, its members and counsel, contributed monetarily to the preparation or submission of the brief.

2. *See Sutton v. United Airlines*, 527 U.S. 471, 484-85 (1999); *see also* H.R. Rep. No. 485, pt. 2, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310.

this unique mandate and perspective, the NCD submits this brief *amicus curiae.*

The NCD is pledged to support the letter and the spirit of the ADA and to preserve the integrity and bedrock principles of the law.[3] Prominent among these are the equal opportunity and self-determination of persons with disabilities. Here, this Court is being asked to allow employers to shut the door on qualified individuals with disabilities who employers believe might be harmed by exposure to a workplace environment.

In this case, petitioner Chevron seeks to accomplish that goal by relying on a "direct threat to self" defense to discrimination charges created by the Equal Employment Opportunity Commission ("EEOC"). Such a defense is found nowhere in the language of the Act, is directly contrary to a plain and natural reading of the Act, and is inconsistent with the clearly expressed intent of Congress. The EEOC's position gives employers the right to decide the degree of risk an individual with a disability can and should accept in performing his or her job. The defense essentially would allow employers unilaterally to bar or dismiss from jobs qualified workers who do not pose a health or safety risk to others, but perhaps only to themselves. Moreover, as in Mr. Echazabal's case, this determination is based on speculative and, at best, probabilistic medical criteria. The result is to endorse the unjustified paternalism and stereotyping that Congress expressly sought to eliminate.

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3. Consistent with that role, NCD published its report to the President of the United States and Congress, *Toward Independence* (1986), *cited in* 135 Cong. Rec. S10765-01, S10790 (daily ed. Sept. 7, 1989) (The NCD report "concluded that the major obstacles facing people with disabilities are not their specific individual disabilities but rather the artificial barrier imposed by others.") (Statement of Sen. Dole).

STATEMENT OF THE CASE

Mario Echazabal worked at Chevron's El Segundo, California oil refinery for some 20 years. During this time, he worked as a laborer, helper, and pipefitter for various maintenance contractors, primarily in the coker unit. Joint Appendix 10 (hereinafter "J.A."). In 1992 Echazabal applied to work directly for Chevron at the refinery's coker unit as a pipefitter/mechanic. He again applied in 1995 for the position of plant helper. J.A. 172-73. On both occasions, Chevron determined that he was qualified for the job and could perform its essential functions. Chevron extended Echazabal a job offer contingent on his passing a physical examination. J.A. 55, 172-73.

After examination and review, Chevron's physician concluded that Echazabal should not be exposed to the solvents and chemicals in the refinery, even though Echazabal's own physician stated he had "no limitations." J.A. 95. Chevron's decision was based on a medical assessment of Echazabal's chronic liver condition, diagnosed as Hepatitis C. J.A. 96-97. In 1996, prior to the phone conversation that took place between Echazabal's physician, Dr. Weingarten, and Chevron's Dr. McGill, and after turning him down for the second time, Chevron wrote to Irwin Industries, Echazabal's employer at the refinery. Chevron demanded that Irwin immediately remove Echazabal from the refinery or place him in a position that eliminated his exposure to solvents/chemicals. J.A. 57-58. This action was taken even though Echazabal's hepatitis never caused injury or accident to himself or anyone else at the refinery.

Chevron refused to hire Echazabal and barred him from working as a plant helper at the refinery. After losing his position at the refinery, Echazabal filed a complaint with the Equal Employment Opportunity Commission. He subsequently filed a complaint in state court (which was removed to federal court)

alleging, among other claims, discrimination on the basis of a disability in violation of the ADA.

The district court granted summary judgment in favor of Chevron. The Ninth Circuit reversed, holding that the direct threat defense contained in the ADA does not permit employers to exclude from employment qualified individuals with disabilities who pose a risk only to themselves and not others; and that the risk that Echazabal poses to his own health does not affect whether he is a qualified individual for purposes of the Act. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1072 (9th Cir. 2000). This Court granted Chevron's petition for certiorari.

SUMMARY OF THE ARGUMENT

Encountering risk is an element of everyday life experience. Assessing and accepting risk are basic elements of personal independence and the exercise of adult responsibility. Congress understood that and acknowledged in the ADA that discrimination takes many forms, including paternalism and stereotyping. *See* H.R. Rep. 485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356. Perhaps the most long-standing and insidious aspect of this type of discrimination is the assumption that people with disabilities are not competent to make informed, wise, or safe life choices. This myth is most apparent and damaging in the employment context.

In its 1986 report to the President and the Congress, upon which Congress relied in its consideration and passage of the ADA, NCD recognized the importance of access to employment as key to the independence of individuals with disabilities:

> As for most other Americans, a major prerequisite to economic self-sufficiency for individuals with disabilities is a job. Employment is an essential

> key to successful adult integration into community life. Various forms of work are associated with greater independence, productivity, social status, and financial security. Success and quality of life are often measured in terms of paid employment.

See National Council on the Handicapped, *Toward Independence* 18-21 (1986).

In part in response to these concerns, Congress passed the ADA and set forth findings about the pervasive nature of discrimination against persons with disabilities. These findings included discrimination resulting from over-protective rules and policies, as well as intentional discrimination that relegated individuals with disabilities to lesser and inferior jobs and foreclosed their employment opportunities. H.R. Rep. No. 485, pt. 2, at 28-29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310-11. The resultant loss to this nation in economic productivity was estimated to be in the billions of dollars. 42 U.S.C. § 12101(a)(9).

Consistent with Congress's findings, Title I of the ADA prohibits discrimination against a "qualified individual with a disability" on the basis of myths, stereotypes, and misperceptions about job capabilities. 42 U.S.C. § 12112(a). The ADA defines a "qualified individual with a disability" as a person with a disability "who, with or without reasonable accommodation, can perform the essential functions" of the job. 42 U.S.C. § 12111(8).

Title I permits certain employer defenses based on qualification standards that are "job-related" and "consistent with business necessity." 42 U.S.C. § 12113(a). Those defenses include the requirement that an employee not pose a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). "Direct threat" is defined as

"a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). Nowhere in the Act is "direct threat" defined or referred to as a risk to self. In fact, there is not a single reference in the Act or the legislative history denoting that a threat to the disabled employee himself is a defense for the employer to refuse to hire the employee.

Nevertheless, the EEOC issued regulations that expanded the definition and defense of "direct threat" beyond the explicit language of the ADA. The EEOC regulations define direct threat to mean "a significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (2001) (emphasis added). Moreover, the regulations provide that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. § 1630.15(b)(2) (2001).

The EEOC's interpretation is fundamentally inconsistent with the text and purpose of the statute. Congress could easily have used the phrase "direct threat to the health or safety *of the individual* or other individuals in the workplace," but it did not. That omission cannot be viewed as an oversight, given the fundamental importance of this phrasing in accomplishing the goals of the statute.

The EEOC's strained interpretation of the direct threat defense to include risk to self undermines the ADA's primary principle. Congress recognized that employer assessment of the risk to the employee historically served as a reason for the unwarranted exclusion — well meaning or otherwise — of qualified individuals from work. The Act was drafted to leave the assessment of personal risk to the employee in consultation with his or her treating physician. The employer was prohibited

from considering the effect on health or safety, unless and until the individual's condition or behavior imperils the health or safety of others in the workplace, or the individual fails to meet specific health or safety standards imposed by federal authorities. *See Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Congress treated the effect of federal standards differently because they were more likely to be general standards applicable to all individuals and, therefore, not based on a paternalistic protection of disabled persons. On the other hand, in the context of private employers' evaluations, Congress recognized that such considerations are a form of paternalism that can pose insurmountable barriers to employment. *See* H.R. Rep. No. 485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356.

Mario Echazabal dramatically exemplifies the situation the ADA was intended to prevent and the harm that results from the application of the EEOC's expanded notion of direct threat. Echazabal successfully performed the essential functions of various jobs in Chevron's refinery coker unit for some twenty years without accident or injury to himself or anybody else. Echazabal was capable of making independent and informed decisions about his employment and medical treatment. Record evidence establishes that Echazabal continued to work in the coker unit at the refinery with full knowledge of his medical condition and of the chemicals and solvents to which he was exposed, and he did so in consultation with his treating physicians. Chevron was fully apprised and aware of Echazabal's health status during these years, through the repeated appointments and evaluations conducted at the Chevron refinery clinic while Echazabal continued to work amidst the hepatoxins.

Chevron is attempting to use the EEOC's rule to override Echazabal's personal decision to continue his day-to-day job activities, because the company, rather than the employee, believes that any exposure to liver toxic chemicals is unacceptable to it. J.A. 32. This action is contrary to the language and intent of the Act.

The Act is carefully calibrated to balance the interests of employers and individuals with disabilities, and it requires that issues be addressed in an ordered and tiered sequence. The threshold determination is whether an individual is qualified to perform the job, with or without reasonable accommodations. Then and only then can the defense of direct threat to others be evaluated.

Congress chose to draft the definition of "direct threat" narrowly. Where Congress has spoken clearly, as here, the natural and direct meaning of the Act controls over any interpretation placed on it by an administrative agency. The EEOC regulations extending the direct threat defense to individuals who pose a substantial health or safety risk to themselves accordingly are not entitled to *Chevron* deference. For these reasons, the Ninth Circuit's decision should be affirmed.

ARGUMENT

I. TITLE I OF THE ADA IS DESIGNED TO SECURE CIVIL RIGHTS FOR PERSONS WITH DISABILITIES BASED ON THEIR ABILITIES AND WITHOUT REGARD TO MYTHS AND MISCONCEPTIONS ABOUT THEIR EMPLOYMENT CAPABILITIES

A. The ADA Marked A Watershed In Civil Rights For Persons With Disabilities And The Abandonment Of The Medical Model Of Disability

By enacting the ADA, Congress committed the federal government to the protection of the civil rights of individuals with disabilities, and abandoned a prior focus on social programs that tended to isolate those individuals. 136 Cong. Rec. E1656-02, E1656 (daily ed. May 22, 1990) ("I agree with the National Council on Disability in its belief that the provisions of this

legislation send persons with disabilities a clear message that their dream of equal civil rights protections will soon become a reality") (Statement of Rep. Gingrich).

The ADA's civil rights model was founded on the principle that individuals with disabilities are a minority group entitled to the same hard-won legal protections as African-Americans and women. It supplanted the "medical model" that focused on the individual, whose disability was conceived as an infirmity that precluded full participation in the economy and in society. The medical model posited that government should direct resources to rehabilitation programs that would assist "the handicapped" to overcome their impairments. *See* Peter Blanck & Michael Millender, *Before Disability Rights: Civil War Pensions and the Politics of Disability in America*, 52 Ala. L. Rev. 1, 2-3 (2000). The medical model also relegated people with disabilities to a subordinate role in their encounters with physicians, employers, and others who aimed to help the disabled adjust to a society structured around the convenience and outlook of the non-disabled. *Id.* at 2.

Because the medical model never questioned the physical and social environment in which disabled people were forced to function, it countenanced their segregation and marginalization. And, because it aimed to address the "needs" of the disabled rather than to recognize their civil rights, the medical model led to governmental policies that viewed assistance for the disabled as a species of welfare. *See generally* Joseph Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 41-64 (1993).

By contrast, the civil rights model that began to influence government policy in the 1970s proposes that disability is a social and cultural construct. The civil rights model focuses on the laws and practices that subordinate disabled persons and insists that government must secure the equality of disabled

persons by eliminating the legal, physical, economic, and paternalistic barriers that preclude their full involvement in society. *See* Peter Blanck & Michael Millender, *Before Disability Rights: Civil War Pensions and the Politics of Disability in America*, 52 Ala. L. Rev. 1, 3 (2000).

The paternalism that the ADA was designed to counteract was chronicled by Congress in the Act's findings and purposes:

- In the past, "society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2).

- Discrimination against individuals with disabilities "persists in such critical areas as employment . . ." 42 U.S.C. § 12101(a)(3).

- Individuals with disabilities "continually encounter various forms of discrimination," "overprotective rules and policies," as well as "outright intentional exclusion." 42 U.S.C. § 12101(a)(5).

- Individuals with disabilities are often relegated to "lesser . . . jobs." 42 U.S.C. § 12101(a)(5).

- Individuals with disabilities have been reduced to a "position of political powerlessness in our society . . . 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). The "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and

> costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity." 42 U.S.C. § 12101(a)(9).

The integrity of these findings and purposes is potentially compromised by the EEOC regulations at issue in this case.

B. The Text And Legislative History Of The ADA Demonstrate That Eliminating Paternalism Was An Overriding Purpose Of Congress

The legislative history identified "paternalism"[4] and targeted it for elimination as "perhaps the most pervasive form of discrimination for people with disabilities." H.R. Rep. No. 485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356; *see also* 136 Cong. Rec. H4614-02, H4623 (daily ed. July 12, 1990); 136 Cong. Rec. S9680-01, S9680 (daily ed. July 13, 1990); H.R. Rep. No. 485, pt. 3, at 42 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 465. Eliminating paternalism goes hand in hand with ensuring equal opportunity and full participation for disabled individuals in the workplace.[5] The Senate Committee

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4. *See Webster's Encyclopedic Unabridged Dictionary of the English Language* 1056 (1994) (defining paternalism as "the system, principle, or practice of managing or governing individuals, businesses, nations, etc. in the manner of a father dealing with his children: *The employees objected to the paternalism of the old president*"); *Merriam-Webster's Collegiate Dictionary* 851 (10th ed. 1993) (defining paternalism as "a system under which an authority undertakes to supply needs or regulate conduct of those under its control in matters affecting them as individuals as well as in their relations to authority and to each other").

5. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) ("There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.") (Thomas, J., concurring); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (explaining that sex discrimination "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage").

on Labor and Human Resources acknowledged: "[T]he values and principles underpinning the ADA . . . include the right of persons with disabilities to independence, inclusion, choice and self-determination, and access . . . and respect for individual differences." S. Rep. No. 357, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3712, 3718.

A central tenet of the ADA is that people are to be "judged as individuals on the basis of their abilities and not on the basis of presumptions, generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies." 135 Cong. Rec. S4979-02, S4984 (daily ed. May 9, 1989) (Statement of Sen. Harkin); *see also* H.R. Rep. No. 485, pt. 2, at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340; H.R. Rep. No. 485, pt. 3, at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 468. That core theme was reinforced in committee reports and proceedings. "[I]t would be a violation of this legislation if an employer were to limit the duties of an individual with a disability based on a presumption of what was best for such individual or based on a presumption about the ability of that individual to perform certain tasks." H.R. Rep. No. 485, pt. 2, at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340.

Mario Echazabal is a qualified worker within the meaning of the ADA who successfully performed the various jobs he held at the refinery. J.A. 10. For twenty years, he worked in close proximity to the very solvents and chemicals about which Chevron is now concerned. He was fully able to evaluate and appreciate the risks posed by the refinery jobs and made informed choices about whether or not to accept those risks. J.A. 10, 11, 32. Chevron, moreover, has not cited to any hepatitis-related workers' compensation or other workplace accident or injury claim filed by Echazabal during this time period.

None of Chevron's physicians was willing or able to calculate or quantify the risk of harm that might befall Echazabal at any time in the future. They were aware only that sooner or later his working at the refinery could possibly damage his liver. J.A. 56. Chevron defended its decision not to hire Echazabal based on the claim that any risk to Echazabal, no matter how far in the future and how speculative, would be unacceptable in light of the company's aversion to risk.[6]

Reliance on a medical opinion that is based on future possibilities, and that seeks to "protect" an individual such as Echazabal from himself, is precisely what Congress intended to prevent.[7] *See, e.g.*, 136 Cong. Rec. H4614-02, H4623 (daily ed. July 12, 1990).

> Thus, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply protecting the individual from opportunistic diseases to which the individual might be exposed. That is a concern on which the individual should consult with his or her private physician and make decisions accordingly.

(Statement of Rep. Owens).[8]

6. In testimony concerning the risk that an individual in Echazabal's position and health would encounter, one of Chevron's evaluating physicians testified that "[a]ny level above one percent is high for me when it's a person's life." J.A. 88. That same physician testified, without regard to Echazabal's own decisionmaking capacities, "I just don't want this individual to be exposed to hepatoxins." J.A. 91.

7. Because there is no restriction on the scope of post-offer medical examinations or inquiries, these examinations may screen for conditions, susceptibilities, or sensitivities, that may predispose an applicant to an increased risk of harm in the future if exposed to a particular substance or work environment. *See* Nicholas A. Ashford *et al.*, *Monitoring the Worker for Exposure and Disease* 71 (1990).

8. With advances in medical technology, including genetic (Cont'd)

A regulation or policy that denies disabled employees the right to decide whether or not to accept the risks posed by a job would embed into law the notion that all individuals with a disability are incapable of engaging in basic decisionmaking. *See generally Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) (explaining that unjustified institutional placement of disabled individuals perpetuates stereotypes regarding individual choice).

C. Congress Viewed The Exclusion Of Individuals With Disabilities Who Pose Only A Direct Threat To Themselves As An Impermissible Act Of Paternalism

Both chambers of Congress recognized that extending the direct threat defense to employees who posed a direct threat only to themselves was an act of entrenched paternalism. Senator Kennedy stated:

> It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, *employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health.* For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a

(Cont'd)
screening, there is the potential for excluding large numbers of pre-symptomatic individuals — "the healthy ill" — on the basis of potential health or safety risks to themselves in the future. As one commentator suggested, the problem with the use of genetic testing to exclude workers is that "an individual's risk of injury or illness from exposure can be elevated relative to the average because of genetic inheritance, because of acquired characteristics, or . . . because of a combination of genetic and environmental influences." Edward J. Calabrese, *Pollutants in High-Risk Groups: the Biological Basis of Increased Human Susceptibility to Environmental and Occupational Pollutants* 192 (1978).

> concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.

136 Cong. Rec. S9684-03, S9697 (daily ed. July 13, 1990) (emphasis added); *see also* 136 Cong. Rec. H4614-02, H4623 (daily ed. July 12, 1990) (expressing the same concern in almost identical language).

Congress vested individuals with disabilities with the power to decide whether or not to apply for or keep working at jobs that pose risks only to themselves, so long as they meet externally imposed governmental qualifications and health and safety standards. Employers were granted the authority to reject applicants and employees who pose a substantial risk of harm to *others* in the workplace.[9]

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9. When first introduced, the ADA did not contain a direct threat defense. 134 Cong. Rec. S5090-02 (daily ed. April 28, 1988). When the Act was reintroduced in 1989, Congress added a direct threat defense to "allay any concerns" that the Act would require employers to "hire or retain employees who posed a significant risk to others." 136 Cong. Rec. E1913-01, E1915 (daily ed. June 13, 1990); *see also* 136 Cong. Rec. H2599-01, H2623-24 (daily ed. May 22, 1990); 136 Cong. Rec. S9684-03, S9686 (daily ed. July 13, 1990).

In its initial form, the direct threat defense applied only to individuals who had a "currently contagious disease or infection." 135 Cong. Rec. S10701-04, S10703 (daily ed. Sept. 7, 1989). During consideration by the Committee on the Judiciary, although the defense was extended to all individuals with disabilities (H.R. Rep. No. 485, pt. 3, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446), the Committee made the defense more difficult to establish by adding a definitional section imposing both a significant risk requirement and a reasonable accommodation requirement: "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." H.R. Rep. 485, pt. 3, at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 457. According to the (Cont'd)

Chevron's conduct may appear on the surface to be less egregious than overt acts of intentional exclusion based on disability. But Chevron and its doctors did not engage in the interactive process contemplated by the ADA or assist Echazabal in weighing the pros and cons of his continuing to work around solvents in the refinery. Most important, they took it upon themselves to dictate what was best for him, excluding him from the dialogue and decision. Chevron's professed motivation was to avoid liability and to mitigate any costs associated with the risk of injury. *See* Brief of Petitioner at 23-28. In the end, Chevron's actions threatened Echazabal's livelihood. This approach is emblematic of the negative attitudes and discriminatory employer conduct that the ADA proscribes. 42 U.S.C. § 12101(a)(5).[10]

(Cont'd)
Committee's Report, this definition was intended to "codify the direct threat standard used by the Supreme Court in *School Board of Nassau County v. Arline*." *Id.*

Consistent with the purpose of the "direct threat" defense, the legislative history is replete with descriptions of the defense as applying only to employees that pose a risk to other individuals. *See* 136 Cong. Rec. H1920-04, H1921 (daily ed. May 1, 1990); 136 Cong. Rec. H2421-02, H2449 (daily ed. May 17, 1990); 136 Cong. Rec. H4614-02, H4617 (daily ed. July 12, 1990); H.R. Rep. No. 485, pt. 3, at 34, 45-46 (1990), *reprinted in* 1990 U.S.C.C.A.N 445, 457, 468-69; H.R. Rep. No. 596, at 57 (1990). *Cf.* H.R. Rep. No. 485, pt. 2, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338 ("It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety of others or poses a direct threat to property.").

10. *See International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) ("It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

II. INCORPORATING "DIRECT THREAT" INTO THE DEFINITION OF "QUALIFIED INDIVIDUAL" WOULD UNDERCUT THE STRUCTURAL INTEGRITY AND PURPOSES OF THE ACT

Congress crafted the Act to calibrate and balance the interests of employers and individuals with disabilities. It did so by creating a structured and tiered analysis that must proceed in an ordered sequence. Once a determination is made that an individual has a disability, a determination must be made as to whether or not the individual is qualified to perform the duties of the job applied for or held, with or without reasonable accommodations. Then, and only then, can the employer defense of direct threat to others be evaluated.

The first question in the sequence is whether or not a person is "a qualified individual with a disability." 42 U.S.C. § 12112(a). That term means "a person who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). There are three embedded considerations: (1) whether the individual has a "disability;" (2) whether the person can perform the "essential functions" of the job; and (3) whether reasonable accommodations are possible.

Congress constructed with meticulous care and phrased in the present tense the definition of a "qualified individual with a disability." The statutory definition is written in the present tense — an individual who *can perform* the essential functions — to denote that present ability, not future ability, to perform the job is the primary, if not exclusive, consideration. 42 U.S.C. § 12111(8). The decision about whether an individual is qualified must be made "at the time of the job action in question; the possibility of future incapacity does not by itself render the

person not qualified." H.R. Rep. No. 485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337. [11]

The intention of Congress with respect to the term "essential functions" is equally clear. "Essential functions" are those "*job tasks* that are fundamental and not marginal." H.R. Rep. No. 485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337 (emphasis added); *see also* 29 C.F.R. § 1630.2(n)(1) (2001). Consideration is afforded the employer's judgment as to those job tasks that are essential. 42 U.S.C. § 12111(8). The EEOC's interpretive guidance notes that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative . . ." 29 C.F.R. § 1630, App. § 1630(2)(n) (2001).

The House Report also signaled that ability is the central focus at this stage.

> The ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities *unless they are actually unable to do the job*. The requirement that job criteria actually measure the ability required by the job is a critical protection against discrimination based on disability.

H.R. Rep. No. 485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 353 (emphasis added).

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11. In this case, timing alone demonstrates that respondent is a "qualified individual with a disability." After having worked at the Chevron facility for twenty years without incident, he can certainly now "tolerate" chemical exposure even if, ultimately, he will not be able to continue to do so.

Nothing in the Act, its legislative history, or regulations, accordingly, suggests that health and safety factors are part and parcel of whether or not a person is a "qualified individual" under 42 U.S.C. § 12111(8).

The ADA incorporates several employer defenses to a charge of discrimination against a qualified individual with a disability. One is that a proposed workplace accommodation imposes an "undue hardship" on the business. 42 U.S.C. § 12112(b)(5)(A). Another is that the applicant does not meet qualification standards and selection criteria that are "job-related" and "consistent with business necessity." 42 U.S.C. § 12112(b)(6); 42 U.S.C. § 12113(a). The direct threat to others defense is a subset of the qualifications defense, specifically carved out by Congress to meet the health and safety aspects of the more general defense. 42 U.S.C. § 12113(a-b).

Despite the structure of the Act, Chevron urges that an individual with a disability who poses a "threat to self" cannot be considered "qualified" under the ADA. This argument mistakenly injects the everyday meaning of the word "qualified" into a tiered, structured, and defined statutory analysis. This Court has stated in *Fox v. Standard Oil Co.*, 294 U.S. 87 (1935) (Cardozo, J.), that a legislative choice of a definition that defines terms more narrowly, or with more precision, prevails over common understanding or usage.

Chevron also contends that Echazabal's ability to perform the functions of the job "safely" is an essential function of the position. Brief of Petitioner at 46. Amici for Chevron urge this Court to defer to Chevron's characterization that Echazabal be able to "tolerate" certain chemicals as an essential function of the plant helper job. *See, e.g.*, Brief of Amicus Chamber of Commerce at 8, 9. However, the legislative history that speaks to the focus of "job tasks" and the ability to "do" the job provides no support for incorporating a health and safety analysis into the question of whether a person is a qualified individual with a disability.

Adhering faithfully to the statutory sequence is critical. Chevron's arguments skew the analytical framework of the Act without compelling reason and contradict the literal and natural reading of the Act. *See EEOC v. Wafflehouse, Inc.*, No. 99-1823, slip op. (S. Ct. Jan. 15, 2002) (a statute must be given its "natural reading"). Under the ADA, health and safety concerns are reviewed in the context of employer defenses (and, specifically, the direct threat to others defense). These concerns are *not* an appropriate part of the analysis of whether a person is a "qualified individual with a disability."

As an articulated aspect of an employer's defenses (42 U.S.C. § 12113(a), (b)), health and safety issues can and must be considered. *See* 29 C.F.R. § 1630.2(q) (2001) (stating that qualification standards include "personal and professional attributes including skill, experience, education, physical, medical, safety and other requirements" necessary for an individual to be eligible for the position). As such, health and safety standards form "qualification standards" or "selection criteria" and are properly considered only in the context of the "defense" requirements under 42 U.S.C. § 12113(a).

Health and safety considerations are a critical component of the Act's tiered analysis, but are not to be tethered to or confused with essential job functions or qualifications, except in extremely limited and narrow circumstances.[12] Such

12. The United States and EEOC, as amici, suggest that there are certain isolated instances in which essential functions will "necessarily implicate issues of safety." Brief of Amicus United States at 26. Admittedly, a firefighter who could not "carry an unconscious adult out of a burning building," 29 C.F.R. § 1630, App. § 1630.2(n), would not be qualified to perform the essential functions of the position and would, also, be unsafe. Similarly, an airline pilot able to take off and land safely only "sometimes" could not perform the essential functions of the job. In both instances, the essential functions need not be analyzed in terms of safety but, rather, inability consistently to do that which the job *always*

(Cont'd)

considerations apply at a later stage of the analysis. At that stage, Congress placed the burden on the employer to demonstrate that its selection criteria or qualification standards are job-related and reflect business necessity. *See* 42 U.S.C. § 12112(b)(6) ("unless" the standard is "job related . . . [and] consistent with business necessity . . ."); *see also* 42 U.S.C. § 12113(a); H.R. Rep. No. 485, pt. 3, at 42 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 465 ("[A] facially neutral qualification standard, employment test or other selection criterion that has a discriminatory effect on persons with disabilities . . . would be discriminatory unless *the employer* can demonstrate that it is job related and required by business necessity.") (emphasis added).[13]

Beyond the express intent of Congress, there are good and sound policy reasons why the business necessity defense in general, and the direct threat defense in particular, should be

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(Cont'd)
demands. Consideration of such issues from a health or safety perspective only clouds the issue of what is required with respect to an essential functions analysis. *See, e.g., E.E.O.C. v. United Parcel Services, Inc.*, 149 F. Supp. 2d 1115, 1159 n.3 (N.D. Cal. 2000) ("[D]riving without accidents *is* like flying without crashing.").

13. A chronology of relevant events itself proves conclusively that Congress intended business necessity (and "direct threat") to be proven by the employer. Business necessity is not a new concept in employment discrimination law. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), a disparate impact case arising under Title VII, the Court placed the burden of proof with respect to business necessity upon the plaintiff. *Id.* at 659. In drafting the ADA, the Senate Committee specifically referred to allocation of burdens of proof as had existed the day *before* the *Ward's Cove* decision. S. Rep. No. 101-116, at 38 (1989). To further reinforce the point, Congress later, in the Civil Rights Act of 1991, clarified the business necessity defense by clearly placing the burden upon the employer. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994). *See* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 Nw. U. L. Rev. 1279, 1339-42 (2001).

proven by the employer. Congress has incorporated consideration of the employer's judgment with regard to the essential functions of the job. 42 U.S.C. § 12111(8). With respect to business necessity and direct threat, the employer often will have superior information and knowledge about workplace requirements and operations. *See generally* Peter David Blanck & Glenn Pransky, *Workers with Disabilities*, 14 Occupational Medicine: State of the Art Reviews 581, 586-87 (1999). Moreover, making certain that business necessity and direct threat are subject to employer proof allows the mandated tiered analysis to go forward in an orderly fashion. The careful step-by-step process of analyzing job placement issues is short-circuited when defenses and essential functions are conflated or merged. Collapsing the issues or truncating the process renders decisions susceptible to the type of myth and paternalism that gave rise to the civil rights model and the ADA.[14]

Further, such conflation violates a basic canon of statutory construction, that no portion of a statute be rendered superfluous. *See TRW Inc. v. Andrews*, 122 S. Ct. 441, 448-49 (2001) (recognizing and applying canon); *Duncan v. Walker*, 121 S. Ct. 2120, 2125 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (*citing United States v.*

14. Cases cited by Amici Equal Employment Advisory Council and National Association of Manufacturers, in fact, illustrate the unfortunate effects of analysis of safety functions designated by Congress as a defense as part of the "qualified individual" analysis. By failing to respect the analytical rigor required by the statute, unnecessary confusion can result. *See, e.g.*, *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998) (affirming grant of summary judgment on the basis that plaintiff was not a "qualified individual" but incorporating "direct threat" analysis where medical condition posed a danger to plaintiff and "others as well"); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) (alternate holding quoting with approval direct threat defense). In either case, the courts clearly could have separated the "qualified individual" analysis from the direct threat analysis as required by the statute with no violence whatsoever to the result.

Menasche, 348 U.S. 528, 538-39 (1955), *quoting Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Indeed, why would Congress fashion a separate defense if "direct threat" were already addressed by the "qualified individual" analysis? This violates the requirement, recognized by this Court in *EEOC v. Wafflehouse, Inc.*, that the ADA be given its "natural" reading.

III. THE EEOC'S REGULATIONS CONCERNING DIRECT THREAT TO SELF ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

This Court held in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), that an agency exceeds its authority in enacting an administrative rule that expands a statutory definition. In *Solid Waste Agency*, the Court held that the Corps of Engineers had exceeded its authority when it promulgated regulations that expanded upon a statutory definition in the Clean Air Act because it departed from the plain language of the Act. *Id.* at 173.

In the ADA, Congress chose to define "direct threat" narrowly. 42 U.S.C. § 12111(3) ("The term 'direct threat' *means* a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."). The EEOC's definition of direct threat, and therefore its "direct threat" qualification standard, unwarrantedly expands the definition Congress chose to give "direct threat" in the ADA. Further, no other provision of the statute, including the "direct threat" defense, supports the EEOC's regulation. Accordingly, the "direct threat to self" regulation must be invalidated.

For the same reasons, the EEOC regulation cannot be saved by the deference accorded agency action in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The threshold question in determining whether *Chevron* deference is appropriate "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue

. . . court[s], . . . as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843.

Only "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id. See also United States v. Mead Corp.*, 121 S. Ct. 2164, 2172 (2001) (holding that a court is "obliged to accept" an agency's position only if "Congress has not previously spoken to the point at issue" and the agency position is "reasonable"). Delegation occurs only "[w]hen Congress has 'explicitly left a gap for the agency to fill'." 121 S. Ct. at 2171 (*citing Chevron*, 467 U.S. at 843-44). Here there is no gap. Congress defined "direct threat" to mean a significant risk to others. 42 U.S.C. § 12111(3).[15] Nowhere in the Act is direct threat defined as a "risk to self." Accordingly, *Chevron* deference is not appropriate.

15. Even if a deferential standard is appropriate in this case, the EEOC regulation is an unwarranted expansion of Congressional intent in enacting the ADA. As this Court reasoned in *Chevron*, under a deferential standard, if a choice of interpretation made by an agency "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845, *citing United States v. Shimer*, 367 U.S. 374 (1961) (holding same).

Even in the event the Court finds that deference is appropriate, the purpose of the statute, as expressed in the statute itself, and the legislative history, make it clear that Congress would not have sanctioned the interpretation placed on the "direct threat" defense by the EEOC. The stated purpose and legislative history make it clear that Congress never intended that employers be charged with determining what risk an individual with a disability can or should accept in performing his or her job. *See* 42 U.S.C. § 12101(a)(5) (setting forth Congressional finding that "individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies . . . exclusionary qualification standards and criteria, and relegation to lesser . . . jobs, or other opportunities.")

CONCLUSION

The NCD's report on federal enforcement of the ADA, *Promises To Keep: A Decade of Enforcement of the Americans with Disabilities Act* (2000), noted that the EEOC's expanded definition of direct threat invites outcomes directly at odds with the ADA. The "threat to self" defense fosters the view that people with disabilities need to be protected from themselves and from their choices. This case is about who is best able to make those most personal of decisions, which here involves encountering some future risk to health in the workplace.

For the above stated reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 00-1406

In the Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases PAGE(S)

State Cases

Statutes

Regulations

Legislative History

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of more than 3,500 attorney members who regularly represent employees in labor, employment and civil rights disputes. NELA is the country's only professional membership organization of lawyers who represent employees in discrimination, wrongful discharge, employee benefits and other employment-related matters.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *EEOC v. Waffle House, Inc.* No. 99-1823 (U.S. Jan. 15, 2002); *Reeves v. Sanderson Plumbing Products,* 530 U.S. 133 (2000) and *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

NELA members have brought numerous cases under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ("ADA"). NELA members have also represented thousands of individuals in this country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect, and

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[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6 *Amicus Curiae* NELA states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

defend the interests of employees involved in workplace disputes. NELA has a compelling interest in ensuring that the goals of the ADA are protected and fully realized.

STATEMENT OF THE CASE

Mario Echazabal worked for a variety of independent maintenance contractors at a Chevron, U.S.A. refinery in El Segundo, California between 1972 and 1996. J. A. 117. Echazabal worked steadily for approximately 12 to 13 years during that time period in the coker unit of the Chevron refinery. J. A. 117. In 1992, Echazabal applied for a job with Chevron in the refinery's coker unit. J. A. 117. Chevron made Echazabal a job offer that was conditioned on the results of a physical examination. J. A. 118. A company doctor who performed the examination concluded that Echazabal had an uncorrectable liver abnormality that might be damaged by exposure to chemicals or solvents in the coker unit. J. A. 197. Based solely on these examination results, Chevron withdrew its job offer to Echazabal. J. A. 197.

Although Echazabal was not hired by Chevron, he continued to work for one of Chevron's contractors in the coker unit. J. A. 197. Chevron made no attempt to remove Echazabal from the coker unit while he was employed by one of its contractors. J. A. 197.

In light of the results of his pre-employment physical at Chevron, Echazabal sought medical treatment. J. A. 197. He was eventually diagnosed with asymptomatic, chronic active Hepatitis C. J. A. 197. Echazabal told each physician with whom he treated about the type of work he did at the refinery. J. A. 197. However, none of those physicians told him that he should stop working at the refinery due to his condition. J. A. 197.

After Echazabal applied again to Chevron in 1995 Chevron extended him another offer of employment that was conditioned on the results of a physical examination. J. A. 55-56. Chevron again rescinded its job offer to Echazabal based on a second physical examination by a new physician for Chevron because there was a risk that Echazabal's liver would be damaged if he worked in the coker unit. J. A. 198. The company physician reached his conclusion even without consulting anyone in the refinery's industrial hygiene department and did not know either the specific chemicals that were present or at what levels they were present in the coker unit. J. A. 131-33, 139. Rather than allow Echazabal to continue to work for the contractor in the refinery's coker unit, however, Chevron's doctor wrote to the contractor and demanded that Echazabal be removed from the refinery or placed in a position that eliminated his exposure to solvents or chemicals. J. A. 198. The contractor removed Echazabal from the refinery and, as a result, his career of over 20 years at the Chevron refinery abruptly ended. J. A. 198.

Echazabal filed suit against both Chevron and the maintenance contractor that terminated him. J. A. 198. The district court granted Chevron's motion for summary judgment under the ADA and related state and federal claims. J. A. 171-95. The U. S. Court of Appeals for the Ninth Circuit reversed the grant of summary judgment in favor of Chevron in a 2-1 decision. J. A. 196-211. The Court of Appeals concluded that an employer may not refuse to hire an individual with a disability based on the possibility that the individual may suffer harm in the employment position. J. A. 207-09.

Chevron sought review by this Court and its request was granted on October 29, 2001. J. A. 222.

SUMMARY OF ARGUMENT

I. The Court of Appeals decision to invalidate the EEOC's extension of the "direct threat" defense to "threats to self" should be upheld. Title I of the ADA is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. In cases involving sex and pregnancy discrimination this Court has held that it is up to the employee herself to decide whether to accept a workplace safety risk. *Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977); *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 202-04 (1991). An EEOC regulation which takes away the same choice from persons with disabilities conflicts with Congress' recognition when it adopted the ADA that overprotective rules and policies create artificial barriers that the statute was intended to remove.

The EEOC's extension of the direct threat defense to include threats to self is not entitled to deference. The ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodations." 42 U.S.C. §12113. Congress clearly did not want the ADA's direct threat defense to include threats to self and, as a result, there is no need to defer to the EEOC's regulations for guidance. However, the ADA's language and its legislative history clearly demonstrate that Congress wanted to limit the direct threat defense to threats to others. Congress' decision to omit the "threat to self" language that had emerged from some pre-ADA Rehabilitation Act decisions demonstrates that it did not intend to incorporate that language into the ADA. The ADA's repeated description of the direct threat defense to apply only to threats to others demonstrates that Congress did not commit a drafting error when it omitted from the statute threats to the individual himself or herself.

II. Mario Echazabal is a "qualified individual with a disability" because he could perform the "essential func-

tions" of the employment position in question. 42 U.S.C. §12112(g). For over two decades Echazabal performed the same type of work in the coker unit of Chevron. Chevron cannot engraft the "threat to self" requirement onto the definition of "qualified" by arguing that the individual must be able to perform the employment position's essential functions without posing a risk to oneself.

The ADA's direct threat qualification standard is an affirmative defense for which the employers carry the burden of proof. Therefore, the ADA cannot be interpreted in a manner that will shift that burden of proof to the employee by requiring the employee to prove that he or she is not a direct threat to himself or others.

III. Interpreting the ADA's direct threat defense in accordance with Congress' desire to limit its application to threats to the safety or health of others will not nullify workplace safety rules. Every state has established worker's compensation programs to pay the costs related to the injuries which some workers inevitably suffer. The EEOC has stated that an employer may not refuse to hire an individual with a disability due to the possibility that the individual poses an increased risk of filing a worker's compensation claim. States have also routinely adopted "second-injury funds" to remove the financial disincentives to hiring workers with disabilities. The petitioners' concerns about potential administrative, civil and criminal liability are remote and can be addressed by disclosing known workplace health and safety risks to its employees.

IV. If the Court holds the ADA's direct threat defense extends to threats to self, the Court should not conclude that an employer can avoid all liability under the ADA's direct threat defense by relying on the advice of the company's doctor. Doctors' opinions may be based on their own stereotypical beliefs and fears about people with disabilities, lack of expertise or incomplete information.

ARGUMENT

I. THE ADA PROVIDES EMPLOYEES WITH DISABILITIES WITH THE RIGHT TO DECIDE FOR THEMSELVES WHAT RISKS TO UNDERTAKE IN THE WORKPLACE

A. The EEOC's Extension Of The "Direct Threat" Defense To Threats To Self Is Prohibited By The Statute Upon Which The ADA Was Patterned

In *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981), the Tenth Circuit Court of Appeals observed that discrimination on the basis of disability "often occurs under the guise of extending a helping hand or a mistaken restrictive belief as to the limitations of [persons with disabilities]." *Id.* at 1385. However, persons with disabilities have not been the first group in our society to be subjected to discriminatory treatment under the guise of good intentions. Women were historically excluded from a variety of opportunities in the workplace through protective legislation or policies. In *Muller v. The State of Oregon*, 208 U.S. 412 (1908) for example, the Supreme Court upheld a statute that limited women to working ten (10) hours a day, reasoning:

> That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421.

Muller observed that "in the struggle for subsistence she is not an equal competitor with her brother." *Id.* at 422. The Court concluded that ". . . she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." *Id.*

In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Supreme Court observed "the position of women in America has improved markedly in recent decades." *Id.* at 685. The principal legislative catalyst for that improvement came with Congress' declaration in Title VII of the Civil Rights Act of 1964, 42. U.S.C. §2000e-2(a) ("Title VII") that employers may not discriminate against an individual based upon sex. Nevertheless, the *Frontiero* Court recognized that "[t]here can be no doubt that our nation has a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' that, in practical effect, put women not on a pedestal, but in a cage." *Id.* at 684.

The first clash between Title VII's prohibition of sex discrimination in the workplace and sex-based protection policies occurred in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Dianne Rawlinson was not hired as a prison guard by the State of Alabama because she could not meet the statutory minimum 120-pound weight requirement. *Id.* at 323-24. While the suit was pending Alabama implemented a regulation prohibiting women from working as prison guards where they would be in "contact" positions in continued close physical proximity to inmates. *Id.* at 325. The Supreme Court observed that the conditions of confinement in the state's prisons were characterized by "rampant violence" and were a "peculiarly inhospitable one for human beings of whatever sex." *Id.* at 334. The Court concluded, however, that the possibility that the contact position might jeopardize the female guard herself was irrelevant, reasoning that "[i]n the usual case, the argument that a particular

job is too dangerous for women may appropriately be met by the purpose of Title VII to allow the individual woman to make that choice for herself." *Id.* at 335 (citation omitted). However, the Court held that being male was a bona fide occupational qualification ("BFOQ") for the contact guard position because of the likelihood that inmates would assault a woman because she was a woman and, therefore, threatened the control of the jail and protection of its inmates and other security personnel. *Id.* at 336-337. According to *Dothard*, "[m]ore is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum-security male prison." 433 U.S. at 337. Therefore, the Court clearly distinguished between the risks posed to the female security guard herself from the risk posed to others.

In *International Union, UAW v. Johnson Controls, Inc.* 499 U.S. 187 (1991), the Supreme Court unequivocally declared that it is up to the female employee herself to decide whether to accept a workplace safety risk. Johnson Controls had a policy barring all fertile women from jobs in its battery plant involving actual or potential lead exposure which exceeded the Occupational Safety and Health Administration's ("OSHA") standard. *Id.* at 192. Johnson Controls argued that its fetal protection policy fell within the scope of the "safety exception" to Title VII's BFOQ defense. *Id.* at 202. The Supreme Court disagreed, reasoning that the BFOQ safety exception "is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job." *Id.* at 204. According to the Court, the employer's fetal protection policy fell outside the scope of the BFOQ defense because employers may only make distinctions based upon sex when such distinctions "relate to [the] ability to perform the duties of the job." *Johnson Controls*, 499 U.S. at 204

Title I of the ADA is patterned after Title VII. *See* Gary Phelan & Janet Bond Arterton, *Disability Discrimination*

in the Workplace, §7:09, at 24 (West Group 1992-2001) ("Phelan, *Disability Discrimination*"). In fact, Title I of the ADA provides that Title VII's powers, remedies and procedures are available under Title I. 42 U.S.C. §12117(a). The ADA's legislative history also provides that Title I was intended "to provide civil rights protection for persons with disabilities that are parallel to those available to minorities and women." H.R Rep. No. 485, pt. 3, 101st Cong., 2d Sess, 48 (1990). In light of *Dothard* and *Johnson Controls*, an employer could not refuse to hire a female applicant because the job posed a risk to the woman's safety. If the ADA is to provide people with disabilities with the same civil rights protections provided to women, an employer should not be given the right to refuse to hire an applicant with a disability even though the job poses a risk to only the individual's safety.

The artificial barriers created by overprotective policies have historically been at least as much of an impediment for people with disabilities as they have been for women.[2] The preamble to the ADA stated that Congress found that individuals with disabilities continually encountered discrimination through "overprotective rules and policies." 42 U.S.C. §12101(a)(5). The House Report for the Committee on Education also acknowledged that "[t]he discriminatory

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[2] Ed Roberts, the primary architect of the disability rights movement that began in the 1960's, looked to how women's rights advocates challenged stereotypes of them as the "weaker, milder sex" as a model to challenge stereotypes about people with disabilities. *See* Joseph Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement*, 47 (1993); *see also, e.g., Americans with Disabilities Act: Hearings Before The House Committee on Small Business*, 101st Cong., 2d Sess. 126 (1990) (testimony of Arlene Mayerson) ("[l]ike women, disabled people have identified 'paternalism' as a major obstacle to economic and social advancement").

nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of 'good intentions'. . . ." H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. 41 (1990). Those sentiments are echoed by Congress' recognition that:

> Employment decisions must not be based on paternalistic views about what is best for a person with a disability. Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals.

H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. 74 (1990).

B. The EEOC's Extension Of The "Direct Threat" Defense To Include Threats To Self Is Not Entitled To Deference

The ADA permits employers to require, as a qualification standard, that an individual not pose a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. §12113(b). The ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodations." 42 U.S.C. §12111(3). In its regulations implementing the ADA, the EEOC expands the direct threat definition to state that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety *of the individual* or others in the workplace." 29 C.F.R. §1630.2(r) (emphasis added).

To determine whether the EEOC's regulatory provision is valid, the Court must: (1) determine whether it must defer to the EEOC's construction, and (2) if so, determine what level of deference the EEOC's determination is due. J. A. 205. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court observed that

"[i]f 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 unambiguously expressed intent of Congress." *Id.* at 842-43. It is only when the statute is silent or ambiguous with respect to a specific issue that a court must consider whether to defer to an agency's interpretation of a statute. *Id.* at 843.

The ADA's direct threat to safety defense plainly expresses Congress' intent to limit its application only to threats to other individuals. There is no ambiguity as to whether the direct threat defense applied to threats to self. J. A. 205-07. The Ninth Circuit observed that "[t]he term 'direct threat' is used hundreds of times throughout the ADA's legislative history . . . [and] in nearly every instance in which the term appears, it is accompanied by a reference to the threats to 'others' or to 'other individuals in the workplace.' Not once is the term accompanied by a reference to threats to the disabled person himself." J. A. 202. In concluding that the ADA direct threat defense did not extend to threats to self, the court in *Kohnke v. Delta Airlines, Inc.*, 932 F. Supp. 1110 (N.D. Ill. 1996) also reasoned that the "House Judiciary Report mentions threat or risk 'to other individuals' or 'to others' nine times, without once mentioning threat or risk to the disabled person himself. This pattern is apparent throughout the legislative history of the ADA." *Id.* at 1112 (citation omitted). Because Congress' intent is clear, there is no need to determine what level of deference is due to the EEOC's decision to engraft threats to an individual's own safety onto the direct threat defense.

Title III of the ADA's Public Accommodation provisions also contains a direct threat to safety defense and defines the term as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services." 42 U.S.C. §12182(b)(3). The Department of Justice ("DOJ"), which is the agency empow-

ered to issue regulations to enforce Title III of ADA's Public Accommodation provisions, confirms that the EEOC's expanded definition of the direct threat defense to include threats to self is invalid. The DOJ's regulations governing the Public Accommodation provision's direct threat to safety defense provides that it applies to a direct threat to the health or safety *of others* but makes no reference whatsoever to threats to the individual himself or herself. 28 C.F.R. §36.208. (emphasis added).

This Court's decision in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987) bolsters the conclusion that the direct threat defense was never intended to extend to threats to self. *Arline* held that in determining whether an individual suffering from a communicable disease was "otherwise qualified" under the Federal Rehabilitation Act, there must be an individualized inquiry to determine whether the individual poses a "significant risk" to the health or safety of others. 480 U.S. at 288. Such an inquiry is essential, according to *Arline*:

> To achieve the goal of protecting handicapped individuals from deprivations based on prejudices, stereotypes or unfounded fear, while giving appropriate weight to such legitimate concerns of [employers] as avoiding *exposing others to significant health or safety risks.*

Id. (emphasis added). This Court also observed in *Bragdon v. Abbott*, 524 U.S. 624 (1998) that the ADA's direct threat defense resulted from *Arline's* recognition "of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks. . . ." *Id.* at 649. Therefore, the *Arline* decision—which the ADA's direct threat defense was intended to codify—made no reference whatsoever to threats to the disabled employee's own health or safety.

C. Congress Omitted The "Threat To Self" Language From The "Direct Threat" Defense

Prior to the passage of the ADA in 1990 some courts interpreted Sections 501 and 504 of the Rehabilitation Act (29 U.S.C. §791(g), 794(d)) to include a threat to the health or safety of the individual as well as to other individuals as a qualification standard. *See, e.g., Montolete v. Bolger*, 767 F.2d 1416, 1421-22 (9th Cir. 1985); *Bey v. Bolger* 540 F. Supp. 910, 926 (E. D. Pa. 1982). Courts have routinely looked to decisions under the Federal Rehabilitation Act for guidance when interpreting the ADA. *See, e.g., Bragdon*, 524 U.S. at 631-32; *Andrews v. State of Ohio*, 104 F.3d 803, 807 (6th Cir. 1997). However, courts have only looked to the Rehabilitation Act decisions "when the language of the two statutes are substantially similar." *Gile v. United Air Lines, Inc.*, 95 F.3d 492, 496 (7th Cir. 1996). Rehabilitation Act court decisions incorporating threats to self into a direct threat defense cannot be relied upon where, as here, the ADA statutory language rejects both the EEOC's applicable regulation and the relevant Rehabilitation Act case law. *See* 42 U.S.C. §12201(a).

Case law interpreting "direct threat" to include threats to self is not "substantially similar" to the ADA's clear and unambiguous limitation of the definition of direct threat to threats to others. The ADA's repeated description of the direct threat defense to apply only to threats to others precludes any chance "that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself." J. A. 201; *see also, Kalskett v. Larson Manufacturing Co. of Iowa, Inc.*, 146 F. Supp. 2d 961, 982 (N.D. Iowa 2001). If Congress had intended to extend the direct threat defense to threats to self it could very easily have done so. However, Congress made no effort whatsoever to codify any of the pre-ADA Rehabilitation Act decisions holding that a direct threat to the individual's own health or safety could render the individual unquali-

fied. Scott E. Schaffer, Note, *Echazabal v. Chevron, Inc.: Conquering the Final Frontier of Paternalistic Employment Practices*, 33 Conn. L. Rev. 1441, 1450 (2001) ("Schaffer, *Paternalistic Employment Practices*"). When Congress amended the Rehabilitation Act in 1992 to provide that the ADA's standards shall be applied when interpreting the Rehabilitation Act, it still did not attempt to incorporate either the pre-ADA case law or the EEOC's regulations adopted in July 1991 defining direct threat to include threats to self. *See* 29 U.S.C. §§791(g), 794(d).

The passage of the Federal Rehabilitation Act of 1973 reflected Congress' recognition of disability discrimination as a federal civil rights issue and transformed disability public policy in America. Phelan, *Disability Discrimination*, §1:03, at 2. However, the statute's "shortcomings and deficiencies" soon became apparent, including "erratic judicial interpretations." *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) (citations omitted). Congress' realization that current disability discrimination laws were inadequate was one of the factors that led to the passage of the ADA. *See id.* Despite court decisions prior to 1990 holding that threats to an individual with a disability's own health or safety would render a person unqualified, Congress chose to limit the definition of the direct threat defense to threats to other individuals. 42 U.S.C. §12113(b).

In *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001) this Court stated that it "ordinarily will not assume that Congress intended to enact statutory language that it earlier discarded in favor of other language." *Id.* at 534 (internal quotation marks omitted). The language of the ADA's direct threat defense, along with the statute's legislative history, clearly demonstrate that it did not intend that the statute or agency regulations should be interpreted to disqualify an individual with a disability from an employment position because of a risk to only the individual herself. J. A. 212; *Kalskett*, 146 F. Supp. 2d at 982; *Kohnke*

v. Delta Airlines, Inc., 932 F. Supp. 1110, 1112 (N.D. Ill. 1996). Rather, Congress' omission of the "threat to self" language demonstrates that "[c]onscious of the history of paternalistic rules that have often excluded individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake." J. A. 212.

II. MARIO ECHAZABAL IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE ADA

A. The ADA Does Not Require Disabled Employees To Show That They Are Able To Perform Their Jobs Without Posing A Risk Of Harm To Themselves

Title I of the ADA prohibits employers from discriminating against a "qualified individual with a disability." 42 U.S.C. §12112(a). To be considered "qualified" under the ADA the individual must be able to "perform the essential functions of the employment position that the individual holds or desires." 42 U.S.C. §12112(g).

In its regulations the EEOC states that the term "essential functions" refers to the "fundamental" duties of the employment position and excludes the "marginal functions" of the position. 29 C.F.R. §1630.2(n)(1). The determination of whether the individual can perform the "essential functions" of the job is made at the time the employment decision is made. *Browning v. Liberty Mutual Insurance Co.*, 178 F.3d 1043, 1047 (8th Cir. 1999); 29 C.F.R. Pt. 1630, App. §1630.2(n). A job duty may be essential because "the reason the position exists is to perform that function" or "the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform that particular function." 29 C.F.R. §§1630.2(n), 1630.2(i),(iii).

The EEOC's regulations provide that if an employer has prepared a written job description as to what job functions it considers to be essential, the description should be considered evidence of the essential functions of the job. 42 U.S.C. §12111(8). Chevron prepared a written job description that incorporated the perceived need for an employee to be able to tolerate an environment which included elements such as hydrocarbon liquids and vapors, petroleum, solvents and oils. J. A. 209. However, the Ninth Circuit correctly rejected the argument that an employee's freedom from susceptibility to harm from chemicals was an essential function of working in the coker unit merely because Chevron chose to describe it that way, reasoning that:

> Job functions are those acts or actions that constitute a part of the performance of the job. 'The job' at the coker unit is to extract usable petroleum products from the crude oil that remains after other refining processes. The job functions of the plant helper position for which Echazabal applied consist of various actions that help keep the coker unit running.

J. A. 209. Chevron cannot transmogrify the essential functions of the actual job functions by merely adding the requirement that "the job functions at the coker unit consist of performing the actions that keep the unit running *without posing a risk to oneself*." J. A. 209. (emphasis in original). "Chevron's reading of essential functions would, by definitional slight-of-hand, circumvent Congress' decision to exclude a paternalistic risk-to-self defense in circumstances when an employee's disability does not prevent him from performing the requisite work." J. A. 210.

If the Court endorses the petitioners' argument, employers could simply engraft the "threat to self" requirement onto the definition of "qualified individual with a disability" with a stroke of a pen. The facts of this case crystallize why the Court should decline the invitation to provide employers

with that unfettered right. Mario Echazabal performed the same type of work for contractors in the coker unit for over twenty (20) years. J. A. 197. If he did not adequately perform the essential functions of his job it is highly unlikely that Chevron would have twice made him contingent offers to work in the coker unit or would have allowed him to work for its contractors for so long. J. A. 211. There is no indication that his liver condition had any impact whatsoever on his ability to perform the essential functions of the employment positions he held. J. A. 211.

The conclusion that the ADA does not provide employers with the right to determine that performing a job without posing a risk to oneself can be an essential function of any job is reinforced by the Court's decision in *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). Johnson Controls argued that the word "qualification" in the phrase "bona fide occupational qualification" included a safety requirement. *Id.* at 201. The Court rejected the argument, reasoning that the term is restricted to "qualifications that affect an employee's ability to do the job." *Id.*[3]

B. The Employer Carries The Burden Of Proof Under The ADA's "Direct Threat" Defense

A plaintiff carries the burden of showing that he or she is a "qualified individual with a disability." *See, e.g., Laurin v.*

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[3] The Ninth Circuit in Echazabal further explained the distinction between safety concerns and job qualifications by quoting Circuit Court Judge Easterbrooks' observation that "[i]t is word play to say that 'the job' at Johnson [Controls] is to make batteries without risk to fetuses in the same way 'the job' at Western Airlines is to fly planes without crashing." J. A. 210 (*citing Johnson Controls*, 499 U.S. at 207) (*quoting International Union, UAW v. Johnson Controls*, 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting)).

Providence Hospital, 150 F.3d 52, 58-59 (1st Cir. 1998). If the ADA were interpreted to require the plaintiff to show that she was not a direct threat to herself to prove that she was "qualified" it would reverse the requirement that an employer carries the burden of proof under ADA's direct threat defense.

The ADA states that if a qualification standard screens out or tends to screen out an individual with a disability, the employer must show that the standard is job-related and consistent with business necessity. 42 U.S.C. §12112(b)(6). The ADA designates the qualification standard as a "defense" and lists it under the heading "Defenses." 42 U.S.C. §12113. The ADA states under the heading "Defenses" that an employer "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. §12113(b). The House Conference Report also provides "the burden should be on the employer to show the relevance of such factors in relying on the qualification standard." H.R. Conf. Rep. No. 546, 101st Cong., 2d Sess. 60 (1990).

In *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) the Fifth Circuit concluded that "[a]s with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat." *Id.* at 764 (*citing* EEOC's Interpretive Guidance to 29 C.F.R. §1630.15(b)(c)). Similarly, the court in *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164 (E.D. Mich. 1996) held that it is the employer's burden to prove that an individual is a "direct threat" under the ADA. *Id.* at 1171. Because the employer carries the burden of proof under the direct threat defense, the ADA cannot be interpreted to require an employee to prove that she is not a direct threat to her own safety to prove that she is qualified for the position in question.

III. LIMITING THE ADA'S "DIRECT THREAT" DEFENSE TO THREATS TO THE SAFETY OR HEALTH OF OTHERS WILL NOT NULLIFY WORKPLACE SAFETY LAWS

This Court's observation in *Bragdon v. Abbott*, 524 U.S. 624 (1998), that "few, if any, activities in life are risk free" certainly applies to the workplace. *Id.* at 649. As one commentator aptly noted "many occupations are inherently dangerous, yet society regularly permits non-disabled individuals to take on risky tasks every day out of necessity, as the economy would fail to function if a line was drawn prohibiting people from working in jobs that are statistically shown to cause greater levels of injury, disease or death." *Supra*, Schaffer, *Paternalistic Employment Practices*, at 1443.

Employees with disabilities are generally at a greater risk from work-related injuries than their non-disabled coworkers. *Bentivegna v. U.S. Department of Labor*, 694 F.2d 619, 622 (9th Cir. 1982); *see also* Craig Zwerling, et al. "*Occupational Injuries Among Workers with Disabilities*," in *Employment, Disability and The Americans with Disabilities Act*, 315, 325 (Peter David Blanck, ed. 2000) (referring to national studies which demonstrated that workers with disabilities have an increased risk of suffering occupational injuries). However, like their non-disabled counterparts, many workers with disabilities are willing to accept those risks every day as a small price to pay for an opportunity. The risk of injury, for example, did not stop John Hockenberry, an individual with paraplegia, from working as a journalist for NBC and National Public Radio ("NPR") or from accepting an assignment from NPR as its Middle East correspondent. Hockenberry observed that:

> In my wheelchair I have piled onto trucks and jeeps, hauled myself up and down steps and steep hillsides to use good and bad telephones, to observe riots, a volcano, street fighting in Romania, to interview Yasir Arafat, to

> spend the night in walk-up apartments on every floor from one to five, to wait out curfews with civilian families, to explore New York's subway, to learn about the first temple of the Israelites, to observe the shelling of Kabul Afghanistan, to witness the dying children of Somalia. For more than a decade I have experienced harrowing moments of physical intensity in pursuit of a deadline, always keeping pace with the rest of the press corps despite being unable to walk.

John Hockenberry, *Moving Violations: War Zones, Wheelchairs and Declarations of Independence,* 3 (1995). If NPR had chosen to do so, it could have prevented Hockenberry from taking these risks by demonstrating that he was a substantial threat to himself in carrying out the precarious job duties of a Middle East correspondent. However, by giving him the opportunity to decide for himself whether to accept these risks, Hockenberry was able to excel as a journalist with NPR for over a decade and to win two Peabody Awards for his work in the process. *See id.*

The petitioner contends that excluding individuals with disabilities if they pose a risk to themselves is a business necessity because it will force employers to pay unnecessary workers' compensation claims. (Brief of Petitioner at 23-24). The petitioner's argument illustrates the need to interpret the ADA's direct threat defense in a way that focuses on the individual rather than based on broad generalizations. Because many occupations are dangerous, every state government has established compensation programs to pay the costs of the inevitable injuries suffered by workers who accept safety risks every day. *Supra,* Schaffer, *Paternalistic Employment Practices* at 1443. Workers' compensation is a vehicle to provide wages and medical care to people who are injured while working. Arthur Larson, *Larson's Workers' Compensation Desk Edition,* §1:00 at 1-1 (1991) ("Larson, *Workers' Compensation*"). The right to recover workers'

compensation benefits depends solely on whether there was a work-related injury and, therefore, negligence and fault are largely immaterial to the question of liability. *Id.* at 1-2. Employers are usually required to secure protection against potential liability through private insurance. *Id.* Workers' compensation statute's underlying philosophy is "social protection rather than righting a wrong." *Id.* at 1-5. Workers' compensation benefits are generally limited to one-half to two-thirds of the injured worker's average weekly wages as well as hospital and medical expenses. *Id.*

The EEOC has stated that under the ADA an employer may not refuse to hire an individual with a disability because it assumes—correctly or incorrectly—that the individual poses an increased risk of occupational injuries and workers' compensation costs. EEOC Enforcement Guidance: Workers' Compensation and the ADA, Equal Employment Opportunity Commission, at 6 (Sept. 3, 1996) (available at http://www.eeoc.gov). In its Enforcement Guidance the EEOC elaborates that an employer may not "err on the side of safety" because of a possible health or safety risk. *Id.* The ADA's legislative history also demonstrates that when it enacted the ADA Congress sought to prohibit employers from refusing to hire individuals with disabilities because of concerns about increased workers' compensation costs. H. R. Rep. No. 485, pt. 3, 101st Cong., 2d Sess. 31 (1990).

Petitioner's concern about the potential for escalating workers' compensation costs also ignores the vital role that "second-injury funds" play in the workers' compensation arena. Second-injury funds are intended to remove the financial disincentives to hiring individuals with disabilities. Technical Assistance Manual on the Employment Provisions (Title I) of the ADA, EEOC, §9.5 at IX-6 (Jan. 26, 1992). Without a second-injury fund an employer might have to pay the full costs if a worker's disability was exacerbated by a work-related injury caused by a pre-existing

condition. *Id.* However, under a second-injury fund (which most states have established) an employer's liability is limited and the balance is paid out of a common fund. *See, e.g., Izzo v. Meriden-Wallingford Hospital*, 676 A.2d 857, 859 n.2 (Conn. 1996), (observing that Connecticut's Second Injury Fund enables employers who received a valid acknowledgment of a pre-existing condition from an employee the right to transfer the full cost of any subsequent injury); *see also supra*, Schaffer, *Paternalistic Employment Practices*, at 1483-84. Second-injury funds also share the ADA's goal of preventing employers from discriminating against working men and women with disabilities. *See, e.g., Lawson v. Suwannee Fruit and Steamship Co.*, 336 U.S. 198, 201 (1948) (observing that one of the major purposes of the second-injury fund contained in the Long-Shore and Harbor Compensation Act, 33 U.S.C. §§901-50, was preventing employers from discriminating against workers with disabilities); *State v. Industrial Accident Commission*, 306 P.2d 64, 68-69 (Cal. Dist. Ct. App. 1957) (stating that California's Subsequent Injury Fund was intended to encourage the employment of persons with physical disabilities).

The petitioner also argues that employers must be able to exclude individuals with disabilities from the workplace if they pose a direct threat to themselves because of the possibility of tort, regulatory and criminal liability. (Brief of Petitioner at 24-25). This Court rejected those same speculative arguments in *Johnson Controls*, reasoning that the potential for employer liability for fetal harm was "remote at best" and did not justify excluding fertile women from jobs that could damage their fetuses. 499 U.S. at 208. *Johnson Controls* also suggested that state tort law would be preempted if it interfered with federal anti-discrimination law, explaining that "we have not hesitated to abrogate state law when satisfied that its enforcement would stand as an obstacle to the accomplishment and execution of the

full purposes and objectives of Congress." *Id.* at 209-10 (internal quotation marks omitted).

An employer that is concerned about potential liability can turn to the ADA as its first line of defense. "Direct threat" refers to a threat to the health or safety of others "that cannot be eliminated by reasonable accommodation." 42 U.S.C. §12111(3); *see also,* 29 C.F.R. §1630.2(r). Therefore, an employer must first examine whether any accommodations can be made to reduce the perceived health risks. *See, e.g., Nunes v. Wal-Mart Stores,* 164 F.3d 1243, 1248 (9th Cir. 1999); *EEOC v. Kinney Shoe Corp.* 917 F. Supp. 419, 428-29 (W.D. Va. 1996), *aff'd sub nom., Martinson v. Kinney Shoe Corp.,* 104 F.3d 683 (4th Cir. 1997) (despite holding for the employer on other grounds, the district court stated that even if the shoe salesperson posed a substantial risk of harm because of possibility of epileptic seizures, there were reasonable accommodations that the employer could have made so there would not have been a direct threat, such as removing stock from high shelves so he would avoid risk of having a seizure while climbing a ladder).

If the employer cannot either eliminate the safety risks or reduce them to an acceptable level as a result of a reasonable accommodation, the employer could still reduce or eliminate any potential tort liability by informing its employees of the workplace hazards. Katelyn S. Oldham, Comment: *The Implications of Echazabal v. Chevron, U.S.A. Inc., for Employers and for the Administration of Workers Compensation and the Occupational Safety and Health Act,* 80 Or. L. Rev. 327, 373 (2001). ("Oldham, *Implications of Echazabal*"). For example, *Johnson Controls* observed that the employer warned its employees about the potential damaging effects of lead. 499 U.S. at 208. Under basic tort law principles, if an individual consents to participating in a potentially dangerous activity the individual has accepted

the risks of the activity and waived the right to sue for damages resulting from the danger.[4]

The petitioner also argues that unless the court endorses the EEOC's definition of the direct threat defense employers will be exposed to substantial legal risks under the Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.* ("OSHA") (Brief of Petitioner at 24-26). In 1970, Congress adopted the OSHA in an effort to protect employees from workplace injuries. Despite nearly thirty (30) years of OSHA oversight over seven million private sector workers were hurt or became ill in 1998. *Supra*, Schaffer, *Paternalistic Employment Practices*, at 1483 (*citing* U.S. Dep't of Labor, Bureau of Labor Statistics, Incident Rates of Nonfatal Occupational Injuries and Illnesses By Industry and Selected Case Types Tbl. 1 (1998)). More than two million of those workers, or two percent (2%) of the work force, were injured seriously enough in 1998 to lose time from work. *Id.* In 1999, over 6,000 deaths occurred in the workplace. *Id.* (*citing* U.S. Dep't of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries By Injury or Event Exposure Tbl. A-1 (1999)).

The petitioner does not contend that OSHA has a specific regulation that would require Chevron to exclude persons with Hepatitis C from areas in the workplace containing

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[4] *See supra*, Oldham, *The Implications of Echazabal*, at 373 (*citing* Restatement (Second) of Torts 496A (1965)) ("A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm"). The only exceptions to this general rule would be if public policy considerations prohibited an individual from contracting to take the risk or if the plaintiff did not fully comprehend the nature of the risk. *Id.* (*citing* Restatement (Second) of Torts 496B and 496D; D. Dobbs, *The Law of Torts* 211 (2000)).

hydrocarbons. *See Albertson's v. Kirkenburg*, 527 U.S. 555, 570-73 (1999) (relying on the distant visual acuity standard of the Federal Motor Carrier Safety Regulations, 49 C.F.R. §391.41(b)(1) to uphold the exclusion of a truck driver with a visual impairment). Rather, petitioner relies on the OSHA's "general duty" clause, which requires employers to "furnish to each of his employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. §654(a)(1). Although the OSHA has been in effect over thirty (30) years the petitioner has failed to identify even one case where OSHA took enforcement action against an employer under its general duty clause for allowing an employee who was aware of the risk to work in an environment which potentially jeopardized the employee's health. An employer may not rely on an exclusionary policy to enable it to meet its obligation of providing its employees with a safe workplace. *See Johnson Controls*, 499 U.S. at 210 ("Johnson Controls attempts to solve the problem of reproductive health hazards by resorting to an exclusionary policy. Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police its workplace"); *see also, supra*, Oldham, *Implications of Echazabal*, at 373.

The petitioner also attempts to justify the need for exclusionary policies by raising the spectre of criminal sanctions, fines and imprisonment (Brief of Petitioner at 26-28). However, the cases and statutes upon which the petitioner relies demonstrate that they focus on intentional wrongdoing by the employer. In *People v. Pymm*, 76 N.Y.2d 511, 563 N.E.2d 1 (1990), for example, OSHA conducted four inspections between 1981 and 1984 of a facility that manufactured thermometers for clinical use. OSHA concluded that the second floor of the facility was dangerously contaminated with mercury and that the workers on the floor did not wear protective gear such as gloves and respirators. *Id.*

OSHA warned the facility's owners of the dangers of mercury poisoning and encouraged then to take action that would reduce the possibility that workers would ingest liquid mercury or inhale mercury vapors. *Id.* at 516, 563 N.E.2d at 3. (Mercury vapor is highly toxic and long-term exposure to low concentrations of mercury can lead to permanent neurological damage. *Id.* at 516, 563 N.E.2d at 2.) In 1985, OSHA learned that the facility's owners were running a clandestine mercury reclamation project in the basement. *Id.* The owners had omitted the basement area from the previous inspections and, when confronted by OSHA, denied that the basement reclamation project even existed. *Id.* An inspection of the reclamation project revealed boxes stacked against walls containing broken thermometers with mercury seeping out of the boxes and out onto the floor. *Id.* at 517, 563 N.E.2d at 3. Readings taken in the basement revealed level readings that were five times the level allowed by OSHA. *Id.* The owners of the facility were indicted after an employee developed brain damage due to long-term exposure to mercury. *Id.*

The facts in *Pymm* are a far cry from a situation where an employer discloses any potential health risks to an employee with a disability, attempts to reduce or eliminate the perceived risks and, if unsuccessful, permits the employee to choose whether or not to accept that risk. An employer that both attempts to eliminate or reduce the problem and leaves the choice of whether to accept that risk to the disabled employee is not engaging in the sort of "intolerable and morally repugnant conduct" which could lead to criminal penalties. *Pymm*, 76 N.Y.2d at 521, 563 N.E.2d at 6.

IV. AN EMPLOYER IS NOT IMMUNE FROM LIABILITY UNDER THE ADA'S "DIRECT THREAT" DEFENSE MERELY BECAUSE IT RELIED ON A DOCTOR'S ADVICE

If the Court endorses the petitioner's argument that the ADA's direct threat defense extends to "threat to self," the Court should not endorse the argument that it is not liable under the ADA merely because it relied upon the opinion of its doctors. *See* Brief of Petitioner at 46; Brief of *Amici* American College of Occupational & Environmental Medicine at 11. The opinion of a company's doctor is often the product of stereotypical beliefs and fears about people with disabilities, lack of expertise, speculation or incomplete medical information. In *EEOC v. Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996), for example, the court rejected the employer's argument that it could not be liable under the ADA for refusing to hire an applicant with obesity for a bus driver position because it relied upon the decision of a company physician who had been conducting Department of Transportation ("DOT") physical examinations for applicants of motor carrier positions for over forty (40) years. *Id.* at 968, 976. The physician disqualified the applicant based on his conclusion that the applicant's obesity would pose a direct threat to her passengers' safety because she would not be able to get out of the way in the event of an accident. *Id.* at 980, 981. The court rejected the employer's direct threat argument, reasoning that: (1) the DOT regulations governing physical qualifications for bus drivers did not address the driver's ability to handle emergency situations, and (2) there was no evidence that the applicant's obesity would prevent her from being able to handle emergency situations. *Id.* The court elaborated that "Texas Bus Lines' blind reliance on a very limited medical examination of [the applicant] by Dr. Frierson is misplaced and cannot be used as a justification to circumvent the anti-discrimination mandate of the ADA." *Id.* at 979.

The employer's physician claimed in *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164 (E.D. Mich. 1996) that an electrician posed a direct threat to himself and his co-workers because of possible complications from his diabetes, such as an increased risk of sudden blurred or lost vision. *Id.* at 1171. Despite the employer's "ominous predictions," however, the court rejected the employer's direct threat defense, reasoning that the employer's physician: (1) did not ascertain whether the individual was experiencing any diabetes-related complications; (2) did not ask the electrician whether he had suffered from dizziness, fainting or vomiting during his 25 years as an electrician; (3) conducted a minimal examination which revealed that the electrician did not suffer from any diabetes-related complications; (4) admitted that, other than the electrician's blood sugar level, the employee exhibited no indications that he posed an imminent risk of injuring himself, and (5) ignored the opinion of a physician, who conducted a more thorough examination, that the individual did not require any work restrictions. *Id.* at 1171, 1172.

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), this Court stated that decisions as to whether the individual is a direct threat must be "based on objective, scientific information available to [the health care provider] and others in the profession." *Id.* at 650. According to this Court, the "objective reasonableness" of those medical determinations should be assessed "in light of available medical evidence." *Id.* *Bragdon* is consistent with the EEOC's regulation that the "determination that an individual poses a 'direct threat' . . . shall be based on a reasonable medical judgment that relies on the most current knowledge and/or on the best available objective evidence." 29 C.F.R. §1630.2(r). The standards articulated in *Bragdon* and by the EEOC appropriately place the "direct threat" focus on objectively reasonable medical opinions. The ADA's direct threat terrain should not be altered in a manner that would immunize employers

from liability based solely on its claim that the adverse employment action was based on the advice of its physician.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

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In the

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a person who is unable to carry out the essential functions of a job without incurring significant risks to the person's own health or life is a "qualified individual" who satisfies the "qualification standards" for that job within the meaning of the Americans with Disabilities Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Miscellaneous

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Amici Pacific Legal Foundation and the California Manufacturers and Technology Association respectfully submit this brief amicus curiae in support of the Petitioner.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties and lodged with the clerk of this Court.

Amicus Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF has participated in numerous cases before this Court concerning statutory interpretation of federal laws in cases raising significant public interest concerns.

Amicus California Manufacturers and Technology Association (CMTA) is a mutual benefit, nonprofit, nonpartisan corporation established in 1918 to effectuate communication between its members and state policymakers and the courts about issues which affect the interests of manufacturers. The membership of CMTA is comprised of more than 700 companies that employ approximately 70% of the manufacturing workforce in the state of California.

CMTA believes that the decision of the court below adversely affects the interests of its members by discounting their legitimate—and legally enforceable—policies regarding

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

worker safety. CMTA believes it is critical for this Court to clarify the standards under which employers may consider safety-based job qualifications in the implementation of the Americans with Disabilities Act (ADA).

Amici seek to augment the arguments of Petitioner by further illustrating how segments of the public not before this Court will be affected by the outcome of this litigation. Amici believe their perspective will provide a unique viewpoint on the issues presented and that this additional viewpoint will aid this Court in evaluating the merits of this case.

STATEMENT OF THE CASE

Respondent Mario Echazabal was an employee of a company called Irwin Industries, Inc., which did subcontract work for Chevron at its coker plant in El Segundo, California. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1065 (9th Cir. 2000). In 1992, Echazabal applied for a job as a "plant helper" directly with Chevron. *Id.* at 1071. Chevron tendered an employment offer to Echazabal contingent upon his passing the company's physical exam. *Id.* at 1065. The physical exam revealed that Echazabal had a liver abnormality. *Id.* Because the plant helper position in the coker plant would expose Echazabal to toxic chemicals that could further damage his liver or, in the event of an accident, fatally injure him, Chevron withdrew its offer. *Id.* Subsequently, doctors diagnosed Echazabal as having chronic active hepatitis C. *Id.* Nonetheless, Echazabal continued to work for the subcontractor at the Chevron plant. *Id.*

In 1995, Echazabal again applied for a job directly with Chevron. *Id.* Again, Chevron tendered an offer contingent upon the results of a medical exam. *Id.* And again, the exam revealed Echazabal's liver problems. *Id.* Accordingly, Chevron withdrew its offer of employment, and further requested of

Echazabal's employer, Irwin Industries, that they remove Echazabal from the coker plant and find him a position where he would not be exposed to liver-toxic chemicals. *Id.* Consequently, Echazabal lost his position at the refinery. *Id.* As a result of these actions, Echazabal filed a complaint with the Equal Employment Opportunity Commission (EEOC), and this suit followed. *Id.*

Echazabal's suit against Chevron and Irwin Industries raised various issues. Relevant here, however, is only one issue: Echazabal's claim under the ADA against Chevron. Chevron defended its actions by asserting that Echazabal was not a "qualified individual with a disability" within the terms of the ADA, and, alternatively, that it was justified because the job would pose a "direct threat" to Echazabal's health. *Id.* at 1066. The district court granted summary judgment for Chevron. *Id.* at 1065.

On appeal, the Ninth Circuit, in a 2-1 decision, reversed. *Id.* at 1072-73. The Ninth Circuit first held that, under the ADA, it was not a defense to liability that a job would pose a threat to the health of the disabled individual; rather, the only rationale on which an employer could justify itself under the "direct threat" defense was if the disabled individual would create a threat to the health or safety of other individuals. *Id.* at 1069. Second, it held that the physical exam requirements of the plant helper job were not legitimate job "qualification standards" within the meaning of the ADA.

This Court granted Chevron's Petition for Writ of Certiorari to resolve a conflict in the circuits on the interpretation of the ADA. Specifically, this Court must resolve whether health conditions can render an individual not a "qualified individual with a disability" for a job and whether "qualification standards" may include health standards that exclude disabled individuals from positions that may expose those individuals to threats to their own health and safety.

SUMMARY OF ARGUMENT

When Congress enacted the ADA in 1990, it was responding to a climate in which the disabled were relegated to second-class citizen status. The disabled often could not access the places and services that able-bodied individuals routinely enjoyed. One of the primary focuses of Congress was in the area of employment. Title I of the ADA was aimed at requiring employers to provide reasonable accommodations to their disabled workers so that these individuals could fully participate in the economic life of the nation.

Congress repeatedly emphasized that the primary roadblock to the ability of the disabled to receive fair treatment was irrational prejudice against those who had disabilities. In this case, however, Petitioner Chevron's decision not to hire Respondent Mario Echazabal was not due to unfounded presumptions about Mr. Echazabal's ability to perform the plant helper job, but was instead due to Chevron's assessment of Mr. Echazabal's health. Because he had hepatitis C, a liver disease, Chevron concluded he was a poor fit for a position that would entail exposure to liver-toxic chemicals. In the decision below, the Ninth Circuit held that Chevron's decision violated Mr. Echazabal's rights under the ADA. In doing so, it essentially ruled that the safety of disabled workers is not a valid employment consideration under the ADA.

Good public policy is advanced by encouraging employers to take appropriate safeguards to protect all of their workers—including disabled workers—from avoidable harms in the workplace. Indeed, both federal and state laws have been passed mandating that employers take affirmative steps to make their workplaces safe and healthful. These public policies would be undermined by an interpretation of the ADA in which employers would be required to ignore the well-being of

disabled individuals, exclusively, in making job-placement decisions. In fact, the Ninth Circuit's interpretation would lead to devastating and nonsensical results, as demonstrated by cases that have already arisen under the ADA and similar laws.

Further, the Ninth Circuit's interpretation of the ADA is not rationally defensible. The language of the ADA does not bar employers from factoring in safety considerations in making employment decisions; thus, the lower court's insistence upon severely limiting the ability of employers to consider worker safety in assessing the job qualifications of its disabled candidates is not justified. Furthermore, barring safety considerations does nothing to further the overall purpose of the ADA in encouraging employers and society at large to eschew biased attitudes toward disabled individuals. Because neither the specific language of the ADA nor the overall purpose of the ADA support the Ninth Circuit's interpretation, it should be reversed.

The goals of the ADA are important, and employers bear significant obligations to ensure that the goals of the ADA are met. However, employers should not be required to ignore their own hiring standards, particularly safety standards, when dealing with disabled employees. Because the decision of the court below is unreasonable and is not supported by the language or the purpose of the ADA, it should be reversed.

ARGUMENT

I

THE NINTH CIRCUIT'S INTERPRETATION RUNS COUNTER TO BROADLY LEGISLATED PUBLIC POLICY AIMED AT PROMOTING WORKER SAFETY, AND WOULD LEAD TO UNCONSCIONABLE RESULTS

Petitioner Chevron was faced with a delicate question: should they hire the Respondent, Mario Echazabal, for a position in their coker plant despite the fact that the position would expose Mr. Echazabal, who has hepatitis C, to particularly acute health risks, including the possibility of death, from liver-toxic chemicals used on the job site? The answer for Chevron was simple enough: of course not. To hire Mr. Echazabal despite the heightened risks due to his liver condition would be nonsensical, irresponsible, and insensitive; moreover, it could lead to exposure to legal liability in the event any adverse health effects came to pass.

Unfortunately for Chevron, however, a decision such as theirs, based on sound and reasonable business and humanitarian concerns, is not a private dealing between private parties, as it once may have been. Instead, hiring decisions by private corporations are subject to myriad federalized concerns, not the least of which is the ADA.

The ADA was enacted in 1990 to help disabled individuals overcome hardships created by their disabilities. Congress focused upon two primary concerns: physical barriers to the full participation of the disabled in mainstream economic life, and social barriers in the form of prejudices and ignorance. Among Congress' stated findings:

> [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) (2001). In response to these findings, Congress intended the ADA to provide a legal mechanism that would eradicate the effects of discrimination based on irrational and unfounded presumptions about the capabilities of disabled individuals. Thus, the ADA encourages, through the threat of civil liability, employers and others to modify their conduct to accommodate disabled individuals.

But there is no indication that Congress intended with the ADA to ignore established public policy in favor of promoting workplace safety by barring employers from applying prudent and reasonable measures designed to enhance and safeguard the safety of its disabled workforce. For example, the House Report specifically noted that the ADA was not intended to undermine OSHA standards:

> The OSHA lead standard, for example, requires that employees exposed to lead be tested periodically to determine the lead level in the employee's blood. If the test shows that lead levels exceed the permissible norm, the employee must be transferred from the exposed workplace to another worksite until the lead level falls below the permissible level. At that point, the employee may return to the original work station.

H.R. Rep. No. 101-485(II), at 74-75, *reprinted in* 1990 U.S.C.C.A.N. at 357. OSHA has no regulation directly relevant to Echazabal's situation. However, it is rather ironic that Congress would acknowledge that OSHA regulations should

prevail above ADA concerns by minimizing the health risks for *all* employees to lead exposures but at the same time require under the ADA that an employer affirmatively ignore a known acute health risk for a disabled employee.

Indeed, there is substantial legislation intended to foster a public policy in favor of employers safeguarding employee health that would be undermined by an interpretation of the ADA requiring Chevron to ignore Mr. Echazabal's well-being. For example, OSHA requires an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . ." 29 U.S.C. § 654(a)(1). Further, California, in which Chevron's coker plant sits, has a state law providing that "[n]o employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful." Cal. Lab. Code § 6402 (2001). These provisions mandate that employers like Chevron make worker safety one of their primary employment obligations.

The ADA itself enforces the concept that the health and well-being of disabled workers must be part of the employer's calculus in making employment decisions. Specifically, the "reasonable accommodation" requirement demands that employers accommodate disabilities to minimize aggravation of a given disability—even to the point of requiring alternative job placement. For example, a House Report explaining the term "reasonable accommodation" used the example of a painter with a severe allergy to a particular paint, stating that he would be entitled to the "reasonable accommodation" of job reassignment if his position entailed exposure to that paint. *See* H.R. Rep. No. 101-485(III), at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451-52.

In this case, then, the application of the "reasonable accommodation" requirement would lead to a very peculiar

result. If Chevron were required to hire Mr. Echazabal as a plant helper despite the health risks imposed by his disability, he would seem to be further entitled to "reasonable accommodation" of that disability—including transfer out of the plant helper position to one in which there was no risk of exposure to liver-toxic chemicals. In other words, by its own terms, the ADA requires that employers enable qualified disabled individuals to *avoid* risks associated with their disabilities. By requiring Chevron to ignore Mr. Echazabal's condition in making its hiring decision, the ADA would mandate a patently unreasonable result: Chevron would be bound to employ Mr. Echazabal in an entirely different capacity than the position for which he applied. It therefore makes little sense to force Chevron to hire Mr. Echazabal as a plant helper; if Mr. Echazabal qualifies for the position despite his disability, Chevron would ultimately be put in the position of guaranteeing his employment in some other capacity.

Finally, as the dissenting opinion of the lower court noted, requiring employers to hire disabled individuals despite the risks to disabled individuals themselves would lead to unconscionable results:

> [A] steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper. The possible examples of this Pickwickian ruling are endless.

Echazabal, 226 F.3d at 1074 (Trott, J., dissenting). But while this parade of horribles may seem fanciful, there is a steady stream of real-world examples that point out the absurdity of allowing the Ninth Circuit's ruling to stand.

For example, in *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981),[2] a woman with a personality disorder reacted to stress by engaging in certain self-destructive acts, including cutting herself and imbibing poison. *Id.* at 766-68. NYU medical school dismissed her when the pressures of medical school caused her to engage in further self-destructive conduct. *Id.* at 767-68. She subsequently sued the medical school under the Rehabilitation Act, alleging that NYU discriminated against her on account of her disability. Under the interpretation adopted by the Ninth Circuit, NYU would have had to stand idly by while Ms. Doe engaged in this behavior, despite knowing that the stress of medical school was the cause of her self-destructive behavior. Though the Second Circuit affirmed the district court's denial of summary judgment for NYU, the court of appeals reversed the grant of a preliminary injunction in Doe's favor, finding that Doe's claim was unlikely to succeed on the merits. *Id.* at 779.

Further, in *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 African-Americans who grew beards on account of a bacterial disorder that predominately affected African-American men sued the City of Atlanta under Title VII and the Rehabilitation

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[2] Of course, *Doe* arose prior to the passage of the ADA, and was instead brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2001). However, one of the central themes echoed by Congress in passing the ADA was its intent to extend the protections of the Rehabilitation Act, which applied only to federally funded activities, to all activities of states and private employers. *See* 42 U.S.C. § 12201 (2001); *see also* Statement by President George Bush upon Signing S. 933, 26 Weekly Comp. Pres. Doc. 1165 (July 30, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601. Thus, the facts giving rise to this Rehabilitation Act case may now arise under the ADA, but in many more contexts than those dealing with a federally funded entity.

Act[3] because of its "no beard" policy for its firefighters. *Id.* at 1113-14. The no-beard policy was implemented because the respirators used by firefighters in smoke-filled environments would not properly seal if individuals had facial hair. Under the Ninth Circuit's ruling, the City of Atlanta would have had to adopt a "tough luck" attitude toward these individuals if the lack of a properly functioning respirator resulted in death or injury to these men while fighting fires. The Eleventh Circuit, however, affirmed the grant of summary judgment to the City of Atlanta. *Id.* at 1114.

And in *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997), after undergoing a physical exam as part of an employment screening process, an individual with hemophilia was denied a position as a firefighter by the City of Bossier. The city provided evidence that, unlike other professions, the job of firefighting, as a rule, involved " 'routine exposure to extreme trauma.' " *Id.* at 331. Under normal circumstances, firefighting is a dangerous job. But under the Ninth Circuit's holding, the City of Bossier would have had to accept callously the fact that one of its firefighters would face extreme danger in matters that could be routinely handled by its other firefighters without hemophilia. The Fifth Circuit, however, found that the individual was not a "qualified individual with a disability." *Id.* at 334-35.

In *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997), an individual with epilepsy, who suffered seizures on the job, was terminated from a position which involved working near fast-moving press rollers, as well as machinery that reached temperatures of 350 degrees. *Id.* at 447-48. The Eleventh Circuit affirmed the district court's grant of summary judgment to the employer, *id.* at 448, but the Ninth Circuit's rule would have mandated that

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[3] *See* note 2.

American Nonwovens, Inc., simply ignore Mr. Moses' condition despite the high risk of serious injury to him.

And in *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000), an individual who suffered from several psychiatric disorders was discharged from his job as a "blaster"—which entailed working with explosives—when his depressive state induced him to entertain suicidal tendencies. While Mr. Borgialli's position was "inherently dangerous" to himself and others, *see id.* at 1295, the Ninth Circuit's interpretation of the ADA might have required Thunder Basin Coal Co. to sit blithely by despite knowing that the job it held for Mr. Borgialli provided convenient and ready means for him to fulfill his suicidal tendencies.

As these cases demonstrate, any imagined or theoretical scenarios that would lead to absurd results are no more outlandish than real-life situations the lower courts are likely to encounter routinely in ADA litigation. If the Ninth Circuit's decision is affirmed, the results in each of these cases would be put into question. Employers would simply have to ignore the well-being of disabled individuals, *especially*, in making employment decisions, despite their general obligation to take reasonable steps to ensure the safety of *all* of their workers. This is not a reasonable way to implement public policy, and reversing the result in all of these cases would hardly serve the goals of the ADA in aiding disabled individuals, as a group, to earn dignity and respect from employers.

In short, in the ADA, Congress repeatedly referred to its broad overall goal of eradicating irrational or unintentional discrimination against the disabled where simple measures could be taken to enable disabled individuals to participate in mainstream economic life. Congress referred to the fact that the ADA was designed to compensate for

> discrimination [that] often results from false presumptions, generalizations, misperceptions,

> patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.

H.R. Rep. No. 101-485(II), at 30, *reprinted in* 1990 U.S.C.C.A.N. at 311. *See also id.* at 33, *reprinted in* 1990 U.S.C.C.A.N. at 315; *id.* at 40, *reprinted in* 1990 U.S.C.C.A.N. at 322; H.R. Rep. No. 101-485(III), at 45, *reprinted in* 1990 U.S.C.C.A.N. at 468. Here, like the cases cited above, there is no contention or even suggestion that Chevron's application of its health standards to Mr. Echazabal was due to any consideration beyond Chevron's legitimate, sound, and sensible concerns for the general safety of its employees and in providing a safe work environment for all of its workers.

It would not serve the purposes of the Act and, indeed, would undermine numerous state and federal laws that reflect a broad public policy interest in advancing employee and public health and safety, for courts to adopt an interpretation of the ADA under which employers could not properly consider worker safety in filling jobs with disabled individuals. This Court should reverse the decision of the court below and establish that legitimate worker safety standards are job qualification standards that employers may permissibly consider under the ADA.

II

MANDATING THAT EMPLOYERS IGNORE THE SAFETY AND HEALTH OF THEIR WORKERS IS NOT CONSISTENT WITH EITHER THE PURPOSE OR THE LANGUAGE OF THE ADA

Title I of the ADA makes it unlawful for employers to discriminate against the disabled in hiring, discharge, compensation, promotion, training, and virtually every other term of employment. 42 U.S.C. § 12112(a) (2001). However, even Congress recognized that not every disability could be accommodated by every employer in a way that made sense, economically or otherwise. For example, it would be foolish to mandate that fire departments hire paraplegic firefighters and bus companies hire blind drivers. Thus, it inserted language into the Act intended to circumvent applications of the law that would bring about absurd results. Unfortunately, Congress' attempt to craft a law that would apply perfectly to every conceivable circumstance has fallen far short of its intended goal. Thus, this Court has been left the unenviable task of divining exactly what Congress intended.

This case deals with the question: when may an employer take into account a disability when implementing employee health and safety standards? As explained above, Chevron's decision was based on a straightforward calculation of whether it was desirable to place Mr. Echazabal, given his current state of health, in a job that posed particular health risks to him. But under the ADA, Chevron must eschew its straightforward approach and respond instead by resolving a number of questions dealing with statutory and regulatory terms. Unfortunately, the ADA's terms are not entirely pellucid when applied in a real world context. It is this ambiguity that militates in favor of allowing Chevron to consider work safety standards in employment decisions.

As stated above, the general mandate of Title I is to prohibit employers from discriminating against the disabled. *See* 42 U.S.C. § 12112(a). In order to be protected by Title I, Section 101 states that an individual must be a "qualified individual with a disability." This

> means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, *consideration shall be given to the employer's judgment as to what functions of a job are essential* . . . .

42 U.S.C. § 12111(8) (2001) (emphasis added). Section 103 of the ADA further provides:

> It may be a defense to a charge of discrimination under this Act that an alleged application of *qualification standards, tests, or selection criteria* that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be *job-related and consistent with business necessity*, and such performance cannot be accomplished by *reasonable accommodation*, as required under this title.

42 U.S.C. § 12113(a) (2001) (emphasis added). And subsection (b) of Section 103 states further:

> The term "qualification standards" may include a requirement that an individual shall not pose a *direct threat to the health or safety of other individuals* in the workplace.

42 U.S.C. § 12113(b) (emphasis added).

Thus, Chevron's decision, recast as a studied interpretation of a number of statutes and regulations, was defended through

several legal assertions. First, Chevron argued Mr. Echazabal was not a "qualified individual with a disability" because the job qualifications for its coker plant position included certain physical health requirements that were "essential" to the position in Chevron's judgment. *See* 42 U.S.C. § 12111(8). And second, Chevron asserted that, consistent with EEOC regulations, proper liver functioning was a valid "qualification standard" of the job because: (a) Chevron's physical exam requirement for positions entailing exposure to certain volatile chemicals was "job-related and consistent with business necessity," *see* 42 U.S.C. § 12113(a); (b) the exposure to these chemicals in the plant helper position could not be reasonably accommodated, *see id.*; (c) the physical health requirements of the position were legitimate "safety standards" of the plant helper position, *see* 29 C.F.R. § 1630.2(q); and, finally (d) the position posed a "direct threat" to the health of Mr. Echazabal, *see* 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r) (allowing "direct threat" defense where threat is to disabled individual himself).

The Ninth Circuit rejected all of these arguments. In doing so, it severely limited the circumstances under which safety standards could be applied to disabled individuals. Notwithstanding the general language of Sections 101 and 103, the court relied exclusively upon Section 103(b), the "direct threat" provision, as the sole defense upon which Chevron could rely. This holding was consistent with EEOC's interpretation of the Act that safety standards may never be analyzed under Section 103(a), but may only be considered a "qualification standard" under Section 103(b)'s "direct threat" defense. *See* 29 C.F.R. § 1630, app. 1630.15(b), (c). However, as this Court noted in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 & n.15 (1999), it is not clear that this view, under which all safety standards must meet the "direct threat" test, is a valid interpretation of the Act. Indeed, some courts have rejected that interpretation. *See, e.g., Equal Employment Opportunity*

Commission v. Exxon Corporation, 203 F.3d 871, 873 (5th Cir. 2000) ("[S]afety requirements are not exclusively cabined into the direct threat test."). Furthermore, the Ninth Circuit adopted a hypertechnical reading of Section 103(b), and, despite EEOC regulations, construed the Act such that employers could only disqualify disabled individuals for safety-related concerns when an individual poses a "direct threat" to third parties, but not the disabled individual himself. *Echazabal*, 226 F.3d at 1066 n.2. *See* 29 C.F.R. § 1630.2(r). As a result, this Court is now presented with the issue of whether, under any reading of the ADA, safety standards may be considered "qualification standards" under Section 103.

Despite the broad language of Section 103(a), the lower court held that the term "qualification standard" in Section 103(a) meant Chevron could only consider whether Mr. Echazabal possessed the physical ability to perform the mechanical aspects of the job, regardless of the unique safety considerations imposed by the workplace. This is a " 'narrowly technical and impractical construction' " of Section 103(a). *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (citation omitted). "In a statutory construction case, the beginning point must be the language of the statute . . . ." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Here, the language of the ADA provides ample leeway for Chevron to consider worker safety in employment decisions. In Chevron's judgment, passing the physical exam was an "essential" part of the job position, and Chevron applied its health criteria as a job "qualification standard." *See* 42 U.S.C. §§ 12111(8); 12113(a).

Safety concerns must be considered a legitimate aspect of any job. *See* 29 C.F.R. § 1630.2(q); 42 U.S.C. § 12113(b). *See also* 29 U.S.C. § 654 (2001) (OSHA, requiring employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to

his employees . . . ."); *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977) ("[A] discriminatory employment practice must be shown to be *necessary to safe and efficient job performance* to survive a Title VII challenge.") (Emphasis added.); *see also Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993) ("[P]rotecting employees from workplace hazards is a goal that, as a matter of law, has been found to qualify as an important business goal . . . ."). Safety is a legitimate factor to consider in interpreting the terms "essential job functions" and "qualification standards."[4]

If, as the Ninth Circuit ordered, the ADA requires companies to ignore acute health risks facing disabled individuals in their hiring decisions, it is hard to see how the goals of the ADA are advanced. Forcing Chevron to offer the plant helper position to Mr. Echazabal has nothing to do with encouraging employers to eschew mistaken notions about the abilities of disabled individuals, or eliminating barriers which can be overcome by reasonable accommodation. Chevron's employment decision regarding Mr. Echazabal was not based upon assumptions or myths, but on a factual assessment of his physical condition vis-a-vis the particular job to which he aspired. In the interest of safeguarding *every* employee's well-being, Chevron employed a policy of barring those with particular health conditions from undertaking positions in which those conditions presented unusual health risks.

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[4] EEOC has taken the extreme position that safety-standards are almost never valid employment considerations, leading to patently absurd arguments. For example, in *Equal Employment Opportunity Commission v. United Parcel Service, Inc.*, 149 F. Supp. 2d 1115, 1158 (N.D. Cal. 2000), the court observed:

> The EEOC contends that the ability to drive safely is not an essential job function for a truck operator. It says that driving is essential but driving safely is not. This argument is a necessary by-product of the EEOC's strategic view of the business-necessity defense . . . .

As the Ninth Circuit noted, there is evidence Congress believed "employment decisions must not be based on paternalistic views about what is best for a person with a disability." *Echazabal*, 226 F.3d at 1067-68; *see also* H.R. Rep. No. 101-485(II), at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356. Indeed, this Court has previously expressed general agreement with this sentiment. *See International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991). But there is a distinction between paternalism, in which decisions are based on generalized presumptions of what might be best for a group of individuals, and frank assessment of the safety conditions as they relate to a particular individual in the execution of his or her job. Thus, unlike *Johnson Controls*, which involved a policy barring all women of child-bearing age from holding positions involving exposure to lead out of fear of harm to potential fetuses, this is not a case in which an employer applies an across-the-board safety standard that bars a discrete class of individuals from a job because of a potential but remote risk of injury. *See Johnson Controls*, 499 U.S. at 196. While the standard in *Johnson Controls* could legitimately be labeled "paternalistic," in that it was based on general assumptions about what is best for all women and ignored evidence that men encountered comparable health risks, *see id.* at 193, the same cannot be said where the standard applied is based on an actual and particularized evaluation of the health risks involved in a job and the physical condition of a specific job candidate.

In this case, Chevron made an individualized assessment of Mr. Echazabal's health conditions and an impartial assessment of the specific conditions of the position he desired. This is not "paternalism"; this is prudence and conscientiousness. As one court aptly explained the distinction:

> Pernicious myths and prejudices about disabilities often infect employment decisions where an employer regards an individual as having an impairment that renders him unsuited for a wide class or broad range

> of jobs. The same cannot be said of cases where, as here, an employer makes a decision by focusing sharply on whether there is a match between a particular job and an individual with an actual impairment, given the current state of medical knowledge about the impairment. Science, not myths and prejudices, underlie such a decision; it is a rational decision, not an irrational one. Put another way, the ADA seeks only to remedy perceived disabilities "that, like actual disabilities, extend beyond [the] . . . isolated mismatch of [a particular] employer and employee."

Serrano v. County of Arlington, 986 F. Supp. 992, 997 (E.D. Va. 1997) (citation omitted).

Where the plain language employed by Congress in a statute is expansive and unqualified, there is no basis for projecting into the statute a construction that would arbitrarily limit its reach. *See Salinas v. United States*, 522 U.S. 52, 57 (1997); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295-96, 297 (1995). This is particularly so if the narrowed interpretation does nothing to advance the purposes of the Act. Congress would not have acted by implication to overrule long-standing, pervasive federal and state public policies mandating the highest regard for worker safety. Accordingly, this Court should reverse the decision of the court below and hold that safety standards may be legitimate "qualification standards" for employment under the ADA.

CONCLUSION

For the reasons stated herein, Amici respectfully request that this Court REVERSE the judgment of the Court below.

DATED: December, 2001.

Respectfully submitted,

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No. 00-1406

In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER,

v.

MARIO ECHAZABAL, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes and Regulations:

Miscellaneous:

Echazabal virtually concedes the certworthiness of this case, which he acknowledges presents a "specific" and "basic legal" issue concerning a key federal statute. Opp. 7, 8. He says nothing to refute Judge Trott's dissent, which demonstrated that Judge Reinhardt's majority opinion is a "bizarre" contortion of the ADA that cannot be squared with Congress's intent to protect disabled persons. He admits (at 8) that the majority held "invalid" a regulation of the EEOC, the agency charged with implementing Title I of the ADA. That the Ninth Circuit's "Pickwickian ruling" struck down a longstanding and authoritative administrative regulation makes review especially appropriate. *E.g.*, *FERC* v. *Martin Exploration Mgt.*, 486 U.S. 204, 208 (1988).

Echazabal repeatedly mischaracterizes the issue presented. The question is not whether an employer may refuse to hire a person whose health would deteriorate "at some indeterminate point in the future." Opp. 15. The district court found that Chevron was entitled to rely on currently available medical evidence, all of which showed that Echazabal would face a "serious, immediate risk" in the plant helper job. Pet. App. 47a; see Pet. 6. The Ninth Circuit did not disagree, basing its decision instead on the unprecedented "legal" ground that danger to the employee's own health is simply irrelevant. Opp. 7. Consequently, nothing in the procedural posture of this case requires this Court to accept as true the post hoc rationalizations of the doctors Echazabal hired for this litigation. Opp. 1 n.1. Given the rulings below, the *only* issue is whether a person who is at imminent risk of serious harm from performing the essential functions of the job must be hired under the ADA.

Like Judge Reinhardt, Echazabal asserts that the Ninth Circuit's decision was compelled by *Johnson Controls* and *Dothard*. Pet. App. 10a, 15a n.9. That serious misinterpretation of this Court's precedents only confirms the need for this Court's review. Those Title VII cases disapproved the use of gender "stereotypes" that affected broad classes of persons on an indiscriminate basis. This ADA case does not involve gender or any use of stereotypes. Echazabal was found unfit for the job

he sought by his own physician and several specialists in industrial medicine based on his particular health condition and the unusual characteristics of the job. This Court should grant review to correct a patent over-extension of its prior decisions.

Most astonishing is Echazabal's claim (at 10) that there is no "serious conflict" among the circuits. Even Judge Reinhardt acknowledged the existence of a conflict. Pet. App. 6a. In arguing there is none, Echazabal misapprehends the meaning of "conflict." "Cases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." R. Stern *et al.*, Supreme Court Practice 355 (7th ed. 1993). Where a different legal standard requiring a different ruling is announced in a "very similar case coming from another lower court," there is an undeniable conflict. W. Rehnquist, The Supreme Court 265 (1987). Based on the clearly stated standard used in several other circuits in closely similar circumstances, this Court can conclude with confidence that the present case would be decided differently in those circuits. Given the exceptional practical importance of this conflict, which has caused widespread confusion in the business community as to how to comply with the ADA—as reflected in the three *amicus curiae* briefs filed in this case—certiorari should be granted.

1. Echazabal concedes (at 13) that the Eleventh Circuit's decision in *Moses* is a "pure threat-to-self case" that directly conflicts with the ruling below. The Ninth Circuit acknowledged that conflict. Pet. App. 6a, 23a-24a. Echazabal's assertion that the conflict is not "serious" is baffling. The *only* risk identified in *Moses* was the "grave risk" to the epileptic plaintiff from doing the job he sought; the court of appeals explicitly relied on the EEOC's "direct threat" regulation in holding that "[a]n employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety"; and the court affirmed entry of summary judgment for

the employer on that basis. 97 F.3d at 447-448. Clearly, the Eleventh Circuit would have decided the present case differently, and it treated the controlling EEOC regulation as authoritative, not "invalid" like the Ninth Circuit here. See also *Blue Cross Blue Shield*, 30 F. Supp. 2d at 306-307 (direct threat defense applied where the *only* risk was to the employee himself).[1]

2. Echazabal concedes as well (at 11) that the Fifth, Tenth, and Eleventh Circuits have held that the direct threat defense covers threats to "the health or safety of the individual *or* others" in cases in which an employee's medical condition resulted in a threat to the employee *and* others. *Borgialli*, 235 F.3d at 1290-1294 (summary judgment for employer that fired employee with psychiatric disorder who "threatened suicide and perhaps injury to others," citing *Moses* and EEOC's regulation); *LaChance*, 146 F.3d at 834-836 (summary judgment for employer that fired epileptic cook whose use of slicing machines and hot items threatened "harm to himself or others"); *Daugherty*, 56 F.3d at 698 (judgment for employer; "the ADA by its terms recognizes the same" "personal safety requirement" as the Rehabilitation Act—that an employee not "'endange[r] the health and safety of the individual or others'").

Echazabal's assertion that these cases "create no meaningful conflict" because they do not turn "solely on the basis" of a threat to self is flatly incorrect. Opp. 11. These decisions rest on a *disjunctive* test—harm to the individual *or* others—and were thus decided on the basis of a legal rule that would dictate a different result in the present case. Echazabal's speculation that these circuits might abandon this legal rule if faced with a case involving a threat only to self finds no support in any of the opinions and ignores the EEOC's unambiguous regulation. In

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[1] *Lowe* v. *Alabama Power*, 244 F.3d 1305 (11th Cir. 2001), casts no doubt on *Moses*. In *Lowe*, the plaintiff urged the court of appeals "to reverse [its] holding in *Moses*," but the court declined even to consider that argument, ruling on other grounds. *Id.* at 1306.

each case the threat to the employee himself provided the basis for an alternative holding, and "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, * * * each is the judgment of the court." *United States* v. *Title Ins. Co.*, 265 U.S. 472, 486 (1924).

3. Contrary to Echazabal's suggestion (at 18), the Ninth Circuit clearly held that the direct threat defense is the "exclusive" way in which safety may be taken into account under the ADA, reasoning that to take safety into account in other ways "would undermine the clear language of the ADA's direct threat provision." Pet. App. 14a, 16a n.10 (rejecting arguments "that a personal safety requirement is a valid qualification standard" and that a person is not a "qualified individual" "if her employment would pose 'a reasonable probability of substantial harm' to her"). The petition (at 17-18) showed that this holding conflicts with rulings of the First, Fifth, and Seventh Circuits that "safety requirements are not exclusively cabined into the direct threat test" (*Exxon*, 203 F.3d at 873), but may also prevent a person from being "qualified" under § 12112(a) or form the basis of § 12113(a) "qualification standards."

In an effort to explain away the Seventh Circuit's decision in *Koshinski*, Echazabal falsely states that the employee there was "presently unable to perform the tasks of his job" and was unqualified for that reason. In fact, the employee could physically perform the job—with pain he said he was willing to bear. But the "job required him to do all of the things his doctors recommended he refrain from doing" because they would "exacerbate his condition." 177 F.3d at 601; see *id.* at 603 ("there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from"). The only reason the court identified why the employee was not a "qualified individual" was doctors' recommendations that he avoid the vibration and repetitive tasks necessarily involved in the job because these would "cause his condition to worsen." *Id.* at 602-603. The Seventh Circuit would

have found Echazabal not "qualified" on the same basis. *Koshinski* is in direct conflict with the Ninth Circuit's ruling that Echazabal's liver condition did not prevent him from being qualified for the plant helper job that would harm or kill him. See also *Foreman* v. *Babcock & Wilcox Co.*, 117 F.3d 800, 803, 807-808 (5th Cir. 1997) (person not "qualified" for job around high voltage electrical equipment that would interfere with his heart pacemaker).[2]

Echazabal's attempted distinction (at 18-20) of *Exxon* and *Amego* because they involve "risk to *others*" is erroneous. The Fifth Circuit in *Exxon* rejected the contention that "the direct threat test must be used *in every case* where a safety-based requirement is at issue" (203 F.3d at 873, emphasis added), holding in equally broad terms that "where an employer has developed a general safety requirement for a position, safety is a qualification standard no different from other requirements defended under the ADA's business necessity provision." *Id.* at 874. The Fifth Circuit thus plainly would analyze as a "qualification standard" an employer's requirement that an employee not pose a serious risk to his *own* health or life—the requirement Chevron imposed when it described the "physical/ environmental demands" for the plant helper job to include ability to work with specified liver toxins. See Pet. 5-6. The First Circuit's decision in *Amego* that posing a threat to others rendered a person not "qualified" rested on the court's determination that the meaning of "qualified" in the ADA is the same as in the Rehabilitation Act and its implementing regulations. 110 F.3d at 143-144. The Rehabilitation Act definition excluded

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[2] This case is *not* "directly analogous" to that of an employee who is fired "because his degenerative heart disease makes a future heart attack inevitable," a situation *Koshinski* distinguished. Opp. 17; 177 F.3d at 603. Here, the medical opinions showed that Echazabal's disease would be exacerbated by doing the *particular* job and that contact with the chemicals in the plant would injure or kill him, perhaps quite quickly.

persons who would "endange[r] the health and safety of the individual." 29 C.F.R. § 1614.203(a)(6), Pet. App. 61a.

Koshinski, *Exxon* and *Amego* conflict directly with the Ninth Circuit's refusal to consider safety issues outside the confines of the "direct threat" defense. Because the Ninth Circuit interpreted that defense to exclude risk to self, in the Ninth Circuit even the most grievous medical risk to the employee can *never* be a factor under the ADA. Pet. App. 16a & n.10. This Court "questioned" the view that the direct threat defense is the exclusive way that "safety-related qualification standards" may be justified in *Albertson's*, 527 U.S. at 569 n.15. This case provides the ideal occasion to address that question and the proper ADA analysis of risk to self.

4. *Amego's* reliance on the Rehabilitation Act reflects the fact that the statutes are to be construed *in pari materia* because "existing language and standards from the Rehabilitation Act were incorporated into the ADA." Statement of President Bush, 1990 U.S.C.C.A.N. 601 (July 26, 1990); *Bragdon*, 524 U.S. at 645 (Congress in the ADA adopted the "administrative and judicial interpretations" of the Rehabilitation Act). Echazabal concedes (at 11-12) that Rehabilitation Act cases routinely hold that a person who in doing a job would pose a substantial risk to "the health or safety of the individual *or* others" is not "qualified." Those include cases in which the principal risk is to the employee himself. *E.g.*, *Chiari*, 920 F.2d at 317 (applying the legal rule that "a significant risk of personal injury can disqualify a handicapped individual from a job"). Furthermore, the Seventh Circuit in *Knapp* squarely held a student with a heart condition not "qualified" under the Rehabilitation Act for a university's sports program *solely* because of the risk he would die. 101 F.3d 473. Echazabal seeks to distinguish *Knapp* because it did not involve employment (Opp. 12 n.4), but Rehabilitation Act § 504's unitary concept of a "qualified" person equally governs employment; *Knapp* relies primarily on employment precedents, including *Chiari* (see101 F.3d at 483);

and Echazabal elsewhere recognizes that non-employment precedents establish standards applicable in the employment context. See Opp. 6 (*Bragdon*, a public accommodation case, establishes the standards for determining if a direct threat exists). Had Congress intended a different result under the ADA it would have said so rather than making minor adjustments —greatly over-dramatized by respondent (at 27)—that are fully *consistent* with the Rehabilitation Act approach. The Ninth Circuit's express rejection of settled Rehabilitation Act law (Pet. App. 16a n.10) provides a further reason for this Court's review.

5. The numerous decisions discussed above and in the petition show that the problem of individuals seeking jobs that will harm or even kill them is a frequently recurring one. Respondent's quibbling distinctions of the cases cannot obscure the pervasive confusion among the courts of appeals as to how such a situation is to be analyzed under the ADA. That uncertainty has profound implications for employers faced with making decisions in life and death situations, who cannot be expected to fathom the micro-distinctions urged by respondent. As the *amicus* briefs filed on behalf of thousands of employers attest, businesses with nationwide operations do not know how to operate when EEOC regulations and courts of appeals around the country state that they may legitimately be concerned about the life and health of their employees, but the Ninth Circuit declares that such concerns are "paternalistic" and unlawful. The predicament of employers is worsened by stringent OSHA and state laws that severely punish employers who fail to protect their workers. The intolerable legal uncertainty that arises from the Ninth Circuit's ruling, and the moral quandary in which it places businesses that seek to protect employees from harm, create a pressing need for clarification by this Court.

6. On the merits, Echazabal parrots the Ninth Circuit's *expressio unius* argument without coming to grips with the plain language of ADA § 12113(b) that a qualification standard "may

include" a requirement that others not be put at risk. Echazabal offers no response to decisions of this Court (see Pet. 22-23) establishing that this sort of reference to one possible defense, stated in non-exclusive terms, does not negate other defenses available to the employer. We question, as this Court did in *Albertson's*, whether the EEOC has any statutory basis for its litigating position *limiting* consideration of safety qualifications to the direct threat defense. But that is a different question from whether it is reasonable for the EEOC to *include* threat to self in the direct threat defense. The EEOC regulation providing that one proper qualification standard is the absence of a "direct threat" to self is a perfectly reasonable interpretation of § 12113(a) and (b) that is entitled to deference. *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988) ("EEOC's interpretation [of a statute] for which it has primary enforcement responsibility * * * need only be reasonable to be entitled to deference"); *Chevron*, 467 U.S. at 843 n.11; see Pet. 28-29.

Echazabal's contention (at 23-25) that anyone who can perform the tasks associated with a job is "qualified"— regardless of whether doing those tasks will seriously harm or kill him—contorts the plain language of the ADA and Congress's purpose to protect persons with disabilities. A "qualified individual" is one who "can perform the essential functions" of the job. § 12111(8). The prospective focus of this language demonstrates that someone who *cannot* perform essential functions on a continuing basis because doing the job will sicken or kill him is not "qualified." At the very least, the statute is silent on the question whether a person who cannot perform the job without serious risk to his health or life is "qualified." It is Echazabal who would rewrite the law to say that a person is "qualified" if he "can perform the essential functions of the job, whether or not those functions would kill or injure him." Congress did not so declare.

Moreover, § 12111(8) mandates consideration of "the employer's judgment as to what functions of a job are essential,"

especially as evidenced by a written job description (like the one Chevron prepared here). There is no sign that Congress meant to preclude an employer from stipulating that an essential function of a position is the ability to perform it safely. At the time Congress drafted this language, it had long been established that "protecting employees from workplace hazards * * * qualif[ies] as an important business goal." *Fitzpatrick* v. *Atlanta*, 2 F.3d 1112, 1119, 1127 (11th Cir. 1993) (reassigning firemen with a disease that prevented them from shaving did not violate the Rehabilitation Act; a clean shave was critical to the effective use of breathing equipment and *"[p]erforming the essential functions of a job means * * * being able to perform those functions without risk of serious physical harm to oneself"*) (emphasis added). Congress in the ADA allowed employers to adopt "physical criteri[a]" that are "consistent with business necessity" (S. Rep. No. 101-116, at 27), while outlawing discrimination based on "patronizing attitudes, ignorance, [and] irrational fears." H.R. Rep. No. 101-485 (Pt. 2), at 30. The Ninth Circuit's insistence that denying employment to a person whom doctors say will be hurt or killed by the job falls on the forbidden side of that line makes nonsense of Congress's overarching purpose to help, not harm, disabled people.

7. Echazabal admits that this case does not turn on any factual dispute: the Ninth Circuit's ruling depends not on any "fact-specific question" about whether he would really be harmed in the plant helper position but on a "basic *legal*" question regarding the meaning of the ADA. Opp. 7. The erroneous legal interpretation adopted by Judge Reinhardt made injury to Echazabal wholly irrelevant.

Respondent nevertheless tries to minimize the danger he faced by citing the post hoc conclusions of doctors hired by his lawyer for this litigation. There is no doubt, however, that Chevron's decision was reasonably based on the objective medical evidence available to it at the time—which the authorities cited by respondent hold is all that is required. See Opp. 6;

Bragdon, 524 U.S. at 649-650 (the employer's "risk assessment must be * * * reasonable in light of the available medical evidence"); *Lowe*, 244 F.3d at 1309 ("The key inquiry is whether the employer made a reasonably informed and considered decision * * * 'based on particularized facts,'" which includes "justifiable reliance on a physician's diagnosis"). As the district court found and the court of appeals did not question, "[a]ll the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision * * *, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed in the position of plant helper, as posing a serious, immediate risk to him." Pet. App. 47a; see Pet. 6-7. Those included the opinions of three Chevron physicians experienced in industrial medicine, who concluded that small exposures to liver toxins over a long period would worsen Echazabal's condition and a large exposure from a relief valve discharge or other event could "cause death." Pet. 6. They also included the oral opinion of Echazabal's own doctor, which far from being "ambiguous" (Opp. 4 n.3), was "that Echazabal should not be exposed to" "substances present in the refinery." Pet. App. 37a. Echazabal's doctor subsequently confirmed in writing that *"of course"* Echazabal should not work in a "job [that] 'may entail exposure to hepatotoxic hydrocarbons.'" *Ibid.* (emphasis added). Chevron had no basis to doubt what occupational medicine specialist Dr. Tang concluded a few weeks later: "exposure to liver toxins would harm and probably kill Echazabal," perhaps from "massive hepatic failure in a few hours." C.A. Supp. App. 41a-42a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2001

No. 00-1406

In The

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Chevron U.S.A., Inc.,

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v.

Mario Echazabal,

Respondent

On a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM") submits this brief in support of Petitioner, Chevron U.S.A., and from the perspective of the human resource professional.[1] For over 50 years, SHRM remains the voice of human resource professionals charged with complying with a myriad of workplace laws and concerns in managing employees in a variety of workplace settings. SHRM represents over 165,000 human resource professionals in the United States and worldwide, and is the world's largest human resource management association.

The issue of whether persons protected under the Americans With Disabilities Act can be denied or held out of a job on the basis of threats to the individual's health or safety is of great importance to SHRM members. In their day-to-day work, human resource professionals are positioned in the middle of this issue. Human resource professionals constantly assist their respective organizations with complying with the fluid requirements of the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* ("ADA"). SHRM members are also charged with implementing appropriate measures to keep their respective organizations' employees productive and safe. Finally, SHRM members are responsible for helping their organizations avoid liability under workplace anti-discrimination, safety, and workers' compensation laws. Furthering the laudable goals of one of these legal schemes should not beget liability under another. Yet, the

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[1] *Amicus* files this brief, pursuant to Supreme Court Rule 37.3, with the consent of the parties. The parties represent that they are filing written consent for all amicus briefs with the Court. No person or entity other than *amicus curiae*, its members, or its counsel

Ninth Circuit's opinion below places employers in the untenable position of choosing between strict ADA compliance and protection of the safety of all employees in the workplace. Under the Ninth Circuit's decision, an individual with a disability insisting on staying in a job he or she can perform day to day, but which subjects the individual to a very real risk to their safety or health, forces the employer into a Hobson's Choice from which the organization cannot escape without incurring liability.

The ADA was designed to promote workplace equality and integration, not workplace libertarianism peculiar to individuals with disabilities. SHRM believes that the ADA allows, and common sense mandates, employers to remove individuals with and without disabilities from situations endangering their health and safety, in keeping with uniform workplace standards. Otherwise, human resource professionals and their organizations will be bound to accept the legal, moral and financial consequences of devil-may-care determinations by employees with disabilities that others in the workplace are not free to make.

SUMMARY OF ARGUMENT

Respondent rightly argues that subjecting individuals with disabilities to disparate paternalism is a form of discrimination that ADA sought to abolish. Excluding individuals with disabilities from jobs, based on stereotypes with no factual or individualized grounding, "for their own good" is as much of a bar to equal employment as invidious discrimination. Qualified individuals with disabilities are entitled to the same respect and rights afforded to all employees. The ADA, however, did not mandate greater employer deference to the choices of individuals with disabilities than to the

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authored any portion of this brief or made any monetary contribution to the preparation or

choices of employees not protected under ADA. Workplace rules and standards inherently limit the self-determination of individuals working for the organization. Holding individuals with disabilities to the same standards and rules places these individuals in the mainstream with others in keeping with the ADA's laudable goals.

Forbidding an employer from removing an employee with a disability from a position that, with or without a reasonable accommodation, threatens the safety or health of the individual puts the employer in a "Catch-22" situation. Employers are legally, morally and financially responsible for removing all employees from conditions in the workplace unduly threatening the individual's or others' safety. If an individual not protected by the ADA can be removed from a position or situation in order to protect their safety, then an individual with a disability can be removed equally – not as a subterfuge for discrimination, but as a means to provide the same protections and restrictions afforded to all employees. That a particular individual with a disability may be more susceptible to harm, even with a reasonable accommodation, does not render efforts to protect the individual's safety unlawfully paternalistic or patronizing. Rather, it places all individuals in the workplace on equal footing, recognizing the unique needs and limitations of the individual just as the ADA and common sense envision. Most individuals, when confronted with reliable information showing a heightened, substantial risk to their health or safety in their job, will inevitably choose a reassignment or another line of work. Others, for economic or other personal reasons, may seek to defy the very real risks. In a workplace in which nobody has an absolute right to harm or kill themselves, individuals with disabilities should be treated no better and no worse.

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submission of this brief.

Under the Ninth Circuit's current holding, human resource professionals may warn an individual with a disability of the risks of continuing to work in a particular position, let the employee decide whether or not to stay, and then stand by idly while the individual is harmed. The individual is not the only party at peril. Allowing an individual to insist on working to the detriment of his or her health and safety, in spite of reliable medical evidence of a hazard to the individual, places the individual and the organization at undue risk. The ADA does not grant individuals with disabilities greater rights than other employees to determine their own fate, subject themselves to inevitable harm, or unilaterally subject their unwilling organization to workers' compensation and, perhaps, Occupational Safety and Health Act liability for allowing them to imperil their health and safety as a result of their work. The implications of the Ninth Circuit's holding, however, "whipsaw" employers in exactly this manner.

SHRM, therefore, urges this Court to accept individual and collective safety as a job-related qualification standard, consistent with business necessity, within the meaning of the ADA, and to adopt a practical rule allowing employers to comply with its obligations to protect individuals' safety without incurring ADA liability. As such, the Ninth Circuit's holding -- that the ADA does not permit employers to exclude employees with disabilities on the basis of a threat to their individual safety and health -- should be reversed.

ARGUMENT

A. The ADA Does Not Excuse Individuals With Disabilities From Safety And Health Standards Legitimately Imposed On All Employees

The Congressional Findings and Purpose section of the ADA declares that "the Nation's goals regarding individuals with disabilities are to assure *equality* of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8) (emphasis supplied). Under Title I of the ADA, on employment, the ADA states that "no covered entity shall 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." 42 U.S.C. § 12112(a) (emphasis supplied). For all employees, returning home from work, safe and uninjured, is far and away one of the most significant --yet often taken for granted -- privileges, terms and conditions of employment. Treating all employees alike in connection with guarding individual safety is consistent with the goals and limitations of the ADA.

Unless an employer is discriminating against an entire group of employees, as in the case of *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), employers have every right, and indeed responsibility, to protect employees from harm to their health or safety. No law stops an employer from removing a particular employee without a disability from a work environment that poses a danger to that individual's safety or health. For example, in *Equal Employment Opportunity Commission v. Woodbridge Corp.*, 263 F.3d 812 (8th Cir. 2001), the court held that applicants not found to have "disabilities" within the meaning of ADA could be excluded from specific manufacturing line work because test results showed that those individuals were susceptible to repetitive

motion injuries from the job.[2] The employer subjected all applicants and employees to these standards. *Id.* at 815. In upholding the legality of this practice and affirming summary judgment for the employer, the Eighth Circuit explained:

> While it may be desirable for a test to be designed and administered that could determine an activity that may prove harmful, that is not the issue before us. There are groups, to include some governmental agencies, who would state that a worthwhile goal for an employer would be to develop protocols that would limit injuries in the workplace and to include tests designed to determine those who may be predisposed to such injuries.

Id. at 815.

Following the reasoning in *Woodbridge*, an individual may have a physical impairment that does not rise to the level of a disability because the impairment may not substantially limit a major life activity of the individual. Yet, the impairment may create a greater susceptibility to injury or health hazards. Examples of this may include the steelworker with vertigo, or the beekeeper with a severe allergy to bee stings raised in Judge Trott's dissent in *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1074 (9th Cir. 2000) (Trott, J., dissenting). Even without an actual disability, an individual's make-up, strength, skill level, or other non-disabling limitations may render that individual particularly susceptible to harm under certain workplace conditions. Assume further that no one regards this individual as substantially limited in a major life activity. As long as the individual is not treated more harshly on the basis of their age, gender, or other protected characteristic, there is no legal impediment to their employer removing them from a job in which they are endangering themselves. In other words, as long as the

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[2] The court held that these individuals did not have disabilities, as they were not "substantially limited" in the major life activity of working a broad range of jobs, and that the employer did not regard these individuals as being substantially limited.

employer is not making a sweeping generalization regarding the individual's age or gender, and using stereotypes or double-standards as the basis for determining that the individual is imperiling their own health or safety, then making the pragmatic decision not to allow the individual to harm himself on the job is lawful.

Persons susceptible to harm in a work environment, whether they have a disability or not, should be treated equally. Employers should not be forced to acquiesce to an employee's impending injury or unfortunate death, even if that is what the employee desires. For example, an employer should have the right to disarm a security guard exhibiting suicidal tendencies. Yet, under the Ninth Circuit's opinion, an individual protected under the ADA must be treated differently. The individual with a disability can, at best, be warned by the employer of the potential risks of working in their particular job or environment. The employer, however, is saddled with whatever decision – even a self-destructive decision – the employee with a disability makes. This paradox awards the individual with a disability greater rights of self-determination than others enjoy in the workplace. This transforms the ADA, as the Seventh Circuit held in *Equal Employment Opportunity Commission v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (a reasonable accommodation case), into a "mandatory preference" statute at odds with ADA's nondiscriminatory and mainsteaming aims. *Id.* at 1028. The Seventh Circuit decried the practice of "giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace. . . ." *Id.* at 1029. Similarly, requiring an individual with a disability to remain in a dangerous job – when an employee without a disability but also susceptible to harm would have been removed – accords that

individual a preference solely on the basis of his or her protected status. Again, this odd type of "preference" is not mandated under the ADA.

B. Allowing Individuals To Decide To Work At Their Peril Places Employers In An Untenable Position

Respondent also argued, at the writ of certiorari stage, that the individual should be free to decide whether or not to risk personal harm in working a particular job, and that the individual should not be restricted by the employer's "paternalistic concerns."[3] Although Respondent is correct in contending that the ADA protects individuals with disabilities from paternalism, based on myths and stereotypes and acting to deny employment opportunities for which they are qualified, removing individuals from objective rather than imagined hazards is not the type of "paternalism" the ADA was intended to bar.[4] There is a manifest difference between (1) excluding an individual with a degenerative illness from employment based on a belief that the individual may become unproductive at a later time, or based on paternalistic stereotypes that a person with a disability could get sick or hurt on the job, and (2) excluding an individual from employment based on an objective, reliable and individualized assessment of the person's susceptibilities to harm arising from performance of the particular job they hold or desire.

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[3] *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari, at 9, 25. Respondent looked to *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991) ("*Johnson Controls*") for this proposition. *Johnson Controls*, however, does not hold that an employer cannot bar an employee from a job based on an individualized determination on the objective risks to that particular person. Rather, *Johnson Controls* speaks to group-based (gender-based) classifications imposing different exclusionary safety standards on women from the standards applied to men. *Id.* at 197-99.

[4] The Congressional Findings and Purpose to the ADA decries "overprotective rules and policies" (42 U.S.C. § 12101(a)(5)) and other forms of discrimination "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals. . . ." 42 U.S.C. § 12101(a)(7).

This is more than simply a case of personal self-determination. A devil-may-care employee, wishing to work a particular job in spite of real risks, has an unwilling partner. Ultimately, employers are legally and financially responsible for an employee's safety.

1. The Ninth Circuit's Decision Creates Havoc With State Workers' Compensation And Tort Schemes.

The Ninth Circuit's opinion places employers in the untenable position of choosing between strict ADA compliance and incurring new liabilities under various state and federal workers' compensation and tort liability schemes. Under the reasoning of the Ninth Circuit in *Echazabal*, American employers will be exposed to additional liability in two anticipated ways. First, employers will be liable to an individual with a disability insisting on staying in a job he or she can perform day to day, but which subjects the individual to a very real risk of further injury. Additionally, employers may be exposed to general tort liability for the subsequent harms befalling workers with disabilities, notwithstanding the general rule of exclusiveness of most workers' compensation statutes. Consequently, the Ninth Circuit opinion also forces the employer into another Hobson's Choice from which the employer cannot escape without incurring added and often hidden liability.

Workers' compensation is a uniquely American mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, with premiums passed on in the cost of the product. See Larson, A and Larson, L, LARSON'S WORKERS' COMPENSATION LAW Volume 1, Chapter 1, Scope (Matthew Bender & Co.). Workers' compensation is fundamentally different from strict tort liability in its basic test

for liability, which is work connection rather than fault. *Id.* Workers' compensation is further fundamentally different from strict tort liability in a number of other ways, including (1) its underlying philosophy of social protection rather than righting a wrong, (2) the nature of the injuries compensated, (3) the elements of damage, and (4) the defenses available. *Id.* The American workers' compensation system is also conceptually distinguishable from public social insurance in a number of ways, most significantly, for the purposes of this discussion, in its mechanism of unilateral employer liability. *Id.* The Ninth Circuit's opinion in *Echazabal,* has the unrealized but realistic consequence of blurring beyond recognition these distinctions, thereby rendering the system unpredictable, and of transforming the nation's various workers' compensation schemes into employer-funded social insurance programs. It does so by requiring employers to assume the liability for all subsequent injuries to employees with disabilities insisting on working a particular job despite real and heightened risks of harm.

In relevant part, the typical workers' compensation act has the following features:

> (a) The basic operating principle is that an employee is automatically entitled to certain benefits whenever the employee suffers a 'personal injury by accident arising out of and in the course of employment' or an occupational disease; (b) negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his or her rights and in the sense that the employer's complete freedom from fault does not lessen its liability; ... (e) the employee and his or her dependents, in exchange for these modest but assured benefits, gives up their common-law right to sue the employer for damages for any injury covered by the act;.

Id. at §1.01.[5]

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[5] The sum total of these ingredients is a uniquely American system which is neither a branch of tort law nor social insurance of the British or continental type, but which has some of the characteristics of each. *Id.* at §1.02.

Compensation under such schemes is often contrasted with tort liability. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and for the most part, fault, are not an issue and cannot affect the result." *Id.* at §1.03.

Of the two components of the almost-universal coverage formula under American workers' compensation schemes—"arising out of" and "in the course of" employment—the "arising out of" test is primarily concerned with causal connection. Most courts in the past interpreted "arising out of employment" to require a showing that the injury was caused by an increased risk to which the claimant, as distinct from the general public, was subjected by his or her employment. *Id.* at Chapter 3, Scope. A substantial number now have modified this to accept a showing merely that the risk, even if common to the public, was actually of this employment. *Id.* An important and growing group of jurisdictions have adopted the positional-risk test, under which an injury is compensable if it would not have happened but for the fact that the condition or obligations of the employment put claimant in the position where he or she was injured. *Id.* Under the Ninth Circuit decision, however, American employers will now be liable for any subsequent injury to workers with disabilities as a result of the decision's instruction to disregard any risk of safety to the worker protected under the ADA.

A troublesome aspect of the workers' compensation scheme is the mixed risk phenomenon. This includes a personal cause and an employment-related cause combined to produce the harm at issue. "The most common example is that of a person with a weak heart who dies because of strain occasioned by the employment. In its broadest theoretical outline, the workers' compensation rule is simple: The law does not weigh

the relative importance of the two causes, nor does it look for primary and secondary causes; it merely inquires whether the employment was a contributing factor. If it was, the concurrence of the personal cause will not defeat compensability." *Id.* at § 4.04. Consequently, the social cost of subsequent injuries suffered by any individual with a disability remaining at risk under the Ninth Circuit's holding will become another cost of doing business in America. American employers become the insurer of cash-wage benefits and medical care to those victims of subsequent work-connected injuries who are now free to ignore without risk their personal limitations and susceptibilities.

Ordinarily, injuries arising out of the risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury. *Id.* Volume 6, Chapter 9, Scope. When the employee has a preexisting physical weakness or disease, this employment contribution may be found either in placing the employee in a position which aggravates the effects due to an idiopathic condition or in precipitating the effects of the condition by strain or trauma. *Id.*

> 'Aggravating' the preexisting condition is exemplified by cancer cases in which the malignant growth is ruptured or spread by occupational exertions, or in which its development is hastened by strains, impact, inhalations, or accidents in the course of employment. The preexisting condition may be any kind of weakness. It may be a syphilitic condition, as in the case in which injuries from an automobile accident combine with a syphilitic condition to produce insanity. It may be mental or nervous in character, as in the case of a worker who has recovered from a paranoid schizophrenia, but suffered a recurrence as a result of a fall. It may be a back condition, or a weakened limb, as in the case of a worker whose arm had previously been broken and had healed poorly, so that it would be injured by a mishap that probably would not have hurt a normal arm. Related examples included the kind of situation in which a claimant suffers a minor cut or blow, but because of diseased blood or other internal condition undergoes a prolonged or serious disability. Here too are many mentioned allergies which combine, for example, with a particular kind of soap associated with the work, to produce

> an injury which other employees are not subject to, but which the claimant would not have encountered in this degree but for the employment. A common category of employment 'combining with' the internal weakness to produce disability is that of a hernia. In the absence of a restrictive statutory provision, it has been held, for example that a hernia suffered while the employee was bending over to untie his shoes while changing his clothes before starting work was compensable, even though he had two prior hernia operations in this same place.

Id. at § 9.02[3].[6] There can be little doubt that employers become the unwilling insurers of these subsequent injuries as a result of the decision below.

Another concept of workers' compensation jurisprudence compromised by the decision of the Ninth Circuit is that of exclusivity. As usually contemplated, the workers' compensation remedy is considered to be exclusive of all other legal remedies by the employee or the employee's dependents against the employer and insurance carrier for the same injury, if the injury falls within the coverage formula of the workers'

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[6] Various cases have resulted in benefit awards for aggravating a pre-existing condition, such as arthritis, back ailments, cancer, circulatory disorders, diabetes, or obesity, resulting from strains, impact, exposures, or accidents in the course of employment. *See e.g. Potenza v. United Terminals, Inc.*, 524 F.2d 1136 (2d Cir. 1975); *Hawkins v. Green Associated*, 559 P.2d 118 (Alaska 1977); *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Little v. Delta Rice Mill, Inc.*, 11 Ark. App. 114, 667 S.W.2d 373 (1984); *McAllister v. Workmen's Compensation Appeals Board*, 445 P.2d 313, 71 Cal. Rptr. 697 (Sup. Ct. 1968); *Urban v. Morris Drywall Spray*, 595 So. 2d 60 (Fla. Dist. Ct. App. 1992); *Fincannon v. Eastern Airlines*, 611 So. 2d 28 (Fla. Dist. Ct. App. 1992); *Concrete Structures of the Midwest v. Industrial Commission*, 351 Ill. App. 3d 596, 734 N.E.2d 970 (2000); *Parks v. Sheller-Globe Corp.*, 177 Ind. App. 498, 380 N.E.2d 110 (1978); *Fiffie v. Borden, Inc.*, 618 So. 2d 1199 Ct. App.), *review denied*, 624 So. 2d 1235 (La. 1993); *Achord v. H.E. Weise Constr. Co.*, 422 So. 2d 1248 (La. Ct. App. 1982); *Hopp v. Grist Mill*, 499 N.W.2d 812 (Minn. 1993); *Miller Transporters, Inc. v. Guthrie*, 554 So. 2d 917 (Miss. 1989); *Normile v. Thomas P. Spagnoletti Constr. Co.*, 27 A.D.2d 169, 277 N.Y.S.2d 155 (1967); *U-Haul of Oregon v. Burtis*, 120 Or. App. 353, 852 P.2d 897, *review denied*, 318 Or. 26, 862 P.2d 1306 (1993); *Gallardo v. Workers' Compensation Commissioner*, 373 S.E.2d 177 (W.Va. 1988).

compensation act. *Id.*, Volume 6, Chapter 100, Scope.[7] "This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large jury verdicts." *Id.* The Ninth Circuit decision casts doubt on the continuing vitality of the exclusivity doctrine.

Furthermore, in an employee's action to recover tort damages for a work related injury, the employer bears the burden of proving the affirmative defense that the plaintiff was an employee entitled only to workers' compensation. *Id.* at § 100.01[2] (citations omitted). "The controlling fact in establishing exclusiveness is the relationship of the parties at the time of occurrence of the injury." *Id.* at § 100.01[3]. The operative fact in establishing exclusiveness is that of actual coverage, not of election to claim compensation in the particular case. *Id.* at § 100.01[4]. The exclusiveness rule is designed to relieve the employer not only of common-law tort liability, but also of statutory liability under all state and federal statutes as well as of liability in contract and in admiralty, for an injury covered by the compensation act. *Id.* at § 100.03[1] (citations omitted). A distinction is drawn, however, between an injury which does not come within the fundamental coverage provisions of a workers' compensation act, and an injury which is in itself covered but for which, under the facts of the particular case, no compensation is payable. *Id.* at § 100.04. In the former class, are the cases in which the employment relation did not exist, or in which plaintiff or the plaintiff's employer was within an excluded category, or in which there was no "injury by accident arising out of

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[7] "Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or the employee's dependents against the employer and insurance carrier." *Id.* at § 100.01[1].

or in the course of employment." *Id.* "Before occupational diseases were specifically made compensable, and in jurisdictions where they are still non-compensable on the ground that they do not constitute accidental injury or are not among listed diseases, it had been the usual holding that the existence of compensation legislation did not bar any rights to sue at common-law, or under factory or safeplace acts, that might otherwise exist. *Id.* This notion was previously "clearly correct, since if compensation is unavailable for such diseases, it can only be because they do not in the particular jurisdiction satisfy the basic coverage clause, especially the 'accidents' requirement, and are, therefore, in the same position as injuries to non-employees or injuries not arising in the course of employment." *Id.*

Examples in which tort actions have been allowed notwithstanding the exclusivity doctrine include the aggravation of a non-occupational disease. *Id.* For example, in *Hotaling v. General Elec. Co.*, 12 N.Y.2d 310, 239 N.Y.S.2d 344, 189 N.E.2d 698 (1963), an employee's action against the employer for common-law negligence and violation of labor laws was permitted where a disability caused by aggravation of a non-occupational disease was not compensable under the New York workers' compensation act. To the same effect see, *Errand v. Cascade Steel Rolling Mills,* 320 Or. 509, 888 P.2d 544 (1994), where a plaintiff with a preexisting sinus condition that predisposed him to airway irritation was allowed to maintain a tort action against his employer as a result of the airway irrigation he experienced following his inhalation of substances in the workplace. In light of the Ninth Circuit's decision, American employers may become increasingly subject to tort liability in connection with the employment of workers susceptible to particular types of harm yet protected under ADA and the Ninth Circuit's

decision. This unintended consequence of the Ninth Circuit's decision cannot be ignored or overstated.

2. The Ninth Circuit's Decision Places Employers At Risk Under The Occupational Safety And Health Act.

In addition to workers' compensation or tort liability, the general duty clause of the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 654(a), and parallel state laws (*e.g.* Cal. Lab. Code § 6402) create a non-waivable obligation upon employers to furnish a workplace free from recognized hazards that pose the risk of death or serious injury to employees. Employers may be held liable under OSHA's general duty clause as soon as the employer has knowledge of the hazard and when such hazards are "feasibly preventable." *E.g. Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976). The Occupational Safety and Health Administration is also able to (and often does) issue citations for safety violations covered under this general duty clause, even though specific OSHA standards are not implicated. 29 U.S.C. § 654(a)(1); *International Union v. General Dynamics Land Systems Div.*, 815 F.2d 1570 (D.C. Cir. 1987) ("general duty" violation may occur even if employer complies with requirements of a specific OSHA standard, if compliance was inadequate to eliminate a known hazard). Compliance with safety standards is, and should be, recognized as a defense against discrimination charges under the ADA. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 570 (1999); 29 C.F.R. § 1630.15(e). The Ninth Circuit's holding, however, conceivably denies employers this defense when individuals protected under the ADA are involved.

Respondent has labeled the general duty clause of the Occupational Safety and Health Act as a "simple expedient" for excluding employees with disabilities. *See* Brief

in Opposition to Petition for a Writ of Certiorari, at 26. This argument, however, overlooks ADA's reasonable accommodation requirement, which mandates that employers undertake, upon request, measures to enable an otherwise qualified individual with a disability to perform the essential functions of their job and satisfy qualification standards. 42 U.S.C. §§ 12112(b)(5)(A), 12113(a); *see also* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under ADA (March 1, 1999), question 11 (envisions reasonable accommodations to eliminate a safety threat; rejection of such an accommodation may render individual not "qualified"). This obligation could include taking additional but effective safety precautions or using different equipment to enable the individual to be no more susceptible to harm or injuries than others. A reasonable accommodation may also include reassignment to a different, vacant position for which the individual is qualified and in which the individual does not face the same, real levels of exposure to harm or injury.[8] If, however, a reasonable accommodation cannot sufficiently minimize a very real and substantial risk of harm to the individual, then, as described above, the employer remains in a very precarious position by keeping an employee in a position endangering his or her safety or health.

C. The Ability To Work Safely Is An Inherent Qualification Standard That Is Job-Related And Consistent With Business Necessity

The Congressional Statement of Findings and Declaration of Purpose and Policy behind the Occupational Safety and Health Act recognizes that:

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[8] This could include reassigning an individual with a back injury rising to the level of a disability to a less physically demanding vacant position – so long as the accommodation is otherwise "reasonable." This realistic factual situation is currently before this Court in *US Airways, Inc. v. Barnett,* No. 00-1250.

> Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

29 U.S.C. § 651(a).

Congress further declared that "employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions." 29 U.S.C. § 651(b)(2). Through the Occupational Safety and Health Act, Congress, therefore, found that protecting individual employee's safety is a legitimate employer concern and even an obligation, or a "business necessity." Safety, as much as productivity, is a critical goal of employers. As such, employers must have a right under the ADA to include guarding safety (of the individual employee and employees collectively) as a subset among many bona fide job qualifications.

Other courts of appeals, along with the Equal Employment Opportunity Commission, have accepted this reality of the workplace. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998); *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599, 600, 603 (7th Cir. 1999); *Equal Employment Opportunity Commission v. Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000); *Reed v. Heil Co.*, 206 F.3d 1055, 1063 (11th Cir. 2000); *Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir. 2000); *Mathews v. The Denver Post*, 263 F.3d 1164, 1168 (10th Cir. 2001); *see also* 29 C.F.R. § 1630.2(q) and (r).

Excluding an individual from a job that, based on an individualized, reliable assessment, endangers his or her health or safety, therefore, should not be barred by the

ADA. Such an individual is not "qualified" within the meaning of 42 U.S.C. § 12111(8). The ADA provides, in two parts of the statute, that employers may apply qualification standards "shown to be job-related for the position in question and . . . consistent with business necessity." 42 U.S.C. § 12112(b)(6);[9] 42 U.S.C. § 12113(a). The first section excludes application of appropriate qualification standards from the very realm of unlawful discrimination. In addition, §12113, on available defenses, explains that:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(a).

The Defenses section of Title I of ADA goes on to provide an example of qualification standards, explaining that "[t]he term 'qualification standards' *may* include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b) (emphasis added). The use of the term "may" in this example, along with the language in §§ 12112(b)(6) and 12113(a), show that preserving the safety and health of others is

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[9] Section 12112(b)(6) explains that one form of employment discrimination under ADA includes:

> [U]sing qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities *unless* the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6) (emphasis added).

by no means the exclusive example of a qualification standard that is job-related and consistent with business necessity. Otherwise, the flexible terms "job-related and consistent with business necessity" would not have been necessary either in § 12112(b)(6) or again in § 12113(a).

This Court accepted the principle that insisting on certain physical attributes needed to satisfy safety standards falls within an employer's rights. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. at 567-68. The Court appeared willing to assume that this entails consideration of the individual's capabilities, with or without a reasonable accommodation, against an otherwise justifiable job qualification, but left open the issue of whether employers must bear a higher burden, as suggested by the Government, in justifying safety-related qualification standards. *Id.* at 568-69 and n.15, and 578 (Thomas, J., concurring).

The EEOC also accepts, in its interpretations of Title I of the ADA, the general principle that employers retain the right to exclude employees with disabilities if performing their job threatens their safety and health. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari, at 3, 8, 11, 15. The agency, however, advocates placing a harder burden on employers relying on individual safety and health considerations for their actions. The EEOC takes the approach that removing an individual whose safety is jeopardized can only be justified through the affirmative defense of "direct threat" to safety and health. *See* 29 C.F.R. §§ 1630.2(r) and 1630.15(b) and (c). This approach is at odds with other courts of appeal and with Justice Thomas' concurring opinion in *Kirkingburg*. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. at 578 (ADA plaintiff bears initial

burden of showing that he or she is "qualified," which includes meeting safety standards) (Thomas, J., concurring); *Equal Employment Opportunity Commission v. Exxon Corp.*, 203 F.3d at 875; *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d at 602. Relegating employer actions motivated by the need to protect the individual's safety exclusively to the "direct threat" affirmative defense also places an uneasy onus on employers. The EEOC's approach, while at least recognizing the practical importance of protecting the individual's safety, may produce harsh effects on an employer acting in good faith but which ultimately cannot prove, by a preponderance of evidence, a "direct threat." If an employer relied on sound medical advice that later proved to be incorrect, then that employer could conceivably be liable for damages and even punitive damages after relying in good faith on a reasonably grounded medical judgment.[10]

Even if preserving the individual's personal safety was "simply" a qualification standard under § 12112(b)(6), human resource professionals would already have to think twice to ensure that the safety-related qualification standards, and the individual's failure to satisfy them, were indeed "job-related and consistent with business necessity" and not based on discriminatory stereotypes. This demands an individualized assessment in the same manner as a determination that an individual can or cannot perform other essential, daily functions of a job. Under an affirmative defense of "direct threat," however, the employer may ultimately have to prove that it is right, rather than show that it acted in good faith on reliable,

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[10] Employers are only insulated from punitive damages available under 42 U.S.C. § 1981a(b)(3) when their good faith conduct comes in the context of the reasonable accommodations process. 42 U.S.C. § 1981a(a)(3).

credible medical information. The EEOC's approach stands to make employers reluctant to exclude an individual with a disability, as opposed to any other employee susceptible to personal injury, based on concerns over the individual's safety.

The ADA's language describing qualification standards that are "job-related and consistent with business necessity," along with the other language of the ADA, guards against the phenomenon legitimately feared by Respondent and the Ninth Circuit: arbitrary and exclusionary "qualification standards" based on stereotypic assumptions over the ability or inability of an individual with a disability to perform a job and perform the job safely.[11] Rather, the ADA mandates an individualized assessment, based on legitimate job qualification and safety criteria measured against good faith, reliable evaluations of the individual's susceptibility to harm stemming from the performance of the particular job.

SHRM, therefore, urges this Court to adopt a common-sense standard, recognizing both employers' needs to guard the safety of all employees as well as the legitimate interest of individuals with disabilities fearing unwarranted exclusion from employment "for their own good." Recognizing the promotion of collective and individual safety among qualification standards that are "job-related and consistent with

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[11] *See* 42 U.S.C. § 12101(a)(7) (stating that ADA is intended to redress "restrictions and limitations" on persons with disabilities "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals...."). *See also* S. Rep. No. 101-116, at 37 (1989); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), 1990 U.S.C.C.A.N. at 353 (explaining that ADA guards against employment actions stemming from "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities").

business necessity" places these interests in proper balance, and reconciles the goals and purposes of the Occupational Safety and Health Act with the goals and purposes of the ADA. In contrast, allowing individuals protected under the ADA to make the ultimate determination as to whether they will continue in a job posing a danger to their health or safety – as held by the Ninth Circuit and urged by Respondent – provides employees with disabilities rights superior to the rights of other employees. It also elevates the rights of individuals protected under the ADA over employers' legitimate interests in adhering to qualification standards generally and the subset of safety standards. Empowering any individual in this manner is inconsistent with the goals and requirements of the ADA and other workplace laws.

CONCLUSION

The Court should allow employers to protect their employees and themselves by adhering to safety-related qualification standards that are job-related and consistent with business necessity, and which include protection of each individual employee's personal safety at work. This approach reconciles the goals of the ADA with other laws and with the practical realities of the workplace. SHRM therefore urges the Court to reverse the Ninth Circuit, and to allow employers to make good-faith, objective assessments of threats to any individual's safety or health in applying qualification standards.

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HOW THE U.S. SUPREME COURT DEFINES THE AMERICANS WITH DISABILITIES ACT

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JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

AMICUS CURIAE (FRIEND OF THE COURT) BRIEFS IN SUPPORT OF MARIO ECHAZABAL

◆ **Twenty-two national organizations*** represent people with various types of disability. As such, they "are intimately familiar with the role that paternalism has played in the lives of people with disabilities." They express concern that affirmation of "Chevron's protectionist arguments" would support limitation in other contexts of "the ability of people with disabilities to be full, participating members of their communities, contrary to the primary goal of the ADA." In addition to supporting the respondent's arguments that "threat to self" does not justify exclusion, the brief argues that to lower the standard for evaluating any medical judgments related to an employee's qualifications to perform a job, as proposed by Chevron and its amici, "would frustrate the purposes of the ADA" by giving an employer's doctors "virtually unreviewable discretion to exclude individuals with disabilities from the workplace." A link to the brief is at www.bazelon.org/echazabal.html

* The 22 organizations are: American Association of People with Disabilities, AARP, American Council of the Blind, American Diabetes Association, ADAPT, Brain Injury Association of America, Disability Rights Education and Defense Fund, Epilepsy Foundation, HalfthePlanet Foundation, Bazelon Center for Mental Health Law, Legal Aid Society—Employment Law Center, National Alliance for the Mentally Ill, National Association of the Deaf Law Center, National Association of Developmental Disabilities Councils, National Association of Protection and Advocacy Systems, National Association of Rights Protection and Advocacy, National Council on Independent Living, National Mental Health Association, National Mental Health Consumers' Self-Help Clearinghouse, Polio Society, The Arc of the United States and United Cerebral Palsy Association.

◆ **The National Council on Disability** writes on the basis of its deep understanding of the ADA's origins, purpose and implementation. NCD is an independent federal agency whose members are appointed by the President and confirmed by the Senate. It was instrumental in creating the legislative record that Congress considered in enacting the ADA and has monitored its implementation over two decades. Reversing the circuit court's ruling, NCD contends, would endorse "the assumption that people with disabilities are not competent to make informed, wise, or safe life choices," which is "the most long-standing and insidious aspect" of the discrimination that is banned by the ADA. In passing the ADA, the brief points out, Congress replaced the "medical model" focusing on an individual's infirmity with the civil rights model it had applied to African Americans and women. Under the ADA, "health and safety concerns are reviewed in the context of employer defenses" (especially as regards danger to other employees) and "are *not* an appropriate part of the analysis of whether a person is a 'qualified individual with a disability.'" Brief at www.its.uiowa.edu/law/press/2002/Echazabal_amicus.htm

◆ **The American Civil Liberties Union** brief reviews the history of paternalism as exclusionary, illustrated by historic cases supporting

[more]

school segregation as benefiting African American students and restricting women's access to the workplace "to protect them from the rigors of manual labor." Rejecting such paternalistic rules in recent decades, courts "have increasingly recognized that a central part of implementing civil rights protections is ensuring that individuals can decide whether they themselves will take on a given social or physical risk, rather than having such decisions made for them based on their race, sex, disability or other protected criteria." Further, Chevron's argument that "it has not discriminated against Echazabal because the decision was not based on stereotype" is irrelevant, the ACLU writes, because, as the Supreme Court has held in other cases, "civil rights laws prohibit all discrimination, not just that based on stereotypes." Brief at www.aclu.org/court/index.html

◆ **Six public health-policy organizations*** offer expertise in workplace safety standards, especially regarding requirements of individuals with Hepatitis C. They argue that exclusion of a currently qualified individual with a disability on the basis of threat to self "does nothing to advance worker safety or public health policy." To the contrary, allowing such exclusion "undercuts employer incentives to improve workplace safety for *all* employees, and is at odds with the ADA and federal and state [Occupational Health and Safety Administration] guidelines." The brief cites expert testimony below and federal guidelines establishing that "if chemicals in Chevron's refinery pose a threat to Echazabal, they pose a threat to all workers." Accordingly, "protection of Echazabal and other workers is accomplished best through reduction of workplace hazards and use of protective equipment, not through their exclusion from the workplace." In addition, Chevron's reliance on its own doctors to evaluate the risk to Echazabal is "far afield of what the ADA and the courts interpreting it have required." Brief at www.bazelon.org/echazabal.html.

* The six organizations are American Public Health Association, American Association for the Study of Liver Disease, Hepatitis C Action and Advocacy Coalition, Hepatitis C Association, Hepatitis C Outreach Project, and Lambda Legal Defense and Education Fund, Inc.

◆ **The National Employment Lawyers Association** reminds the court that Echazabal had already demonstrated that he is "a qualified individual" because he had performed the same type of work in the same setting for more than two decades. Under the ADA, the NELA brief argues, the burden of proof of "direct threat" is on the employer; it cannot be shifted to the employee to prove that he is not a direct threat to his own safety in order to qualify for the position in question. Addressing the underlying reason for Chevron's exclusion of Mario Echazabal, the brief points to a federal Equal Employment Opportunity Commission guidance stating that under the ADA "an employer may not refuse to hire an individual with a disability because it assumes—correctly or incorrectly— that the individual poses an increased risk of occupational injuries and workers' compensation costs." The brief also challenges Chevron's asserted fears about escalating workers compensation costs and criminal sanctions for putting workers with disabilities at risk. It explains the role of "second injury" funds in limiting employers' liability when a worker's disability is exacerbated by a work-related injury. It also reviews the types of "morally repugnant conduct" that can lead to criminal sanctions against employers, noting that these are "a far cry from a situation where an employer discloses any potential health risks" and then "permits the employee to choose whether or not to accept them." Brief at www.bazelon.org/echazabal.org.

JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

Chevron v. Echazabal

On February 27, the United States Supreme Court will hear the case of *Chevron v. Echazabal*. The court will decide whether the Americans with Disabilities Act permits an employer to exclude a person with a disability from employment because that person poses a direct threat to his or her own health or safety.

Mario Echazabal had worked at a Chevron oil refinery for 17 years, primarily at its coker unit, as an employee of various contractors. In 1992 he applied for a job working directly for Chevron at the coker unit. The company offered him the job contingent on the results of a physical exam. The company doctor, however, declared Echazabal unfit for the job because blood tests showed that toxic substances in the refinery might pose a risk to his liver. Nonetheless, Echazabal was permitted to continue working in the coker unit as employee of Chevron's contractor. He sought treatment and was ultimately diagnosed with Hepatitis C. In 1995 he again applied for a job at Chevron, and again was turned down on the basis of the company doctor's conclusion that exposure to toxins at the unit "could be fatal." This time the company directed the contractor who employed Echazabal to take him out of that position, which it did in 1996. In 1997 he filed suit, charging that Chevron's actions violated the ADA. He presented testimony by physicians expert in liver disease (which Chevron's doctors were not) that working at the factory would not, in fact, put him at any greater risk than any other employee.

The district court refused to consider the experts' testimony, however, because it was not presented prior to Echazabal's firing. He appealed, and the Ninth Circuit Court of Appeals ruled that an employer may not exclude individuals with disabilities based on threats to their own health or safety. Chevron then asked the Supreme Court to reverse that ruling.

This case is of great concern to individuals with disabilities. Congress made clear in the ADA that, while posing "direct threat to the health or safety of other individuals" may disqualify a person with a disability from employment, an employer may not exclude a worker based on possible risks to the worker's *own* health or safety. The decision whether to maintain employment that may pose such risks is one that the worker, not the employer, must make. Moreover, permitting employers to exclude workers based on concerns about the workers' own health or safety would result in exclusions of individuals with disabilities based on paternalistic impulses and unfounded assumptions about their health and safety.

Amicus Briefs

The Bazelon Center played a central role in organizing and coordinating the following amicus (friend of the court) briefs to the Supreme Court on behalf of Mario Echazabal.

The brief of 22 national organizations* (PDF file) representing people with various types of disability. As such, they "are intimately familiar with the role that paternalism has played in the lives of people with disabilities." They express concern that affirmation of "Chevron's protectionist arguments" would support limitation in other contexts of "the ability of people with disabilities to be full, participating members of their communities, contrary to the primary goal of the ADA." In addition to supporting the respondent's arguments that "threat to self" does not justify exclusion, the brief argues that to lower the standard for evaluating any medical judgments related to an employee's qualifications to perform a job, as proposed by Chevron and its amici, "would frustrate the purposes of the ADA" by giving an employer's doctors "virtually unreviewable discretion to exclude individuals with disabilities from the workplace."

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The brief of the National Council on Disability on the basis of NCD's deep understanding of the ADA's origins, purpose and implementation. NCD is an independent federal agency whose members are appointed by the President and confirmed by the Senate. It was instrumental in creating the legislative record that Congress considered in enacting the ADA and has monitored its implementation over two decades. Reversing the circuit court's ruling, NCD contends, would endorse "the assumption that people with disabilities are not competent to make informed, wise, or safe life choices," which is "the most long-standing and insidious aspect" of the discrimination that is banned by the ADA. In passing the ADA, the brief points out, Congress replaced the "medical model" focusing on an individual's infirmity with the civil rights model it had applied to African Americans and women. Under the ADA, "health and safety concerns are reviewed in the context of employer defenses" (especially as regards danger to other employees) and "are *not* an appropriate part of the analysis of whether a person is a 'qualified individual with a disability.'"

The American Civil Liberties Union's brief reviews the history of paternalism as exclusionary, illustrated by historic cases supporting school segregation as benefiting African American students and restricting women's access to the workplace "to protect them from the rigors of manual labor." Rejecting such paternalistic rules in recent decades, courts "have increasingly recognized that a central part of implementing civil rights protections is ensuring that individuals can decide whether they themselves will take on a given social or physical risk, rather than having such decisions made for them based on their race, sex, disability or other protected criteria." Further, Chevron's argument that "it has not discriminated against Echazabal because the decision was not based on stereotype" is irrelevant, the ACLU writes, because, as the Supreme Court has held in other cases, "civil rights laws prohibit all discrimination, not just that based on stereotypes."

The brief by six public health-policy organizations* offer expertise in workplace safety standards, especially regarding requirements of individuals with Hepatitis C. They argue that exclusion of a currently qualified individual with a disability on the basis of threat to self "does nothing to advance worker safety or public health policy." To the contrary, allowing such exclusion "undercuts employer incentives to improve workplace safety for *all* employees, and is at odds with the ADA and federal

and state [Occupational Health and Safety Administration] guidelines." The brief cites expert testimony below and federal guidelines establishing that "if chemicals in Chevron's refinery pose a threat to Echazabal, they pose a threat to all workers." Accordingly, "protection of Echazabal and other workers is accomplished best through reduction of workplace hazards and use of protective equipment, not through their exclusion from the workplace." In addition, Chevron's reliance on its own doctors to evaluate the risk to Echazabal is "far afield of what the ADA and the courts interpreting it have required."

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The National Employment Lawyers Association brief reminds the court that Echazabal had already demonstrated that he is "a qualified individual" because he had performed the same type of work in the same setting for more than two decades. Under the ADA, the NELA brief argues, the burden of proof of "direct threat" is on the employer; it cannot be shifted to the employee to prove that he is not a direct threat to his own safety in order to qualify for the position in question. Addressing the underlying reason for Chevron's exclusion of Mario Echazabal, the brief points to a federal Equal Employment Opportunity Commission guidance stating that under the ADA "an employer may not refuse to hire an individual with a disability because it assumes--correctly or incorrectly--that the individual poses an increased risk of occupational injuries and workers' compensation costs." The brief also challenges Chevron's asserted fears about escalating workers compensation costs and criminal sanctions for putting workers with disabilities at risk. It explains the role of "second injury" funds in limiting employers' liability when a worker's disability is exacerbated by a work-related injury. It also reviews the types of "morally repugnant conduct" that can lead to criminal sanctions against employers, noting that these are "a far cry from a situation where an employer discloses any potential health risks" and then "permits the employee to choose whether or not to accept them."

Back to ADA

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No. 00-1406

In the Supreme Court of the United States

CHEVRON U.S.A., INC., PETITIONER

v.

MARIO ECHAZABAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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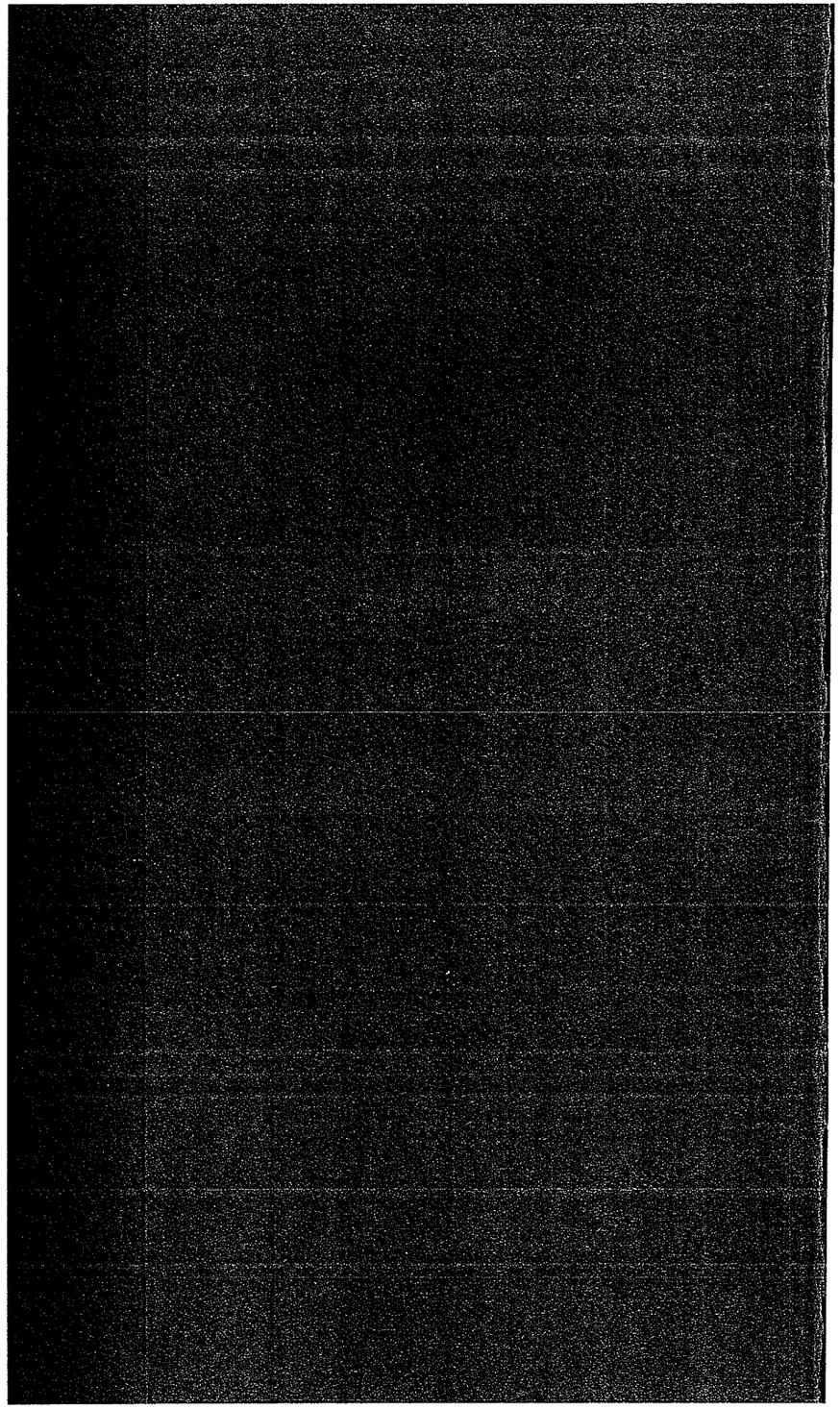

QUESTION PRESENTED

Whether the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, permits an employer to refuse to hire an individual because his performance of the job will, as a result of his disability, pose a direct threat to his own health or safety.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 00-1406

CHEVRON U.S.A., INC., PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, prohibits an employer from discriminating against a "qualified individual with a disability." 42 U.S.C. 12112(a). A "qualified individual with a disability" is a disabled individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. 12111(8). The ADA defines "discriminate" to include "using qualification standards, employment tests or other selection criteria that screen

; or tend to screen out an individual with a disability
a class of individuals with disabilities unless the
ndard, test or other selection criteria, as used by the
'ered entity, is shown to be job-related for the
ition in question and is consistent with business
essity." 42 U.S.C. 12112(b)(6).

A section entitled "Defenses" clarifies that "[i]t may
a defense to a charge of discrimination under [the
A] that an alleged application of qualification stan-
ds, tests, or selection criteria that screen out or tend
screen out or otherwise deny a job or benefit to an
ividual with a disability has been shown to be job-
ated and consistent with business necessity, and such
formance cannot be accomplished by reasonable
ommodation." 42 U.S.C. 12113(a). That section spe-
cally provides that the "term 'qualification stan-
ds' may include a requirement that an individual
ll not pose a direct threat to the health or safety of
er individuals in the workplace." 42 U.S.C. 12113(b).
e ADA defines "direct threat" as "a significant risk
the health or safety of others that cannot be
minated by reasonable accommodation." 42 U.S.C.
11(3).

The ADA requires the Equal Employment Opportu-
y Commission (EEOC) to issue regulations to carry
the provisions of Title I, 42 U.S.C. 12116, and the
OC, following public notice and comment, has issued
ulations pursuant to that mandate, 56 Fed. Reg.
726 (1991). Consistent with the statutory text, the
ulations provide that an employer may defend
inst a charge that a qualification standard improp-
y screens out disabled individuals by showing that
standard is "job-related and consistent with busi-
s necessity, and such performance cannot be accom-
hed with reasonable accommodation." 29 C.F.R.
1630.15(b)(1). In elaborating on that defense, the regulations state that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. 1630.15(b)(2). Accordingly, the regulations define direct threat to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r).

2. From 1972 until 1996, respondent Mario Echazabal worked at an oil refinery owned by petitioner Chevron U.S.A., Inc., as an employee of various maintenance contractors. In 1992, respondent applied to work directly for petitioner in the refinery's coker unit. Petitioner made respondent an offer of employment contingent upon his passing a physical examination. The examination revealed that respondent's liver was releasing certain enzymes at a higher than normal level. Based on that examination, petitioner concluded that respondent's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. Petitioner therefore rescinded the job offer. Pet. App. 2a.

After learning of the enzyme test results, respondent consulted several doctors. He was eventually diagnosed with asymptomatic, chronic active Hepatitis C, a viral infection of the liver. Pet. App. 3a, 35a. Respondent continued to work throughout the refinery (including in the coker unit) as an employee of petitioner's maintenance contractor. *Id.* at 2a.

In 1995, respondent again applied to petitioner for a position in the coker unit. Petitioner again made respondent an offer contingent on a physical examination. Pet. App. 3a. The examining physician concluded that

ther exposure to hepatotoxic chemicals and solvents
e those used in the coker unit would seriously en-
ıger respondent's health and, in certain circum-
ınces, could be fatal. *Id.* at 38a; C.A. App. 81-82.
titioner's medical director agreed that respondent
ıld not work in the coker unit without risk to his own
ılth. Pet. App. 38a. Based on the doctors' findings,
:itioner refused to hire respondent. *Id.* at 3a.
:itioner also instructed its maintenance contractor to
ıure that respondent was not exposed to solvents
l chemicals, and, as a result, respondent could no
ger work at the refinery. *Ibid.*

:. a. Respondent then brought this action in state
ırt alleging, among other things, that petitioner and
maintenance contractor had discriminated against
ı on the basis of a disability, in violation of the ADA.
:. App. 3a. Petitioner removed the case to the
ited States District Court for the Central District of
ifornia. *Id.* at 33a. The district court granted sum-
ry judgment in favor of petitioner on all of respon-
ıt's claims. *Id.* at 32a-57a. On the ADA claim, the
trict court found that petitioner's refusal to hire
pondent was lawful because, as a result of respon-
ıt's liver condition, his working in the refinery would
'e posed a direct threat to his health. *Id.* at 46a-52a.
ə district court stayed the proceedings against the
intenance contractor, and certified several issues for
ıeal, including the propriety of the grant of summary
gment on the ADA claim. *Id.* at 3a-4a.[1]

[1] In the district court, respondent presented medical evidence the court described as "raising a genuine issue that despite ated liver enzyme levels, [respondent]'s liver function was nal, and that the substances to which he would be exposed in position [in the coker unit] posed no greater a danger to pondent] than to other workers." Pet. App. 48a. The district court discounted that evidence, however, because the evaluations on which it was based were not performed until after the alleged discrimination. *Ibid.* The EEOC filed an amicus brief in the court of appeals in which the EEOC argued that the district court erred, but the court of appeals did not reach that issue, and it is not presented by the petition for a writ of certiorari.

b. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 1a-18a. The court first held that the ADA does not provide an affirmative defense permitting an employer "to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety." *Id.* at 5a. The court found the language of the ADA "dispositive" of that question. *Id.* at 6a. The court noted that the statutory language provides that an employer may impose, as a qualification standard, a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Ibid.* (quoting, in part, 42 U.S.C. 12113(b)). Relying on the maxim of statutory construction *expressio unius est exclusio alterius*, the court reasoned that, "by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the defense." *Id.* at 6a-7a. The court also found support in the ADA's definition of "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* at 7a (quoting 42 U.S.C. 12111(3)).

The court further concluded that the ADA's legislative history reinforces that the direct threat defense excludes threats to oneself. Pet. App. 7a. The court noted that the legislative history contains numerous

'erences to "direct threat" in relation to others, but
: term "direct threat" is never "accompanied by a
'erence to threats to the disabled person himself." *Id.*
7a-8a. The court also relied on a floor statement by
nator Kennedy that "employers may not deny a
rson an employment opportunity based on
:ernalistic concerns regarding the person's health."
at 8a (quoting 136 Cong. Rec. 17,377 (1990)). The
ırt acknowledged that a discussion in a House of
presentatives Committee Report supports the exis-
ıce of a defense based on a threat to the employee's
n health, but the court concluded that the discussion
s "somewhat ambiguous" and "outweighed by the
)stantial evidence to the contrary" elsewhere in the
islative history. *Id.* at 9a n.6.

In reaching its conclusion, the court invalidated the
OC's regulations providing that an employer may
ablish as a "'qualification standard' * * * a require-
nt that an individual shall not pose a direct threat to
health or safety of *the individual* or others in the
rkplace." 29 C.F.R. 1630.15(b)(2) (emphasis added);
also 29 C.F.R. 1630.2(r). The court analyzed the
;ulations under *Chevron U.S.A. Inc.* v. *Natural*
sources Defense Council, Inc., 467 U.S. 837, 842-843
84), Pet. App. 11a-12a & n.8, but found them "con-
ry" to the ADA's text. In the court's view, "the
guage of the direct threat defense plainly expresses
ıgress's intent to include within the scope of [the]
'ense only threats to other individuals in the
rkplace." *Id.* at 12a.

The court acknowledged that its conclusion conflicts
h the decision of the United States Court of Appeals
the Eleventh Circuit in *Moses* v. *American Non-*
)ens, Inc., 97 F.3d 446, 447 (1996) (per curiam), cert.
ıied, 519 U.S. 1118 (1997). Pet. App. 6a. The court
also noted that its decision is inconsistent with dicta in three other circuit court decisions. *Ibid.* (citing *LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1998); *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997); *Daugherty* v. *City of El Paso*, 56 F.3d 695 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996)).

The court of appeals next addressed petitioner's contention that, "even if the direct threat provision does not provide it with a defense to its actions," respondent, "because of the risk of damage to his liver, * * * is not 'otherwise qualified' to perform the job at issue." Pet. App. 14a. The court acknowledged that an individual who, because of his disability, is unable to perform the "essential functions of the employment position that such individual holds or desires" (42 U.S.C. 12111(8)) is not a "qualified individual" (42 U.S.C. 12112(a)) under the ADA and, therefore, is not protected by the statute. Pet. App. 14a. In this case, however, the court explained, there is no evidence "that the risk [respondent] allegedly poses to his own health renders him unable to perform [the job] duties." *Id.* at 17a. Rather, the evidence shows that respondent had successfully performed work in the coker unit for years. "Had [he] failed during that period to perform the essential functions of his work, we seriously doubt that [petitioner] would have twice extended him contingent offers to work at the coker unit." *Id.* at 18a. The court concluded that whatever risk respondent's "employment might pose to his own health" in the future, it "does not affect the question whether he is a 'qualified individual with [a] disability.'" *Ibid.*

Judge Trott dissented, calling the majority's decision a "Pickwickian ruling" that "leads to absurd results." Pet. App. 23a. Judge Trott both disagreed with the majority's conclusion that respondent is a "qualified

lividual" and noted that "[petitioner] has a defense to s action, known as the 'direct threat' defense." *Id.* at a. He stressed that the "EEOC's implementing gulations, authorized by Congress, define[] a 'direct eat' to mean 'a significant risk of substantial harm to health or safety of the individual * * * that cannot reduced by reasonable accommodation.'" *Ibid.* oting 29 C.F.R. 1630.2(r)). Judge Trott would have ferred to the EEOC's regulations because "the OC has rationally and humanely spoken." *Ibid.*

DISCUSSION

This Court should grant the petition for a writ of tiorari. The court of appeals incorrectly held that ADA forecloses the affirmative defense that a abled individual's performance of the job would pose ignificant risk of substantial harm to his own health safety. In so doing, the court erroneously invali- ed EEOC regulations that recognize that defense l created a conflict with the decision of the Eleventh cuit in *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 5 (1996) (per curiam), cert. denied, 519 U.S. 1118 97). The issue is an important one, and its resolution this Court is warranted.

THE COURT OF APPEALS ERRED IN INVALIDATING THE EEOC'S REGULATIONS

A. The EEOC's Threat-To-Self Regulations Are Consistent With The Text Of The ADA

Title I of the ADA prohibits an employer from "using alification standards, employment tests or other ection criteria that screen out or tend to screen out individual with a disability or a class of individuals h disabilities *unless* the standard, test or other ection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6) (emphasis added). The statute clarifies that "[i]t may be a defense to a charge of discrimination" if a challenged qualification standard or criterion "has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). The ADA specifies that the "term 'qualification standards' may *include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b) (emphasis added), and defines "direct threat" in parallel terms, see 42 U.S.C. 12111(3).

The EEOC has interpreted those provisions to permit an employer to impose a qualification standard that screens out not only individuals who pose a direct threat to the health or safety of other individuals in the workplace but also individuals who pose such a threat to their own health or safety. Specifically, the EEOC has issued a regulation that provides that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of *the individual* or others in the workplace." 29 C.F.R. 1630.15(b)(2) (emphasis added). Another EEOC regulation defines "direct threat" as a "significant risk of substantial harm to the health or safety of *the individual* or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r) (emphasis added).

The EEOC promulgated those regulations through notice-and-comment rulemaking, see 56 Fed. Reg. 35,726 (1991), pursuant to an express delegation of authority to promulgate regulations to "carry out" the

provisions of Title I of the ADA. 42 U.S.C. 12116. The EEOC's regulatory interpretation is therefore entitled to deference in accordance with *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

"[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). It is "fair to assume" that "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure," such as the notice-and-comment rulemaking that the EEOC undertook in this case. *Id.* at 2172-2173. Compare *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (reserving the question whether the EEOC's regulation interpreting the term "disability" is entitled to *Chevron* deference because that term is defined in statutory provisions over which the EEOC has not been delegated rulemaking authority).

Because the EEOC's regulations interpret provisions over which the ADA expressly grants the EEOC rulemaking authority, the court of appeals was "obliged to accept the [EEOC]'s position if Congress has not previously spoken to the point at issue and the [EEOC]'s interpretation is reasonable." *Mead*, 121 S. Ct. at 2172 (citing *Chevron*, 467 U.S. at 842-845). The court, however, concluded that the EEOC's position is contrary to the clear intent of Congress. That conclusion was incorrect.

The ADA sets forth a general defense for "qualification standards" or "other selection criteria" that are "job-related and consistent with business necessity." 42 U.S.C. 12113(a); see also 42 U.S.C. 12112(b)(6) (excluding such standards and criteria from the definition of discrimination). The statute specifies that such qualification standards "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). It does not state that this requirement is the only permissible qualification standard concerning workplace threats to health or safety. To the contrary, it provides a general defense for job-related qualification standards and selection criteria that are consistent with business necessity, and it employs words of inclusion ("may include") when specifying a threat to others as an example of a permissible qualification standard. Nothing in the ADA forecloses a qualification standard or selection criterion that requires that an individual not pose a threat to his own health or safety. Under those circumstances, Congress has not "directly spoken to the precise question" whether an employer may require as a qualification standard that a prospective employee be able to perform the job he seeks without posing a threat to his own health or safety. *Chevron*, 467 U.S. at 842.

B. The Court Of Appeals' Reliance On The *Expressio Unius* Canon Was Erroneous

The court of appeals reached a contrary conclusion because of its mistaken reliance on the canon of statutory construction *expressio unius est exclusio alterius*. The court reasoned that the statutory specification of a "direct threat" defense for the risk of harm to others implicitly precludes a direct threat defense for the risk of harm to self. See Pet. App. 6a-7a.

That reasoning is flawed. The court of appeals' reliance on the *expressio unius* principle was inappropriate because the relevant statutory language is expressly inclusive. As noted above, the threat-to-others defense is included in the section of the ADA that sets forth a more general defense for qualifications standards that are "job-related and consistent with business necessity." 42 U.S.C. 12113(a). The statutory language specifies one example of that defense—"'qualification standards' may *include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b) (emphasis added). The use of the term "include" indicates that what follows is illustrative rather than exclusive. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (explaining that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 231 (6th ed. 2000); see, *e.g.*, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 (1977).[2]

This Court has frequently cautioned against that kind of uncritical reliance on the *expressio unius* principle. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 703 (1991); *Burns* v. *United States*, 501 U.S. 129, 136 (1991); *Ford* v. *United States*, 273 U.S. 593, 612 (1927). Moreover, courts have noted that the canon is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R.* v. *ICC*, 902 F.2d 66, 69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990). Because it relies on an inference rather than a direct statement, the canon "can rarely if ever be the 'direct[]' congressional answer required by *Chevron*." *Ibid.* See also *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (*expressio unius* maxim "is simply too thin a reed to support the conclusion that Congress has clearly resolved [the] issue"), cert. dismissed, 528 U.S. 1147 (2000).

The legislative history of the ADA likewise does not indicate an intent to limit the business necessity defense to health and safety threats to others in the workplace. The Ninth Circuit concluded otherwise because, when the term "direct threat" was used in the "various committee reports" and "floor debate," there was no explicit reference to "threats to the disabled person himself." Pet. App. 7a-8a. That reasoning applies to the legislative history the same erroneous *expressio unius* analysis that the court of appeals applied to the statutory language. As discussed above, that principle is not applicable here. Indeed, it is particularly inappropriate to apply the *expressio unius* canon to the legislative history, since "the language of a statute * * * is not to be regarded as modified by examples set forth in the legislative history." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990). Further, although the legislative history relevant to the threat-to-self defense is mixed, see 136 Cong. Rec. 17,377 (1990) (Sen. Kennedy), there is, as

[2] The ADA's definition of "direct threat" to mean "a significant risk to the health or safety of others," 42 U.S.C. 12111(3), does not preclude the EEOC from using that term to describe another, similar example of the business necessity defense—a requirement that an employee's performance of the job not pose a significant risk to the health or safety of the employee himself. The statutory definition of "direct threat" simply defines that term as it is used in the statute.

the court of appeals acknowledged (Pet. App. 9a n.6), legislative history that supports its recognition, H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 73-74 (1990).

C. The EEOC's Threat-To-Self Regulations Are A Reasonable Interpretation Of The ADA

The EEOC's regulations reflect a reasonable interpretation of the ADA entitled to *Chevron* deference. Although the "direct threat" provision of the ADA does not itself provide a defense when the employee's job performance poses a threat to the employee himself, the EEOC reasonably concluded that the general business necessity defense is broad enough to include a threat-to-self defense. See 29 C.F.R. Pt. 1630 App. § 1630.15(b) (noting that employers with qualification standards based upon safety must satisfy the direct threat standard "in order to show that the requirement is job-related and consistent with business necessity").

As noted above, the ADA provides a general defense for qualification standards or other selection criteria that are job-related and consistent with business necessity. The "direct threat" provision is illustrative of that general defense and does not exclude other potential applications. A qualification standard that screens out disabled individuals who pose a threat to their own health or safety fits comfortably within the general defense. Like the congressionally-specified defense for standards that screen out those who pose a threat to the health or safety of others, it is job-related and consistent with business necessity.

When there is a high probability that an employee will suffer serious injury or death in the near future because of his performance of the job, there is a significant risk that the employee will not be able to perform the essential functions of the job on an ongoing basis. If the employee becomes unable to perform the job, the employer will likely incur considerable costs due to interruption of business operations and the need to find a replacement. Furthermore, serious injuries and deaths pose the potential for unique disruptions in the workplace and unique costs to employers.

In addition, as the EEOC noted when it promulgated its regulations, 56 Fed. Reg. at 35,745, including harm to the disabled individual within the general business necessity defense is consistent with judicial precedent under the Rehabilitation Act of 1973, 29 U.S.C. 791-794 (1994 & Supp. V 1999), as well as the EEOC's regulations interpreting that provision. See Pet. 18-20 (collecting cases and also citing EEOC regulations); Pet. App. 16a n.10 (citing *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422-1424, amended by 38 Fair Empl. Prac. Cas. (BNA) 1517 (9th Cir. 1985)). Because the ADA is modeled on the Rehabilitation Act, it was reasonable for the EEOC to incorporate prior practice under the Rehabilitation Act into its ADA regulations. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632, 645 (1998); see also 42 U.S.C. 12201 (incorporating Rehabilitation Act standards into the ADA "[e]xcept as otherwise provided").

Finally, at the same time that the EEOC's approach accommodates legitimate business concerns, it also protects disabled employees from "over-protective rules and policies" (42 U.S.C. 12101(a)(5)) based on "stereotypic assumptions" (42 U.S.C. 12101(a)(7)). Under the threat-to-self regulations adopted by the EEOC, employers do not (as the court of appeals feared) have license to "deny a person an employment opportunity based on paternalistic concerns regarding

he person's health." Pet. App. 8a (quoting 136 Cong. Rec. at 17,377 (Sen. Kennedy)). The EEOC's regulations apply to the threat-to-self defense the demanding direct threat standard that applies to the threat-to-others defense. That standard protects against abuse of the defense by requiring the employer to prove significant risk of substantial harm to the health or safety of the individual or others," based "on an individualized assessment of the individual's present ability to safely perform the essential functions of the job." 29 C.F.R. 1630.2(r). In addition, by analyzing employer concerns about threat to self as a defense rather than part of the employee's prima facie demonstration that he or she is "qualified" under 42 U.S.C. 12112(a)), the regulations appropriately place the burden of proof on employers. The EEOC's regulations are thus eminently reasonable, and the court of appeals erred in invalidating them.

I. THE COURT OF APPEALS' DECISION WARRANTS THIS COURT'S REVIEW

This Court should grant the petition for a writ of certiorari and reverse the erroneous decision of the Ninth Circuit. That decision has created a conflict among the courts of appeals. As the Ninth Circuit acknowledged, Pet. App. 6a, its decision cannot be reconciled with the decision of the Eleventh Circuit in *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446 (1996) (per curiam), cert. denied, 519 U.S. 1118 (1997). In *Moses*, the court of appeals held that an employer did not violate the ADA by terminating an employee with epilepsy because the risks to "his own health or safety" satisfied the "direct threat" defense. *Id.* at 447. Citing both the general business necessity and direct threat subsections of the ADA, the court stated: "An employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety." *Ibid.* Although the Eleventh Circuit did not explicitly address the validity of the EEOC's regulations, the court cited one of those regulations with approval. See *ibid.* (citing 29 C.F.R. 1630.2(r)).[3]

This Court's review is also warranted because the Ninth Circuit's decision invalidates the EEOC's regulations. As a result, employers who operate nationwide must modify their employment practices in the Ninth Circuit even though they follow EEOC regulations in other parts of the country. For the EEOC, the Ninth Circuit's ruling means that different field offices will process discrimination complaints under different legal standards. Offices outside the Ninth Circuit will apply the threat-to-self regulations; offices that serve areas entirely within the Ninth Circuit will not, and offices that serve areas both inside and outside the Ninth Circuit will need to apply different standards in different cases. The ADA's anti-discrimination provisions should not apply in this haphazard fashion; clear and consistent standards should govern nationwide.

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[3] The Ninth Circuit's holding in this case is also inconsistent with statements in decisions of other courts of appeals that assume the existence of a threat-to-self defense. See Pet. App. 6a (citing cases); see also *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284, 1291 (10th Cir. 2000) (citing with approval EEOC's regulations). Moreover, although the Ninth Circuit correctly held that respondent is a "qualified individual" under 42 U.S.C. 12112(a), that aspect of the court's decision is in tension with the Seventh Circuit's decision in *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (1999). In that case, the Seventh Circuit held that the plaintiff was not qualified because "there was no way to do the job [that he had previously held] without subjecting himself to the very things his doctors recommended he stay away from." *Id.* at 603.

Finally, the issue of threat to self arises with sufficient frequency that it merits this Court's attention. In addition to the cases involving private employers noted in the petition, the federal government has encountered numerous cases involving threats to the health or safety of applicants or employees. In *McClaren* v. *Dalton*, Appeal No. 01960820, 1997 WL 774840, at *3 (EEOC Dec. 5, 1997), for instance, the EEOC ruled that the Department of the Navy lawfully precluded an employee with multiple sclerosis from working aboard ships because the work would have posed a direct threat of substantial harm to the employee's health and safety. In another case, the EEOC sustained the Postal Service's refusal to allow an employee to continue his previous work as a window clerk because that continued employment would have posed a threat to his health and possibly required amputation of his foot. *Haug* v. *Runyon*, Appeal No. 01951337, 1998 WL 25247, at *8 (EEOC Jan. 9, 1998). See also *Burkett* v. *United States Postal Serv.*, 175 F.R.D. 220 (N.D. W.Va. 1997); *Merrell* v. *Pirie*, Appeal No. 01971565, 2001 WL 237043, at *4 (EEOC Mar. 2, 2001); *Patterson* v. *Summers*, Appeal No. 01964964, 2000 WL 366113 (EEOC Apr. 3, 2000); *Stallings* v. *Summers*, Appeal No. 01964963, 2000 WL 366114 (EEOC Apr. 3, 2000); *Cobb* v. *Summers*, Appeal No. 01965074, 2000 WL 366115 (EEOC Apr. 3, 2000).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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