No. 97-1992

In the Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN L. MURPHY, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

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

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the determination if petitioner's severe, Stage IV hypertension is a "disability" under the Americans with Disabilities Act, 42 U.S.C. 12102(2)(A), should be made without consideration of mitigating measures such as medication.

2. Whether there are genuine issues of disputed, material fact concerning whether respondent "regarded" petitioner as "disabled" when respondent fired him because of his high blood pressure.

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INTEREST OF THE UNITED STATES

This case concerns the definition of "disability" in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* Congress delegated to the Equal Employment Opportunity Commission (EEOC) and Department of Justice authority to promulgate regulations and to enforce the provisions of the ADA. Both agencies have issued extensive regulations and interpretive guidance concerning the definition of the term "disability." The EEOC participated as *amicus curiae* in this case in the court of appeals. In response to the Court's invitation, the United States and the EEOC filed a brief as *amicus curiae* at the petition stage in this case.

STATEMENT

Petitioner brought this case under Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, after he was dismissed from his job because he had high blood pressure. The district court granted summary judgment to respondent on petitioner's claim under the ADA. The court of appeals affirmed.

1. Petitioner has had high blood pressure (hypertension) since he was ten years old. For 22 years, petitioner worked as a mechanic. Pet. App. 13a. Despite the fact that his blood pressure was very high (approximately 250/160, see *id.* at 9a), it was controlled by medication. His own physician and respondent's physician both testified that, with medication, petitioner's "hypertension does not significantly restrict his activities and that in general he can function normally and can engage in activities that other persons normally do." *Id.* at 13a.

In August 1994, respondent hired petitioner as a mechanic, a position that required him to drive commercial motor vehicles on "road tests" and "road calls," and which therefore required satisfaction of Department of Transportation requirements. Pet. App. 13a-14a. Among those requirements is that the driver of a commercial motor vehicle in interstate commerce "[h]as no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely." 49 C.F.R. 391.41(b)(7). The district court construed a subsequent DOT publication to provide that "in order to be physically qualified to drive a commercial motor vehicle * * *, an individual must maintain blood pressure less than or equal to 160/90." Pet. App. 16a. See note 10, *infra*.

At the time he was hired, petitioner's blood pressure was measured as 186/124. Pet. App. 16a. In September 1994, when respondent realized that petitioner's blood pressure exceeded 160/90, petitioner was retested; his blood pressure was approximately 160/104. See Pet. 2. Petitioner's treating physician "testified that [petitioner] is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects." Pet. App. 16a. On October 5, 1994, respondent fired petitioner. *Id.* at 17a.

2. The district court granted summary judgment to respondent, ruling that petitioner had failed to show that there were disputed issues of material fact as to whether he had a "disability." Under the ADA:

> The 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.

42 U.S.C. 12102(2).

The district court held that, for purposes of determining whether petitioner had shown that he had a disability, his "impairment should be evaluated in its medicated state." Pet. App. 29a. The court noted that "[t]he only limitation specifically set by [petitioner's] treating physician" was a restriction on repetitive lifting of items weighing 200 pounds or more. *Id.* at 31a; see also *id.* at 13a ("[Petitioner's] own physician and UPS' medical expert each testified that [petitioner's] hypertension does not significantly restrict his activities and that in general he can function normally and

can engage in activities that other persons normally do."). Analyzing whether petitioner was substantially limited in his major life activity of working, the court stated that such a limitation "is not of such a nature as to significantly restrict him in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities," and that therefore petitioner's "high blood pressure and its concomitant effects do not constitute a disability under the ADA." *Id.* at 31a.[1]

Addressing the "regarded as" prong of the statutory definition of "disability," the district court concluded that "[respondent] did not regard [petitioner] as disabled, only that he was not certifiable under DOT regulations." Pet. App. 32a. The court added that petitioner was not qualified for the job, *id.* at 33a-35a, that in any event respondent's purported compliance with DOT regulations was a complete defense to petitioner's ADA claim, *id.* at 35a-37a, and that any accommodation by respondent to petitioner's condition "would have been an undue hardship on [respondent]," *id.* at 37a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-6a. The court noted that petitioner's own doctor had testified that "when his high blood pressure is medicated, he 'functions normally doing everyday activity that an everyday person does.'" *Id.* at 4a. Relying on its holding in *Sutton* v. *United Air Lines, Inc.*, 130 F.3d 893, 902 (1997), cert. granted, No. 97-1943 (Jan. 8, 1999), that the "substantial

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[1] Cf. 29 C.F.R. 1630.2(j)(3) ("With respect to the major life activity of *working*[,] [t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes.").

limitation" inquiry should assess the individual after mitigating or corrective measures are taken, the court held that petitioner's high blood pressure is therefore not a disability. *Ibid.*

The court of appeals also affirmed the district court's ruling that respondent did not regard petitioner as having an impairment that limits a major life activity. The court stated that "[respondent] did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke," but dismissed petitioner "because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." Pet. App. 5a. In the court's view, it followed that respondent "in its termination decision, did not regard [petitioner] as having an impairment that substantially limits a major life activity." *Ibid.* The court expressly declined to reach the questions whether petitioner was otherwise "qualified" for the job under the ADA, *ibid.*, and whether the DOT regulations would provide a defense to petitioner's ADA claim. *Id.* at 5a-6a.

4. On January 8, 1999, this Court granted review limited to the first and fourth questions presented in the petition for certiorari.

SUMMARY OF ARGUMENT

I. The court of appeals' conclusion that petitioner had not shown an actual disability was wrong. There appears to be no dispute that petitioner has hypertension so severe that, if left unmedicated, it substantially limits all or most of his major life activities. Therefore, he has an actual disability. The fact that petitioner takes medication to relieve his condition may be relevant to a number of inquiries under the ADA, such as whether a requested accommodation by the employer is reasonable, whether the medication is sufficiently effec-

tive to render him qualified to perform his job, whether petitioner can satisfy federal safety standards, and whether he poses a direct threat to the health or safety of others. But the fact that he takes mitigating measures is of no relevance in the threshold inquiry as to whether he is disabled.

Although the ADA does not in terms address whether mitigating measures are to be taken into account in assessing the existence of a disability, Congress's intent on the question is clear. The relevant committee reports each stated with unusual clarity that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 52 (1990); see also *id.*, pt. 3, at 28. Moreover, assessing the existence of a disability without regard to mitigating measures is most consistent with the ADA's basic purpose to eliminate the exclusion of individuals from the workplace because of outdated stereotypes and myths about those individuals' abilities.

Assessing the existence of a disability without regard to mitigating measures is also most consonant with the structure of the statute, which, as noted above, provides for addressing issues arising out of the use of mitigating measures at stages of the analysis beyond the threshold determination of whether a disability exists. And it would inject uncertainty and instability into the system, because individuals could gain and lose status as "disabled" depending on the changing effectiveness of their regimen of mitigating measures and their changing decisions regarding whether those measures are warranted in light of their unwanted side effects.

The agencies entrusted with issuing regulations to carry out the ADA have consistently taken the position that the existence of a disability should be assessed without regard to mitigating measures. The EEOC has taken that position in interpretive guidelines that were subject to notice and comment at the same time as—and together with—the formal ADA regulations. Because the EEOC's guidelines state its interpretation of its own ADA regulations, they are entitled to controlling weight, and they therefore establish that mitigating measures should not be taken into account in assessing the existence of a disability.

II. The court of appeals also erred in holding that petitioner was not "regarded as" disabled under the third prong of the statutory definition of "disability." Respondent asserted that it dismissed petitioner because petitioner's blood pressure was too high to satisfy a federal requirement for driving a commercial motor vehicle in interstate commerce. If respondent were correct, that would establish that petitioner, because of his impairment (hypertension), was substantially limited in the major life activity of working, *i.e.*, he was severely restricted in a broad class of jobs for which his training and skills otherwise qualified him. At this threshold stage of the inquiry, it would be of no significance whether or not respondent bore any animus toward petitioner and whether or not respondent were correct in its view that petitioner could not satisfy the federal requirement. So long as respondent regarded petitioner as substantially limited in the major life activity of working, petitioner satisfied the statutory definition of being "regarded as" disabled.

To accept the court of appeals' theory would permit employers to circumvent the ADA's "qualification" inquiry in any "regarded as" case. The ADA prohibits discrimination only against a "*qualified* individual with

a disability." 42 U.S.C. 12112(a) (emphasis added). Accordingly, if respondent indeed regarded petitioner as unqualified under DOT medical standards, that may be relevant to whether petitioner is "qualified" for the job, though issues would remain regarding whether respondent's views of petitioner were correct and whether driving a truck is an "essential function" of the job, see 42 U.S.C. 12111(8). But respondent's views concerning petitioner's qualifications do not establish—or even support—respondent's contention that it did not regard petitioner as "disabled."

ARGUMENT

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A PERSON HAS A "DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT

The term "disability" within the meaning of the Americans with Disabilities Act is defined in terms of three separate, alternative criteria. Under the first criterion—actual disability—a disability is "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. 12102(2)(A). Parsing that definition in *Bragdon* v. *Abbott*, 118 S. Ct. 2196 (1998), this Court explained that its application requires first the identification of the relevant impairment(s) and major life activities and then, "tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity." *Id.* at 2202.

Petitioner's high blood pressure is a "physical * * * impairment." As this Court explained in *Bragdon*, Congress's "repetition" in the ADA of that "well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." 118 S. Ct. at

2202. Under those interpretations, codified without relevant change in the EEOC's regulations implementing the ADA, see 29 C.F.R. 1630.2(h)(1), a "physical * * * impairment" is "[a]ny physiological disorder, or condition * * * affecting" a number of named body systems, including the cardiovascular system. *Ibid.* Petitioner's hypertension is a "physiological disorder" and it affects his cardiovascular system. Accordingly, he has a "physical impairment" within the meaning of the Act.

In determining whether petitioner is disabled within the meaning of the "actual disability" prong of the ADA, the remaining question is whether petitioner's impairment "substantially limits" any of petitioner's major life activities. The answer to that question turns on whether petitioner's impairment is viewed in its mitigated or unmitigated state.

A. Congress Intended That The Existence Of An Actual Disability Should Be Assessed Without Taking Into Account Mitigating Measures

The text of the ADA itself does not define "substantially limits" and therefore does not answer the question whether the inquiry into substantial limitation of a major life activity is to be undertaken with or without taking into account mitigating measures. The legislative history of the statute and its structure, however, indicate that Congress intended that the existence of an actual disability is to be analyzed without regard to mitigating or ameliorative measures.

1. Both the Senate and House Committee Reports on the ADA state in plain and direct terms that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989)

(Senate Rep.); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 52 (1990) (House Labor Rep.); see also *id.*, pt. 3, at 28 (1990) (House Judiciary Rep.) ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."). That expression of Congress's understanding, repeated in the three relevant committee reports on the ADA, is unusually clear and unequivocal, and it makes Congress's intent unmistakable.

The House Reports on the ADA reinforced the point by reciting specific examples of individuals who are disabled notwithstanding their use of mitigating measures that control their impairment:

> [A] person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

House Labor Rep. at 52; accord House Judiciary Rep. at 28-29.[2]

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[2] In discussing the third ("regarded as") prong of the disability definition, the Senate Report also states that an

> important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

2. This specific evidence of congressional intent on the question presented in this case is consistent with the overall structure and purpose of the statute. See *Brotherhood of Locomotive Eng'rs* v. *Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 157 (1996) ("[T]he statutory classification must be understood in accord with that objective."). Congress determined that "not working is perhaps the truest definition of what it means to be disabled in America." Senate Rep. at 9; House Labor Rep. at 32.[3] In defining the scope of those covered by the ADA, Congress clearly intended to include those who *could* function in the workplace, but were excluded by the "discrimination by employers [that] remains an inexcusable barrier to increased employment of disabled people." Senate Rep. at 9; House Labor Rep. at 33; see also *id.* at 43-46. To read the statute to exclude from its protections individuals who have mitigated their impairments (through either assistive devices or medicines, or self-adapta-

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Senate Rep. at 24. An individual may fall within more than one of the three prongs of the Act's definition of disability, and some impairments may present borderline cases with respect to one prong but not another. Accordingly, the Senate Committee's comment that the "regarded as" prong "ensure[s]" protection of an individual with "controlled diabetes or epilepsy" under the Act is not inconsistent with the clear and unequivocal statements in the Senate Report and the two House Reports that such individuals would be covered under the "actual disability" prong as well. See *Arnold* v. *United Parcel Serv., Inc.*, 136 F.3d 854, 860 (1st Cir. 1998).

[3] See also 136 Cong. Rec. H2428 (daily ed. May 17, 1990) (Rep. Owens); 135 Cong. Rec. S10,711 (daily ed. Sept. 7, 1989) (Sen. Harkin); *id.* at S4985, S4987 (daily ed. May 9, 1989) (Sen. Harkin); 134 Cong. Rec. H2894 (daily ed. May 3, 1988) (Rep. Owens); *id.* at S5108 (daily ed. Apr. 28, 1988) (Sen. Weicker).

tions[4]) would negate one of the "critical goal[s] of this legislation—to allow individuals with disabilities to be part of the economic mainstream of our society." Senate Rep. at 10; House Labor Rep. at 34.[5]

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[4] See *Bartlett* v. *New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Doane* v. *City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997), cert. denied, 522 U.S. 1048 (1998).

[5] In *Bragdon*, this Court relied in part on the consistent judicial precedent under the Rehabilitation Act to construe the ADA. See 118 S. Ct. at 2208. Although no court squarely addressed the mitigating measures issue under the Rehabilitation Act, courts routinely treated persons who had mitigated the effects of their impairment as protected by the statute. See, *e.g.*, *Reynolds* v. *Brock*, 815 F.2d 571, 574 (9th Cir. 1987) ("Reynolds's epilepsy substantially limits her ability to work. Even though medication controls her seizures, federal and state regulations and policies restrict the types of jobs available to her."); *Strathie* v. *Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) ("undisputed" that applicant whose hearing aid corrected for hearing impairment "is a handicapped person"); *Longoria* v. *Harris*, 554 F. Supp. 102, 103-104 (S.D. Tex. 1982) (individual with right leg amputated below the knee who "was in no way restricted in mobility by his artificial leg" was handicapped individual). The Rehabilitation Act regulations are of little additional assistance, because they do not expressly address the question whether mitigating measures are to be taken into account. The Department of Health, Education, and Welfare declined to define the term "substantially limits" in the Rehabilitation Act because it did "not believe that a definition of this term is possible at this time." 42 Fed. Reg. 22,685 (1977). The Department of Labor, the agency charged with enforcing federal contractors' duty to take affirmative action to employ individuals with disabilities under Section 503(b) of the Rehabilitation Act, 29 U.S.C. 793(b), defined "substantially limited" to mean "likely to experience difficulty in securing, retaining or advancing in employment because of a handicap." 41 Fed. Reg. 16,149 (1976); see also 41 C.F.R. 60-741.2 (1990) (codification of above definition at time ADA was enacted); 41 C.F.R. Pt. 60-741 App. A (1990) (interpretive guidance).

3. The structure of the ADA provides strong support for the proposition that mitigating measures should not be taken into account in determining the existence of a disability at the initial stage of the inquiry. Mitigating measures and reasonable accommodations are both types of "adjustments" that may have to be made on account of a disabling condition. Congress consistently provided in the ADA that the effectiveness of such adjustments should be considered after the initial determination of disability, and not as a part of that threshold inquiry.

An employer must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. 12112(b)(5)(A). Accommodations provided by an employer are similar to mitigating measures taken by an employee in that they are both types of adjustments that make it possible for a disabled person to work. Under the court of appeals' construction of the ADA, an impairment that requires mitigating measures is not a protected disability, while an impairment that requires employer accommodations is. "It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self-help." *Arnold* v. *United Parcel Serv., Inc.*, 136 F.3d 854, 863 n.7 (1st Cir. 1998).

Indeed, the two types of adjustment are often inextricably intertwined. Mitigating measures taken by an employee will often require some accommodation by the employer. For example, an employee may develop a serious and chronic medical condition that can be effectively controlled only by taking oral medication several times a day. In many employment situations, giving the employee a brief break so that the employee

could take the medication would be a reasonable accommodation. Yet, under the court of appeals' theory here, the employer could refuse that accommodation, because the employee—by virtue of his medication—ceases to be disabled and is therefore not entitled to the protections of the ADA.

The example can be generalized. Instead of requiring reasonable changes to the work environment (as when a reasonable accommodation is requested), an employee with a disability for which mitigating measures are taken simply requests the employer reasonably to accommodate the employee's condition by not penalizing the employee for taking the mitigating measure. Ironically, however, under the court of appeals' theory, in cases in which the mitigating measure is most effective and imposes the least burden on the employer, the employer would be most free to refuse it. Thus, an employee who requires a modification of his work duties because it is necessary to accommodate his uncontrollable high blood pressure may well be entitled to it (so long as it does not impose an undue hardship on the employer, see 42 U.S.C. 12112(b)(5)(A), or alter the essential functions of the job, see 42 U.S.C. 12111(8); 29 C.F.R. Pt. 1630 App. § 1630.2(o)). And an employee whose high blood pressure can be somewhat controlled by medication but who still must observe substantial limitations on his activities would also be entitled to reasonable accommodations from the employer. But the employee who takes medication that effectively controls the employee's high blood pressure would not be entitled to any accommodation from the employer—not even the simple permission from the employer to take the medication without losing his job or suffering other discrimination on the basis of impairment.

The effectiveness of the adjustment, whether in the form of mitigating measures or reasonable accommoda-

tions, is properly addressed by other ADA provisions, not as part of the threshold determination of liability. For example, the basic anti-discrimination mandate under the ADA does not come into play unless the employee is not only disabled but also "qualified" for the position in question. 42 U.S.C. 12112(a). If there is a question whether particular mitigating measures render the employee able to do the job, the ADA provides for addressing that issue through the inquiry into whether the employee is "qualified," not the initial inquiry into disability. If there is a question whether the mitigating measures enable the employee to perform the job safely or to be in compliance with federal safety regulations, the ADA permits the employer to take adverse action if the employee is "a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). See also 29 C.F.R. 1630.15(e) ("It may be a defense to a charge of discrimination * * * that a challenged action is required or necessitated by another Federal law or regulation."). The provisions in the Act addressing all of these "adjustment" questions at later stages of the analysis suggest that they should not be imported into the threshold disability determination—as the court of appeals' interpretation would require.

4. Finally, the court of appeals' theory would lead to a strange instability in the definition of disability. Determining whether an impairment substantially limits a major life activity is relatively straightforward, because it does not require difficult distinctions to be drawn among impairments based on the extent to which they can be ameliorated with medications or assistive devices and the extent to which the medications or devices impose new limitations or uncertainty themselves. Indeed, many forms of medication and other mitigating measures vary in their effectiveness

over time and may be accompanied by unwanted side effects. Under the court of appeals' theory that mitigating measures must be taken into account, an individual with an impairment that would be disabling if unmedicated would gradually become disabled if the medication loses its effectiveness, until new effective medication is obtained and the cycle would begin again. Or an individual's status would alternate between disabled and non-disabled as the individual altered his assessment of the desirability of taking an available medication. Although the EEOC has stated that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities," 29 C.F.R. Pt. 1630 App. § 1630.2(j), that regulation provides little guidance in addressing the moving target of disability under the court of appeals' theory in these kinds of cases. The result of requiring that mitigating measures should be taken into account, therefore, would be to inject considerable uncertainty into what should be a relatively straightforward threshold determination of the existence of a disability.

B. The Agencies Charged With Enforcing The ADA Have Determined That Mitigating Measures Should Not Be Taken Into Account, And That Determination Is Entitled To Deference

This Court in *Bragdon* reserved the question whether the substantiality of a limitation on a major life activity was to be assessed without regard to available mitigating measures. 118 S. Ct. at 2206. As the Court noted (*ibid.*), however, the EEOC and the Department of Justice have taken the consistent position that mitigating measures are not to be considered in making the "substantial limitation" determination. That view constitutes the reasonable position of the agencies charged

with the enforcement of the statute and should be followed in the instant case.

In resolving a question regarding the interpretation of a statute, this Court "ask[s] first whether 'the intent of Congress is clear' as to 'the precise question at issue.'" *Regions Hosp.* v. *Shalala*, 118 S. Ct. 909, 915 (1998) (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). The ADA itself does not directly specify whether the existence or substantiality of the limitation should be measured with or without mitigating or ameliorative measures that the individual could take to improve his or her functioning.[6] Since the ADA "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 915 (quoting *Chevron*, 467 U.S. at 843).

Congress required the EEOC to "issue regulations * * * to carry out [Title I of the ADA]." 42 U.S.C. 12116. "As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title [I] in court, the [EEOC]'s views are entitled to deference." *Bragdon*, 118 S. Ct. at 2209 (statutory citations omitted; citing *Chevron*, 467 U.S. at 844). "Such legislative regulations are given controlling weight unless they are

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[6] See *Washington* v. *HCA Health Servs.*, 152 F.3d 464, 467 (5th Cir. 1998) ("the text of the ADA is not unambiguously clear on this matter"); *Matczak* v. *Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997) ("[t]he ADA itself does not say whether mitigating measures should be considered"); *Harris* v. *H & W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) ("nothing in the language of the statute itself * * * rules out" determining "the existence of a substantial limitation without regard to mitigating measures").

arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.[7] In determining the meaning of such regulations, similarly, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).

Although the EEOC's regulation regarding the meaning of the term "substantially limits" does not itself expressly address the issue of whether mitigating measures should be taken into account, the EEOC has consistently interpreted its regulation to mean that mitigating measures are not to be considered in making the "substantial limitation" determination. First, to "respond to comments [to its proposed regulations] from disability rights groups, which were concerned that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures," the EEOC explained that "the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures." 56 Fed. Reg. 35,727-35,728 (1991). Second, at the same time as it promulgated the regulations, the EEOC issued an "Inter-

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[7] Because Congress expressly delegated the authority to issue binding regulations to the EEOC, these "legislative" regulations are entitled to deference, as opposed to the mere "power to persuade" value sometimes accorded the EEOC's interpretations of Title VII published in the Code of Federal Regulations. Compare *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), with *id.* at 260 (Scalia, J., concurring), and *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988).

pretive Guidance" that had been subject to the same notice and comment as the regulations. Cf. *Bragdon*, 118 S. Ct. at 2209 (according *Chevron* deference to, *inter alia*, administrative guidance interpreting the ADA). The Guidance expressly provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(j); accord 2 EEOC, *Compliance Manual* § 902.5 (1995); EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, II-2 (1992).

The Department of Justice, which is charged with promulgating regulations under Titles II and III of the ADA, has reached the same conclusion. See 28 C.F.R. Pt. 35 App. A § 35.104 ("[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services."); 28 C.F.R. Pt. 36 App. A § 36.104, at 583 (same); U.S. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual*, II-2.4000 (1992) (same); U.S. Dep't of Justice, *The Americans with Disabilities Act: Title III Technical Assistance Manual*, III- 2.4000 (1992) (same).[8]

Deference to administrative agency views is especially appropriate here, as the EEOC and Department of Justice "played a pivotal role in 'setting [the statutory] machinery in motion.'" *Ford Motor Credit*

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[8] The Department of Transportation, which also has authority to issue regulations under the ADA, 42 U.S.C. 12149, 12164, adopted the Department of Justice's definition of "disability." See 49 C.F.R. 37.3; 56 Fed. Reg. 45,584, 45,585 (1991).

Co. v. *Milhollin*, 444 U.S. 555, 566 (1980). When agencies promulgate their regulations virtually contemporaneously with a statute's enactment, utilizing the insights they derived from their participation in the legislative process, the rationale for granting deference is heightened. See *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979); *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S. 110, 131 (1978); *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969); *United States* v. *Moore*, 95 U.S. 760, 763 (1877).

C. The Court Of Appeals Erred In Ruling That Petitioner Is Not Disabled

In this case, neither the district court nor the court of appeals assessed petitioner's impairment in its unmitigated state. Petitioner has asserted that the record shows that in an unmitigated state his severe hypertension would damage his kidneys, heart, and eyes, and would lead to almost immediate hospitalization, Pet. 7; Pet. C.A. Br. 18-19, which would substantially limit him in the major life activities of "caring for oneself, performing manual tasks, walking, seeing, * * * and working." 29 C.F.R. 1630.2(i) (defining "major life activities"); *Bragdon*, 118 S. Ct. at 2205 (approving identical regulatory definition of "major life activities"). If petitioner can prove those facts, he is disabled under the ADA.

We note, as we explain in our amicus brief (at 11-12) in *Sutton* v. *United Air Lines*, No. 97-1943, that it is not enough to simply place into evidence that an individual has a diagnosable disorder or would be worse off without the mitigating measure. A plaintiff may not prevail under the "actual disability" prong of the definition unless the evidence shows that the unmitigated impairment restricts the "condition, manner or duration under which an individual can perform a particular

major life activity" compared to "the average person." 29 C.F.R. 1630.2(j)(1)(ii). If, as petitioner contends, he would have to be hospitalized, then he would of course meet that requirement, as he would be substantially limited in many life activities; unlike the "average person," an individual hospitalized for high blood pressure could not, for example, care for him or herself or work regularly. Thus, respondent was not entitled to summary judgment on the ground that petitioner did not have a "disability" under Section 12102(2)(A).

II. RESPONDENT COULD BE FOUND TO HAVE REGARDED PETITIONER AS DISABLED BECAUSE IT VIEWED HIM AS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF WORKING

An individual is "disabled" under the ADA not only if the individual has an impairment "that substantially limits one or more of the major life activities of such individual," 42 U.S.C. 12102(2)(A), but also if the individual is "regarded as having such an impairment," 42 U.S.C. 12102(2)(C). The record in this case demonstrated that respondent regarded petitioner as having an impairment (his high blood pressure, whether viewed in the mitigated or unmitigated state) that substantially limited petitioner in the major life activity of working. The Tenth Circuit erred in ruling to the contrary.

As noted above, the EEOC regulations generally provide that an individual is substantially limited in a major life activity if the individual is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or duration under which" the individual can perform the activity as compared to the "average person in the general popula-

tion." 29 C.F.R. 1630.2(j)(1).[9] The regulations provide special guidance, however, for determining the substantiality of a limitation on the major life activity of working. In that context, the regulations provide that "[t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i). The regulations add that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Ibid.*

1. There is no dispute in this case that respondent was aware of petitioner's high blood pressure and of its levels in both the mitigated and unmitigated state, and there appears similarly to be no dispute that high blood pressure is a "disorder" of petitioner's cardiovascular system. Accordingly, respondent regarded petitioner as having a physical impairment within the meaning of the ADA. In determining whether petitioner is disabled under the "regarded as" prong of the definition, therefore, the sole remaining question is whether respondent viewed petitioner's high blood pressure as substantially limiting one of his major life activities. In this case, petitioner alleges that the relevant major life activity is working. If respondent regarded petitioner's high blood pressure as substantially limiting that activity (or if there was at least a genuine issue of material fact in this regard, see Fed. R. Civ. P. 56(c)),

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[9] The regulations also provide that "[t]he following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. 1630.2(j)(2).

then the grant of summary judgment to respondent was erroneous.

2. Viewed in the light most favorable to petitioner, the record demonstrates that respondent viewed petitioner as substantially limited in the major life activity of working. That evidence consisted of respondent's consistent explanation that it dismissed petitioner because it believed "that he was not certifiable under DOT regulations." Pet. App. 32a; see also *id.* at 5a ("[Respondent] terminated [petitioner] because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles.").[10] Respondent clearly

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[10] In our brief at the petition stage of this case (at 17 n.5), we noted that the courts below erred in construing the DOT standards to preclude someone with blood pressure higher than 160/90 from operating a commercial motor vehicle in interstate commerce. The reason for that error has become clear.

The basic regulation at issue prohibits the operation of commercial motor vehicles by individuals who have a "current clinical diagnosis of high blood pressure *likely to interfere with his/her ability to operate a commercial motor vehicle safely*." 49 C.F.R. 391.41(b)(6) (emphasis added). The regulations further provide that, when an individual is tested under that standard, "[i]f the blood pressure is consistently above 160/90 mm. Hg., further tests *may be* necessary to determine whether the driver is qualified to operate a commercial motor vehicle." 49 C.F.R. 391.43(f) (emphasis added). Thus, although the general rule prohibits individuals whose high blood pressure would interfere with vehicle operation from operating commercial vehicles, blood pressure above 160/90 does not necessarily or categorically trigger that prohibition.

The district court referred (Pet. App. 15a-16a) to a document that is now entitled "Medical Advisory Criteria for Evaluation Under 49 CFR Part 391.41." That document addresses various medical criteria for commercial driver's licenses, including high blood pressure. In its current version (available at http://mcregis.fhwa.dot.gov/medical.htm (last modified Apr. 8, 1998)), that document begins:

> Unlike regulations which are codified and have a statutory base, the recommendations in this advisory are simply guidance established to help the medical examiner determine a driver's medical qualifications pursuant to Section 391.41 of the Federal Motor Carrier Safety Regulations (FMCSRs). The Office of Motor Carrier Research and Standards routinely sends copies of these guidelines to medical examiners to assist them in making an evaluation. The medical examiner may, but is not required to, accept the recommendations. Section 390.3(d) of the FMCSRs allows employers to have more stringent medical requirements.

Printed versions of this document are divided into specific subdocuments that address specific medical criteria, and the subdocuments do not include the above-quoted language. But we are informed that DOT has typically sent out printed versions of this document or its subdocuments with a cover letter that includes the above-quoted language or its close equivalent.

With respect to blood pressure, the medical regulatory criteria recommends that no driver with blood pressure over 181/105 should be qualified to operate a commercial motor vehicle and that drivers with blood pressure between 160/90 and 181/105 may drive for three months and then may be retested to determine whether their blood pressure has been reduced to 160/90 or below. But, as the above quoted language makes clear, the fact that petitioner's blood pressure is above 160/90 does not absolutely preclude him from driving a commercial motor vehicle in interstate commerce.

The record in this case appears to contain only a 1988 printed version of the subdocument regarding medical criteria for high blood pressure. See C.A. App. 85-87. The medical substance of that document has not changed in relevant respects since 1988. Because the general statements regarding the advisory nature of the document, however, were typically included only in a cover letter—and not in the subdocuments themselves—the version of the blood pressure criteria subdocument in the record does not include the information regarding the nonbinding, advisory status of its recommendations. The courts below accordingly were apparently unaware that the document did not state a mandatory DOT policy regarding qualifications of individuals with blood pressure above 160/90. We believe it to be important, however, to clarify that DOT currently and at the time of the events in this

understood—indeed, relied upon—the fact that DOT certification is required for "all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. 390.3(a). Under any reasonable view of what is a substantial limitation of the major life activity of working, that describes either a "class of jobs or a broad range of jobs in various classes." 29 C.F.R. 1630.2(j)(3)(i).[11] Petitioner's inability to perform all such jobs would accordingly be a "substantial limitation" on his major life activity of working. Therefore, by regarding petitioner as unable to satisfy the DOT certification requirements, respondent regarded petitioner as substantially limited in his major life activity of working.

3. The court of appeals rejected petitioner's argument that respondent regarded him as substantially limited in the major life activity of working, on the ground that "[respondent] did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke," but rather on respondent's belief that "his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." Pet. App. 5a. The court's reasoning is mistaken; if respondent regarded petitioner's impairment (his high blood pressure) as exceeding DOT's requirements, it thereby regarded him as substantially limited in the major life activity of working.

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case has viewed the medical advisory criteria documents as nonbinding recommendations for medical examiners. By contrast, the regulations state DOT's official policy regarding the medical qualifications for driving a commercial motor vehicle in interstate commerce.

[11] DOT has informed us that by 1994, when the events at issue in this case occurred, at least 7.1 million commercial drivers licenses had been issued.

The court of appeals' reasoning appears to be based on an unstated premise that an individual's status as disabled under the "regarded as" prong depends on proof that the employer acted with animus toward that individual or his impairment or with a misperception of the nature or consequences of that impairment. The definition of "disability" in the ADA, however, does not turn on whether an individual has been subject to invidious discrimination; it simply turns on whether the individual is, or is regarded as, substantially limited in a major life activity. Thus, it may be accepted that respondent did not have an "unsubstantiated fear" concerning the health consequences of petitioner's high blood pressure, and it may be accepted (although it appears that the record is not sufficient to support summary judgment on this point) that respondent believed that petitioner was perfectly able to drive its vehicles and perform all the duties of his job as a mechanic for respondent, but was limited in so doing by DOT regulations. Nonetheless, even if respondent harbored no animus toward petitioner, it still regarded him as disabled under the "regarded as" definition, because it regarded his impairment as substantially limiting his ability to obtain or keep a "class of jobs."

4. To accept the court of appeals' contrary theory would permit employers to circumvent the ADA's "qualification" inquiry in any "regarded as" case. As noted above, the basic prohibition of Title I of the ADA does not forbid an employer to act adversely against an individual with a disability; rather, the employer may not discriminate against "a *qualified* individual with a disability." 42 U.S.C. 12112(a) (emphasis added). The inquiry into whether the employee is "qualified" is separate from the inquiry into whether the individual has a "disability." Indeed, it is essential to the ADA's purpose of eliminating discrimination based on "pre-

judice, stereotypes, or unfounded fear," *School Bd.* v. *Arline*, 480 U.S. 273, 287 (1987), that the inquiry into whether the individual is qualified turns on the individual's actual qualifications—not the way in which the employer regards him. Moreover, the question whether an individual is "qualified" under the ADA turns on whether the individual "can perform the *essential functions* of the employment position," 42 U.S.C. 12111(8) (emphasis added), not whether the individual satisfies every criterion that the employer has in fact used as a job qualification in the past. That "essential function" inquiry is also crucial to achievement of the ADA's goals.

Under the court of appeals' theory, both of these crucial elements of the "qualification" inquiry—the need to show actual qualification and the inquiry into "essential functions" of the job—would simply be eliminated in cases involving a "regarded as" disability.[12] That is because the court of appeals' reasoning essentially reduces to the proposition that, because respondent regarded petitioner as unable to satisfy a job qualification (DOT certification), respondent therefore did not regard petitioner as substantially limited in

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[12] The need for the inquiry into actual (as opposed to perceived) qualification can be illustrated by this very case. As noted above, see note 10, *supra*, respondent (and both courts below) erred in concluding that DOT regulations precluded petitioner from operating a commercial motor vehicle in interstate commerce. Because this job qualification was mistakenly addressed under the "regarded as" prong of the disability definition, however, it required proof only as to what respondent regarded DOT regulations to require, not what those regulations actually require. Under the "regarded as disabled" inquiry, respondent's mistake would have little to do with its liability under the ADA. Had the issue been addressed properly under the "qualification" inquiry, however, petitioner's actual qualification to drive a commercial motor vehicle could be a dispositive issue in this case.

the major life activity of working. In most (or perhaps every) "regarded as" case, however, the employer could make a similar assertion: it could claim that it did not regard the employee as substantially limited in a major life activity, but rather as unable to satisfy what it (the employer) believed to be a job qualification. Under the court of appeals' reasoning, that assertion, if true, would result in a determination that the employee was not "regarded as" disabled, and it would insulate the employer from all obligations under the ADA.

Nor would the problem be limited to the "qualification" inquiry under the ADA. Presumably, the court of appeals would adopt the same reasoning if, for example, an employer in a "regarded as" case asserted that the employer had dismissed an employee not because the employer regarded the employee as disabled, but because the employer regarded the employee as having an impairment that posed a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). The ADA contemplates that an employer would have a defense to liability if the employee actually posed such a "direct threat" and no "reasonable accommodation * * * would either eliminate the risk or reduce it to an acceptable level." See 29 C.F.R. Pt. 1630 App. § 1630.2(r). But that defense arises after a determination that the employer regarded the employee as disabled; it is a justification for the employer's view, not a denial of it.

Under the court of appeals' reasoning, the employer in a "regarded as" case could pretermit the statutory inquiry into whether the employee actually posed a direct threat and whether a reasonable accommodation could eliminate or acceptably reduce that threat. Instead, the employer could simply claim that the employee was dismissed not because the employee was regarded as substantially limited in the major life

activity of working, but because the employer regarded the employee as posing a direct threat to other individuals in the workplace. So long as the employer actually did regard the employee as posing a direct threat to other individuals in the workplace, the employee would not be "regarded as" disabled, and the employer's ADA obligations would cease. The fact that the employee did not actually pose a direct threat or that a reasonable accommodation would have eliminated that threat would be irrelevant. Once again, importing these other statutory standards and defenses into what should be a relatively straightforward threshold inquiry into "disability" would threaten to unravel the statutory scheme that Congress enacted.

5. In short, although an ostensible failure to satisfy DOT standards may well assist respondent in showing that petitioner was not qualified for the job, see 42 U.S.C. 12112(a), that he would "pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b), or that he failed a "qualification standard[]" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. 12113(a), it does not establish that petitioner was not regarded as having a physical impairment that substantially limited his major life activity of working. See 29 C.F.R. 1630.15(e) (recognizing defense "that a challenged action is required or necessitated by another Federal law or regulation"); *Daugherty* v. *City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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