IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioner :

v. : No. 00-1406

MARIO ECHAZABAL. :

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Washington, D.C.

Wednesday, February 27, 2002

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

APPEARANCES:

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

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

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

C O N T E N T S

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

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

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

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

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

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

QUESTION: 59a?

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

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

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

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

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

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

QUESTION: Which one is the general provision?

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

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

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

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

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

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

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

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

QUESTION: Right. So --

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

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

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

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

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

QUESTION: Where do we find that? Reply brief?

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

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

safety-sensitive positions.

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

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

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

MR. SHAPIRO: Absolutely.

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

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

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

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

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

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

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

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

QUESTION: Are we ultimately --
MR. SHAPIRO: But they're not coextensive.
QUESTION: Are we ultimately asking the question, is he qualified?
MR. SHAPIRO: That's the first question. The second question is, if he is qualified, because, as Justice O'Connor said, he can do the job in the short run, which we don't think he can, then the question is whether we have a business need to retain him.
QUESTION: Well, but let me -- when we go through the whole statute, including 121113, do you ultimately say we come to the conclusion that after reading the whole statute, he is not qualified, as that term is used in 8?
MR. SHAPIRO: That's our principal submission. Our backup --
QUESTION: Now, you don't even rely on the EEOC regulation? At least you're not arguing from that.
MR. SHAPIRO: We -- we -- it's one of our -- we have several arguments in the alternative, yes.
QUESTION: The regulation specifically says the individual -- the threat to the individual can be considered.
MR. SHAPIRO: We believe we -- we can win the case on that ground.

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

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

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

MR. SHAPIRO: We --

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

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

QUESTION: Well, if you agree with what they

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

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

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

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

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

(Laughter.)

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

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

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

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

speculate on --

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

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

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

MR. SHAPIRO: Yes.

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

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

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

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

QUESTION: Fine.

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

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

MR. SHAPIRO: I hope not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: -- because we would be interested.

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

MR. SHAPIRO: Yes.
QUESTION: What -- what is -- what are the interests?
MR. SHAPIRO: There are several --
QUESTION: Other than not violating OSHA.
MR. SHAPIRO: -- several interests. There -- there is Federal law compliance. There is State law compliance. There is State tort law liability that we're concerned about.
QUESTION: Does Workman's Comp go up if -- if he suffers?
MR. SHAPIRO: It -- it could. It certainly could.
QUESTION: Suppose the Federal statute said this is -- this preempts any inconsistent duty, that the employer is not liable for compliance with this statute.
MR. SHAPIRO: Well, we would hope that preemption would work that way, but preemption issues in the States court often do not.
QUESTION: Let's assume -- let's assume it does. Is there still a business necessity?
MR. SHAPIRO: Oh, yes, there still is.
QUESTION: And what is that?
MR. SHAPIRO: That's -- that's preservation of employment relations, avoidance of adverse publicity, and

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

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

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

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

MR. SHAPIRO: Yes.

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

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

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

MR. SHAPIRO: Yes.

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

MR. SHAPIRO: Exactly.

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

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

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

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

QUESTION: Very well, Mr. Shapiro.

Ms. Blatt, we'll hear from you.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Well, so this --

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

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

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

Now, in -- in this case --

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

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

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

of problem involving direct threat to self.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. BLATT: The EEOC argued below no.

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

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

QUESTION: Was inappropriate.

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

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

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

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

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

QUESTION: Yes.

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

QUESTION: Thank you, Ms. Blatt.

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

ORAL ARGUMENT OF SAMUEL R. BAGENSTOS

ON BEHALF OF THE RESPONDENT

MR. BAGENSTOS: Yes, Your Honor.

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

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

affirmative legal authorization for precisely that sort of conduct.

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

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

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

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

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

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

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

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

QUESTION: And what is it here?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the ADA is concerned.

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

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

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

previously appeared in the EEOC regs.

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

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

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

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

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

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

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

they're misplaced as a justification across the board for a threat to self defense as the EEOC has adopted. Worker's compensation premiums --

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

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

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

that an employer should care about its employees.

MR. BAGENSTOS: Certainly --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Well, explain why it isn't.

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

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

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

(Laughter.)

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

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

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

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

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

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

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

QUESTION: You tell me about the reg.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: May I ask you to comment on a

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

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

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

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

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

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

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

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

(Laughter.)

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

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

(Laughter.)

MR. BAGENSTOS: Right. If the employer did

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

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

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

QUESTION: No age discrimination problem here?

(Laughter.)

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

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

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

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

QUESTION: Well, let the doctor decide.

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

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

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

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

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

MR. BAGENSTOS: Right, no --

QUESTION: It's not the legal --

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

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

MR. BAGENSTOS: I --

QUESTION: And what's the form of words?

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

meaning to the reg that's --

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

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

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

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

(Laughter.)

MR. BAGENSTOS: And no --

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

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

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

(Laughter.)

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

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

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

QUESTION: Thank you, Mr. Bagenstos.

Mr. Shapiro, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONER

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

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

QUESTION: Mr. Shapiro, I thought that was

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

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

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

Now, this Court has held that under the business

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shapiro.

The case is submitted.

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