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## Bragdon v. Abbott: The Supreme Court's Anti-discrimination Advocacy and the Reopening of Pandora's Box

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# ***Bragdon v. Abbott*: The Supreme Court's Anti-discrimination Advocacy and the Reopening of Pandora's Box**

## I. INTRODUCTION

Pandora, the Greek mythological counterpart to Christianity's Eve, is generally thought of in Greek mythology as the first woman on earth.<sup>1</sup> Pandora, the symbol of perfection in the eyes of all the gods, carried a box in which she kept all the blessings of the world.<sup>2</sup> After Pandora received the benefit of fire from Prometheus, which he had stolen from the heavens, she brought this power to humankind.<sup>3</sup> The gods sought to punish Pandora for this action.<sup>4</sup> So, taking a box that was once filled solely with blessings, each god put something evil or harmful into the box and warned Pandora not to open it.<sup>5</sup> Pandora, accustomed to opening the box to release blessings and beauty into the world, became overcome with curiosity and opened the box.<sup>6</sup> In doing so, Pandora released all the evils into the world creating many types of problems – both practical and legal.<sup>7</sup>

The Supreme Court, in like fashion, faced a similar dilemma in *Bragdon v. Abbott*.<sup>8</sup> The Americans with Disabilities Act (“ADA” or “the Act”) became law in 1990<sup>9</sup> with the stated purpose of “provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>10</sup> To continue the analogy, the Americans with Disabilities Act is clearly a blessing to Americans. In *Bragdon*, however, the Supreme Court addressed whether human immunodeficiency virus (“HIV”) in its asymptomatic phase, is a “disability,” as defined by the ADA, so that individuals afflicted with the virus could determine

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1. See generally EDITH HAMILTON, MYTHOLOGY 88 (1944); DAVID LEEMING & JAKE PAGE, GODDESS, MYTHS OF THE FEMALE DIVINE 116-19 (1994).

2. See HAMILTON, *supra* note 1, at 88.

3. See LEEMING, *supra* note 1, at 116.

4. See *id.*

5. See HAMILTON, *supra* note 1, at 88.

6. See *id.*

7. See *id.*

8. 118 S. Ct. 2196 (1998).

9. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1995).

10. See 42 U.S.C. § 12101(b)(1) (1995).

whether they could receive protection against discrimination.<sup>11</sup> Taken as a whole, it would be difficult for one to argue that HIV is not disabling.<sup>12</sup> Hence, the clear and rational goal of the Supreme Court was to open the box of blessings and hold that HIV is a disability, providing protection to such individuals. However, like Pandora, in the Court's eagerness to bestow a blessing and reach the correct result, they rushed to judgment and set forth a holding that is certain to have problematic and far-reaching consequences unforeseen to most justices joining the majority.

This Note will provide an analysis of the Court's decision and detail those far-reaching consequences. Part II provides an in-depth discussion of the facts surrounding the case.<sup>13</sup> Part III explores the Americans with Disabilities Act, detailing the various elements of the Act and the regulations which have interpreted them.<sup>14</sup> Part IV provides an analysis of the majority, concurring, and dissenting opinions.<sup>15</sup> Part V discusses the practical impact of the Court's decision on employment and medical insurance coverage.<sup>16</sup> Finally, Part VI concludes this Note by commenting on how the Court reached the correct conclusion—the blessing of eradicating discrimination—using the wrong grounds.<sup>17</sup>

## II. STATEMENT OF THE CASE

The Supreme Court confronted several issues in *Bragdon*.<sup>18</sup> First, the Court had to determine whether persons infected with HIV are protected under the ADA.<sup>19</sup> To make this determination, the Court had to consider: (1) whether HIV infection is a "physical or mental disability", as defined by the ADA, when the infected individual is asymptomatic, (2) whether HIV infection, if qualified as a physical or mental impairment, affects a "major life activity", as defined by the ADA, and (3) whether that physical or mental disability "substantially limits" that major life activity.<sup>20</sup> Second, the Court had to determine whether—if HIV were found to be a disability affecting a major life activity—an owner of a place of public accommodation could nonetheless discriminate against such a person utilizing the "direct threat" provision of the ADA.<sup>21</sup>

The plaintiff, Sidney Abbott, had been infected with the HIV virus in 1986, nine years prior to the incidents which led to this suit.<sup>22</sup> HIV, the retrovirus which causes

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11. See *Bragdon*, 118 S. Ct. at 2200-01.

12. See generally *id.* at 2201-02.

13. See *infra* notes 18-39 and accompanying text.

14. See *infra* notes 40-65 and accompanying text.

15. See *infra* notes 66-163 and accompanying text.

16. See *infra* notes 164-80 and accompanying text.

17. See *infra* notes 181-82 and accompanying text.

18. See generally *Bragdon*, 118 S. Ct. at 2196.

19. See *id.* at 2200.

20. See *id.* at 2201-02.

21. See *id.* at 2202, 2209-10.

22. See *Abbott v. Bragdon*, 912 F.Supp. 580, 584 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 524 U.S. 624 (1998).

Acquired Immune Deficiency Syndrome ("AIDS"), may be carried by infected individuals for years without a manifestation of any symptoms characteristic of the AIDS syndrome.<sup>23</sup> However, those who have been exposed to HIV are likely to contract the virus and, in turn, develop antibodies to the virus, thus becoming "HIV-positive."<sup>24</sup> Although HIV-positive individuals begin to develop abnormalities in the blood and lymphatic systems, most remain asymptomatic for a period of time—some for as many as twelve years or more.<sup>25</sup> Additionally, HIV-positive individuals often appear relatively healthy and are able to carry on their day to day lives.<sup>26</sup> Unfortunately, even in this asymptomatic phase, carriers are able to infect others with the HIV virus.<sup>27</sup> As of the date of the initial proceeding in this matter, Abbott was in this asymptomatic phase.<sup>28</sup>

The defendant, Randon Bragdon, was a dentist who has maintained a practice in Bangor, Maine since 1978.<sup>29</sup> Abbott went to Bragdon's office on September 16, 1994, for her scheduled dental appointment.<sup>30</sup> Prior to any office visit, all of Bragdon's dental patients were asked to fill out a Patient Registration and Health Record form.<sup>31</sup> Bragdon first learned of Abbott's HIV-positive status from this form.<sup>32</sup> Bragdon continued with the cleaning and examination as scheduled, but, upon finding a cavity, informed Abbott that he would not fill her cavity in his office.<sup>33</sup> Rather, pursuant to his "infectious disease policy," he would fill the cavity in a hospital setting which he deemed as having better-equipped facilities.<sup>34</sup>

Abbott refused this alternate arrangement and, instead, filed suit in the United States District Court for the District of Maine<sup>35</sup> arguing that Bragdon's refusal to

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23. *See id.*

24. *See id.*

25. *See* Christine Gorman, *Battling the AIDS Virus: There's Still No Cure, but Scientists and Survivors Make Striking Progress*, TIME, Feb. 12, 1996, at 62, 64 (examining the current position of science in the battle against AIDS).

26. *See id.*

27. *See* Elizabeth C. Chambers, *Asymptomatic HIV as a Disability Under the Americans with Disabilities Act*, 73 WASH. L. REV. 403, 403 (1998) (arguing that the ADA protects asymptomatic individuals).

28. *See Abbott*, 912 F.Supp. at 584.

29. *See id.*

30. *See Abbott*, 118 S. Ct. at 2201.

31. *See Abbott*, 912 F.Supp. at 584.

32. *See id.*

33. *See id.*

34. *See id.* Although Bragdon informed Abbott that he would still charge his normal fee for filling the cavity, Abbott would be required to pay an additional fee to the hospital for use of their facilities.

*See id.*

35. *See id.* at 580.

treat her constituted a violation of the ADA.<sup>36</sup> The district court granted summary judgment in favor of Abbott on the grounds that: (1) Abbott's HIV status, although asymptomatic, was a physical impairment which substantially limited her major life activity of reproduction; (2) Bragdon's refusal to treat Abbott in his office was not justified as a direct threat to his health or that of others; and (3) that Bragdon's office was a "place of public accommodation."<sup>37</sup> Bragdon appealed the decision, and the United States Court of Appeals for the First Circuit affirmed.<sup>38</sup> The United States Supreme Court granted Bragdon's petition for writ of certiorari on November 26, 1997.<sup>39</sup>

### III. THE AMERICANS WITH DISABILITIES ACT

Dating back to the post-World War II period, federal legislation has attempted to protect individuals with disabilities from discrimination, primarily in the area of employment.<sup>40</sup> This movement led to the enactment of the Rehabilitation Act of 1973, which expanded upon the protections available for disabled persons.<sup>41</sup> Seventeen years later, in July, 1990, President Bush signed the ADA.<sup>42</sup>

Congress, in evaluating the need for the ADA prior to its passage, determined that approximately 43,000,000 Americans have at least one physical or mental disability and that historically society has isolated and discriminated against such

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36. See *id.* at 584. But see Arthur D. Rutkowski & Barbara L. Rutkowschi, *Is a Symptom-Free HIV-Positive Person Disabled?*, 13 NO. 5 EMPLOYMENT L. UPDATE 2 (May 1998) (reporting that Abbott, an AIDS activist, specifically sought Bragdon following comments Bragdon had made about his refusal to treat AIDS patients in his office).

37. See *Abbott*, 912 F.Supp. at 586. The court, in holding that Abbott's HIV-positive status did not pose a direct threat to Bragdon or others, relied primarily on affidavits which were submitted by Dr. Wayne Marianos, Director of the Division of Oral Health of the Centers for Disease Control and Prevention (CDC). See *id.* at 589. Dr. Marianos asserted that if the dentist followed the universal precautions in the Recommended Infection-Control Practices for Dentistry guide issued by CDC in 1993, it would be safe for a dentist to treat a HIV-positive patient in their dental office. See *id.*

38. See *Abbott v. Bragdon*, 107 F.3d 934, 938 (1st Cir. 1997). The court of appeals, similar to the district court, found that Abbott's HIV-positive status did not pose a direct threat to Bragdon or others. See *id.* at 943-48. However, rather than simply relying on affidavits by Dr. Marianos, the court of appeals additionally sought information that the American Dental Association provided in 1991 entitled "Policy on AIDS, HIV Infection and the Practice of Dentistry." See *id.* at 945-46.

39. See *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998).

40. See Michael D. Carlis & Scott A. McCabe, *Are There No Per Se Disabilities Under the Americans With Disabilities Act? The Fate of Asymptomatic HIV Disease*, 57 MD. L. REV. 558, 561 & n.17 (1998)[hereinafter Carlis & McCabe].

41. See *id.* at 561-63; see generally, Lowell P. Weicker, Jr., *Historical Background of the Americans With Disabilities Act*, 64 TEMP. L. REV. 387, 387-88 (1991) (stating that the Rehabilitation Act of 1973 extended vocational protections, inaugurated basic equal protection guarantees, developed affirmative action plans for persons with disabilities, and prohibited discrimination by any program that received federal financial assistance).

42. See American's with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1995); see also Carlis & McCabe, *supra* note 40, at 560.

people.<sup>43</sup> Congress further noted however, that “unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”<sup>44</sup> Therefore, Congress drafted the ADA in order to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>45</sup>

The general rules set forth by the ADA establish that individuals with disabilities cannot be discriminated against in the context of employment,<sup>46</sup> public services,<sup>47</sup> or public accommodations.<sup>48</sup> Specifically, Title III of the ADA, which prohibits discrimination in places of public accommodation, provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>49</sup> Essentially, Title III

43. See 42 U.S.C. §12101(a)(1) & (2)(1995) (stating that such “discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem”).

44. See 42 U.S.C. §12101(a)(4) (1995).

45. See *id.* at 42 U.S.C. §12101(a)(8) (1995). Furthermore, the Americans with Disabilities Act was drafted:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

See 42 U.S.C. §12101(b) (1995).

46. See 42 U.S.C. §12112(a) (1995). This provision, known as Title I of the ADA, provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” See *id.*

47. See 42 U.S.C. §12132 (1995). This provision, known as Title II of the ADA, establishes that “[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” See *id.*

48. See 42 U.S.C. §12182 (1995). This provision, known as Title III of the ADA, shields disabled persons from discrimination in places of public accommodation. See *id.* The focus of *Bragdon v. Abbott* is on Title III of the ADA; therefore, this Note’s discussion of the ADA will hereafter focus primarily on this provision.

49. See *id.* at 42 U.S.C. §12182(a) (1995).

prohibits discrimination in places of public accommodation, by providing that disabled persons cannot be denied participation in the entity, provided only an unequal benefit from the entity, or provided only a separate benefit from the entity.<sup>50</sup>

In order to determine who is protected by the provisions of the ADA, it is necessary to determine which persons are deemed to have a disability.<sup>51</sup> All titles of the ADA utilize the same definition of disability, which provides: “[t]he term ‘disability’ means, with respect to an individual: (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.”<sup>52</sup>

Although this provides a universal definition of the term disability, the code does little to explain which persons have the characteristics described in each of the three aforementioned prongs.<sup>53</sup> Although the ADA does not delegate explicit authority to any agency to interpret the provisions of the ADA, it does delegate authority to various agencies to promulgate regulations necessary to enforce the various titles of the ADA.<sup>54</sup> In doing so, these agencies are implicitly given the authority to interpret the definition of disability so that they may make determinations concerning which persons will receive federal protection.<sup>55</sup>

## A. *The Administrative Regulations*

### 1. Equal Employment Opportunity Commission Regulations

The Equal Employment Opportunity Commission (“EEOC”) was given authority to promulgate regulations to enforce Title I of the ADA.<sup>56</sup> The EEOC provided that it would be “unlawful for a covered entity to discriminate on the basis of disability against a qualified individual . . . .”<sup>57</sup> For purposes of this part, covered entities

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50. *See id.* at 42 U.S.C. § 12182(b)(1)(A) (1995).

51. *See generally* 42 U.S.C. §§ 12112, 12132, 12182 (1995).

52. 42 U.S.C. § 12102(2) (1995).

53. *See Carlis & McCabe, infra* note 40, at 563 (stating that the DOJ and EEOC have authority to interpret the statute’s definition).

54. *See* 42 U.S.C. § 12116 (1995) (delegating authority to the Equal Employment Opportunity Commission to issue regulations necessary to enforce Title I’s employment aspects of the ADA); *see also* 42 U.S.C. §§ 12134, 12149, 12164 (1995) (delegating authority to the Attorney General and the Secretary of Transportation to issue regulations necessary to enforce Title II’s public service aspects of the ADA); 42 U.S.C. § 12186 (1995) (delegating authority to the Secretary of Transportation to issue regulations to enforce Title III’s public accommodation aspects of the ADA).

55. *See Carlis & McCabe, infra* note 40, at 563.

56. *See* 29 C.F.R. § 1630.1 (a) (1998) (“The purpose of this part is to implement Title I of the Americans with Disabilities Act . . . requiring equal employment opportunities for qualified individuals with disabilities . . . .”)

57. *See* 29 C.F.R. § 1630.4 (1998).

include any "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ."<sup>58</sup>

## 2. Department of Justice Regulations

The Department of Justice ("DOJ") was given authority to promulgate regulations to enforce Title III of the ADA.<sup>59</sup> In drafting the interpretation of the term disability, the DOJ clearly determined that no provision of the ADA was to be interpreted to provide a lesser standard than was applied under Title V of the Rehabilitation Act of 1973.<sup>60</sup> With such a limitation in mind, the DOJ promulgated regulations which provided greater detail to the ADA's definition of disability. The phrase "physical or mental impairment" was defined to include "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more . . . body systems . . ." as well as any "mental or psychological disorders . . . [and various] contagious and noncontagious diseases . . ."<sup>61</sup> Additionally, the phrase "major life activities" was defined to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>62</sup> As such, all persons afflicted with such a disability cannot be discriminated against in places of public accommodation.

### B. Universal "Direct Threat" Provision

However, there remains one substantial limitation on protection under the ADA. Even if an individual is deemed to have a disability as defined by the ADA, the Act is not operative to afford protection to that individual if the individual's disability is a direct threat to others.<sup>63</sup> Stated differently, it is permissible to discriminate against the disabled individual if that discrimination is premised upon a direct threat that the

58. See 29 C.F.R. § 1630.2(e)(1) (1998). Although the EEOC regulations regarding protection of disabled employees is more thorough than discussed here, for the sake of brevity this Note will mainly focus on Title III of the ADA because *Bragdon v. Abbott* dealt solely with protections in places of public accommodation.

59. See 28 C.F.R. § 36.101 (1998) ("The purpose of this part is to implement Title III of the Americans with Disabilities Act of 1990 . . . , which prohibits discrimination on the basis of disability by public accommodations . . .") (citing 42 U.S.C. § 12181 (1998)).

60. See 28 C.F.R. § 36.103(a) (1998).

61. See 28 C.F.R. § 36.104(l)(i)-(iii) (1998) (stating body systems include "neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine").

62. See 28 C.F.R. § 36.104(2)

63. See 42 U.S.C. § 12182(b)(3) (1995).



disability poses to the health or safety of others.<sup>64</sup> For purposes of this ADA provision, a direct threat has been defined as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”<sup>65</sup> Essentially, any inquiry into this area must proceed in two parts. First, it must be determined that the disabled person poses a direct threat to the health or safety of others. Second, even if a direct threat is present, discrimination is permissible only if reasonable modifications to policies, practices, or procedures would not serve to ameliorate the risk.

#### IV. ANALYSIS OF THE COURT’S OPINIONS

##### A. Justice Kennedy’s Majority Opinion

###### 1. Is HIV a Protected Disability Under the ADA?

Justice Kennedy wrote for himself and four other justices.<sup>66</sup> He began by stating that certiorari was granted to determine, first, whether persons infected with HIV are protected under the ADA.<sup>67</sup> To warrant protection, an individual must “(A) [have] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [have] a record of such an impairment; or (C) [be] regarded as having such an impairment.”<sup>68</sup> Justice Kennedy held that HIV infection is a disability under subsection (A) and, therefore, did not need to discuss the potential application of subsections (B) or (C).<sup>69</sup> To make this determination, the Court had to consider (1) whether HIV infection is a physical impairment as defined by the ADA when the infected individual was still asymptomatic, (2) whether HIV infection, if qualified as a physical or mental impairment, affects a major life activity as defined by the ADA, and (3) whether that physical impairment substantially limits that major life activity.<sup>70</sup> Thereafter, if such a determination was made, the Court had to determine whether an owner of a place of public accommodation could nonetheless discriminate against an HIV-infected individual utilizing the direct threat provision of the ADA.<sup>71</sup>

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64. *See id.*

65. *See id.*

66. *See Bragdon*, 118 S. Ct. at 2200 (Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg, and Breyer).

67. *See id.*

68. *See* 42 U.S.C. § 12102(2) (1995).

69. *See Bragdon*, 118 S. Ct. at 2201.

70. *See id.* at 2202.

71. *See id.*

*a. Is HIV a Physical or Mental Impairment?*

In interpreting the definition of a physical or mental impairment, it is necessary to give credence to interpretations drawn from various administrative agencies.<sup>72</sup> Whenever a well-established term from previous statutes is repeated in another statute, it carries with it an implication that Congress had the intent for this term to be interpreted in accordance with previous interpretations.<sup>73</sup> Although early statutes did not include HIV infection amongst the list of included physical impairments, Justice Kennedy attributed this to the fact that HIV had not been declared to be the cause of AIDS when these early statutes were drafted.<sup>74</sup> Despite the limitation of these earlier statutes, Justice Kennedy held that HIV infection fits within the general definition of physical impairment as set forth by the DOJ Regulations.<sup>75</sup>

A person infected with the HIV virus has no mechanism with which to eliminate the virus or prevent the virus from multiplying and infecting the cells of the blood.<sup>76</sup> Helper T-lymphocytes (or CD4+) cells, a type of white blood cell, coordinate the body's immune system and protect the body from disease.<sup>77</sup> It is these cells that are the most vulnerable to attack by the HIV virus.<sup>78</sup> When CD4+ cells begin to deteriorate, the immune system suffers and the body becomes unable to ward off infections and disease.<sup>79</sup> Stage one of the HIV infection, which lasts approximately three months, is characterized by a sudden decline in the number of white blood cells present in the individual's bloodstream.<sup>80</sup> An individual in this stage often suffers from mononucleosis-like symptoms, although these symptoms will often abate within

72. See 42 U.S.C. § 12201(a) (1995) (noting that nothing in the ADA should be "construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title").

73. See *Bragdon*, 118 S. Ct. at 2202 (citing *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437-438 (1986); *Commissioner v. Estate of Noel*, 380 U.S. 678, 681-682 (1965); and *ICC v. Parker*, 326 U.S. 60, 65 (1945)).

74. See *id.* at 2203; see also generally Barre-Sinoussi et al., *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 Sci. 868 (1983) (declaring that HIV infection is the ultimate cause of the AIDS virus).

75. See *Bragdon*, 118 S. Ct. at 2203; see also 28 C.F.R. § 36.104 (1998) (providing that a physical or mental impairment is one which affects certain body systems including "neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine").

76. See *Bragdon*, 118 S. Ct. at 2203.

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*

three weeks.<sup>81</sup> Following this phase, HIV enters into what is commonly referred to as its “asymptomatic phase.”<sup>82</sup> This phase, which usually lasts between seven to eleven years, is characterized by the migration of the virus from the circulatory system into the lymph nodes.<sup>83</sup> Once in the lymph nodes, the virus attacks other CD4+ cells and continues to decrease the defensiveness of the individual’s immune system by deteriorating their CD4+ cells at an average rate of five to ten percent per year throughout the duration of phase two.<sup>84</sup> The final phase of HIV, in which a person is deemed to have the AIDS virus, is characterized by clinical symptoms “such as *pneumocystis carinii* pneumonia, Kaposi’s sarcoma, and non-Hodgkins lymphoma” as well as “fever, weight loss, fatigue, lesions, nausea, and diarrhea . . .”<sup>85</sup>

As outlined above, HIV infection is a “physiological disorder with a constant and detrimental effect on the infected person’s hemic and lymphatic systems . . .”<sup>86</sup> As such, Justice Kennedy stated that “[i]n light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection.”<sup>87</sup>

### *b. Does This Impairment Affect a Major Life Activity?*

Justice Kennedy acknowledged that, since the initiation of this dispute, reproduction was the major life activity that the parties have asserted as being affected by HIV.<sup>88</sup> Although Justice Kennedy asserted that numerous other major life activities could have served to satisfy the requirements of the ADA, the Court is limited to reviewing only those questions raised and considered in lower courts and upon which they granted certiorari.<sup>89</sup> Therefore, the Court had to determine whether reproduction is a major life activity.<sup>90</sup>

In making such a determination, the Court correctly noted that the ADA must be construed in accordance with the Rehabilitation Act of 1973 regulations and the DOJ

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81. *See id.* The mononucleosis-like symptoms can include “fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders.” *Id.*

82. *See id.* at 2204. The Plaintiff was in this phase of HIV infection when she visited Defendant Bragdon’s dental office in September, 1994. *See id.* at 2201.

83. *See id.* at 2204.

84. *See id.*

85. *See id.*

86. *Id.*

87. *Id.* *See also* 28 C.F.R. § 36.104 (1998) (noting that the body systems which, if affected, would constitute a physical impairment are the hemic and lymphatic systems).

88. *See Bragdon*, 118 S. Ct. at 2204.

89. *See id.* at 2205; *see, e.g.,* *Blessing v. Firestone*, 520 U.S. 329, 340 n.3 (1997) (citing Rule 14.1(a) and stating that Supreme Court review is limited to the grounds raised at the court of appeals level).

90. *See Bragdon*, 118 S. Ct. at 2205.

regulations.<sup>91</sup> The regulations for both the Rehabilitation Act and the ADA provide that major life activities include “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>92</sup> Justice Kennedy pointed out that the use of the term “such as” clearly confirms that “the list is illustrative, not exhaustive.”<sup>93</sup> Therefore, the pertinent question is whether or not “reproduction” is analogous enough to the illustrative list of major life activities such that it ought to be included among them.<sup>94</sup>

Petitioner argued that the term “major,” in light of the illustrative examples provided for in the regulations, should be interpreted to cover aspects of a person’s life with a “public, economic, or daily character.”<sup>95</sup> Justice Kennedy, however, dispensed with this argument rather quickly by stating that “[t]he breadth of the term confounds the attempt to limit its construction in this manner.”<sup>96</sup> Rather, Justice Kennedy held, as did the court of appeals, that the term major should denote “comparative importance.”<sup>97</sup> Defining the term as such, Justice Kennedy stated that reproduction was clearly a major life activity because “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.”<sup>98</sup>

### *c. Does the Physical Impairment Substantially Limit Reproduction?*

Although HIV has been held to constitute a physical impairment, and reproduction has been held to constitute a major life activity, the statute is not operative until and unless reproduction, as a major life activity, is substantially limited by HIV.<sup>99</sup> However, unlike the previous subparts of this provision, the regulations do not provide any further guidance as to the definition of substantially limited.<sup>100</sup> Justice

91. *See id.*; *see also* 42 U.S.C. § 12201(a) (1995) (providing that “nothing in this chapter shall be construed to apply a lesser standard than . . . the Rehabilitation Act of 1973.”).

92. *See Bragdon*, 118 S. Ct. at 2205; *see also* 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 36.104 (1998).

93. *See Bragdon*, 118 S. Ct. at 2205.

94. *See id.*

95. *See id.*; *see also* Krauel v. Iowa Methodist Medical Center, 95 F.3d 674, 677 (1996) (holding that reproduction is not a major life activity under the ADA).

96. *See Bragdon*, 118 S. Ct. at 2205. Additionally, Justice Kennedy stated that activities such as “caring for one’s self” and “performing manual tasks” do not have a “public, economic, or daily character” and, yet, they are included in the regulations amongst the list of major life activities. *See id.*

97. *See id.*; *see also* Abbott v. Bragdon, 107 F.3d 934, 939-40 (1997) (citing THE AMERICAN HERITAGE DICTIONARY of the English Language 1084 (3d ed. 1992) listing “major” to mean “greater than others in importance or rank” and WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 718 (1989) listing “major” to mean “greater in dignity, rank, importance, or interest”).

98. *See Bragdon*, 118 S. Ct. at 2205.

99. *See id.*

100. *See* 45 C.F.R. pt. 84, app. A, at 334 (1998).

Kennedy declared that an HIV infection substantially limited reproduction in two ways: a woman infected with HIV risks spreading the infection to (1) her male partner, and (2) her unborn child through perinatal transmission.<sup>101</sup> Petitioner argued that, although the risk of spreading the infection to an unborn child through perinatal transmission is approximately twenty-five percent, the risk can be reduced to eight percent through the use of antiretroviral therapy.<sup>102</sup> Although there is support for the proposition that possible mitigating measures should not factor into the substantiality determination,<sup>103</sup> Justice Kennedy disregarded that argument and simply stated that “[i]t cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one’s child does not represent a substantial limitation on reproduction.”<sup>104</sup>

To further support his holding, Justice Kennedy looked to the administrative regulations promulgated by various agencies both before and after the enactment of the ADA.<sup>105</sup> Although such administrative regulations are not binding, they do carry substantial deferential weight.<sup>106</sup> As such, Justice Kennedy pointed to administrative precedent issued by the Office of Legal Counsel of the DOJ (OLC). In regards to the Rehabilitation Act of 1973, the OLC concluded that HIV-infected individuals, both symptomatic and asymptomatic, are protected against discrimination in any covered program.<sup>107</sup> More persuasive, however, are the regulations promulgated by the DOJ as required under the ADA which specifically added HIV infection, symptomatic and asymptomatic, to their illustrative list of disorders which constitute physical impairments.<sup>108</sup> The majority held that such administrative regulations, as well as the Court’s own interpretation of the ADA, support the conclusion that “HIV infection, even in the so-called asymptomatic phase, is an impairment which substantially limits the major life activity of reproduction.”<sup>109</sup>

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101. See *Bragdon*, 118 S.Ct. at 2206.

102. See *id.*

103. See, e.g., 28 C.F.R. pt. 36, app. B at 611 (1998); 29 C.F.R. pt. 1360, app. at 351 (1998) (both regulations stating that mitigating measures should not be considered in making the substantiality determination).

104. See *Bragdon*, 118 S. Ct. at 2206. Justice Kennedy also stated that “[t]he Act addresses *substantial limitations* on major life activities, not *utter inabilities*.” *Id.* (emphasis added).

105. See *id.* at 2207.

106. See *id.*; see generally *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1994) (holding that when Congress does not unambiguously resolve an issue and grants power to administrative agencies to draft regulations, such regulations should be given judicial deference as long as they are reasonable).

107. See *Bragdon*, 118 S. Ct. at 2207 (citing Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 265-65 (Sept. 27, 1988)).

108. See *Bragdon*, 118 S. Ct. at 2209 (citing 28 C.F.R. § 36.104(1)(iii) (1998)).

109. See *id.*

## 2. The Direct Threat Defense

Although the Supreme Court held that asymptomatic HIV infection is an impairment which substantially limits the major life activity of reproduction, respondent Abbott is not afforded protection under the ADA if the disability is a "direct threat to the health or safety of others."<sup>110</sup> The ADA's direct threat provision is a codification of case law set out in *School Board of Nassau County v. Arline*.<sup>111</sup> In *Arline*, the Court recognized that, while it is important to prohibit discrimination against disabled individuals, it is equally important to protect the health and safety of others from significant risks associated with contagious diseases.<sup>112</sup> Although *Arline* was an employment case brought under the Rehabilitation Act of 1973, Congress later relied on this decision and adopted this language in drafting the ADA.<sup>113</sup> As such, Justice Kennedy next evaluated whether Bragdon could refuse to treat Abbott under the ADA's direct threat provision.<sup>114</sup>

This inquiry could be addressed in several different ways, but, in this matter, certiorari was granted merely to determine whether the Court should defer to the subjective professional judgment, provided the judgment was reasonable, of a health care provider, who has personally opined that treatment would pose a direct threat to himself or others in his office.<sup>115</sup> In answering this question, two distinct issues emerged: (1) should the Court give deference to Bragdon's subjective evaluation of the risk involved, and (2) regardless of Bragdon's subjective opinion, was his refusal to treat Abbott in his dental office nonetheless reasonable in light of then available medical knowledge.<sup>116</sup>

### a. Objective or Subjective Standard?

Drawing again from the Court's decision in *Arline*, Justice Kennedy quickly disposed of this initial inquiry by stating that "[t]he existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on *medical or*

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110. See *id.* at 2210 (quoting 42 U.S.C. § 12182(b)(3) (1995)) (the ADA defined direct threat as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services").

111. 480 U.S. 273 (1987).

112. See *id.* at 287 n.16.

113. See *Bragdon*, 118 S. Ct. at 2210; see also 28 C.F.R. pt. 36, app. B at 626 (1998) (stating that the direct threat provision of the ADA is a codification of the *Arline* decision).

114. See *Bragdon*, 118 S. Ct. at 2210.

115. See *id.* at 2209-10.

116. See *id.* at 2210-11.

*other objective evidence.*"<sup>117</sup> Furthermore, Justice Kennedy explicitly stated that even if a health care professional maintained a good faith belief that a significant risk was present, unless that belief was supported by objective medical information, the professional would not be relieved of liability.<sup>118</sup>

*b. Current Medical Information*

Despite Justice Kennedy's determination that any direct threat must be evaluated using objective medical information, petitioner's actions remain protected if such action is reasonable in light of then available medical knowledge.<sup>119</sup> Because that determination cannot be made without giving credence to public health authorities, a medical professional can prevail against the norm by setting forth a reliable scientific basis for their belief.<sup>120</sup> Justice Kennedy began this process by stating that the court of appeals correctly refused to give weight to petitioner's offer to treat respondent in a hospital setting, because petitioner provided no evidence that such a setting reduced the risk of HIV transmission or even that petitioner had hospital privileges.<sup>121</sup> However, in granting summary judgment in favor of respondent, the court of appeals necessarily found that petitioner had presented no triable issues of material fact as to the reasonableness of any health or safety threats.<sup>122</sup> In making this determination, the court of appeals relied on two primary sources of information, the 1993 Centers for Disease Control and Prevention ("CDC") Dentistry Guidelines and the 1991 American Dental Association Policy on HIV.<sup>123</sup> Justice Kennedy, however, correctly pointed out that, while such guidelines clearly state that current CDC and American Dental Association guidelines serve as the most effective way to combat HIV transmission, neither set of guidelines assessed the level of risk associated with dental treatment.<sup>124</sup> In that respect, the guidelines only made reference to a dentist's professional responsibility and did not point to the statistical likelihood of HIV transmission.<sup>125</sup>

In addition to the lack of statistical evidence on the risk of transmission, petitioner did advance some evidence in support of an appreciable risk of transmission.<sup>126</sup> Petitioner argued that the CDC had located seven dental workers, as of September 1994, who potentially had occupationally transmitted HIV.<sup>127</sup> While that

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117. *Id.* at 2210 (emphasis added).

118. *See id.*

119. *See id.* at 2211.

120. *See id.* (Justice Kennedy stated he would assess the views of the U.S. Public Health Authorities, the CDC, and the National Institute of Health).

121. *See id.*

122. *See* *Abbott v. Bragdon*, 107 F.3d 934, 945-46 (1997).

123. *See id.*

124. *See* *Bragdon*, 118 S. Ct. at 2211.

125. *See id.* at 2212.

126. *See id.* at 2212-13.

127. *See id.* at 2212.

evidence could not, standing alone, sufficiently meet the objective standard required under the ADA, the Court recognized serious questions as to whether or not the court of appeals conducted a sufficient analysis of all available studies before concluding that no triable issues existed.<sup>128</sup> Therefore, Justice Kennedy remanded this particular issue to the court of appeals for further proceedings to evaluate the full merit of these studies.<sup>129</sup>

### *B. Justice Stevens' Concurring Opinion*

Justice Stevens, in a separate opinion,<sup>130</sup> joined Justice Kennedy as to the judgment, but filed separately to assert that he would have preferred an outright affirmance of the court of appeals' decision.<sup>131</sup> Justice Stevens stated that the court of appeals had conducted an extensive study of the record and that Bragdon had based his decision not to treat Abbott on speculative and inconclusive data.<sup>132</sup> Therefore, Justice Stevens believed that there was sufficient evidence to determine that Abbott's HIV status did not pose a direct threat to Bragdon or others in his office.<sup>133</sup>

### *C. Justice Ginsburg's Concurring Opinion*

Justice Ginsburg, who also filed a concurring opinion,<sup>134</sup> joined Justice Kennedy as to the judgment, but filed separately in order to stress that Abbott's asymptomatic HIV-positive status constituted a disability which substantially affected numerous major life activities.<sup>135</sup> While outside the scope of this decision, Justice Ginsburg stated that other major life activities, such as "the afflicted individual's family relations, employment potential, and ability to care for [oneself]", would serve to fulfill the requirements of the ADA.<sup>136</sup>

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128. *See id.* at 2213.

129. *See id.*

130. *See id.* (Stevens, J., concurring) (Justice Stevens was joined by Justice Breyer).

131. *See id.* (Stevens, J., concurring).

132. *See id.* (Stevens, J., concurring).

133. *See id.* (Stevens, J., concurring).

134. *See id.* (Ginsburg, J., concurring).

135. *See id.* at 2213-14 (Ginsburg, J., concurring).

136. *Id.* at 2214. (Ginsburg, J., concurring).



#### D. Chief Justice Rehnquist's Dissenting Opinion

Chief Justice Rehnquist filed an opinion concurring in the judgment, but dissenting in part.<sup>137</sup> Initially, Chief Justice Rehnquist argued that the majority truncated the question concerning a major life activity by ignoring the second half of the inquiry—that a major life activity must be one “of such individual.”<sup>138</sup> While Chief Justice Rehnquist did not dispute the determination that asymptomatic HIV-positive status results in a physical impairment, it is also necessary to adduce whether Abbott viewed such impairment as substantially limiting one of *her* major life activities.<sup>139</sup> The majority, in affirming summary judgment on this issue, failed to take notice that Abbott provided no evidence which would indicate that, absent HIV, she “would have had or was even considering having children.”<sup>140</sup> In fact, Chief Justice Rehnquist pointed out that when respondent was asked “during her deposition whether her HIV infection had in any way impaired *her* ability to carry out any of her life functions, respondent answered ‘No’.”<sup>141</sup> Therefore, reproduction is not a major life activity of respondent.<sup>142</sup>

More substantial than this individualized argument, however, was Chief Justice Rehnquist's assertion that the majority was simply wrong in holding reproduction to be a major life activity at all.<sup>143</sup> He pointed out that the majority chose to define major as denoting “comparative importance,” but another definition denoting “greater in quantity, number, or extent” is more consistent with the DOJ's regulations.<sup>144</sup> While the list of activities deemed to be major provided by the DOJ are merely illustrative, as opposed to exclusive, the common thread linking them together is the repetition of performance—they are all activities which must be

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137. *See id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist, joined by Justices Scalia and Thomas, concurred in the judgment and dissented in part. *See id.* Justice O'Connor joined this opinion as to HIV's applicability in the ADA, but not as to the direct threat analysis. *See id.*

138. *See id.* (Rehnquist, C.J., dissenting); *see also* 42 U.S.C. § 12102(2) (1995) (stating that the term disability means “with respect to an individual . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . .”) (emphasis added).

139. *See Bragdon* 118 S. Ct. at 2214. (Rehnquist, C.J., dissenting).

140. *See id.* at 2215. (Rehnquist, C.J., dissenting).

141. *Id.* (Rehnquist, C.J., dissenting).

142. *See id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist also stated that

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

*Id.* at n.2 (Rehnquist, C.J., dissenting).

143. *See id.* at 2215 (Rehnquist, C.J., dissenting).

144. *See id.* (Rehnquist, C.J., dissenting); *see also* 28 C.F.R. § 36.104 (1998) (“The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”).

performed on a day-to-day basis in the life of an individual.<sup>145</sup> Despite the illustrative nature of such a list, the majority made absolutely no attempt to analogize reproduction to any of the stated activities to demonstrate that it should be listed amongst them.<sup>146</sup> Activities such as those listed by the DOJ, stated Chief Justice Rehnquist, “are quite different from the series of activities leading to the birth of a child.”<sup>147</sup>

Additionally, although not part of the majority’s argument, Chief Justice Rehnquist dispensed with the assertion, contained in both Respondent’s brief and in an Amicus brief, that reproduction must be a major life activity because the DOJ regulations include disorders affecting the reproductive system amongst the list of physical impairments.<sup>148</sup> However, he pointed out that numerous disorders, such as dysmenorrhea and endometriosis, affect the reproductive system and “are so painful that they limit a woman’s ability to engage in major life activities such as walking and working.”<sup>149</sup> Chief Justice Rehnquist noted that cancer in any of the reproductive organs would surely limit numerous other major life activities.<sup>150</sup> Therefore, he dismissed the argument that reproduction must be a major life activity by stating that such an argument simply lacked merit and was devoid of all logic.<sup>151</sup>

In addressing the substantial limitation prong of the ADA’s definition of disability, Chief Justice Rehnquist argued that, even if reproduction were a major life activity, that an asymptomatic HIV-positive individual is not substantially limited in reproduction.<sup>152</sup> Although there is a risk, an HIV infected individual is still capable of performing all of the necessary activities for reproduction, including childbirth.<sup>153</sup> Chief Justice Rehnquist stated that while individuals, conscious of the inherent risk, may choose to not engage in sexual relations or give birth to a child, “there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a ‘limit’ on one’s own life activities.”<sup>154</sup> Furthermore, he stated that the definition of disability is satisfied only if the impairment substantially limits a major life activity at the present time.<sup>155</sup> Although a rather harsh argument, Chief

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145. See *Bragdon*, 118 S. Ct. at 2215. (Rehnquist, C.J., dissenting).

146. See *id.* (Rehnquist, C.J., dissenting).

147. See *id.* (Rehnquist, C.J., dissenting).

148. See *id.* (Rehnquist, C.J., dissenting); see also 28 C.F.R. § 36.104 (1998) (stating that “[t]he phrase *physical or mental impairment* means . . . [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . reproductive . . .”).

149. See *Bragdon*, 118 S. Ct. at 2215. (Rehnquist, C.J., dissenting).

150. See *id.* (Rehnquist, C.J., dissenting).

151. See *id.* (Rehnquist, C.J., dissenting).

152. See *id.* at 2216. (Rehnquist, C.J., dissenting).

153. See *id.* (Rehnquist, C.J., dissenting).

154. See *id.* (Rehnquist, C.J., dissenting).

155. See *id.* (Rehnquist, C.J., dissenting).

Justice Rehnquist correctly pointed out that asymptomatic HIV did not presently limit Abbott's ability to reproduce.<sup>156</sup> Abbott would be limited only if she was unable to live long enough to raise and care for her child.<sup>157</sup> Chief Justice Rehnquist argued that this argument, "taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects."<sup>158</sup>

Finally, as to the direct threat defense provided for by the ADA, Chief Justice Rehnquist argued that Abbott had presented sufficient evidence of a direct threat to those in the dental profession to, at the very least, avoid summary judgment.<sup>159</sup> Specifically, Chief Justice Rehnquist pointed out that the statute only required a risk of transmitting the infection, not certainty of transmission.<sup>160</sup> Therefore, Abbott's arguments, while speculative, deserved to be weighed by the trier of fact.<sup>161</sup> Medical information set forth by public health authorities as the norm should be given no more judicial deference than any other forms of medical information "simply because they have been endorsed by a politically appointed public health authority...."<sup>162</sup> As such, "[g]iven the 'severity of the risk' involved here, *i.e.*, near certain death, . . . it seems likely that petitioner can establish that it was objectively reasonable for him to conclude that treating respondent in his office posed a 'direct threat' to his safety."<sup>163</sup>

## V. IMPACT OF THE COURT'S DECISION

The Supreme Court's *Bragdon* decision is the epitome of a correct conclusion reached upon the wrong grounds.<sup>164</sup> No rational person would attempt to argue that any individual suffering from the AIDS virus is not disabled.<sup>165</sup> From such a standpoint comes a strong argument that individuals who have HIV, even at its asymptomatic phase, are similarly disabled.<sup>166</sup> Therefore, if these individuals are disabled, it follows that they should be provided protections against discrimination—which is the very goal of the ADA.<sup>167</sup> However, in an attempt to reach such a

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156. *See id.* (Rehnquist, C.J., dissenting).

157. *See id.* (Rehnquist, C.J., dissenting).

158. *See id.* (Rehnquist, C.J., dissenting).

159. *See id.* at 2217. (Rehnquist, C.J., dissenting).

160. *See id.* (Rehnquist, C.J., dissenting); *see also* 42 U.S.C. § 12182(b)(3) (1995) (defining direct threat to mean "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.") (emphasis added).

161. *See Bragdon*, 118 S. Ct. at 2217. (Rehnquist, C.J., dissenting).

162. *See id.* (Rehnquist, C.J., dissenting).

163. *Id.* (Rehnquist, C.J., dissenting).

164. *See Supreme Court Off-Base On Disabilities Decision*, THE NEWS TRIBUNE, July 13, 1998, at A6.

165. *See id.*

166. *See id.*

167. *See id.*

warranted end result, the Supreme Court has “veered off the path of logic by concluding that HIV carriers should be protected under the ADA because reproduction for such people carries the significant risk of passing the virus on to their children [and sexual partners].”<sup>168</sup>

Justice Kennedy’s majority opinion stated, at the outset, that the opinion is limited in scope to a determination as to whether or not reproduction is a major life activity.<sup>169</sup> Furthermore, Justice Kennedy asserted that numerous other major life activities could have served to satisfy the requirements of the ADA, but that the Court was limited to reviewing only those questions raised in lower courts and upon which it granted certiorari.<sup>170</sup> Perhaps asymptomatic HIV-infection does affect *other* major life activities, but declaring that reproduction is a major life activity is certain to create a slippery slope flooding our judicial system with frivolous lawsuits engendered by the overly broad decision in *Bragdon*.

Borrowing from the reasoning of the court of appeals, Chief Justice Rehnquist, in his dissenting opinion, argued that by holding reproduction is a major life activity, the majority would allow “every individual with a genetic marker for some debilitating disease [to be considered] ‘disabled’ here and now because of some possible future effects.”<sup>171</sup> Although this argument may be somewhat exaggerated, the majority’s decision does have an immediate impact upon the rights of persons afflicted with other reproductive impairments—namely, infertility.

In fact, within hours after the decision in *Bragdon*, advocates for infertile persons “seized on the decision as a victory for all people whose ability to procreate is impaired.”<sup>172</sup> The argument is rather simple. Diane Aaronson, national head of the infertility organization Resolve, states that “this ruling will help to strengthen the claims of discrimination when those with infertility are not allowed workplace accommodations, to undergo treatments, or when an employer does not provide infertility insurance coverage.”<sup>173</sup> Prior to the *Bragdon* decision, employers were not permitting infertile employees to take time off from their jobs to undergo lengthy infertility treatment and, when such treatment was sought, it was not covered by

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168. *See id.*

169. *See Bragdon*, 118 S. Ct. 2196, 2204 (1998). Justice Kennedy explained that reproduction is the only major life activity which has been introduced by the parties since the initiation of the litigation and, therefore, the Supreme Court must likewise limit its review to reproduction. *See id.*

170. *See id.* at 2205; *see also, e.g.*, *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) (citing Rule 14.1(a) and stating that Supreme Court review is limited to the grounds raised at the Court of Appeals level).

171. *See Bragdon*, 118 S. Ct. 2196, 2216 (1998) (Rehnquist, C.J., dissenting).

172. *See* Esther B. Fein, *AIDS Virus Case Opens Door For Infertile*, NEW YORK TIMES, July 5, 1998 (available in 1998 WL 5418217).

173. *ADA and Infertile Couples*, WEEKEND: ALL THINGS CONSIDERED, (National Public Radio broadcast, June 27, 1998) (available in 1998 WL 6387567).

medical insurance.<sup>174</sup> Although there are several treatments to aid infertile couples in the reproductive process, the most advanced, and successful, treatment is in-vitro fertilization, whereby a woman's egg is fertilized by a man's sperm in a laboratory setting and then implanted into the uterus.<sup>175</sup> Such a procedure is both time consuming and expensive, with a single round of in-vitro fertilization costing a minimum of \$10,000.<sup>176</sup> Therefore, due to time and cost consumption, employers were not permitting employees to take time off for such a cause and insurance companies were not covering such procedures in their medical coverage plans.<sup>177</sup>

However, with the Supreme Court's decision in *Bragdon* holding that reproduction is a major life activity, such persons can now allege that withholding such benefits is discrimination in violation of the American with Disabilities Act. Infertility is unquestionably an impairment which prevents reproduction, and, therefore, such claims appear to have substantial support in the *Bragdon* decision. Although there are currently no reported decisions at this time, it has been reported that "[a] growing number of infertile people have sued their employers and insurance companies, claiming [that] refusal to cover their condition or provide time off for treatments, is discrimination."<sup>178</sup> Such an influx of litigation concerning infertility, if deemed protected by the ADA, is certain to have a marked effect on both employment and insurance coverage rates.

Of course, holding that reproduction is a covered disability under the ADA is certain to lead to other inexorable complications. For instance, consider the effect on insurance companies who refuse to cover the new anti-impotence drug Viagra.<sup>179</sup> If impotence is deemed a disability, denying coverage for such a medication could clearly be held discriminatory. Would similar results be required if a post-menopausal woman sought infertility treatments? Esther B. Fein poses this hypothetical: "A 40-year-old woman struggling to conceive a baby is told by her doctor that the quality of her eggs is poor and the lining of her uterus doesn't replenish itself well enough to sustain a pregnancy. Is she fairly average, or is she disabled?"<sup>180</sup> What if an employer permits a 20-year-old woman to take a leave of absence to pursue infertility treatments, but withholds that same benefit from a post-menopausal woman? Is such an action disability discrimination, age discrimination, both, or neither? What about older men who have the desire to father children, but simply cannot? What about the far-reaching affects on pre-pubescent teenagers?

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174. See *id.*

175. See *id.*

176. See *id.*

177. See *id.*

178. See *id.*

179. See Andrew Brownstein, *Ruling Could Make Infertility a Disability: Bragdon Case Raises Discrimination Questions*, BANGOR DAILY NEWS, June 30, 1998 (available in 1998 WL 13311819) (noting that if insurance companies provide benefits to other disabled individuals, it should naturally follow that analogous benefits must be provided to infertile individuals).

180. Esther B. Fein, *HIV Case May Help in Defining Infertility as Disability*, ORANGE COUNTY REGISTER, July 5, 1998, at A26 (available in 1998 WL 2636763).

Such individuals clearly cannot reproduce. Are they disabled? Quite plainly, the Supreme Court's decision in *Bragdon* created many more questions than answers.

## VI. CONCLUSION

These questions, essentially, are the very evils unleashed by the Supreme Court in their variant of Pandora's Box. The Supreme Court was faced with deciding whether or not asymptomatic-HIV infection is a disability which would be protected under the ADA.<sup>181</sup> Quite plainly, the proper holding, or "blessing" to continue the analogy with Pandora, would be to hold that such individuals need protection from discrimination. Setting out to achieve such a goal, however, the Supreme Court, like Pandora, set out to help mankind without acting responsibly and has released a force that was unexpected. By stretching the confines of the ADA to include reproduction as a major life activity,<sup>182</sup> the Court has essentially unleashed what will surely be a flurry of consequences, namely, the flooding of our courts with frivolous lawsuits by persons claiming they are "reproductively-disabled." While Pandora may have had a noble goal in bringing fire and other blessings to mankind, Pandora was punished by the gods for her actions. While the Supreme Court might have had a noble goal in *Bragdon v. Abbott* in protecting persons with asymptomatic-HIV infection from discrimination, our courts will certainly be punished for their actions.

BRETT D. WATSON

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181. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2200 (1998).

182. See *id.* at 2209.

