RANDON BRAGDON, D.M.D., Petitioners, v. SIDNEY ABBOTT, ET AL., Respondents.

No. 97-156

SUPREME COURT OF THE UNITED STATES

*1997 U.S. Briefs 156; 1998 U.S. S. Ct. Briefs LEXIS 111*

October Term, 1997

February 6, 1998

[*1] On Writ Of Certiorari To The United States Court Of Appeals For The FIRST Circuit.

# BRIEF OF SENATORS HARKIN, KEFFORDS AND KENNEDY AND OF REPRESENTATIVES HOYER, OWENS AND WAXMAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

**COUNSEL:** * ARLENE MAYERSON, ESQUIRE, HOLLY BALDWIN, ESQUIRE, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, 2212 Sixth Street, Berkeley, CA 94710, Telephone: (510) 644-2555

* Counsel of Record

CARY LaCHEEN, ESQUIRE, 137 MacDougal Street, New York, NY 10012, Telephone: (212) 998-6674

View Table of Authorities

**INTERESTS: INTEREST OF AMICI CURIAE ***

* The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The following Senators and Congressmen were primary authors and sponsors of the Americans with Disabilities Act and are leaders in shaping this nation's disability policy. Amici have an interest in ensuring that the fundamental principles of the ADA are not eroded by overly restrictive interpretations of the term "disability," which result in condoning the discriminatory practices the ADA was intended to prohibit.

Senator Tom Harkin was the chief sponsor and a principal author of the ADA. As Chair of the Subcommittee on Disability Policy of the Senate Committee on Labor and Human Resources, and floor manager, he was involved in all aspects of the passage of the ADA.

Congressman Steny H. Hoyer was the lead House co-sponsor of the ADA. He led the House passage of the legislation and was intimately involved in all aspects of its consideration.

Senator James M. Jeffords has authored or contributed to every piece of legislation affecting federal disability policy since 1974, including amendments to Section 504 of the 1973 Rehabilitation Act, and the ADA. He is currently the Chair of the Senate Labor and Human Resources Committee.

Senator Kennedy, a principal author of the ADA, was the Chair of the Senate Committee on Labor and Human Resources during its passage, and is now Ranking Minority Member. He has been a leader on HIV/AIDS issues, including assuring coverage in the ADA.

Congressman Major R. Owens was Chair of the Subcommittee on Select Education of the Committee of Education and Labor during the deliberations on the ADA and was involved in all deliberations in the House.

Congressman Henry A. Waxman was an original co-sponsor of the ADA, and Chair of the House Commerce Subcommittee on Health and the Environment during its passage. He has been a leader in promoting public health and civil rights legislation for people with HIV infection.

**TITLE:** BRIEF OF SENATORS HARKIN, KEFFORDS AND KENNEDY AND OF REPRESENTATIVES HOYER, OWENS AND WAXMAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

**SUMMARY OF THE ARGUMENT**

Although couched in an argument rejecting "per se" coverage of persons with asymptomatic HIV infection under the American with Disabilities Act, Petitioner and his amici are actually asking this Court to hold that these individuals are never protected from discrimination under the ADA. This result threatens the very core of the ADA, which is meant to ensure that people with physical or mental impairments are not denied an equal opportunity to contribute to and participate [*5] in community life based on myths, fears, and stereotypes about disability.

Petitioner's argument that individuals with asymptomatic HIV infection are not "substantially limited in a major life activity" relies on an overly restrictive and unfounded interpretation of the plain language of the statute and contradicts unequivocal Congressional intent to protect persons with both symptomatic and asymptomatic HIV infection from adverse treatment that is not based on objective medical fact.

The substantially limited language as carried over from Section 504 of the 1973 Rehabilitation Act was understood to distinguish "trivial impairments" from those that significantly impact a person's life. HIV infection clearly has a significant impact on the life of those diagnosed with this debilitating fatal disease.

Moreover, Congress did not limit the definition of disability to those with substantially limiting impairments. Petitioner and his amici simply ignore the third prong of the disability definition - "regarded as" - which was designed precisely to ensure that individuals with stigmatic conditions which invoke negative reactions in others would not be "vulnerable to discrimination on the [*6] basis of mythology . . . precisely the type of injury Congress sought to prevent." *School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987).*

In order to ensure that individuals with disabilities would have their conditions "evaluated in light of medical evidence . . ." Arline at 285, Congress adopted this Court's formulation of "direct threat" in Arline. Since this case, like Arline, involves the risk of contagion, deference to public health officials is appropriate. There is nothing in the language or legislative history of the ADA which justifies deference to private health care providers who are defendants or on whom a defendant has relied.

**ARGUMENT**

**I. THE DEFINITION OF DISABILITY IS BROAD IN ORDER TO ACHIEVE THE NON-DISCRIMINATION GOALS OF THE ADA**

In its extensive deliberations on the Americans with Disabilities Act (ADA), n1 Congress heard testimony from a wide range of people with different disabilities about the many types of discrimination that limit equal opportunity to education, employment, public accommodations, and public services. n2 Congress also reviewed authoritative governmental, public health, and census reports which studied [*7] the status of people with disabilities, which all concluded that comprehensive civil rights legislation was necessary to combat pervasive discrimination against people with disabilities. n3

n1 The Senate Committee on Labor and Human Resources and the Senate Subcommittee on the Handicapped held five hearings on the bill. On September 7, 1989, the bill passed the Senate with overwhelming support by a vote of 76 to 8. In the House, over 20 hearings were held before four House committees subcommit-

tees. The House and Senate Conference Committee convened twice. The conference bill passed by an overwhelming majority in both the House (by a vote of 377 to 28) and the Senate (by a vote of 91 to 6). The ADA was signed by President Bush on July 26, 1990.

n2 For example:

> . . . A young woman who has cerebral palsy told the Senators about a local movie theater that would not let her attend because of her disability. . . .
>
> . . . A Vietnam veteran who had been paralyzed during the war and came home using a wheelchair testified that . . . [he] could not get a job because of discrimination.
>
> . . . A woman testified that, when she lost her breast to cancer, she also lost her job and, as a person with a history of cancer, could not find another one. Parents whose small child had died of AIDS testified about how they could not find an undertaker who would bury their child. . . .

Arlene Mayerson, The History of the ADA, in Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans, 17, 23 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (citations omitted). For a review of testimony, see H.R. Rep. No. 101-485, pt. 2, at 28-49 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 310-31; S. Rep. No. 101-116, at 5-20 (1989).

[*8]

n3 The Committee Reports cite a variety of reports relied on by Congress. See H.R. Rep. No. 101-485, pt. 2, at 28, 1990 U.S.C.C.A.N. at 310; S. Rep. No. 101-116, at 6.

Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services," *42 U.S.C. ß 12101*(a)(3) (emphasis added), and that the purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *42 U.S.C. ß 12101*(b)(1).

Congress recognized that discrimination takes a variety of forms--outright exclusion, lack of access, application of outmoded eligibility criteria, and attitudinal barriers based on "false presumptions, generalizations, misperceptions. patronizing attitudes, ignorance, irrational fears and pernicious mythologies." H.R. Rep. No. 101-485, pt. 2, at 30, 1990 U.S.C.C.A.N. at 311; S. Rep. No. 101-116, at 7.

Comprehensiveness was the hallmark of the Americans [*9] with Disabilities Act. As stated by then Attorney General Thornburgh, on behalf of President Bush:

> One of the (the ADA bill's) most impressive strengths is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piece-meal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.

H.R. Rep. No. 101-485, pt. 2, at 48, 1990 U.S.C.C.A.N. at 330; S. Rep. No. 101-116, at 19.

Congress' intent was to ensure that all decisions based on disability, present, past, or perceived, were guided by facts, not myths, fears, and stereotypes. As stated by Senator Dole:

> We have included in this legislation all people with all disabilities, no matter how misunderstood because that is what this bill is about--replacing misunderstanding with understanding.

136 Cong. Rec. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole).

Petitioner's argument that, in passing the ADA, Congress intended to condone discrimination against an individual with asymptomatic [*10] HIV infection based on unfounded fear of contagion, threatens the very core of the ADA. With the advance of medical technology, many individuals with a variety of disabilities from epilepsy to schizophrenia are or will become asymptomatic. n4 To argue that Congress intended to strip them of anti-discrimination protection for this reason is not only illogical, but also totally ignores Congress' recognition that disability status alone often invokes discrimination. n5 Congress was well aware that people with HIV infection, whether symptomatic or not, face pervasive discrimination due to fear of contagion. The history of the ADA demonstrates that Congress saw this type of discrimination as the same as, not different from, the types of discrimination faced by people with a wide variety of disabilities.

n4 It is for this reason that the Committee Reports and authoritative agency regulations require limitations to be assessed without regard to mitigating measures. See H.R. Rep. No. 101-485, pt. 2, at 52, 1990 U.S.C.C.A.N. at 333; S. Rep. No. 101-116, at 23; 29 C.F.R. Pt. 1630, App., ß 1630.2(j).

n5 See discussion of "regarded as" prong, infra pp. 13-22.

In determining who would [*11] be protected by the ADA, Congress adopted the definition of "handicap" under Section 504 of the Rehabilitation Act of 1973. n6 A "disability" is defined with respect to an individual in three ways:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

*42 U.S.C.ß 12102*(2). n7

n6 As explained in the Committee Reports, "no change in definition or substance is intended nor should be attributed to the change in phraseology [from the term "handicap" to "disability."]." H.R. Rep. No. 101-485, pt. 2, at 51, 1990 U.S.C.C.A.N. at 332; S. Rep. No. 101-116, at 21, See also H.R. Rep. No. 101-485, pt. 3, at 26 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 449.

n7 This definition is often referred to as a three-prong definition. As discussed infra, Congress also carved out specific exclusions to the definition of disability in the ADA. See p. 22.

This Court reviewed the history of the Section 504 definition in *School Board of Nassau County v. Arline, 480 U.S. 273 (1987)*. [*12] Prior to 1974, the definition of handicap was tied directly to employability. See *id. at 279 n.3*. As noted in Arline, the definition was expanded in 1974 to address "the range of discriminatory practices in housing, education, and health care programs, which stemmed from stereotypical attitudes and ignorance about the handicapped," S. Rep. No. 93-1297, at 16, 37-38, 50, cited in Arline at 279 n.3.

The agency responsible for promulgating the Section 504 regulations, concluded that a specific list of conditions, which would constitute handicaps, was not possible because it would be difficult to ensure the "comprehensiveness of any such list." 45 C.F.R. Pt. 84, App. A, p. 310 (1985) cited in *Arline, 480 U.S. at 280 n.5*. Moreover, in response to comments that the definition was unreasonably broad, the agency found that the broad regulatory definition "is inherent in the statutory definition." *Arline, 480 U.S. at 280 n.5*.

As this Court stated in Arline, "the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief." *Id. at 285*. This Court emphasized [*13] that with-

out a broad definition of disability, individuals with disabilities would never have the opportunity to have their qualifications objectively evaluated, leaving them "vulnerable to discrimination on the basis of mythology - precisely the type of injury Congress sought to prevent." Id.

As argued below, Congress intended people with HIV infection, symptomatic or not, to be protected against discrimination based on fear of contagion. The substantially limited language carried over from Section 504 was understood to distinguish "trivial impairments" from those that significantly impact a person's life. H.R. Rep. No. 101-485, pt. 2, at 52, 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 23. No one could seriously argue that HIV infection does not have a significant impact on the life of those diagnosed with this debilitating fatal disease. n8

n8 In addition, any argument that Congress intended to exclude individuals with asymptomatic HIV infection from coverage under the ADA is belied by the plain language of the statute. The language of the ADA, itself, demonstrates that Congress knew how to exclude disabilities from ADA coverage when it wished to do so. See discussion infra p. 22.

[*14]

Moreover, Congress did not limit the definition to those with present substantially limiting impairments. Rather, Congress recognized that in order to achieve its purpose, the ADA needed to protect those who were not currently substantially limited but who have a history of a disability or whose physical or mental condition invoked negative reactions in others. n9 See *42 U.S.C. ß 12102*(2)(b)-(c).

n9 For example, as pointed out in Arline, "'irrational fears or prejudice on the part of employers or fellow workers' . . . make it difficult for former cancer patients to secure employment." *Arline, 480 U.S. at 284* (quoting 123 Cong. Rec. 13515 (1977) (statement of Sen. Humphrey)). See "Regarded As" argument, infra pp. 13-22.

As Petitioner states in his brief, this Court has "over and over . . . stressed that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" Pet. Brief at 27, quoting *United States Nat'l Bank of Or. v. Indep. Ins. Agents of N. America, 508 U.S. 439, 455 (1993)*. That said, Petitioner proceeds to apply [*15] a hypertechnical and incomplete interpretation to the definition of disability that would wholly defeat Congressional purpose and intent in passing the ADA. It is absolutely impossible to read the language and legislative history of the ADA and come to the conclusion that Congress condoned adverse treatment of people with HIV infection without reference to medical reality.

Petitioner's attempt to cast his argument as a mere rejection of "per se" coverage is misleading. Under Petitioner's case-by-case approach, individuals with asymptomatic HIV infection would always lose because according to Petitioner asymptomatic HIV infection, by definition, does not substantially limit major life functions. Pet. Brief at 3. In other words, Petitioner and his amici argue for "per se" non-inclusion of persons with asymptomatic HIV infection.

The "per se" characterization is a misnomer, in any case. People with certain disabling conditions will always be covered by the first "substantially limited" prong, not because the analysis is discarded, but because the condition itself is inherently substantially limiting. Moreover, an individual who has a physical or mental condition that is stigmatized [*16] and results in adverse treatment is covered by the third "regarded as" prong. Therefore, a person with HIV infection, who like Ms. Abbott, experiences discrimination because of fear of contagion is covered by the ADA. This is what Congress intended-this is the only way that the Congressional purpose to prohibit actions based on myths, fears, and stereotypes can be realized. Any other result would do violence to the "object and policy" of the *ADA. United States Nat'l Bank of Or., 508 U.S. at 455.*

**II. HIV INFECTION FALLS WITHIN THE PLAIN LANGUAGE OF THE STATUTORY DEFINITION OF "DISABILITY".**

While the Petitioner apparently concedes that HIV infection is an impairment, Petitioner argues that asymptomatic HIV infection can never be a disability under the ADA. This argument would nullify not only the unequivocal intent of Congress, but also all agency regulations implementing the statute. Moreover, in Petitioner's attempt to persuade the Court that Congress condoned discrimination against people with HIV infection based on contagion, unless they are symptomatic, Petitioner fails to acknowledge the full definition of disability, including the "regarded as" prong of the

[*17] definition. Whether under the first prong or the third prong, it is clear that people who face discrimination based on HIV status are covered by the ADA.

**A. HIV Infection Falls Within the First Prong of the Definition of Disability Because HIV Infection - Symptomatic or Asymptomatic - Substantially Limits Major Life Activities.**

As noted above, the first prong of the definition of "disability" defines the term as a "physical or mental impairment that substantially limits one or more . . . major life activities." *42 U.S.C. ß 12102*(2)(a). The term "major life activities" must be interpreted broadly enough to encompass the full range of disability experiences intended to be covered by the ADA. As repeatedly stated in the Committee Reports, the purpose of the substantial limitation language was to distinguish "trivial" impairments.

> Persons with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or [*18] duration under which they can be performed in comparison to most people.

H.R. Rep. No. 101-485, pt. 2, at 52, 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 23.

As anyone diagnosed with HIV infection knows, and as Congress was well aware, a positive HIV test changes everything. n10 Numerous legislators stated their understanding of the pervasive effect of an HIV diagnosis. In the words of Senator Kennedy:

> People with HIV disease are individuals who have any condition along the full spectrum of HIV infection - asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. These individuals are covered under the first prong of the definition of disability in the ADA, as individuals who have a physical impairment that substantially limits a major life activity. . . . Although the major life activity that is affected at any point in the spectrum by the HIV infection may be different, there is a substantial limitation of some major life activity from the onset of HIV infection.

136 Cong. Rec. S9696 (daily ed. July 13, 1990) (statement of Sen. Kennedy); accord 136 Cong. Rec. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); id. at H4624 (statement [*19] of Rep. Edwards); id. at H4626 (statement of Rep. Waxman).

> n10 From the moment of contraction, HIV-infected individuals must pay constant and diligent attention to developing proper sleep and eating patterns, regulating weight in anticipation of future possible weight loss, avoiding dangerous activities that might threaten others with exposure to the virus, and avoiding exposure that might result in reactivation of prior infections for which the individual has a compromised ability to respond. Moreover, all life decisions are influenced greatly by the known progressive and fatal nature of the disease.

Petitioner's argument is nothing more than a rehashing of the argument presented to and rejected by this Court in Arline. In that case, the petitioner argued that an adverse decision based on fear of contagion was not disability-based discrimination because it was not based on "real or perceived diminution of an individual's capabilities." *Arline, 480 U.S. at 281 n.6.* Supporting the petitioner, the government argued that since it is possible for a person to be capable of spreading a disease without having a "physical impairment," discrimination based on contagion could [*20] never be disability-based discrimination. The government in Arline incorrectly used asymptomatic HIV infection as such an example. See *id. at 282 n.7.* Since that time, the unanimous opinion of public health officials, Congress, and the implementing agencies is that HIV infection is an impairment. See S. Rep. No. 101-116, at 22; 29 C.F.R. Pt. 1630, App., ß 1630.2(j). Petitioner has conceded this point. Pet. Brief at 18. Therefore, the words of Arline apply with equal force here.

> We do not agree with Petitioners that, in defining a handicapped individual under ß 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. [Respondent's] contagiousness and her physical impairment each resulted from the

> same underlying condition. . . . It would be unfair to allow [Petitioner] to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and then use that distinction to justify discriminatory treatment.

*480 U.S. at 282.*

Finally, contrary to Petitioner's claim, there is no reason in the language of the [*21] ADA not to recognize reproduction as a major life activity. Congress did not intend the term to be restrictive, or to give certain types of disabilities preference over others because of the major life function affected. Indeed, a finding that reproduction or intimate sexual activities are not major life activities will thwart the will of Congress.

The Committee Reports repeatedly cite with approval a memorandum written by the Office of Legal Counsel of the Department of Justice interpreting Section 504 and its application to individuals with HIV infection: n11

> As noted by the U.S. Department of Justice, . . . a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term "disability" because of a substantial limitation to procreation and intimate sexual relationships.

H.R. Rep. No. 101-485, pt. 2, at 52, 1990 U.S.C.C.A.N. at 334 (citing OLC Memorandum at 9-11). See also H.R. Rep. No. 101-485, pt. 3, at 28 n.18, 1990 U.S.C.C.A.N. at 451; S. Rep. No. 101-116, at 22. Since it is clear that Congress and the Department of Justice concluded that sex and reproduction are major life activities, and everyone involved [*22] in the legislation was aware of this, Petitioner and his amici's contrary view is not persuasive. n12

> n11 Memorandum of Office of Legal Counsel to the President Regarding Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 1988, reprinted in Americans with Disabilities Act of 1988: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources, 101st Cong. 338-366 (1989) [hereinafter OLC Memorandum]. The Petitioner cites to an earlier D.O.J. memorandum, concluding that HIV is not a "handicap" under 504. Pet. Brief at 22 n.15. What Petitioner fails to convey, however, is that the Cooper memorandum cited was actually the background for the Government's position in Arline, which was rejected by this Court. See *Arline, 480 U.S. at 282 n.7.*

> n12 As explained by Justice Breyer:
>
> > [A] fairly common function of legislative history [is] explaining specialized meanings of terms or phrases in a statute which were previously understood by the community of specialists (or others) particularly interested in a statute's enactment.
>
> Stephen Breyer. On the Uses of Legislative History in Interpreting Statutes. *65 S. Cal. L. Rev. 845, 853 (1992).*

[*23]

The agencies charged with implementing the ADA have also concluded that HIV infection substantially limits major life activities. n13 See the Department of Justice Title III implementing regulations, 28 C.F.R. Pt. 35, App. A, ß 35.104, and the Equal Employment Opportunity Commission ["EEOC"] Title I implementing regulations, 29 C.F.R. Pt. 1630, App., ß 1630.2(j). See also 28 C.F.R. ß 36.104; id. at Pt. 36, App. B, ß 36.104.

> n13 The DOJ and EEOC regulations are entitled to judicial deference. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984)* ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . ."); *Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984)* ("This Court generally has deferred to contemporaneous regulations issued by the agency responsible for implementing a congressional enactment.").

Petitioner's argument that "asymptomatic HIV-infection is not a substantial physical limitation on [the] ability to have intimate sex and/or reproduce," Pet. Brief at 13, is quite astounding. The risk of transmitting [*24] HIV to offspring is real and substantial. In the words of the First Circuit, "no reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one's child is not a substantial restriction on reproductive activity." *Abbott v. Bragdon, 107 F.3d 934, 942 (1st Cir. 1997).*

**B. HIV Infection Falls Within the Third Prong of the Definition of Disability.**

In arguing that HIV is not a disability under the ADA, Petitioner ignores the "regarded as" prong of the ADA definition of disability. Even if this Court does not find asymptomatic HIV infection to be a disability under the first prong of the definition, it is clear that the "regarded as" prong of the definition, as explained in Arline, was enacted precisely to address the type of discrimination faced by Ms. Abbott in this case. There is no dispute that Petitioner's reason for not treating Ms. Abbott was fear generated by her impairment. n14

n14 As argued above, Congress considered HIV infection to be substantially limiting. However, for purposes of the "regarded as" analysis it is sufficient that Petitioner adversely reacted to her impairment, which Petitioner does not dispute.

[*25]

A review of the legislative history leaves no doubt that Congress intended the "regarded as" prong to prohibit discrimination based on disability status. As this Court stated in Arline, n15

> to combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having an impairment [but who] may at present have no actual incapacity at all."

*480 U.S. at 279* (emphasis added). n16

n15 See supra note 6. Congress adopted the definition of disability from the definition of handicap under Section 504.

n16 The Court specifically noted that the previous definition was

> "too narrow to deal with the range of discriminatory practices in housing, education, and health care programs which stemmed from stereotypical attitudes and ignorance about the handicapped."

*Arline, 480 U.S. at 279 n.3* (citing S. Rep. No. 93-1297, at 16, 37-38, 50) (emphasis added).

Quoting from the Arline decision, the ADA Committee Reports adopt the rationale articulated by this Court as follows: [*26]

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

*Arline, 480 U.S. at 284* (emphasis added), cited in H.R. Rep. No. 101-485, pt. 2, at 53, 1990 U.S.C.C.A.N. at 336; S. Rep. No. 101-116, at 24.

As reflected in the Committee Reports, Congress intended to adopt the long-standing definition of the "regarded as" prong under Section 504, as follows:

(iv) "Is regarded as having an impairment" means

> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a [covered entity] as constituting such a limitation;
>
> (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (C) has none of the impairments defined in [prong 1] but is treated [*27] by a [covered entity] as having such an impairment.

H.R. Rep. No. 101-485, pt. 3, at 29, 1990 U.S.C.C.A.N. at 452, citing 45 C.F.R. ß 84.3(j)(2)(iv), (incorporated in ADA regulations at 29 C.F.R. at 1630 App. A ß 1630.2(1) (1997)). See also H.R. Rep. No. 101-485, pt. 2, at 53, 1990 U.S.C.C.A.N. at 336; S. Rep. No. 101-116, at 23.

Subsection (B) is intended to cover stigmatic impairments, such as HIV infection, which invoke reactions based on ignorance, fear, and stereotypes. As this Court recognized in Arline,

> Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.
>
> * * *
>
> The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief.

*480 U.S. at 284-85.* n17

> n17 In Arline this Court interpreted Section 504 without any explicit references in the legislative history to contagious diseases. Any concerns of the Arline dissent in this regard are not applicable here because Congress made its intent to cover individuals with HIV infection under the ADA explicit. See *480 U.S. at 289-90;* see also infra pp. 23-26 (discussing legislative history concerning HIV infection).

[*28]

While conceding "regarded as" coverage on one hand, Petitioner undercuts coverage by arguing that an individual defendant would need to regard the infection as affecting a "pertinent" major life activity. Pet. Brief at 18. In Petitioner's formulation, this would be impossible, because it would be extremely unlikely that a person with asymptomatic HIV infection would be adversely treated because the defendant viewed her as substantially limited in walking, breathing, hearing, etc. Rather, the adverse treatment would be based on fear of contagion, as in this case.

Petitioner's interpretation of the "regarded as" prong makes a mockery of Congressional intent. Under his formulation, a school board would be free to exclude a child with asymptomatic HIV infection from school on the mistaken belief that the child would infect classmates, so long as the school board did not view the child as substantially limited in a "pertinent life activity." The numerous statements of members expressing outrage about the plight of Ryan White and other children with HIV infection belie such an assertion. n18

> n18 See, e.g., 136 Cong. Rec. S7442 (daily ed. June 6, 1990) (Ronald Reagan: "We Owe It to Ryan"); 136 Cong. Rec. H2479 (daily ed. May 17, 1990) (statement of Rep. McCloskey); id. at H2480 (statement of Rep. McDermott); id. at H2481 (statement of Rep. Jontz).

[*29]

Likewise, it makes no sense for Petitioner to argue that Ms. Abbott is not covered under the "regarded as" prong of the definition because he did not perceive her to be limited in a "pertinent major life activity." Petitioner viewed Ms.

Abbott as substantially limited in the ability to receive routine medical care. Petitioner would like to have it both ways. He cannot refuse treatment based on her medical condition and then come to court and argue that he did not regard her medical condition as "substantially limiting" enough to bring her under the protection of the ADA. This argument simply ignores the language and purpose of the "regarded as" prong.

Petitioner's example of "Magic" Johnson and Greg Louganis as super-heroes who could not possibly be "disabled," Pet. Brief at 3-4, misses the whole purpose of the "regarded as" prong of the disability definition. The ADA recognizes that many people with physical or mental impairments are extremely capable, but are stymied in their efforts to participate in society because of the views of others. If "Magic" Johnson or Greg Louganis were denied medical services or entrance to a restaurant because of the unfounded fear of HIV transmission, [*30] it would be irrelevant whether they could win gold medals at the Olympics. That is the whole point of the "regarded as" prong, to assure that people have an opportunity to be judged on their merits, not on the misguided perceptions or prejudices of others.

Congress noted the particular importance of the "regarded as" prong of the definition for those with "stigmatic conditions." H.R. Rep. No. 101-485, pt. 2, at 53, 1990 U.S.C.C.A.N. at 336; S. Rep. No. 101-116, at 24. The most commonly cited example of a person covered by the "regarded as" prong in the legislative history is a "burn victim." H.R. Rep. No. 101-485, pt. 2, at 53, 1990 U.S.C.C.A.N. at 336; H.R. Rep. No. 101-485, pt. 3, at 30, 1990 U.S.C.C.A.N. at 453; S. Rep. No. 101-116, at 24. Again, Congressional intent would be subverted if Petitioner could turn down all burn victims and then argue that he did not view them as substantially limited in "pertinent major life activities," i.e., the ability to walk, hear, see, etc.

In fact, discrimination against many of the disabilities that Congress intended to cover would be condoned by Petitioner's logic. As this Court noted in Arline,

> Even those who suffer or have recovered [*31] from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.

*480 U.S. at 284.* According to Petitioner, individuals with epilepsy or cancer, who are not substantially limited in a "pertinent life activity" could be turned away because of fear of contagion. This inequity was condemned in Arline:

> Allowing discrimination based on the [perceived] contagious effects of a physical impairment would be inconsistent with the basic purpose of ß 504, which is to ensure that handicapped individuals are not denied . . . benefits because of the prejudiced attitudes or the ignorance of others.

Id.

There can be no doubt that people with HIV infection are substantially limited as a result of the attitudes of others. As the Commissioner to the National Commission on AIDS stressed in his testimony before Congress, "remember, Ryan White, denied entry to school. The Ray family, burned from their home. A woman with AIDS denied entry with her children to a public swimming pool. A bright young attorney forced into poverty because he was fired from his job." Americans with Disabilities Act of 1989: [*32] Hearings Before the House Subcomm. on Civil and Constitutional Rights and Comm. on the Judiciary, 101st Cong., 1st Sess. 171 (1989) (statement of Rev. Scott Allen, Commissioner, National Commission on AIDS). Social exclusion of this nature most certainly materially limits major life activities. See *Cain v. Hyatt, 734 F. Supp. 671, 678 (E.D. Pa. 1990)* ("HIV-positive individuals are unjustifiably and 'widely stereotyped as indelibly miasmic, untouchable, physically and morally polluted.'"). n19

> n19 See also *Harris v. Thigpen, 941 F.2d 1495, 1521 (11th Cir. 1991)* (HIV-infected prisoners are "categorically separated from virtually all aspects of general population institutional life"); *Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995)* (noting that in addition to impairing multiple body systems, HIV infection substantially limits major life activities "by . . . the fear it inspires in others"); *Doe v. District of Columbia, 796 F. Supp. 559, 565 (D.D.C. 1992)* (Defendant testified that he "'would be crazy' not to take the public's fear of HIV and AIDS into account."); *Cain v. Hyatt, 734 F. Supp. 671, 680 (E.D. Pa. 1990)* ("The particular associations AIDS shares with sexual fault, drug use, social disorder, and with racial minorities, the poor, and other historically disenfranchised groups accentuates the tendency to visit condemnation upon its victims."); *Doe v. Dolton Elementary School Dist. No. 148, 694 F. Supp. 440, 444 (N.D. Ill. 1988)* ("Surely no

physical problem has created greater public fear and misapprehension than AIDS."); *Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987)* ("The Court recognizes the concern and fear which is flowing from this small community... However, the Court may not be guided by such community fear. . . .").

[*33]

Members of Congress recognized the importance of HIV coverage to combat the stigma attached to the disease, particularly fear of contagion:

> With this measure, we call for an end to finger pointing and fear mongering about AIDS. We know with great certainty how this disease is and is not transmitted. There is no scientific or medical reason to shun people with AIDS or HIV disease.

135 Cong. Rec. S10789 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

Perhaps nothing better illustrates the purpose of the "regarded as" prong of the definition of disability than the floor debates on the Chapman amendment. Under this proposal, food-handling employees diagnosed with an infectious disease would have been exempt from certain provisions of the ADA. n20 According to Representative Chapman, the proponent of the amendment:

> the bill as currently drafted will not provide an employer the flexibility to move an employee out of food-handling position [sic] if that employee were diagnosed as having an infectious or contagious disease such as AIDS. The reality is that many Americans would refuse to patronize any food establishment if an employee were known to have a communicable [*34] disease.

136 Cong. Rec. H2478 (daily ed. May 17, 1990) (statement of Rep. Chapman).

n20 See H.R. Conf. Rep. No. 101-596, at 61 (1990), reprinted in 1990 U.S.C.C.A.N. 565, 570.

From the start, Representative Chapman admitted that there was no evidence that AIDS could be transmitted in the process of handling food. See id. The whole debate centered on the fact that restaurants would lose patrons because of the erroneous belief that the disease could be transmitted through food. See id. In arguing against the amendment, Representative McDermott stated:

> . . . the amendment is not about the reality of contagious disease. It is about the fear of contagious disease. Let us be honest: It is about the fear of AIDS.
>
> * * *
>
> A few years ago, a school board in Indiana told Ryan White that he could not go to school with other children. It was not that the school officials thought Ryan would infect the others, they said, it was that some parents were afraid he would. That school system made a policy decision in response to fear and prejudice. By the time Ryan White died last month, everyone knew better.

136 Cong. Rec. H2480 (daily ed. May 17, 1990) (statement of Rep. McDermott). [*35]

> The Bush Administration agreed. Dr. Sullivan, the Secretary of Health stated: 'Any policy based on fears and misconceptions about HIV will only complicate and confuse disease control efforts without adding any protection to public health. We need to defeat discrimination rather than to submit to it.'

136 Cong. Rec. S9686 (daily ed. July 13, 1990) (statement of Sen. Harkin).

In conference, the Chapman Amendment was replaced with a provision that rejected decisions based on "false perceptions" requiring decisions about food handling to be based on "valid scientific and medical analysis and using ac-

cepted public health methodologies. . . ." H.R. Conf. Rep. No. 101-596, at 62, 1990 U.S.C.C.A.N. at 570. As stated by Senator Hatch, the author of the substitute amendment, "this does away with people's fears and it says let science govern, which is the only way to do it." 136 Cong. Rec. S9538 (daily ed. July 11, 1990) (statement of Sen. Hatch). n21

n21 See also 136 Cong. Rec. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens) ("The original amendment offered by Congressman Chapman responded to public fear and misperception regarding people with HIV diseases by legitimizing those fears. . . . I am pleased that we have arrived at an acceptable resolution of this issue, particularly because the ADA offers such critical protection to people with HIV disease in a range of areas."); id. at H4624 (statement of Rep. Edwards). Without a doubt, there is fear and misperception regarding the threat posed by people with Acquired Immune Deficiency Syndrome (AIDS) and other forms of Human Immunodeficiency Virus (HIV) disease. But the proper response to such fear and misperception is not to legitimize them by allowing such false perceptions to determine who can hold certain jobs. Rather, the proper response is that taken in the Hatch amendment, which the conferees have adopted.").

[*36]

The debates and resolution of the Chapman amendment make no sense in Petitioner's view of HIV coverage. According to the Petitioner's circular analysis, a restaurant owner could not only transfer but also fire an individual with HIV infection who handled food, so long as the owner did not regard the infection as affecting a "pertinent life activity." Pet. Brief at 18. Yet in defeating the Chapman amendment, Congress expressly rejected such actions by restaurant owners.

People with both symptomatic and asymptomatic HIV infection are equally situated, vis-a-vis contagion. As evidenced by the debates concerning the Chapman amendment, Congress intended that a person with HIV infection, whether or not symptomatic, who is turned away because of fear of contagion be given an opportunity to have the adverse treatment evaluated under objective standards pursuant to the ADA. Nothing could better exemplify the "object and policy" of the "regarded as" prong of the definition. *United States Nat'l Bank of Or., 508 U.S. at 455.*

**C. HIV Infection is Not One of the Conditions Explicitly Excluded from the Statutory Definition of Disability Under the ADA.**

In perhaps the most [*37] disingenuous argument presented by Petitioner, Petitioner argues that Congress rejected HIV coverage because "HIV infection is nowhere mentioned in the legislation passed after extensive debate." Pet. Brief at 26 n.18.

As stated above, the ADA adopted the approach taken in the Rehabilitation Act, which rejected listing specific conditions because of the "difficulty of ensuring the comprehen-siveness of any such list." 45 C.F.R. Pt. 84 App. A, p. 310 (1985), cited in *Arline, 480 U.S. at 280 n.5.* However, while the ADA does not list exemplary conditions or diseases that fit within the disability definition, the statute does list those conditions that do not constitute a disability under the ADA. n22 These examples show that Congress clearly knew how to exempt certain conditions or diseases from coverage under the ADA when it so desired. Moreover, in light of the abundant testimony before Congress on the subject of HIV and AIDS, it speaks volumes that the exemptions cited in the statute do not include mention of HIV infection. Not only did Congress choose not to exclude asymptomatic infection from coverage, it made certain that the exclusions would not affect HIV coverage. [*38]

n22 Under *42 U.S.C. ß 12208,* being a transvestite is not a disability. Similarly, under *42 U.S.C. ß 12211*(a), "homosexuality and bisexuality are not impairments and as such are not disabilities." Section 12211(b) further clarifies conditions that do not qualify as disabilities, including transsexualism, exhibitionism, compulsive gambling, pyromania, and "psychoactive substance use disorders resulting from current illegal use of drugs." *42 U.S.C. ß 12211*(b).

The following colloquy between Senators Helms and Harkin could not be clearer.

MR. HELMS: I do not understand why, for example, you went down the road of including in your definitions people who are HIV positive, because 85 percent or more of the HIV positive people in this country are known to be drug users or homosexual or both. [sic]

> MR. HARKIN: Then I respond to the Senator that they are not covered under this bill on the basis of their homosexuality or drug use.
> MR. HELMS: The Senator better read his committee report, because it says they are covered.
> MR. HARKIN: They are covered on the basis of their HIV infection but not on the basis [*39] of being current drug users.

135 Cong. Rec. S10768 (daily ed. Sept. 7, 1989) (statements of Sens. Helms and Harkin).

> The Judiciary Report reiterates this understanding: Individuals who are homosexual or bisexual and are discriminated against because they have a disability, such as infection with the Human Immunodeficiency Virus, are protected under the ADA. The Committee specifically rejected amendments to exclude homosexuals with certain disabilities from coverage.

H.R. Rep. No. 101-485, pt. 3, at 75, 1990 U.S.C.C.A.N. at 498.

**III. THE LEGISLATIVE HISTORY OF THE ADA MAKES CLEAR THAT CONGRESS INTENDED HIV INFECTION TO BE A COVERED "DISABILITY" UNDER THE ACT.**

Congressional intent to cover people with both symptomatic and asymptomatic HIV infection is unambiguous. Congress repeatedly affirmed this intent - in both the Committee Reports and the floor statements - in order to ensure that people with HIV disease were not subject to discrimination based on fear or ignorance.

First, the Committee Reports confirm Congress' intent to use the standards and interpretations under Section 504, including this Court's discussion of the definition of "disability" in Arline. [*40] Prior to enactment of the ADA, the agency responsible for implementing Section 504 n23 and all courts addressing the issue concluded that HIV infection was a covered "handicap." See infra note 27. It is well established that when Congress adopts a new law incorporating sections of a prior law, Congress is presumed to be aware of prior judicial interpretations and to adopt them in re-enacting statutory language. See *Lorillard v. Pons, 434 U.S. 575, 580-81 (1978)*. See also *Keene Corp. v. United States, 508 U.S. 200, 212-13 (1993)* (where Congress re-enacts a statute that had been given a consistent judicial interpretation, such re-enactment generally includes the settled judicial interpretation). n24

> n23 Enforcement of Nondiscrimination on the Basis of Handicap in Department of Justice Programs, *48 Fed. Reg. 55996 (1983)* (codified at 28 C.F.R. Pt. 39).

> n24 This is most compelling here, as the ADA states that: "Nothing in the ADA shall be construed to provide a lesser standard than the standard applied under Title V of the Rehabilitation Act." *42 U.S.C. ß 12201*(a).

Congress knew that Section 504 was a powerful tool [*41] to combat discrimination based on fear and ignorance of HIV transmission. For example, in the 1980s children with HIV infection who had been terrorized by their community and excluded from school, n25 and a child who had been put in a glass enclosure in the back of the classroom, n26 were able to use Section 504 to combat myths, fears, and stereotypes about HIV infection. In fact, no court even considered the proposition that HIV infection may not be a covered handicap under Section 504. n27

> n25 *Ray v. School District of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987)*. As stated by the Ray Court, "the reality is that the Ray boys have already been dealt a hand not to be envied by anyone. The boys at their young ages are having to face two potentially life-threatening diseases. This is more than most people face in their entire adult lives. Denial of the opportunity to lead as normal an educational and social life as possible is adding insult to injury." *Id. at 1535*.

> n26 *Martinez v. School Board of Hillsborough County, 861 F.2d 1502, 1504 (11th Cir. 1988)*.

n27 See, e.g., *Doe v. Garrett, 903 F.2d 1455, 1459 (11th Cir. 1990)* (holding that infection with AIDS constitutes a handicap under Rehabilitation Act), cert. denied, *499 U.S. 904 (1991); Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820, 825 (5th Cir. 1990)* (assuming that HIV infection is an impairment protected by Section 504); *Chalk v. United States Dist. Court. Central Dist. of Cal., 840 F.2d 701, 705 (9th Cir. 1988)* (assuming AIDS comes within Section 504).

[*42]

Congress not only relied on prior interpretations of Section 504, however; it expressly endorsed the conclusion of the Department of Justice memorandum that Section 504 applies to individuals infected with HIV. n28 In addition, it endorsed the recommendation of the Presidential Commission on the HIV Epidemic that HIV-infected individuals be covered under anti-discrimination legislation:

> As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the HEV [sic] epidemic and will leave HIV-infected individuals isolated and alone.
>
> * * *
>
> Comprehensive Federal anti-discrimination legislation, which prohibits discrimination against persons with disabilities in the public and private sectors, including employment, housing, public accommodations and participation in government programs should be enacted. All persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities [*43] who are covered by the anti-discrimination protections of this legislation.

H.R. Rep. No. 101-485, pt. 2, at 31, 48, 1990 U.S.C.C.A.N. at 313, 330 (citing Report of the Presidential Comm. on the Human Immunodeficiency Epidemic, June 1988, at 123); S. Rep. No. 101-116, at 8, 19.

n28 See discussion supra pp. 11-12.

Finally, as quoted throughout this brief, the record is replete with floor statements expressing the intent that HIV be a covered disability. See supra pp. 10, 19-21, 23. As the debates over the Chapman amendment make vividly clear, n29 even those who didn't approve of HIV coverage understood that the ADA prohibited discrimination on the basis of HIV infection, symptomatic or asymptomatic. n30

n29 See discussion supra pp. 19-21.

n30 In the words of one opponent of the ADA, "With the adoption of this act we are instantaneously going to bring within the definition of disabled person across this land every HIV carrier in America, every person with AIDS. Now that is not what my definition of disability should be including." 136 Cong. Rec. H4621 (daily ed. July 12, 1990) (statement of Rep. Dannemeyer).

**IV. IN DETERMINING WHETHER AN INDIVIDUAL POSES A DIRECT** [*44] **THREAT UNDER THE ADA, COURTS SHOULD NOT DEFER TO PRIVATE HEALTH CARE PROVIDERS.**

At the core of the ADA is the requirement that any adverse decision based on disability be judged by objective fact. Perhaps the most invidious stereotype faced by people with disabilities throughout the ages has been that they pose a danger to others. As noted by this Court in Arline, "the isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness." *480 U.S. at 284 n.12* (citations omitted).

In order to ensure that individuals with disabilities were not assumed to be a danger without objective facts, Congress created the "direct threat" defense. *42 U.S.C. ß 12182*(b)(3). This defense protects people with disabilities from unfounded adverse actions, while at the same time recognizing legitimate concerns for public safety. See H.R. Rep. No.

101-485, pt. 2, at 56-57, 1990 U.S.C.C.A.N. at 338-39; H.R. Rep. No. 101-485, pt. 3, at 45-46, 1990 U.S.C.C.A.N. at 468-69; S. Rep. No. 101-116, at [*45] 27.

This is not, however, a case that calls upon this Court to speculate about how a generally expressed Congressional intent would apply to the situation presented here. The exact issue presented in the third question certified in this case was decided by Congress when it enacted the direct threat defense based on the standard articulated in Arline. n31 Arline directly addressed the standard to be used in cases where the threat posed is infection. In those cases, the Court held that the question of whether a person with a disability poses a direct threat must be evaluated objectively given the state of medical knowledge, and that

> in making these findings, courts normally should defer to the reasonable medical judgments of public health officials.

*480 U.S. at 288.* See also *id. at 286 n.15.*

> n31 Section 101(8) - Direct Threat
>
> The Committee intends to codify the direct threat standard used by the Supreme Court in School Board of Nassau County [ILLEGIBLE WORD] Arline.

H.R. Rep. No. 101-485, pt. 3, at 34, 1990 U.S.C.C.A.N. at 457. See also H.R. Rep. No. 101-485, pt. 2, at 56-57, 1990 U.S.C.C.A.N. at 338-39; S. Rep. No. 101-116, at 27, 40.

[*46]

While this Court also noted that Arline did not present, and it therefore did not address, the question of whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied, see *id. at 288 n.18,* this reference must be to the medical judgments of private physicians on matters other than the risk posed by a contagious disease. Otherwise, the Court's twice-mentioned statement that courts should defer to judgments of public health officials on issues of contagion would make little sense. Thus, Petitioner's attempt to construe Arline as leaving open the question presented here is unsupportable. A rule cannot provide simultaneous deference to public health officials and employers' private physicians or physician defendants on the same determinations, because such judgments may conflict, as in this case. n32

> n32 While it is not necessary to address the open question in this case, it should be noted that Congress's intent to cover doctor's offices in the same manner as other public accommodations is clear from the legislative history. As argued infra, deference to medical doctor defendants, or to defendants' doctors, was explicitly rejected.

[*47]

Nothing in the ADA or its legislative history supports the conclusion that Congress intended to create a different standard for private health care providers. Indeed, discrimination by health care providers against people with disabilities was one of the very harms the ADA was enacted to address. n33 Adopting the findings of a report by the U.S. Commission on Civil Rights, Congress concluded that discrimination against people with disabilities "persists in such critical areas as . . . medical treatment." H.R. Rep. No. 101-485, pt. 2, at 31, 1990 U.S.C.C.A.N. at 312; S. Rep. No. 101-116, at 8.

> n33 Offices of health care providers are specifically covered. See *42 U.S.C.ß 12181*(7)(f).

There is no principled way to distinguish between cases where the health care provider is a defendant and those where the defendant relies on a doctor as the basis for an adverse decision. Congress explicitly rejected giving deference to defendants' doctors. As stated in the House Committee on Education and Labor Report:

> Any determination by a company physician can be challenged by evidence from the complainant's physician. Company doctors often are unfamiliar with [*48] certain disabilities and assume that there are barriers to employment which, in fact, do not exist. The complainant's own physician often has more knowledge about the effects of the disability on the individual being considered.

H.R. Rep. No. 101-485, pt. 2, at 73, 1990 U.S.C.C.A.N. at 356. n34

> n34 Petitioner's reference to the legislative history statement that "nothing in this legislation is intended to prohibit a physician from providing the most appropriate medical treatment in the physician's judgment," is incomplete and therefore misleading. Pet. Brief at 43, quoting S. Rep. No. 101-116, at 63. This sentence goes on to state that the ADA does not prohibit a physician from: "referring an individual with a disability to another physician when the physician would make a referral of an individual who does not have a disability." S. Rep. No. 101-116, at 63 (emphasis added). By using such limiting language, Congress made clear that where a health care provider refuses to treat a patient on the basis of her disability and would not have made the same referral to an individual without a disability, a question of discrimination arises. It is undisputed that the reason for rejection here was the Respondent's disability.

[*49]

Moreover, the refusal by dentists and other health care providers to treat individuals with HIV was explicitly mentioned in the legislative history as an area of discrimination that the ADA was intended to remedy:

> The public accommodations title of the ADA will also offer necessary protection for people with HIV disease. This title prohibits discrimination in such areas as doctors' offices, dentists' office [sic], lawyers' offices, and various other service providers. These are areas of society in which, unfortunately, people with HIV disease have faced discrimination.

136 Cong. Rec. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens) (emphasis added).

The test adopted by Congress, which is reflected in the U.S. Department of Justice's regulations implementing Title III, does not leave health care providers or any other places of public accommodation without recourse. As noted by the First Circuit in this case, the deference afforded to public health officials under the ADA's "direct threat" standard is not absolute. Petitioner and other defendants, whether health care providers or not, are free to come forward and challenge the views of public health officials [*50] "based on contrary, properly supported opinions voiced by other recognized experts in the field (e.g., research studies published in peer-reviewed journals)." *Abbott, 107 F.3d at 945.* Defendants, for example, may choose to put forth evidence demonstrating that the reports and opinions of public health officials on which a plaintiff relies are out of date, or reflect stereotypes about people with disabilities. The Petitioner's failure to put forth sufficient evidence to rebut the Guidelines of the U.S. Centers for Disease Control and the policy of the American Dental Association, both of which conclude that with use of universal precautions patients with HIV can be treated in dentists' offices without significant risk, *id. at 948,* does not support the application of a weaker standard for health care providers. This demonstrates why the uniform standard intended by Congress is needed.

**CONCLUSION**

For the foregoing reasons, the judgment of the Appeals Court should be affirmed.

Respectfully submitted,

* ARLENE MAYERSON, ESQUIRE, HOLLY BALDWIN, ESQUIRE, DISABILITY RIGHTS EDUCATION AND, DEFENSE FUND, 2212 Sixth Street, Berkeley, CA 94710, Telephone: [*51] (510) 644-2555

* Counsel of Record

CARY LACHEEN, ESQUIRE, 137 MacDougal Street, New York, NY 10012, Telephone: (212) 998-6674