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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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.

Respectfully submitted,

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