No. 18-1139

In the Supreme Court of the United States

BNSF RAILWAY COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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After the Equal Employment Opportunity Commission (EEOC or Commission) filed its brief in this case, the Court granted Russell Holt's motion for leave to intervene as a respondent and to file a brief in opposition. This supplemental brief, filed pursuant to Rule 15.8 of this Court, responds to Holt's brief in opposition.

A. The Court Of Appeals Erred In Affirming The Grant Of Summary Judgment In Favor Of The EEOC

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, prohibits discrimination "on the basis of disability in regard to job application procedures * * * and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). An employer violates that prohibition by "treat[ing] some people less favorably than others because of their" disability. *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52 (2003) (citation omitted). To establish such disparate treatment under

the ADA, a plaintiff must identify a decision by the employer that was "actually motivated" by disability. *Ibid.* (citation omitted).

In this case, petitioner required Holt (1) to obtain a follow-up MRI and (2) to pay for that MRI.[*] In affirming the grant of summary judgment to the EEOC, the court of appeals concluded that the second, but not the first, of those decisions violated the ADA's prohibition on discrimination on the basis of disability. Pet. App. 17a-24a. The court's theory was that, although petitioner made both decisions because of Holt's disability, *id.* at 20a-21a, the ADA "implicitly authorized" the requirement that he bear the "additional burden" of undergoing the follow-up MRI, but not the requirement that he bear the "further burden" of paying for it, *id.* at 20a.

As the EEOC's brief explains (at 20-26), the court of appeals' reasoning cannot be squared with the statute. Although the court was correct to conclude that petitioner's decision to require Holt to obtain a follow-up MRI did not violate the ADA, that is not because the ADA "implicitly authorize[s]" discrimination on the basis of disability in follow-up examinations, Pet. App. 20a; quite the opposite, the ADA expressly prohibits such discrimination, see 42 U.S.C. 12112(a), 12112(d)(1) and (d)(3)(A); EEOC Br. 23-24. Petitioner's decision to require the follow-up MRI did not violate the ADA for a different reason: because the record indicates that it was not actually motivated by disability in the first place. See EEOC Br. 21. And if, as the record also indicates, petitioner has a general policy of declining to

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[*] Petitioner also treated Holt as having declined his conditional job offer when he did not obtain a follow-up MRI. C.A. E.R. 645, 1483. But the court of appeals did not conclude, and Holt does not contend, that decision alone violated the ADA. See EEOC Br. 22.

pay for any follow-up MRI—whether or not the job applicant is perceived as having a physical or mental impairment—then its decision to require Holt to pay for the follow-up MRI was likewise not motivated by disability and likewise not a violation of the ADA. See *id.* at 22-24.

In his brief in opposition, Holt adopts a theory different from the court of appeals', but his theory likewise cannot be squared with the statute. Like the court of appeals, Holt distinguishes (Br. in Opp. 21-22) requiring him to obtain a follow-up MRI from requiring him to pay for it, arguing that the first of those decisions did not violate the ADA but that the second one did. Unlike the court of appeals, however, Holt rests that distinction (*id.* at 22) on a theory about the kinds of "adverse employment action[s]" the ADA covers. He contends (*ibid.*) that, although both of petitioners' decisions were motivated by disability, only the second—requiring him to pay for the follow-up MRI—is an "adverse employment action" covered by the ADA. In Holt's view, requiring a job applicant to undergo a follow-up examination, without more, "is not a covered 'adverse employment action,'" *id.* at 21-22 (citation omitted)—by which he means that it is not "the sort of adverse action that would violate Section 12112(a) if the requirement were imposed because of the applicant's disability," *id.* at 23.

That contention is wholly divorced from the ADA's text. The words "adverse employment action" do not appear in the statute. Rather, the text of the ADA's general prohibition against discrimination provides: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to *job application procedures*, the hiring, advancement, or dis-

charge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a) (emphasis added). The kinds of employment actions covered by the ADA therefore include "job application procedures." *Ibid.* And the phrase "job application procedures" is naturally understood to encompass medical examinations that an employer requires as part of the job application process.

Any doubt that the ADA's general prohibition against discrimination covers such examinations is eliminated by Section 12112(d), which provides that "[t]he prohibition against discrimination as referred to in subsection (a) of this section *shall include medical examinations and inquiries*." 42 U.S.C. 12112(d)(1) (emphasis added). And with respect to post-offer, preemployment medical examinations specifically, Section 12112(d) further provides that an employer "may require" such an "examination" if, among other things, "all entering employees are subjected to such an examination *regardless of disability*." 42 U.S.C. 12112(d)(3)(A) (emphasis added).

Thus, although Holt is correct that requiring him to obtain a follow-up MRI did not violate the ADA, he is wrong about the reason. The reason cannot be that requiring such an examination fails to be a covered adverse employment action under the statute. As explained above, the ADA makes clear that requiring an applicant to obtain a follow-up MRI *is* the sort of action that would violate the statute if the requirement were imposed because of the applicant's disability. See 42 U.S.C. 12112(a), 12112(d)(1) and (3)(A). Rather, the reason that requiring a follow-up MRI did not violate the ADA here is the lack of evidence showing that petitioner imposed that requirement because of Holt's disability. It is not

discrimination on the basis of disability for an employer to require each job applicant to provide all medically relevant information as a condition of completing the medical screening process. See EEOC Br. 21. And the record indicates that petitioner was simply following such a policy here when it required Holt to obtain a follow-up MRI. See, *e.g.*, C.A. E.R. 575, 602-603, 671, 902, 919, 961.

Contrary to Holt's contention (Br. in Opp. 19-21, 23), the email he received from petitioner requesting the follow-up MRI does not establish discriminatory motive. That email stated that a follow-up MRI was "needed to determine [his] qualification for [the] position due to uncertain prognosis of [his] back condition." C.A. E.R. 671. The email itself thus indicates that petitioner's request was motivated not by disability, but by a "need[]" for "[a]dditional information" to determine Holt's "qualification" for the job in the face of "uncertain[ty]." *Ibid.* To be sure, the cause of that uncertainty was a perceived impairment—Holt's "back condition." *Ibid.*; see EEOC Br. 12-16. But that shows only that the need for additional information was "related to" disability—not that the request was motivated by disability itself. *Raytheon*, 540 U.S. at 54 n.6; see *Lopez* v. *Pacific Mar. Ass'n*, 657 F.3d 762, 764 (9th Cir. 2011) ("The ADA prohibits employment decisions made because of a person's qualifying disability, not decisions made because of factors merely related to a person's disability."). When, as the record indicates here, an employer is simply following a neutral policy of obtaining all medically relevant information from each applicant, a request for additional medically relevant information is the product not of discriminatory motive, but of the "analytically distinct" need to complete the applicant's

medical picture. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 611 (1993); cf. *Kentucky Ret. Sys.* v. *EEOC*, 554 U.S. 135, 143 (2008) (explaining that, because "age and pension status remain 'analytically distinct' concepts," "one can easily conceive of decisions that are actually made 'because of' pension status and not age, even where pension status is itself based on age") (citation omitted).

Holt's novel reading of the ADA therefore fares no better than the court of appeals'. Indeed, no court has ever embraced his reading; nor did either court below even consider it. And the fact that Holt is unable to defend the court of appeals' decision on its own terms in light of the position asserted in the EEOC's brief suggests at least a "reasonable probability" that the court of appeals itself may reconsider its decision in light of that position if given the opportunity. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

B. A GVR Is Warranted In Light Of The EEOC's Confession Of Error In This Court

Although Holt acknowledges (Br. in Opp. 25) that "a confession of error by the Solicitor General (or any litigant) will often warrant a GVR," he contends that a GVR is unwarranted in this case because the EEOC has independent litigating authority in the lower courts. That authority, however, should have no bearing on this Court's decision whether to issue a GVR. That is because the EEOC in this case is bound by its confession of error in any event.

1. Title 42 U.S.C. 2000e-4(b) gives the General Counsel of the EEOC the "responsibility for the conduct of litigation" on behalf of the Commission in the lower courts. 42 U.S.C. 2000e-4(b)(1). Section 2000e-4(b)(2) provides, however, that "the Attorney General shall

conduct all litigation to which the Commission is a party in the Supreme Court." 42 U.S.C. 2000e-4(b)(2); see 28 U.S.C. 518(a) ("Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested."). The Attorney General has delegated that authority to the Solicitor General. 28 C.F.R. 0.20(a); see *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 92-93 (1994).

The Solicitor General thus represents the EEOC in this Court. Indeed, both this brief and the brief previously filed by the Solicitor General in this case are briefs "for the respondent"—namely, the EEOC. EEOC Br. 1 (capitalization and emphasis omitted); p. 1, *supra* (capitalization and emphasis omitted). And because those briefs represent the position of the EEOC in this case, it is now the EEOC's position that the court of appeals erred in affirming the grant of summary judgment in the EEOC's favor. See EEOC Br. 20-26; pp. 1-6, *supra*.

That confession of error is an express repudiation, and thus waiver, of any argument to the contrary. See *Stutson* v. *United States*, 516 U.S. 193, 195 (1996) (per curiam) (describing a confession of error as a "repudiat[ion] [of] the legal position that [the prevailing party] advanced below"). And like any such waiver, it is binding on the party that makes it throughout the rest of the litigation. See *Stanford Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 592 (2013) ("Stipulations must be binding."); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law* v. *Martinez*, 561 U.S. 661, 678 (2010) ("[A] judicial admission . . . is conclusive in the case.") (citation omitted). To be sure, a court need

not accept the existence of error. See *Young* v. *United States*, 315 U.S. 257, 258-259 (1942) (explaining that a court may "examine independently the errors confessed"). But the confession remains binding on the party making it—here, the EEOC.

It follows that the EEOC could not undo the confession of error it has made in this Court. That is so even if the case were remanded to the court of appeals, where the EEOC's General Counsel would resume responsibility for the conduct of litigation on behalf of the Commission. Although the General Counsel would possess independent litigating authority in that court on issues not covered by the confession, the EEOC would remain bound in this case by the confession itself—just as any party would remain bound by an earlier concession in a case, notwithstanding a subsequent change in counsel. Thus, contrary to Holt's contention (Br. in Opp. 25-26), the EEOC could not simply return to its prior position on remand if this Court were to issue a GVR. This case therefore is no different from the cases in which Holt acknowledges (*id.* at 25) "there is usually good reason" for a GVR.

2. Distinguishing this confession of error from others because of the EEOC's independent litigating authority in the lower courts would lead to anomalous results. First, it would undermine one of the central "reasons for reserving litigation in this Court to the Attorney General and the Solicitor General": "the concern that the United States usually speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people." *United States* v. *Providence Journal Co.*, 485 U.S. 693, 706 (1988). If, as Holt suggests (Br. in

Opp. 25-26), the appropriateness of a GVR should depend on whether the EEOC's General Counsel agrees with, and appears on, the brief filed by the Solicitor General confessing error, then the Court would effectively be permitting the EEOC to speak with two voices, not one, before this Court.

Second, treating this case as different because of the EEOC's independent litigating authority in the lower courts would suggest that the Solicitor General's representations about the Commission's position in this Court were only provisional, unless the EEOC's General Counsel agreed with them. That would undermine not only this Court's ability to rely on those representations, but also the Solicitor General's exercise of "independent judgment" in arriving at a position in the first place. *Providence Journal*, 485 U.S. at 702 n.7.

Third, if a GVR were inappropriate because the EEOC could simply walk away from a position that the Solicitor General had taken on its behalf in this Court, the Solicitor General would have little choice but to urge plenary review in many cases otherwise not worthy of certiorari, merely as a way of vacating the erroneous judgment and binding the EEOC through this Court's decision. Such a system is not one the Court should wish to encourage.

3. Holt's remaining arguments against a GVR likewise fail. He attempts (Br. in Opp. 26) to analogize the EEOC's briefs in this case to the Solicitor General's invitation briefs in other cases. When, however, the Solicitor General files a brief in response to this Court's call for his views, he generally files a brief for the United States as amicus curiae. Even assuming that an amicus brief for the United States would not bind fed-

eral agencies in the exercise of their independent litigating authority in the lower courts, that is not the type of brief at issue here. Here, the briefs filed by the Solicitor General (including this one) are briefs not for the United States as amicus, but for the EEOC as respondent, the prevailing party below. And as Holt acknowledges, a GVR is typically appropriate when a "prevailing party" confesses error. *Id.* at 25 (citation omitted).

Holt also observes (Br. in Opp. 27) that several Justices have criticized the Court's current GVR practice as "insufficiently respectful of the lower courts." In particular, several Justices have objected to GVRs when the Solicitor General, "without conceding that a *judgment* is in error, merely suggests that the lower court's *basis* for the judgment is wrong." *Nunez* v. *United States*, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting); see, *e.g.*, *Myers* v. *United States*, 139 S. Ct. 1540, 1541 (2019) (Roberts, C.J., dissenting) (similar). Here, however, the Solicitor General, on behalf of the EEOC, has taken the position that the record does not support summary judgment in favor of the EEOC on any theory. See EEOC Br. 20-27. Thus, the Solicitor General has confessed error in the court of appeals' *judgment*, not just its reasoning.

* * * * *

For the foregoing reasons and those stated in the EEOC's previous brief, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further proceedings in light of the position asserted in the EEOC's briefs.

Respectfully submitted.

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