No. _____

In The Supreme Court of the United States

NICOLE COLTON,

Petitioner,

v.

FEHRER AUTOMOTIVE, NORTH AMERICA, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Colton's short stature could plausibly be a disability covered by the Americans with Disabilities Act 1990, as amended by the ADA Amendments Act of 2008 to survive a motion to dismiss?

2. Whether the ADA Amendments Act of 2008 changes the analysis in *Carruthers v. BSA Advert., Inc.*, 357 F.3d. 1213, 1216, (11th Cir. 2004) of what is necessary to plead to be "Regarded as Disabled"?

3. Based on the ADA Amendments Act of 2008 whether Colton reasonably believed her accommodation request constituted protected activity?

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The opinion of the court of appeals is unpublished. (App. *infra* A1-A9*).* The order of the district court is unpublished. (App.A10-A19)

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2021. A1 Colton's petition for rehearing was denied on September 16, 2021. A20. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act of 1990. (42 U.S.C. § 12101 et seq.) and the ADA Amendments Act of 2008 (ADAAA).

STATEMENT OF THE CASE

The case presents a question of whether a person's short stature without a medical explanation could possibly rise to the level of a disability to garner protection under the Americans with Disabilities Act buttressed by the 2008 amendments to survive a motion to dismiss. Nicole Colton ("Colton"), the petitioner, was terminated for being too short (4ft 6 in) from a factory position with FEHRER Automotive ("Fehrer"). App., *infra* A2.

Citing the *Sutton v. United Airlines* decision that employers are "free to decide that physical

characteristics or medical conditions that do not rise to the level of an impairment – such as one's *height*, build or singing voice – are preferable to others." 527 U.S. 490 (1999). (emphasis added).", the 11th Circuit affirmed the lower court's dismissal. App., *infra* A5. However, extreme shortness is an immutable physical condition and unlike build or singing voice cannot be changed.

Colton's complaint pled no facts that assigned a physiological reason for her shortness. App., *infra* A2, A4. Colton is of short stature and is unaware of the physiological origin of her condition.

When Colton reported to work for on the job training, she could not reach her assigned worktable. App., infra A2. Colton asked for reasonable accommodation, including but not limited a shorter table or a different assignment. *Ibid.*

When Colton's assigned trainers did not provide a fixable solution, Colton raised her height issue with Fehrer's Human Resource Representative. Colton was then deemed to be "not a good fit" for Fehrer and terminated from employment. Ibid

On a prior occasion, Colton had worked successfully within Fehrer's Gadsden, Alabama plant which manufactures automobile interiors. App., *infra* A2.

Upon being terminated, Colton was additionally informed that she "asked too many questions" and that her name was given "a red flag" rendering her ineligible for any future employment with Fehrer. A3, Complaint ¶19 and Doc. 1-1 EEOC Charge.

1. Colton filed an EEOC Charge alleging

discrimination based on short stature and retaliation. App., *infra* A3, A12

2. The district court dismissed Colton's complaint for failure to state a claim for disability discrimination or retaliation. App., *infra* A10-A19. The court held that EEOC's definition of a "physical impairment requires some type of disorder or pathology of the body that (b) affects one or more body systems. Colton's height fails to satisfy this definition because Colton has not alleged that her height is due to any disorder or pathology" App., *infra* 13-14. Without a physiological tie-in, the district court would not read the ADA to elevate a physical characteristic to the status of disability citing the *Sutton* decision. App. *infra* A4.

3. In the same vein, the district court held that Colton's claim that she was regarded as disabled because Colton failed to plead that FEHRER believed her height to be an ADA qualifying disability. App. infra A15-16.

4. Colton's personnel file was given a "red flag" and she was barred from future employment for asking to many questions. App. *infra.* A3, A17. Following the determination that no recognizable ADA disability was involved, the district court held Colton could not claim retaliation

5. The court of appeals affirmed. App. *infra.* A1-A9. In her brief, Colton argued that the motion to dismiss stage is too early for the final determination that Colton's extreme shortness unprotected by the ADA. Allowing the case to proceed may reflect that Colton's shortness does not qualify as a disability or in fact meets the definitional requirements. The case never got that

far. If Colton's short stature was protected, the employer retains their defenses. The EEOC had not rejected Colton's charge for failing to state a claim or for retaliatory purposes that Colton's belief that she experienced discrimination was unreasonable because she complained of conduct was not within the agency's bailiwick.

The court of appeals rejected Colton's argument that extreme shortness did not amount to a recognizable ADA claim without her citation to a specific physiological disorder or condition. App. *infra* A7.

The court of appeals held that although Colton may have subjectively thought that she was being discriminated against such a belief was not reasonable given the existing law. The court of appeals relied on the *Sutton* decision and the EEOC's interpretive guidance to refute Colton's contentions of disability discrimination was objectively unreasonable. App. *infra* A9.

A request for Panel Rehearing or Hearing En Banc was denied. App. *infra* A20.

REASONS TO GRANT THE WRIT

This case is a superior vehicle for resolving whether short stature persons are eligible for protection to the Americans with Disabilities Act as Amended in 2008.

The court below along with the Second Circuit in a non-precedential decision held a complaint for alleged ADA violations stemming from short stature do not survive a motion to dismiss. See *Morey v. Windsong Radiology Grp., P.C.*, 794 F. App'x 30, 32

(2d Cir. 2019) Whereas a district court decision in 9th circuit denied a motion to dismiss based on a short stature allegation. See *McElmurry v. Arizona Dept. of Agriculture*, 2013 WL 2562525, at *4 (D.Ariz., 2013):

> It is plausible that "short stature" could, in some contexts, "substantially limit [ ] one or more of the major life activities of an individual." 42 U.S.C. § 12102(1)(A). The Department's claim that "Plaintiff cannot demonstrate her height is a disability", (Doc. 10 at 2), is premature. At this early stage, the terms of the Amended Complaint are taken as true. Given that posture, the Court rejects the Department's blanket assertion.

Applying an overly strict standard, the lower courts denied Colton the opportunity challenge her termination for being of short stature as she could not explain why she was so short and in doing so limited the reach of the Americans with Disabilities Act, as Amended.

Following the *Sutton* decision, congress recognized the ADA was being narrowly construed beyond it's intended purpose. Congress provided a legislative fix through the 2008 Amendments Act to the Americans with Disabilities Act. The amendments expanded the definition of disability to protect more people. See *Rohr v. Salt River Project Agricultural Imp. and Power Dist.*, 555 F.3d 850, 861 (C.A.9 (Ariz.),2009).

"The ADAAA explicitly rejects several Supreme Court decisions that defined "disability" more narrowly than many of the ADA's original Congressional proponents had intended. *See*

H.R.Rep No. 110–730, at 5 (2008) (H. Comm. on Educ. & Labor). Beginning in January 2009, "disability" was to be broadly construed and coverage will apply to the "maximum extent" permitted by the ADA and the ADAAA. 122 Stat. at 3553"

Decided on a motion to dismiss, no evidentiary review occurred of whether Colton's short stature rose to the level of a physical impairment. As a matter of law, the termination was deemed unreviewable as being outside the scope of Americans with Disabilities Act. Colton does not know whether her lack of height is attributable to a physiological disorder or a genetic condition, only that she always has been of short stature.

As the case was pending on FEHRER's Motion to Dismiss, no expert deadline had been established for an expert report that could potentially address physiological origins, if any, for Colton's shortness. Extreme shortness is a physical issue that presents unique challenges. Unlike build or a singing voice, it cannot be changed. Being of extremely short stature impacts your physical ability to negotiate any space or reach for items whether in your activities of daily living or an assigned work location.

Lacking a physiological lynchpin for her extremely short stature doomed her claim from any substantive consideration.

Definition of Perceived Disability Changed By The ADA Amendment Acts of 2008

Applying a standard that required Colton to also allege that her employer believed that she suffered

from an ADA qualifying disability to be "regarded as" disabled was too strict. The panel decision relies on *Carruthers v. BSA Advert Inc.*, 357 F.3d 1213, 1216, (11th Cir. 2004) for the point that Colton failed to plead the employer perceived her to have, "ADA-qualifying disability". App. *infra* A6. However, the 2008 amendments changed what a person must show to demonstrate a regarded as claim.

The ADA Amendment Acts of 2008 defined "being regarded as disabled" as more employee friendly,

> Nearly a decade later, however, Congress passed the ADAAA. Those 2008 amendments expressly rejected the interpretation of "regarded as having such an impairment" that the Court had set forth in Sutton. Pub. L. No. 110–325, sec. 1, § 2(b)(3). In enacting those amendments, *588 Congress changed the relevant portion of the ADA by adding a new paragraph (3). That new paragraph defined the scope of the term "being regarded as having such an impairment," id. sec. 4, § 3(1)(C), as follows:
>
> An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. Id. sec. 4, § 3(3)(A) (emphasis added).[4]

Mercado v. Puerto Rico, 814 F.3d 581, 587–88 (C.A.1 (Puerto Rico),2016).

With the amendments, it is unnecessary to plead the employer's perception was of an "ADA qualifying disability" to establish a regarded as claim. Colton was held to the pre-amendment standards. There is no dispute the employer perceived Colton as too short for the job.

Thus, the amendments also implicate the reasonableness of Colton's belief that she was engaging in protected activity by challenging her employer's decision based on their perceptions of her physical limitations. Particularly, when her file was given a red flag for her not being "a good fit" and she was banned from all future employment for any job when she protested her treatment and asked for an accommodation. Although the courts rejected Colton's claim, the EEOC, agency in charge of enforcing the discrimination statutes accepted her charge as being within their purview. The notice of right to sue issued by the agency did not check the box that the claim was being dismissed for failure to state a claim under the statutes enforced by the agency. Doc. 1-1 pg.1

Colton's treatment mirrors well known discrimination experienced by persons of short stature. As sung in Randy Newman's Short People song or chronicled in Jonathan Swift's Gulliver Travels to the island of Lilliput, short people are imbued with negative characteristics. One scholar has noted, "The bias against short people is so ingrained in our brains that when we know someone is successful or in a leadership position we unconsciously add a few inches to his height." Omer

Kimhi, *Falling Short: On Implicit Biases and the Discrimination of Short Individuals*, 52 Connecticut Law Review, No. 2, 719, 727.[1] When Colton opposed heightism, she was informed that she asked, "too many questions" and was barred from future employment. App. *infra* A3.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] Kimba cites John Kenneth Galbraith as saying discrimination against shortness is one of society's "…most blatant and forgiven prejudices." Id at 753