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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that petitioner perceived a job applicant as having a physical impairment within the meaning of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*

2. Whether the court of appeals erred in concluding that petitioner violated the ADA by conditioning the applicant's job offer on his procuring an additional medical examination at his own expense.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Wash.):

EEOC v. *BNSF Ry. Co.*, No. 2:14-cv-1488-MJP (Mar. 14, 2016)

United States Court of Appeals (9th Cir.):

EEOC v. *BNSF Ry. Co.*, No. 16-35457 (Sept. 12, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 902 F.3d 916. The order of the district court granting summary judgment (Pet. App. 30a-53a) is not published in the Federal Supplement but is available at 2016 WL 98510. The order of the district court granting injunctive relief (Pet. App. 54a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2018. A petition for rehearing was denied on November 30, 2018 (Pet. App. 60a). The petition for a writ of certiorari was filed on February 27, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title I of the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 330, prohibits discrimination on the basis of disability in employment. Its "general rule" against such discrimination, § 102(a), 104 Stat. 331 (capitalization omitted), is codified at 42 U.S.C. 12112(a), which 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 discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

The ADA defines each of the key terms in that general prohibition against discrimination. It defines "covered entity" to mean, among other things, "an employer." 42 U.S.C. 12111(2). It identifies a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8). And it provides that "[t]he term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. 12102(1). Paragraph (3), in turn, provides:

> (A) 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 chapter 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.

> (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

42 U.S.C. 12102(3).

Congress has granted the Equal Employment Opportunity Commission (EEOC) the authority to issue regulations implementing the ADA's definition of "disability." 42 U.S.C. 12205a; see 42 U.S.C. 12116. Pursuant to that authority, the EEOC has issued a regulation defining "[p]hysical or mental impairment," in relevant part, as "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine." 29 C.F.R. 1630.2(h)(1) (emphasis omitted).

In addition to setting forth a general prohibition against discrimination in Section 12112(a), the ADA identifies various actions that fall within that prohibition. 42 U.S.C. 12112(b). Those actions include:

> using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. 12112(b)(6).

The ADA also provides that the general prohibition against discrimination in Section 12112(a) encompasses

"medical examinations and inquiries." 42 U.S.C. 12112(d)(1). Section 12112(d)(3) specifically addresses "[e]mployment entrance examination[s]." 42 U.S.C. 12112(d)(3) (emphasis omitted); see 42 U.S.C. 12112(d)(2)(A) (prohibiting preemployment examinations or inquiries "as to whether [a job] applicant is an individual with a disability or as to the nature or severity of such disability," except as provided in Section 12112(d)(3)). It provides that "[a] covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such 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), and "the results of such examination are used only in accordance with [Title I of the ADA]," 42 U.S.C. 12112(d)(3)(C).

The EEOC has published guidance explaining that, consistent with those provisions, an employer that "has obtained basic medical information from all individuals who have been given conditional offers in a job category" may "ask specific individuals for more medical information," "if the follow-up examinations or questions are medically related to the previously obtained medical information." EEOC, *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995), http://www.eeoc.gov/policy/docs/preemp.html (last modified May 9, 2019) (*ADA Enforcement Guidance*); see EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* (Jan. 1992), https://askjan.org/publications/ada-specific/

Technical-Assistance-Manual-for-Title-I-of-the-ADA.cfm ("[T]he ADA does not require that the scope of medical examinations must be identical. An employer may give follow-up tests or examinations where an examination indicates that further information is needed.").

2. Petitioner "operates one of the nation's largest rail networks." C.A. E.R. 504. In 2011, petitioner posted openings for the position of senior patrol officer in Seattle, Washington. *Ibid.* The responsibilities of the position include patrolling company property, responding to safety concerns, conducting investigations, identifying trespassers, and arresting suspects. *Id.* at 505. Russell Holt applied and interviewed for the job, *id.* at 446, 458, and petitioner extended him an offer of employment conditioned on the outcome of a background investigation and a medical evaluation, *id.* at 460-461, 506.

Comprehensive Health Services (CHS), a private medical contractor, conducted Holt's preemployment medical evaluation on petitioner's behalf. Pet. App. 6a. As the first step of that evaluation, CHS asked Holt to fill out a medical questionnaire. C.A. E.R. 615-622; see *id.* at 527, 932. The questionnaire asked whether Holt had "ever had a back injury." *Id.* at 618. Holt answered "[y]es," explaining that he had suffered a "[b]ulging disk in 2007." *Ibid.* The questionnaire also asked whether Holt had "ever had any of the following musculoskeletal problems"—among them, "[b]ack pain." *Id.* at 619. Holt again answered "[y]es," stating that he had experienced "[b]ack pain" "[d]ue to the bulging disk in 2007." *Ibid.*

After reviewing Holt's responses, a nurse from CHS asked Holt to provide medical records relating to his

back. C.A. E.R. 383, 544, 644; see *id.* at 528. Holt provided an MRI from 2007, along with notes from his primary-care physician and his chiropractor. *Id.* at 627-632; see *id.* at 554, 644; Pet. App. 7a. CHS also directed Holt to obtain a physical examination—including an occupational health assessment of his back, C.A. E.R. 547—from Dr. Marcia Hixson, a physician employed by CHS's subcontractor. *Id.* at 644, 647-653, 660-661; see Pet. App. 7a. Although Dr. Hixson was not provided Holt's 2007 MRI or other medical records, C.A. E.R. 1047, she was aware that Holt had reported suffering a bulging disc, *id.* at 660. During her occupational health assessment of his back, Dr. Hixson found "no apparent functional limitations." *Ibid.* (capitalization omitted).

CHS then referred Holt's medical file to petitioner's medical department for additional review, citing Holt's history of a "[d]isc extrusion" in his "[b]ack." C.A. E.R. 1006; see *id.* at 529-530. In reviewing the file, petitioner's medical officer, Dr. Michael Jarrard, *id.* at 521, found Holt's 2007 MRI to show a "disc extrusion at two levels," *id.* at 552, where "the soft, jelly-like material" that "should be contained inside a disc" had escaped through an opening into his spinal canal, *id.* at 559. Dr. Jarrard was concerned that the extruded material could become "lodge[d] against different nerve structures," *ibid.*, and "leave [Holt] very seriously impaired," *id.* at 562. Given that "quite abnormal MRI," *id.* at 573, Dr. Jarrard concluded that he needed more information before he could declare Holt "fit to do the heavy demands of th[e] job" of senior patrol officer, *id.* at 575. In particular, Dr. Jarrard needed "pro[of] that [Holt] doesn't still have major pathology," *id.* at 561—such as proof

that, in the years since the 2007 MRI, the "extruded material had * * * been resorbed by [Holt's] body," *id.* at 574.

Dr. Jarrard therefore drafted an email that petitioner sent to Holt, informing him that "[a]dditional information is needed * * * due to uncertain prognosis of your back condition." C.A. E.R. 624, 671. Among the additional information requested was "a current MRI scan" of Holt's back. *Ibid.* The email informed Holt that, if he supplied the additional information, petitioner would "evaluate [his] condition again." *Ibid.*

After receiving the email, Holt asked his primary-care physician to perform a new MRI, but his physician told him that his insurance would not cover the MRI because the MRI was not medically necessary. C.A. E.R. 1358-1359. Without insurance coverage, an MRI would have cost Holt about $2500 out of pocket. *Id.* at 1359. Although petitioner had paid for the cost of Holt's medical evaluation up to that point, Pet. 6, it informed Holt that "[t]he cost for the MRI * * * [wa]s [his] responsibility," C.A. E.R. 962. When Holt did not provide the MRI or the other additional information Dr. Jarrard had requested, petitioner treated Holt as having declined the conditional job offer. *Id.* at 645, 1483.

3. After Holt filed a charge of disability discrimination with the EEOC, First Am. Compl. ¶ 7, the EEOC brought suit against petitioner in federal district court, alleging that petitioner had "failed to hire" Holt "because of his disability," in violation of the ADA, *id.* ¶ 8; see 42 U.S.C. 12117(a). The EEOC sought monetary and injunctive relief. First Am. Compl. 6.

The district court denied petitioner's motion to dismiss. D. Ct. Doc. 28 (Jan. 29, 2015). The court acknowledged that "medically-related follow-up examinations

of some entering employees are permitted" under the ADA. *Id.* at 5. The court reasoned, however, that petitioner's "requirement that Holt procure a follow-up MRI after the post-offer, pre-employment examination functioned as a screening criterion that screened out an applicant with a disability by imposing an expensive additional requirement not imposed on other applicants." *Ibid.* The court further reasoned that, according to the EEOC, "the MRI requirement was not job-related and consistent with business necessity." *Ibid.* The court therefore concluded that the EEOC had stated a plausible claim under Section 12112(b)(6). *Id.* at 3, 6.

Following discovery, the district court granted the EEOC's motion for summary judgment on liability. Pet. App. 30a-53a. The court explained that, although it had relied on Section 12112(b)(6) in denying petitioner's motion to dismiss, *id.* at 41a, it had come to conclude that the EEOC could not bring a disparate-treatment claim under Section 12112(b)(6) because only disparate-impact claims could be brought under that provision, *id.* at 41a-43a. The court also concluded that the EEOC had "not demonstrated that actual 'qualification standards, employment tests or other selection criteria' were employed by [petitioner] to disqualify Mr. Holt." *Id.* at 43a. The court reasoned, however, that "'discrimination' under § 12112(a) is not limited to the categories listed in § 12112(b)." *Ibid.* It then explained that to establish disparate treatment under Section 12112(a), "the EEOC must show (1) that Mr. Holt is disabled within the meaning of the ADA; (2) that he is a qualified individual with a disability; and (3) that he was discriminated against because of his disability." *Id.* at 46a.

The district court determined that the EEOC was entitled to summary judgment on liability because the

EEOC had "provided sufficient undisputed evidence" on each of those elements. Pet. App. 52a. Addressing the third element first, the court reasoned that petitioner's "withdrawal of Mr. Holt's job offer when he failed to supply an updated MRI at his own cost constituted facial 'discrimination.'" *Id.* at 47a. The court then determined that petitioner had engaged in discrimination "because of Mr. Holt's 'disability.'" *Id.* at 48a. The court explained that Holt met "the requirement of 'being regarded as having [a physical] impairment,'" *ibid.* (quoting 42 U.S.C. 12102(3)), because he "admitted to [petitioner] that he had a back injury and provided an MRI showing a two-level disc extrusion, and [petitioner] halted the hiring process in response to that information," *ibid.* Finally, the court noted that petitioner had made "no attempt to argue that Mr. Holt was not otherwise a 'qualified individual.'" *Id.* at 49a.

Following the district court's decision, the parties stipulated to compensatory damages in the amount of $62,500. D. Ct. Doc. 147, at 2 (Jan. 25, 2016). The court also awarded $32,833.37 in back pay, D. Ct. Doc. 154, at 2 (Jan. 29, 2016), and issued a nationwide permanent injunction requiring petitioner to "bear the cost of procuring any additional information it deems necessary to complete a medical qualification evaluation," Pet. App. 57a.

4. The court of appeals affirmed the judgment of the district court as to liability, but vacated the nationwide permanent injunction and remanded for further proceedings on the proper scope of injunctive relief. Pet. App. 1a-29a.

The court of appeals first concluded that petitioner had perceived Holt as having an impairment within the meaning of Section 12102(3)(A). Pet. App. 13a-14a, 16a-

17a. The court found that, "[i]n 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, [petitioner] assumed that Holt had a 'back condition' that disqualified him from the job unless Holt could disprove that proposition." *Id.* at 17a. The court also found that, "in rejecting Holt's application because it lacked a recent MRI, [petitioner] treated him as it would an applicant whose medical exam had turned up a back impairment or disability." *Ibid.* Based on those facts, the court determined that petitioner "chose to perceive Holt as having an impairment at the time it asked for the MRI and at the time it revoked his job offer." *Ibid.*

The court of appeals then concluded that petitioner had discriminated against Holt because of his disability. Pet. App. 17a-24a. The court noted that the EEOC had "frame[d] the discriminatory act" as the "rescission of [Holt's] job offer." *Id.* at 18a (brackets in original). The court, however, viewed the "key question" as instead "whether [petitioner] was entitled to condition Holt's continuation through the hiring process on Holt providing an MRI at his own cost." *Ibid.* The court explained that, "[i]f [petitioner] was entitled to do this, then disqualifying Holt because he failed to cooperate in the completion of the medical screening process, whatever the reason he could not complete the process, was likely permissible." *Ibid.*

Having framed the "dispute" as one over "cost allocation," Pet. App. 20a, the court of appeals determined that Section 12112(a) prohibits an employer from "request[ing] an MRI at the applicant's cost only from persons with a perceived or actual impairment or disability," *id.* at 21a. The court acknowledged that, under the EEOC's guidance, "follow-up exams are permissible so

long as they are 'medically related to previously obtained medical information.'" *Id.* at 19a. The court also stated that "follow-up exams will frequently be required of people with disabilities or impairments because they have disabilities or impairments." *Id.* at 20a. But the court viewed that "additional burden" as "implicitly authorized by 12112(d)(3)'s authorization of medical exams." *Ibid.* By contrast, the court reasoned, Section 12112(d)(3) "does not * * * authorize an employer to further burden a prospective employee with the cost of the testing, however necessary the testing may be." *Ibid.* The court therefore concluded that Section 12112(a) "and the ADA's policy purposes should control on the issue of who must bear the costs of testing." *Id.* at 20a-21a. And the court determined that petitioner had violated Section 12112(a) by "impermissibly condition[ing] Holt's job offer on Holt procuring an MRI at his own expense." *Id.* at 25a.

Finally, the court of appeals determined that, although an injunction was appropriate, the district court had failed to "make adequate factual findings to support the scope of the injunction" it had issued. Pet. App. 28a. The court of appeals therefore vacated the injunction and remanded for further factual findings. *Id.* at 29a.

DISCUSSION

Petitioner contends (Pet. 9-20) that it did not perceive Holt as having a physical impairment within the meaning of the ADA. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Petitioner also contends (Pet. 23-26) that the court of appeals erred in concluding that petitioner dis-

criminated against Holt on the basis of disability by requiring him to obtain a follow-up MRI at his own expense. The EEOC argued below that it was entitled to summary judgment on the issue of discrimination. Upon further consideration, the United States agrees with petitioner that summary judgment in favor of the EEOC was inappropriate. Because the government now takes the position that the judgment reached by the court of appeals was incorrect, this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further consideration in light of the position asserted in this brief.

1. Petitioner contends (Pet. 9-20) that the court of appeals erred in concluding that petitioner perceived Holt as having a physical impairment within the meaning of the ADA. That contention does not warrant this Court's review.

a. The court of appeals correctly concluded that petitioner perceived Holt as having a physical impairment within the meaning of the ADA. Pet. App. 13a-17a.

i. Under the ADA, an individual with a "disability" is defined to include an individual who is "regarded as having [a physical or mental] impairment." 42 U.S.C. 12102(1)(C). An individual meets that definition "if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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." 42 U.S.C. 12102(3)(A).

The EEOC's implementing regulation defines "[p]hysical * * * impairment" to include "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems,

such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine." 29 C.F.R. 1630.2(h)(1) (emphasis omitted). The EEOC's interpretive guidance explains that "[t]he definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder." 29 C.F.R. Pt. 1630, App. at 397. The guidance also identifies "hearing loss, osteoporosis, [and] arthritis" as examples of "impairments." *Id.* at 398.

A disc extrusion meets Section 1630.2(h)(1)'s definition of a physical impairment. A disc extrusion occurs when "[t]he disc material has ripped open," and "the soft, jelly-like material inside[] has been squeezed out * * * into the spinal canal." C.A. E.R. 559. That process is irreversible: once the jelly-like material escapes through a crack in the disc, it cannot be regenerated or put back inside. *Id.* at 900. A disc extrusion is thus a negative abnormality in the spine. *Id.* at 1251. Much like "osteoporosis" or "arthritis," 29 C.F.R. Pt. 1630, App. at 398, it therefore qualifies as a "physiological disorder or condition * * * affecting" the "musculoskeletal" system, 29 C.F.R. 1630.2(h)(1).

A 2007 MRI of Holt's back showed that he had a disc extrusion at two levels. C.A. E.R. 629. Petitioner understood that Holt had suffered a disc extrusion, *id.* at 552, and expressly referred to his "back condition" in asking that he provide a current MRI, *id.* at 671. Because a disc extrusion is a physical impairment, and because petitioner understood Holt to have suffered one,

petitioner perceived Holt as having a physical impairment under Section 1630.2(h)(1).

ii. Petitioner does not dispute that Section 1630.2(h)(1) supplies a valid definition of the term "physical impairment." Petitioner argued below, however, that a disc extrusion does not necessarily meet that definition. Pet. C.A. Reply Br. 5-7. That is because, petitioner contended, a disc extrusion could be a "non-issue" if, for example, the extruded material avoided impinging on a nerve. *Id.* at 5. And if that were the case, petitioner argued, the disc extrusion would not qualify as a condition "affecting [a] body system[]," *id.* at 7 (brackets in original), because the person would still have a "normally functioning spine," *id.* at 6.

Petitioner's reliance on the "affecting" clause of Section 1630.2(h)(1) is misplaced. To be sure, a condition must "affect[] one or more body systems" adversely to be an "impairment." 29 C.F.R. 1630.2(h)(1) (emphasis omitted); see *Bond* v. *United States*, 572 U.S. 844, 861 (2014) (considering the "ordinary meaning of a defined term" in applying the definition). Petitioner's reading of the "affecting" clause, however, would require not just that the effect be adverse, but that it be so severe as to limit a person's "functioning." Pet. C.A. Reply Br. 6.

The text of Section 1630.2(h)(1) forecloses petitioner's reading. The "affecting" clause applies not just to "[a]ny physiological disorder or condition," but also to any "cosmetic disfigurement." 29 C.F.R. 1630.2(h)(1). If the clause required showing that a "cosmetic disfigurement" affected a person's functioning, scars from skin grafts or from severe burns, as well as other merely "cosmetic" disfigurements, would never qualify as impairments—a result contrary to the regulation (which petitioner does not challenge). Cf. H.R. Rep. No.

485, 101st Cong., 2d Sess., Pt. 3, at 30 (1990) (1990 House Report) (explaining that "severe burn victims often face discrimination" "because of the attitudes of others towards the impairment"); see also 29 C.F.R. Pt. 1630, App. at 411 ("To illustrate how straightforward application of the 'regarded as' prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability.").

The text and history of the ADA confirm that the definition of "impairment" does not incorporate petitioner's functional test. Before Congress amended the ADA in 2008, the "regarded as" prong of the statute's definition of "disability" applied only to individuals regarded as having an "impairment that substantially limits one or more * * * major life activities." 42 U.S.C. 12102(2) (2006). In 2008, Congress amended the "regarded as" prong to eliminate any requirement that "the impairment limit[] or [be] perceived to limit a major life activity." ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 4(a), 122 Stat. 3555. As amended, the "regarded as" prong requires only that the impairment not be "transitory and minor." 42 U.S.C. 12102(3)(B). Given that requirement—which Congress intended to exclude "claims at the lowest end of the spectrum of severity," H.R. Rep. No. 730, 110th Cong., 2d Sess., Pt. 2, at 18 (2008) (2008 House Report)—it would make little sense to read a distinct functional requirement into the term "impairment" itself.

Moreover, when Congress amended the ADA in 2008, it did so for the express purpose of "reinstat[ing] the reasoning of the Supreme Court in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987)[,] which set forth a broad view of the third prong of the definition

of handicap under the Rehabilitation Act of 1973," ADAAA, § 2(b)(3), 122 Stat. 3554 (italicization added)—a prong parallel to the "regarded as" prong of the ADA's definition of "disability." In *Arline*, the Court reasoned that a "'visible physical impairment'" "might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 282-283 (citation omitted). That reasoning, which the 2008 amendments reinstated, makes clear that a condition need "not diminish a person's physical or mental capabilities" to qualify as an "impairment" in the first place. *Id.* at 283; see 2008 House Report Pt. 1, at 13-14 ("[T]here is no functional limitation requirement under the 'regarded as' prong of the definition.").

The statutory and regulatory text, as well as the history of the 2008 amendments, thus indicate that, "to qualify for coverage under the 'regarded as' prong, an individual is not subject to any functional test." 29 C.F.R. Pt. 1630, App. at 411. The extent to which petitioner was uncertain about whether Holt's back was "functioning" "normally" in 2011, Pet. C.A. Reply Br. 6—or would instead "prevent him from safely performing the duties of a Senior Patrol Officer," Pet. 19—therefore is irrelevant under the "regarded as" prong. Petitioner understood that Holt had suffered a disc extrusion, and that is enough to establish that petitioner perceived him as having a physical impairment, no matter what petitioner "belie[ved] concerning the severity of the impairment." 29 C.F.R. Pt. 1630, App. at 411.[*]

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[*] Although petitioner perceived Holt as having a physical impairment, Holt would not be covered by the "regarded as" prong of the

iii. Petitioner reads (Pet. 9) the court of appeals' decision as resting on a different rationale: that "when an employer requires an individualized medical examination as a condition of employment, that requirement *in itself* establishes that the employer regards the applicant or employee as impaired within the meaning of the ADA." Petitioner's reading of the court's decision is mistaken. The court's decision rested not on the fact that petitioner "request[ed] an MRI because of Holt's prior back issues and condition[ed] his job offer on the completion of the MRI at his own cost," but rather on the fact that, in doing so, petitioner "assumed that Holt had a 'back condition' that disqualified him from the job unless Holt could disprove that proposition." Pet. App. 17a. In concluding that petitioner "chose to perceive Holt as having an impairment," the court thus quoted—and relied on—the email that petitioner sent Holt, in which petitioner expressly referred to Holt as having a "back condition." *Ibid.*; see *id.* at 8a (quoting the same email). Given the court's reliance on the particular facts of this case, petitioner errs (Pet. 2) in characterizing the court's decision as establishing a "*per se*" rule about when an "employer 'regards' [a] prospective employee as disabled within the meaning of the ADA."

To be sure, the court of appeals "decline[d] to parse the nature of Holt's medical condition," deeming "irrelevant" whether "Holt's disc extrusion was a permanent condition." Pet. App. 17a. In context, however, that

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ADA's definition of "disability" if, as an objective matter, the impairment were "transitory and minor." 42 U.S.C. 12102(3)(B); see 29 C.F.R. 1630.15(f) ("Whether the impairment at issue is or would be 'transitory and minor' is to be determined objectively."). Petitioner has never attempted to show that Holt's impairment is "transitory and minor." See 29 C.F.R. 1630.15(f) (placing the burden on the employer to establish the defense).

passage should be understood as declining only to resolve the "uncertainty as to the actual state of Holt's back" in 2011. *Ibid.* As explained above, the severity of his impairment at that time is irrelevant under the definition of the term "impairment." See pp. 14-16, *supra*. Regardless of how Holt's back was functioning in 2011, petitioner understood that Holt had a disc extrusion. It thus perceived him as having a "physiological * * * condition * * * affecting" the "musculoskeletal" system. 29 C.F.R. 1630.2(h)(1).

b. Contrary to petitioner's contention (Pet. 10-17), the court of appeals' decision does not conflict with any decision of another court of appeals. Petitioner's assertion of a circuit split (Pet. 10) rests on its characterization of the court of appeals' decision as announcing a per se rule that "requiring an individualized medical examination as a condition of employment establishes that the employer 'regards' the prospective employee as disabled." As explained above, that characterization of the court's decision is mistaken. See pp. 17-18, *supra*. And because the court's decision turned not on any per se rule, but rather on the particular facts of this case, petitioner's assertion of a circuit split is likewise mistaken.

The decision below does not conflict with the other published ADA decisions petitioner cites (Pet. 10-15) for another reason: All of those other published decisions involved the ADA's definition of "disability" before Congress amended the statute in 2008. See *Tice* v. *Centre Area Transp. Auth.*, 247 F.3d 506, 512, 514 (3d Cir. 2001); *Haulbrook* v. *Michelin N. Am., Inc.*, 252 F.3d 696, 702-703 (4th Cir. 2001); *Sullivan* v. *River Valley Sch. Dist.*, 197 F.3d 804, 810 (6th Cir. 1999), cert. denied, 530 U.S. 1262 (2000); *Wright* v. *Illinois Dep't of Corr.*, 204 F.3d 727, 730 (7th Cir. 2000); *Wisbey* v. *City*

of Lincoln, 612 F.3d 667, 672 (8th Cir. 2010); *Cody* v. *CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 598 (8th Cir. 1998); *Lanman* v. *Johnson Cnty.*, 393 F.3d 1151, 1156 (10th Cir. 2004); see also *Sanchez* v. *Henderson*, 188 F.3d 740, 744 (7th Cir. 1999) (involving the Rehabilitation Act's parallel definition of "disability" in effect at the time), cert. denied, 528 U.S. 1173 (2000). Thus, in each of those other cases, the question was whether an employer "regarded" an individual as having "a physical or mental impairment *that substantially limits one or more of the major life activities of such individual*," 42 U.S.C. 12102(2)(A) (2006) (emphasis added)—not whether the employer perceived the individual as having any physical or mental impairment at all.

Indeed, petitioner identifies only one decision, *Lanman*, in which another court of appeals addressed the latter question. Pet. 16 (citing *Lanman*, 393 F.3d at 1157). And even there, the Tenth Circuit "resolve[d] the case" on a different "basis," explaining that, "even if [it] were to conclude [that the employee] has sufficiently demonstrated that she was regarded as impaired, she simply has not shown a genuine issue of fact[] exists as to whether the [employer] believed the perceived impairment substantially limited her in at least one major life activity." *Lanman*, 393 F.3d 1157. In any event, petitioner's contention (Pet. 9) that the decision below conflicts with *Lanman* rests on the premise that the decision below "held that when an employer requires an individualized medical examination as a condition of employment, that requirement *in itself* establishes that the employer regards the applicant or employee as impaired within the meaning of the ADA." Because that premise is erroneous, see pp. 17-18, *supra*, no conflict exists.

2. Petitioner also contends (Pet. 23-26) that the court of appeals erred in concluding that petitioner discriminated against Holt, in violation of the ADA, by "condition[ing] Holt's job offer on Holt procuring an MRI at his own expense." Pet. App. 25a. Although the EEOC took the position below that it was entitled to summary judgment on the issue of discrimination, the United States now agrees with petitioner that summary judgment in favor of the EEOC was inappropriate.

a. "This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact." *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52 (2003). A disparate-treatment claim alleges that the employer has "treat[ed] some people less favorably than others because of" a "protected characteristic" such as disability. *Ibid.* (brackets and citation omitted). "Liability in a disparate-treatment case 'depends on whether the protected trait . . . actually motivated the employer's decision.'" *Ibid.* (citation omitted). "By contrast, disparate-impact claims 'involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'" *Ibid.* (citation omitted). "Under a disparate-impact theory of discrimination, 'a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate that is required in a "disparate-treatment" case.'" *Id.* at 52-53 (brackets and citation omitted).

i. Disparate-treatment claims are cognizable under the ADA. *Raytheon*, 540 U.S. at 53; see, *e.g.*, 42 U.S.C.

12112(a), (d)(1), and (d)(3)(A). Because "[p]roof of discriminatory motive is critical" under a disparate-treatment theory, such a claim cannot succeed unless the plaintiff can identify a decision by the employer that was motivated by disability. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Petitioner made three relevant decisions here: (1) the decision to require Holt to obtain a follow-up MRI; (2) the decision to treat Holt as having declined his job offer; and (3) the decision to require Holt to pay for the follow-up MRI.

No one argues that petitioner acted with a discriminatory motive in requiring Holt to obtain a follow-up MRI. Under 42 U.S.C. 12112(d)(3), an employer may "require a medical examination" if "all entering employees are subjected to such an examination *regardless of disability*." 42 U.S.C. 12112(d)(3)(A) (emphasis added). The EEOC has long taken the position that an employer may require job applicants to undergo "follow-up examinations" (like MRIs) that are "medically related to previously obtained medical information," without running afoul of the ADA's prohibition on disparate treatment. *ADA Enforcement Guidance*; see Pet. App. 19a. That is because a policy of obtaining all medically relevant information about applicants is a facially neutral one. And although an impairment might be "correlated with" a need for follow-up examinations under such a policy, such correlation does not establish discrimination on the basis of disability itself. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 611 (1993); see *Raytheon*, 540 U.S. at 54 n.6. It is therefore uncontested that petitioner's decision to require the additional MRI did not, by itself, violate the ADA. See Pet. App. 19a-20a ("[I]t would be

an odd and incomplete medical exam that could not include follow-up inquiries or testing based on red flags raised in the initial exam."); *id.* at 20a ("[T]he EEOC concedes that [petitioner] could have required Holt to get an MRI if [petitioner] had offered to pay for the MRI.").

In its brief below, the EEOC identified the relevant discriminatory act as petitioner's decision to treat Holt as having declined his job offer. See EEOC C.A. Br. 37. The court of appeals, however, correctly declined to adopt that "fram[ing]" of the "discriminatory act." Pet. App. 18a. A policy of conditioning job offers on "completion of the medical screening process" is a facially neutral policy. *Ibid.* And the record shows that, in treating Holt as having declined his offer, petitioner simply applied such a policy here; as the EEOC itself acknowledged, petitioner "rescinded the offer because Holt did not provide a current MRI." EEOC C.A. Br. 38; see *id.* at 35 ("Holt's inability to procure the MRI was what caused [petitioner] to rescind his job offer."); C.A. E.R. 461 (Holt acknowledging that his job offer was conditioned on satisfying "medically related" requirements). Because petitioner's decision to treat Holt as having declined the offer was based on his failure to complete the medical screening process—not on disability—that decision did not violate the ADA.

Having rejected the EEOC's framing of the relevant discriminatory act, the court of appeals affirmed the grant of summary judgment on a different theory: that the discriminatory act was petitioner's decision to require Holt to pay for the follow-up MRI. Pet. App. 19a. The record, however, does not support that theory. As explained above, there is no dispute that petitioner's de-

cision to require the follow-up MRI was not discrimination on the basis of disability. See pp. 21-22, *supra*. And there is no evidence that petitioner declines to pay for only some applicants' follow-up MRIs. Rather, the record indicates that petitioner has a general policy of declining to pay for any follow-up MRI and that Holt was subjected to the cost of paying for the MRI simply because a follow-up MRI was required. See C.A. E.R. 602 (deposition testimony of Dr. Jarrard suggesting that the refusal to pay for Holt's MRI reflected a general policy of not paying for evaluations that fall in "the world of the treating providers"); *id.* at 603 (deposition testimony of Dr. Jarrard stating that paying for additional tests "becomes the candidate's responsibility" when petitioner "need[s] more information than * * * what [it] typically would get" through its "occupational" assessments). Given the lack of evidence to the contrary, summary judgment in the EEOC's favor was inappropriate.

In reaching a contrary conclusion, the court of appeals reasoned that although Section 12112(d)(3) "authorizes testing that may disproportionately affect persons with disabilities," it is "silent as to who must bear the costs of testing" and therefore does not "authorize an employer to further burden a prospective employee with" such costs. Pet. App. 20a. That reasoning misunderstands the statutory scheme. Section 12112(d)(3) does not except "testing" from the ADA's general prohibition against disparate treatment. *Ibid.* On the contrary, Section 12112(d)(1) provides that the ADA's general "prohibition against discrimination * * * shall *include* medical examinations and inquiries." 42 U.S.C. 12112(d)(1) (emphasis added). And Section 12112(d)(3)

provides that an employer may "require a medical examination" if "all entering employees are subjected to such an examination *regardless of disability*." 42 U.S.C. 12112(d)(3)(A) (emphasis added). Requiring Holt to obtain a follow-up MRI was lawful not because it was authorized by Section 12112(d)(3), but because it did not constitute disparate treatment on the basis of disability; as explained above, it reflected the application of a facially neutral policy, with no discriminatory motive. See pp. 21-22, *supra*. And if, as the record indicates, requiring Holt to pay for the follow-up MRI was likewise the application of a facially neutral policy, with no discriminatory motive, then it was lawful for the same reason: because it did not constitute disparate treatment on the basis of disability. See pp. 22-23, *supra*.

The court of appeals also reasoned that "[w]here * * * an employer requests an MRI at the applicant's cost *only from* persons with a perceived or actual impairment or disability, the employer is imposing an additional financial burden on a person with a disability because of that person's disability." Pet. App. 21a (emphasis added). But the record contains no evidence that petitioner declines to pay for a follow-up MRI only when the applicant is perceived as having an impairment. Rather, the record indicates that petitioner has a general policy of declining to pay for any follow-up MRI, whether the applicant is perceived as having an impairment or not. See C.A. E.R. 602-603.

Moreover, to the extent that the court of appeals was concerned that such a general policy would have a disparate impact on individuals with disabilities, that concern was misplaced. The EEOC forfeited any disparate-impact claim by not pursuing, or presenting evidence to support, such a claim below. See EEOC C.A. Br. 53-54;

Raytheon, 540 U.S. at 53. And in any event, disparate-impact claims are incompatible with the "regarded as" prong of the ADA's definition of "disability." Unlike the other two prongs of that definition, the "regarded as" prong turns on the "perception" of the employer; liability will not lie unless the individual is "treated as if he has an impairment." 1990 House Report Pt. 3, at 30. Unlike the other two prongs, moreover, the "regarded as" prong contains its own language specifying the necessary relationship between the employer's action and the protected trait: It requires a showing that the individual "has been subjected to an action prohibited under this chapter *because of* an actual or perceived physical or mental impairment." 42 U.S.C. 12102(3)(A) (emphasis added). Although this Court has recognized disparate-impact liability under other statutes' provisions containing the phrase "because of," it has done so only when the provisions in question "refer[red] to the consequences of actions and not just the mindset of actors." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015). The "regarded as" prong does not refer to such consequences; rather, it refers exclusively to the employer's *perception* and to actions taken *because of* that perception. Accordingly, the "regarded as" prong is naturally understood to encompass only disparate-treatment claims.

ii. Because the court of appeals concluded that the EEOC was entitled to summary judgment on its claim that petitioner had violated Section 12112(a)'s general prohibition against discrimination, the court did not reach the EEOC's alternative argument that petitioner had violated Section 12112(b)(6)'s prohibition against the use of certain "qualification standards, employment

tests, or other selection criteria," 42 U.S.C. 12112(b)(6). Pet. App. 25a n.12. Section 12112(b)(6), however, cannot serve as an alternative basis for the court's judgment. The EEOC pursued a Section 12112(b)(6) claim below, but did so only on a disparate-treatment theory. See Pet. App. 41a-42a; EEOC C.A. Br. 49-54. To the extent that such a theory may be pursued under Section 12112(b)(6), liability would still require a showing of discriminatory motive. See *Raytheon*, 540 U.S. at 52. Given the lack of evidence of such motive, see pp. 21-24, *supra*, summary judgment in the EEOC's favor on its Section 12112(b)(6) claim is likewise unwarranted.

Moreover, Section 12112(b)(6) applies only to the use of "qualification standards, employment tests or other selection criteria," 42 U.S.C. 12112(b)(6), and the requirement that Holt pay for a follow-up MRI was none of those things. Pet. App. 43a. The reason petitioner did not "select[]" Holt for the job was his failure to complete the medical screening process. 42 U.S.C. 12112(b)(6); see p. 22, *supra*. Completion of the medical screening process—not the requirement to pay for the follow-up MRI—was thus the "selection criteri[on]" used in this case. 42 U.S.C. 12112(b)(6); see 29 C.F.R. Pt. 1630, App. at 424 (giving "safety requirements, vision or hearing requirements, walking requirements, [and] lifting requirements" as examples of "selection criteria"). Section 12112(b)(6) therefore cannot be invoked to support the judgment below.

b. Because the government now agrees with petitioner that the EEOC was not entitled to summary judgment, it would be appropriate to grant the petition for a writ of certiorari, vacate the judgment below, and remand the case (GVR) for further consideration in light of the position asserted in this brief. See *Lawrence*

v. *Chater*, 516 U.S. 163, 165-175 (1996) (per curiam). The Court has previously issued a GVR in cases in which the United States confessed that the judgment reached by the court of appeals was incorrect. See, *e.g.*, *France* v. *United States*, 136 S. Ct. 583 (2015) (No. 15-24); *Tax-Garcia* v. *United States*, 572 U.S. 1112 (2014) (No. 13-8627); *Breland* v. *United States*, 565 U.S. 1153 (2012) (No. 11-6912). The Court should follow the same course here.

Contrary to petitioner's contention, plenary review is not warranted at this time. Petitioner errs in asserting (Pet. 21-22) that the decision below conflicts with *Porter* v. *United States Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997), and *O'Neal* v. *City of New Albany*, 293 F.3d 998 (7th Cir. 2002). *Porter* involved an employee who injured his back while working as a machine operator. 125 F.3d at 245. His employer put him on a leave of absence and required him to undergo a "functional capacity evaluation" at his own expense before he could be permitted to return to work. *Ibid.* After the employee failed to undergo the evaluation, his employer terminated him. *Id.* at 245-246. The employee sued his employer, alleging that his termination violated the ADA. *Id.* at 245. The Fourth Circuit concluded that "the ADA allowed [the employer] to request a medical examination from [the employee] and, therefore, the [employer's] decision to terminate him did not violate the ADA." *Id.* at 246. Because the employee did not challenge—and the Fourth Circuit did not address—the employer's decision to require the employee to pay for the evaluation, the Fourth Circuit's decision does not conflict with the decision below.

There is likewise no conflict between the decision below and the Seventh Circuit's decision in *O'Neal*. The

plaintiff in *O'Neal* had applied to be a police officer. 293 F.3d at 1002. During a post-offer, preemployment medical examination, a physician concluded that the plaintiff had various "heart problems." *Ibid.*; see *id.* at 1008-1009. The defendants made the plaintiff's job offer contingent on his undergoing additional medical tests at his own expense. *Id.* at 1002. After the plaintiff failed to undergo those tests, the defendants declined to hire him. *Ibid.* The plaintiff sued, alleging that the defendants had violated the ADA "by rejecting him from employment based on conditions identified by [the physician] wholly unrelated to his ability to perform as a police officer." *Id.* at 1009-1010. The plaintiff "concede[d]," however, "that he d[id] not have a disability; nor d[id] he argue that the defendants regarded him as having one." *Id.* at 1010. The Seventh Circuit therefore concluded that the plaintiff had "not shown that the defendants used his medical examination results in violation of the ADA." *Ibid.*

Because neither *Porter* nor *O'Neal* addressed whether the employers' decisions to require the plaintiffs to pay for their medical examinations violated the ADA, petitioner's asserted circuit conflict does not exist. And even if it did, a GVR here would vacate the only decision on one side of the asserted split, thereby eliminating any need for plenary consideration of the issue at this time.

Petitioner also asserts (Pet. 26-32) that the decision below conflicts with federal regulations promulgated by the Office of Personnel Management (OPM). No such conflict exists. OPM's regulations permit federal agencies to require applicants for certain federal positions to undergo "[a] routine pre-employment medical examination." 5 C.F.R. 339.301(a). The regulations provide that

the "agency must pay" for that examination, "whether conducted by the agency's physician or medical review officer, an independent medical evaluation specialist (e.g., occupational audiologist) identified by the agency, or a licensed physician or practitioner chosen by the applicant." 5 C.F.R. 339.304(a). The regulations further provide that if the applicant wishes to provide "supplemental" medical information, the applicant "is responsible for payment" of any "further examination." 5 C.F.R. 339.304(b). Providing supplemental information, however, is optional; the agency will "render a final medical determination" whether supplemental information is provided or not. *Ibid.* The court of appeals' conclusion that petitioner "impermissibly conditioned Holt's job offer on Holt procuring an MRI at his own expense," Pet. App. 25a, therefore has no bearing on the validity of OPM's regulations, which do not make providing supplemental information a condition of completing the medical screening process. In any event, a conflict between a court of appeals' decision and federal regulations—which are within the government's power to revise—is not the type of conflict that would warrant this Court's review. See Sup. Ct. R. 10; cf. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (explaining that the Court is "more restrained and circumspect" in granting review of issues involving the Sentencing Guidelines, which the Sentencing Commission can amend).

CONCLUSION

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 this brief.

Respectfully submitted.

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