

## 1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   CHEVRON U.S.A., INC.,                   :

4                   Petitioner                   :

5           v.                   :   No. 00-1406

6   MARIO ECHAZABAL.                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Wednesday, February 27, 2002

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:07 a.m.

## 13   APPEARANCES:

14   STEPHEN M. SHAPIRO, ESQ., Chicago, Illinois; on behalf of  
15   the Petitioner.

16   LISA S. BLATT, ESQ., Assistant to the Solicitor General,  
17   Department of Justice, Washington, D.C.; on behalf of  
18   the United States, as amicus curiae, supporting the  
19   Petitioner.

20   SAMUEL R. BAGENSTOS, Cambridge, Massachusetts; on behalf  
21   of the Respondent.

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## P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-1406, Chevron U.S.A., Inc. v. Mario Echazabal.

Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONER

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

According to the National Institutes of Health, hepatitis C kills 8,000 to 10,000 people in this country every year, and it's the largest cause of liver transplants. This is a progressive disease, which in many cases goes without any symptoms for a period of time, but in a large percentage of cases, it results in cirrhosis and liver failure. The disease in this instance was chronic, active, and severe, according to the standards of the NIH.

Now, NIOSH's Occupational Health Guidelines also confirm that the chemicals in this factory were liver toxins. The ordinary worker can withstand that exposure, which is consistent with OSHA standards. But the Government's guidelines say again and again that employees should receive medical tests before beginning work to look

1 out for special vulnerability. NIOSH's statement about  
2 phenol, one of the 12 chemicals here, is typical, and I  
3 quote from the guideline. Liver damage may occur.  
4 Persons with a history of abnormalities of the liver would  
5 be expected to be at increased risk from exposure.

6 Now, none of this matters according to the Ninth  
7 Circuit because injury to self is beyond the employer's  
8 legitimate concern. But we believe that the plain  
9 language of the statute and its structure tell a  
10 completely different story.

11 The defense provision in the statute, which is  
12 section 12113(a), first speaks in general terms.

13 QUESTION: Where do we find that, Mr. Shapiro?

14 MR. SHAPIRO: That is found on page 59a of the  
15 petition appendix.

16 QUESTION: 59a?

17 MR. SHAPIRO: 59a, Your Honor, yes.

18 QUESTION: Actually it's 58a, 1211(a), at the  
19 bottom --

20 MR. SHAPIRO: It begins on 58a, but the  
21 pertinent provision, 12113(a), is right there on 59a.

22 QUESTION: You first referred to the general  
23 rule. That's what I thought.

24 MR. SHAPIRO: And the general provision says it  
25 is permissible to use qualification standards and tests

1 that are job-related and consistent with business  
2 necessity. This is generic language and it does not  
3 exclude injury to self. After this general provision, the  
4 statute --

5 QUESTION: Which one is the general provision?

6 MR. SHAPIRO: The -- the first part is 12113(a),  
7 which states: in general. That's the general defense  
8 provision.

9 And right after it comes a particular example in  
10 subpart (b), which refers to risks to other individuals.  
11 And that, of course, is just an example that fits within  
12 the general rule here, and we know it's just an example  
13 because Congress said that permissible standards may  
14 include such a test. This is obviously not an exhaustive  
15 description.

16 QUESTION: And why isn't it an exhaustive  
17 description at least of that category, of the category of  
18 direct threat to health or safety? I can see that the  
19 words, may include, may include this and it may include  
20 that, but when the -- when the Congress is describing  
21 direct threat and it has only the health of other  
22 individuals, why for that part isn't it self-contained? I  
23 mean, you say it has a plain meaning. It would have been  
24 much plainer if Congress had said: of the individual or  
25 others, if that's what it meant.

1           MR. SHAPIRO: We think the -- the phrase, may  
2 include, is illustrative of matters that might fit into  
3 the general description that comes just before and that  
4 injury to -- to other persons and injury to self are --  
5 are both matters that fit within the general description  
6 of business necessity, public safety --

7           QUESTION: Well, there's some legislative  
8 history that suggests that indeed it wasn't intended to  
9 allow review of danger or risk to the employee himself.

10          MR. SHAPIRO: We found several instances that we  
11 cite in our brief where Congress was talking about injury  
12 to -- to the individual himself. So, again, it's not an  
13 exclusive reference. And I think if you look at the  
14 structure of the statute, Justice O'Connor, it again helps  
15 to answer this question.

16          QUESTION: It's -- surely it's exclusive to some  
17 extent. I mean, Mr. Shapiro, you certainly wouldn't argue  
18 that a qualification could include a requirement that the  
19 -- that the individual not pose an indirect threat to the  
20 health or safety of other individuals.

21          MR. SHAPIRO: That might be an inference from  
22 that language --

23          QUESTION: Right. So --

24          MR. SHAPIRO: -- that that would be inconsistent  
25 with the express language.

1 QUESTION: Right. So, I guess the question is  
2 how strong is the exclusionary inference --

3 MR. SHAPIRO: We think it's -- it's particularly  
4 weak because the -- the provision that comes right before  
5 this provision that deals with discrimination makes it  
6 clear that the employer may use medical examinations and  
7 may make an offer of employment contingent on the results  
8 of those medical examinations. That's in the  
9 discrimination section.

10 QUESTION: Where -- where is that now? What are  
11 you --

12 MR. SHAPIRO: That is in section 12112(d), which  
13 is quoted in our reply brief at page 7.

14 QUESTION: Where do we find that? Reply brief?

15 MR. SHAPIRO: At reply brief page 7. It says  
16 the employer may require a medical examination and may  
17 condition an offer of employment on the results of that  
18 examination. Again, the focus is perfectly general in  
19 scope. The exam is lawful if it is job-related and  
20 consistent with business need.

21 Now, we don't think it's necessary to resort to  
22 legislative history in this case, but there is a  
23 conference report here that stated that this act does not  
24 intend to override any -- any -- legitimate medical  
25 standards or requirements established by employers for

1 safety-sensitive positions.

2 QUESTION: Well, Mr. Shapiro, as I go through  
3 this statute, under your theory of the case, beginning on  
4 page 58a, 12118, do you concede, for purposes of the  
5 statutory analysis, that the employee here was a qualified  
6 individual?

7 MR. SHAPIRO: We -- we deny that he was a  
8 qualified individual. We make two arguments: one, that  
9 -- that we have a business necessity not to hire somebody  
10 who would be killed in this particular job, but also that  
11 he's not qualified.

12 QUESTION: So, as -- as you see the case, could  
13 we dispose of the case by reading just 1211 -- 121118 and  
14 end it right there --

15 MR. SHAPIRO: Absolutely.

16 QUESTION: -- and find what we're talking about  
17 in defenses just does not bear on our determination one  
18 way or the other? Obviously, you look at the whole  
19 context of the statute to make sure that what you're doing  
20 is consistent -- consistent with it.

21 MR. SHAPIRO: I -- I would agree with that, and  
22 we --

23 QUESTION: It's hard to say he's not qualified  
24 when he worked there for the other contractor in the same  
25 circumstances for 20 years or so.



1           MR. SHAPIRO: The qualification standard focuses  
2 on whether he can perform the job on an ongoing basis in  
3 the near term. And -- and if the person would become  
4 seriously ill or die in the near term, that person can't  
5 carry out the job functions.

6           QUESTION: But 12113 specifically deals with  
7 qualification standards. I mean, don't you think that the  
8 qualification standards portion has to be read in pari  
9 materia with the -- with the -- with the provision  
10 defining a qualified individual? I mean, it seems to me  
11 the two are addressing exactly the same thing.

12          MR. SHAPIRO: There is linguistic overlap and  
13 there is practical overlap. A person who is not qualified  
14 is a person --

15          QUESTION: I mean, you wouldn't -- you wouldn't  
16 say that -- that a person is not a qualified individual if  
17 he would pose an indirect threat to the health or safety  
18 of others, would you? Because that's clearly excluded.  
19 You cannot use that as a qualification standard. I -- I  
20 just don't think it's an easy way out. I just -- it is in  
21 another section, but I think that other section has to be  
22 read to -- to be corresponding to the qualification  
23 standards.

24          MR. SHAPIRO: Our view is that there's overlap  
25 between qualification and business necessity.

1 QUESTION: Are we ultimately --

2 MR. SHAPIRO: But they're not coextensive.

3 QUESTION: Are we ultimately asking the  
4 question, is he qualified?

5 MR. SHAPIRO: That's the first question. The  
6 second question is, if he is qualified, because, as  
7 Justice O'Connor said, he can do the job in the short run,  
8 which we don't think he can, then the question is whether  
9 we have a business need to retain him.

10 QUESTION: Well, but let me -- when we go  
11 through the whole statute, including 121113, do you  
12 ultimately say we come to the conclusion that after  
13 reading the whole statute, he is not qualified, as that  
14 term is used in 8?

15 MR. SHAPIRO: That's our principal submission.  
16 Our backup --

17 QUESTION: Now, you don't even rely on the EEOC  
18 regulation? At least you're not arguing from that.

19 MR. SHAPIRO: We -- we -- it's one of our -- we  
20 have several arguments in the alternative, yes.

21 QUESTION: The regulation specifically says the  
22 individual -- the threat to the individual can be  
23 considered.

24 MR. SHAPIRO: We believe we -- we can win the  
25 case on that ground.

1 QUESTION: But the Ninth Circuit thought that  
2 went beyond the clear terms of the statute.

3 MR. SHAPIRO: Yes, and we think that that  
4 regulation is perfectly consistent with -- with the  
5 general defense provision, and we believe we can win the  
6 case under that regulation and, indeed, that it's entitled  
7 to Chevron deference because this agency had legislative  
8 rulemaking power to issue that standard.

9 QUESTION: But then you give the -- then you  
10 give the agency no deference at all when the agency says,  
11 yes, of course, he's a qualified individual. He can do  
12 the job. He's done it and he hasn't dropped dead for  
13 those 20 years. But so you say don't give the EEOC any  
14 respect on -- on the qualified individual, but give them  
15 Chevron deference on the 12113.

16 MR. SHAPIRO: We --

17 QUESTION: So, it's kind of when you like what  
18 the agency says, you respect it, and when you don't like  
19 it, you don't respect it.

20 MR. SHAPIRO: Well, I would note that the -- the  
21 agency in its cert stage amicus brief said that the  
22 qualification issue is whether the individual can perform  
23 the job in the near term. And we agree with that. But we  
24 say this person cannot do that because --

25 QUESTION: Well, if you agree with what they

1 said -- they have spelled it out what their position is in  
2 their brief, and they said, in no uncertain terms, this is  
3 a qualified individual.

4 MR. SHAPIRO: But you'll -- you'll note --

5 QUESTION: That's just in the brief, though.  
6 They didn't issue a rule to that effect, did they?

7 MR. SHAPIRO: Absolutely. That's just a  
8 brief --

9 QUESTION: And we're -- we're not paying any  
10 attention to what they say in briefs, are we?

11 (Laughter.)

12 MR. SHAPIRO: Well, they say -- they say helpful  
13 things in the brief too. They note that firemen and --  
14 and airline pilots and others that would succumb to an  
15 illness while they're conducting their jobs in the near  
16 term are disqualified. They're not qualified to do the  
17 job. And the reason is that safety considerations are  
18 paramount there, they say.

19 Well, they're paramount in this refinery too.  
20 There were five physicians here who said this individual  
21 was at imminent risk of death --

22 QUESTION: Just out of curiosity, why does he  
23 want to kill himself?

24 MR. SHAPIRO: It's an old story, Your Honor.  
25 Some people do not listen to their doctors. I won't

1 speculate on --

2 QUESTION: All right. You say -- I mean -- the  
3 reason I ask that question is I suspect in any real case,  
4 since people don't really want to kill themselves, there's  
5 an argument about how risky it is.

6 MR. SHAPIRO: Well, if you read the cases that  
7 we've cited, it's amazing how frequently people with --

8 QUESTION: In all those other cases, it seemed  
9 to me -- in all the cases that you cited --

10 MR. SHAPIRO: Yes.

11 QUESTION: -- there was a different issue at  
12 stake, and that in part was whether he could do the job.  
13 And here, perhaps unrealistically we are assuming, for the  
14 sake of this case, that he can do the job perfectly well.

15 MR. SHAPIRO: We -- we don't assume that.

16 QUESTION: All right. You don't. But suppose  
17 -- I don't know. I thought the issue is presented in the  
18 context where we're forced to make that assumption. I  
19 don't think anyone denies that if he can't do the job with  
20 reasonable accommodation, you have the right not to hire  
21 him. I don't know that anyone denies that one.

22 MR. SHAPIRO: We say he -- he is like the steel  
23 worker with vertigo who can fall --

24 QUESTION: Fine.

25 MR. SHAPIRO: -- off the beam at any moment --

1 QUESTION: Fine. If that's correct -- does  
2 anyone doubt that proposition of law?

3 MR. SHAPIRO: I hope not.

4 QUESTION: No, all right. So, this becomes  
5 serious as a matter of law only if we assume that he can  
6 do the job. And I just wonder under those circumstances  
7 whether in any real case the issue isn't an argument about  
8 how risky it is, and if that's so, my question would be,  
9 why doesn't this statute try to leave that matter up to  
10 him? If he does the job for you okay, that's your  
11 business. And if he wants to run greater risks than you  
12 think he should, that's his business.

13 MR. SHAPIRO: This statute rejects that thesis  
14 in the medical examination provisions, recognizing that  
15 the employer has a stake in this issue. There are many  
16 legitimate interests that the employer has.

17 QUESTION: Is it the case that it would violate  
18 the Occupational Safety and Health Act for Chevron to hire  
19 this person under those circumstances? Do we know that?

20 MR. SHAPIRO: Arguably it would, Your Honor,  
21 because this is a known hazard.

22 QUESTION: Does that have to be considered then  
23 in the balance of qualification? And the court below, I  
24 guess, didn't resolve that.

25 MR. SHAPIRO: It should -- it should factor into

1 the business necessity evaluation because we do have a  
2 business necessity to avoid violating State law and  
3 Federal law. And here there --

4 QUESTION: What section of the OSHA would you  
5 point to on that?

6 MR. SHAPIRO: I would point to the general  
7 duty --

8 QUESTION: And is it -- is it in the material  
9 before us?

10 MR. SHAPIRO: Oh, I -- I see we -- we didn't put  
11 it in our appendix, but it's the general duty provision of  
12 the OSHA statute cited in our opening brief and our reply  
13 brief. And what it says is that if you've recognized a  
14 hazard, you cannot send the employee into the jaws of that  
15 hazard.

16 QUESTION: Where -- where is the text of that  
17 that you're reading now?

18 MR. SHAPIRO: It's the general duty clause --

19 QUESTION: Maybe you can supply it later rather  
20 than take your time now --

21 MR. SHAPIRO: Yes. We'll supply it for you.

22 QUESTION: -- because we would be interested.

23 QUESTION: You were -- you were about to say why  
24 the -- the employer has an interest other than the mere  
25 charitable one in not letting an employee kill himself.

1 MR. SHAPIRO: Yes.

2 QUESTION: What -- what is -- what are the  
3 interests?

4 MR. SHAPIRO: There are several --

5 QUESTION: Other than not violating OSHA.

6 MR. SHAPIRO: -- several interests. There --  
7 there is Federal law compliance. There is State law  
8 compliance. There is State tort law liability that we're  
9 concerned about.

10 QUESTION: Does Workman's Comp go up if -- if he  
11 suffers?

12 MR. SHAPIRO: It -- it could. It certainly  
13 could.

14 QUESTION: Suppose the Federal statute said this  
15 is -- this preempts any inconsistent duty, that the  
16 employer is not liable for compliance with this statute.

17 MR. SHAPIRO: Well, we would hope that  
18 preemption would work that way, but preemption issues in  
19 the States court often do not.

20 QUESTION: Let's assume -- let's assume it does.  
21 Is there still a business necessity?

22 MR. SHAPIRO: Oh, yes, there still is.

23 QUESTION: And what is that?

24 MR. SHAPIRO: That's -- that's preservation of  
25 employment relations, avoidance of adverse publicity, and



1 -- and fear of criminal responsibility. There have been  
2 many criminal prosecutions, and courts never -- never hold  
3 that -- that general criminal laws are -- are preempted by  
4 Federal safety legislation. So, I don't think that's --  
5 that's any defense in that situation.

6           There are -- in all well-run businesses today,  
7 the model of the business is safety is our business. For  
8 100 years in this country, the industrial policy has been  
9 safety comes first. So, this is per se a legitimate  
10 business interest in this context.

11           Now, our -- our friend's argument to the  
12 contrary, interestingly, is an exact replay of the  
13 argument that was made to the EEOC back in 1991 when the  
14 agency adopted its rules. The argument was made then that  
15 if you refer to risk to self, it's going to encourage  
16 paternalism and encourage negative stereotypes. But the  
17 agency rejected that argument, explaining it was  
18 inconsistent with the purpose of the statute and was  
19 inconsistent with a long line of cases under the  
20 Rehabilitation Act. And the agency's judgment here, we  
21 believe, is entitled to Chevron deference.

22           QUESTION: Wasn't that the argument that was  
23 made in Johnson's Control that this is unsafe the -- the  
24 -- allowing a woman of child-bearing capacity to work --  
25 was it -- what was the toxic substance --

1 MR. SHAPIRO: Yes.

2 QUESTION: -- that -- that the same kind of  
3 evidence that you have about how dangerous it was, it's as  
4 dangerous to the woman, dangerous to the fetus?

5 MR. SHAPIRO: That was evaluated under a  
6 different legal standard, the BOFQ standard, which is much  
7 more stringent. This Court has said the business  
8 necessity standard is more flexible and -- and permissive.  
9 And that was a case where the Government said there was no  
10 serious risk, and all you had to do is take a simple  
11 precaution and the lead would not injure the -- the  
12 fetuses of -- of the woman. And there was discrimination  
13 between the sexes, which was the real thrust of the  
14 Court's decision, and there's nothing like that here.

15 QUESTION: But I thought the BFOQ goes together  
16 with an explicit sex --

17 MR. SHAPIRO: Yes.

18 QUESTION: -- what do they call it? Disparate  
19 treatment.

20 MR. SHAPIRO: Exactly.

21 QUESTION: And that here -- and the business  
22 necessity goes with neutral rule disparate effect. Are  
23 you saying that's what we have here?

24 MR. SHAPIRO: Business necessity applies to any  
25 screening test or medical examination or qualification

1 standard that the employer uses. And this was something  
2 that the business community fought hard for in Congress to  
3 get this flexible test. It's repeated three or four times  
4 in -- in title I of the statute, and -- and to disregard  
5 it here we think defeats the very basis of this  
6 legislation.

7 I see I've used a great deal of my time. I  
8 wonder if I might reserve the balance of the time for  
9 rebuttal.

10 QUESTION: Very well, Mr. Shapiro.

11 Ms. Blatt, we'll hear from you.

12 ORAL ARGUMENT OF LISA S. BLATT

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

15 MS. BLATT: Thank you, Mr. Chief Justice, and  
16 may it please the Court:

17 If I could first address just how the statute  
18 works with respect to whether an individual is qualified.  
19 It proceeds in two basic steps. The plaintiff has the  
20 burden of proof to show that he can perform the essential  
21 fundamental job tasks of the job and that he satisfies the  
22 employer's other qualification standards.

23 Now, if a particular qualification standard  
24 screens out someone because he is disabled, then the  
25 burden shifts to the employer to justify that standard as

1 job-related and consistent with business necessity. And  
2 what -- the EEOC's regulatory threat to self regulation is  
3 one example of a subset of a valid standard that is job-  
4 related and consistent with business necessity.

5 The statute recognizes that a valid  
6 qualification standard may include a safety requirement  
7 that an individual not pose a safety threat to others in  
8 the work place. The EEOC has reasonably concluded that a  
9 parallel defense is available if the individual would pose  
10 a significant safety threat to himself.

11 QUESTION: I -- I have one question. I guess  
12 it's a -- maybe a soft variety of the expressio/exclusio  
13 argument. But the theory of Chevron deference is that the  
14 -- that the Congress basically left a blank place to be  
15 filled in in whatever way the agency think is best. Why  
16 would Congress have wanted to leave, as it were, a hiatus  
17 on the question of individual safety when it specifically  
18 attended to safety of others? It just seems like an odd  
19 thing to leave up to the agency when it was that close to  
20 the subject in -- in what it did require.

21 MS. BLATT: Well, the context is very important  
22 here. What the direct threat to others -- the statutory  
23 threat to others defense -- is is a codification of this  
24 Court's decision in Arline, and that arose in the context  
25 of a teacher with a contagious disease that posed a direct

1 threat to others. But Congress expressly anticipated that  
2 other types of safety threats would be addressed by the  
3 more general business necessity. Congress simply didn't  
4 address safety threats to self or safety threats to others  
5 in the public and not necessarily the work place.

6 QUESTION: Perhaps Congress thought like Justice  
7 Breyer, that it's quite implausible that anybody would  
8 want to kill himself. Right? I mean, it -- it is not  
9 something that leaps to mind, that you -- you have to stop  
10 somebody from taking a job that's going to kill him,  
11 whereas stop somebody from taking a job in which he's  
12 going to hurt somebody else, that's something you would  
13 worry about.

14 MS. BLATT: The threat to self context can come  
15 up where an employee wants to either, A, assume the risk  
16 or, B, there's a disagreement about whether that risk in  
17 fact exists.

18 Now, the question is, is when an employer can  
19 prove, meet a burden of showing a documented and  
20 scientific basis for finding a significant risk of  
21 substantial harm, the employer has legitimate interests in  
22 refraining from injuring or killing its workers. The mere  
23 fact that the employee consents to that risk cannot trump  
24 the employer's interests, no more than it could if the  
25 employees agreed to assume the risk of working in an

1 environment with a person with tuberculosis. In both  
2 cases, the employer has legitimate interests.

3 Now, at the same time, the legislative history  
4 shows that Congress was concerned about employment  
5 decisions based on stereotype or group-based predictions  
6 and unfounded fears about disabled people posing safety  
7 threats. And what the regulations do is carefully balance  
8 the employer's legitimate interest with the rights of  
9 disabled persons to be free of these prejudicial decisions  
10 by requiring an individualized determination that looks at  
11 the person's actual medical condition and recognizes that  
12 disabilities pose varying levels of side effects and  
13 limitations or safety threats and requires an objective  
14 determination based on --

15 QUESTION: Well, they have a physician's exam  
16 and report. Is that enough?

17 MS. BLATT: The regulations require it to be  
18 based on objective or other medical examination.

19 QUESTION: Well, so this --

20 MS. BLATT: And that may -- well may be.

21 QUESTION: So, is that enough in -- in the view  
22 of the Government?

23 MS. BLATT: In the view of the Government, if  
24 the medical opinion is reasonable, then that's enough.

25 Now, in -- in this case --

1           QUESTION: But you take the position in the  
2 brief that perhaps it isn't. I was curious about that.

3           MS. BLATT: The position that the EEOC argued to  
4 the Ninth Circuit, which the Ninth Circuit did not address  
5 and would be available on remand, was that there was a  
6 factual dispute that summary judgment should not be  
7 entered on whether there was a reasonable determination.  
8 But employers are entitled to rely on the reasonable  
9 medical judgments that reflect available current --  
10 current medical knowledge.

11          QUESTION: Can I ask you a question about the  
12 reg? Because normally you should, of course, defer to the  
13 agency's regs. I understand that. But this particular  
14 reg is surprising the way it's written; that is, it  
15 doesn't say there are a lot of qualification standards.  
16 One of them is a direct threat to individuals, contagious  
17 disease problem. Another one is the suicidal employee.  
18 Rather it has the definition of the word, direct threat,  
19 and that's where it sticks the word self. And it appears  
20 then to be talking about a definition in the statute,  
21 direct threat to others. And it defines direct threat to  
22 others as direct threat to self and others. Now, if what  
23 it's doing is explaining the words, direct threat to  
24 others, I don't see how you can define the words, direct  
25 threat to others, to deal with a completely different kind

1 of problem involving direct threat to self.

2 MS. BLATT: With all due respect, Justice  
3 Breyer, what the -- what the agency did -- and it's on  
4 page 60a of the petition -- is said that a valid  
5 qualification standard includes a requirement that there  
6 not be a direct threat to the individual. And then it  
7 separately defined direct threat in terms of the way  
8 direct threat was defined by Congress.

9 QUESTION: And you left out three things. It  
10 says, direct threat to the health and safety of the  
11 individual or others. See 1630.2(r) defining direct  
12 threat, which refers you back to the reg in which what  
13 they seem to be doing is defining the words, direct  
14 threat.

15 MS. BLATT: But what -- what the agency did, as  
16 a matter of administrative convenience in protecting the  
17 rights of disabled persons, is that in -- in crafting a  
18 regulatory threat to self defense, it wanted to ensure  
19 that the same protections would be given to workers and  
20 that there had to be a showing of a significant risk of  
21 substantial harm. At the same time, this was beneficial  
22 to employers. So they wouldn't be confused by two  
23 different standards, it would be the same standard.

24 The agency could have accomplished the same  
25 result had it said, well, we want this direct threat to



1 others that follows the statute and as far as threats to  
2 self were concerned, it could have just avoided using the  
3 word, direct threat, and said, don't adopt a qualification  
4 standard unless it screens out significant safety risks  
5 that cause substantial harm. So, the mere fact -- it was  
6 administrative convenience to -- to have a parallel  
7 defense and using the terminology of direct threat.

8 QUESTION: May I ask you, Ms. Blatt? Do you  
9 think -- does the Government think that it was proper for  
10 the district court to enter summary judgment in the case?

11 MS. BLATT: Yes, on the -- the EEOC argued that  
12 the summary judgment on -- on direct threat with respect  
13 to petitioner's argument. And that would be available for  
14 the Ninth Circuit to consider on remand if this Court  
15 upheld the -- the regulation.

16 QUESTION: Is the district court saying that  
17 those two other doctors don't count because they weren't  
18 before -- I thought you had just said, in response to an  
19 earlier question, that that would be open if the -- on  
20 remand, the question of whether this person was in fact a  
21 risk to himself because, as I understand it, there were  
22 two witnesses that said he -- he was not.

23 MS. BLATT: Petitioner is arguing that its  
24 medical -- physicians advised that there was -- that there  
25 was a direct threat here. And what respondent argued in

1 response to that on summary judgment is that those  
2 decisions weren't reasonable. And we just think the  
3 parties have a genuine fact dispute about --

4 QUESTION: But the district judge said they  
5 didn't. The district judge said, I reject those two  
6 witnesses. They come too late. Goodbye. Summary  
7 judgment. So --

8 MS. BLATT: It's -- but what's relevant is not  
9 that the opinions were submitted late, it's whether at the  
10 time -- the -- the relevant inquiries at the time the  
11 employment decision is made, but you can still ignore what  
12 the medical literature says and make an unreasonable  
13 decision.

14 QUESTION: So, you think -- you're saying the  
15 district court erred as to that extent in saying summary  
16 judgment, no trial. This person is a danger to himself.

17 MS. BLATT: The United States hasn't  
18 independently briefed it, but that is what the EEOC argued  
19 to the Ninth Circuit. And it does turn on complicated  
20 medical questions that would be appropriately addressed by  
21 the Ninth Circuit on remand. What -- what we think this  
22 Court should do is hold that respondent was a qualified  
23 individual, but the employer is entitled to show that he's  
24 not qualified because it has a valid qualification  
25 standard that --

1           QUESTION: But do you have a position on the  
2 question whether, as a matter of law, the defendant has  
3 sustained the burden of proof that it was a reasonable  
4 medical decision?

5           MS. BLATT: The EEOC argued below no.

6           QUESTION: I'm not asking what the EEO argued  
7 below. I'm asking what is the Government's position on  
8 that issue.

9           MS. BLATT: I don't know what the United States'  
10 position on that is, but we don't have any reason to  
11 disagree with the EEOC. We just haven't independently  
12 looked at it. But the EEOC certainly makes a reasonable  
13 argument that there was a factual dispute on it and  
14 summary judgment was inappropriate.

15          QUESTION: Was inappropriate.

16          MS. BLATT: Inappropriate, right, that there was  
17 a genuine fact dispute about whether the direct threat  
18 test was met here, and we think the Ninth Circuit should  
19 be able to -- to address that in the first instance.

20          QUESTION: Address whether -- whether that  
21 argument is true or not.

22          MS. BLATT: Right, that because there is a valid  
23 regulation that the EEOC promulgated and it's entitled to  
24 deference, it should be upheld, and there's just a  
25 question about whether it was met in this particular case.

1           QUESTION: Ms. Blatt, I -- I find it peculiar to  
2 say he was a qualified individual but he didn't meet the  
3 employer's qualification standards. I mean, what is a  
4 qualified individual except one who can do what the  
5 employer's standard says has to be done?

6           MS. BLATT: May I answer, Mr. Chief Justice?

7           QUESTION: Yes.

8           MS. BLATT: It's just -- if I could give you the  
9 example of the airline pilot with a contagious disease.  
10 He's qualified to fly the plane, but he may, nonetheless,  
11 pose an unacceptable safety risk, and that's a valid  
12 qualification standard to -- to not hire him. It's just a  
13 question of burden of proof basically, Justice --

14          QUESTION: Thank you, Ms. Blatt.

15          Mr. Bagenstos, we'll hear from you. Am I  
16 pronouncing your name correctly?

17          ORAL ARGUMENT OF SAMUEL R. BAGENSTOS

18          ON BEHALF OF THE RESPONDENT

19          MR. BAGENSTOS: Yes, Your Honor.

20          Thank you, Mr. Chief Justice, and may it please  
21 the Court:

22          The exclusion of individuals with disabilities  
23 from jobs for their own protection was a principal target  
24 of the Americans with Disabilities Act, but the threat to  
25 self defense proposed by Chevron here would provide

1 affirmative legal authorization for precisely that sort of  
2 conduct.

3 For three principal reasons, we think it clear  
4 that Congress did not authorize such a threat to self  
5 defense, the first simply being the statutory text and  
6 particularly the change from the EEOC's prior regulations  
7 under the Rehabilitation Act which specifically included a  
8 threat to self disqualification to the ADA's direct threat  
9 provision which is limited to threats to others.

10 The second being the consistent jurisprudence  
11 under Title VII of the Civil Rights Act of 1964, a statute  
12 that provided a significant model for Title I of the ADA,  
13 that also responds in significant measure to a problem of  
14 paternalistic discrimination and --

15 QUESTION: Just tell us, if you would, why the  
16 employee would want to take a job where the doctor says  
17 it's going to kill you?

18 MR. BAGENSTOS: Well, I -- I think that --

19 QUESTION: These toxins will cause your early  
20 death. Now, why does the employee want that job?

21 MR. BAGENSTOS: Well, I think there aren't  
22 really employees who want to do that.

23 I think Justice Breyer and Justice Scalia's  
24 points made in the first half of the argument are well  
25 taken. When Congress was looking at this issue, it wasn't

1 thinking about the largely fanciful case where the  
2 employee -- where the employee wants to -- wants to go  
3 into a suicidal situation, but was thinking about the run  
4 of cases where, you know, there -- there's a small risk,  
5 there's an overstatement of the risk, there's some dispute  
6 about the risk. The -- and then the question is who  
7 decides.

8 QUESTION: And what is it here?

9 MR. BAGENSTOS: And -- and here I think it's  
10 clear there's a dispute about the nature of the risk. I  
11 think it's also clear if you look to what -- even the --  
12 even the testimony of Chevron's doctors is here. It's a  
13 small risk. Right? So -- so, when the -- when the  
14 doctors are asked what is the probability that this is  
15 going to happen, they can't put a number on it. Dr. Tang  
16 closest he -- who is the -- who is the most credentialed  
17 doctor for Chevron's side of the case, the closest he can  
18 come is he says, well, something like 1 percent. This is  
19 at page 88 of the joint appendix. So, what we're really  
20 saying here is that, you know, people get injured in this  
21 work place from time to time. Maybe there's a 1 percent  
22 incremental risk. Even if you accept Chevron's  
23 argument --

24 QUESTION: May I interrupt you just for a  
25 moment? Perhaps you're right on the facts of this case,

1 but the legal rule that you're contending for seems it  
2 would apply even if the risk was 99 percent and 2 weeks  
3 from today.

4 MR. BAGENSTOS: I think that -- I think that is  
5 correct, Your Honor. And -- and my response to Justice  
6 O'Connor was I think it's appropriate in crafting a rule  
7 for Congress to think that the 99 percent death 2 weeks  
8 from today cases aren't really going to arise, that the  
9 run of cases are going to be like this.

10 QUESTION: How sure can you be about that?  
11 There are people who smoke when they know the risk is very  
12 clear. There are people who will take serious risks  
13 because they need to earn money to support a family, and  
14 they often will do things their doctors tell them not to  
15 do. But you say they have an absolute right to take  
16 whatever the risk is.

17 MR. BAGENSTOS: Well, I -- I think they have --  
18 they have the same right as people who don't have  
19 disabilities. A very important point is that the question  
20 is -- the question here is -- I'm sorry, Your Honor.  
21 Would you like to --

22 QUESTION: Well, I -- I want to also get your  
23 view on that because there's another aspect of the case  
24 that I'm puzzled by. Mr. Shapiro at the beginning said  
25 that everybody else in the plant is safe under the OSHA

1 standards and so that only this person is at risk. Is --  
2 do you agree with that, or is there also risk to everybody  
3 else in the plant?

4 MR. BAGENSTOS: Well, I -- I think that the  
5 testimony of -- of the two experts on our side of the case  
6 -- this is why I say it's disputed. The testimony of the  
7 two experts on our side of the case is to the effect that  
8 if there is a risk for Mr. Echazabal, there is a risk for  
9 everyone else in the plant.

10 But the real issue is not whether the employer  
11 can take steps to make its work place safe. The real  
12 issue is whether the employer or the employee gets to make  
13 the decision whether --

14 QUESTION: Is it conceivable that someone would  
15 not be disabled but still be in a position where the -- he  
16 would propose a risk to himself similar to this?

17 MR. BAGENSTOS: I -- I -- of course, it's  
18 possible. That's absolutely right. And we don't have  
19 any --

20 QUESTION: Surely the employer can say no in  
21 that situation.

22 MR. BAGENSTOS: Well, I think -- I think what  
23 the employer can do -- the employer can certainly do  
24 whatever it wants with respect to people who don't have  
25 disabilities as defined in the statute, at least as far as



1 the ADA is concerned.

2 But again, the -- the question here is we have  
3 an individual who is excluded precisely because the  
4 employer believed that his disability rendered him unsafe.  
5 And the question is who gets to decide whether this job is  
6 too unsafe. Is it the employer? Is it the employee? We  
7 believe that -- that Congress firmly left that decision in  
8 the hands of the employee.

9 QUESTION: But the reason you make -- I think  
10 the reason you make that argument is essentially the --  
11 the paternalism theory. Congress rejected paternalism.  
12 But isn't what Congress rejected a combination of  
13 paternalism and stereotype? It rejected the kind of  
14 Johnson Controls situation which would say all women are  
15 at risk. Here you can call it paternalism if you want to,  
16 but at least the -- the medical claim is that there is a  
17 determination of risk specific to this individual. And  
18 can we say that Congress rejected the employer's authority  
19 to take that into consideration? No stereotype.  
20 Specific.

21 MR. BAGENSTOS: I think -- I think we can say  
22 that. I think we can -- we can say that because of the  
23 reference to over-protective rules and the statutory  
24 findings. We can say that because of Congress' lopping  
25 off of the threat to self disqualification that had

1 previously appeared in the EEOC regs.

2 QUESTION: Well, as I understand -- I want to  
3 come back to that, but go ahead. I don't want to --

4 MR. BAGENSTOS: Well, I -- I was done with that  
5 point.

6 QUESTION: I was just going to say with respect  
7 to -- when you get to the regulation itself, one answer  
8 from the Government was that the -- the reason the  
9 regulation mentioned threats to others is that there was  
10 -- there was case law on the point, and there's -- there  
11 really isn't comparable case law on threats to  
12 individuals. So that one way to read what Congress did  
13 was to say it wanted to preserve the law -- the case law  
14 that there was and leave the rest open. What do you --  
15 what do you say to that argument?

16 MR. BAGENSTOS: Well, I think -- I think that --  
17 that I may misconstrue their argument, but -- but  
18 certainly -- certainly as to the state of the  
19 Rehabilitation Act law at the time the ADA was adopted,  
20 there was a specific regulation by the EEOC. It's quoted  
21 in the petition's -- petition appendix at page 61, right,  
22 that specifically said a person is qualified only if he  
23 can perform the essential functions of the position in  
24 question without endangering the health or -- and safety  
25 of the individual and others.

1 Congress in 42 U.S.C. 12201(a) adopted by  
2 reference the Rehabilitation Act regulations, at least as  
3 a floor for protection under the ADA. This is one  
4 instance where Congress actually departed from what the  
5 prior Rehabilitation Act regulations did. We think that  
6 -- that has particular significance, particularly in light  
7 of the consistent drum beat not just in the statutory  
8 findings, not just in the legislative history at the  
9 hearing stage, at the committee report stage, at the floor  
10 stage, but also consistently in Title VII law, this --  
11 this distinction between -- between excluding people based  
12 on risk they pose to others and excluding people based on  
13 risk they pose to themselves.

14 QUESTION: Well, isn't there some room, though,  
15 for the argument that it -- there may be a business  
16 necessity not to hire somebody who's going to be killed as  
17 a result? You do have OSHA standards. You do have  
18 workmen's comp premiums that get jacked up if some  
19 employee is injured on the job or made ill because of the  
20 job. You have probably labor relations problems as a  
21 result of having somebody put at risk on the job. There  
22 -- there are arguments there for a business necessity  
23 defense.

24 MR. BAGENSTOS: Well, I think -- I think there  
25 may be arguments there. I think that they -- I think that

1 they're misplaced as a justification across the board for  
2 a threat to self defense as the EEOC has adopted.

3 Worker's compensation premiums --

4 QUESTION: Maybe but notwithstanding the  
5 regulation, just looking at the provisions of the act as  
6 applied in this case, how do we deal with that business  
7 necessity argument?

8 MR. BAGENSTOS: Well, I think I'd say two things  
9 about that. First, I think that -- I think that the  
10 decision that Congress made in 12113(b), the direct threat  
11 provision, to say specifically this is -- this is a  
12 defense that is limited to significant risks, because  
13 that's how it defines direct threat, and risks to others,  
14 I think that -- that in and of itself suggests that  
15 Congress has foreclosed a business necessity defense for  
16 anything -- anything relating to safety risk that falls  
17 outside the terms of it, just as Congress couldn't -- just  
18 as an employer could not say, as Justice Scalia suggested,  
19 well, we're excluding this person because of an indirect  
20 threat, but there's a business necessity for it.

21 QUESTION: Well, I thought Justice O'Connor's  
22 question was somewhat broader. Obviously, we understand  
23 your statutory position. But the -- the point of her  
24 question at least, as -- as I began to consider it, was  
25 whether or not in this society, it's -- it's wrong to say

1 that an employer should care about its employees.

2 MR. BAGENSTOS: Certainly --

3 QUESTION: It seems to me that that's a very,  
4 very important policy to further, and your position wants  
5 an employer to take a position that could be completely  
6 barbarous. You have an employee who has severe mobility  
7 problems near dangerous machines where he could be maimed,  
8 and you say that that's just irrelevant. I think that's a  
9 -- an argument that's very demeaning to a society that  
10 wants to encourage good conduct on -- on the part of its  
11 employers.

12 MR. BAGENSTOS: Well, I think that this Court  
13 confronted basically the same argument in the Johnson  
14 Controls case, that the employer said -- the employer  
15 said, look, we have a moral interest in the safety of our  
16 employees.

17 QUESTION: But wasn't that a case involving a  
18 broad category of all women of child-bearing age whether  
19 or not you were dealing with a specific individual who had  
20 been told by the doctor you better not do this. That was  
21 a broad categorical rule. Here we're dealing with an  
22 individual and individual circumstances. Does that make a  
23 difference, do you think? I mean, I would think Johnson  
24 is a -- a very sound concept as applied to broad  
25 categories, but I'm not sure it covers this case.

1           MR. BAGENSTOS: Well, I -- I mean, two points  
2 with respect to that. One is I think that it's clear that  
3 as -- as the employment discrimination law moves from  
4 Title VII which deals with large groups to -- to  
5 disability, which as -- as this Court's definition of  
6 disability decisions indicate, is a very individualized  
7 kind of a concept. Right? I mean, two people who have  
8 the same medical diagnosis, one may have a disability, one  
9 may not, this Court has repeatedly emphasized.  
10 Necessarily the kind of intentional discrimination we're  
11 talking about is going to be intentional discrimination  
12 against a person because of his particular disability as  
13 opposed to because of some broader group membership.

14           I -- I would suggest that there -- there is  
15 exclusion on the basis of some kind of group membership  
16 even in a case like this. Anyone with chronic hepatitis C  
17 would be excluded by -- by what Chevron --

18           QUESTION: But once -- once you eliminate the  
19 stereotyping as, you know, Justice Souter was -- was  
20 inquiring about, I don't see why Congress would be so  
21 adamant about paternalism for the handicapped but not  
22 adamant about paternalism for everybody else. I mean, if  
23 -- if I don't have a handicap, I have some disability that  
24 -- that does not qualify as a handicap, and I want to -- I  
25 want to work in -- in a particular job, and it's

1 dangerous, and under OSHA rules I don't have any right to  
2 say, paternalistic State, get out of here. I'm willing to  
3 accept the risk. You can't do it. Why -- why is Congress  
4 only worried about paternalism for the handicapped?

5           Once you eliminate the stereotyping, you have  
6 individual determination that this person is -- is going  
7 to be harmed. Why does Congress say, if it's a disabled  
8 person, he can kill himself, but if it's not a disabled  
9 person, oh, no, you can let him kill yourself? Why would  
10 Congress want to make that distinction?

11           MR. BAGENSTOS: Well, I think two -- two  
12 points. One is if it's a disabled person, he still has to  
13 be subject to the same OSHA rules as everyone else.

14           But two, why is Congress concerned about  
15 paternalistic discrimination? I mean, I -- I think a  
16 significant part of it is the concern that over the run of  
17 cases, there's -- when an employer looks at an individual  
18 with a disability and the risk posed by that individual to  
19 himself, history has shown -- and there's ample evidence  
20 of this in the -- in the legislative record -- history has  
21 shown that -- that there is likely to be an over-emphasis,  
22 an over-determination that there is in fact a risk.  
23 The --

24           QUESTION: By doctors? I mean, this requires  
25 medical -- medical evidence.

1           MR. BAGENSTOS: By doctor -- by doctors, company  
2 doctors, as occurs -- as occurred --

3           QUESTION: You're against even the most extreme  
4 case, which this may not be. I mean, that's hard to see  
5 that.

6           I -- I -- but I'm particularly curious. What  
7 about the reg? What about the reg? I mean, there it is.  
8 I take it your clients in this instance don't like the  
9 reg, but more often than not, the EEOC regs are quite  
10 favorable to disabled people. So -- so, how can we say,  
11 well in this case we're paying no attention to the reg,  
12 but in some other case you'll be back here arguing we  
13 ought to pay a lot of attention to the reg. So, what's  
14 your response to that?

15          MR. BAGENSTOS: Well, I don't think it's a  
16 question of -- of whose ox is gored. Right? I mean, I  
17 think why this reg --

18          QUESTION: Well, explain why it isn't.

19          MR. BAGENSTOS: Right. And why this reg doesn't  
20 -- ought not to get deference, it seems to me, is because  
21 what the EEOC is basically doing is sneaking back into its  
22 regulation a piece of the Rehabilitation Act regulation  
23 that was cut out by Congress.

24          QUESTION: You tell me how I write this sentence  
25 in the paragraph that says the reg doesn't matter? I say,



1 oh, they were sneaking this one in? I don't think I can  
2 write that.

3 (Laughter.)

4 QUESTION: What is it I'm supposed to say about  
5 that?

6 MR. BAGENSTOS: Well, I -- I think that  
7 deference doesn't apply when Congress has explicitly --

8 QUESTION: If it's clear, that's right, but I  
9 find it pretty hard to say it's clear when you start  
10 talking about extreme cases. I mean, maybe this isn't one  
11 of them, but you have the carpenter who's -- you know. I  
12 mean, you know, we can make them up. I think they're very  
13 hypothetical. I doubt very much they really exist, but  
14 you're asking for a rule that encompasses those  
15 hypothetical, far-out cases, and there I see the reg.  
16 What am I supposed to do?

17 MR. BAGENSTOS: So, two -- two points about the  
18 extreme cases, I mean, if that's what we're focusing on.  
19 The first point, as -- as Your Honor acknowledges, far-  
20 out probably don't exist. When Congress writes a rule, it  
21 doesn't write a rule for the extreme cases. It writes a  
22 rule for the run of cases. So, it wouldn't be crazy to --  
23 to read Congress -- what Congress said as not --

24 QUESTION: No. I find it difficult because I  
25 think the subject matter of the potentially suicidal

1 worker has nothing whatsoever to do with the problem of  
2 contagious diseases. And so, I find it very hard to say  
3 that in writing about contagious diseases, they were  
4 saying anything whatsoever about suicides.

5 MR. BAGENSTOS: Well, I think that -- I think  
6 that one of the -- one of the changes that the ADA makes  
7 in the direct threat provision is broadening that from  
8 contagious diseases to all other kinds of risks, number  
9 one.

10 QUESTION: You tell me about the reg.

11 MR. BAGENSTOS: Right, right. So, number two,  
12 about -- about the reg, it seems to me that in some of the  
13 extreme cases, a lot of them, maybe all of them, the  
14 person will fail on the qualified individual standard. A  
15 person who's going to die by -- simply by walking on the  
16 job, simply is unable to perform essential functions --

17 QUESTION: You're not telling me about the reg.  
18 I want to know how to avoid -- from your point of view,  
19 you want me to avoid the fact that I owe deference to a  
20 reg of the agency. So, I want to know. I know the normal  
21 rule is I owe that deference. So, what's special about  
22 this in respect to that?

23 MR. BAGENSTOS: Well, I -- I think that the  
24 question -- the question is, as I said, whether Congress  
25 has spoken to the matter with respect to whether an

1 employer can exclude an individual based on risk to self,  
2 and we say that Congress has spoken to that matter in  
3 12113(b), the direct threat provision.

4 QUESTION: Sure, but the -- the question is how  
5 plainly. And -- and here's the problem that I have, just  
6 as a technical matter, without even getting to the  
7 suicidal patient.

8 You make a very good argument about the contrast  
9 between what Congress wrote in the old EEOC regs. As  
10 against the force of that argument, you've got the text of  
11 the statute that refers to the qualifications, including  
12 threats to others. So, in the -- you know, the very  
13 breath that they're giving your -- an example, they're  
14 saying, and there can be all kinds of other things too.

15 It may very well be -- I don't know. It may  
16 very well be that, as Justice Ginsburg suggested earlier,  
17 they were talking about other kinds of examples on other  
18 subjects. But I don't know. It's not clear to me, and  
19 that's the point at which Chevron deference becomes  
20 crucial. How can I say it is so plain that Congress was  
21 excluding a -- a Chevron treatment?

22 MR. BAGENSTOS: Okay. Two points, one textual,  
23 one contextual. The textual point, directly on -- on this  
24 provision, I think goes back to what Justice Scalia said  
25 in the first half of the argument which is just because it

1 begins with may include, doesn't mean that everything that  
2 follows it -- everything that follows it doesn't place any  
3 limitations on everything that precedes may include.  
4 Congress said, you know, qualification standards may  
5 include a direct threat to others --

6 QUESTION: Absolutely, but I don't know how to  
7 draw the line. That's my problem.

8 MR. BAGENSTOS: And -- and I think the  
9 contextual point helps answer that with the -- the  
10 consistent statements both in the statutory findings and  
11 in this provision, the change from the -- from the  
12 Rehabilitation Act regs, and consistently in the  
13 legislative history, including that specifically referring  
14 to this particular provision saying the reason why we cut  
15 this language out basically is in order to say that  
16 paternalistic determinations, determinations by employers  
17 for the safety of employees, for the safety of the  
18 particular excluded employees, should not be permitted to  
19 justify --

20 QUESTION: Okay. But that gets back to the  
21 point that several have raised and that is paternalism  
22 combined with stereotype, yes, I understand. That's out.  
23 Johnson Controls is out.

24 But paternalism alone? Particularly where, as  
25 Justice Scalia has said, paternalism for the -- for the

1 non-disabled is -- is alive and well in OSHA. That's --  
2 that's not so easy for -- for me to follow.

3 MR. BAGENSTOS: Paternalism for everybody, the  
4 non-disabled, as well as the disabled --

5 QUESTION: Yes.

6 MR. BAGENSTOS: -- taken as a whole -- I -- I  
7 agree is taken kind of as part of the OSHA.

8 I -- I think that it's certainly, as -- as I  
9 meant to say in response to Justice Scalia's question,  
10 there certainly is a concern for stereotyping here. The  
11 question is whether Congress meant to permit -- or meant  
12 to require employees to have to prove stereotyping in each  
13 case. That is -- that is, Congress could have made a  
14 class-based decision that most of the time when we have an  
15 exclusion of an individual with a disability because of a  
16 conclusion that his disability makes him unsafe, that --  
17 that is likely to be informed by some degree of  
18 stereotyping or the -- the incentives that -- that  
19 employers' doctors have to exclude people rather than hire  
20 them and take the steps necessary to protect them as the  
21 American Public Health Association makes clear in its  
22 brief. So, stereotyping is --

23 QUESTION: So, that may -- that may simply get  
24 us down to a very important point but not a point here,  
25 and that is, the -- a sufficiency of evidence point or a

1 -- or a sufficient specificity of evidence point. And  
2 that's -- that's not what we've got.

3 MR. BAGENSTOS: Well, the problem -- right. I  
4 think that's right. I think Congress then has two  
5 choices. Do you require plaintiffs to prove in every case  
6 that there is stereotyping in addition to paternalism? Or  
7 do you presume essentially paternalism entails  
8 stereotyping when it's paternalistic discrimination? It's  
9 not paternalism at large, not paternalism visited on all  
10 employees. And I think that Congress, given the history  
11 recounted over and over in -- in the hearings, was  
12 entitled to say that we're just going to make a -- a broad  
13 class of --

14 QUESTION: Did it say that? That's the question  
15 we're all interested in. It certainly was entitled to  
16 say, but I don't believe you can point to any particular  
17 place where it specifically says that.

18 MR. BAGENSTOS: Well, I think that -- I think  
19 that the closest is that just as the direct threat  
20 provision excludes an indirect threat as a basis for --  
21 for excluding someone, so too does the threat to others  
22 language there exclude threats to self.

23 QUESTION: Yes, but you -- you have to push  
24 beyond the analogy from direct threat to indirect threat  
25 to -- to get that far out.

1 MR. BAGENSTOS: Well, I -- I don't -- I don't  
2 know that you have to push beyond the analogy. I mean,  
3 it's -- I would -- I would say, with respect, it seemed --  
4 it seems like it's precisely parallel statutory language.

5 There are two limitations in the 12113(b) direct  
6 threat provision. One is direct threat defined as  
7 significant risk, and the other is risk to others. It  
8 seems like if you're going to override either of those  
9 limitations under the guise of the general 12113(a)  
10 qualification standards defense, then any purpose Congress  
11 had for including those limitations in that direct threat  
12 provision is -- is going to be rendered meaningless.

13 And so -- so, I think that's the concern there.  
14 And this is not -- this is not a concern that's -- that's  
15 unique to the ADA. It's a concern that this Court  
16 approached under Title VII.

17 I think the important answer that -- I'd like to  
18 get back to Justice Kennedy's point before -- is that this  
19 is not a statute, even under our reading, that prevents  
20 employers from taking steps, taking lots of steps, to  
21 protect their employees. It just eliminates one thing  
22 they might do, and that is simply exclude an employee who,  
23 because of a disability, is determined to -- to pose an  
24 undue risk.

25 QUESTION: May I ask you to comment on a

1 hypothetical that I -- I can't -- haven't quite been able  
2 to think through? Assume that the -- that an employee has  
3 to be able to lift at least 200 pounds in order to be safe  
4 in a particular assignment. And one employee can't lift  
5 200 pounds because he's just not any stronger than a lot  
6 of other people, and another employee can't do it because  
7 he's disabled. Could they fire -- could they deny the  
8 employment of the disabled person in that hypo?

9 MR. BAGENSTOS: I think that that would be a  
10 neutral qualification standard. That's the paradigm case  
11 of a neutral qualification standard. That is what  
12 12113(a) is about. Asking everybody --

13 QUESTION: So, if the -- if Standard Oil had a  
14 -- had a qualification that anyone with hepatitis beyond a  
15 certain degree is ineligible for employment, that would be  
16 okay?

17 MR. BAGENSTOS: Well, I think the point -- the  
18 point of its neutrality in the lifting hypothetical --

19 QUESTION: Some -- some neutral standard that  
20 whatever -- they phrase it in medical terms, and if you  
21 cross the threshold, you're at too much of a risk and  
22 we'll -- we won't employ you.

23 MR. BAGENSTOS: Well, I think if they have to  
24 ask themselves what is your medical condition, do you have  
25 hepatitis C, which hepatitis C is a disability in this



1 case, then it's no longer neutral. Then what they're  
2 doing is engaging in intentional discrimination against  
3 that person because of his condition. If, on the other  
4 hand, what they say is we require everybody to lift 200  
5 pounds, we don't care if the reason you can't lift 200  
6 pounds is because --

7 QUESTION: Well, then you're discriminating  
8 against people with hernias probably.

9 (Laughter.)

10 QUESTION: Well, it -- it would certainly screen  
11 out people with hernias, and -- and therefore would prima  
12 facie violate the screening out provision of -- of the  
13 statute unless there were a business necessity  
14 justification. This is precisely the context in which  
15 there would be a business necessity justification under  
16 the statute where -- where an employer says we require  
17 everybody to satisfy the standard. We don't care. We  
18 don't even ask what's the reason why you can't lift. We  
19 give you 200 pounds and say, lift if for us, and if you  
20 can't do it --

21 QUESTION: What if the employer says, we require  
22 everybody to have a prognosis of living for at least 2  
23 years on the job?

24 (Laughter.)

25 MR. BAGENSTOS: Right. If the employer did

1 that, I mean, I think -- I think that that would be  
2 something -- that would be something that goes a lot  
3 closer to a qualification standard that is neutral. Now,  
4 the concern in that case is, number one, is it really  
5 neutral? That is, is it the case that they say only to  
6 people with disabilities, people with medical conditions  
7 that constitute disabilities, we think that you fail this  
8 test.

9 QUESTION: No, but I'm talking about just across  
10 the board. One of the things that we require, regardless  
11 of what you're condition is, is we want -- we want your  
12 life expectancy to be at least 2 years.

13 MR. BAGENSTOS: I think that they could do that  
14 if they could justify it as job-related and consistent  
15 with business necessity, which might be very difficult.  
16 The business justification I suppose would be we don't  
17 want turnover in employment, but there's a lot of turnover  
18 for a lot --

19 QUESTION: No age discrimination problem here?

20 (Laughter.)

21 MR. BAGENSTOS: There might well be an age  
22 discrimination problem there. Disparate effects, you  
23 know, depending on whether disparate effect is recognized  
24 under that statute.

25 But -- but under -- as far as the ADA is

1 concerned, certainly it's the case that they would be able  
2 to assert a business justification, but I think it would  
3 be difficult in that case to actually prove the business  
4 justification because it's only -- if it's only people who  
5 are going to die in 2 years, however we predict that, who  
6 are excluded from employment and not people who are going  
7 to take a better job, not people who are going to leave  
8 because they fall in love and move to a different city or  
9 leave to take care of a sick parent -- I mean, there are  
10 thousands of reasons why job turnover occurs. If they  
11 single out something that screens out people with  
12 disabilities, that's obviously very different.

13 But the crucial point, it seems -- it seems to  
14 me, is that in this case what we have and in the class of  
15 cases on which the legal question presented addresses --  
16 what we have is a choice effectively of who's going to  
17 decide whether a job is too risky for a particular  
18 individual in a context where there are general rules like  
19 OSHA that are complied with.

20 QUESTION: Well, let the doctor decide.

21 MR. BAGENSTOS: Well, I think that the  
22 individual will certainly -- will certainly follow the  
23 dictates of his own doctor in most cases. And when the  
24 individual doesn't, I mean, there are obviously cases  
25 where people --

1 QUESTION: I'm afraid you haven't thought about  
2 the Christian Scientists in this -- in this community.

3 MR. BAGENSTOS: Right. Well, I mean, I think --  
4 I think that raises obviously distinct issues.

5 But -- but yes, I think that -- people will  
6 obviously consult with their doctors. I mean, what's --  
7 what's notable here is that Chevron purported to consult  
8 with Echazabal's doctor, didn't really give him all the  
9 information, didn't get it, didn't ask him whether there  
10 was a significant risk, but never put the doctor in  
11 contact with Echazabal, just purported to have --

12 QUESTION: Well, that goes to the issue on  
13 remand if there is one.

14 MR. BAGENSTOS: Right, no --

15 QUESTION: It's not the legal --

16 MR. BAGENSTOS: I -- I agree with that. I -- I  
17 agree with that really does go --

18 QUESTION: But if we're focusing on our concern  
19 about extreme cases, of which this may not be one, have  
20 you thought of a form of words that might cabin those off  
21 if they ever occur, which would give some meaning to the  
22 reg?

23 MR. BAGENSTOS: I --

24 QUESTION: And what's the form of words?

25 MR. BAGENSTOS: I don't know that I can give any

1 meaning to the reg that's --

2 QUESTION: If you can -- if you apply it, you  
3 could think of an extreme case where the person is -- you  
4 know, the suicidal worker, I'm going to die with my boots  
5 on and I hope tomorrow. I mean, there may be such people,  
6 and -- and okay. So, that's what maybe this reg is about.  
7 I don't know. It doesn't say it isn't. And -- and what's  
8 the form of words that would cabin off those cases?

9 MR. BAGENSTOS: Well, I think that the cabining  
10 would have to be external to the regulation. I think it's  
11 -- I think it's -- to -- to say --

12 QUESTION: Well, give me the form of words,  
13 however you want to do it.

14 MR. BAGENSTOS: Okay. And I think that the  
15 cabining is threefold. Number one, an employer can  
16 exclude someone who is not a qualified individual with a  
17 disability, which many people who pose such an extreme  
18 present risk themselves will be. Number two, an employer  
19 can apply neutral qualification standards that are job-  
20 related and consistent with business necessity. And  
21 number three, if we have someone who really is bent on  
22 committing suicide by employment, there are State law  
23 commitment remedies available for such people, people who  
24 can't --

25 (Laughter.)

1 MR. BAGENSTOS: And no --

2 QUESTION: I mean, that's -- that's extreme. I  
3 mean, people may want to die with their boots on. There  
4 are a lot of things that move people. Some don't believe  
5 it, et cetera. So, is there a serious form of words that  
6 you could say, well, if it's really one of those cases, it  
7 might be a -- a situation that falls within the reg? And  
8 you're telling me the answer to that question is no.  
9 There is no form of words.

10 MR. BAGENSTOS: I -- I think outside of the  
11 situation -- the first two situations that I spoke of  
12 where the person isn't qualified or where the person is  
13 excluded under a neutral job-related and consistent with  
14 business necessity qualification standard, that I would  
15 suspect excludes everybody except what we've now described  
16 as the really extreme cases.

17 QUESTION: In order to avoid paternalism, we're  
18 going to tell employers they can just commit their  
19 employees.

20 (Laughter.)

21 MR. BAGENSTOS: Well, I think the crucial point  
22 is that, I mean, there are due process limitations on  
23 commitment which there are not for employers. And that's  
24 the crucial point, Justice Kennedy. If -- if we say that  
25 employers get to decide willy-nilly this is too unsafe,

1 that's -- that's a very different kind of a process. Of  
2 course, commitment is only in a very extreme circumstance,  
3 and we have procedures to make sure that independent  
4 decision makers make those decisions with full knowledge  
5 of the facts not employers here and then forcing --  
6 forcing employees to come to court and fight for 6 years  
7 to prove that they really weren't a risk to themselves.  
8 And -- and that we think is the reason why Congress  
9 excluded the -- excluded the notion that an employer could  
10 make the decision instead of the employee as to what is  
11 too unsafe.

12 And we would then submit that the court of  
13 appeals judgment should be affirmed.

14 QUESTION: Thank you, Mr. Bagenstos.

15 Mr. Shapiro, you have 2 minutes remaining.

16 REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

17 ON BEHALF OF THE PETITIONER

18 MR. SHAPIRO: Thank you, Mr. Chief Justice.

19 Justice Stewart's opinion for the Court in the  
20 Dothard case contained an excellent rebuttal to the  
21 argument we've just heard. He stated that safety is not  
22 romantic paternalism. Safety is a basic business  
23 necessity in this country. That's the culmination of 100  
24 years of industrial policy.

25 QUESTION: Mr. Shapiro, I thought that was

1 safety of others because didn't Dothard make the  
2 distinction between the -- the risk to the individual  
3 woman, which was up to her? What Dothard said is, this  
4 prison is a jungle. By her presence, she is endangering  
5 everyone else in the place. There are going to be riots.  
6 So, I think Dothard doesn't work for you at all.

7 MR. SHAPIRO: Oh, we think it does. The Court  
8 discussed both kinds of danger, danger to the individual  
9 and danger to other people. And this Court twice has said  
10 in Dothard -- in Beezer -- the Beezer case later -- that  
11 safety is a paradigm business necessity. And indeed, it  
12 -- it is the paradigm, safe and efficient operations of  
13 business.

14 And this is not a statute that cut out risks to  
15 self. This is a statute that included risks to self in  
16 the business necessity defense. That's generic language  
17 that encompasses it. And there was a long line of cases  
18 that Congress meant to adopt under the Rehab Act. They  
19 didn't disapprove those cases. In fact, business  
20 necessity is repeated four different times in the statute,  
21 and it's applied specifically to medical examinations of  
22 the individual employee. Congress wasn't talking about  
23 general tests. It was talking about examinations like the  
24 one given to Mr. Echazabal.

25 Now, this Court has held that under the business



1 necessity defense, it will not substitute its judgment for  
2 the employer's judgment. All that is needed is a  
3 reasonable relationship to a legitimate business  
4 objective. There certainly is a legitimate business  
5 objective here in saving this individual's life and  
6 promoting safety in the plant.

7           Was the judgment a reasonable one? We had four  
8 opinions from experienced physicians. We spoke with Mr.  
9 Echazabal's own physician. We told him, did you realize  
10 this man would be exposed to liver toxins, and he said,  
11 no, that should not be done. Someone with hepatitis C  
12 can't even have a drink of alcohol, much less liver  
13 toxins.

14           CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Shapiro.

16           The case is submitted.

17           (Whereupon, at 11:07 a.m., the case in the  
18 above-entitled matter was submitted.)  
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