

No. 17-1537

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**In The  
Supreme Court of the United States**

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PATRICIA MORRISON,  
Administrator for the Estate of Tommy Morrison,  
*Petitioner,*

v.

QUEST DIAGNOSTICS INCORPORATED,  
JOHN HIATT, PH.D., DR. MARGARET GOODMAN,  
NEVADA STATE ATHLETIC COMMISSION,  
and MARC RATNER,  
*Respondents.*

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

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**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Was the Ninth Circuit correct in affirming the district court's grant of summary judgment for Quest Diagnostics and John Hiatt, Ph.D.?

Respondents Quest Diagnostics Incorporated's [f/k/a APL Healthcare Group, Inc.] ("Quest Diagnostics") and John Hiatt, Ph.D. object to each of Petitioner's stated "Questions Presented" because each: contains either claims not presented to, or considered by, the courts below; assumes contested facts not supported by any evidence in the record; and are premised upon misstatements of law.

**STATEMENT PURSUANT TO RULE 29.6**

Respondent Quest Diagnostics Incorporated [f/k/a APL Healthcare Group, Inc.], incorporated in Nevada, is a wholly-owned subsidiary of American Medical Laboratories, Incorporated, a Delaware corporation. American Medical Laboratories, Incorporated, is a wholly-owned subsidiary of Quest Diagnostics Incorporated, a Delaware corporation. Quest Diagnostics Incorporated, a Delaware corporation, is a publicly-traded company on the New York Stock Exchange.

Respondent John Hiatt, Ph.D., is an individual.

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Pursuant to Supreme Court Rule 15.2, Respondents Quest Diagnostics Incorporated [f/k/a APL Healthcare Group, Inc.] (“Quest Diagnostics”) and John Hiatt, Ph.D. (collectively “Respondents”) submit their opposition to Petitioner Patricia Morrison’s, Administrator for the Estate of Tommy Morrison, (“Petitioner”) Petition for Writ of Certiorari and respectfully request that this Court deny the Petition.

## **I. STATEMENT OF THE CASE**

### **A. Introduction.**

Respondents object to Petitioner’s statement of the case. An accurate statement of the Petitioner’s allegations and claims and the undisputed facts considered by the district court is set forth in the district court’s order granting summary judgment and is incorporated by reference herein. Pet. App. 4–25. This case involves solely issues of Nevada state tort law. There is no federal question, federal circuit split, or other compelling reason to grant a Petition for Writ of Certiorari. Both the district court and the court of appeals correctly applied well-established principles governing motions for summary judgment under the Federal Rules of Civil Procedure. The Petition is based entirely on unsupported personal opinions and is replete with misstatements of both facts and the law.

### **B. Factual Background.**

This case arises from an HIV antibody test performed in February 1996 as part of an application to

obtain a Nevada boxing license. Quest Diagnostics tested Tommy Morrison's blood sample for HIV-1 antibodies, complying with the clinical laboratory standard of care for HIV testing in 1996. His test result was positive Western Blot (HIV-1). Since Tommy Morrison was unable to provide a negative HIV laboratory test report, his license application was denied and the fight was cancelled. Immediately thereafter, Tommy Morrison submitted to additional HIV testing by other laboratories. From 1996 until his death in 2013, Tommy Morrison was repeatedly tested, diagnosed, and treated for HIV and/or AIDS by various physicians, including HIV specialists, using different HIV testing methods—all of which confirmed his HIV infection.

However, as early as 1996, Tommy Morrison began questioning the existence of HIV, claiming the 1996 test result was a false positive, and frequently refusing standard treatment for HIV. During his attempted return to professional boxing in 2007, Tommy Morrison publicly stated that he was not actually infected with HIV, repeatedly alleged that Quest Diagnostics's February 1996 HIV-1 antibody test result was inaccurate, and ceased treatment for HIV—which he continued to refuse intermittently until his death in 2013.<sup>1</sup> Tommy Morrison died on September 1, 2013.

### **C. Procedural History.**

On July 24, 2014—more than 18 years after the HIV test at issue was performed—Petitioner, on behalf

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<sup>1</sup> Petitioner did not meet Tommy Morrison until 2009.

of and as the surviving spouse of Tommy Morrison, filed this diversity action pursuant to 28 U.S.C. § 1332 in the United States District Court for the District of Nevada. Petitioner asserted various claims against Respondents and others arising from the February 1996 HIV laboratory test result. Petitioner's Original Complaint was dismissed on October 16, 2015 for failure to state any viable claim. Petitioner filed her First Amended Complaint ("FAC") against Respondents, reasserting her original claims for negligence, defamation, fraud/misrepresentation, and adding claims for intentional infliction of emotional distress and intentional interference with a contract under Nevada law. Petitioner alleged that, *inter alia*, Tommy Morrison: (1) never had HIV; (2) was never tested for, diagnosed with, or treated for HIV after Quest Diagnostics's February 1996 test; and (3) died of health issues unrelated to HIV. Contrary to these allegations, medical records obtained in discovery and other evidence confirmed that Tommy Morrison had been repeatedly tested, diagnosed, and treated for HIV by health care providers after Quest Diagnostics's test in 1996 and up to his death in 2013.

On June 8, 2016, Respondents filed their motion for summary judgment on each of Petitioner's claims in her FAC, supported by competent summary judgment evidence, including expert evidence. The motion demonstrated that, *inter alia*, Quest Diagnostics's February 10, 1996 HIV-1 antibody test result was accurate, met the standard of care for HIV testing in 1996, and was subsequently confirmed by independent

testing. Petitioner did not controvert Respondents' evidence and failed to adduce any probative, competent evidence in support of her own claims.

On October 24, 2016, the district court granted Respondents' motion for summary judgment finding that the undisputed evidence showed that each of Petitioner's claims was time-barred under Nevada law and that all of her claims failed on the merits. Pet. App. 4–25. Petitioner appealed to the Ninth Circuit Court of Appeals, and asserted claims not considered by the district court, such as her allegation that clinical laboratories in the United States—including the U.S. Centers for Disease Control (“CDC”)—were using HIV-1 antibody tests that were not clinically useful or appropriate for identifying HIV infection in humans.

On September 26, 2017, the Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment. Pet. App. 1–3. The Ninth Circuit denied Petitioner's subsequent request for a panel rehearing and petition for a rehearing *en banc* on February 26, 2018 and issued its mandate on March 7, 2018. Pet. App. 26.

## **II. REASONS THE PETITION SHOULD BE DENIED**

### **A. No Compelling Reason Exists To Warrant This Court's Discretionary Review.**

This case does not involve any federal questions or any other federal issue presenting an important legal principle for this Court's review. Petitioner identifies

no aspect of the Ninth Circuit’s ruling that conflicts with any decisions of this Court or with any decisions from other United States Courts of Appeals, or that suggests that this case presents an unsettled area of federal law. Instead, Petitioner asks this court to correct purported errors that were made with respect to claims and issues that were never presented to the courts below—this is not worthy of review. Sup. Ct. R. 10. Furthermore, Petitioner’s claims of “conflict” are based on her mischaracterizations of the proceedings below, facially inapplicable and irrelevant authority, and misstatements regarding uncontroverted evidence in the summary judgment record. The lower courts’ rulings are correct in all respects and the Petition should be denied.

**B. Petitioner Failed To Present Or Preserve Her Claims For Review.**

Although not included in Petitioner’s Questions Presented, and therefore not properly before this Court, Sup. Ct. R. 14.1(a), the gravamen of the Petition is that Petitioner’s state law claims should have prevailed on the merits and that the district court’s entry of summary judgment should be reversed.<sup>2</sup> But the district

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<sup>2</sup> Pursuant to Supreme Court Rule 14.1(a), “[a] petition for a writ of certiorari shall contain . . . [t]he questions presented for review, expressed concisely in relation to the circumstances of the case. . . .” Respondents object to Petitioner’s “Questions Presented” because, *inter alia*, the questions of preemption of NAC 467.027 by the “American Disabilities Act of 1990,” as well as the “fraudulent concealment” and “continuous course of treatment” tolling doctrines under New York state law fail to conform to the

court properly granted summary judgment on the merits of each of Petitioner’s claims because she failed to present any competent evidence to support her factual allegations or claims in response to Respondents’ motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Petitioner’s primary arguments and contentions in this appeal are not premised on the allegations in her operative FAC, but are instead based on allegations that she unsuccessfully sought leave to add and therefore were never at issue in the district court proceedings. The Ninth Circuit refused to address claims not considered by the district court. This Court should follow suit. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (“Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.”) (citations omitted); *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (“Ours is a court of final review and not first view.”) (internal quotations and citations omitted).

**C. The Petition Is Premised On Repeated Misstatements Of Fact, Law, And The Courts’ Decisions Below.**

Even if the merits of Petitioner’s claims were now before this Court, Petitioner’s contentions regarding the district court’s entry of summary judgment are based on mischaracterizations of the district court’s

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arguments in, and holdings of, the appellate court or the district court. Pet. App. 1–26.

decision,<sup>3</sup> misstatements of the summary judgment record, and gross factual misstatements. This alone is also sufficient to deny the Petition. Sup. Ct. R. 14.4. Pursuant to Rule 15.2, Respondents identify the following significant examples of misstatements of facts and law.<sup>4</sup>

### ***Quest Diagnostics’s HIV-1 antibody testing***

Each of Petitioner’s contentions regarding laboratory standards of care for HIV testing, Quest Diagnostics’s laboratory testing and procedures, Tommy Morrison’s medical history and condition, and the referenced alleged electron microscopy testing (now referred to as “pathology reports”) are misstatements directly contrary to the undisputed evidence in the summary judgment record. *See* Pet. App. 5–16, 18–20. Some of the more egregious examples of misstatements wholly unsupported by the record include, *inter alia*:

- “QUEST has hidden crucial facts in its possession, resulting in millions of people’s lives being destroyed, and in premature deaths because they did not receive supplemental

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<sup>3</sup> *See, e.g.*, Pet., p. 26 (“Judge Richard F. Boulware II. September 08th, 2016, correctly ruled: “The tests didn’t test for the virus.”); Pet., p. 7 (“The decision below reflects the latest effort by a lower court to avoid the facts of the case and ‘real’ science.”).

<sup>4</sup> Given the sheer volume of these misstatements in Petitioner’s petition, it would be impractical, if not impossible, to list Petitioner’s misstatements in their entirety.

testing and treatment for differential-diagnoses . . . ,” Pet., p. 7;

- “Because of TOMMY, this case reveals a ‘positive result’ by QUEST, and its affiliated companies, does not medically, or scientifically, conclude ‘infection with the human immunodeficiency virus’ (“HIV”),” Pet., p. 8;
- “QUEST concealed and suppressed a material fact from TOMMY, the public, physicians, and the courts, that are in QUEST’s possession, custody and control for decades . . . ,” including information regarding the efficacy of ELISA HIV-1 antibody testing, CDC guidance on Western Blot HIV-1 antibody testing, and the use of PCR/viral load testing in testing for HIV, Pet., p. 11–12;
- “No commercial tests for ‘AIDS’ or ‘HIV infection’ exist and QUEST have known for decades that positive reactions occur in dogs, cows, and healthy human blood, *inter alia*, as documented in peer-reviewed science journals,” Pet., p. 12; and
- “QUEST negligently ignores studies harming the public with its deceit and fraudulent conduct by authoring ‘positive for HIV’ reports as unequivocal evidence of HIV infection. TOMMY was just another one of its victims,” Pet., p. 13.

### ***Applicable law and legal standards***

Petitioner repeatedly misstates the applicable law and the governing legal standards. In addition to issues and claims discussed above, some of Petitioner's significant legal misstatements include, *inter alia*:

- Petitioner's attempt to rely on New York state law to argue that the statute of limitations should have been tolled under the "continuous treatment/course of treatment" doctrines,<sup>5</sup> Pet., pp. ii, 5–7, 20–21, 27–28, 38;
- Repeated misstatements regarding evidentiary standards and the admissibility of evidence, Pet., pp. 11, 22–23, 28, 33–34, 37, 40, 42; and
- Petitioner's citations and references to various drug testing cases that she contends are "analogous to this case," but which are plainly inapposite. Pet., pp. 15–17, 30–32.

### ***Evidence presented and the record below***

Petitioner repeatedly misstates the evidence regarding Quest Diagnostics's HIV testing. Without any basis in evidence or the record, Petitioner repeatedly refers to alleged "admissions" and "confessions" by Quest Diagnostics that purportedly support her claim that HIV-1 antibody testing is fraudulent and cannot

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<sup>5</sup> Petitioner's apparent suggestion that Respondents' action in subpoenaing records to defend against her baseless claims somehow tolls the statute of limitations on those same claims is unsupported by any authority.

be used to diagnose or treat HIV infection in humans. *E.g.*, Pet., pp. 4, 6, 26, 28–29. Other misrepresentations that have no support in the record include, *inter alia*:

- An “antemortem pathology report dated July 31st, 2012 at 12.02pm, and the postmortem report dated September 17th, 2013 at 11.13am, scientifically reveal[ed] TOMMY did not have HIV,” Pet., p. 4;
- “No opportunity was given to review QUEST’s medical decision made in Las Vegas, Nevada,” Pet., p. 18;
- After Tommy Morrison’s death, Tommy Morrison was examined and “TOMMY did not have HIV. No AIDS diseases were found,” Pet., p. 22;
- “No ‘blood evidence’, . . . exist on the record that TOMMY carried HIV . . . between his Birth (1969), Death (2013) . . .,” Pet., p. 28;
- Tommy Morrison’s February 1996 HIV-1 antibody test report was “incomplete” based on the standard of laboratory practice, standard of care, and in conformance with FDA approved packet inserts and CDC laboratory procedure for the HIV antibody/HIV Western Blot Test, Pet., p. 36; and
- Quest Diagnostics’s expert witness was an interested party. Pet., p. 30.

***Misconduct by Parties and counsel***

Petitioner makes numerous misstatements regarding alleged misconduct by counsel and Quest Diagnostics throughout the litigation and these proceedings that allegedly resulted in the dismissal of her claims. Pet., pp. 3–4. Both courts below found these allegations to be wholly baseless. These unsupported misstatements include, *inter alia*:

- Respondent withheld the findings of alleged “antemortem pathology report” and “post-mortem report” that “scientifically” “revealed” that Tommy Morrison did not have HIV and which served as the basis for this lawsuit, Pet., pp. 4, 22;
- Respondent “subpoenaed medical records, including blood testing, drug and patient-physicians’ psychological notes, from other states without a Court Order from a Judge in Nevada, violating out-of-state laws and the 14th Amendment,” Pet., p. 20;
- The lower court abused its discretion granting summary judgment due to “sheer volumes of withheld documents and disclosure of QUEST’s industry secrets that are not privileged . . . and were requested by MORRISON, and discoverable under FRCP 26,” Pet., p. 31;
- Quest continues to conceal that human blood has trace elements consistent with other medical conditions all scientifically known to trigger a positive reaction, Pet., p. 31; and

- The judges and courts below were deceived and evidence concealed, Pet., p. 30.

The pervasiveness of the misstatements in the Petition and Petitioner's lack of candor with this Court, standing alone, warrant denial of the Petition.

### III. CONCLUSION

There is no compelling reason to exercise this Court's discretionary review and the Petition for Writ of Certiorari should be denied.

Dated: June 11, 2018    Respectfully submitted,

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