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

Catherine A. Hanssens*
Jon W. Davidson
Phillip Mendelsohn
Lambda Legal Defense & Education Fund, Inc.
120 Wall Street, #1500
New York, NY 10005
(212) 809-8585

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

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 employer

---

[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.

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

I. 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

---

[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]

---

[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]

---

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

---

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 worker

---

[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.

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]

---

[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

---

[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]

---

[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 rationale is at direct odds with the text and spirit of the ADA, which

---

[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.").

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 compromises the ability to perform a job's essential functions

---

[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).

– 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

---

[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 chemicals as an actual job requirement. *See* J.A. at 65-66. Regardless,

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 Chevron's industrial hygienist Charles Nyeholt testified, the use of proper respiratory and other protective equipment

---

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.

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 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

---

[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.

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 state that employment decisions "should not be based on speculation that the employee may become unable [sic] in the

---

[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).

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 protection... Discrimination occurs against persons with disabilities because of stereotypes...*and fears about increased*

---

[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).

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 actual costs, into the analysis of what constitutes a reasonable accommodation, it prohibited employers' reliance on

---

[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).

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]

---

[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

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:

> 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

---

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.*

> 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 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

---

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

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]

---

[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 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);

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.

As the Solicitor General correctly recognizes, the standard for maintaining a direct threat defense is a demanding one, requiring the employer to prove significant

---

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.

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 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

---

[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.

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,

Catherine A. Hanssens*
Jon Davidson
Phillip Mendelsohn
Lambda Legal Defense and Education Fund

*Counsel of Record

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.