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

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KATHRYN D. KIRMAYER
DANIEL SAPHIRE
Counsel of Record
EDWARD A. KENDALL, JR.
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
(202) 639-2505
dsaphire@aar.org

Counsel for Amicus Curiae Association of American Railroad

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR seeks to participate as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole.

This case raises such an issue because the decision below, which creates a split with other Courts of Appeals, has created uncertainty about the impact of hiring practices utilized by railroads and other employers to assess whether prospective employees will be able to perform their jobs safely. Inasmuch as maintaining a safe workplace is the railroad industry's highest priority, and a substantial percentage of railroad employees perform safety-critical jobs, resolving that uncertainty is of utmost importance to AAR's member railroads.

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[1] As required by Rule 37.2(a), counsel for AAR has timely notified the parties of AAR's intent to file this brief. Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

Many railroad jobs are physically and mentally demanding, and railroad operations can pose risks of serious injury or death to employees and to others if an employee has a medical condition that impairs the mental awareness and concentration, or physical ability, required to safely perform his or her job's essential functions. In fact, Congress has designated many railroad jobs as "safety-related," and imposed requirements and restriction designed to assure that those employees are capable of performing their jobs safely. When railroads hire for any number of safety-critical positions they must make every effort to ensure that the applicant will be able to perform the job safely.

The Ninth Circuit's view that merely investigating a job applicant's ability to safely perform a job confers on that applicant disabled status under the Americans with Disabilities Act (ADA) is in conflict with the law in other Circuits, and the uncertainty arising out of that conflict threatens to substantially disrupt the process by which railroads (and other employers) hire employees. The uncertainty will have its greatest impact where safety-sensitive positions are involved—like in the railroad industry—because that is when it is most important for employers to accurately assess an applicant's ability to perform the job. This Court should grant the petition and resolve this issue, so that railroads can have a clear understanding of the legal ramifications of investigating a prospective employee's abilities.

ARGUMENT

THE DECISION BELOW WILL UNDERMINE THE ABILITY OF RAILROADS AND OTHER EMPLOYERS TO ASSESS WHETHER A JOB APPLICANT WILL BE ABLE TO PERFORM THE JOB SAFELY.

Under the ADA it is unlawful to discriminate against a qualified individual with a disability. 42 U.S.C. §12112(a). To be considered disabled under the ADA, an individual must have (1) a physical or mental impairment that substantially limits one or more major life activity, or (2) a record of such an impairment, or (3) be regarded as having such an impairment. *Id*. at §12102(1). Whether an individual is disabled is a threshold issue in all ADA cases. It was a key issue in this case.

Russell Holt applied for, and was conditionally offered, a position with BNSF as a railroad police officer. Individuals holding railroad police positions must be state-certified. Once on the job, they have the law enforcement responsibilities and functions of police officers in the jurisdictions in which their employing railroad owns property. 49 U.S.C. §28101(a). Those responsibilities include the protection of railroad employees and passengers, as well as railroad property and facilities, and the shipments moved by rail. *Id*. Railroad police jobs, like all law enforcement positions, are physically and mentally demanding, and critical to maintaining overall railroad safety. *See Krocka v. City of Chicago*, 203 F.3d 507, 515 (7th Cir. 2000) ("The position of [ ] police officer certainly presents significant safety concerns, not only for other" police officers "but for the public at large."); *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir.

1999) (noting the "tremendous harm" that can ensue when a police officer cannot properly perform the job).

Like all individuals offered railroad police jobs at BNSF, Holt was required to undergo a post-offer medical examination. *See* 42 U.S.C. §12112(d)(3). When the results of that examination, along with further review by the BNSF's medical staff, left uncertainty about whether Holt had a current impairment that would prevent him from safely performing the job, BNSF asked Holt to undergo a follow-up examination, in the form of an MRI, and to provide updated medical records. When Holt did not complete the MRI or provide the updated records, BNSF considered Holt as having declined the conditional job offer. Holt then filed a charge with the Equal Employment Opportunity Commission, which brought the instant discrimination suit under the ADA. *See* Pet. at 6–7.

Holt claimed that requiring he undergo an MRI meant that BNSF regarded him as having a disability, satisfying an element of his ADA claim. 42 U.S.C. §12102(1)(C). The District Court agreed, and the Ninth Circuit affirmed that an employer's attempt to obtain relevant follow up information on a job applicant's medical condition—a legitimate tool for assessing whether an applicant can perform a job safely—conclusively establishes that the employer regards the applicant as disabled. Pet. App 13a -17a. That ruling has created a split among the Courts of Appeals that will result in uncertainty about how the "regarded as" basis for disability is to be applied in numerous ADA cases.[2]

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[2] The Court of Appeals' decisions that conflict with the decision below involve a number of different industries and different types of jobs. *See* Pet. at 9–15 and 20–22 (describing the split among the Circuits resulting from the decision below).

This Court should grant the petition to resolve that uncertainty. Federal employment law must be interpreted consistently throughout the nation so employers understand their obligations and have a clear sense of the impact of the employment-related decisions they make. For employers, like railroads, that employ many workers in safety-sensitive jobs, the uncertainty created by the existing circuit split is especially problematic because it will undermine their ability to take effective action to assure a safe workplace.

A. A Safe Working Environment Must Be Maintained By All Railroads and Many Railroad Jobs Can Have Grave Safety Implications if Not Performed Properly.

1. *The Nature of Railroad Work*

Although railroad safety has improved markedly over the past several decades, the work remains challenging and difficult.[3] Technological advances have eliminated many of the dangers that were present in the early days of the industry. However, even today rail operations can pose risks of serious injury or death if an employee has a medical condition that impairs the mental awareness and concentration, or physical ability, required to safely perform a job's essential functions. In the railroad industry, a safety lapse can affect not only a particular employee and that

[3] Since 1980, the rate of train accidents has declined by 79 percent; grade crossing accident rates have declined by 80 percent; and employee injuries rates have declined by 83 percent. Fed. R.R. Admin., *Railroad Safety Statistics Annual Report*, 1997-2010, Tables 1-1, 1-2, 4-1; Fed. R.R. Admin., *Accident/Incident Bulletin*, 1980-1996, Tables 19, 36, S. For more recent data see https://safetydata.fra.dot.gov/officeofsafety/publicsite/summary.aspx.

employee's co-workers, but also the general public. Indeed, derailments and the release of hazardous materials can result if an employee fails to perform the job properly or deviates from safety rules. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 628 (1989) (some railroad employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences").

There are a number of factors that account for the railroad industry's improved safety record, but chief among them is the highest priority given to maintaining the safety of rail operations, and protecting rail employees and the communities through which railroads operate. Railroads demonstrate their commitment to safety every day, through massive investments in infrastructure and technology totaling over $100 billion in the last four years alone. Railroads continually work to identify and develop safer operational practices and methods, and have implemented workplace rules and procedures aimed at reducing the likelihood of accidents that are strictly enforced. An important component of maintaining a safe working environment is ensuring that applicants for (as well as employees currently holding) safety-sensitive jobs are capable of performing their jobs safely.

2. *There Are Many Safety-Sensitive Jobs in the Railroad Industry.*

Police officers are far from the only railroad workers with demanding, safety-critical jobs. Railroad employees in a host of jobs are routinely called upon to perform complex tasks that demand physical strength and dexterity, as well as mental alertness and careful attention to detail. Many railroad employees perform their duties in and around large and moving equip-

ment. Railroad jobs are often performed outdoors, sometimes in darkness or inclement weather, or both.

Given the nature of railroad work and the industry's interface with the general public—trains constantly travel through communities throughout the United States—the Federal government has identified the railroad industry as one in which attention to safety is paramount. Congress has regulated railroad safety since the late Nineteenth Century, and in 1970 granted the Secretary of Transportation authority to issue regulations covering every area of railroad safety. 49 U.S.C. §20103(a). That authority has been delegated to the Federal Railroad Administration (FRA), an agency with the sole mission of regulating railroad safety. 49 C.F.R. §1.89.

Congress also has defined a host of railroad employees as "safety-related railroad employee[s]." This includes, but is not limited to, employees who operate trains, maintain the rights-of-way, and inspect, repair or maintain passenger and freight cars and locomotives. 49 U.S.C. §20102(4)(A)–(F). Because the job duties of employees who operate trains have serious safety implications, Congress has limited the number of consecutive hours they may be on the job and prescribed the amount of rest time they must be allowed. *Id.* at §21103. Similar "hours of service" requirements apply to employees who are engaged in installing, repairing or maintaining signal systems, as well as employees who perform dispatching services. *Id*. at §§21104 and 21105. *Baltimore & Ohio R.R. v. Interstate Comm. Comm'n*, 221 U.S. 612, 619 (1911) ("The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends" and Congress is "competent to consider, and to

endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, [ ] and other persons embraced within the class defined by the act.").

In addition, Congress directed that engineers and conductors—the employees who are responsible for operating trains—receive certification before they may undertake those positions. 49 U.S.C. §§20135 and 20163; 49 C.F.R. Parts 240 and 242. With respect to locomotive engineers, FRA requires railroads "to have a formal process for evaluating prospective operators of locomotives and determining that they are competent before permitting them to operate a locomotive or train" in order to "minimize the potentially grave risks posed when unqualified people operate trains." Fed. R.R. Admin. *Qualifications for Locomotive Engineers*, 56 Fed. Reg. 28228 (1991). With respect to conductors, FRA has characterized the purpose of the certification regulations as ensuring "that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety." Fed. R.R. Admin., *Conductor Certification*, 76 Fed. Reg. 69802 (2011). The engineer and conductor certification regulations include a requirement that these employees meet standards for visual and hearing acuity. 49 C.F.R. §§240.121 (engineers), 242.117 (conductors). The FRA also has issued detailed regulations on drug and alcohol testing in the railroad industry in order "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." 49 C.F.R. §219.1(a); *see generally, id*. at Part 219.

It goes without saying that it is especially important that railroads be able to make sure that the people

who are hired to perform safety-critical tasks are able to do so effectively. As this Court has observed, the railroad industry "is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Skinner*, 489 U.S. at 627. *See Kosmicki v. Burlington N. & Santa Fe Ry. Co.*, 545 F.3d 649, 652 (8th Cir. 2008) (affirming summary judgment for railroad in an ADA case where the railroad discharged the plaintiff because he "took medication that adversely affected his ability to perform his job safely"). Consequently, when railroads hire for any number of safety-critical positions they take steps designed to obtain all the information necessary to ensure that the applicant will be able to perform the job safely. That is what BNSF did when it considered Holt for a job as a railroad police officer.

B. Railroads Must Be Able to Effectively Evaluate A Job Applicant's Ability to Perform the Job Safely.

The drafters of the ADA acknowledged that employers have a legitimate "need to discover possible disabilities that do, in fact, limit the person's ability to do the job." H.R. Rep. No. 101-485, Pt. 2, at 73, *reprinted in* 1990 U.S.C.C.A.N. 267, 355 (1990). Moreover, Congress acknowledged that in industries in which safety is a paramount concern, such as transportation, employers have an obligation to assure that their employees are medically fit to perform the job safely. *Id.* at 74. Balancing the desire to end discrimination against persons with disabilities against the imperative of maintaining workplace safety, Congress crafted the ADA to require that employers focus on an employee's or prospective employee's actual ability to perform a job safely based on "valid medical analyses." *Id.* at 73.

The ADA prescribes the kinds of employment-related medical examinations that are permissible. Before an offer of employment is made, an employer may not ask a job applicant to undergo a medical examination or inquire whether he or she is disabled. 42 U.S.C. §12112(d)(2)(A). Once an offer of employment has been made, a prospective employee may be asked to undergo a medical examination, provided that all entering employees are subjected to such an examination regardless of disability. *Id*. at §12112(d)(3); *see Chedwick v. UPMC*, 2011 U.S. Dist. LEXIS 43239, at *33 (W.D. Pa. 2011). Post-offer, pre-employment medical examinations and inquiries must be consistent with the ADA's general prohibition against discrimination based upon disabilities. 42 U.S.C. §12112(d)(3)(C); *Rowles v. Automated Prod. Sys.*, 1999 U.S. Dist. LEXIS 21605, at *22-23 (M.D. Pa. 1999). Such medical examinations do not need to be job-related and consistent with business necessity, but if the results obtained are used to screen out persons with disabilities, the exclusionary criteria must be job-related and consistent with business necessity. 29 C.F.R. §1630.14 (b)(3); *Garrison v. Baker Hughes Oilfield Opers., Inc*., 287 F.3d 955, 960 (10th Cir. 2002).

When an initial examination or inquiry creates uncertainty about an applicant's ability to perform a job, the employer may refer the applicant for further examination. *Sumler v. Univ. of Colo. Hosp. Auth.*, 2018 U.S. Dist. LEXIS 178505, at *20-22 (D. Colo. 2018) (appeal filed); *see* Equal Employment Opportunity Comm'n, EEOC Notice 915.002, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (Oct. 1995) (EEOC Enforcement Guidance); available at https://www.eeoc.gov/policy/docs/preemp.html (last visited Apr. 1, 2019) (after obtaining basic medical

information from all individuals given conditional offers, an employer may ask specific individuals for additional information that is medically related to the information disclosed, e.g., an employer may give medical examinations designed to diagnose back impairments to persons who stated that they had prior back injuries).

The ADA generally does not permit employers to rely on assumptions or stereotypes about how a medical condition will impact a prospective employee's ability to perform a job. Rather, "[i]n order to properly evaluate a job applicant on the basis of his personal characteristics, the employer must conduct an individualized inquiry into the individual's actual medical condition, and the impact, if any, the condition might have on that individual's ability to perform the job." *Holiday v. City of Chattanooga*, 206 F.3d 637, 643 (6th Cir. 2000). An employer must show that it made due inquiry into an applicant's possible impairment sufficient to inform itself whether an impairment exists and if so, whether it imposes any limitations on the applicant's ability to safely perform the job, and then may base a hiring decision on an applicant's actual limitations. *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 29 (1st Cir. 2002). The critical question is whether an adverse employment action, such as a refusal to hire, "resulted from an informed and considered decision, based on appropriate criteria." *Id*. Employment decisions that are not based on good-faith assessments of an individual's capabilities can result in ADA liability. *Id. See Smith v. Chrysler Corp*., 155 F.3d 799, 807-08 (6th Cir. 1998).

As permitted by the ADA, BNSF made an effort to determine whether Holt was capable of performing the job of a railroad police officer. When the initial post

offer, pre-employment examination left BNSF's internal medical staff uncertain about whether Holt could safely perform the job he sought, BNSF attempted to obtain additional, relevant medically related information that was specific to Holt in order to resolve that uncertainty, a legally permissible inquiry. *See* EEOC Enforcement Guidance; *Jennings v. Dow Corning Corp.*, 2013 U.S. Dist. LEXIS 66803, at *28 (E.D. Mich. 2013) (review of applicant's "most recent medical information from each of [his] treating physicians [and] medical questionnaires" filled out by the applicant regarding his treatment history, and consultation with the PA who examined the applicant "is exactly the type of individualized inquiry, based on Plaintiff's current medical capabilities, the ADA demands"). Consistent with the law, by requiring an MRI and updated medical records BNSF was simply attempting to ascertain whether Holt had an impairment, and if so, whether it rendered him unable to safely perform the essential functions of a railroad police officer. "[I]f (and to the extent that) essential job functions implicate the safety of others, the plaintiff must demonstrate that she can perform those functions in a manner that will not endanger others." *Gillen*, 283 F.3d at 24.

The Ninth Circuit held that BNSF's exercise of its legal right to obtain medically related follow up information established that it regarded Holt as disabled. This ruling, which conflicts with the holdings of several other Courts of Appeals, creates potential legal liability whenever employers request additional relevant medically related information about an applicant that is necessary to resolve uncertainties about an applicant's ability to safely perform a job. If permitted to stand, the decision below will undermine employers' ability to make the individualized determinations about job

applicants the ADA requires. This is likely to have the greatest impact when safety-sensitive positions are involved because that is when it is most important that employers accurately assess an applicant's ability to perform the job.

Railroads will live with the risks and uncertainties created by the decision below every day because they have no choice but to make good faith efforts to assure, consistent with the ADA, that a medical condition does not render an employee incapable of performing the job safely. The Ninth Circuit's ruling will affect not just practices related to the hiring of new employees, but also decisions about current employees who may develop a medical condition. Indeed, a number of cases in which the issue presented here has arisen involve fitness-for-duty examinations given to incumbents when questions arose about whether a medical condition affected their ability to continue to perform their job safely. *E.g., Wisbey v. City of Lincoln*, 612 F.3d 667 (8th Cir. 2010) (because an employee's medical condition raised questions about whether she remained able to perform her job as an emergency dispatcher, which required that she be able to obtain accurate and complete information about emergency situations from frantic and incoherent callers, and act quickly and calmly in those situations, it was legitimate for the employer to require a fitness-for-duty psychiatric examination); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506 (3rd Cir. 2001) (it was appropriate for an employer to require that an employee who suffered a back injury submit to an independent medical examination before being permitted to return to his job as a bus driver).

As BNSF points out, it has extensive operations in the Ninth Circuit, and also operates in several other

Federal circuits, some of which have addressed this issue differently than the Ninth Circuit, and some of which have not yet addressed the issue. Pet. at 32.[4] Union Pacific, the other large freight railroad operating in the western United States, is in the same position. Amtrak, the intercity passenger railroad, operates in all Federal circuits. Those railroads will be subject to conflicting rules related to their hiring practices. Of course, railroads that do not operate in the Ninth Circuit also have an interest in having clarity about the legal ramifications of their employment-related decisions. Beyond railroads, there are numerous other employers operating across multiple jurisdictions who hire individuals for safety-critical positions that also will be subject to conflicting legal rules.

Not only will the decision below affect many employers, it will have an impact on innumerable employment-related decisions in the railroad industry alone. As discussed above, a significant percentage of railroad jobs are safety-sensitive. The large railroads each employ several hundred police officers. They also employ many thousands of workers falling within the safety-related category as determined by Congress. 49 U.S.C. §20102(4)(A)–(F). These employees operate locomotives, dispatch trains, switch tracks, maintain signals, and work around heavy equipment and "live" tracks. The ability of each such employee to properly perform his or her job has implications for their own safety, as well as the safety of their fellow workers and

[4] In addition to the Ninth Circuit, BNSF operates in the Eleventh, Tenth, Eighth, Seventh, Sixth and Fifth Circuits. The Sixth, Seventh, Eighth and Tenth Circuits have issued opinions on the "regarded as" issue that conflict with the Ninth Circuit, while the Eleventh and Fifth Circuit have not addressed the issue. Pet. at 12-15.

the general public. At least in the Ninth Circuit, railroads seeking to hire these workers will be faced with the prospect that their efforts to make appropriate individualized assessments about the applicant's ability to perform the job safely will result in a legal disadvantage if a hiring decision results in an ADA claim. To the extent this chills employers' efforts to carefully evaluate whether an applicant's impairments will affect his or her ability to perform safely, it undermines the ADA.

CONCLUSION

For the foregoing reasons the petition should be granted.

Respectfully submitted,

KATHRYN D. KIRMAYER
DANIEL SAPHIRE
Counsel of Record
EDWARD A. KENDALL, JR.
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
(202) 639-2505
dsaphire@aar.org

Counsel for Amicus Curiae Association of American Railroad

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