No. 00-1089

IN THE
Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Petitioner,
v.
ELLA WILLIAMS,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-3000
Attorneys for *Amicus Curiae* National Association of Manufacturers

ANN ELIZABETH REESMAN
Counsel of Record
KATHERINE Y.K. CHEUNG
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600
Attorneys for *Amicus Curiae* Equal Employment Advisory Council

June 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE ADA DOES NOT COVER AN INDIVIDUAL WHO IS LIMITED IN PERFORMING ONLY A SUBSET OF ACTIONS ASSOCIATED WITH A MAJOR LIFE ACTIVITY	6
A. The ADA Protects a "Discrete and Insular Minority" of 43 Million Substantially Limited Individuals	6
B. The Legislative History Shows That Congress Intended the Reach of the ADA To Remain Narrow	7
C. Loosening the Test to Determine Whether an Individual Has a Disability Would Compromise the Goals of the ADA	9
D. The Sixth Circuit Erred in Lowering the Burden of Proof To Establish a Disability Under the ADA	11
II. "WORKING" IS NOT PROPERLY A "MAJOR LIFE ACTIVITY" FOR ADA PURPOSES	13
A. The Court Below Used a Tortured Version of the "Working" Analysis To Reach Its Erroneous Conclusion	13

TABLE OF CONTENTS—Continued

Page

B. The EEOC Lacks Congressional Authority To Define "Disability" 14

C. This Court's Concern That the Inclusion of "Working" as a "Major Life Activity" Under the ADA Creates a Circular Definition Is Well-Founded 15

D. The Vague and Amorphous Concept of "Substantially Limited in Working" Violates the ADA's Mandate To Provide "Clear, Strong, Consistent, Enforceable Standards" To Address Discrimination..... 17

E. Working Is Not Intrinsically Central Enough to Life To Be a Major Life Activity..... 19

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES Page

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) 12
Bragdon v. Abbott, 524 U.S. 624 (1998) 20
Broussard v. University of Cal., at Berkeley, 192 F.3d 1252 (9th Cir. 1999) 13
Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000) 11
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 14
Duncan v. Washington Metro. Area Transit Auth., 240 F.3d 1110 (D.C. Cir. 2001) 16, 18, 19
Dutcher v. Ingalls Shipbuilding, 53 F.3d 723 (5th Cir. 1995) 14
Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996) 12
McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369 (6th Cir. 1997) 13
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 14, 15
Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) ..... *passim*
United States v. Mead Corp., No. 99-1434, 2001 U.S. LEXIS 4992 (June 18, 2001) 14

STATUTES

Americans with Disabilities Act,
42 U.S.C. § 12101 *et seq*..... 2, 3, 6
42 U.S.C. § 12101(a)(1)..... 4, 6
42 U.S.C. § 12101(a)(7)..... 4
42 U.S.C. § 12101(b) 19
42 U.S.C. § 12101(b)(2) 17
42 U.S.C. § 12102(2) 6
42 U.S.C. § 12112(b)(5)(A)..... 9

TABLE OF AUTHORITIES—Continued

REGULATIONS Page

29 C.F.R. § 1630.2(i) (2000)..... 14
29 C.F.R. pt. 1630, App. (2000) 17

LEGISLATIVE HISTORY

135 Cong. Rec. S10711 (daily ed. Sept. 7, 1989).. 9
H.R. Rep. No. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 ..... 7, 8
S. Rep. No. 101-116 (1989)..... 8

OTHER AUTHORITIES

Mark R. Frietas, *Closing the Floodgates: The Employee's Duty to Mitigate and Why Working Is Not a Major Life Activity*, 19 Rev. Litig. 465 (2000) 15, 16, 18

IN THE

Supreme Court of the United States

No. 00-1089

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and the National Association of Manufacturers respectfully submit this brief as *amici curiae*.[1] Letters of consent from all parties have been filed with the Court. The brief urges this Court to reverse the decision below, and thus supports the position of the petitioner, Toyota Motor Manufacturing, Kentucky, Inc.

[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 350 of the nation's largest private sector corporations, collectively employing over 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers ("NAM") is the nation's largest multi-industry trade association. NAM represents 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

All of EEAC's and NAM's members are employers subject to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and other equal employment statutes and regulations. As employers, and as potential defendants to claims asserted under these laws, EEAC's and NAM's members have a substantial interest in the issue presented in this case, *i.e.*, whether an individual whose impairment affects her ability to perform only a subset of manual tasks associated with her job is substantially limited in the major life activity of performing manual tasks so as to have a "disability" under the ADA.

EEAC and NAM seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matter that the parties have not raised. Because of their experience in these matters, EEAC and NAM are well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Ella Williams sued her former employer Toyota Motor Manufacturing, Kentucky, Inc. (Toyota), alleging Toyota failed to accommodate her disability and fired her in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*[2] Williams worked on an assembly line at one of Toyota's automobile assembly plants. Her job included three duties—inspecting cars for defective paint, manually wiping down newly painted cars, and wiping down passing cars with a highlight oil. This last task required Williams to grip a block of wood with a sponge on the end while keeping her hands and arms raised at shoulder height for several hours. Williams alleges this position exacerbated her ligament and muscle problems, resulting in carpal tunnel syndrome and tendonitis affecting her hands, arms, shoulders and neck. Pet. App. 2a. Williams claims Toyota refused to remove this last duty from her job. Toyota denies this allegation.

The district court concluded that Williams did not have a "disability" under the ADA and granted summary judgment in favor of Toyota on this claim. On appeal, the Sixth Circuit reversed, holding that Williams' inability to perform certain

[2] She also claimed Toyota denied her leave and reinstatement rights in violation of the Family and Medical Leave Act (FMLA). The district court granted summary judgment in favor of Toyota on this claim and the Sixth Circuit affirmed.

specific manual tasks associated with her assembly line job was sufficient to allow a fact finder to conclude that her condition substantially limited her in the major life activity of performing manual tasks and thus, that she was an individual with a disability protected by the ADA. According to the Sixth Circuit, Williams' ability to carry out a range of isolated, non-repetitive manual tasks that were not associated with her work, such as tending to her personal hygiene and carrying out personal or household chores, did not alter this conclusion. Pet. App. 4a. The appellate court then held that a factual issue existed on whether Toyota had failed to accommodate Williams' condition.

Judge Boggs wrote a separate opinion concurring in part and dissenting in part in the opinion. With respect to Williams' ADA claim, Judge Boggs disagreed with the court's decision and criticized the majority for "conflat[ing] (and erod[ing]) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.'" Pet. App. 11a. According to him, the majority erred in reducing the test for determining whether an individual is substantially limited in performing manual tasks to looking at the individual's ability to perform only a subset of them—certain manual tasks required by her job.

This Court granted certiorari to address the issue of whether an impairment that prevents an individual from performing only a limited number of manual tasks associated with her work qualifies as a disability under the ADA.

SUMMARY OF ARGUMENT

The ADA does not cover an individual who is limited in performing only a subset of actions associated with a major life activity. Instead, the language of the ADA is clear that the statute protects a "discrete and insular minority" of 43 million substantially limited individuals. 42 U.S.C. § 12101(a)(7) and (a)(1). The legislative history also shows

that Congress intended the reach of the ADA to remain narrow. Loosening the test to determine whether an individual has a disability, as this case would require, would compromise the goals of the ADA and create unintended hardships for both employers and employees.

The Sixth Circuit impermissibly circumvented the standard for determining when an impairment constitutes a disability by requiring a limitation in only a subset of manual tasks. Unless this Court reverses the decision below, the Sixth Circuit's opinion will permit plaintiffs to do an end-run around the statutory requirement that an individual's ability to perform a major life activity be substantially limited before gaining the protection of the ADA.

Moreover, this Court should reject the Equal Employment Opportunity Commission's (EEOC) improper definition of "major life activities" to include working. Congress did not give the agency authority to issue such a regulation. This Court already has questioned the inclusion of "working" as circular. The lack of clear and consistent standards on when an individual is substantially limited in working also violates the ADA's mandate to provide "clear, strong, consistent, enforceable standards" to address discrimination. In addition, "working" is not intrinsically central enough to life to constitute a major activity under the ADA.

ARGUMENT

I. THE ADA DOES NOT COVER AN INDIVIDUAL WHO IS LIMITED IN PERFORMING ONLY A SUBSET OF ACTIONS ASSOCIATED WITH A MAJOR LIFE ACTIVITY

A. The ADA Protects a "Discrete and Insular Minority" of 43 Million Substantially Limited Individuals

The threshold requirement for coverage under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, is that the plaintiff be an "individual with a disability." The law defines that term as follows:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that *substantially limits one or more of the major life activities* of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (emphasis added).

The language of the ADA states unequivocally that Congress intended to protect from discrimination a narrow group of individuals with disabilities—persons whose serious physical and mental impairments prevent them from functioning at the level of the average person in at least one major life activity. The very first legislative finding in the ADA is that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1). This Court recognized in *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (1999), that this relatively small number shows that Congress and the President intended the ADA to improve the circumstances of a limited group of significantly impaired

people. Had Congress intended the scope of the ADA's protection to be larger, it would have cited a much higher number of protected individuals. *Id.*

Additional language in the findings confirms the narrow scope of the protected class. As Justice Ginsburg points out in her concurring opinion in *Sutton*, Congress described the protected class selectively as "a discrete and insular minority," who have been faced with restrictions and limitations, "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, § 12101(a)(7)." *Id.* at 494 (internal quotations omitted). Like the majority, Justice Ginsburg concluded that "Congress's use of the phrase [discrete and insular minority] is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class." *Id.* at 495.

These legislative findings convinced this Court in *Sutton* that the ADA was never intended to cover individuals with correctable disabilities, since to do so would greatly expand the Act's coverage beyond the intended protected class of 43 million people. 527 U.S. at 484. The same logic applies here.

B. The Legislative History Shows That Congress Intended the Reach of the ADA To Remain Narrow

The legislative history of the ADA also provides strong support for interpreting the Act's protection to extend only to a limited group. As the House Committee on Education and Labor Report explains, "[a] person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990

U.S.C.C.A.N. 303, 334; S. Rep. No. 101-116, at 23 (1989). Once again, Congress utilized language showing that it intended to protect individuals who are restricted as compared to the significant majority who are not.

Congress' own description of those who stand to benefit under the ADA provides further evidence of the limited scope of the protected class. Like the text of the ADA, the Senate Committee on Labor and Human Resources Report identifies 43 million individuals who "will be entitled to the protections of this legislation as employees, job applicants, clients and customers of places of public accommodation, and *users of telephone services*." S. Rep. No. 101-116, at 88 (1989) (emphasis added). Of that number, the Senate Committee identified approximately 24 million hearing impaired and 2.75 million speech impaired persons in the country who would benefit from the increased availability of telecommunications services as a result of the legislation. [3] *Id.* at 88-89. The sum of almost 27 million individuals with hearing and speech impairments that Congress intended the ADA to help leaves only 16 million individuals in the country with other physical or mental impairments so severe that they would qualify as disabled. The small size of this residual group strongly indicates that it cannot include individuals with impairments affecting only a subset of tasks associated with a major life activity. *See Sutton*, 119 S. Ct. at 2149 (noting that "the number of people with vision impairments alone is 100 million").

[3] This benefit refers to Title IV of the legislation, which amended Title II of the Communications Act of 1934 to require telephone common carriers to provide adequate telecommunications services to hearing and speech impaired individuals to enable them to communicate effectively with hearing individuals.

C. Loosening the Test to Determine Whether an Individual Has a Disability Would Compromise the Goals of the ADA

Throughout debate and passage of the ADA, Congressional sponsors reiterated the statute's important goal of extending opportunities to individuals with disabilities. As Senator Harkin stated, "For too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic and social mainstream of American life. It is time we eliminate these injustices." 135 Cong. Rec. S10711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin). Extending coverage under the ADA to individuals based merely on a subset of tasks in a major life activity would expand the protected class well beyond the statutory definition and create substantial problems for both employers and employees.

Most importantly, an overly expansive reading of the protected class could compromise the rights the ADA has created for those truly in need of statutory protection. The ADA requires that employers provide reasonable accommodation to individuals with disabilities unless doing so would impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A). While some accommodations, standing alone, would not impose an undue hardship, a number of accommodations in the aggregate may well reach that level. The greater the number of individuals entitled to accommodation, the sooner the next person to need an accommodation will be denied one because providing that additional accommodation would impose an undue hardship on the employer's business. By vastly expanding the protected class, the Sixth Circuit thus has jeopardized the protection that the ADA provides for those who have true disabilities within the statutory definition of that term.

The Sixth Circuit's opinion may even jeopardize an employer's operations by forcing it to respond to virtually

every request for an accommodation, regardless of whether the individual actually suffers from a disability under the ADA. The standard the Sixth Circuit has adopted is so broad that employers will be hard pressed to determine whether an individual has an ADA-covered disability when the individual first requests an accommodation. In view of this uncertainty, employers may have little choice but to grant the accommodation, despite the rigorous standards the ADA actually imposes to determine whether one has a statutorily protected disability.

As a result, employers may end up with a workforce that is limited in multiple, potentially inconsistent ways. For example, some employees may have lifting restrictions, some may have bending restrictions, and some may have restrictions on how long they can stand. The employer will have to try to reconcile all of these restrictions in order to run its business. In the end, however, the employer may discover that it lacks enough employees who can perform all the tasks necessary to operate its business and may have to pare down its operations as a result.

EEAC's and NAM's members have a long history of providing equal employment opportunities for individuals with disabilities and a strong commitment to nondiscrimination. These exemplary employers support the goals of the ADA as applied to individuals with disabilities. Those efforts will become diluted, however, if the definition of what constitutes a disability under the ADA is expanded to include relatively minor impairments as disabilities, even though they do not fit the statutory definition of the term.

D. The Sixth Circuit Erred in Lowering the Burden of Proof To Establish a Disability Under the ADA

The Sixth Circuit concluded that Williams is substantially limited in the major life activity of "performing manual tasks" because her impairments:

> prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.

Pet. App. 4a. The Sixth Circuit thus focused on the few job-related manual tasks Williams cannot perform, to the exclusion of the numerous others she can perform both inside and outside the workplace. In other words, the Sixth Circuit found that Williams is a member of the ADA's protected class because, out of all of the manual tasks that can be performed with the human hand, she is unable to perform some that are needed only at her job.

This broad view of the ADA's coverage conflicts directly with the statutory language defining the ADA's protected class in terms of an impairment that *substantially* limits a major life activity. For an individual to be limited in a major life activity, that person must be substantially limited as compared to the average person with respect to the *entire* activity, not merely a small subset of it. *See, e.g.*, *Chanda v. Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000) (employee's tendonitis, which severely restricted him typing or cutting foamboard for extended periods of time, only affected a *narrow category of tasks*, and thus did not substantially limit performance of manual tasks generally).

Moreover, the Sixth Circuit's broad interpretation, if extended to other major life activities, would inflate the

ADA's coverage exponentially. Under the Sixth Circuit's view, someone with a minor breathing problem, which prevented him only from using SCUBA gear, would be substantially limited in breathing because he could not get a job as a deep-sea diver. Someone who is colorblind would be substantially limited in seeing and thus protected by the ADA if he wanted to be an electrical technician but could not distinguish among color-coded wires. Someone with an average voice would be substantially limited in speaking if he could not produce the mellifluous tones so prized in a radio announcer. Such results would be well beyond the scope of the ADA. *See, e.g.*, *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996) (individual who suffered a limp, could not walk more than a mile, could not jog, and had trouble climbing stairs was not disabled under the ADA).

This Court squarely rejected relaxing the standard for determining whether an individual is "disabled" under the ADA in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). In that case, this Court criticized the Ninth Circuit for "appear[ing] willing to settle for a mere difference" in ability rather than a substantial limitation as compared to the average person. *Id.* at 565.

This Court should prevent the Sixth Circuit from accomplishing the same goal—"undercut[ting] the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities"—albeit through different means. *Id.* The decision circumvents the rationale in this Court's opinions in *Sutton* and *Albertson's*—to interpret the reach of the ADA narrowly to effectuate Congress' intent in enacting the legislation. For this reason, the Court should reverse the Sixth Circuit's decision in this case.

II. ”WORKING” IS NOT PROPERLY A “MAJOR LIFE ACTIVITY” FOR ADA PURPOSES

A. The Court Below Used a Tortured Version of the “Working” Analysis To Reach Its Erroneous Conclusion

The Sixth Circuit’s inappropriate standard is a curious misapplication of the analysis used previously by this Court regarding the activity of “working.” Assuming without deciding that “working” is properly considered a major life activity under the ADA, this Court in *Sutton* addressed the meaning of “substantially limited” in that context. In so doing, the Court concluded that “[w]hen the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a broad *class* of jobs.” *Sutton*, 527 U.S. at 491 (emphasis added). Using some of the same words, the Sixth Circuit allowed Williams to show a substantial limitation in “performing manual tasks”—by “show[ing] that her manual disability involves a ‘class’ of manual activities affecting the ability to perform tasks *at work*.” Pet. App. 4a (emphasis added).

Indeed, had the Sixth or any other Circuit analyzed this set of facts in terms of whether Williams was substantially limited in “working,” it would have concluded that she was not.[4] *See, e.g.*, *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) (holding that employee who could not use vibrating tools or perform repetitive motions was not substantially limited in working); *Broussard v. University of Cal., at Berkeley*, 192 F.3d 1252 (9th Cir. 1999) (former employee with carpal tunnel syndrome was not

[4] Counsel for Williams conceded at oral argument before the Sixth Circuit that Williams’s strongest claim was that she was substantially limited in the major life activity of performing manual tasks, not working. Pet. App. 4a n.1.

substantially limited in working); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995) (arm injury that prevents heavy lifting, repetitive rotational movements and holding objects tightly or up high for long periods of time does not substantially limit plaintiff from working).

B. The EEOC Lacks Congressional Authority To Define "Disability"

The ADA itself does not define the scope of the term "major life activities," nor does it establish that "working" falls within the definition. The EEOC, to whom Congress gave statutory authority to interpret the employment provisions contained in Title I of the ADA, issued regulations defining "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and *working*." 29 C.F.R. § 1630.2(i) (2000) (emphasis added). Based on the EEOC's definition, most parties and courts had accepted "working" within this definition without question.

In *Sutton*, this Court observed that "[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101-12102, which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term 'disability.' § 12102(2)." *Sutton*, 527 U.S. at 479. Thus, the EEOC's regulation defining "major life activities" to include "working" is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), since the EEOC had no authority to promulgate it. *United States v. Mead Corp.*, No. 99-1434, 2001 U.S. LEXIS 4992, at *19-20 (June 18, 2001) (slip op. at 12).

Nor does the regulation deserve any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). As the Court stated in *Skidmore*, an agency view that is not controlling can

be useful as guidance "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140. As we show below, the EEOC's definition of "major life activities" as including "working"—about which the agency itself has expressed doubt—lacks such persuasive force.

C. This Court's Concern That the Inclusion of "Working" as a "Major Life Activity" Under the ADA Creates a Circular Definition Is Well-Founded

This Court itself has suggested that including working within the definition of "major life activities" is not a permissible construction of the statute. In *Sutton*, the Court observed that:

> there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap."

Sutton, 527 U.S. at 492 (citation omitted).[5] As this Court discerned, an individual's exclusion from work becomes both the reason for and the effect of the disability. This construct, however, is circular and thus impermissible.

"Clearly, the inability to work cannot also be the reason for the exclusion. Such a concept creates a circular argument that was not intended in the ADA." Mark R. Frietas, *Closing*

---

[5] The Supreme Court did not decide what deference to give the EEOC's definition in *Sutton* since neither of the parties had questioned its validity. *Sutton*, 527 U.S. at 492.

the Floodgates: The Employee's Duty to Mitigate and Why Working Is Not a Major Life Activity, 19 Rev. Litig. 465, 482 (2000). Viewing "working" as a major life activity circumvents the statute's separate and distinct requirements that an individual both have a physical or mental impairment that substantially limits a major life activity and be harmed because of the disability in order to benefit from the protection of the ADA.

Recently, three members of the Court of Appeals for the D.C. Circuit similarly questioned whether "working" is properly a major life activity within the meaning of the ADA in *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (D.C. Cir. 2001). These judges expressed concern that defining the term "disability" based on one's treatment in the workplace draws attention away from an individual's physical or mental condition, the intended focus of the ADA.

> [T]o make "working" a major life activity is to create a residual category, one that matters only if the individual is not suffering from some serious physical or mental impairment. (If the individual is so suffering there is no need to consider working as a separate category). When "working" is used in this way, the existence of a disability will necessarily turn on factors other than the individual's physical characteristics or medical condition.

Id. at 1118 (citations omitted) (Randoph, Williams & Sentelle, JJ., concurring).

As this Court also pointed out in *Sutton*, the EEOC itself showed trepidation about including "working" within the definition of "major life activities," making "working" the major life activity of "last resort," to be used only if no other

major life activity is substantially limited. 527 U.S. at 492.[6] This is a telling statement. If no other major life activity is affected, it would seem unwise to confer ADA coverage on such a circular basis, particularly in light of the millions of individuals who are substantially limited in major life activities such as seeing, hearing, speaking, walking, and performing manual tasks—and yet are working.

D. The Vague and Amorphous Concept of "Substantially Limited in Working" Violates the ADA's Mandate To Provide "Clear, Strong, Consistent, Enforceable Standards" To Address Discrimination

One express purpose of the ADA is to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). Clear and consistent standards would enable covered entities to understand their obligations under the ADA, which in turn, would help them achieve the goals of the statute.

Including working as a major life activity under the ADA, however, has created confusion on what the law requires and is problematic for both employers and employees. *See also* Section I.C., *supra*.

The concept of working as a major life activity is remarkably amorphous, encompassing an almost limitless range of widely varied tasks. In fact, "working" is really a collection of activities, not discrete by itself. As such, a substantial limitation in working must result from an individual's difficulties in performing other activities.

---

[6] *See* 29 C.F.R. pt. 1630, App. (2000) (§ 1630.2(j)).

As a practical matter, this results in standards that are virtually impossible to meet. As one commentator aptly has concluded:

> disability claims based upon the major life activity of working should be deemed insufficiently specific because they do not afford an employer the opportunity to consider any accommodations. While an employer could in certain situations reasonably accommodate an employee's specific disability (such as hearing, seeing, or walking), the employer cannot be expected to accommodate an employee's inability to work. The condition alleged is simply too vague.

Frietas, *supra,* at 481.

The three judges who concurred in the *Duncan* opinion raised similar concerns about the lack of standards for employers as a result of identifying "working" as a major life activity.

> From the employer's point of view, the standards will hardly appear "clear," 42 U.S.C. § 12101(b). When "working" is the allegedly impaired major life activity, how is the employer to determine whether the employee is disabled (and thus entitled to a reasonable accommodation)? The employer certainly cannot tell just by looking at the employee, or by consulting medical records, or by insisting upon a physical examination. Disability will depend on the job market, on whether there are jobs in some undefined region "utilizing an individual's skills (but perhaps not his or her unique talents)," jobs for which the employee is qualified. Exactly how the employer is to make that determination is far from certain.

Duncan, 240 F.3d at 1118 (citation omitted) (Randolph, Williams & Sentelle, JJ., concurring). These judges noted that varied outcomes inevitably will result depending on the

particular circumstances affecting the individual's own employment prospects. Whether individuals are disabled thus may have less to do with their physical or mental conditions than with how many and what types of jobs are available in their geographic area. These differences, however, conflict with the ADA's express purpose of providing "clear, strong, *consistent*, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b) (emphasis added); *see also Duncan*, 240 F.3d at 1118 (concurring opinion).

In the end, as even Judge Edwards recognized in his dissent in *Duncan*, including "working" as a major life activity may expand the scope of the ADA well beyond what Congress envisioned.

> [A]n expansive view of work as a major life activity might allow a person to claim a disability and discrimination under the ADA if he/she is allegedly denied work for a physical impairment, such as cosmetic disfigurement, which does not rise to the level of an underlying handicap. In this sense, "work" is arguably over-inclusive when viewed as a major life activity, at least when considered in conjunction with the principal purposes of the ADA.

Duncan, 240 F.3d at 1122 (Edwards, J., dissenting). This Court should halt this unprecedented expansion now by refusing to recognize working as a major life activity under the ADA.

E. Working Is Not Intrinsically Central Enough to Life To Be a Major Life Activity

Working, as an activity, does not approach the level of importance commonly ascribed to the other life activities recognized as major under the ADA. For example, in holding that reproduction was a major life activity, this Court found that "[r]eproduction and the sexual dynamics surrounding it

are central to the life process itself." *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)

In contrast, while some people are called "workaholics," many individuals do not work—or do not work full time—and for a variety of reasons. Some adults choose not to work, because they have other priorities such as caring for children, or because they are financially independent, or because they are simply not interested. Some people do not work because they are children, or because they have chosen to retire. Other individuals are unemployed involuntarily; they may want to work, but cannot find a job.

For all of these people, their unemployment may stretch from days to months to years, yet their lives continue. Their unemployment need not even affect their other activities, as a substantial limitation in seeing, or breathing, or walking would. Accordingly, "working," if it could be considered a single activity, would not be "major" under the ADA.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-3000

Attorneys for *Amicus Curiae* National Association of Manufacturers

ANN ELIZABETH REESMAN
Counsel of Record
KATHERINE Y.K. CHEUNG
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

June 2001