No. 00-1406

In the Supreme Court of the United States

October Term, 2001

CHEVRON U.S.A., INC.,
Petitioner,

v.

MARIO ECHAZABAL,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, EQUAL RIGHTS ADVOCATES, THE NATIONAL WOMEN'S LAW CENTER, THE NORTHWEST WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, WOMEN EMPLOYED, AND THE WOMEN'S LAW PROJECT, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Over the last four decades, the ACLU has appeared before this Court in numerous cases involving the proper interpretation of those civil rights laws, both as direct counsel and as *amicus curiae*. The ACLU has advocated for interpretations of civil rights laws, including the Americans with Disabilities Act (ADA), that will ensure that all individuals have equal access to the workplace and are not disadvantaged because of protected characteristics such as race, sex, or disability. This case involves the scope of the protections afforded by the ADA. The proper resolution of that question is a matter of significant concern to the ACLU and its members throughout the country.

Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has undertaken difficult impact litigation that has resulted in establishing new law and provided significant benefits to large groups of women. ERA has litigated significant gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), as well as appearing as *amicus curiae* in numerous Supreme Court cases involving the interpretation of Title VII. ERA believes that individuals' freedom to decide what social or physical risks they will assume in their employment or other aspects of their lives is a core civil rights principle. If this principle can be eliminated in the context of disability discrimination under the ADA, it can be challenged in other civil rights arenas as well, and may weaken the very foundation of other major civil rights statutes, such as Title VII and Title IX, which underlie ERA's litigation goals and objectives.

The National Women's Law Center (NWLC) is a nonprofit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as *amicus curiae* in numerous cases involving employment law and civil rights issues.

The Northwest Women's Law Center (NWWLC) is a nonprofit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, the NWWLC has been dedicated to advocating for women's rights in many realms, including the workplace. The NWWLC has worked to eliminate barriers that block women's full participation in the workplace and has fought to ensure equal economic opportunities for women. Towards these ends, the NWWLC has participated as counsel and as *amicus curie* in cases throughout the Northwest and the country. The NWWLC continues to serve as a regional expert and leading advocate on these issues.

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[1] Counsel for respondents have informed counsel for *amici* that the parties have filed blanket letters of consent with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national nonprofit civil rights organization that uses the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Bowman v. Heller*, 420 Mass. 517, *cert. denied*, 516 U.S. 1032 (1995). NOW Legal Defense participated as *amicus* in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993), and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) is a national civil rights organization founded in 1972. It seeks to ensure equal protection of the laws and to protect the civil rights of Puerto Ricans and other Latinos. Since its inception, PRLDEF has worked to secure equal employment opportunities through full enforcement of the civil rights laws.

Women Employed is a national association of working women based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed maintains that it is an individual's freedom, not an employer's, to assess the risks and benefits of particular employment for the individual. This fundamental freedom is protected under federal employment discrimination laws and federal civil rights law in general.

The Women's Law Project (WLP) is a nonprofit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past twenty-eight years, WLP's activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of illegal discrimination in the workplace and the availability of strong and effective remedies under anti-discrimination statutes, including the Americans with Disabilities Act.

STATEMENT OF THE CASE

Mario Echazabal worked for various subcontractors at a Chevron oil refinery in El Segundo, California, for many years, including working in and around the refinery's coker unit. In 1992, and again in 1995, Echazabal applied to work directly for Chevron in the coker unit. Finding him qualified for the position both times, Chevron offered Echazabal employment, conditioned on his passing a physical examination. When the examination indicated that Echazabal had chronic liver disease, Chevron concluded that exposure to the chemicals in the coker unit might harm Echazabal, and rescinded its offers of employment. J.A. 172-77.

Echazabal challenged Chevron's refusal to hire him under the Americans with Disabilities Act (ADA). After the district court granted Chevron summary judgment, Echazabal appealed. The United States Court of Appeals for the Ninth Circuit reversed, holding that a threat to a worker's own health, with no threat to anyone else in the workplace, does not constitute a defense to liability under the ADA. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1072 (9th Cir. 2000). This Court then granted Chevron's petition for *certiorari.*

SUMMARY OF ARGUMENT

Exclusionary rules and practices, such as those keeping women out of certain professions and segregating the races in education and marriage, were long justified by assertions that they

actually benefited those excluded. Since the middle of the 20th century, however, such paternalistic exclusions have been recognized as discriminatory, even where the harms they seek to avoid are real rather than pretextual. Both the courts and Congress have recognized that people should not be disadvantaged "for their own good" because of their race, sex, or disability. The "direct threat" provision of the ADA exemplifies this cardinal civil rights principle. Congress provided that no employer need hire someone whose disability may harm others in the workplace. But that exception to the ADA's general nondiscrimination principle does not apply where the individual's disability poses a risk of harm only to the individual. Where a person with a disability faces such a risk of harm to himself, the decision whether to accept that risk belongs to the individual rather than to his employer. When Chevron refused to hire Echazabal because it believed that, due to his disability, the job posed a threat to him, it violated the ADA.

ARGUMENT

I. ALLOWING INDIVIDUALS TO DECIDE WHAT PHYSICAL OR SOCIAL RISKS THEY THEMSELVES WILL UNDERTAKE IS A CORE CIVIL RIGHTS PRINCIPLE

American anti-discrimination law seeks to enable each individual to participate fully in civic life, ensuring equal access for everyone to the workplace, to housing, and to places of public accommodation. The Constitution and civil rights laws accomplish this end in at least two ways: First, they protect against discriminatory exclusions based on invidious prejudice. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423 (1968)(Civil Rights Act of 1866 meant to end discrimination based on "custom or prejudice"). Second, the civil rights laws take aim at paternalism or mistaken beneficence -- the decision to exclude an employee from a job, a housing applicant from an apartment, or a student from a school, because of her race, sex or disability, based on the assertion that the exclusion will actually help the excluded person. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977). This second principle is no less a core principle of civil rights than the first.

Paternalistic exclusions were routinely upheld in many contexts prior to the second half of the 20th century, but such restrictions have since been recognized as discrimination itself. This reversal results from the recognition that individuals should have the freedom to decide what physical or social risks they will assume in their employment or in other aspects of their lives, rather than allowing others to make such decisions for them based on race, sex, or disability, no matter how well- or ill-intentioned these decisions may be.

A. Paternalism Has Often Been Invoked To Justify Discrimination

Historically, paternalism has often been invoked in support of discrimination. Employers, landlords, and educators have asserted that treating certain people differently because of their race or sex was done "for their own good." Such superficially well-meaning restrictions have appeared in numerous situations. For example, in one of the earliest school desegregation cases, the Massachusetts Supreme Judicial Court dismissed a constitutional challenge to a segregated primary school by asserting that racial separation benefited black students. Indeed, the court adopted the view of the primary school committee that the "continuance of separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to promote the instruction of that class of the population." *Roberts v. City of Boston*, 59 Mass. 198, 1849 WL 2756, at *3, *8 (1849).

Almost a century later, when Heman Sweatt challenged the constitutionality of Texas's separate law school for African Americans, he was met with substantially the same response: Texas argued, and the Texas courts agreed, that the race-segregated law school benefited African Americans because the smaller classes in the "Negro Law School" would provide black students with "better experience and education; they would be called on more frequently, would be more 'on their toes'." *Sweatt v. Painter*, 210 S.W.2d 442, 449 (Tex. Civ. App. 1948)(noting testimony

of law school dean that "in the Negro Law School he (Sweatt) would have gotten a good deal more personal attention from the faculty than he would have had he been in the large entering class in The University of Texas"), *rev'd*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *see also Davis v. County Sch. Bd.*, 103 F.Supp. 337, 340 (E.D. Va. 1952)("maintenance of the separated system [of schools by race] . . . in practice has begotten greater opportunities for the Negro"), *rev'd*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

Even after this Court repudiated purportedly "separate-but-equal" race-segregated educational facilities in *Brown*, arguments persisted that mandating separate schools benefited African Americans. For example, in *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F.Supp. 667 (S.D. Ga. 1963), *rev'd*, 333 F.2d 55 (5th Cir. 1964), the trial court found that a racially mixed classroom would be detrimental to both black and white students, and that segregation was beneficial for both as well. It reasoned that "[f]ailure to attain the existing white standards would create serious psychological problems of frustration on the part of the Negro child, which would require compensation by attention-creating antisocial behavior." *Id.* at 683. The court determined that "[t]otal group integration as requested by plaintiffs would seriously injure both white and Negro students . . . and adversely affect the educational standards and accomplishments of the public school system." *Id.* at 684. The district court concluded that even a partial integration of students would be damaging to African-American pupils, reasoning that:

> Negro children so transferred would not only lose their right of achievement in their own group but would move to a class where they would be inescapably conscious of total social rejection by the dominant group. Such children must try to identify themselves with the white children while unable to free themselves from continuing identification with other Negro children. Additionally, the children involved, while able to maintain the rate of the white class at first, would, according to all of the [IQ] test results [presented by the witnesses], thereafter tend to fall further back in each succeeding term.
>
> The effects on the remaining Negro children would be even more injurious. The loss of the better group members would greatly increase any existing sense of inferiority. The competitive drive to educational accomplishment for those not transferred would be taken away. The Court finds that selective integration would cause substantial and irremovable psychological injury both to the individual transferee and to other Negro children.

Id.; *see also id.* ("damaging assumptions of inferiority increase whenever the [Negro] child is brought into forced association with white children"). For that court, racial segregation in the schools was justified because the court found that it benefited black students.

Even laws prohibiting interracial marriage were justified by assertions that they actually helped African Americans and other non-Caucasian individuals. In *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), the Virginia high court upheld the state's anti-miscegenation law, observing that "it is for the peace and happiness of the colored race, as well as of the white, that laws prohibiting intermarriage of the races should exist." *Id.* at 752 (citing *Green v. State*, 58 Ala. 190 (1877)).

Discrimination against women was also justified by assertions that excluding them from various situations protected women's physical well-being. For example, in the early 20th century, statutes restricting women's access to the workplace were defended as protecting women from the physical rigors of manual labor. In upholding a statute that limited women to ten hours of work a day, the Supreme Court at that time cited the need to safeguard the physical constitution of women and their role as mothers. The Court reasoned:

> That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . . [and] justif[ies] legislation to protect her from the greed as well as the passion of man.

Muller v. Oregon, 208 U.S. 412, 421-22 (1908). Other courts readily approved similar restrictions on a woman's ability to work based on the asserted need to protect women from physical harm. *See, e.g.*, *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695, 697 (Ill. 1910)(upholding 10-hour workdays for women but not men as necessary "to protect . . . women from the consequences induced by long, continuous manual labor," which would render women "weakly and sick" and unable to be the "mothers of vigorous children"); *Wenham v. State*, 91 N.W. 421, 424 (Neb. 1902)(upholding 10-hour workdays for women because longer workdays would "wreck the constitutions and destroy the health of women, and render them incapable of bearing their share of the burden of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition"); *Commonwealth v. Beatty*, 15 Pa. Super. 5, 9 (Pa. 1900)(upholding a statute that prohibited women from working more than twelve hours per day in certain jobs and agreeing with the lower court that "an act which prevents the mothers of our race from being tempted to endanger their life and health can be condemned by none").

Similarly paternalistic arguments were advanced based on a purported concern for women's moral, rather than physical, well-being. For example, in *Bradwell v. Illinois*, 83 U.S. 130 (1872), Myra Bradwell applied to practice law. In upholding the state's refusal to admit Bradwell to the bar, Justice Bradley, concurring in the judgment, observed that:

> the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.

Id. at 141. The Wisconsin Supreme Court relied on like reasoning in *In re Goodell*, 39 Wis. 232, 1875 WL 3615 (1875), when it too refused a woman admission to the bar:

> It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman . . . that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape . . ., all the nameless catalogue of indecencies . . . with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold [women] in too high reverence . . . voluntarily to commit [them] to such studies and such occupations.

Id., 1875 WL 3615, at *8-9.

Courts' acceptance of paternalistic justifications for excluding women is not a thing of the distant past, but endured at least into the 1960s. Women were excluded from jury service, or allowed to serve on a solely voluntary basis, in order to insulate them from the "filth, obscenity,

and noxious atmosphere that so often pervades a courtroom during a trial." *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966) (holding that the "legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers"); *see also Near v. Commonwealth of Va.*, 116 S.E.2d 85, 91 (Va. 1960)(upholding exclusion of women from juries in order to prevent their exposure to "court trials, which often involve facts and circumstances of a filthy, indecent, and loathsome nature, references to intimate sexual relations, and other elements likely to prove humiliating and embarrassing to a lady"); *Bjorlin v. United Steamship Co.*, 10 F.R.D. 42, 42 (N.D. Ohio 1950)(excluding female juror from case involving discussion of venereal disease because it would "be potentially embarrassing to a mixed jury").

B. Such Paternalistic Rationales Have Since Been Recognized As Discriminatory

Since the middle of the 20th century, however, there has been a growing recognition that such paternalistic justifications themselves are discriminatory. In the passage of various civil rights acts by Congress, and in court decisions interpreting those civil rights acts and the Constitution, both Congress and the courts have repudiated the notion that employers, landlords, or schools can justify excluding individuals based on race, sex, or other protected characteristics where the exclusion is purportedly "for their own good."

For example, the Fifth Circuit reversed the trial court's approval of race-segregated schools in *Stell*, acknowledging that separation of the races was *per se* discriminatory under *Brown v. Board of Education*, 347 U.S. 483, despite the proffered evidence that it might actually help at least some black children. *Stell v. Savannah-Chatham County Bd. of Educ.*, 333 F.2d at 61-62. Even before *Brown*, this Court reversed the state court ruling in *Sweatt v. Painter*, holding that black students did not benefit from the separate "Negro Law School," even if the faculty-student ratio was better. *Sweatt v. Painter*, 339 U.S. at 634-35. And the ban on interracial marriages was declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1, 2 (1967), regardless of whatever harm some may have argued miscegenation might cause.

As courts have rejected these paternalistic rationales, they have increasingly recognized that a central part of implementing civil rights protections is ensuring that individuals can decide whether they themselves will take on a given physical or social risk, rather than having such decisions made for them based on their race, sex, disability, or other protected criteria. For example, in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), an employer denied women positions as switchmen, arguing that its restriction was necessary to protect women from the demanding physical requirements of the position, which included working late hours and the possibility of having to lift a 34-pound fire extinguisher. The court rejected the argument that these requirements rendered being male a bona fide occupational qualification for the position.[2] As the court explained:

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or

[2] Under 42 U.S.C. §2000e-2(e)(1), an employer may discriminate on the basis of sex "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." It therefore provides a limited defense to a claim of sex discrimination under Title VII of the Civil Rights Act of 1964.

> unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.

Id. at 236. *See also Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980)(holding that, "in the area of civil rights, personal risk decisions not affecting business operations are best left to individuals who are targets of discrimination," and thus invalidating requirement that all flight attendants commence leave immediately upon becoming pregnant in order to ensure their safety). Civil rights law gives individual women the opportunity to make these choices for themselves in part because of a recognition that the old paternalistic rules were as likely to harm women as help them, by restricting their opportunities and making them second-class and undesirable workers. As this Court observed in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), the nation's history of sex discrimination was often "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 & n.10 (1982)(discussing history of legislation aimed at protecting women).

In holding that individuals should be free to choose what educational opportunities are most appropriate for them, this Court in *United States v. Virginia,* 518 U.S. 515 (1996), reaffirmed the principle that it is up to the individual, not a third party, to decide whether to take on specific social or educational risks. Virginia limited enrollment at the Virginia Military Institute (VMI) to men and established a separate school, the Virginia Women's Institute for Leadership (VWIL), for women. VMI operated on an "adversative" educational model, designed to break the individual spirit of men and instill in them certain values; VWIL operated on a different model that sought to build confidence in women. *Id.* at 523, 527. Lower courts held that purported differences in how women and men would respond to the contrasting educational models justified the sex-based admission restrictions. *Id.* at 528; *see United States v. Commonwealth of Virginia*, 852 F.Supp. 471, 476 (1994)(finding VWIL to be appropriate for women in part based on evidence that "an adversative method of teaching in an all-female school would not only be inappropriate for most women, but counter-productive," according to research that shows "that most women reaching college generally have less confidence than men"); *id.* at 480 (citing evidence of widespread depression and eating disorders among college-age women stemming from their lack of confidence and overabundance of self-control). Rejecting the argument that all women should be excluded from VMI because many women would not find its approach to be beneficial, this Court explained that the issue "is not whether women -- or men -- should be forced to attend VMI; rather the issue is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords." 518 U.S. at 542. In other words, individual women must be allowed to decide for themselves whether they want to attend an "adversative" educational institution, even if some may claim it would be harmful to women.

C. Even Where A Paternalistic Exclusion Seeks To Avoid Actual Harm, It Is Still Prohibited Discrimination

It does not matter that an exclusionary policy purportedly seeks to protect individuals from an actual, rather than imaginary, physical or social harm; the civil rights laws recognize that decisions about whether to risk that harm are for the individual to make, not for an employer, landlord, or school board to make on the basis of a protected characteristic. In *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), this Court made the principle explicit: even the prospect of actual harm to an individual does not justify empowering an employer to deny equal employment opportunity based on what it thinks is best for the individual because of her race, sex, or disability.

In *Johnson Controls*, this Court held that the goal of avoiding potential injury to a woman and her fetus from exposure to lead, while understandable, was insufficient to justify a sex-based exclusion from work. Johnson Controls, which operated a battery plant, prohibited all women capable of bearing children from taking jobs that could expose them to lead. The employer

argued that this exclusion was necessary in order to protect women and their fetuses, but this Court responded: "Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself." *Id.* at 206. "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make." *Id.* at 211.

Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321, this Court distinguished between a risk of harm to an individual herself, which could not justify the person's exclusion from the workplace, and a risk of harm to others, which could. In *Dothard*, Alabama prohibited women from serving as prison guards where they would be in "contact" positions involving close physical proximity to male prisoners. In discussing whether that rule violated Title VII's ban on sex discrimination, this Court held that the fact that contact positions might involve potential harm to a woman guard herself was irrelevant. As the Court explained, "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." *Id.* at 335. If *Dothard* had involved no more than "an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum-security male prison," the restriction would have been stricken despite the potential physical danger the female guards faced. *Id.* This Court upheld the prohibition against women guards in contact positions only because the "likelihood that inmates would assault a woman because she was a woman" posed "a real threat . . . to the basic control of the penitentiary and protection of its inmates and the other security personnel." *Id.* at 336. Thus, while the threat of harm to the female guard herself would not justify a sex-discriminatory restriction, the threat of harm to others would.[3]

Despite the prospect of an acknowledged and avoidable harm to an individual in these cases, this Court reaffirmed the basic principle that decisions about risks to oneself are reserved to the individual and are not for third parties to make based on the individual's membership in a protected class, no matter how serious the risk of harm may be and no matter how well-intentioned the proposed exclusion.

Today it may seem implausible that the exclusion of women and African Americans that was accepted in the early cases was actually believed to be for their own benefit. But at the time, the rationales that justified segregated schools in *Roberts*, the ban on interracial marriage in *Naim*, and the prohibition against women lawyers in *Bradwell*, may well have been accepted by many as truths. The proponents of these positions certainly could have cited widespread social acceptance of, and scientific bases for, their conclusions. *See, e.g.*, *United States v. Virginia*, 518 U.S. at 537 & n.9 (noting that, in 1839, "[h]igher education . . . was considered dangerous for women" on physical grounds, since the science of the day held that educating women would "interfere with the development of girls' reproductive organs"); *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F.Supp. at 683 (accepting expert testimony that racially integrating

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[3] Age discrimination cases draw a similar line, recognizing that age can be a bona fide occupational qualification (BFOQ) on grounds of safety where the employee may endanger the safety of others, but implicitly rejecting the notion that an individual may be excluded because of her age based on the risk of harm to the individual herself. *See, e.g.*, *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 423 (1985)(holding that mandatory retirement age for flight engineers would be lawful only where advanced age would impair the engineer's ability to carry out his job functions, thereby threatening the safety of passengers and crew members); *EEOC v. Missouri State Hwy. Patrol*, 748 F.2d 447, 453-56 (8th Cir. 1984)(upholding maximum hiring age for patrolmen based on threat to safety of public); *Usery v. Tamiami Trails Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976)(finding that a maximum hiring age for bus drivers was a BFOQ because it was "reasonably necessary to the essence of his business -- here, the safe transportation of bus passengers from one point to another").

schools would cause significant educational harm to African Americans). But even where today's science suggests that actual harm may result, where that potential harm threatens only the individual, it is now the law that the individual has the right to decide whether to take the risk rather than being "protected" from the harm based on race, sex, or disability. This is part of the fundamental guarantee of civil rights laws.

II. THE AMERICANS WITH DISABILITIES ACT EMBODIES THIS CORE CIVIL RIGHTS PRINCIPLE

The Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, embodies the principle that individual employees, rather than their employers, should be free to decide what risks they themselves will undertake in the workplace.

The ADA was intended to eradicate discrimination against people with disabilities, including paternalistic restrictions such as "overprotective rules and policies." 42 U.S.C. §12101(a)(5). This purpose of the ADA is reflected not only in the text of the statute, but in its legislative history. The House Report states plainly: "It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant." H. R. Rep. No. 101-485, pt. 2, at 72, *reprinted in* 1990 U.S.C.C.A.N. 303, 354. And, as Representative Waxman explained, "[t]he ADA precludes an employer from denying an employment opportunity to an individual with HIV disease based on paternalistic concerns that the employee might be exposed to additional health risks." 136 Cong. Rec. H4626 (July 12, 1990).[4]

As part of the ADA's overall focus on preventing people with disabilities from being excluded from participation in society for their "own good," Congress distinguished between a threat that an individual poses to other people, which may justify excluding her from employment, and a threat that she may pose solely to herself, which does not. The text of the ADA provides that an employer may validly adopt as a qualification standard "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals." 42 U.S.C. §12113(b) (emphasis added). A "direct threat," in turn, is specifically limited to "a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation." 42 U.S.C. §12111(3) (emphasis added). The distinction between threat to self and threat to others also appears in the legislative history. Senator Kennedy, one of the co-sponsors of the ADA, stated:

> [t]he ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace -- that is, to other coworkers or customers . . . . It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim

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[4] The ADA's focus on eliminating protective policies is typical of other civil rights acts, including the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (the "PDA"). *See, e.g.*, Legislative History of the Pregnancy Discrimination Act of 1978, at 130-31 (1980)("Under S. 955, the treatment of pregnant women in covered employment must focus not on their condition alone, but on the actual effects of that condition on their ability to do work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees")(Statement of Sen. Cranston); *id.* at 208 ("The legal status of the past often forced women to choose between having children and working. For many, wanting children could not outweigh the economic realities that her income was essential. This legislation gives her the right to choose both, to be financially and legally protected before, during, and after her pregnancy")(Statement of Rep. Sarasin).

> that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.

136 Cong. Rec. S9684-03, at S9697 (July 13, 1990).[5]

In limiting the direct threat defense to situations involving a threat to others, Congress made the ADA a consistent part of American civil rights law. As discussed above, exclusions based on protected characteristics are not justified based simply on the risk that an individual may suffer harm to herself, without causing harm to others. Just as the threat of personal injury to female guards themselves did not justify excluding women from contact positions in *Dothard*, 433 U.S. at 335; and just as the threat of physical injury to a woman and her fetus from working around lead did not justify excluding women of child-bearing age from the workplace in *Johnson Controls*, 499 U.S. at 211, so too, the ADA makes the individual the proper arbiter of risk, the person in command of his or her own fate.

III. CHEVRON VIOLATED THE ADA BY REFUSING TO HIRE ECHAZABAL BECAUSE OF HIS DISABILITY

When Chevron refused to hire Echazabal because it believed that working in the coker unit would pose a threat to his health, it engaged in impermissible discrimination. Chevron asserts that it has not engaged in disability discrimination because it based its employment decision upon an evaluation of Echazabal's individual medical condition. Brief for Petitioner at 36-37 n.15, 39. This assertion is specious, since it was Echazabal's disability itself that constituted the very "medical condition" that caused Chevron not to hire him. Chevron excluded Echazabal from the coker unit because he has chronic liver disease, which is what Chevron has conceded makes him an individual with a disability protected under the ADA. That Chevron considered Echazabal's individual physical condition[6] does not make Chevron's actions any less discriminatory; on the contrary, it is precisely Chevron's reliance on Echazabal's particular medical condition that links the company's employment decision to his disability and renders that decision unlawful. Chevron in effect usurped a choice that under the ADA belongs to Echazabal. As this Court clarified in *Johnson Controls*, whether to take risks with one's own health or welfare is a decision reserved to the individual himself, not one for an employer to make based on characteristics protected by the civil rights laws.[7]

Chevron's proposed distinction, between relying on Echazabal's medical condition as opposed to relying on his disability, was recognized as irrelevant in *Johnson Controls*. There, this Court held not only that the company was precluded from excluding all women capable of

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[5] *Amici* understand that the implications of the ADA's direct threat provision, along with the direct threat regulations promulgated by the Equal Employment Opportunity Commission, are discussed in greater detail in the Brief for Respondent.

[6] *Amici* understand that the degree to which Chevron conducted an "individualized" inquiry is very much in dispute.

[7] Indeed, one reason the individual should decide what risks to take is because the individual has the incentive to secure the most comprehensive information about the risks he faces. Here, for example, Echazabal vigorously disagrees with Chevron about the nature of the harm he would face by working in the coker unit and his doctors say he faces no significant health threat from working there. J.A. 99-116, 122-26.

bearing children from working in the battery plant, but also that it could not exclude specific women who were actually pregnant. 499 U.S. at 206. Thus, even if Johnson Controls had considered the actual health risks faced by its female employees one by one, as Chevron considered Echazabal's medical condition here, the result would have been the same. Indeed, cases since *Johnson Controls* have made clear that even where an employer fears for the safety of a particular worker, firing her because she is actually pregnant is unlawful sex discrimination. *See, e.g.*, *EEOC v. Corinth*, 824 F.Supp. 1302, 1306, 1308-1309 (N.D. Ind. 1993)(firing of pregnant waitress out of concern that she was "too big" and "might fall down" and hurt herself or her fetus was sex discrimination). Chevron's notion that an individualized determination is somehow inherently nondiscriminatory is just wrong; a decision to exclude a particular individual for discriminatory reasons is still discriminatory. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 456 (1982)("Every *individual* employee is protected against . . . discriminatory treatment")(emphasis in original).

Chevron contends it has not discriminated against Echazabal because its decision was not based on stereotypes. *See* Brief for Petitioner at 36-37 n.15. But Chevron's liability is not determined by whether or not it relied on stereotypes, since civil rights laws simply prohibit discrimination, whether based on stereotypes, protective rationales, or individualized assessments. For example, in *Johnson Controls*, the company's rationale for excluding all women capable of bearing children was a threat of actual harm to women and their fetuses, not only a stereotype about the proper role of women in society. 499 U.S. at 206. And while the *Dothard* Court held that "it is impermissible under Title VII to refuse to hire [on] the basis of stereotyped characterizations of the sexes," 433 U.S. at 333, neither the Court's holding (a) that women could not be excluded from contact positions based on a threat of harm to themselves, nor (b) that they could be excluded based on a threat to others, depended on whether or not the prison had acted solely on the basis of stereotypes. *Id.* at 335-36.

CONCLUSION

It is a core principle of civil rights that individuals should be able to decide whether to risk harm to themselves, rather than allowing others to decide to "protect" them from such harm based specifically on their protected characteristics such as race, sex, or disability. Because the clear language of the ADA limiting the direct threat defense to threats to others embodies this fundamental principle, the decision the court of appeals should be affirmed.

Respectfully submitted,

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