No. 18-1139

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Equal Employment Opportunity Commission ("EEOC"), through the Solicitor General, agrees that the Ninth Circuit's judgment is incorrect and asks this Court to grant the petition, vacate the judgment, and remand. BNSF joins that recommendation. A remand would permit the Ninth Circuit to consider the government's new position and bring its circuit law into conformity with conflicting decisions of the Fourth and Seventh Circuits on the second question presented. *See* Pet. 21.

Alternatively, the Court should grant plenary review of that question and *also* the first question presented. The Ninth Circuit's decision creates a serious circuit split that the Solicitor General and Intervenor Holt unpersuasively assert does not exist. Contrary to their view, the Ninth Circuit held that requesting a follow-up medical examination, *in and of itself*, demonstrates that an employer regards a job applicant as disabled. Pet. App. 13a-17a. Resolving this question in BNSF's favor would independently require reversal of the Ninth Circuit's judgment.

I. IN LIGHT OF EEOC'S CONFESSION OF ERROR, THE COURT SHOULD GRANT THE PETITION, VACATE THE NINTH CIRCUIT'S JUDGMENT, AND REMAND.

A. The government's confession of error makes a GVR highly appropriate. It has long been the Court's practice to GVR "in light of…confessions of error…by the Solicitor General." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (per curiam); *see also Stutson v. United States*, 516 U.S. 163, 183 (1996) (Scalia, J., dissenting) (agreeing that GVRs in such

circumstances are "now well entrenched"). And here, both BNSF and EEOC agree that the Ninth Circuit's legal error rendered that court's *judgment*—not merely its reasoning—incorrect. *Stutson*, 516 U.S. at 183 & n.3; *see also* Resp. Br. 27 (citing authorities).

None of the factors that might counsel against a GVR following the Solicitor General's confession of error applies here. *See Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (mem.) (Gorsuch, J., concurring) (summarizing factors). The confession of error bears no "marks of gamesmanship" and is fully justified. *Id.* at 2001. The Ninth Circuit made essentially the same error that this Court has already addressed by relying on policy views about an employer's practices and "by conflating the analytical framework for disparate-impact and disparate-treatment claims." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 51-53 (2003).

Furthermore, no "independent and untainted legal grounds…exist that would support the judgment." *Hicks*, 137 S. Ct. at 2001. On remand, EEOC will not be free to contend that BNSF's employment decision was facially discriminatory or that it constituted discriminatory treatment on this record. Resp. Br. 23-24. Nor can EEOC rely on 42 U.S.C. § 12112(b)(6) or otherwise press a disparate-impact theory given the Solicitor General's concessions on those issues. *Id.* at 24-26.

Contrary to Holt's surprising suggestion, the litigation positions of the Solicitor General, the agency's legal representative in this Court, will bind EEOC on remand. And those positions make it highly likely that a different judgment will be entered on remand. *See Lawrence*, 516 U.S. at 172. Indeed, in all probability, on this record, BNSF will be entitled to judgment.

Nor would accepting EEOC's confession of error "lead to a circuit conflict." *Hicks*, 137 S. Ct. at 2001. BNSF disagrees with the government and Holt's discussion of the conflicting Fourth and Seventh Circuit decisions BNSF cited, *see* Pet. 21-22, but agrees that a GVR would eliminate one side of the circuit split and obviate the immediate need for plenary review of Question 2.

B. Holt contends that Question 2 is "not important" because some state statutes require employers to pay for medical tests under certain circumstances. Intervenor Br. 17-18. Holt does not mention the various limitations present in most of the statutes or that they are rarely enforced, particularly in the safety-sensitive transportation or public-safety arenas.

And with good reason. The statutes—which are not disability-related laws—likely are preempted by the ADA itself, which affirmatively authorizes employers to require medical examinations, including at the applicant's cost. *See* Pet. 23-26; 42 U.S.C. § 12201(b) (saving from preemption state laws providing "greater or equal protection for the rights of individuals with disabilities"); *see also* 29 C.F.R. § 1630.1(c) App. ("[T]he ADA does preempt inconsistent requirements established by State or local law for safety or security sensitive positions."). Other preemption doctrines would independently apply in the context of this case. *See*, *e.g.*, 49 U.S.C. § 20106 (Federal Railroad Safety Act preempts most "[l]aws, regulations, and orders related to railroad safety"); *Emswiler v. CSX Transp., Inc.*, 691 F.3d 782, 792-93 (6th Cir. 2012) (state-law disability discrimination claim preempted by Railway Labor Act).

Regardless, this is not a state-law case. It concerns the construction of an important federal statute, and direction on its scope is essential, especially for multistate employers like BNSF. That is particularly true given that medical-examination issues most often arise with employees in the highly safety-sensitive public-safety, public-protection, and public-transportation sectors. *See* Pet. 2-3, 26, 32-34; *see also* Ass'n Am. R.Rs. *Amicus* Br. 1, 5-9; Nat'l Ass'n Mfrs. & HR Pol'y Ass'n *Amicus* Br. 1-2.

This Court has not refrained from deciding federal issues simply because a state law addresses a related topic. The Court recently heard argument about Title VII coverage even though, as the Chief Justice noted at argument, 23 states have laws addressing the issue. Tr. of Oral Arg. at 25-26, *Bostock v. Clayton Cty.*, No. 17-1618 (Oct. 8, 2019). The statutes Holt cites do not detract from the importance of this case.

C. The Solicitor General correctly confesses error. As EEOC's legal representative before this Court, 42 U.S.C. § 2000e-4(b)(2), the Solicitor General confirms that BNSF did not act unlawfully in requiring that Holt provide medical documentation, including an MRI, to complete the ADA-authorized post-offer medical-examination process. Like BNSF, EEOC recognizes that the Ninth Circuit's decision is based on policy concerns about hypothetical adverse effects of BNSF's medical-examination practices rather than on the statute, a virtual repeat of the Ninth Circuit's reversible error in *Raytheon Co.*, 540 U.S. 44. *See* Pet. 25-26; Resp. Br. 20-26.

The Ninth Circuit misread the ADA's statutory authorization for medical examinations (42 U.S.C. § 12112(d)(3)), which expressly permits employers to

"require" examinations and does not—as Congress has in related statutes—impose the costs of authorized examinations on employers. *See* Pet. 24-25. The lower court instead held that an employer may place on applicants the *burden* of medical examinations, including individualized follow-up examinations, but not the *cost* (in any amount), because the statute's purported silence about costs permits courts to choose an outcome based on a perceived statutory "policy." *See id.* at 23-26.

Holt does not defend the Ninth Circuit's "silence" rationale. Nor does he engage with BNSF's argument that the medical-examination authorization provision necessarily carries with it the authority to require the applicant to pay for it. Pet. 24. Holt argues instead that examinations remain subject to the ADA's general nondiscrimination duty.

The Solicitor General submits that BNSF made "three relevant decisions," observing that as to each BNSF implemented facially neutral practices without disparate treatment based on disability. Resp. Br. 20-25; *see also* Nat'l Ass'n Mfrs. & HR Pol'y Ass'n *Amicus* Br. 13-15 (pathogen example). Holt responds that, by seeking an MRI to investigate Holt's purported impairment, BNSF necessarily acted on the basis of a "protected trait" and thus "with a discriminatory motive." Intervenor Br. 20-21. Consequently, Holt contends, BNSF did not act on the basis of "facially neutral" practices either in seeking the MRI or in declining to offer to pay for it. *Id.* at 21-24.

Holt's argument fundamentally misunderstands the statute. Under his view, authorized follow-up medical examinations, which as the Solicitor General notes EEOC has always approved, Resp. Br. 21, would

necessarily constitute unlawful disparate treatment because they are motivated by a "protected trait." Intervenor Br. 20-24. Holt tries to avoid the contradiction by asserting that an individualized follow-up medical examination, while constituting disparate treatment, can never be an "adverse employment action." *Id.* at 21-22. He offers no authority for that position, which was not argued below and is wrong in any event. On Holt's view, an employer could intentionally require all manner of follow-up examinations to impose time, travel, and physical burdens expressly for a discriminatory purpose, yet the conduct would not be actionable (assuming the employer paid) because the examinations would not constitute "adverse employment actions."

Moreover, Holt overlooks that disability is unlike other protected statuses. This Court has long recognized the point. *See Alexander v. Choate*, 469 U.S. 287, 298 (1985) ("the handicapped typically are not similarly situated to the nonhandicapped"); *see also Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) ("Congress understood in shaping the ADA…[that nondiscrimination] would sometimes require not blindfolded equality, but responsiveness to difference…."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985) (disability not a suspect or quasi-suspect classification).

Disability differs from other traits in the employment setting because impairment sometimes matters to an individual's employability. It is no accident that the ADA is the only federal discrimination statute that expressly protects only *qualified* individuals. *See* 42 U.S.C. §§ 12111(8), 12112(a). Thus, rather than requiring employers always to *disregard* disability

when making employment decisions—as they are expected with "blindfolded equality" to disregard race, national-origin, color, and other characteristics that have no bearing on employability—the ADA both *allows* employers to require and assess medical job qualifications, *id*. § 12112(d), and *compels* employers to make reasonable accommodations for individuals with disabilities, *id*. §§ 12111(9), 12112(b)(5)(A).

Under the ADA, an employer *can* permissibly consider the effect that potential impairments may have on an individual's employability. The employer need not be "blindfolded." While Holt's analysis may apply under Title VII, it does not work under the ADA. Far from being evidence of discriminatory motive, as Holt claims, Intervenor Br. 20, an employer's ability to consider and act on a potential impairment to determine medical qualifications is part of the negotiated fabric of the statute.

Holt's reading of the statute thus erases a crucial legislative compromise. Authorized medical examinations were essential to employers, who had long required such examinations, particularly in safety-sensitive industries. *See* 29 C.F.R. § 1630.14(b) App.; Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans With Disabilities Act: A View from the Inside*, 64 Temp. L. Rev. 521, 534-40 (Summer 1991). Holt reads the medical-examination provision as simply another enumerated act that can constitute discrimination under Section 12112(a), not as the authorization to require the examinations that Congress intended. Under Holt's view, the medical-examination provisions are redundant of the general prohibition on discrimination in Section 12112(a) and do no work.

As the Solicitor General recognizes, proof of "disparate treatment" under the ADA requires evidence of discriminatory motive, meaning deliberately using an individual's impairment *for the purpose of* excluding them from employment opportunities. Resp. Br. 21. Merely showing, as here, that the employer acknowledged and acted on an applicant's reported medical history—even if that history included an impairment—does not suffice. And as the Solicitor General explains, *id.* at 21-24, no one has ever contended that BNSF's policies, practices, or actions concerning Holt were a façade for intentional denial of equal employment opportunity to a qualified individual with a disability.

II. ALTERNATIVELY, THE COURT SHOULD GRANT PLENARY REVIEW OF BOTH QUESTIONS PRESENTED.

If the Court does not accept the GVR recommendation it should grant plenary review of Question 2 for the reasons stated in BNSF's petition and above. It also should grant plenary review of Question 1.

A. The government and Holt read the Ninth Circuit's decision unreasonably. In their view, the lower court held that BNSF regarded Holt as disabled because it accepted Holt's report of a 2007 disc extrusion. They submit that the Ninth Circuit's mention of Dr. Jarrard's use of the phrase "back condition" means that alone was the basis for its holding. Resp. Br. 13-14, 17; Intervenor Br. 12-14.

But the Ninth Circuit actually held: "*In* requesting an MRI because of Holt's prior back issues and conditioning his job offer on the completion of the MRI at his own cost, BNSF assumed that Holt had a 'back

condition' that disqualified him from the job unless Holt could disprove that proposition." Pet. App. 17a (emphasis added). The holding's context, grammar, and syntax leave no doubt that the court considered regarded-as liability triggered by the mere act of "requesting" a follow-up MRI.

If all the Ninth Circuit decided was that Dr. Jarrard had written "back condition" rather than "back" in the communication and thereby assumed that an impairment existed, the court could have said that and nothing more. Instead, the Ninth Circuit held that *by the act* of requiring the MRI, BNSF assumed Holt had an impairment. Pet. App. 17a. That was why the court deemed it unnecessary to "parse the nature of Holt's medical condition." *Id.* The court created a legal *presumption* that requiring the MRI constituted perceiving Holt as having an impairment. *Id.* The government's and Holt's recasting of the Ninth Circuit's holding does not withstand scrutiny.

B. That erroneous recasting also forms the principal basis of the government's and Holt's denial of a circuit split. In addition, they dismiss the conflicting cases as pre-dating the 2008 ADA amendments. Yet neither addresses BNSF's detailed explanation why those amendments do not touch the regarded-as issue. *See* Pet. 15-17; *see also Richardson v. Chi. Transit Auth.*, 926 F.3d 881, 888-89 (7th Cir. 2019).

Moreover, in emphasizing the substantial-limitation language of the pre-amendment cases, Holt and the government overlook the core holding of those cases: "Doubts alone do not demonstrate that the employee was held in any particular regard." *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001). Other than invoking "ADA amendments" and

"broad construction," the government and Holt have no textual or other explanation for why, post-amendment, doubts somehow become an actionable "perception" of impairment.[1]

C. On the merits of Question 1, the government and Holt err in arguing that BNSF "regarded" Holt as disabled. Resp. Br. 12-14. They never defend the Ninth Circuit's "perceived as" reasoning. Instead, they shift from a perceived-impairment theory to an actual-impairment theory. They cite the regulatory definition of "impairment" and declare that a disc extrusion is an "impairment" because one aspect of an extrusion (though not the one that caused Dr. Jarrard to request information) is the "irreversible" loss of material from a disc. Resp. Br. 13; Intervenor Br. 13. That is the same argument EEOC unsuccessfully made to the Ninth Circuit, describing the condition as "permanent." *See* Pet. App. 15a-17a.

Holt and the government offer no justification for their assumption that any permanent loss of bodily material is an impairment, an assumption that the loss of the appendix, gall bladder, tonsils, or wisdom teeth, among other bodily material, proves unfounded. Contrary to their assumptions, not every "negative abnormality" or body-related issue labeled a "condition" is an ADA-defined "impairment." *See*, *e.g., Rich-*

[1] *Pena v. City of Flushing*, 651 F. App'x. 415 (6th Cir. 2016), expressly rejects the argument that the ADA amendments affected the Sixth Circuit's previous reasoning that uncertainty about an impairment does not equal perceiving an impairment. The obviousness of the conclusion may explain why the court was content to express it in a non-precedential decision.

ardson, 926 F.3d at 890-91; *Neely v. Benchmark Family Servs.*, 640 F. App'x. 429, 433 (6th Cir. 2016).[2]

Holt and the government again point to Dr. Jarrard's use of "back condition" as proof BNSF perceived Holt as having an impairment. That was not the Ninth Circuit's rationale. Nor would it make sense. When an applicant reports a medical condition, it is natural for the employer's physician to use medical terminology, rather than legalistically noting an "alleged" or "purported" condition in communicating with the applicant about the report. The same reasoning applies to use of the word "prognosis." Regarded-as coverage cannot come down to the physician's turn of phrase when asking about an applicant's or employee's self-reported back condition.

Moreover, as EEOC agreed, an "impairment" must be current. Pet. App. 14a. Holt's 2007 disc extrusion was a *past* event, and a past impairment does not equate to a present impairment or perception of an impairment. *Cf.* 42 U.S.C. § 12102(1)(B) (separate provision covering past disabilities). If it did, every conflicting case cited in BNSF's petition was wrongly decided, because in each the employer was aware of a past medical issue. *See* Pet. 10-15.

BNSF indisputably did not know the current state

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[2] By arguing that EEOC did not prove an impairment, actual or perceived, BNSF is *not* proposing a return to the pre-amendment substantial-limitation standard or otherwise focusing on a person's functional capabilities, but is simply applying the definition of "impairment." The government's attribution of a "functional test" argument to BNSF is mistaken. BNSF has never made any such argument. *See* Pet. C.A. Opening Br. 16-17, 33-36 & n.5; Pet. C.A. Reply Br. 6-7; D. Ct. Doc. 98, at 14-15 (Nov. 2, 2015).

of Holt's back when it sought information from him. Dr. Jarrard's uncontradicted testimony expressed doubts about *whether* an impairment existed. *E.g.*, C.A. E.R. 560 ("And it's now four years later, and it's a reasonable medical question to know what happened, what's the status of things now compared to where it was four years ago. Have they been completely resorbed? Wonderful if they have."); C.A. E.R. 899 ("I didn't have enough information to know whether it was a continued—an ongoing issue then or not."). Likewise, the undisputed purpose of the MRI was to determine whether the material from Holt's disc had been resorbed. C.A. E.R. 599-600. Exploring that question showed only doubts—not a perception of impairment.

The ADA permits employers to examine medical uncertainties without fear of a government enforcement action. *See* Pet. 5-6 (quoting *Arline* as showing that the purpose of regarded-as coverage is to favor "actions based on reasoned and medically sound judgments"). That is true in every court of appeals save the Ninth Circuit.

CONCLUSION

The Court should GVR as to Question 2 in light of the Solicitor General's position. Alternatively, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: October 23, 2019.