

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RANDON BRAGDON, Petitioner v. SIDNEY ABBOTT,
ET AL.

CASE NO: 97-156

PLACE: Washington, D.C.

DATE: Monday, March 30, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 RANDON BRAGDON, :
4 Petitioner :
5 v. : No. 97-156
6 SIDNEY ABBOTT, ET AL. :

7 - - - - -X
8 Washington, D.C.

9 Monday, March 30, 1998

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 JOHN W. MCCARTHY, ESQ., Bangor, Maine; on behalf of
15 the Petitioner.

16 BENNETT H. KLEIN, ESQ., Boston, Massachusetts; on behalf
17 of the Respondents.

18 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Respondents.

C O N T E N T S

ORAL ARGUMENT OF (10:03) PAGE

JOHN W. McCARTHY, ESQ. We'll hear argument

On behalf of the Petitioner 3

ORAL ARGUMENT OF

BENNETT H. KLEIN, ESQ.

On behalf of the Respondent W. McCARTHY 26

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LAWRENCE G. WALLACE, ESQ. Best Justice, and may in

On behalf of the United States, as amicus curiae,
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JOHN W. McCARTHY, ESQ. Of action, despite

On behalf of the Petitioner risks are acceptable 51

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office treatment of otherwise healthy patients without

additional precautions Mr. Waldman believes that when he

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should be allowed to take additional precautions.

This raises one of the fundamental questions in

this case. What is the proper legal standard for

determining when to impose liability on a dentist facing a

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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 97-156, Randon Bragdon v.
5 Sidney Abbott.

6 Mr. McCarthy.

7 ORAL ARGUMENT OF JOHN W. MCCARTHY

8 ON BEHALF OF THE PETITIONER

9 MR. MCCARTHY: Mr. Chief Justice, and may it
10 please the Court:

11 Some risks are acceptable. We know when we
12 build a major bridge or a tunnel that there are risks of
13 death during the course of construction, despite
14 reasonable precautions, but these risks are acceptable
15 because there are benefits to society and because the
16 workers are not compelled to participate.

17 Ms. Abbott and her supporters believe the risk
18 to the lives of dentists is outweighed by providing in-
19 office treatment to HIV-positive patients without
20 additional precautions. Dr. Bragdon believes that when he
21 provides service in the face of the risk of death, he
22 should be allowed to take additional precautions.

23 This raises one of the fundamental questions in
24 this case. What is the proper legal standard for
25 determining when to impose liability on a dentist facing a

1 claim of discrimination under the Americans With Disabilities Act when the direct threat provisions are
2 implemented?

3
4 QUESTION: Mr. McCarthy, may I ask you to
5 clarify at the outset whether you recognize that once the
6 symptoms are visible, what is now described as AIDS, once
7 a person has that disease, that that would constitute a
8 disability?

9 MR. MCCARTHY: I think that's very likely, Your
10 Honor, but our position is that the definition applies for
11 disability, and the definition is when there's a physical
12 or mental impairment and here we're talking about HIV,
13 that substantial limits a major life activity, if that
14 comes into play, then the person's disabled, then it seems
15 very likely it would come into play if a person had
16 visible symptoms of HIV disease.

17 QUESTION: You concede there is a physical
18 impairment, or don't you?

19 MR. MCCARTHY: I don't -- we don't concede that,
20 although we see the force of the respondents' argument on
21 that issue. We note that the Fourth Circuit in Runnebaum
22 found that there was no physical impairment and we're
23 unwilling to concede that issue when a circuit court of
24 appeals has made that finding.

25 QUESTION: I thought it was curious that the

1 American Medical Association took the position that it is
2 a physical impairment under the act from the beginning,
3 and the dental association, on the other hand, takes the
4 opposite view.

5 MR. McCARTHY: Well, I'm not sure what position
6 the dental association takes with regard to physical
7 impairment. We don't think that it's really essential to
8 the arguments that we are making in this matter. Our
9 arguments are directed to disability and -- rather than a
10 physical impairment.

11 There was, it appears to us, a great deal of
12 confusion about those terms in Congress, where Congressmen
13 and women sometimes didn't seem to understand the
14 difference between impairment and disability.

15 QUESTION: Well, the act seems to go further,
16 and say if someone is regarded as having the impairment
17 it's covered.

18 MR. McCARTHY: I think that the language of the
19 act says, if someone is regarded as having such
20 impairment, and when they say such impairment they're
21 referring to an impairment that substantially limits a
22 major life activity, so the regarded as only comes into
23 play if you have an impairment that substantially limits a
24 major life activity.

25 QUESTION: Was that issue argued in the First

1 Circuit, the regarded as? Was that point argued in the
2 First Circuit, or --

3 MR. McCARTHY: In our view it wasn't really
4 argued aggressively, but the issue has appeared. The
5 Solicitor General, or the Department of Justice raised it
6 in the First Circuit.

7 QUESTION: Had it been raised in the district
8 court?

9 MR. McCARTHY: I believe the respondent believes
10 that it has, and the record is somewhat ambiguous on that.

11 QUESTION: Really a pretty skimpy record on that
12 point.

13 MR. McCARTHY: There's a very skimpy record on
14 that issue.

15 QUESTION: But you are contending that a
16 rational Congress would draw the line and exclude from
17 this protection a person whose symptoms are not yet
18 visible, yet include someone who would pose perhaps at
19 least equal danger whose symptoms are visible?

20 MR. McCARTHY: No. We do not think that
21 Congress excluded individuals with HIV disease. We think
22 that congress defined disability, and you have to meet it.
23 Whether you are symptomatic or not symptomatic, you have
24 to have a physical impairment that substantially limits a
25 major life activity, and our argument goes directly to the

1 statute, and there are certainly -- although there may
2 have been efforts to pass legislation that excluded from the
3 contagious diseases, they were not successful, and we
4 certainly don't take that position. ready in place that
5 major life We take the position that you have to meet the
6 definition, and the reason the issue is raised in a case
7 like this is because this particular individual is a
8 classic example of a person who had no symptoms, no
9 difficulties whatsoever. The record is very clear on
10 that, that she doesn't have any of the sorts of attributes
11 that are attributed to some asymptomatic and certainly
12 some symptomatic HIV individuals. order to determine what

13 goes on the QUESTION: Well, do you say that we have to
14 focus on daily public and economic life activities, as
15 oppose to the more private activities that are the --
16 really the basis for the respondent's contention? ed by

17 EEOC early MR. McCARTHY: We get to that language when we
18 look at reproduction as a major life activity, and there
19 are sort of two parts of that, and the first part is, it's
20 well, this -- how do you get away from the idea that it's
21 so major -- obviously reproduction is so major, it must be
22 a major life activity. the Fair Housing Amendments Act.

23 And we escape from that argument, we believe
24 successfully, by the fact that Congress already narrowed
25 that definition to what's in the regulation, and I say

1 Congress narrowed it to what's in the regulation because
2 they adopted the language, major life activities, from the
3 1973 act, the Rehabilitation Act, and the 1988 Fair
4 Housing Amendments Act, so it was already in place that
5 major life activities is limited to functions such as
6 living, breathing, working.

7 When we get to that, the question then becomes
8 is reproduction on that list of major life activities, and
9 the reason it isn't is precisely for the reason I think
10 you made inquiry with respect to, Your Honor, and that is,
11 you have to look at the context and purposes of the
12 Americans With Disabilities Act in order to determine what
13 goes on that list, and the context and purposes are, day-
14 to-day independent living and economic self-sufficiency.

15 QUESTION: Are you relying on the regulations
16 issued by the Department of Justice or those issued by
17 EEOC earlier?

18 MR. MCCARTHY: We're -- I'm making reference to
19 the Department of Justice title III regulations, but it's
20 also important to make reference in the sense that I just
21 described to the regulations that issued under the
22 Rehabilitation Act and the Fair Housing Amendments Act.

23 QUESTION: Can I ask -- and are they identical
24 in that --

25 MR. MCCARTHY: They are either identical or

1 essentially identical in that regard.

2 QUESTION: What function does the Justice
3 Department have under title III, other than issuing
4 regulations?

5 MR. McCARTHY: I'm not sure exactly what you
6 mean. They issued the regulations --

7 QUESTION: Do they do anything else under title
8 III?

9 MR. McCARTHY: -- under title III.

10 QUESTION: Do they administer title III in any
11 sense?

12 MR. McCARTHY: I'm not aware of the Department
13 of Justice --

14 QUESTION: Suppose you have a Congress that's
15 been taken over by the Republicans after 40 years of
16 Democratic control and Democratic judicial appointments
17 and Congress, this Republican Congress does not like the
18 kind of decisions that Democratic judges are going to be
19 making, can Congress say that the interpretation of
20 statutes shall be governed by regulations issued by the
21 Department of Justice? I find that extraordinary.

22 MR. McCARTHY: It certainly was unusual, and we
23 don't -- and we don't really rely on it in that sense.
24 Our reliance comes upon -- comes out of the fact that
25 the -- that Congress knew when it accepted the term, major

1 life activities, that major life activities was already
2 under a term under the Rehabilitation Act that had already
3 had an existing regulation, so it incorporated that, and
4 there are two -- I think you're making a distinction
5 that's worth noting, if I understand it correctly.

6 There are two different ways they look at that,
7 and one is simply knowing that that language already
8 existed, and the other is attempting to say through the
9 Senate and committee reports that they were adopting that
10 language, and those are two different ways of looking
11 at --

12 QUESTION: The whole Congress said that through
13 the committee report.

14 MR. McCARTHY: They attempted to say it through
15 the committee reports.

16 QUESTION: -- on those reports.

17 MR. McCARTHY: Oh, no, certainly the whole
18 Congress did not, but the committee reports made that
19 argument.

20 We're not suggesting that those committee
21 reports are significant. What I'm trying to get at is an
22 answer to the question of what role does independent --
23 day-to-day independent living and economic self-
24 sufficiency play in defining what is and what is not a
25 major life activity, and we think we've in a sense solved

1 the riddle to how do you determine what goes on that list,
2 and the riddle and answer is, you have this principle
3 basis now for deciding what should be on the list, and
4 that is these goals of the Americans With Disabilities
5 Act.

6 Once you have those goals in mind and have this
7 principal basis, you then say a major life activity is a
8 activity which, if substantially limited by a physical or
9 a mental impairment, interferes with the ability to
10 achieve day-to-day independent living and economic self-
11 sufficiency, and when you apply that test you'll find
12 reproduction doesn't fit that list in whatever fashion we
13 describe as reproduction, but learning, hearing, working,
14 breathing do.

15 QUESTION: If you stipulate that 3 or 4 years
16 hence it is highly likely that major life activities of
17 the kind you've been discussing will be affected, is the
18 person disabled, have disability within the meaning of the
19 act in the first year, when we know that it's inevitable
20 that there will be an effect 3 or 4 years down the line?

21 MR. McCARTHY: Well, of course, in a sense it --
22 we think of it as inevitable, but recent --

23 QUESTION: Let's assume that it's --

24 MR. McCARTHY: But if we assume it's inevitable
25 the definition of disability certainly does not seem to

1 attempt to affect future disabilities, which is the
2 question that that raises.

3 In fact, I believe the EEOC guidelines for title
4 I specifically say they're not addressing -- and now I
5 can't remember the term -- gene-based disabilities, or
6 disabilities that are going to occur in the future in that
7 sense, and the argument that because you know, almost know
8 for sure you're going to have disabilities later on, you
9 should be classified as disabilities now, I think simply
10 goes beyond the statute.

11 The statute not only defines disabilities in a
12 present sense, but if you open up the statute to future
13 disabilities, then you start looking at hypertension,
14 genetic problems, Huntington's chorea disease, whatever
15 might exist in the future.

16 QUESTION: But it doesn't mean, does it, the
17 major life activity, that the life activity has to be
18 related to the performance of the job? I mean, a person
19 could be blind. That doesn't mean the blind person would
20 not be -- would be not disabled simply because some jobs
21 don't require seeing.

22 MR. MCCARTHY: I think that's correct.

23 QUESTION: All right. If that's correct --

24 MR. MCCARTHY: I'm having a little bit of
25 difficulty adjusting to a --

1 QUESTION: If that's correct, then let's take a
2 person who had some eating disorder, or couldn't -- that's
3 not on the list, I don't think, eating disorders, but
4 people are terribly frightened of getting it, so he can't
5 eat except in very, very unusual ways, a very serious
6 problem. People are frightened to death of getting it.
7 Does that fall within the act?

8 MR. McCARTHY: I think it's entirely possible
9 that eating is a major life --

10 QUESTION: Well, I would think so.

11 (Laughter.)

12 QUESTION: And then if that's so, why isn't
13 reproductive activity, which includes the person having a
14 sex life, I take it -- I mean, you'd think perhaps that
15 that is at least regarded in this society as a major
16 activity, portion of human life.

17 MR. McCARTHY: But that argument escapes from
18 the idea that the term major life activities incorporates
19 a definition that's already bounded by the regulation.

20 QUESTION: Well, the regulation didn't refer to
21 eating. I didn't see eating on there.

22 MR. McCARTHY: No.

23 QUESTION: And what about a person who couldn't
24 feel, some unusual disease where he can't feel at all. I
25 mean, I take it you put that on there, even though it

1 doesn't mention it.

2 MR. McCARTHY: The regulation says, such as, so
3 it's not excluded.

4 QUESTION: Exactly.

5 MR. McCARTHY: But now --

6 QUESTION: So if that's so, my question is, if
7 you're willing to put in things that relate to feeling,
8 things that relate to eating, things that relate to those
9 things which are part of our ordinary human life, and if
10 you also say that sexual activity is an ordinary part of
11 human life, and an important part, why isn't that on
12 there, too?

13 MR. McCARTHY: Because the test is not
14 important. The test is, is it -- does it fit within the
15 terms of this regulation, which is such as eating,
16 breathing, learning, and --

17 QUESTION: May I ask about the regulation -- I'm
18 a little puzzled. You want us to ignore the regulations
19 that are issued by the Department of Justice pursuant to
20 this statute and look at some other regulations.

21 MR. McCARTHY: No. The regulation that I'm
22 referring to that gives meaning to major life activities
23 is part of this statute. I'm just pointing out that these
24 same regulations --

25 QUESTION: Well, the regulations specifically

1 list HIV as a physical or mental impairment.

2 MR. McCARTHY: And it almost certainly is a
3 physical or mental impairment, but a physical or mental
4 impairment is different than a disability, and we know
5 that it's classified, probably classified as a physical
6 impairment, certainly if you follow the regulations, but
7 the question is, is it a disability, and we get to -- in
8 order for it to be a disability, it has to be a physical
9 impairment that substantially limits a major life
10 activity.

11 QUESTION: You're saying -- you're -- you're
12 referring, when you keep referring to the examples in the
13 regs, to the one set out on page -- in the appendix to
14 your brief, 36.104 --

15 MR. McCARTHY: Yes, Your Honor.

16 QUESTION: -- which has the examples, and I
17 take it your argument is that all of those examples go to
18 the capacity of an individual in effect to survive
19 personally. They are the things that one has to do to
20 live, but they do not go beyond that.

21 MR. McCARTHY: That's right. They are -- in
22 other --

23 QUESTION: So that's why you would pick up
24 eating, but you would draw the line -- one does not have
25 to reproduce in order to survive.

1 MR. McCARTHY: In a sense. They go to
2 sustaining oneself, and reproduction is outside that --
3 doesn't fit with the list. I mean the -- sort of the game
4 here are the -- and of course that's a loose way of
5 referring to it, but the whole idea here is, we're given
6 this regulation that says what major life activities are,
7 and it defines it in terms of examples, and one must
8 understand why the examples are there to know what else
9 goes on the list.

10 QUESTION: What about sustaining oneself, the
11 words you just used, including access to ordinary health
12 care like going to the dentist? This -- a person who has
13 the HIV virus, would you agree, needs to be checked more
14 regularly than you or I, needs access to medical
15 monitoring?

16 MR. McCARTHY: I think it's arguable that if a
17 person has a serious disease and the present medical
18 regimen would include more visits to the office than
19 perhaps some -- not I, but somebody else makes.

20 QUESTION: And that access is rendered more
21 difficult, as this very case shows. That person needs the
22 monitoring, and is impeded from getting it. Why doesn't
23 that qualify?

24 MR. McCARTHY: Well, if that argument is, you're
25 substantially limited in the ability to care for

1 yourself --

2 QUESTION: Yes.

3 MR. McCARTHY: Because you have to go to the
4 doctor, first of all -- or a dentist, first of all she's
5 not substantially limited. That part of the definition
6 exists also.

7 Dr. Bragdon didn't prevent her from obtaining
8 care. In fact, he offered her care, and there's lots of
9 other care available, so we can't mix up the
10 discrimination and the disability questions, and the
11 disability question is, is this caring for oneself come
12 under that --

13 QUESTION: Is there something in the record that
14 indicates that someone in the position of Ms Abbott would
15 have to go to the dentist more regularly than someone
16 without that condition?

17 MR. McCARTHY: There's nothing in the record
18 that I'm aware of that would suggest dental care would fit
19 under that rubric.

20 QUESTION: But do I under -- I may not
21 understand you. Do I understand you correctly that in
22 response, for example, to Justice Ginsburg's question,
23 that your point is that under the reg the substantial
24 limitation goes to what the individual can do by himself
25 alone. It does not go to what others may do in

1 relation -- in other words, discrimination is not a --
2 cannot amount itself to a disability?

3 MR. McCARTHY: I think that's correct, that
4 the -- you can't get at what is a disability by what is
5 allegedly discrimination, but what I was trying to get at
6 is, we're now talking about reproduction as a -- we're now
7 talking about caring for oneself as a major life activity,
8 and we know it is a major life activity because it's on
9 the list, and the AMA tries to put health care services
10 under that, and our first argument is it really doesn't
11 belong there. It's not caring for oneself, but we haven't
12 even discussed that --

13 QUESTION: Is others caring for one?

14 MR. McCARTHY: But the part that I was
15 getting -- attempting to get at was there is -- you're not
16 substantially limited in it simply because a single
17 dentist says to you, I believe we should take additional
18 precautions to treat you.

19 The other part of the major life activity
20 argument that I wanted to get at is the idea, this idea of
21 the principal basis in day-to-day independent living and
22 economic self-sufficiency being the guide. The reason
23 reproduction doesn't fit within that group is, people who
24 have limitations in fertility, or impotent, don't normally
25 have difficulties with day-to-day independent living or

1 economic self-sufficiency, and that's --

2 QUESTION: But even if you put -- and I realize
3 you're not doing it, but even if you put reproduction
4 within the approved list of activities that the statute is
5 getting at, I take it you make a distinction between,
6 let's say, a person who is infertile and a person who
7 simply has HIV.

8 MR. McCARTHY: Ultimately you do, yes.

9 QUESTION: Yes. And what is that distinction?

10 MR. McCARTHY: Well, if we're talking about HIV,
11 the first question is, is it an impairment, and the
12 regulation suggests that it is an impairment, and when
13 we're talking about whether it substantially limits a
14 major life activity, like being impotent or like being
15 infertile, it has no relationship to this concept of day-
16 to-day independent living.

17 QUESTION: Yes, but let's assume we get over
18 that point and we classify this as one of the activities
19 that does, in fact, belong within the series of examples.

20 MR. McCARTHY: Reproduction?

21 QUESTION: Yes. I understood you to make a
22 distinction even at that point -- you're sort of, not at
23 the last ditch, but you're close to it. I understood you
24 to be making a distinction at that point between the
25 position of the individual with the HIV infection and the

1 individual who is infertile or who is impotent or who is
2 sterile, and you said yes, you did make such a
3 distinction.

4 MR. McCARTHY: Right.

5 QUESTION: What is your distinction?

6 MR. McCARTHY: I'm afraid I've lost that
7 distinction as we discussed now.

8 I do want to take a minute, while I still have
9 the opportunity, to get that --

10 QUESTION: I don't understand your answer.
11 You -- is there a distinction or isn't there a
12 distinction?

13 MR. McCARTHY: I lost -- I'm not aware of the
14 distinction as I stand here.

15 QUESTION: You would think that if HIV -- if the
16 inability to reproduce because of HIV qualifies under the
17 statute, the inability to reproduce because of impotence
18 or sterility would also --

19 MR. McCARTHY: That's correct, arguably.

20 QUESTION: But what about --

21 MR. McCARTHY: Those are being --

22 QUESTION: It's arguably, but do you take that
23 position?

24 MR. McCARTHY: Those are the -- those are the
25 physical impairments that relate to the major life

1 activity of reproduction.

2 QUESTION: No, but I thought your -- the
3 argument that was suggested you didn't -- I don't think
4 you went into it in great detail -- was that the person
5 with HIV can in fact perform the sexual function, can
6 reproduce. The person who is sterile, or infertile, or
7 impotent, cannot.

8 MR. McCARTHY: Right. Having HIV doesn't keep
9 her from having a child or from reproducing. She's still
10 able to reproduce, so in that sense HIV is different than
11 being infertile or being impotent.

12 QUESTION: It's crucially different --

13 MR. McCARTHY: Yes.

14 QUESTION: -- if you get to that point, isn't
15 it?

16 MR. McCARTHY: That's correct.

17 QUESTION: Can I ask you a question about what
18 you started with, which is what I think you wanted to get
19 to, and that is, you were talking about was this dentist
20 reasonable in his fear, and in respect to that you asked
21 about the standard, and I gather that there are standards
22 in the regs.

23 The direct threat must rely on an individualized
24 assessment based on a reasonable judgment, relies on
25 current medical knowledge, and in Arline this Court said

1 courts should normally defer to the reasonable medical
2 judgments of public health officials.

3 On those standards, assuming, as I think is
4 correct, after 15 years and hundreds of thousands of
5 people dead as a result of this disease, I gather after 15
6 years and hundreds of thousands of deaths, there isn't one
7 case -- maybe just one -- in which a dentist, despite
8 hundreds of thousands of dentists who do treat AIDS
9 patients, there isn't one case in which one of those
10 dentists documentedly caught AIDS from a patient.

11 Now, if that's so, how could we say here that
12 your client exercised reasonable medical judgment?

13 MR. McCARTHY: Well, there are two parts to that
14 question, and first of all, we believe that assertion by
15 the respondent is simply wrong. The -- in June of 1994
16 the CDC reported that there are seven HIV-infected health
17 care workers. Seven with known occupational injuries,
18 seven with known HIV exposures, and no other identifiable
19 source of HIV.

20 The respondent dismisses these seven as --

21 QUESTION: No, no, he said they weren't
22 dentists. He said those were not dentists.

23 MR. McCARTHY: No, these are seven health care
24 workers -- I don't know if they're all dentists.
25 Certainly at least some of them are dentists, and the

1 point is that they are in the same position as dentists
2 and that they suffer these --

3 QUESTION: Why do you say certainly at least
4 some of them are dentists? Why is that?

5 MR. McCARTHY: Because they're all dental health
6 care workers.

7 QUESTION: Oh, they're dental health care
8 workers.

9 MR. McCARTHY: Yes.

10 QUESTION: Okay.

11 MR. McCARTHY: Yes, and --

12 QUESTION: That's rather an important qualifier,
13 isn't it?

14 MR. McCARTHY: Yes. I'm sorry if I --

15 (Laughter.)

16 MR. McCARTHY: If I said health care workers, I
17 misspoke. They're all dental health care workers, and the
18 CDC labels these as possible because it uses the term
19 possible to mean anything that's less than absolutely
20 certain, but when you look at the way the CDC treats
21 these, they're all apparent occupational transmissions
22 that occurred in the dental care setting, and any logical
23 analysis under our way of looking at things would -- by
24 ours, I mean the legal system's, would include these were
25 more likely than not occurrences. And so --

1 QUESTION: And that's in the record? That study
2 is in the record?

3 MR. McCARTHY: Yes. Yes, it is, and the point
4 is that the term documented that's used by respondent and
5 others here, because that's a CDC term that refers to
6 having an HI -- having all of the circumstances we just
7 described, and then having an HIV test immediately after
8 the percutaneous exposure to establish that you don't
9 already have HIV, that's the only distinction.

10 And the studies go on to indicate more often,
11 much more often than not there is no such HIV test, and
12 this passive surveillance system that revealed this
13 finding is by the CDC itself disclosed to be as much as 90
14 percent underreported. It's a totally passive system.
15 There are --

16 QUESTION: And the relevant date, I take it, is
17 1994, when the discrimination took place?

18 MR. McCARTHY: Yes. September 16 --

19 QUESTION: Or the alleged discrimination.

20 MR. McCARTHY: Yes. September 16, 1994.

21 I want to speak for just a minute, if I can, to
22 the question of then-current medical knowledge. Assuming
23 we get to the appropriate legal standard, which is good
24 faith and reasonable judgment, relying on the objective
25 standard of then-current medical knowledge, what is

1 advanced here by respondents and even by the First Circuit
2 to a certain extent is the CDC, as if it were a public
3 health authority that made a pronouncement here, and this
4 is truly an emperor with no clothes.

5 The CDC has issued reports. They are
6 guidelines. It establishes standards, and no place in the
7 CDC guidelines does it indicate that there's no
8 significant risk. In fact, it specifically recognizes the
9 unique nature of most dental procedures also may require
10 specific surgery -- strategies.

11 Universal precautions are minimum guidelines and
12 there's no reason why additional precautions shouldn't be
13 taken, and that's what the guidelines say, and if I can
14 just say one more thing --

15 QUESTION: Well, let me ask you this. This case
16 arose in '92, '93?

17 MR. McCARTHY: September 16, 1994.

18 QUESTION: '94. Have the -- has our knowledge
19 about the risks changed since that time?

20 MR. McCARTHY: I --

21 QUESTION: Do we look at it as of that date, and
22 how has our information changed since then?

23 MR. McCARTHY: The standard is to look at then-
24 current medical knowledge, and I think that's the only
25 fair way to determine whether or not you're going to

1 impose civil rights liability. That's what's suggested by
2 the amicus brief of the AMA here and in Arline, where they
3 cite similar cases under the Rehabilitation Act of 1973,
4 and the point is that then-current medical knowledge is
5 the only way to judge it.

6 I don't really think the information has
7 changed, but there's one significant piece of evidence
8 here, and the First Circuit pointed it out, and that's how
9 this emperor ended up having no clothes, is they had the
10 CDC at the district court level, through a witness who was
11 testifying, a litigation witness in a litigation posture
12 from the CDC, making four different declarations that
13 ultimately say something like, the risk is safe to treat,
14 the dentist care in the -- in this setting, and the point
15 is you don't have that any more. You just have the CDC
16 guidelines by themselves, and that's why I ask you to look
17 at the CDC guidelines, because they don't say there's no
18 risk.

19 I'd like to reserve my time, except to say OSHA
20 has very much similar supportive information that's -- for
21 our position that's noted in the record.

22 Thank you.

23 QUESTION: Thank you, Mr. McCarthy.

24 Mr. Klein, we'll hear from you.

25 ORAL ARGUMENT OF BENNETT H. KLEIN

1 ON BEHALF OF RESPONDENTS

2 MR. KLEIN: Thank you, Mr. Chief Justice, and
3 may it please the Court:

4 The problem of discrimination against
5 individuals with HIV was squarely before Congress when it
6 enacted the ADA. And the committee reports reflect a
7 concern that unless there were clear protections against
8 discrimination for all individuals with HIV, people with
9 HIV would hide their condition.

10 As the First Circuit correctly found, Sidney
11 Abbott, a woman infected with the virus that causes AIDS
12 has a disability within the meaning of the ADA. And this
13 Court can affirm the First Circuit's decision on three
14 alternative grounds.

15 First of all, this Court can affirm the First
16 Circuit if it finds that reproduction is a major life
17 activity. In addition, the Court can affirm the First
18 Circuit if it finds, as reflected in the committee reports
19 and as the First Circuit also noted in its decision, that
20 everybody with HIV, a fatal, contagious, incurable
21 disease, is substantially limited in many different major
22 life activities.

23 QUESTION: Well, Mr. Klein, you say as noted in
24 the committee reports. That isn't the same as the
25 statute, is it?

1 MR. KLEIN: It's not the same as the statute,
2 and I think that what is noted in the committee reports,
3 which is the people with HIV are limited in major life
4 activities, is consistent with the plain meaning of the --
5 the phrase that Congress did choose. Which was
6 substantially limited in one or more major life
7 activities. As an incurable, fatal and contagious
8 disease, people with HIV cannot engage in procreation or
9 intimate sexual relations.

10 QUESTION: Well, why can they not? The -- the
11 difficulty that I'm having with your argument is that you
12 are -- you are using the judgment that your client made,
13 a -- a very responsible moral judgment, as being
14 equivalent to the limitation that the statute talks about
15 and that the regs talk about. And without certainly any
16 disrespect for the moral judgment that your client has
17 made, I don't find it that easy to transfer from the moral
18 limitation that she has placed upon herself to the
19 limitation that the statute is speaking of.

20 The statute speaks in terms of -- of there being
21 a substantial limit upon an activity. And the
22 regulation -- I take it the regulation that's closest to
23 it is the one set out on -- on page 7a of the Government's
24 brief. And let me just read the sentence that gives me
25 the -- the greatest difficulty in -- in relation to your

1 case.

2 I am reading from the middle of page 7a:

3 "A person is considered an individual with a
4 disability for purposes of Test A, the first prong of the
5 definition, when the individual's important life
6 activities are restricted as to the condition, manner, or
7 duration under which they can be performed in comparison
8 to most people."

9 "Can be performed" sounds to me like a physical
10 capacity to perform them. It doesn't sound like a
11 responsibly, self-imposed limitation. Could you address
12 the difficulty I'm having in getting from "can be" to
13 moral limitation?

14 MR. KLEIN: Yes. Yes. And I'd like to address
15 both under the -- the meaning of the term "substantial
16 limitation" and also the regulation that you quoted from.
17 The -- the term "substantial limitation," by its plain
18 meaning, doesn't mean that somebody is precluded from
19 engaging in the activity, or even chooses not to engage in
20 the activity. "Substantially limited" cannot have that
21 meaning. Indeed, somebody couldn't be -- ever be
22 substantially limited in the major life activity of
23 breathing if one had to be precluded from engaging in that
24 activity.

25 Now, the regulations, which you quoted, indicate

1 that a person cannot engage in the activity or cannot
2 perform the activity under the same conditions or manner
3 or even duration as somebody who does not have that
4 impairment, or the average member of the population. A
5 person with HIV --

6 QUESTION: And the question is, why are those
7 conditions moral conditions rather than physical
8 conditions?

9 MR. KLEIN: Well, the -- the limitation flows
10 from the physical impairment of HIV.

11 QUESTION: No. But the -- the -- the physical
12 impairment of HIV, certainly at the asymptomatic stage
13 that we're talking about here, does not in any -- as I
14 understand it -- does not in any way limit the physical
15 capacity to engage in reproductive function, whether it be
16 male or female.

17 MR. KLEIN: Well, I think that a person is
18 limited -- a person cannot perform an activity under the
19 same conditions as somebody without the impairment if --
20 if, for example, they can transmit a deadly disease to a
21 sexual partner, if they can infect their child, and also
22 because --

23 QUESTION: I mean, you can say that, but is it
24 true?

25 QUESTION: Yes. I keep saying, why is the moral

1 condition equal to the physical condition? Why is that
2 so?

3 MR. KLEIN: Because it all flows from the
4 inevitable fact of the contagiousness of H -- not only the
5 contagiousness of HIV, but the fatality of HIV. For
6 example, reproduction is not simply the act of conception.
7 It -- procreation and reproduction also involve raising
8 and nurturing a child. As a fatal disease --

9 QUESTION: Well, there again, that -- that's --
10 that's a fine statement. And -- and people who reproduce
11 ought to consider how they're going to nurture. But I'm
12 not sure that that's what the statute is talking about.
13 And I'm not sure that that is what the courts have meant
14 thus far in talking about reproduction. I presume they
15 have been talking about reproduction as in fact a
16 physical, biological activity that results in the birth of
17 a baby, in the normal course.

18 MR. KLEIN: Well, I think the plain meaning of
19 the statute does not -- does not preclude the re -- does
20 not require a preclusion of the activity. In other words,
21 just the phrase "a physical or mental impairment that
22 substantially limits a major life activity, but for that
23 impairment" -- but for the existence of HIV, reproduction
24 and procreation and the choices and decisions that people
25 have to make around it would be very different.

1 QUESTION: Well, do -- do you concede that it's
2 strictly a moral limitation or a moral mandate that you're
3 client followed? I -- I suppose a person with
4 tuberculosis, which I assume can be very infectious and
5 contagious, stays away from other people and we don't just
6 call that a -- a moral choice. It is an objective
7 limitation on that person's ability to interact with other
8 people in society.

9 MR. KLEIN: That's correct.

10 QUESTION: I don't see -- I don't think --

11 QUESTION: Is that right? Are there laws
12 against it? I mean -- I mean, I can understand that if we
13 quarantine everybody with tuberculosis. Then it's not a
14 moral choice. And then you're compelled. But you think
15 it's not a moral choice if someone -- I mean, let's say I
16 have a very contagious cold. And I decide, you know, not
17 to -- not to go on an airplane. Is -- is that a moral
18 choice?

19 MR. KLEIN: Well, I don't think that the key
20 choice is a moral choice. I think the limitation flows
21 from the physical impairment. And as the First Circuit
22 noted --

23 QUESTION: No, but it flows through a choice
24 about what I ought to do in relation to other people. I
25 ought not to expose the airplane full of people to my

1 cold. That's the way the limitation flows. And it seems
2 to me that that moral choice is crucial to -- to the -- to
3 the consequence that you draw from the physical act -- the
4 physical infection.

5 QUESTION: But -- but are all good sens -- I've
6 been interrupted before you answered my question -- are
7 there -- are all sensible safeguards for the public's
8 safety moral choices?

9 MR. KLEIN: I don't believe -- I'm not sure I
10 under --

11 QUESTION: Under the regulation, what difference
12 does it make whether it's moral or not? That's what I
13 don't understand.

14 MR. KLEIN: The -- I don't think the fact that
15 there's a volitional aspect to a limitation precludes it
16 from being a substantial limitation under the statute.
17 Many --

18 QUESTION: Would it be a disability under the
19 Act if -- if I know that -- that there is in my family a
20 gene that causes manic depression, and -- and I choose,
21 therefore, not to have children?

22 MR. KLEIN: Well --

23 QUESTION: Is that a disability under the Act?

24 MR. KLEIN: I think that's a very separate and
25 complex question that's not at issue in this case.

1 Because the Court would have to reach the question
2 there --

3 QUESTION: Oh, I thought it was an issue in this
4 case. I'm sorry.

5 MR. KLEIN: The -- well, I think -- I think that
6 is somewhat -- somewhat distinct, Justice Scalia. Because
7 the Court would have to reach the issue there of whether a
8 genetic condition is an impairment. And that depends on a
9 scientific understanding of -- of the effects of that
10 genetic disorder. In other words --

11 QUESTION: Is it different? I don't understand
12 that. Are you disabled under the Act if you know if you
13 get out of the house you'll give the whole city bubonic
14 plague?

15 MR. KLEIN: I would certainly think so, yes.

16 QUESTION: Yes, I would think so, too.

17 (Laughter.)

18 QUESTION: And the -- then, even though you
19 haven't shown symptoms yet, you haven't shown symptoms,
20 you're not -- you're not -- you're not that -- I mean,
21 that -- that is not so obvious, but I -- can I ask you
22 another -- a different a slightly different --

23 QUESTION: May I say that I don't think that's
24 so obvious. I -- I --

25 QUESTION: But I agreed with you, it isn't

1 obvious. It is not obvious. But I think that -- that
2 that's the kind of issue we're talking about. If -- if
3 the -- what I -- what I'd like to -- to know is just a
4 quick factual question. I read the ABA brief. And it
5 says none of the documented cases -- the 42 they're
6 talking about -- involved a dental practitioner. You
7 know, I don't read these briefs with a absolute dental
8 practitioner -- was it a dental -- I assumed it didn't
9 have somebody who was in the dentist's office.

10 Now, were these cases dental practitioners or
11 were they not?

12 MR. KLEIN: There is no documented case of a
13 dental practitioner who has been infected with HIV.

14 QUESTION: And by that, you're not using some
15 technical loaded thing. You mean --

16 MR. KLEIN: No. There is no dental health care
17 worker.

18 QUESTION: I mean, somebody like a person who's
19 in the dentist's office and who is working, I would call a
20 dental practitioner.

21 MR. KLEIN: That's right. Right. To make it
22 crystal clear, there has never been a case of occupational
23 transmission of HIV from a patient to a dentist.

24 QUESTION: But what about the seven cases that
25 the other side has mentioned, of dental health care

1 workers?

2 MR. KLEIN: Those are cases that the CDC has
3 investigated and concluded that there's not sufficient
4 evidence to determine occupational transmission.

5 QUESTION: As of 1994?

6 MR. KLEIN: As of 1994 and as of today.

7 QUESTION: Well, that would not enable you to
8 say there has never been a case. You -- you say there has
9 not been a documented case. What does documentation
10 require?

11 MR. KLEIN: Well, documentation requires --

12 QUESTION: According to CDC, requires what?

13 MR. KLEIN: Requires that there be an initial
14 injury and that the person then have a baseline HIV test
15 so we know --

16 QUESTION: Immediately afterwards, right?

17 MR. KLEIN: That's correct.

18 QUESTION: Okay.

19 MR. KLEIN: Okay.

20 QUESTION: So there are a lot of conditions
21 that -- that -- that may not have been followed in the
22 vast majority of cases?

23 MR. KLEIN: Well, we -- we don't -- all we know
24 is what -- what current medical knowledge can tell us.
25 The regulation requires that we -- we base direct threat

1 on a determination of current medical knowledge.

2 QUESTION: It can't tell us that there's never
3 been a case -- which is what you said -- they can't tell
4 us that?

5 MR. KLEIN: It -- it can't tell us that.

6 QUESTION: Okay.

7 MR. KLEIN: But we -- what we know is that we
8 have no known case. And, you know, there's been over a
9 billion dental procedures.

10 QUESTION: Would you tell me again why it is
11 that we should not give any weight to these seven cases?
12 What -- would you say that --

13 MR. KLEIN: I'm sorry?

14 QUESTION: Why -- why are the seven cases that
15 he relies on not relevant?

16 MR. KLEIN: Because there's no -- no
17 documentation of HIV status arising from the occupational
18 injury. And as -- as there is testimony --

19 QUESTION: I mean, is it a question of causation
20 that wasn't proved or that the -- there was in fact no --
21 no disease to the dental worker? I still am not quite
22 clear why they're totally irrelevant. What was not
23 documented?

24 MR. KLEIN: What was not documented was that the
25 causation of -- of HIV transmission was through an

1 occupational means. The CDC determined that there is not
2 valid scientific evidence to know that -- that HIV
3 transmission occurred through the dentist's occupational
4 duties. There are many other modes of HIV transmission.

5 QUESTION: Well, the question is whether or not
6 it was reasonable for the dentist, in 1994, to assume that
7 there was a significant risk. I'm not sure that he is --
8 is bound by exactly what the CDC determines, especially at
9 some later date.

10 MR. KLEIN: Well, the -- the regulation requires
11 that the determination be consistent with current medical
12 knowledge. And certainly there is no known case of this
13 happening. The CDC's position is that -- is that they
14 have instructed dentists how to perform procedures safely.

15 QUESTION: Well, the statute doesn't say
16 anything about the CDC. He can -- he can put in his own
17 expert witnesses on this, just as on any issue, I suppose.

18 MR. KLEIN: Yes, he --

19 QUESTION: And the CDC -- I mean, that's very
20 nice, but --

21 QUESTION: Why should -- why should -- why do we
22 defer to the CDC?

23 MR. KLEIN: Well, for two reasons. First of
24 all, this Court, in Arline, indicated that when we're
25 trying to determine whether -- whether the risk of

1 transmission of a contagious disease can be the basis
2 for its prevention --

3 QUESTION: That was pretty much dicta in Arline,
4 was it not?

5 MR. KLEIN: No, I don't believe it was dicta.
6 But right after -- right after Arline was decided, the
7 Congress, a few years later, passed the ADA, adopting the
8 same kind of direct threat test. And in Section 12201,
9 referred back to -- to standards under the Rehabilitation
10 Act, which was Arline. And deference to the health care
11 provider is inconsistent with the statute. Because the
12 statute covers health care providers as places of public
13 accommodation. And -- and Congress found, in 12101, that
14 there was discrimination on the basis of disability in
15 health services --

16 QUESTION: Mr. Klein, may I ask you whether the
17 plaintiff below relied on any impairment of a major life
18 activity other than reproduction?

19 MR. KLEIN: We argued in the District Court that
20 HIV is a disability, and specifically that Sidney Abbott
21 was an example of that, through the limitation on her --

22 QUESTION: Could you answer the question that I
23 asked, which was whether the plaintiff relied on any other
24 activity other than reproduction?

25 MR. KLEIN: The plaintiff did not present

1 specific testimony and did not rely for her individualized
2 planning of disability on any activity other than
3 reproduction. But we certainly argued in the District
4 Court that HIV is always a disability.

5 QUESTION: What -- what is the best authority in
6 the record or in the brief to sustain that position, that
7 it's a disability on a major -- or it impairs a major life
8 function, other than reproduction? Where would I look if
9 I wanted to find that?

10 MR. KLEIN: Well, I think in the section of our
11 brief talking about the plain meaning of the terms
12 "substantial limitation of a major life activity," and in
13 the legislation history, which indicates that the
14 committees considered that HIV was always a disability,
15 not only because it harmed -- discrimination harmed
16 individuals, but because there was a grave concern about
17 the public health consequences, that if people could not
18 be assured of nondiscrimination -- and we had to rely on
19 somebody's intentions about reproduction or sexual
20 activity today, tomorrow or yesterday, that --

21 QUESTION: Thank you, Mr. Klein.

22 MR. KLEIN: Thank you, Mr. Chief Justice.

23 QUESTION: Mr. Wallace, we'll hear from you.

24 ORAL ARGUMENT OF LAWRENCE G. WALLACE

25 FOR UNITED STATES, AS AMICUS CURIAE

1 SUPPORTING RESPONDENTS

2 QUESTION: Mr. Wallace, while you're coming up,
3 will you tell me why the Justice Department regulations
4 make any difference? I mean, I used to be in the Justice
5 Department and I used to write opinions on behalf of the
6 Attorney General. And it would have been very nice if the
7 Congress had said, you know, whatever Scalia says the
8 statute means, it means.

9 (Laughter.)

10 QUESTION: I -- I didn't think they could do
11 that. And -- and this statute is -- it -- am I correct?
12 It gives no responsibilities to the Justice Department
13 except to issue interpretive regulations.

14 MR. WALLACE: That is not correct, Justice
15 Scalia.

16 QUESTION: What else -- what else does the
17 Justice Department do?

18 MR. WALLACE: There is, in 42 U.S.C., Section
19 12188, a provision entitled "Enforcement." And Subsection
20 B of that Section 12188 is entitled "Enforcement by
21 Attorney General." And it gives in its subparts a duty to
22 investigate possible violations of the public
23 accommodations provision and authority to bring lawsuits.
24 And, indeed, this is very important authority, because
25 only the Attorney General can bring a suit for

1 compensatory damages.

2 QUESTION: Well, that's just like the criminal
3 law.

4 QUESTION: Yes.

5 QUESTION: Can we tell the Attorney General to
6 interpret the criminal statutes, issue regulations as to
7 what the criminal statutes mean? I have not thought that
8 that's the kind of administration of the law that we talk
9 about when we accord chevron deference to agencies.

10 MR. WALLACE: And then -- and then, Section
11 12186 of Title 42 explicitly imposes a duty on the
12 Attorney General to adopt regulations to implement Title
13 III.

14 QUESTION: Well, Mr. Wallace, supposing we have
15 a standard criminal law statute, like carrying a gun in
16 connection with a drug felony. And Congress, as a part of
17 that statute, says: And the Attorney General shall issue
18 regulations telling what these section -- sections mean.
19 Now, do you think we would give deference to those
20 regulations?

21 MR. WALLACE: Well, I should think so. Yes.
22 And there is a further -- and there is a further provision
23 here that is of -- of direct relevance. And that is
24 Section 12201, Subsection A of Title 42, which says
25 "Except as otherwise provided in this Chapter, nothing in

1 this Chapter shall be construed to apply a lesser standard
2 than the standards applied under Title V of the
3 Rehabilitation Act of 1973 or the regulations issued by
4 Federal agencies pursuant to such Title."

5 QUESTION: Mr. Wallace --

6 MR. WALLACE: And -- and many of the regulations
7 were carried forward verbatim from the HHS regulations
8 that Congress was referring to in this provision. And --

9 QUESTION: I have no trouble with that.

10 MR. WALLACE: And --

11 QUESTION: Mr. Wallace, may I ask -- the -- the
12 provision directing the Attorney General to -- to
13 promulgate regulations says that they shall include
14 standards applicable to facilities and vehicles covered
15 under Section 12182 of this Title. What is that Section,
16 12182? What are the -- the facilities and vehicles?

17 MR. WALLACE: Well, let me look and see.

18 QUESTION: I know it, but I'm not going to tell
19 you.

20 (Laughter.)

21 MR. WALLACE: That -- that is a -- it's entitled
22 "Prohibition of discrimination by public accommodations."
23 And it's -- it's in the -- it's in the --

24 QUESTION: Why don't you follow it with the
25 Clerk later?

1 MR. WALLACE: All right. Well, I'm sorry. I
2 would have to -- but -- but that -- that is the general
3 prohibition of discrimination in the furnishing of public
4 accommodations. And public accommodations or elsewhere
5 defined to include these health facilities.

6 Now, one of the regulations that has been
7 carried over verbatim, as we were talking about, from the
8 previous regulations, and one that was very much before
9 Congress because it was quoted, set out in this Court's
10 opinion in the Arline case, is the definition of physical
11 impairment, to include any physiological disorder or
12 condition affecting the hemic or lymphatic systems. And
13 that of course includes HIV infection, as the current
14 regulations specifically state it does.

15 QUESTION: Mr. Wallace --

16 QUESTION: It includes a mental impairment, too,
17 doesn't it, the Act?

18 MR. WALLACE: That is correct.

19 QUESTION: Would -- would you -- would you
20 regard a firm homosexual sexual orientation as being a
21 disability under the Act?

22 MR. WALLACE: Well, that is specifically
23 excluded in another provision. And that is pointed out in
24 an amicus brief filed by Senators Harkin, et al., who were
25 sponsors and floor managers of the legislation.

1 QUESTION: That's excluded where? Do you know
2 the provision? I mean, in -- in -- in the regulations or
3 in the statute?

4 MR. WALLACE: In -- in the statute itself. And
5 there is the point made that -- in -- it's Section 12211,
6 I am told --

7 QUESTION: Mr. Wallace, while that is on the
8 burner, may I ask -- as I understand it, there's no
9 dispute here that HIV is a physical impairment.

10 MR. WALLACE: Yes, that is correct.

11 QUESTION: And so the only question is whether
12 it's a disability. And those two questions shouldn't be
13 confused. So we're talking about is it a disability,
14 given that it is a physical impairment? And there are
15 some physical impairments that are not disabilities.

16 MR. WALLACE: In -- in order to be a disability,
17 it must substantially limit a major life activity. So
18 there are two further questions once it -- it is
19 determined that it is a physical impairment. One is
20 whether it affects a major life activity and whether --
21 and the second is whether it substantially limits that
22 major life activity.

23 The major life activity which was the focus of
24 this case and on which both courts below relied was
25 reproduction and impairment to the reproductive capacity.

1 That, in the very same regulation that I quoted, is really
2 implicit in that regulation. Since impairment is defined
3 as a disorder or condition that, among other things,
4 affects the reproductive system, it is hard to see how
5 that would have any relevance unless reproduction were a
6 major life activity, a substantial limitation of which
7 could be a disability under the Act. Because it's hard to
8 see how impairment of the reproductive system would relate
9 to any other major life activity.

10 QUESTION: Well, you can have cancer. You --
11 you could have ovarian cancer. That would be an
12 impairment of the -- of the reproductive system, which
13 could cause a disability.

14 MR. WALLACE: It -- it -- it's --

15 QUESTION: And not necessarily a disability
16 associated just with reproduction. I -- I understood the
17 regulations went through all the major physical functions
18 of the body, or physical whatever doctors call them,
19 including the reproductive system, the breathing system
20 and so forth. Isn't that right?

21 MR. WALLACE: And the -- and I might add that
22 the current regulations also refer to HIV disease
23 specifically as an impairment. And the -- the list --

24 QUESTION: We don't have a problem with whether
25 it's an impairment. We have -- I have a problem with your

1 saying: Since reproductive disease is an impairment,
2 the -- affecting the ability to reproduce is a disability,
3 in that automatically the ability to reproduce is a major
4 life activity. I don't understand that leap. Just
5 because they mention the reproductive system along with
6 all the other organs of the body.

7 MR. WALLACE: All right. All right. Well, that
8 is just one indication, perhaps not a conclusive
9 indication, but it certainly looks in the direction of
10 concern about impairment to the reproductive system.

11 Now, the Court of Appeals approached this
12 question in what we believe was an exemplary fashion. The
13 Act does not itself define what is a major life activity.
14 And so the Court of Appeals said: We'll think of the
15 ordinary meaning of "major," which is significant in
16 comparison with other activities.

17 QUESTION: Mr. Wallace, if we don't accept your
18 view that reproduction is this major life activity, if we
19 don't accept that, do -- do you lose?

20 MR. WALLACE: No. Although a remand might be in
21 order.

22 What -- there is protection, as Justice O'Connor
23 pointed out and as the Court relied on quite strongly in
24 the Arline case, for individuals who are regarded as
25 having an impairment that affects a major life activity.

1 QUESTION: Is that the only basis? Can't we
2 find from the briefs that there are other impacts on major
3 life activities, other than reproduction?

4 MR. WALLACE: I would say that is best
5 documented in two of the amicus briefs, the one filed by
6 the American Medical Association, which spends quite a few
7 pages describing HIV --

8 QUESTION: But amicus briefs can't raise issues
9 that are not raised by the parties, Mr. Wallace.

10 MR. WALLACE: That is correct. As well as the
11 brief of Senator Harkin, et al. But --

12 QUESTION: Let me ask -- let me ask one other
13 question. Suppose the dentist has AIDS, not the patient.
14 Would it be discriminatory for an HMO with more than 15
15 people to refuse to hire the dentist or, alternatively, to
16 require that the dentist disclose this to the patients?

17 MR. WALLACE: Well, the last footnote in our
18 brief points out that the -- the question of HIV infection
19 in health care workers and whether they are otherwise
20 qualified really raises different issues.

21 QUESTION: Why does it raise different issues
22 if the -- if the chance is infection because of the close
23 proximity between the dentist and the patient?

24 MR. WALLACE: Because it's the health care
25 worker that's in charge and control of whether the

1 precautions are taken or not, the patient will be
2 subjected to risks over which the patient has no control.
3 But if the health care worker follows the universal
4 procedures that have been recommended by the Centers for
5 Disease Control and the Dental Association and the Medical
6 Association and other professional groups, the health care
7 worker can limit any possible risk --

8 QUESTION: So then it would seem to me the
9 answer to the question is that this doesn't have to be
10 disclosed and the -- and the dentist has to be hired.

11 MR. WALLACE: Well, the -- the question of
12 disclosure really is not addressed by this Act.

13 QUESTION: Well, suppose there were a policy by
14 the HMO that the -- the person has to disclose to the
15 patient so the patient has a choice.

16 MR. WALLACE: There's -- there's nothing in the
17 Act that I'm aware of that addresses that question.

18 QUESTION: Well, let's assume that that would be
19 a discrimination under the Act.

20 MR. WALLACE: Well, it's very close to the
21 question that the Court had in Arline, in which you tried
22 to specify some standards to be used to be sure that there
23 was meaningful protection afforded to what were
24 handicapped individuals within the meaning of the Act, and
25 that only real, rather than conjectural, risks of the kind

1 found here by the Court of Appeals, after a very careful
2 review of the evidence, would be used to hold the person
3 unqualified for protection, because the Act is an
4 anti-discrimination act, which could be undermined if each
5 person can choose for himself whether to discriminate.

6 Now, I do say -- want to say that implicit in
7 the findings is that --

8 QUESTION: What -- what findings?

9 MR. WALLACE: In -- in -- in the findings of why
10 it was that --

11 QUESTION: But who made the finding?

12 MR. WALLACE: Both the District Court and the
13 Court or appeals. That the reason -- and -- and this is
14 Petitioner's own contention -- the reason that Dr. Bragdon
15 refused ordinary dental treatment to the Respondent here
16 was because of his fear of possible contagion from the --

17 QUESTION: This case wasn't tried to a jury in
18 the District Court, it was tried in the Court of --

19 MR. WALLACE: It was -- summary judgment was
20 granted.

21 QUESTION: Summary judgment for whom?

22 MR. WALLACE: For the Respondent. And that was
23 upheld by the Court of Appeals.

24 QUESTION: So if there's any factual dispute,
25 that's wrong?

1 MR. WALLACE: If it's a factual dispute that can
2 survive summary judgment.

3 QUESTION: Thank you, Mr. Wallace.

4 Mr. McCarthy, you have 3 minutes left.

5 REBUTTAL ARGUMENT OF JOHN W. MCCARTHY

6 ON BEHALF OF PETITIONER

7 MR. MCCARTHY: Thank you, Your Honor.

8 I would just like to address a couple of issues.

9 One, on the question of deferral, in this case,
10 there isn't anything to defer to for the reasons we
11 disclosed before. And even the Department of Justice, in
12 its interpretive guidelines, indicates that when you're
13 looking to public authorities, they are sources of
14 information that include. There's no suggestion that the
15 public health authorities have any particular power here.

16 Now, there very well -- may very well be a
17 different situation, where the public health authorities
18 have addressed an issue directly and the courts would have
19 reason to defer to them. But there isn't in this
20 situation, because there aren't any public authorities
21 that have spoken to the issue. That includes the American
22 Dental Association, which isn't a public health authority,
23 but gets cited as if it's one.

24 It's a -- it's a 501(c)(6) business league, and
25 it made a policy statement -- and it made a political

1 decision about what it recommends. And it shouldn't be
2 determinative of whether or not an individual member is
3 guilty of a civil rights violation, as opposed to
4 following their policy.

5 QUESTION: Did you introduce expert testimony at
6 the trial?

7 MR. MCCARTHY: Yes, we did.

8 QUESTION: Of your own?

9 MR. MCCARTHY: Right.

10 It wasn't at trial, but introduced it in
11 response to the motion for summary judgment.

12 With respect to the -- I call them the reverse
13 cases, where health care providers have brought these
14 claims of violation of the Americans with Disabilities
15 Act, and have lost every time. It's important to note, I
16 believe, that it's conceded in this case that it's easier
17 to transmit HIV from a patient to a doctor than it is from
18 a doctor to a patient.

19 And there are -- all the experts on both sides
20 conceded this. Dr. Molinari, the plaintiff's expert,
21 wrote an article on it. It's at Fed. App. 137a, and in
22 his deposition at 139a. And Dr. Marianos, the CDC expert,
23 made the same concession that there is not any argument
24 about that particular question.

25 The plain -- the Respondents have raised very

1 many policy issues in this matter. And some of them are
2 certainly worthy of serious consideration. But those
3 issues belong for consideration with Congress and not with
4 the Court. We rely on the statute. We believe, if the
5 statute is relied upon, the conclusions we've advanced
6 will be --

7 QUESTION: How many cases of AIDS had there been
8 approximately as of 1994?

9 MR. MCCARTHY: I -- I don't know that figure. I
10 recall hearing the term "million," but I would be guessing
11 wildly to say it. I do know that there are hundreds of
12 thousands of cases of HIV, where it's not known how the
13 transmission occurred. And that, we think, it important
14 when you're looking at this question of under-reporting.

15 QUESTION: All right. Suppose the worst that
16 could have happened is that he thought there was a risk of
17 7 -- if he'd looked into it, 7 cases in a million. That's
18 about 1 in 120,000. That's certainly not lightning. What
19 are we supposed to do?

20 MR. MCCARTHY: Well, the question is, does he --
21 what's the then-current medical knowledge? He has all of
22 this information before him, including OSHA, these seven
23 cases, what's occurred in other cases. We certainly
24 believe there's good reason for him to believe and take
25 the position that there could be risk. And it was a

1 reasonable judgment for him to make.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you,
4 Mr. McCarthy. The case is submitted.

5 (Whereupon, at 11:00 a.m., the case in the
6 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

RANDON BRAGDON, Petitioner v. SIDNEY ABBOTT, ET AL.
CASE NO: 97-156

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BY Don Mari Fedirko-----

(REPORTER)