SUPREME COURT OF THE UNITED STATES

No. 97–156

RANDON BRAGDON, PETITIONER *v.* SIDNEY ABBOTT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 25, 1998]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, and with whom JUSTICE O'CONNOR joins as to Part II, concurring in the judgment in part and dissenting in part.

I

Is respondent– who has tested positive for the human immunodeficiency virus (HIV) but was asymptomatic at the time she suffered discriminatory treatment– a person with a "disability" as that term is defined in the Americans with Disabilities Act of 1990 (ADA)? The term "disability" is defined in the ADA to include:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." 42 U. S. C. §12102(2).

It is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry. The Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made "with respect to an individual." Were this

not sufficiently clear, the Act goes on to provide that the "major life activities" allegedly limited by an impairment must be those "of such individual." §12102(3)(A).

The individualized nature of the inquiry is particularly important in this case because the District Court disposed of it on summary judgment. Thus all disputed issues of material fact must be resolved against respondent. She contends that her asymptomatic HIV status brings her within the first definition of a "disability."[1] She must therefore demonstrate, *inter alia*, that she was (1) physically or mentally impaired and that such impairment (2) substantially limited (3) one or more of her major life activities.

Petitioner does not dispute that asymptomatic HIV-positive status is a physical impairment. I therefore assume this to be the case, and proceed to the second and third statutory requirements for "disability."

According to the Court, the next question is "whether reproduction is a major life activity." *Ante*, at 11. That, however, is only half of the relevant question. As mentioned above, the ADA's definition of a "disability" requires

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[1] Respondent alternatively urges us to find that she is disabled in that she is "regarded as" such. 42 U. S. C. §12102(2)(C). We did not, however, grant certiorari on that question. While respondent can advance arguments not within the question presented in support of the judgment below, *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 119, n. 14 (1985); *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970), we have rarely addressed arguments not asserted below. It was the United States, not respondent, that asserted the "regarded as" argument below. The Court of Appeals declined to address it, as should we.

In any event, the "regarded as" prong requires a plaintiff to demonstrate that the defendant regarded him as having "*such* an impairment" (*i.e.*, one that substantially limits a major life activity). 42 U. S. C. §12102(2)(C). Respondent has offered no evidence to support the assertion that petitioner regarded her as having an impairment that substantially limited her ability to reproduce, as opposed to viewing her as simply impaired.

that the major life activity at issue be one "of such individual." §12102(2)(A). The Court truncates the question, perhaps because there is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction[2] (assuming for the moment that reproduction is a major life activity at all). At most, the record indicates that after learning of her HIV status, respondent, whatever her previous inclination, conclusively decided that she would not have children. App. 14. There is absolutely no evidence that, absent the HIV, respondent would have had or was even considering having children. Indeed, when asked during her deposition whether her HIV infection had in any way impaired her ability to carry out any of *her* life functions, respondent answered "No." *Ibid.* It is further telling that in the course of her entire brief to this Court, respondent studiously avoids asserting even once that reproduction is a major life activity *to her*. To the contrary, she argues that the "major life activity" inquiry should not turn on a particularized assessment of the circumstances of this or any other case. Brief for Respondent Sidney Abbott 30–31.

But even aside from the facts of this particular case, the Court is simply wrong in concluding as a general matter that reproduction is a "major life activity." Unfortunately, the ADA does not define the phrase "major life activities." But the Act does incorporate by reference a list of such activities contained in regulations issued under the Reha-

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[2] Calling reproduction a major life activity is somewhat inartful. Reproduction is not an activity at all, but a process. One could be described as breathing, walking, or performing manual tasks, but a human being (as opposed to a copier machine or a gremlin) would never be described as reproducing. I assume that in using the term reproduction, respondent and the Court are referring to the numerous discrete activities that comprise the reproductive process, and that is the sense in which I have used the term.

bilitation Act. 42 U. S. C. §12201(a); 45 CFR §84.3(j)(2)(ii) (1997). The Court correctly recognizes that this list of major life activities "is illustrative, not exhaustive," *ante*, at 12, but then makes no attempt to demonstrate that reproduction is a major life activity in the same sense that "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" are.

Instead, the Court argues that reproduction is a "major" life activity in that it is "central to the life process itself." *Ante*, at 11–12. In support of this reading, the Court focuses on the fact that "'major'" indicates "'comparative importance,'" *ibid.*; see also Webster's Collegiate Dictionary 702 (10th ed. 1994) ("greater in dignity, rank, importance, or interest"), ignoring the alternative definition of "major" as "greater in quantity, number, or extent," *ibid.* It is the latter definition that is most consistent with the ADA's illustrative list of major life activities.

No one can deny that reproductive decisions are important in a person's life. But so are decisions as to who to marry, where to live, and how to earn one's living. Fundamental importance of this sort is not the common thread linking the statute's listed activities. The common thread is rather that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual. They are thus quite different from the series of activities leading to the birth of a child.

Both respondent, Brief for Respondent Sidney Abbott 20, n. 24, and the United States as *amicus curiae*, Brief for United States as *Amicus Curiae* 13, argue that reproduction must be a major life activity because regulations issued under the ADA define the term "physical impairment" to include physiological disorders affecting the reproductive system. 28 CFR §36.104 (1997). If reproduction were not a major life activity, they argue, then it would have made little sense to include the reproductive

disorders in the roster of physical impairments. This argument is simply wrong. There are numerous disorders of the reproductive system, such as dysmenorrhea and endometriosis, which are so painful that they limit a woman's ability to engage in major life activities such as walking and working. And, obviously, cancer of the various reproductive organs limits one's ability to engage in numerous activities other than reproduction.

But even if I were to assume that reproduction *is* a major life activity of respondent, I do not agree that an asymptomatic HIV infection "substantially limits" that activity. The record before us leaves no doubt that those so infected are still entirely able to engage in sexual intercourse, give birth to a child if they become pregnant, and perform the manual tasks necessary to rear a child to maturity. See App. 53–54. While individuals infected with HIV may choose not to engage in these activities, there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a "limit" on one's own life activities.

The Court responds that the ADA "addresses substantial limitations on major life activities, not utter inabilities." *Ante*, at 14. I agree, but fail to see how this assists the Court's cause. Apart from being unable to demonstrate that she is utterly unable to engage in the various activities that comprise the reproductive process, respondent has not even explained how she is less able to engage in those activities.

Respondent contends that her ability to reproduce is limited because "the fatal nature of HIV infection means that a parent is unlikely to live long enough to raise and nurture the child to adulthood." Brief for Respondent Sidney Abbott 22. But the ADA's definition of a disability is met only if the alleged impairment substantially "limits" (present tense) a major life activity. 42 U. S. C. §12102(2)(A). Asymptomatic HIV does not presently limit

respondent's ability to perform any of the tasks necessary to bear or raise a child. Respondent's argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease "disabled" here and now because of some possible future effects.

In my view, therefore, respondent has failed to demonstrate that any of her major life activities were substantially limited by her HIV infection.

II

While the Court concludes to the contrary as to the "disability" issue, it then quite correctly recognizes that petitioner could nonetheless have refused to treat respondent if her condition posed a "direct threat." The Court of Appeals affirmed the judgment of the District Court granting summary judgment to respondent on this issue. The Court vacates this portion of the Court of Appeals' decision, and remands the case to the lower court, presumably so that it may "determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk." *Ante*, at 29. I agree that the judgment should be vacated, although I am not sure I understand the Court's cryptic direction to the lower court.

"[D]irect threat" is defined as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aides or services." §12182(b)(3). This statutory definition of a direct threat consists of two parts. First, a court must ask whether treating the infected patient *without precautionary techniques* would pose a "significant risk to the heath or safety of others." *Ibid*. Whether a particular risk is significant depends on:

> "(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the

> carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.'" *School Bd. of Nassau Cty.* v. *Arline,* 480 U. S. 273, 288 (1987).

Even if a significant risk exists, a health practitioner will still be required to treat the infected patient if "a modification of policies, practices, or procedures" (in this case, universal precautions) will "eliminat[e]" the risk. §12182(b)(3).

I agree with the Court that "the existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation," as of the time that the decision refusing treatment is made. *Ante*, at 23. I disagree with the Court, however, that "[i]n assessing the reasonableness of petitioner's actions, the views of public health authorities . . . are of special weight and authority." *Ante*, at 24. Those views are, of course, entitled to a presumption of validity when the actions of those authorities themselves are challenged in court, and even in disputes between private parties where Congress has committed that dispute to adjudication by a public health authority. But in litigation between private parties originating in the federal courts, I am aware of no provision of law or judicial practice that would require or permit courts to give some scientific views more credence than others simply because they have been endorsed by a politically appointed public health authority (such as the Surgeon General). In litigation of this latter sort, which is what we face here, the credentials of the scientists employed by the public health authority, and the soundness of their studies, must stand on their own. The Court cites no authority for its limitation upon the courts' truth-finding function, except the statement in *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S., at 288, that in making findings regarding the risk of

contagion under the Rehabilitation Act, "courts normally should defer to the reasonable medical judgments of public health officials." But there is appended to that dictum the following footnote, which makes it very clear that the Court was urging respect for *medical* judgment, and not necessarily respect for "official" medical judgment over "private" medical judgment: "This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied." *Id.*, at 288, n. 18.

Applying these principles here, it is clear to me that petitioner has presented more than enough evidence to avoid summary judgment on the "direct threat" question. In June 1994, the Centers for Disease Control and Prevention published a study identifying seven instances of possible transmission of HIV from patients to dental workers. See *Ante*, at 27. While it is not entirely certain whether these dental workers contracted HIV during the course of providing dental treatment, the potential that the disease was transmitted during the course of dental treatment is relevant evidence. One need only demonstrate "risk," not certainty of infection. See *Arline*, *supra*, at 288 ("the probabilities the disease will be transmitted'" is a factor in assessing risk). Given the "severity of the risk" involved here, *i.e.*, near certain death, and the fact that no public health authority had outlined a protocol for *eliminating* this risk in the context of routine dental treatment, it seems likely that petitioner can establish that it was objectively reasonable for him to conclude that treating respondent in his office posed a "direct threat" to his safety.

In addition, petitioner offered evidence of 42 documented incidents of occupational transmission of HIV to healthcare workers other than dental professionals. App. 106. The Court of Appeals dismissed this evidence as irrelevant because these health professionals were not den-

tists. 107 F. 3d 934, 947 (CA1 1997). But the fact that the health care workers were not dentists is no more valid a basis for distinguishing these transmissions of HIV than the fact that the health care workers did not practice in Maine. At a minimum, petitioner's evidence was sufficient to create a triable issue on this question, and summary judgment was accordingly not appropriate.