No. 00-

In the Supreme Court of the United States

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

v.

MARIO ECHAZABAL, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent, who has chronic hepatitis C, a debilitating liver condition, applied for a job at Chevron's refinery that would have exposed him to a range of liver-toxic chemicals. After Chevron's doctors and respondent's own physician agreed that daily exposure to these chemicals would accelerate the deterioration of respondent's liver and that a large-scale exposure from a burst pipe, fire, or other emergency could quickly kill him, Chevron declined to hire him. In conflict with decisions of other courts of appeals as well as with EEOC regulations and guidelines squarely on point, the Ninth Circuit, in an opinion by Judge Reinhardt, held that under the Americans with Disabilities Act, an employer may not refuse to hire an employee whose medical condition would make the particular position he seeks dangerous to his health or life. Judge Trott dissented.

The question presented is:

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

RULES 14.1 AND 29.6 STATEMENT

The parent of petitioner Chevron U.S.A., Inc., is Chevron Corporation. No other publicly held company owns 10 percent or more of petitioner's stock.

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chevron U.S.A., Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 226 F.3d 1063 (superseding the opinion reported at 213 F.3d 1098). The court of appeals' opinion addressing respondent's state law intentional interference with contract claim (App, *infra*, 25a-29a) is unreported. The opinion of the district court (App., *infra*, 32a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2000. Petitioner filed a timely petition for rehearing and rehearing en banc on June 9, 2000. The court of appeals issued an amended opinion on September 26, 2000. It denied Chevron's rehearing petition on December 12, 2000. App., *infra*, 30a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12111, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, together with relevant portions of the regulations implementing those statutes, are reproduced at App., *infra*, 58a-61a.

STATEMENT

Chevron withdrew an offer to employ respondent in a refinery job in which he inevitably would have been exposed to liver-toxic substances after Chevron's physicians determined that respondent had a "history of a long term liver problem, [a] diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes." C.A. App. 81. Chevron's physicians concluded that the "exposure to hepatotoxic chemicals"

involved in the job "would further damage [respondent's] already reduced liver capacity," "seriously endanger his health," and "potentially cause [his] death." *Id.* at 81-82. Respondent's own doctor advised Chevron that respondent should not be exposed to hepatotoxins. App., *infra*, 37a, 47a.

The Ninth Circuit majority (Reinhardt and Bright, JJ.) nevertheless held that respondent was "qualified" for the refinery job within the meaning of the Americans with Disabilities Act ("ADA") because he posed no "direct threat" to other people. Chevron could not refuse to hire respondent on the ground that doing the job "most probably will endanger his life." App., *infra*, 21a.

That "bizarre" result, as Judge Trott described it (App., *infra*, 21a), creates numerous conflicts with other courts of appeals. The Ninth Circuit's ruling conflicts with the holding of the Seventh Circuit that an employee is not a "qualified individual" under the ADA if there is "no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from." *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599, 601, 603 (7th Cir. 1999). It conflicts with decisions that recognize a "direct threat" defense to ADA liability where an employee's "assigned tasks presented grave risks to [the] employee" as a result of a medical condition. *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996); see also *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284, 1288-1294 (10th Cir. 2000). It conflicts with decisions that safety requirements may be included in the "qualification standards" for a position. *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873-874 (5th Cir. 2000); *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 143 (1st Cir. 1997). And it is at odds with cases interpreting virtually identical language in the Rehabilitation Act, which hold that persons who "pose a significant risk of harm to themselves" are not "qualified." *Doe* v. *New York Univ.*, 666 F.2d 761, 777 (2d Cir. 1981); see also *Daugherty* v. *City of El*

Paso, 56 F.3d 695, 697-698 (5th Cir. 1995); *Knapp* v. *Northwestern Univ.*, 101 F.3d 473, 482-484 (7th Cir. 1996).

Beyond creating sharp conflicts among the circuits, the court of appeals' decision expressly overrides regulations of the Equal Employment Opportunity Commission, the expert agency Congress charged with implementing the ADA's employment provisions. App., *infra*, 11a-12a. Those regulations provide that an employer may establish as a "qualification standard" "medical" and "safety" requirements that an applicant must meet, and that such standards may exclude an applicant who would pose a "significant risk of substantial harm to the health or safety of the individual or others." 29 C.F.R. §§ 1630.2(q), (r), 1630.15(b)(2). The court of appeals' ruling also is inconsistent with the command of the Occupational Safety and Health Act (as well as state worker protection laws) that employers provide a safe workplace for all employees. 29 U.S.C. § 654.

The "absurd" result in this case—one that will cost workers' lives and force unwilling employers to be complicit in their injuries—is not what Congress had in mind when it enacted the ADA, as the plain language and legislative history demonstrate. App., *infra*, 23a. Absent this Court's intervention, businesses will face intolerable uncertainty in determining how to comply with the requirements of the ADA in the face of conflicting judicial and regulatory commands, while also complying with OSHA and state worker protection laws. These factors have led commentators to describe the Ninth Circuit's ruling as "one of the most important decisions under the ADA during the 10 years since it has been in effect," and to observe that it "cries out for Supreme Court review." Hudson, *Paternalism is Out*, ABA Journal, Feb. 2001, at 30.

The full articulation of competing views in the opinions below makes this the ideal case in which to resolve the important question presented. This case also presents the Court

with an opportunity to address the issue left unresolved in *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 & n.15 (1999)—whether all safety-related qualification standards "must satisfy the ADA's 'direct threat' criterion" to be valid.

A. The Statutory And Regulatory Scheme

The Americans with Disabilities Act of 1990 prohibits an employer from discriminating in employment decisions "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is someone with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). The ADA provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential," and that an employer's "written description" of the job is evidence of its essential functions. *Ibid.*

It is "a defense to a charge of discrimination" under the ADA that an individual was denied employment as the result of the employer's "application of qualification standards" that are "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). The statute provides one example of a qualification standard: "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

The responsibility of an employer who denies employment to an applicant because the job would endanger his health or life may be analyzed in terms of whether the applicant is a "qualified individual" pursuant to ADA sections 12111(8) and 12112(a), or in terms of whether the absence of such danger is a proper "qualification standard" and therefore a defense to

ADA liability under section 12113(a). The EEOC's regulation expressly recognizes a defense where there is "a significant risk of substantial harm to the health or safety *of the individual* or others," and describes the basis on which it may be determined that such a threat exists. 29 C.F.R. § 1630.2(r) (emphasis added).

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

Respondent Mario Echazabal worked at Chevron's oil refinery in El Segundo, California from 1972 until 1996, employed by independent maintenance contractors, most recently by Irwin Industries, Inc. ("Irwin"). In 1992, Echazabal applied to work directly for Chevron in the refinery's coker unit. Chevron offered him the job, contingent on a satisfactory medical examination. Chevron's regional physician, Dr. Baily, conducted that examination and concluded from the results of tests showing elevated levels of liver enzymes in Echazabal's blood that he had "an uncorrectable liver abnormality, and should avoid exposure to solvents and other liver toxic chemicals in order not to exacerbate his liver problems." Dr. Baily's successor, Dr. McGill, agreed with this conclusion. On that basis, Chevron rescinded its offer of employment to Echazabal, who continued to work at the refinery for Irwin. Thereafter, Echazabal's own doctors diagnosed him with chronic active hepatitis C and treated him with the drug Interferon. App., *infra,* 34a, 36a; C.A. App. 86.

In late 1995 Echazabal again applied to Chevron for a position as plant helper in the refinery's coker unit. Chevron's official "job summary" (C.A. App. 156-159) included a description of the "physical/environmental demands" of the plant helper job and of worker abilities necessary to withstand those demands. *Id.* at 159. That description identified as "airborne contaminants and chemicals in work environment" "hydrocarbon liquids and vapors, acid, caustic, refinery waste

water and sludge, petroleum solvents, oils, greases, [and] chlorine bleach." *Ibid.*; App., *infra*, 36a-37a.

Chevron offered Echazabal the plant helper job contingent upon his passing a medical examination. In conducting that examination, Chevron's Dr. McGill—who has practiced industrial medicine since 1980—reviewed results of eight blood tests taken between 1992 and 1996. All of those tests showed that Echazabal had significantly elevated levels of liver enzymes, which had not improved despite treatment with Interferon. App., *infra*, 35a-36a. Dr. McGill also reviewed the written job summary of the plant helper position identifying environmental conditions to which a plant helper is exposed, including "several that are hepatotoxic." C.A. App. 80-81; App., *infra*, 36a-37a. He concluded that Echazabal "faced a significant risk of substantial harm" in the plant helper position and "could not safely perform that job." C.A. App. 85.

Given Echazabal's "long term liver problem, his diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes over a period of years" evidencing "a reduced liver function" and "progressive liver disease," Dr. McGill concluded that "further exposure to hepatotoxic chemicals and solvents would * * * seriously endanger [Echazabal's] health" and "could be fatal." "Small exposures over a long period of time" would compromise his health. "[A] single event large exposure (for example, as a result of a ruptured pipe, a relief valve popping and venting, a fire, explosion or other emergency situation)" could "potentially cause death." C.A. App. 81-82. Dr. McGill was also informed by Echazabal's own physician, orally and in writing, that Echazabal should not be exposed to hepatotoxic substances. App., *infra*, 37a; C.A. App. 195.

Chevron's medical director, Dr. Bridge, agreed with Dr. McGill's assessment that Echazabal could not safely work in the plant helper position. Dr. McGill then informed Chevron's personnel director that if Echazabal were hired, it should be

subject to a work limitation: "No exposure to solvents or other liver toxic chemicals." The personnel director determined that such exposure is "a necessary and inseparable part of the plant helper position," and accordingly withdrew Echazabal's conditional job offer. App., *infra*, 38a-39a.

Shortly thereafter, Chevron sent a letter to Irwin explaining Echazabal's medical condition and asking Irwin to "remove Mr. Echazabal from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." App., *infra*, 39a. Irwin removed Echazabal from Chevron's refinery and had him examined by a physician. Dr. Tang, who is board certified in occupational medicine and teaches that subject, reviewed Echazabal's test results for Irwin and "concluded that exposure to liver toxins would harm and probably kill" him. *Id*. at 40a. After such exposures, "some people have died of massive hepatic failure in a few hours, and [it] can also occur over months and years." C.A. Supp. App. 23. Dr. Tang stated that Echazabal "has a condition that will be worsened by [exposure to hepatotoxins], causing probable death. *** * *** If he's exposed to hepatotoxins, he should not be there." *Id*. at 27. Echazabal was laid off by Irwin, though there are factual disputes concerning the course of events involving Irwin and Echazabal. App., *infra*, 41a-42a.[1]

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[1] Echazabal produced testimony from two doctors retained for purposes of this litigation who dispute whether his elevated enzyme levels reflect liver damage or reduced liver function and also dispute the determination of Chevron's doctors that exposure to substances at the refinery would endanger Echazabal's life and health. See App., *infra*, 36a, 48a. The district court correctly held that the legally relevant inquiry for the purpose of Echazabal's claims is whether Chevron reached a "reasonable medical judgment" based on "the best available objective evidence" at the time the employment decision was made. *Id.* at 48a-49a. See 29 C.F.R. § 1630.2(r) (establishing that test); *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599, 602 (7th Cir. 1999) (determination "must be made 'as of the time of the

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

Echazabal filed suit against Chevron in April 1997 alleging that Chevron's withdrawal of his employment offer violated the Americans with Disabilities Act, the Rehabilitation Act, and California's Fair Employment and Housing Act, Cal. Gov't Code § 12940 ("FEHA"), and that Chevron intentionally interfered with Echazabal's contractual relations with Irwin. Echazabal sought punitive as well as actual damages for each claim.[2] The district court (Baird, J.) granted summary judgment to Chevron on each of those counts.

The district court carefully reviewed the relevant statutes, regulations, and case law, concluding that under the ADA, Rehabilitation Act, and FEHA, "an employer may lawfully refuse to hire a disabled individual who is not otherwise qualified because the proposed employment poses a direct threat to the health of the employee himself." App., *infra*, 46a. The court engaged in a detailed review of the medical evidence and evidence concerning environmental conditions in Chevron's refinery. The court found it "undisputed" that Chevron's determination that Echazabal posed a direct threat to

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employment decision'"). The court held that the evaluations of Echazabal's expert witnesses, "even if correct, were not available to Chevron" when it withdrew its offer, and that "the evidence which was available to [Chevron] supported [its] decisions." App., *infra*, at 49a. The difference of opinion between Echazabal's and Chevron's physicians, on the one hand, and Echazabal's expert witnesses on the other, was not mentioned in the Ninth Circuit majority's opinion. It has no bearing on the legal issues decided by the court of appeals and presented in this petition.

[2] Respondent also alleged that Irwin violated the ADA, Rehabilitation Act, and FEHA. The district court denied Irwin's summary judgment motion and the claims against Irwin are not at issue here.

his own health and safety was based on an individualized assessment by Dr. McGill supported by consultation with other Chevron doctors and Echazabal's own physician. *Id*. at 47a. The court also found that "[a]ll the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision * * *, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed, as posing a serious, immediate risk to him." *Ibid*.

Because Chevron had made a reasonable medical judgment based on available evidence that the plant helper job would endanger Echazabal's health and life, the court granted Chevron summary judgment on Echazabal's ADA, Rehabilitation Act, and FEHA claims. App., *infra*, 52a. The court also granted Chevron summary judgment on Echazabal's intentional interference with contractual relations claim, because he had presented no evidence that Chevron intended that his relation with Irwin be terminated. *Id*. at 53a. The district court certified its grant of summary judgment to Chevron for immediate appeal under Fed. R. Civ. P. 54(b). C.A. App. 646-652.

D. The Ninth Circuit's Divided Decision

In his appeal, Echazabal argued that whether Chevron had adequately established that Echazabal would pose a direct threat to his own safety could not properly be resolved on summary judgment. Echazabal did not initially challenge the district court's ruling that the "direct threat" defense applies when the threat is to an applicant's or employee's own health. Instead, the issue was raised by the panel, *sua sponte*, in a request for supplemental briefing. App., *infra*, 5a n.3.[3]

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[3] The EEOC declined the court of appeals' invitation to file a brief on the question whether the "direct threat" defense applies to threats to self. App., *infra*, 11a n.7. The Chamber of Commerce of the United

The Ninth Circuit reversed the district court's grant of summary judgment on the ADA claim. The majority concluded that the ADA's "direct threat" defense does not apply to applicants or employees who pose a direct threat to their own health or safety but not to the health or safety of others in the workplace. App., *infra*, 13a. The majority also rejected Chevron's argument that Echazabal was not "qualified" to perform "essential functions" of the plant helper job because of the risks the job posed to him, holding as a matter of law that "not posing a risk to one's own health or safety cannot in itself constitute an essential job function." *Id*. at 17a. The majority reasoned that in specifying a "direct threat to others" defense in section 12113(b), Congress intended "to exclude a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work," and also intended to preclude "a personal safety requirement [as] a valid qualification standard." *Id*. at 16a & n.10. The majority acknowledged that these rulings are in conflict with the decisions of other courts of appeals. *Id*. at 6a, 17a n.11. Furthermore, in reaching its decision the majority expressly "reject[ed] the EEOC's contrary interpretation" of the ADA, even though it recognized that "Congress explicitly required the EEOC to issue regulations implementing Title I" of the ADA (which includes the employment provisions at issue here). *Id*. at 11a-12a & n.8.

Judge Trott dissented. He stated that the majority's "Pickwickian ruling" is "bizarre" and "leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with

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States and Equal Employment Advisory Council filed a supplemental amicus brief in support of Chevron explaining that the "direct threat" defense is not the only way of showing that an individual is not "qualified" for the job, and that an individual who cannot perform the job without incurring serious injury is not a "qualified individual."

narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper." App., *infra*, 21a, 23a. He observed that the majority's decision also has the "pernicious" effect of "dislodg[ing] longstanding laws mandating workplace safety. * * * So much for OSHA" and state safe-workplace laws. *Ibid.*

Judge Trott would have affirmed the grant of summary judgment to Chevron on two grounds. First, a person is not "qualified" to "perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him." Second, Chevron satisfied the ADA's "direct threat" defense, as interpreted by the EEOC to apply to workers who pose a threat to their own safety—an interpretation to which Judge Trott would have deferred under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). App., *infra*, 21a-23a.

Judge Trott protested that the majority's decision will "require employers knowingly to endanger workers," will generate obvious "legal peril" for employers, and will impose an "unconscionable" "moral burden" on them. App., *infra*, 23a. He predicted that "conflicting responsibilities under different labor laws" would now engender "long, expensive, and unpredictable litigation." *Ibid.* Judge Trott expressed hope that the clear conflict among the circuits "will compel Supreme Court review." *Id.* at 23a-24a.

REASONS FOR GRANTING THE PETITION

This Court should review the Ninth Circuit's decision because the circuits are split over the recurring issue whether a person who will suffer serious injury or death as a result of carrying out the essential functions of a job is "qualified" for that job within the meaning of the Americans with Disabilities Act, and because the Ninth Circuit rejected the interpretation set forth in regulations of the agency Congress charged with implementing the law. In addition, the Ninth Circuit's ruling

creates inconsistent obligations for employers under the ADA and federal and state worker-protection laws such as the Occupational Safety and Health Act. By forcing employers to be complicit in injury to their employees—a result that Congress plainly did not intend—the Ninth Circuit's decision opens businesses up to liability not only under these worker protection statutes, but also in state tort suits, and it creates debilitating practical problems in the workplace.

The Ninth Circuit's decision, which is incorrect under well established principles of statutory interpretation, throws businesses' efforts to comply with the ADA into confusion. This Court should grant certiorari to restore sensible and certain rules to this important area of disability and employment law, and to avoid the absurd result that an employer within the Ninth Circuit cannot now deny a job handling dangerous machinery to an epileptic who suffers uncontrollable seizures, remove an employee with uncontrollable vertigo from a job scaling high structures, or keep any employee from work that will certainly kill him because of his medical condition.

I. THE NINTH CIRCUIT'S DECISION CREATES MULTIPLE CONFLICTS WITH OTHER COURTS OF APPEALS AND CONTRADICTS EEOC RULES

Courts of appeals have recognized no fewer than three statutory bases under the ADA for a business to refuse to employ a person who would incur substantial harm to life or health in performing the essential functions of a job. First, a person who cannot perform essential job functions without endangering his health or life is not a "qualified individual" under section 12112(a), and so is not within the ADA's protections at all. Second, an employer's insistence that a person not pose a "direct threat" to his own safety is a permissible "qualification standard" for a job under section 12113(b), as interpreted by the EEOC in regulations and guidance. 29 C.F.R. § 1630.2(r). Third, an employer is more

generally entitled under section 12113(a) to establish and enforce "qualification standards" for a position that are "job-related and consistent with business necessity," including specifically "medical" and "safety" standards. 29 C.F.R. § 1630.2(q). The Ninth Circuit rejected each of these grounds for denying employment to someone whose condition makes the job he seeks dangerous to his health or life. Its decision also conflicts with directly relevant authority interpreting virtually identical provisions of the Rehabilitation Act, which increases the unsettling impact of this "bizarre" ruling. App., *infra*, 21a.

1. *Qualified individual*. The Ninth Circuit held that Echazabal was "qualified" for the plant helper position despite the fact that Echazabal's and Chevron's doctors agreed that the substances he would be exposed to on the job would harm or kill him. App., *infra*, 14a-18a. That holding is squarely in conflict with the Seventh Circuit's decision in *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999).

In *Koshinski*, the plaintiff was fired from his job operating a blast furnace after he was diagnosed with degenerative osteoarthritis and his own and his employer's doctors concluded that he should not be exposed to the vibrations and high force, repetitive tasks involved in the job because that would "exacerbate his condition." 177 F.3d at 601. Relying on the medical opinions available to the employer at the time it made its decision, the Seventh Circuit rejected "Koshinski's self-destructive wish to return to this particular job" because "there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from." *Id.* at 602-603. Koshinski therefore "could not perform the essential functions" of the position and was not "qualified to do the job." *Id.* at 603.

The Seventh Circuit found it unnecessary to address whether Koshinski's employer had a "direct threat" defense in these circumstances, because "[t]he 'direct threat' issue arises * * *

only after an ADA plaintiff has made out a prima facie case, as an employer's defense to the challenged adverse employment decision." Koshinski had not shown "that he was entitled to protection under the ADA" as a "qualified individual" in the first place. 177 F.3d at 603. See also *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 142-144 (1st Cir. 1997) (holding that risks to the safety of others could be considered "as part of the 'qualifications' analysis").

Clearly, the reasoning and result in *Koshinski* are at odds with the Ninth Circuit's decision here. The Seventh Circuit would have held that Echazabal—who produced no contemporaneous medical evidence that he could do the plant helper job without harm to himself—had failed to make out a *prima facie* case that he was "qualified," and hence was outside the scope of the ADA's protection.

2. *Direct threat.* As the Ninth Circuit acknowledged (App., *infra*, 5a, 11a-12a), its holding that an employer may not require as a "qualification standard" that a person not pose a "direct threat" to his own health or safety conflicts with EEOC regulations and with decisions of other circuits applying the EEOC's regulations.

The EEOC "has authority to issue regulations to carry out the employment provisions in Title I of the ADA." *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 478 (1999). Exercising that authority in 1991 shortly after the ADA was adopted, the EEOC promulgated regulations interpreting sections 12113(a) and (b), which create a defense to liability when an applicant or employee fails to satisfy appropriate "qualification standards." 56 Fed. Reg. 35726, 35730 (July 26, 1991). Those regulations define "qualification standards" to mean "personal and professional attributes including * * * physical, medical, safety and other requirements established by a covered entity" as eligibility requirements for the job. 29 C.F.R. § 1630.2(q). These regulations also provide that the qualification standard

defense is satisfied where an applicant or employee poses "a significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated or reduced by reasonable accommodation." *Id.* § 1630.2(r) (emphasis added). The EEOC explained that including threats to the "health or safety of the individual" as a defense "is consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act." 56 Fed. Reg. at 35730.

The EEOC has also emphasized in guidance that "[a]n employer may require that an individual not pose a direct threat of harm to his or her own safety or health." EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IV-14 (Jan. 1992), C.A. App. 549. The determination that such a direct threat exists must be based—like Chevron's determination here—on "valid medical analyses" showing "specific risk" to the "particular individual," not on "stereotypes, patronizing assumptions," or "generalized fears." *Ibid.* Hence, for example, an employer is not required "to hire an individual disabled by narcolepsy who frequently and unexpectedly loses consciousness to operate a power saw or other dangerous equipment." *Ibid.*

The Ninth Circuit majority recognized that "Title I contains an explicit grant of regulatory authority to the EEOC," acknowledged that the EEOC's "implementing regulations * * * state that an employer may assert a 'direct threat' defense with respect to individuals who pose a threat only to their own health or safety," but "reject[ed]" that interpretation on the theory that it is inconsistent with the ADA's language and legislative history. App., *infra*, 11a-12a & n.8. The Ninth Circuit's rejection of a consistent, decade-old interpretation, formally promulgated by the agency Congress charged with implementing the ADA, itself warrants this Court's intervention.

Unlike the Ninth Circuit, other courts of appeals have explicitly followed the EEOC's regulations. For example, relying on ADA section 12113 and 29 C.F.R. § 1630.2(r), the Eleventh Circuit has held that "[a]n employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety." *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996). Applying that standard, the court affirmed the award of summary judgment against an epileptic employee. The court observed that the employee, who was at "significant risk" of having "seizures on the job" that were not controlled by medication, "sat on a platform above fast-moving press rollers" and "worked next to exposed machinery that reached temperatures of 350 degrees." *Id.* at 447-448. See also *LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832, 834-836 (11th Cir. 1998) (a line cook who used hot equipment and slicing machines and who experienced epileptic seizures on the job was a "direct threat" to himself and others; summary judgment for employer); *EEOC* v. *Blue Cross Blue Shield*, 30 F. Supp. 2d 296, 306-307 (D. Conn. 1998) (an employer who reasonably determined that an applicant for a burdensome kitchen job would face "potentially serious health risks, including stroke, heart attack, or death," could "appropriately rescin[d]" its job offer pursuant to 29 C.F.R.. § 1630.2(r)).

The Tenth Circuit reached the same conclusion in *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000). There, the defendant fired an employee with psychiatric disorders "who worked with explosives and who harbored a grudge against his supervisor, threatened suicide and perhaps injury to others." *Id.* at 1294. Citing 29 C.F.R. § 1630.2(r) and the Eleventh Circuit's decision in *Moses*, the court affirmed summary judgment in favor of the employer because "[u]nder the ADA it is a defense to a charge of discrimination if an employee poses a direct threat to the health or safety of himself *or* others," and because the employer's doctors had reasonably concluded that the employee presented "a direct safety threat to

himself and to the other workers." *Id.* at 1288, 1290, 1292 (emphasis added).

3. *Safety-based qualification standards*. The EEOC has taken the position that threats to self or others must be analyzed in terms of the "direct threat" defense and are not otherwise relevant under the ADA. See *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 (1999). This Court in *Albertson's* "questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one," but had "no need to confront the validity of th[at] reading." *Id.* at 569 n.15; see also *id.* at 578 (Thomas, J., concurring) (suggesting that safety issues "might also be relevant to the question whether respondent was a 'qualified individual'"). This case squarely presents the issue reserved for future decision in *Albertson's*, as to which the circuits are in conflict.

The Ninth Circuit held that satisfying the demands of the "direct threat" defense is the "exclusive" way in which employers may take account of safety concerns, reasoning that otherwise "definitional sleight-of-hand" would "circumvent" the limits of the defense, including Congress's supposed "decision to exclude a paternalistic risk-to-self defense." App., *infra,* 14a, 16a. The Ninth Circuit noted, however (*id.* at 17a n.11), that other courts of appeals disagree. As we have already demonstrated (*supra*, pp. 13-14), the First and Seventh Circuits held in *Amego* and *Koshinski* that safety risks may prevent a person from being a "qualified individual" within the meaning of ADA section 12112(a), precluding any need to consider the "direct threat" defense. Recently, the Fifth Circuit agreed that "safety requirements are not exclusively cabined into the direct threat test." *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000). Rather, "[i]n cases where an employer has developed a general safety requirement for a position"—as Chevron did with regard to its plant helper position—"safety is a qualifi-

cation standard no different from other requirements defended under the ADA's business necessity provision," section 12113(a). *Id*. at 874.

Unlike the Ninth Circuit, the First, Fifth, and Seventh Circuits thus recognize that safety issues may be addressed either as part of the section 12112(a) inquiry into whether a person is a "qualified individual" (*Amego*, *Koshinski*) or as part of a "qualification standard" authorized by section 12113(a) (*Exxon*). This case presents an ideal vehicle to address the issue left open in *Albertson's* and to end confusion in the lower courts over how safety requirements fit into the ADA's scheme.[4]

4. *Rehabilitation Act precedents.* This Court has made clear that construction of the ADA is to be "informed by interpretations of parallel definitions" in the Rehabilitation Act, because Congress' repetition of those provisions in the ADA indicates its "intent to incorporate [those provisions'] administrative and

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[4] The Ninth Circuit majority purported to distinguish *Amego* and *Exxon* on the ground that both involved claims that an individual posed a threat to others, not himself. App., *infra*, 17a n.11. In fact, that makes the conflict even more compelling. The First and Fifth Circuits held that qualification standards requiring that a person not pose a risk to others are not cabined by the "direct threat" defense, even though the statute describes the defense in terms of "a direct threat to the health or safety of other individuals in the workplace" (§ 12113(b)). Those circuits would hardly treat qualification standards requiring that a person not pose a risk to *himself* as restricted to the "direct threat" defense when the statutory provision creating that defense makes no mention at all of threats to self. As we discuss below, *infra*, Part II, the fact that threats to self are *not* mentioned in section 12113(b) strongly suggests that they should be analyzed instead under sections 12112(a) and 12113(a). The Ninth Circuit's attempted distinction in any event does not account for *Koshinski*, which analyzed a threat to self under section 12112(a)'s "qualified individual" rubric, and ignores the fact that the suicidal plaintiff in *Amego* also posed a threat to herself.

judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 631, 645 (1998); see also 42 U.S.C. § 12201(a); 29 U.S.C. § 794(d). The Ninth Circuit's ruling, however, contradicts other courts of appeals' and the EEOC's interpretation of virtually identical provisions of the Rehabilitation Act.

Like ADA section 12112(a), section 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a), extends protection to "qualified" individuals with a disability. Since 1978, EEOC regulations have defined that term to mean a person who "can perform the essential functions of the position in question without endangering the health and safety *of the individual* or others." 43 Fed. Reg. 12293, 12295 (Mar. 24, 1978) (emphasis added); 29 C.F.R. § 1614.203(a)(6) (2000). Courts of appeals prior to passage of the ADA likewise interpreted section 504's "qualified individual" language to exclude persons who posed a significant risk to themselves. *E.g.*, *Doe* v. *New York Univ.*, 666 F.2d 761, 777 (2d Cir. 1981) (if a student's mental disorder would result in a relapse into "behavior harmful to herself and others," including suicidal and other self-destructive acts, she would not be "qualified" for admission to medical school; Congress did not intend "to force institutions to accept * * * persons who pose a significant risk of harm to themselves or others"). Thus, when Congress enacted ADA section 12112(a), the terms it used had a settled regulatory and judicial interpretation, which Congress "inten[ded] to incorporate." *Bragdon*, 524 U.S. at 645; see 1 House Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. 101-336, Americans with Disabilities Act 485 (Comm. Print 1991) ("Leg. Hist.") (the ADA "is based on the same standard for 'qualified' person with a disability that has existed for years under the Rehabilitation Act"); see also *id.* at 71, 100, 124.

The courts of appeals continue consistently to hold that persons who would harm themselves in carrying out the essential functions of the job are not "qualified individuals" within the meaning of Rehabilitation Act section 504(a). See,

e.g., *Knapp* v. *Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996) (student with heart condition who would risk death playing basketball was not qualified for university's basketball program); *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1393-1395 (5th Cir. 1993) (person with diabetes or uncorrectably impaired vision is not "qualified" for a driver's job that "presents a genuine substantial risk that he could injure himself or others"); *Chiari* v. *City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (a person with Parkinson's disease was not "qualified" to be a construction inspector; "a significant risk of personal injury can disqualify a handicapped individual from a job if the employer cannot eliminate the risk"). The Ninth Circuit erroneously dismissed this line of cases and the EEOC's regulation as "irrelevant to [its] inquiry" because they interpret the Rehabilitation Act rather than the ADA. App., *infra*, 16a n.10. This Court squarely held in *Bragdon* that judicial and regulatory interpretations of Rehabilitation Act language repeated in the ADA are highly pertinent to understanding the ADA. The conflict between the Ninth Circuit's interpretation of the term "qualified individual" in the ADA and the EEOC's and other courts of appeals' interpretation of the same provision in the Rehabilitation Act warrants this Court's review.[5]

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[5] Contrary to the Ninth Circuit's ruling (App., *infra*, 16a n.10), Congress' inclusion of the "direct threat defense" in ADA section 12113(b) does not show that it intended to depart from the Rehabilitation Act understanding of the term "qualified." Had that been Congress' intent, it would have said so, rather than simply reenacting the "qualified individual" language of the Rehabilitation Act that had consistently been interpreted to permit exclusion of persons whose performance of the job would cause harm to themselves. Moreover, a 1988 amendment added an explicit "direct threat" provision to the Rehabilitation Act that denied protection to persons with communicable diseases who "would constitute a direct threat to the health or safety of other individuals." 29 U.S.C. § 705(20)(D). As the decisions cited in the text demonstrate, courts understood that the existence of this provision did not change the meaning of the term "qualified."

5. Unless this Court resolves these serious conflicts now, employers in the Tenth and Eleventh Circuits will be able to rely on EEOC regulations defining the "direct threat" defense to encompass threats to self; employers in the First, Fifth, and Seventh Circuits will be able to deny employment to persons who pose a threat to themselves because they are not "qualified" or fail safety-based "qualification standards"; but businesses in the Ninth Circuit will have to employ workers who will suffer injury or death on the job. Nationwide businesses with unified employment policies will as a practical matter have to comply with the Ninth Circuit's ruling everywhere. Moreover, any company doing business within the Ninth Circuit may be sued there for ADA violations, wherever those violations are alleged to have occurred, and so will potentially be subject to the Ninth Circuit's misconstruction of the Act. Wasteful litigation over the question presented also is sure to occur in circuits that have not yet addressed the issue. This Court should grant certiorari to end this confusion and ensure uniform application of the ADA throughout the Nation.

II. THE NINTH CIRCUIT'S DECISION DISREGARDS THE ADA'S PLAIN LANGUAGE AND NULLIFIES CONGRESSIONAL INTENT

According to the Ninth Circuit majority, threats to a worker's own health have no relevance under the ADA: the "direct threat" defense is the "exclusive way" in which threats to health may be taken into account, and that defense applies only when harm is threatened to *others*. App., *infra*, 14a. That faulty interpretation does not fit the plain language of the ADA, is contradicted by well established canons of statutory interpretation, and is refuted by the legislative history. It fails to give deference to the EEOC's reasonable interpretation to the contrary. It also relies on a patent misreading of this Court's Title VII jurisprudence. Absent this Court's intervention, the Ninth Circuit's "Pickwickian" decision will lead to "absurd results" that undermine worker protection laws and force

unwilling employers to assist workers in disruptive and demoralizing acts of self-destruction. *Id*. at 23a.

1. Three provisions of the ADA deal with a person's qualification for employment. First, the statute's primary bar on discrimination against the disabled, section 12112(a), extends protection only to a "qualified individual with a disability," defined as a disabled person who "can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). Second, the Act provides that it is a defense to liability that a disabled person has been screened out of a job by the application of "qualification standards" that are "job-related and consistent with business necessity." *Id.* § 12113(a). Finally, the Act addresses a particular "qualification standard," specifying that an employer "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b); see also § 12111(3) (defining "direct threat" as a "significant risk to the health or safety of others").

The sum total of the Ninth Circuit's textual analysis was to observe that section 12113(b) does not mention threats to self, and to conclude under the canon of interpretation *expressio unius est exclusio alterius* that threats to self therefore cannot be included within the "direct threat" defense. App., *infra*, 6a-7a. The *expressio unius* maxim, however, "serves only as an aid in discovering the legislative intent when that is not otherwise manifest," and here "too much is claimed for it." *United States* v. *Barnes*, 222 U.S. 513, 519 (1912).

By its plain terms, section 12113(b) sets forth only one example of a permissible qualification standard: a qualification standard *"may include"* a requirement that others not be put at risk. The provision therefore does not purport to be an exclusive list of safety-related qualification standards; it merely removes doubt that avoiding harm to others is *one* valid qualification standard. Section 12113(b) says *nothing else* about the meaning

of the terms "qualification standard" and "qualified individual" in the Act's other provisions. See *Albertson's*, 527 U.S. at 569 (section 12113(b) "appears to be a permissive provision"); *Christensen* v. *Harris County*, 529 U.S. 576, 587-588 (2000) (the term "may include" is "plainly permissive"); *Smith* v. *United States*, 508 U.S. 223, 230 (1993) ("It is one thing to say that [a phrase] *includes* [one use]. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use") (emphasis in original). Because section 12113(b) expressly is *not* exclusive and in no way limits the scope of sections 12112(a) or 12113(a), the Ninth's Circuit's reliance on the *expressio unius* maxim was misplaced.

2. The plain language of the ADA shows that posing a danger to self may disqualify a person for employment. The term "qualified" means "fitted" by "endowments * * * for a given purpose" or "having complied with the specific requirements * * * for an * * *employment." Webster's Third New Int'l Dictionary (1971). It is contrary to common usage and common sense to suggest that a person whose medical condition threatens injury or death at a particular job is "fitted" for that job; he is plainly *unfitted*. Also, where an employer has specified the environmental conditions an employee must be able to tolerate to do a job—as the ADA expressly permits (42 U.S.C. § 12111(8)) and as Chevron did here—an employee who will be injured or killed by those conditions obviously has not "complied with the specific requirements" for the job. Similarly, the term "qualification standards" in section 12113(a) is broad enough to encompass a "standard" requiring that a person be able to do the job in question without suffering serious harm or death. The EEOC has recognized as much by interpreting "[q]ualification standards" to include "personal * * * attributes" including "medical [and] safety" requirements established by an employer "which an individual must meet in order to be eligible for the position" (29 C.F.R. § 1630.2(q)), an interpretation that is entitled to deference under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984).

3. Well established canons of statutory construction confirm that a person who would pose a serious risk to his own health or life in a job is not qualified for that job. First, as we have already explained (*supra*, pp. 18-19), this Court has held that the ADA is to be construed in light of judicial and regulatory interpretations of the Rehabilitation Act. Congress clearly intended that the ADA incorporate principles embodied in the Rehabilitation Act and its regulations, and that the two laws be construed to avoid "inconsistent, conflicting standards." 1 Leg. Hist. 71, 100, 124. Accordingly, the ADA and Rehabilitation Act are to be construed *in pari materia*. See 2B N. Singer, Statutes and Statutory Construction § 51.03 (6th ed. 2000).

Both before and after passage of the ADA, courts of appeals have interpreted the concept of a "qualified individual" in the Rehabilitation Act to exclude a person who will be seriously harmed by the job as the result of a medical condition. See *supra*, pp. 19-20. The EEOC likewise has long defined a "qualified" person for purposes of the Rehabilitation Act as a person who can do the job "without endangering the health and safety of the individual." 43 Fed. Reg. at 12295. Interpreting the ADA's "qualified individual" provision *in pari materia* with the virtually identical provisions of the Rehabilitation Act and its implementing regulation confirms that a person who poses a significant risk to self is not "qualified" and therefore is outside the protection of the ADA. See *Koshinski*, 177 F.3d at 603.

In addition, it is well settled that courts should not interpret statutes to needlessly conflict with other federal laws or to produce absurd consequences. *E.g.*, *Moragne* v. *States Marine Lines*, 398 U.S. 375, 400-402 (1970); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994); 2B N. Singer, *supra*, § 53.03. The Ninth Circuit's construction of the ADA does lead to "absurd results." App., *infra*, 23a. To begin with, it conflicts with "longstanding laws mandating workplace safety." *Id.* at 22a. The Occupational Safety and Health Act imposes a duty on every employer to "furnish to *each* of his

employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a) (emphasis added). The Occupational Health and Safety Administration has explained that this obligation applies equally to the employment of disabled persons. See OSHA, Standards Interpretation, Employment of Individuals with Disabilities (Aug. 27, 1997), at www.osha-slc.gov/OshDoc/Interp_data/I19970827.html ("OSHA's policy is [that] *if* an employee can perform their job functions *in a manner which does not pose a safety hazard to themselves* or others, the fact they have a disability is irrelevant") (emphasis added).

For example, OSHA standards limit the employment of a fireman with heart disease, epilepsy, or emphysema; require that employees with sores not work in spray-finishing operations; and mandate removal of employees who exceed specified blood levels of lead and other substances from jobs involving exposure to those substances. See 1 OSHA Comp. Guide (CCH) ¶ 1161, at 1585-1586 (2000). State laws likewise impose obligations on employers to keep all of their workers safe, often providing criminal as well as civil penalties for failing to do so. See App., *infra*, 21a-22a; Cal. Lab. Code § 6402 ("No employer shall * * * permit any employee to go or be in any employment or place of employment which is not safe and healthful"). Yet the Ninth Circuit labels such worker protection policies "paternalistic," and allows an employer to deny a sick worker employment only when he reaches the point of being "unable to perform [the job's] duties." App., *infra*, 16a-17a. Given that "law books * * * overflow with statutes and rules designed by representative governments to protect workers from harm," this cannot be a correct interpretation of the ADA. *Id.* at 21a; *Albertson's*, 527 U.S. at 573 ("federal safety rules * * * limit application of the ADA as a matter of law"); 29 C.F.R. § 1630.15(e).

The Ninth Circuit's interpretation has other harmful consequences. It would expose employers to tort suits by injured workers and their families. The majority dismissed that risk on the ground that state tort laws inconsistent with ADA obligations would be impliedly preempted. App., *infra*, 13a. Judge Trott correctly observed, however, that relying on "the long, expensive, and unpredictable litigation road" to preempt state laws is "highly pernicious" when the issue can be avoided by a plain-language interpretation of the ADA, and is "a thin reed at best." *Id.* at 23a. As Judge Trott also noted, the Ninth Circuit's rule "requir[ing] employers knowingly to endanger workers" imposes an "unconscionable" "moral burden" on employers. *Ibid*. No reasonable interpretation of the ADA would impose a legal obligation on an employer knowingly to put a worker in the way of serious or fatal harm.

4. The ADA's legislative history contradicts the Ninth Circuit's ruling. The court relied on *a single floor statement* by Senator Kennedy that "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." App., *infra*, 8a, quoting 136 Cong. Rec. 17377 (1990). Senator Kennedy commented that "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician." *Ibid.*

The Ninth Circuit attached too much weight to Senator Kennedy's personal and "frankly partisan statements about the meaning of" the direct threat defense, which "cannot plausibly be read as reflecting any general agreement." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 262 (1994); see, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history"). Senator Kennedy's example of

paternalistic fear that a person with HIV would contract opportunistic infections—a speculative fear that could bar a worker from *any* job—is in any event far removed from the situation here. Chevron had specific, unanimous medical advice that documented conditions in the refinery would exacerbate Echazabal's liver disease and probably kill him.

"[T]he House and Senate commitee reports on the ADA flatly contradict" the court of appeals' reading of the statute. *Board of Trustees* v. *Garrett*, No. 99-1240, slip op. at 13 (Feb. 21, 2001). Congress aimed in the ADA to bar decisionmaking about employment of disabled persons based on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, [and] pernicious mythologies." 1 Leg. Hist. 125 (Senate Report). None of those improper motives formed the basis for Chevron's decision. It had specific, unrebutted medical reports that Echazabal would be seriously endangered by performing the plant helper job. Congress fully recognized that the results of a post-offer medical examination might "mak[e] the individual not qualified for the job." *Id.* at 137. The House Report thus states that, while "[g]eneralized fear about risks from the employment environment, such as exacerbation of the disability caused by stress," do not disqualify a person from employment, an employer may deny work based on "a direct impact on the ability of the person to do their actual job duties without imminent, substantial threat of harm." *Id.* at 347. The clear import of this passage is that a real and substantial risk of "exacerbation of the disability" is a proper ground to deny employment.[6]

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[6] The Ninth Circuit also incorrectly relied on *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), and *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991). App., *infra*, 13a, 15a n.9. In *Dothard*—which held that women *may* be excluded from contact positions in a high-security male prison—this Court stated that "it is impermissible under Title VII to refuse to hire [on] the basis of

5. Once the relationship between sections 12113(a) and (b) is understood—the "direct threat" defense is a "subset" of the more general "qualifications standards" defense (1 Leg. Hist. 423)—the logic of the EEOC's "direct threat" regulation is evident. The EEOC determined in 1991, immediately after the ADA was adopted, that section 12113(a) "qualification standards" may properly include "personal attributes" including "medical [and] safety" requirements. 29 C.F.R. § 1630.2(q). Rather than treat those requirements separately from the "threat to others" qualification standard set forth in section 12113(b), the EEOC treated *all* medical and safety standards—whether directed to avoiding harm to others or to self—as subject to the same set of substantive and evidentiary rules, using the "direct threat" rubric. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). Although the threat to self and threat to others qualification standards have different statutory sources—sections 12113(b) and (a)

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stereotyped characterizations of the sexes." 433 U.S. at 333. Chevron's decision not to hire Echazabal was based not on stereotypes but individualized consideration of Echazabal's medical condition. *Johnson Controls* held that an employer violated Title VII when it barred women of childbearing age from jobs that involved contact with lead to protect their fertility and fetuses. Because lead also has a "debilitating effect * * * on the male reproductive system," singling out women was blatantly discriminatory. 499 U.S. at 198. Another federal statute prohibited discrimination based on the potential for pregnancy. *Id.* at 198-199. In addition, OSHA had concluded that there was no scientific basis to exclude women of childbearing age from jobs involving lead exposure, and the employer kept lead exposure levels below the maximum amount recommended by OSHA. *Id.* at 208. None of those factors is involved here. Speculative future harm to speculative future pregnancies of fertile women as a class is far removed from the specific, individualized medical advice given to Chevron that exposure to toxins in its refinery would exacerbate Echazabal's liver condition and probably kill him. The Ninth Circuit's misconstruction of *Dothard* and *Johnson Controls* is itself a reason to grant review.

respectively—the EEOC has elected to make them subject to a single set of regulatory requirements. That reasonable decision by the agency Congress specifically charged with implementing these provisions is entitled to deference under *Chevron*. The Ninth Circuit erred in refusing to defer to the EEOC's interpretation of the ADA's qualification standards provisions.

6. The remaining question is whether the Ninth Circuit erred in holding that the "direct threat" defense is the *exclusive* means to defend a decision not to hire a person because of medical risks. App., *infra*, 14a. The EEOC has taken the litigating position that threats to self and others are relevant only as a defense to liability and play no role in determining whether a person is "qualified" in the first place. This Court questioned that position in *Albertson's*, 527 U.S. at 569 n.15, because it irrationally "impose[s] a higher burden on employers to justify safety-related qualification standards than other job requirements." The Seventh Circuit has rejected efforts to cabin all safety-related inquiries within the "direct threat" defense, holding that an employee fails to make a *prima facie* showing that he is a "qualified individual" under section 12112(a) if he does not produce evidence "as of the time of the employment decision" that he would not be harmed by doing the job. *Koshinski*, 177 F.3d at 602-603. In such a case, there is no need to "reach the question of whether the [employer] had a valid defense": the employee simply is outside the Act's protections. *Id*. at 603. See also *Albertson's*, 527 U.S. at 578 (an ADA plaintiff "bears the burden of proving * * * that he is a qualified individual") (Thomas, J., concurring).

How threats to self and others are to be analyzed under the ADA is of exceptional practical importance in many suits filed in federal courts throughout the country. We believe that the correct analysis is the one adopted by the Seventh Circuit in *Koshinski*. Once the employer has determined by medical testing or otherwise that an applicant poses a significant risk of harm to self or others in performing the essential functions of

the job, the applicant has the burden of coming forward with evidence, reasonably available to the employer when the employment decision was made, that the applicant could perform those tasks safely. If the applicant fails to produce such evidence, he has failed to make out a *prima facie* case that he is a "qualified individual." If the applicant does satisfy his initial burden, the question then becomes whether the "direct threat to self or others" defense applies. This interpretation ensures that, before an applicant may pursue actual and punitive damages claims against an employer for an ADA violation, there is evidence that the employer had reason to believe the applicant could do the job without injuring or killing himself or others. Like the scheme used in Title VII disparate treatment cases, this "division of intermediate evidentiary burdens" would bring the "litigants and the court expeditiously and fairly" to the ultimate question whether unlawful discrimination has occurred. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted.[7]

Respectfully submitted.

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[7] The court of appeals vacated the judgment as to Echazabal's Rehabilitation Act and FEHA claims and remanded those claims for reconsideration because "the district court treated the substantive standards for liability under [the ADA and those two] statutes as identical." App., *infra*, 18a n.12. In a separate opinion, the court reversed the grant of summary judgment to Chevron on Echazabal's state law interference with contract claim. *Id*. at 25a-29a. The court made clear, however, that its ruling as to that count too turned on its interpretation of the ADA: Chevron's letter to Irwin was not "justified" under the ADA, so Chevron had not made out the affirmative defense of justification. *Id*. at 28a-29a. Accordingly, reversal of the Ninth Circuit on the question presented would require a remand as to all of respondent's claims.

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