

ABBOTT, AIDS, AND THE ADA: WHY A PER SE DISABILITY RULE FOR HIV/AIDS IS BOTH JUST AND A MUST

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I. INTRODUCTION

It has become standard form, indeed borderline cliché, to open discussions regarding the American with Disabilities Act (“ADA”)¹ with the words of President George H.W. Bush as he signed the legislation into law.² To hedge against the risk of being too iconoclastic—contrary to what ensues—this commentary will follow suit:

[The ADA] signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.³

However, as the number of individuals with HIV around the globe continues to grow,⁴ one inescapable truth continues to dim the brightness of the ADA’s domestic and international impact: namely, the ADA, as enforced by American courts, has never adequately protected HIV positive individuals from unjustified discrimination and exclusion from mainstream American life. American courts have formed barriers to protection for HIV positive individuals, contrary to the plain meaning and legislative intent of the statute. The main barrier has been a shrinking definition of who is disabled. Specifically, despite initially being hailed by some as advancing the rights of

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2007).

2. See Teresa A. Schneider, Note, *Stretching the Limits of the ADA: Asymptomatic HIV-Positive Status as a Disability in Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), 77 NEB. L. REV. 206, 206 (1998); Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 997 (2004); Christopher E. Tierney, Comment, *Casey Martin, Ford Olinger and the Struggle to Define the Limits of the Americans with Disabilities Act in Professional Golf*, 51 CATH. U.L. REV. 335, 335 (2001); Karen M. Volkman, Comment, *The Limits of Coverage: Do Insurance Policies Obtained through an Employer and Administered by Insurance Companies Fall Within the Scope of Title III of the Americans with Disabilities Act?*, 43 ST. LOUIS U. L.J. 249, 249 (1999).

3. Statement by President George Bush Upon Signing S. 933, 1990 U.S.C.C.A.N. 601, 602.

4. UNAIDS, Report on the global AIDS Epidemic: Executive Summary, A UNAIDS 10th anniversary special edition at 6 (2006), available at http://data.unaids.org/pub/GlobalReport/2006/2006_GR-ExecutiveSummary_en.pdf.

people with HIV/AIDS under the ADA, the *Bragdon v. Abbott*⁵ decision by the Supreme Court did not go far enough. In favor of people with HIV/AIDS, the Court did rule that HIV, even when asymptomatic, constitutes an impairment under the ADA.⁶ The Court also held that reproduction was a major life activity that HIV substantially limited.⁷ However, perhaps because it was endeavoring to walk too fine a line between providing protection and appeasing the strict textualists, the Kennedy majority opinion did not determine that HIV/AIDS was a per se disability under the ADA. As a consequence, *Bragdon* left open a fair amount of latitude for courts to determine whether a major life activity was being limited and, thus, a fair amount of latitude on whether a person was disabled. Not missing a beat, courts have taken advantage of that latitude to continually shrink the definition of “disabled” and the scope of the ADA’s application.⁸ This note argues that the only way to adequately ensure that all people with HIV/AIDS are adequately protected from discrimination is for the courts to rule, or Congress to clarify, that HIV/AIDS is a per se disability under the Americans with Disabilities Act—as it was intended to be.

Part II of this note will provide a primer on the ADA and its requirements with respect to the definition of “disabled.” Part III will discuss the *Bragdon* decision, its advances, and its shortcomings. Part IV, the crux of the argument, will address how a per se disability interpretation of the ADA is more consistent with the plain language, legislative history, administrative regulations, and prior legal history of the ADA. Part V argues that a per se disability interpretation makes the most sense from a policy perspective, a practical perspective, and provides built-in checks to prevent a per se disability interpretation from allowing a flood of frivolous litigation.

II. OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

As indicated by President Bush’s prophetic language, the ADA was intended to usher in dramatic societal change aimed at enabling the achievement of economic autonomy and social equality for the disabled.⁹ Congress’ own sentiments regarding the purpose and the importance of the Act are no less charged. Invoking the “sweep of its congressional authority,”¹⁰ Congress states that the purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹¹ Specifically, the ADA prohibits discrimination against individuals with disabilities by employers (Title I), public entities (Title II), and places of public accommodation (Title III).

5. 524 U.S. 624 (1998).

6. *Id.* at 637.

7. *Id.* at 641.

8. *See, e.g.,* Sutton v. United Airlines, Inc., 527 U.S. 471, 482–83 (1999) (holding that an impairment that can be treated by medication or technology does not constitute a disability); *see also, infra* at pp. 9–11.

9. Bush *supra* note 3.

10. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(4) (2007).

11. 42 U.S.C. § 12101(b)(1).

The definition of who is disabled is the same for all three provisions. According to the definitions section of the ADA, “[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.”¹² Hence, to be considered disabled under the Act and thus able to access its protections, a person must satisfy three criteria with respect to subsection (A). They must (1) have an impairment (2) that substantially limits (3) a major life activity.

However, nowhere does Congress define what constitutes a major life activity—the third element. That said, much can be gleaned regarding its intended scope from the ADA’s precursor, the Rehabilitation Act of 1973,¹³ and the ADA’s implementing regulations. The Rehabilitation Act’s regulations give a non-exhaustive, yet broad, list of examples of major life activities which include “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹⁴ This is significant because Congress, knowing that its Rehabilitation Act had been implemented and interpreted as such by the agencies charged with its enforcement, used the same defining language in both the Rehabilitation Act and the ADA.¹⁵ This repetition is important because it demonstrates the sanctioning of the broad interpretation and implementation by the pre-ADA implementing agencies.¹⁶ Additionally, the ADA regulations enacted by the Equal Employment Opportunity Commission (“EEOC”) and Department of Justice (“DOJ”) adopt the same non-exhaustive list of major life activities.¹⁷ Indeed, motivated by a desire to ensure that the Rehabilitation Act and its accompanying regulations and jurisprudence were not chipped away at by the courts, Congress specifically commanded the courts not to apply a lower standard than was applied under the Rehabilitation Act.¹⁸

Further, as will be outlined more fully in part IV, it seems fairly evident both from the legislative history and the Rehabilitation Act case law that HIV/AIDS was intended to be considered as a disability across the board.¹⁹ However, in *Bragdon* and even more so in the cases that have followed, American courts have turned a blind eye to the relatively clear instruction from

12. 42 U.S.C. § 12102(2).

13. 29 U.S.C. § 790 (repealed 1992).

14. 45 C.F.R. § 84.3(j)(2)(ii) (2007); 28 C.F.R. § 41.31(b)(2) (2007).

15. S. REP. No. 101-116, at 21 (1989) [hereinafter SENATE REPORT]; H.R. REP. No. 101-485, pt. 2, at 50 (1990) [hereinafter HOUSE LABOR REPORT]; H.R. REP. No. 101-485, pt. 3, at 27 (1990) [hereinafter HOUSE JUDICIARY REPORT].

16. See Donald H.J. Hermann, *The Developments of AIDS Federal Civil Rights Law: Anti-Discrimination Law Protection of Persons Infected with Human Immunodeficiency Virus*, 33 IND. L. REV. 783, 854 (2000) (discussing the impact of incorporating the previous interpretation and the Court’s awareness of this in the Abbott decision).

17. See 29 C.F.R. § 1630.2(h) (2007).

18. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(a) (2007).

19. For further discussion regarding the legislative history and pre-ADA cases interpreting the meaning of major life activity. See *infra* part IV.

Congress to apply the ADA in a no less exacting, protecting fashion than the Rehabilitation Act and to include HIV/AIDS as a disability.

III. *BRAGDON V. ABBOTT*, ITS ADVANCES, AND ITS SHORTCOMINGS

The Supreme Court's only decision on what constitutes a major life activity within the context of HIV/AIDS was *Bragdon v. Abbott*, a Title III case in which the dentist of an HIV positive, but asymptomatic, plaintiff, Sidney Abbott, would only treat her in a hospital and if she bore the additional expenses.²⁰ Abbott brought suit under Section 12182(a) of the ADA alleging discrimination based on her HIV status.

The main issue in contention was whether Abbott had a protected disability. To determine this, the Court rightly looked to section 12102(2) which, again, defines "disability" as a physical or mental impairment that substantially limits a major life activity.²¹ With regard to the first element of impairment, the Court relied heavily on the Department of Health, Education and Welfare ("HEW") regulations interpreting the Rehabilitation Act which, as the Court notes, "appear without change in the current regulations issued by the Department of Health and Human Services."²² Those regulations define "physical or mental impairment" as "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive, genitor-urinary; hemic and lymphatic; skin; and endocrine."²³ The Court noted that in issuing these regulations the HEW, and later the DOJ, did not list any specific disorders to avoid the impression that if not specifically enumerated, a certain impairment was not included.²⁴ Even so, the commentary accompanying the regulations does contain a vast representative list ranging from heart disease to alcoholism.²⁵

The Court, relying on these regulations as nearly dispositive of the meaning of "impairment," found that, from the moment of infection, HIV "must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems."²⁶ Indeed, the Court concluded that "HIV infection satisfies the statutory and *regulatory* definition of a physical impairment during every stage of the disease."²⁷ The Court did not perform an individual inquiry regarding the physical impairment aspect of the "disability" definition.²⁸ The Court did not determine whether it was an

20. 524 U.S. 624, 624 (1998).

21. *Id.* at 630.

22. *Id.* at 632.

23. 45 C.F.R. § 84.3(j)(2)(i) (2007).

24. *Bragdon*, 524 U.S. at 633.

25. 42 Fed. Reg. 22685 (1977), reprinted in 45 C.F.R. pt. 84, App. A, p. 334 (2007).

26. *Bragdon*, 524 U.S. at 637.

27. *Id.* (emphasis added).

28. See Hermann, *supra* note 16, at 851 (describing the Court's wholesale approach of treating HIV/AIDS as a physical impairment without specifically and individually examining whether it was an impairment to Abbott).

impairment to Abbott, but analyzed the disease in the abstract, concluding that if a person had the virus, regardless of the symptoms or CD4 count, there is impairment.²⁹ This is important because the Court recognizes, at least implicitly, that an individualized inquiry need not be performed with respect to the physical impairment part of the disability definition. Therefore, *Bragdon* supports the conclusion that an individualized inquiry is not necessary even though the “with respect to an individual” language of the definition applies equally to the physical impairment prong as it does to the “major life activity” prong.³⁰

Having determined that HIV infection constitutes a physical impairment under the ADA, the Court then turned its attention to the second element of “disability” under the ADA: whether or not a “major life activity” is being affected. The Court noted that the plain meaning of the term “major” denoted comparative importance.³¹ Observing the breadth of the term “major life activity,” the Court held that nothing in the definition suggests that activities without a public, economic, or daily character were outside what constituted a “major life activity.”³² This holding opened the door for the Court’s determination that reproduction is a “major life activity.”³³

After holding that reproduction was a “major life activity,” the Court addressed the third element of the definition of disability: whether there is a substantial limitation. Put in context, the Court answered whether having HIV was a substantial limitation on the “major life activity” of reproduction. It did so by analyzing medical data which suggested that an HIV-positive woman trying to conceive imposes a significant risk of passing the infection to a man and to her child, despite antiretroviral treatment.³⁴ The Court also noted that some state public health control measures forbid people with HIV from engaging in intercourse with others.³⁵ Because of these laws and the significant risk of transmission to both sexual partner and fetus, the Court found that HIV was a substantial limitation on reproduction, a “major life activity.”³⁶

Consequently, Abbott was “disabled” under the ADA and thus entitled to protection.³⁷ Unfortunately, not all HIV positive people will similarly benefit from protection because the Court sidestepped³⁸ the opportunity to clarify that some impairments, particularly HIV, are per se disabilities under the ADA. By so doing, the Court missed an opportunity to ensure that this misunderstood disease received the full protection against discrimination envisioned by Congress.

29. See *Bragdon*, 524 U.S. at 637.

30. See *id.*; see also Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (2007).

31. *Bragdon*, 524 U.S. at 638.

32. *Id.*

33. *Id.* at 639.

34. *Id.*

35. *Id.* at 641.

36. *Bragdon*, 524 U.S. at 641.

37. *Id.*

38. *Id.* at 641–42 (“In view of our holding, we need not address the second question presented, i.e., whether HIV infection is a per se disability under the ADA.”).

The consequences of not addressing the per se disability question are grave and have become apparent since the *Bragdon* opinion. Strikingly, by basing accessibility to the protections of the ADA on, for example, reproduction (which in the eyes of many, including the dissent, was a stretch to begin with)³⁹ the Court left exposed to discrimination those who have HIV, but are no longer able to reproduce or have no intention to reproduce. This includes post-menopausal women, sterile men and women, and many homosexuals. Moreover, because the Court endorses the individualized approach to determining whether a person's major life activity is infringed (even though they do not perform an individualized inquiry with regard to impairment), it grants conservative courts the leeway to construe facts so that even though a person is impaired with HIV, a "major life activity" is not impaired.

In dissent, Chief Justice Rehnquist and others criticized the majority for not doing enough of an "individualized inquiry."⁴⁰ To mollify these critics courts would need to scrutinize and probe whether the particular plaintiff, in this case Abbott, was capable of having children, wanted to have children, or was planning on having children with seemingly no limit to how far the court can delve. Thankfully, the majority opted for a more benign and less intrusive implementation of the "individualized inquiry" into whether there is a substantial limitation on a "major life activity." Nevertheless the Court used a model, that without checks, can be just as malleable and soul-searching as the standard called for by the dissent. To be specific, the *Bragdon* decision examined whether HIV is a substantial limitation to reproduction for a straight female and, to a certain extent, inquired into the personal, individual effect that HIV had on Abbott's life.⁴¹ The effect being that HIV/AIDS deterred her from reproducing.⁴² However, by never spelling out how deep the individual inquiry is to go—and by condoning the practice with regard to people with HIV/AIDS—the Court gave another avenue for courts to limit the protected class through judicial interpretation.

It did not take long for courts to take advantage of the vagaries and unanswered questions of *Bragdon*. Indeed, in the very next term, the Court addressed the meaning of major life activity, albeit this time not in the context of HIV/AIDS. In *Sutton v. United Airlines, Inc.* the Court, relying on the present indicative tense of the statute, held that an individual must be "presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."⁴³ The Court used this finding to buttress its ultimate decision: if a disability can be corrected through medication or technology, then it does not impair a "major life activity."⁴⁴ This is bad news for people with HIV who,

39. See Laing P. Akers, *The Wrong Standard, the Right Decision: Opening Pandora's Box in Bragdon v. Abbott*, 28 CAP. U.L. REV. 421, 440–48 (2000) (arguing that reproduction should not be regarded as a major life activity because it is not repeatedly performed or crucial to daily existence).

40. *Bragdon*, 524 U.S. at 657.

41. *Id.* at 641.

42. *Id.*

43. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999).

44. *Id.* at 482. See also Bonnie Poitras Tucker, *Symposium: The Americans with Disabilities Act: A Ten-Year Retrospective: The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 326 (2000) (discussing the *Sutton* decision but highlighting how the House

though per se impaired under *Bragdon*, can be treated with antiretrovirals and, thus, are deemed to not have major life activities affected. As science and drugs improve (as they already have since the time of *Bragdon*) it is not hard to envision courts finding, on a factual basis, that reproduction is not impaired by HIV. Thus, on its face, the *Sutton* decision hinges the protection granted to HIV positive individuals on some future court's opinion of whether prevailing medicine "corrects" an HIV positive individual's ability to reproduce. Put differently, an HIV positive individual can expect her rights to be ever-changing and fleeting.

Moreover, the Court took the opportunity in *Sutton* to resolve what ambiguity had existed post-*Bragdon* and specifically held that an individualized inquiry must be conducted⁴⁵—subjecting each individual to an vast amount of scrutiny and subjecting the courts to an incredible amount of work and resources in adjudicating discrimination claims under the ADA.

Sutton also conflicts with both the legislative history and EEOC regulations.⁴⁶ Both the House Judiciary Report and the House Labor Report on the ADA indicate that whether or not a person is disabled should be decided by evaluating him or her absent mitigating measures.⁴⁷ As one commentator phrased it, "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."⁴⁸ While it seems obvious that the hearing-impaired are deaf regardless of whether an aid helps and should be afforded protection and accommodations for their infirmity, the same logic is no less applicable within the context of HIV/AIDS.

The judicial shrinking of the definition of "disability" continued in *Murphy v. United Parcel Service, Inc.*⁴⁹ (decided contemporaneously with *Sutton*) where the Tenth Circuit and then the Supreme Court again took a chunk out of what constituted a "major life activity" and, consequently, the size of the protected class.⁵⁰ The Court held that the plaintiff, who was dismissed from his job due to his hypertension, was not, in fact, disabled because while taking medication he was not limited in the tasks he could perform.⁵¹ A safeguard to horrible ironies such as this are the "regarded as" provisions within the definition of who is disabled. However, here, as in *Sutton*, the Court held that the employer had merely regarded him as unable to perform a particular job and that for work to

Judiciary Report on the ADA stated that when determining whether a disability existed, mitigating measures should not be considered).

45. *Sutton*, 527 U.S. at 483.

46. Tucker, *supra* note 44, at 328–29. (discussing the conflict between the *Sutton* decision, on one hand, and the legislative history and regulations, on the other, which both said not to consider mitigating measures).

47. HOUSE JUDICIARY REPORT at pt. 3, at 28–29; HOUSE LABOR REPORT at pt. 2, at 52.

48. TUCKER, *supra* note 44, at 325.

49. 527 U.S. 516 (1999).

50. For more information and further detailed explanations of both the *Sutton* and *Murphy* decisions see Tucker, *supra* note 44, at 327–33.

51. *Murphy*, 527 U.S. at 521.

be a “major life activity,” the plaintiff had to be unable or regarded as unable to perform a broad range of jobs.⁵²

Some have argued that despite the shrinking definition of “major life activity,” the “regarded as” prong of the definition of disability provides another avenue of protection.⁵³ However, courts have been very restrictive here as well. For example, in *Roberts v. Unidynamics Corp*, the Eighth Circuit determined that remarks by co-workers that the plaintiff might have AIDS were insufficient to demonstrate that the company regarded him as having AIDS.⁵⁴ Moreover, the court held that even if the plaintiff demonstrated that the employer regarded him as having AIDS, his burden was to demonstrate that the employer regarded him as having a substantial impairment of a “major life activity” and discriminated against him for this reason.⁵⁵ However, in most cases the discrimination has little or nothing to do with some “major life activity” such as reproduction or the inability of a person with AIDS to perform some employment task but rather arises out of fear or misunderstanding surrounding the disease. Hence, proving that the employer regards the plaintiff as substantially impaired in a “major life activity” is difficult, if not impossible, thus severely undercutting the scope of who is covered and the statute’s purpose.

Though the Court in *Bragdon* ruled that HIV/AIDS is a per se impairment, indicated a willingness to interpret “major life activity” in a more expansive way, and did some heavy lifting in interpreting reproduction as a “major life activity,” by not ruling that HIV/AIDS is a per se disability the Court left open an avenue to narrow what constitutes a disability under the ADA. Unfortunately, too many courts, including the Supreme Court, have gone down that avenue and have hampered an individual’s freedom from discrimination.

Now that *Bragdon* and its progeny’s shortcomings have been elucidated, it is necessary to outline the legal soundness and benefits of a per se disability ruling for HIV/AIDS.

IV. THE LEGAL SOUNDNESS OF A PER SE DISABILITY RULING

A. Plain Language

One of the main tools used to limit the ADA’s application is to rely, almost exclusively, on the plain meaning of the text, ignoring legislative history, precedent, administrative regulations, and other tools of construction. The words of the statute are of primary importance but they do not exist in isolation. As Tony Maida describes it, “[i]n the age of ‘new textualism’ . . . the question of the plaintiff’s inclusion in the ADA’s conditional protected class has increasingly become a convenient vehicle for courts to dispose of ADA cases.”⁵⁶ While the

52. *Id.* at 524. See also Tucker, *supra* note 44, at 322.

53. Akers, *supra* note 39, at 446.

54. 126 F.3d 1088, 1093 (8th Cir.) (1997).

55. *Id.* at 1092.

56. Tony Maida, Note and Comments, *How Judicial Myopia is Jeopardizing the Protection of People with HIV/AIDS under the ADA*, 27 AM. J.L. AND MED. 301, 305–06 (2001).

following sections focus on how the text, in conjunction with the legislative history, regulations, and previous case law, demonstrate that HIV/AIDS was intended to be a per se disability, this section argues that the plain text in-and-of-itself also indicates that HIV/AIDS is a per se disability.

The main textual argument supporting the idea that HIV/AIDS is not a per se disability is that the definition of “disability” includes “with respect to an individual.”⁵⁷ While those words could certainly be read to mean that each individual needs to be examined, it is far from self-evident. Moreover, other sections of the ADA text explicitly mention a “class of individuals with disabilities.”⁵⁸ If “with respect to an individual” is to be fairly interpreted as requiring an individualized inquiry into one’s disability status, then no less fair is the conclusion that by referring to classes of individuals with disabilities the text contemplates that there exist impairments which are, by definition, always disabilities. Thus, people with these disabilities “can be identified and treated as a class.”⁵⁹

Certain impairments can and should be treated as a class when the effects are predictable and universally limiting.⁶⁰ Such disabilities include blindness, quadriplegia, and HIV infection. No one would question whether a person paralyzed from the neck down is substantially limited in a major life activity—a step by step, individualized inquiry is superfluous and it is borderline insulting to scrutinize and question a person whose life has been so devastated. The same is true when questioning the impact that HIV/AIDS has on a person’s life. As the Court in *Bragdon* noted, the disease begins to damage immediately and severely:

[I]nfection with HIV causes immediate abnormalities in a person’s blood, and the infected person’s white cell count continues to drop throughout the course of the disease . . . HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person’s hemic and lymphatic systems from the moment of infection.⁶¹

It is this constant attack that leads almost inevitably to the HIV victim’s death. Moreover, the Court in *Bragdon* found that the text of the statute did not mandate an individualized inquiry with respect to the physical impairment prong of disability, notwithstanding the “with respect to an individual” language.⁶² Hence, *Bragdon*, despite its shortcomings, could be seen as important in interpreting the plain meaning of “with respect to an individual” expansively.

In line with the textual interpretation of HIV as a per se disability is the purpose of the Act, which is part of the text and should not be ignored even from a textualist approach. However, even if the purpose was not specifically enumerated by Congress, courts should look to Congress’ purpose to resolve

57. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (2007).

58. 42 U.S.C. § 12182(b)(2)(A)(i); 42 U.S.C. § 12112(b)(6).

59. Brief of Respondent-Plaintiff at 29, *Bragdon v. Abbott*, 524 U.S. 624 (1998) (No. 97—156) [Hereinafter Brief].

60. *Id.* at 28.

61. *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998).

62. *See id.* at 658 (Rehnquist, J., dissenting).

any questions regarding the plain meaning of the statute in alignment with that purpose.⁶³ If it is not clear from the text that certain classes of impairments are per se disabilities, then an ambiguity exists in the text and the purpose must be evaluated. Again, because Congress codified its purpose, that purpose should be evaluated regardless of ambiguity in the text.

Congress' stated purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"⁶⁴ and a "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."⁶⁵ It is hard to imagine grander, clearer language; the purpose of this Act was to eliminate discrimination against people who had been historically disadvantaged and discriminated against. People with HIV/AIDS, especially in the decade preceding the enactment of the ADA, have suffered such discrimination—perhaps more than any other group.

In conjunction with the articulated purpose of the statute, the plain meaning should be evaluated in light of the statute's remedial nature. It is standard statutory interpretation that remedial legislation, such as the ADA, should be interpreted broadly to effectuate Congress' intention of prohibiting discrimination.⁶⁶ That broad interpretive gloss dictates that the conflicting references to individuals and classes of individuals be read to afford as much protection as possible. The reading that affords the most protection includes HIV/AIDS as a per se disability.

B. Legislative History

Any remaining doubt regarding Congress' statutory intent to include some classes of disabilities as per se disabilities is easily overcome by the voluminous legislative history. Legislative history is valuable when the statutory language is not clear on its face. However, even when "the language of the statute is clear, any lingering doubt as to its proper construction may be resolved by examining the legislative history."⁶⁷ The legislative history of the ADA evinces a clear intent and understanding that all individuals with HIV/AIDS, as a class, are disabled under the ADA.

Both the Senate and the House of Representative considered HIV infection and AIDS as disabilities under the ADA,⁶⁸ without delving into individualized examinations. Both Senate and House reports accepted and concurred with the DOJ's conclusion that "a person infected with [HIV] is covered under the first prong of the definition of the term disability because of a substantial limitation to procreation and intimate sexual relations."⁶⁹

63. *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986).

64. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(1) (2007).

65. 42 U.S.C. § 12101(b)(2).

66. *Atl. Richfield Co. v. Am. Airlines*, 98 F.3d 564, 570 (10th Cir. 1996).

67. *United States v. Clark*, 454 U.S. 555, 561 (1982).

68. Maida, *supra* note 56, at 306 (pointing out that both the House and Senate reports considered HIV as a disability and even went so far as including it in its list of representative disorders).

69. HOUSE LABOR REPORT at pt. 2, at 52; SENATE REPORT at 22; see Memorandum from Douglas W. Kamiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to

Moreover, related both to the ADA's purpose and the legislative history is Congress' belief that ending discrimination against people with HIV/AIDS is a crucial element in the public health strategy for combating the spread of the disease.⁷⁰ The former Chairperson of the President's Commission on the Human Immunodeficiency Virus Epidemic, Admiral Watkins, pressed Congress to enact a strong national policy aimed at preventing discrimination. Admiral Watkins testified that "discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and this Nation's efforts to control the epidemic."⁷¹ Both chambers included this testimony in their reports.⁷² ADA protection for individuals with HIV/AIDS is crucial to stopping the spread of the disease because discrimination pushes the disease underground, perpetuates stigma associated with the disease and, as a consequence, prevents people from getting tested and treated.⁷³ The House, agreeing with the Commission, believed that the ADA was necessary to ensure that "all persons with symptomatic and asymptomatic HIV infection [would] be clearly included as persons with disabilities."⁷⁴ This is unequivocal language indicating that all people with HIV are disabled.

The congressional record is replete with statements by representatives indicating that HIV/AIDS is a "disability" under the ADA. This sentiment was so widespread it seems as if it was almost taken for granted. One example is the statement of Congressman McDermott who said that people with HIV are "covered under the first prong of the definition of disability in the ADA As a physician, I know that although the major life activity that is affected at any point along the spectrum by the HIV infection may be different, an effect on some major life activity exists from the time of HIV infection."⁷⁵ Indeed, even the ADA's most vociferous detractors, such as Senator Helms, recognized that people with HIV are a protected class under the ADA.⁷⁶ That is probably one of the reasons he opposed the bill.

Critics of the per se disability position highlight that the ADA drafters rejected a proposal to treat disability as a category of protected people similar to the protected classes of Title VII: gender, race, national origin, and religion. However, that decision was driven "by political considerations and a calculated

Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 346 (1989). *See also* HERMANN, *supra* note 16, at 797 (discussing the importance of the House and Senate reports and their acceptance of the DOJ report); MAIDA, *supra* note 56, at 306 (also discussing the importance of the House and Senate reports and their acceptance of the DOJ report).

70. *See* Maida, *supra* note 56, at 306–07.

71. SENATE REPORT at 8; HOUSE LABOR REPORT at pt. 2, at 31. *See also* MAIDA, *supra* note 56, at 307.

72. *Id.*

73. Maida, *supra* note 56, at 306–07.

74. HOUSE LABOR REPORT at pt. 2, at 31. *See also* Hermann, *supra* note 16, at 787.

75. 136 CONG. REC. H2626 (daily ed. May 22, 1990) (statement of Rep. McDermott). *See* Wendy E. Parmet and Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J. L. AND MED. 7, 21 (1997).

76. 135 CONG. REC. S10, 765-01 (daily ed. Sept. 6, 1989) (statement of Sen. Helms).

legal judgment that, based on Rehabilitation Act precedent, this definition was functionally equivalent to Title VII.”⁷⁷

One commentator has summarized the legislative history of HIV under the ADA succinctly, stating:

While all of the Congressional legislative reports on the ADA that considered the question of whether HIV infection is a disability under the ADA reached the same conclusion that it is . . . none of the reports actually proceeded through a step-by-step analysis under the actual terms of the statute to show how AIDS and HIV infection met the statutory criteria for disability. Instead, these reports simply assume that the impairment caused by HIV is a significant physical impairment and that persons with HIV are assumed to have a disability.⁷⁸

Hence, Congress clearly believed that HIV was a per se disability and did not find it necessary to undergo a step-by-step analysis to do so.

C. Administrative Regulations

Congress’ inclusion of those with HIV as per se disabled, and thus protected under the ADA, is also found in the administrative regulations. The statute specifically authorizes the Attorney General to promulgate regulations implementing Title III of the ADA.⁷⁹ Because of this congressional authorization the regulations carry significant weight and are not to be ignored as recent decisions have done.⁸⁰ The regulations should be given additional gravitas when one considers that the statute is far from definitive in indicating that an individual inquiry must be conducted.

Consistent with the House and Senate Reports that adopted the DOJ Memorandum, which declared that asymptomatic HIV individuals are disabled because HIV substantially limits the major life activities of reproduction and intimate sexual relations, is the definitions section of the DOJ regulations which adopts the same language.⁸¹ The agency charged with implementing regulations for Title I of the Act,⁸² the EEOC, adopts even more uncompromising language. The EEOC regulations explain how in most cases “[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has Some impairments may be disabling for particular individuals but not for others.”⁸³ The regulations continue, stating “[o]ther impairments, however, such as HIV infection, are

77. Maida, *supra* note 56, at 305. See Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, BERKELEY J. EMP. & LAB. L. 91, 91–93, 126–29 (2000).

78. Hermann, *supra* note 16, at 813.

79. Americans with Disabilities Act of 1990, 42 U.S.C. § 12186(b) (2007) (“Not later than 1 year after the date of the enactment of this Act [enacted July 26, 1990], the Attorney General shall issue regulations in an accessible format to carry out the provisions of this title [42 U.S.C. § 12181 et seq]”)

80. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 479 (1999).

81. 28 C.F.R. Part 36, App. B Section 36.104 (2007).

82. 42 U.S.C. § 12116 (“Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Commission shall issue regulations in an accessible format to carry out this title”)

83. 29 C.F.R. 1630 App. (2007).

inherently substantially limiting.”⁸⁴ HIV is the example that the regulations point to as undoubtedly being substantially limiting. The Technical Assistance Manual on Title I echoes this by describing how “[s]ome impairments, such as blindness, deafness, HIV infection or AIDS, are by their nature substantially limiting.”⁸⁵ To complete the enthymeme: HIV is thus, by its nature, a disability.

Bragdon recognized the validity of both the pre- and post-ADA regulations. Justice Kennedy acknowledged that the Court’s “holding is confirmed by a consistent course of agency interpretation before and after the enactment of the ADA.”⁸⁶ The Court also condoned the adding of HIV to the representative list of disorders constituting a physical impairment.⁸⁷ Moreover, relying on the administrative regulations to help interpret the definition of disability in the ADA is consistent with *Chevron* analysis.⁸⁸ *Chevron* analysis, as explained by the Supreme Court in *United States v. Mead Corporation*, first requires courts to determine whether Congress intended to grant the agency the power to issue regulations with the “force of law” on the subject in question.⁸⁹ If there is such a delegation, courts are to examine whether the statute’s meaning is clear or ambiguous/silent.⁹⁰ If the meaning is clear then the regulations should be consistent with the statute. If the meaning is ambiguous or silent, then courts are to defer to the agency interpretation so long as the interpretation is reasonable.⁹¹ If there is no delegation then the regulations are not entitled to *Chevron* deference (though they may be entitled to some lower level of deference).⁹²

Here, Congress’ intent to have the agencies issue regulations with the “force of law” is made evident both by the explicit charge to the agencies to issue regulations and by Congress’ acknowledgement of the pre-ADA regulations which it approved, endorsed, and incorporated.⁹³ As outlined in the previous sections, a strong argument can be made based on the plain meaning and legislative intent that HIV was intended to be considered a per se disability and thus any regulation to that affect is consistent with the statute. However, at worst, the statute is ambiguous or silent as to the meaning of disability and thus the agency regulations should be deferred to if reasonable. Here, the regulatory definitions are eminently reasonable especially when considered in light of the text, legislative history, and purpose of the ADA all which support a per se disability ruling and, more generally, are geared towards protecting individuals

84. *Id.*

85. EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at T-II (1992).

86. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998).

87. *Id.* at 646; 28 C.F.R. 36.104(1)(iii) (2007).

88. *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see Maida, *supra* note 56, at n.121 (highlighting the role of *Chevron* analysis and how if the language is not clear, then agencies can be empowered to fill the gap).

89. *Id.* at 843–44; *United States v. Mead Corporation*, 533 U.S. 218, 226–27 (2001).

90. *Chevron*, 467 U.S. at 842–43; *Mead*, 533 U.S. at 226–30.

91. *Chevron*, 467 U.S. at 844; *Mead*, 533 U.S. at 229.

92. *Mead*, 533 U.S. at 226–27

93. Americans with Disabilities Act of 1990, 42 U.S.C. § 12186(b); § 12116. (2007), MAIDA, *supra* note 56, at 307.

with disabilities from the scourge of discrimination. As a result, great deference should be given to the agency regulations.

Despite Congress's delegation to the agencies and their recognition of that delegation in *Bragdon*, the Court, just one year later in *Sutton*, had a change of heart. In *Sutton*, the Court wrongly ignored the EEOC regulations, arguing that because of the ADA's structure, no agency had been delegated authority to issue regulations regarding the definitions sections, 12101 and 12102.⁹⁴ The argument in *Sutton* was that Section 12116 of the ADA commands the EEOC to "issue regulations [. . .] to carry out this subchapter."⁹⁵ According to the majority, the reference to "this subchapter" confines the regulations scope to Title I, Sections 12111-12117.⁹⁶ However, as Justice Breyer highlights in his dissent, the EEOC is empowered to "elaborate through regulations the meaning of the term 'disability' if elaboration is needed in order to 'carry out' the substantive provision of 'this subchapter.'"⁹⁷ Also, the term "disability" is ubiquitous throughout Title I and because the term is used in the subchapter referred to by Congress, the EEOC is empowered to issue regulations to clarify its meaning.⁹⁸ Finally, the language "in this subchapter" was most likely added to distinguish the EEOC's ability to regulate employment and the DOJ's ability to regulate under Title III as opposed to limiting either agency's ability to interpret the meaning of "disability."

In addition to the current regulations, the previous legal history of the ADA is overwhelming in its endorsement of the interpretation of HIV as a per se disability.

D. Prior Legal History

As described above in the *Overview of the ADA*, Congress, knowing how the courts and regulations had interpreted the definition of handicap in the Rehabilitation Act, used the same definition and regulations in the ADA.⁹⁹ As Abbott's brief points out, "every reported decision under the Rehabilitation and the Fair Housing Act had determined that asymptomatic HIV constituted a disability."¹⁰⁰ The list of court decisions ruling that asymptomatic HIV is a per se disability is voluminous.

In *Cain v. Hyatt*, the court ruled that "HIV infection constitutes a substantial limitation upon major life activities."¹⁰¹ The court in *Thomas v. Atascadero Unified School District* held that "[p]ersons infected with the AIDS virus suffer

94. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 479 (1999); Maida, *supra* note 56, at n.162.

95. *Americans with Disabilities Act of 1990*, 42 U.S.C. § 12116 (2007).

96. *Sutton*, 527 U.S. at 478.

97. *Id.* at 514 (Breyer, J., dissenting). See Maida, *supra* note 56 at n.162 (quoting and highlighting Breyer's recognition that the term disability is throughout the ADA and thus the EEOC would have the authority to help define the term).

98. See *Sutton*, 527 U.S. at 514-15 (Breyer, J., dissenting).

99. See discussion *supra* at 4.

100. Brief, at 9-10. See Hermann, *supra* note 16, at 853 (also pointing out that "every agency that addressed the problem before enactment of the ADA reached the conclusion that those with HIV infection were handicapped")

101. 734 F. Supp. 671, 679 (E.D. Pa. 1990).

significant impairments of their major life activities.”¹⁰² In *Doe v. Garrett*, the court noted that “it is well established that infection with AIDS constitutes a handicap for the purposes of the [Rehabilitation] Act.”¹⁰³ Surprisingly, though *Bragdon* skirted the issue of whether or not HIV/AIDS was a per se disability, the Court also recognized that “[e]very court which addressed the issue before the ADA was enacted in July 1990 . . . concluded that asymptomatic HIV infection satisfied the Rehabilitation Act’s definition of a handicap.”¹⁰⁴ The Court did so while citing a cache of cases even more comprehensive than the one included in the Plaintiff’s brief.¹⁰⁵

This prior legal history revolving around the Rehabilitation Act is of incredible significance given the standard canon of construction that presumes that when Congress enacts a new law incorporating language or sections of previous law, Congress is aware of the previous judicial interpretations and adopts them as part of the new statute unless otherwise specified.¹⁰⁶ That presumption is all the more valid here because Congress gave explicit directions that the ADA be interpreted in alignment with such prior legal history and dictated that no lower standards or protections be applied than those applied in the Rehabilitation Act.¹⁰⁷ Indeed, the ADA was specifically drafted to incorporate the Rehabilitation Act and its prior interpretation because lawmakers were comfortable with the act and the judicial interpretations of it.¹⁰⁸

Given that the prior legal history, agency regulations, legislative history and plain text support the idea that HIV, even when asymptomatic, is a per se disability under the ADA, the Court should either rule as such based on the overwhelming weight of legal evidence or Congress should clarify its intention to include HIV/AIDS as a per se disability. However, aside from the purely legalistic or formalistic reasons to rule that HIV/AIDS is a per se disability, there are also policy reasons and practical benefits to the per se disability rule.

V. THE POLICY AND PRACTICAL BENEFITS OF A PER SE DISABILITY RULING

Until this point, the focus of this note has been to justify HIV/AIDS as a per se disability from a legal perspective. Focusing on the law should not overshadow the more fundamental reason why a per se ruling is necessary: because of the protection it would provide. It would serve as the full embodiment of Congress’s intent in passing the ADA, fundamentally changing how the least amongst us are viewed.

102. 662 F. Supp. 376, 379 (C.D. Cal. 1987); see HERMANN, *supra* note 16, at 807–08 (discussing the court’s treatment of an asymptomatic HIV positive individual as per se handicapped under the Rehabilitation Act).

103. 903 F.2d 1455, 1459 (11th Cir. 1990).

104. *Bragdon v. Abbott*, 524 U.S. 624, 644 (1998); see Brief, at 61–62.

105. *Id.*

106. *Lorillard, Div. of Loew’s Theatres, Inc., v. Pons*, 434 U.S. 575, 580–81 (1978).

107. Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(a) (2007).

108. See Maida, *supra* note 56, at 305, Feldblum, *supra* note 77, at 91–93, 101–02, 126–29 (both discussing Congress’s intent to continue the previous interpretation of the Rehabilitation Act with the enactment of the ADA).

Put simply, a per se disability rule protects people with HIV/AIDS from the discrimination that has plagued the disease since before its official naming and discovery. This protection becomes all the more important when one considers that HIV/AIDS discrimination has often been linked with and used as a reason for discriminating against some of societies most marginalized groups, notably homosexuals and Haitians. Indeed, before the disease was officially termed AIDS, it was known originally known as “GRID,” or gay-related immune deficiency.¹⁰⁹ Sadly and shockingly, some people still refer to it as such.

By ruling that HIV is a per se disability, the loophole that currently exists would be closed. As discussed above, under *Bragdon*, a “major life activity” must be identified, followed by an individualized inquiry into whether the physical impairment affects the major life activity. However, with regard to the “major life activity” of reproduction, homosexuals and people who are unable to have children, may not be protected by the ADA.¹¹⁰ This is particularly true given the recent trend toward limiting what constitutes a “major life activity.”¹¹¹ Even though homosexuals have recently found ways to procreate, “reproduction is generally regarded [wrongly or rightly] as a heterosexual activity.”¹¹² In fact, “courts and commentators alike have expressly excluded gay men and lesbians from the class of people who procreate.”¹¹³ Indeed, the court in *Runnebaum v. Nationsbank of Md., N.A.* directly questions the role of reproduction in the homosexual plaintiff’s life and whether or not reproduction was a “major life activity” for that individual.¹¹⁴ If what constitutes a major life activity is limited, and HIV is not regarded as a per se disability, then homosexuals, post-menopausal women, and others will be unable to gain protected status under a different major life activity. The result is that certain people are not protected simply because of their age, hormones, or sexuality—an unacceptable result.

On a practical level, a per se disability ruling saves the courts and parties resources and time in litigation. By considering HIV/AIDS a per se disability, courts avoid the extensive discovery and individualized inquiry that closely scrutinizes every aspect of a plaintiff’s life and the disease’s impact on it. Courts can devote more attention either to other cases or, within HIV-ADA cases, to the most pressing question of whether or not the disability is the reason for the discrimination.

Finally and briefly, some defense. One of the main concerns by critics of a per se disability ruling is that it will lead to fluvial litigation and frivolous suits.¹¹⁵ These suits run the risk of both watering down the ADA and exposing businesses to financially debilitating liability. However, though a per se

109. Avert.org , The History of AIDS: 1981-1986, http://www.avert.org/his81_86.htm (last visited Aug. 10, 2007).

110. Schneider, *supra* note 2, at 221.

111. See, e.g. *Sutton*, 527 U.S. at 482—83; *Murphy*, 527 U.S. at 521.

112. Michelle R. King & Beth S. Herr, *The Consequences and Implications of a Case-by-Case Analysis Under the Americans with Disabilities Act for Asymptomatic HIV-Positive Gay Men and Lesbians Post-Bragdon*, 8 LAW & SEX. 531, 546 (1998).

113. *Id.*

114. 123 F.3d 156, 172 (4th Cir. 1997).

115. Schneider, *supra* note 2, at 228.

disability ruling would expand the size of the protected class, an important check remains. To win a suit under the ADA, discrimination must occur and it must be based on the disability.¹¹⁶ Just because a person is HIV positive, i.e. disabled, and is dismissed from her job, does not ensure that she has won her suit. Instead, by streamlining the analysis for HIV-positive individuals, the focus of litigation is brought back to the motivation and action of the defendants. This rightly refocuses the discussion on protecting the disabled and ensuring that defendants who do not mistreat the disabled out of fear or malice are also protected. This is contrary to the current focus on forcing plaintiffs to become martyrs and prove that they really, *honestly*, are disabled, and that their lives have been substantially devastated.

There is also a very real concern that labeling people with HIV as per se disabled would further stigmatize them given the historical negatives associated with the term “disabled.” This is an important concern, but one that can be somewhat mitigated. First, by including HIV positive individuals as disabled under the ADA, they are provided legal protection against potential stigmatization and discrimination. That protection will have downstream effects on societal norms. Moreover, not discounting the stigma associated with being disabled, these individuals are already battling the stigma of being HIV positive that may be even more intense. Further, in discrimination cases such as *Bragdon*, plaintiffs are arguing that, despite their condition they are in fact able to do their jobs and that they should be given an equal and fair chance to compete, and work, free of discrimination and stigma.

VI. CONCLUSION

To conclude, HIV/AIDS should be considered a per se disability under the ADA because it is legally sound, good public policy, and practically sensible. The plain text, legislative history, administrative regulations, and prior legal history all demonstrate that HIV was intended to be considered a per se disability and HIV victims were not intended to undergo an extensive, probing, case-by-case analysis. Also, a per se rule would ensure that people with barriers to reproduction such as menopause, infertility, or homosexuality are not unfairly excluded from the ADA’s protection, giving full effect to Congress’ expansive purpose. Because of the requirement that a person be actually discriminated against because of their disability, this rule will not clog the courts nor lead to frivolous litigation. For these reasons, the Supreme Court should rule or Congress should clarify that HIV/AIDS is a per se disability and by doing so help to relight the beacon that is the ADA.

116. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(a) (2007).