No. 18-1139

IN THE

Supreme Court of the United States

BNSF RAILWAY CO.,

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 IN OPPOSITION FOR PROPOSED INTERVENOR-RESPONDENT RUSSELL HOLT

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held 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. § 12102(3)(A), because petitioner believed the applicant had a back condition.

2. Whether the court of appeals correctly held that petitioner violated the ADA's prohibition on discrimination in "job application procedures" and "hiring," 42 U.S.C. § 12112(a), when it required a job applicant to pay for a costly medical test because it perceived him as having a physical impairment.

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STATEMENT OF THE CASE

A. Legal background

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, broadly prohibits disability discrimination in hiring and employment. This case concerns the application of that prohibition to an employer's decision to require a qualified job applicant to pay for a costly medical test because it believed he had a back condition.

1. The ADA provides that a covered employer may not "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." 42 U.S.C. § 12112(a). A "qualified individual" protected under Section 12112(a) is someone who can perform the "essential functions" of the relevant job. *Id.* § 12111(8).[1]

The ADA defines a protected "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities," "(B) a record of such an impairment," or "(C) being regarded as having such an impairment." *Id.* § 12102(1). This case involves the "regarded as" prong, which Congress substantially expanded in the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325,

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[1] The ADA also requires employers to reasonably accommodate qualified individuals with disabilities. 42 U.S.C. § 12112(b)(5). This case involves only the general prohibition on discrimination, not the reasonable-accommodation requirement.

§ 4(a), 122 Stat. 3553, 3555. Under the amended statute, an individual satisfies the "regarded as" requirement if "he or she has been subjected to an action prohibited under [the ADA] 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). Thus, ADA plaintiffs are no longer required to make any extensive showing about the severity of their actual or perceived impairments. Instead, any impairment triggers the ADA's non-discrimination rules so long as it is not "transitory and minor." *Id.* § 12102(3)(B).

2. The ADA provides that Section 12112(a)'s general nondiscrimination rule applies in the context of employment-related "medical examinations and inquiries." 42 U.S.C. § 12112(d)(1). But because the information revealed by such examinations and inquiries poses special risks of disability discrimination, Congress also imposed additional prophylactic restrictions. *See* H.R. Rep. No. 485, Pt. III, at 42-43, 101st Cong., 2d. Sess. (1990).

For current employees, medical examinations and disability-related inquiries are permitted only if they are "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). During the hiring process, employers are generally prohibited from requiring medical examinations or asking disability-related questions at all. *Id.* § 12112(d)(2)(A). The only exception applies "after an offer of employment has been made." *Id.* § 12112(d)(3) At that point, an employer "may require a medical examination" and may condition the job offer on the result, so long as "all entering employees are subjected to such an

examination regardless of disability" and the results are kept confidential and used only in accordance with the ADA. *Id.*

B. The present controversy

1. In 2011, Russell Holt applied to be a patrol officer for petitioner BNSF Railway. Pet. App. 5a. At the time, Mr. Holt was serving as a criminal investigator for a county sheriff's office. *Id.* 5a-6a. BNSF offered him the job, subject to a background check and a medical evaluation. *Id.* 6a.

BNSF uses a contractor to coordinate its medical evaluations, which include a health questionnaire and a physical examination. Pet. App. 6a. Mr. Holt disclosed on his questionnaire that he had injured his back four years earlier, in 2007. *Id.* In response to follow-up questions, Mr. Holt explained that he had kept his job after the injury; that he had no current back pain; and that he saw a chiropractor for "maintenance." *Id.* 6a-7a. He provided medical records related to the injury, including a 2007 MRI showing that he had suffered a "two-level disc extrusion"—an irreversible event in which "the 'jellylike material' inside two of Holt's spinal discs ha[d] been pushed out of the discs into the spinal column." *Id.* 6a; *see id.* 15a-16a.

Mr. Holt also submitted letters from his primary care physician and chiropractor, who wrote that he had responded well to care and was functioning normally. Pet. App. 7a. In addition, BNSF's contractor arranged for Mr. Holt to see Dr. Marcia Hixson, who conducted a "very thorough" examination. *Id.* "Dr. Hixson's exam revealed no issues—with Holt's back

or otherwise—that would prevent him from performing the duties of the Patrol Officer job." *Id.*

The contractor sent Mr. Holt's file to BNSF's chief medical officer, Dr. Michael Jarrard. Pet. App. 8a. Although "all the reviewing doctors had agreed that he could perform the job," Dr. Jarrard "was concerned that there was an underlying pathology that might disqualify Holt." *Id.* Dr. Jarrard instructed the contractor to request more information from Mr. Holt, including "a current MRI and radiologist's report." *Id.* Dr. Jarrard wrote that BNSF wanted the MRI "due to the uncertain prognosis of Holt's back condition." *Id.* (brackets omitted); *see* C.A. E.R. 1481.

Mr. Holt tried to obtain an MRI on his own, but his doctor told him that "the MRI was not medically necessary and so would not be covered by his insurance." Pet. App. 8a-9a. Mr. Holt learned that without insurance, the MRI would have cost more than $2,500. *Id.* 9a. He was in bankruptcy at the time and could not afford to pay such a large sum. *Id.* Mr. Holt asked BNSF to arrange the required test, but "BNSF responded that he was expected to bear the cost of the MRI himself." *Id.* He declined to do so, and BNSF therefore refused to hire him. *Id.*

2. Mr. Holt filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that BNSF had violated the ADA. The ADA incorporates the enforcement provisions of Title VII, which authorize the EEOC to investigate charges of discrimination and to bring suits seeking relief for aggrieved individuals like Mr. Holt. 42 U.S.C. § 2000e-5(b), (f); *see id.* § 12117(a). In this case, the EEOC investigated Mr. Holt's charge, concluded it had merit, and brought suit against BNSF. Pet. App. 10a.

a. On cross-motions for summary judgment, the district court held that BNSF violated the ADA by requiring Mr. Holt to pay for an MRI as a condition of obtaining a job. Pet. App. 30a-53a. The court explained that to establish disparate treatment in violation of Section 12112(a), the EEOC had to 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.* 46a.

The court held that Mr. Holt easily met the "regarded as" standard for disability because BNSF knew he had "a two-level disc extrusion." Pet. App. 48a. The court emphasized that under the ADAAA, "[t]he severity of Mr. Holt's limitations, if any, is no longer at issue." *Id.* 49a. The court noted that BNSF had not denied that Mr. Holt was qualified for the patrol officer job. *Id.* And it concluded that BNSF's demand that Mr. Holt obtain an MRI at his own cost constituted prohibited discrimination because it was motivated by BNSF's perception that he had an impairment. *Id.* 47a.

b. The parties stipulated that the proper measure of Mr. Holt's compensatory damages was $62,500. C.A. E.R. 132. The district court concluded that he was entitled to another $32,800 in backpay. *Id.* 73. It also issued a permanent injunction barring BNSF from requiring job applicants to pay for additional medical tests. Pet. App. 54a-59a.

3. A unanimous panel of the Ninth Circuit affirmed the district court's finding of liability, but vacated and remanded for further proceedings on the injunction. Pet. App. 1a-29a.

a. As relevant here, the Ninth Circuit first held that BNSF perceived Mr. Holt as having an impairment. Pet. App. 13a-17a. The court emphasized that, after the ADAAA, "[t]he ADA no longer requires a showing of a substantially limiting impairment," and that the EEOC was instead required to show "only that BNSF considered Holt to have an impairment." *Id.* 16a. The court found that standard satisfied here because "BNSF assumed that Holt had a 'back condition' that disqualified him from the job unless Holt could disprove that proposition." *Id.* 17a.

b. The Ninth Circuit next held that BNSF had discriminated against Mr. Holt because of his perceived impairment. Pet. App. 17a-24a. The court identified the "key question" as "whether BNSF was entitled to condition Holt's continuation through the hiring process on Holt providing an MRI at his own cost." *Id.* 18a. The court explained that the ADA does not prohibit an employer from requiring a medical test to determine the scope of an applicant's actual or perceived impairment. *Id.* 20a. It also stated that BNSF "would not run afoul of § 12112(a) if it required that everyone to whom it conditionally extended an employment offer obtain an MRI at their own expense." *Id.* 21a. But the court held that when "an employer requests an MRI at the applicant's cost only from persons with a perceived or actual impairment or disability," it has engaged in disparate treatment by "imposing an additional financial burden on a

person with a disability because of that person's disability." *Id.*

c. Although the Ninth Circuit affirmed the district court's finding of liability and BNSF did not separately challenge the amount of the award to Mr. Holt, the Ninth Circuit vacated and remanded the injunction for further proceedings. Pet. App. 25a-29a.

4. The Ninth Circuit denied BNSF's petition for rehearing en banc with no judge requesting a vote. Pet. App. 60a.

REASONS FOR DENYING THE WRIT

BNSF renews its contentions that it did not perceive Mr. Holt as having an impairment and that it did not violate 42 U.S.C. § 12112(a) by requiring him to pay for an MRI. The Ninth Circuit correctly rejected those arguments, and its decision does not conflict with any decision of another court of appeals. Indeed, BNSF has not cited any other decision even addressing a similar situation. That is no surprise: Most states prohibit employers from requiring job applicants to pay for employer-mandated medical tests, and BNSF's practice appears to be an outlier.

The Solicitor General agrees that the questions presented do not warrant plenary review and that BNSF perceived Mr. Holt as having an impairment. But the Solicitor General disagrees with the Ninth Circuit and the EEOC on the second question presented, and he urges this Court to grant, vacate, and remand (GVR) so that the Ninth Circuit can reconsider that question in light of his views.

The Court should simply deny the petition outright. The Court sometimes GVRs when the

United States (or any other litigant) confesses error in a judgment it procured. That is because there is usually good reason to give a lower court a chance to reconsider if the party that supported its original holding has changed positions and would argue for a different result on remand. But that is not the situation here. The EEOC has independent litigating authority in the courts of appeals, and the Solicitor General's brief neither purports to reflect the EEOC's views nor states that the EEOC would urge the Ninth Circuit to adopt his position following a GVR.

The Solicitor General thus seeks to extend the GVR procedure beyond its justification—and beyond precedent, too. He does not cite (and we have not found) any case in which this Court has GVR'd in similar circumstances. The Court should decline this novel invitation to expand its existing GVR practice, which several Justices have already criticized as too quick to upset lower-court judgments based on briefs from the Solicitor General.

I. BNSF's contention that it did not perceive Mr. Holt as having an impairment does not warrant review.

BNSF principally contends that this Court should grant review to resolve a purported circuit conflict created by the Ninth Circuit's holding that BNSF perceived Mr. Holt as having an impairment. Pet. 9-20. No such conflict exists. The Ninth Circuit grounded its holding on an explicit statement by BNSF's chief medical officer that Mr. Holt had a "back condition." Pet. App. 17a. That factbound holding does not conflict with any decision by another court of appeals. It is also clearly correct.

A. BNSF's asserted circuit split does not exist.

BNSF asserts that Ninth Circuit departed from the decisions of other courts of appeals by adopting a per se rule that whenever an employer requires a job applicant or employee to get an individualized medical test, it has perceived him as having an impairment. Pet. 10-17. The Ninth Circuit did not adopt that rule, and it would not have created a circuit conflict even if it had.

1. BNSF starts with the premise that "[t]he Ninth Circuit 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." Pet. 9. But the Ninth Circuit announced no such categorical rule. It also did not rely on the mere fact that petitioner ordered Mr. Holt to get an MRI. Instead, it held that the record showed that "BNSF assumed that Holt had a 'back condition' that disqualified him from the job unless he could disprove that proposition." Pet. App. 17a.

Lest there be any doubt about the case-specific nature of that holding, the Ninth Circuit was quoting BNSF's own chief medical officer, Dr. Jarrard, who wrote that he was ordering an MRI "due to the uncertain prognosis of Holt's back condition." Pet. App. 8a (brackets omitted). That statement confirms that Dr. Jarrard perceived Mr. Holt as having a physical impairment: a "back condition." And because the Ninth Circuit explicitly relied on that statement, its holding would not extend to other circumstances—for example, a case in which an employer required a medical test because it was unsure about the *existence* of an impairment rather than its "prognosis."

BNSF protests too much when it insists that the Ninth Circuit's decision was "*not* factbound." Pet. 10, 19. BNSF emphasizes that the Ninth Circuit "decline[d] to parse the nature of Holt's medical condition" and considered it "irrelevant" whether his disc extrusion is "permanent." Pet. App. 17a; *see* Pet. 10. But that is not because the Ninth Circuit adopted the categorical rule BNSF posits. Instead, it is because the ADAAA makes the severity of Mr. Holt's back condition immaterial: All that matters is whether BNSF acted on the basis of a "an actual or perceived physical . . . impairment." 42 U.S.C. § 12102(3)(A).[2]

2. Even if the Ninth Circuit had adopted the per se rule BNSF attributes to it, that still would not establish a circuit conflict. BNSF asserts that other courts of appeals have held that an employer's request for a medical test does not establish that it regarded the affected individual as disabled. But every precedential decision BNSF cites applied the pre-ADAAA statute, which required a showing not just that the employer regarded the plaintiff as having an impairment, but also that it believed the impairment "substantially limit[ed] one or more major life activities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

That is a much higher bar, and the decisions BNSF cites explicitly relied it. The Third Circuit, for example, held that a valid request for a medical test,

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[2] BNSF has not argued that Mr. Holt's perceived back impairment was "transitory and minor." 42 U.S.C. § 12102(3)(B); *see* 29 C.F.R. § 1630.15(f) (specifying that the "transitory and minor" exception is an affirmative defense).

without more, is not "sufficient to demonstrate that an employer 'regarded' the employee as substantially limited in a major life activity." *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001). The Seventh Circuit likewise emphasized that "the plaintiff must be regarded as having a substantial impairment, not just any impairment." *Sanchez v. Henderson*, 188 F.3d 740, 745 (7th Cir. 1999).[3]

BNSF maintains that its pre-ADAAA decisions are still good law because they relied on the lack of any perceived impairment at all rather than the now-repealed "substantially limits" requirement. Pet. 15-16. But only the Tenth Circuit's decision in *Lanman v. Johnson County*, 393 F.3d 1151 (10th Cir. 2004),

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[3] *See also Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 703 (4th Cir. 2001) (holding that the plaintiff had not shown that his employer "regarded him as substantially limited in the major life activity of working"); *Wright v. Ill. Dep't of Corr.*, 204 F.3d 727, 732 (7th Cir. 2000) (holding that the employee "failed to demonstrate that the [employer] regarded him as being substantially impaired in a major life activity"); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) ("A request that an employee obtain a medical exam . . . does not prove that the employer perceives the employee to have an impairment that substantially limits one or more of the employee's major life activities."); *Cody v. Cigna Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998) ("A request for an evaluation is not equivalent to treatment of the employee as though she were substantially impaired."). The Eighth Circuit's decision in *Wisbey v. City of Lincoln*, 612 F.3d 667 (8th Cir. 2010), is even further afield because it held that the plaintiff *was* disabled even under the pre-ADAAA statute. *See id.* at 673 (holding that "the City did not mistakenly regard Wisbey as having an impairment that substantially limited her ability to work" because "Wisbey was, in fact, unable to work").

even raised that possibility, and it did so in dicta. BNSF quotes a portion of the court's opinion doubting that the defendant regarded the plaintiff as impaired. *Id.* at 1157. But the court did not rely on that discussion. Instead, it "resolve[d] the case on [another] basis," holding that "even if" the plaintiff had shown "that she was regarded as impaired," she had not shown that "the perceived impairment substantially limited her in at least one major life activity." *Id.*[4]

B. The Ninth Circuit's decision is correct.

The Ninth Circuit correctly held that BNSF perceived Mr. Holt as having a physical impairment.

1. The ADA does not define "impairment," but Congress specified that all aspects of the definition of disability "shall be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of [the ADA]." 42 U.S.C. § 12102(4)(A). Congress also authorized the EEOC "to issue regulations implementing the definition of disability." 42 U.S.C. § 12205a. Exercising that authority, the EEOC has defined a physical impairment to include "[a]ny physiological disorder or condition, cosmetic disfig-

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[4] BNSF's sole authority applying the post-ADAAA statute is *Pena v. City of Flushing*, 651 Fed. Appx. 415 (6th Cir. 2016). That decision could not create a circuit conflict because it is not precedential. 6th Cir. R. 32.1. In any event, *Pena* did not appear to address the question whether the employer perceived the employee as having an "impairment." Instead, it held that the employer did not violate the ADA because the required examination was "job related and consistent with business necessity." 651 Fed. Appx. at 420-21. Such an examination is lawful even if the employee is disabled. 42 U.S.C. § 12112(d)(4)(A).

urement, or anatomical loss affecting one or more body systems," including the "musculoskeletal" system. 29 C.F.R. § 1630.2(h)(1).

BNSF has not challenged that definition, which provides a clear answer here: A disc extrusion is a physical impairment because it is a "physiological disorder or condition" affecting the "musculoskeletal" system, 29 C.F.R. § 1630.2(h)(1); *see* SG Br. 12-16. BNSF knew that Mr. Holt had a two-level disc extrusion, and Dr. Jarrard explicitly referred to Mr. Holt's "back condition" in taking the challenged adverse action. Pet. App. 8a. Nothing more is required.

2. BNSF asserts that the record shows only that it was unsure "whether Holt had a current impairment that would prevent him from safely performing the duties of a Senior Patrol Officer." Pet. 19 (emphasis omitted). But that conflates two different types of uncertainty. BNSF may well have been unsure about the *severity* of Mr. Holt's impairment, but it undeniably knew that he had *some* impairment. Dr. Jarrard recognized that Mr. Holt had suffered an irreversible disc extrusion, Pet. App. 15a-16a, and he wrote at the time that he was requiring an MRI "due to the uncertain prognosis of Holt's back condition." *Id.* 8a (brackets omitted). In other words, Dr. Jarrard was uncertain only about the impairment's "prognosis," not its existence.

3. BNSF's petition does not address that contemporaneous statement by its own chief medical officer, which formed the basis of the Ninth Circuit's holding. Instead, BNSF relies mainly on a policy argument, emphasizing that "employers must be permitted to require medical examinations" when they have reason to believe that applicants or employees have

conditions that could prevent them from doing their jobs. Pet. 19-20. The Ninth Circuit's decision poses no threat to that sensible goal.

BNSF seems to presume that an employer exposes itself to liability any time it perceives an individual as having an impairment. In fact, that simply brings the individual within the protection of the ADA. It does not threaten liability any more than an employer's knowledge of other protected traits like age or religion. An employer risks liability only if it *both* perceives an individual as having an impairment *and* violates one of the ADA's substantive rules.

In enacting the ADAAA, moreover, Congress deliberately made the "regarded as" threshold a low bar. It emphasized that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADAAA § 2(b)(5), 122 Stat. 3554. Instead, Congress determined that "the primary object of attention" in ADA cases should be whether covered employers "have complied with their obligations." *Id.*

Congress crafted those obligations to give employers ample room to protect the legitimate interests that BNSF highlights. In particular, an employer who perceives an individual as having an impairment does not violate the ADA's nondiscrimination rule unless (a) the individual is qualified for the job, and (b) the employer discriminates against the individual by taking an adverse employment action because of his perceived impairment. 42 U.S.C. § 12112(a).

As the Ninth Circuit took pains to emphasize, therefore, nothing in its decision prevents BNSF (or

any other employer) from securing the information necessary to determine whether applicants and employees can do their jobs—including by requiring "follow-up exams" of "people with disabilities or impairments." Pet. App. 20a. BNSF violated Section 12112(a) not because it concluded that Mr. Holt had a physical impairment and sought more information, but only because it "impos[ed] an additional financial burden" on Mr. Holt "because of" his perceived impairment. *Id.* 21a.

II. BNSF's contention that it did not violate Section 12112(a) does not warrant review.

BNSF also contends that this Court should grant review to resolve an asserted circuit split created by the Ninth Circuit's holding that BNSF violated Section 12112(a) when it required Mr. Holt to pay for an MRI because of his perceived impairment. Pet. 20-26. Again, no conflict exists. Neither of the decisions BNSF cites considered the question presented here. That question has rarely arisen—likely because most States prohibit employers from requiring job applicants to pay for employer-mandated medical tests under any circumstances. And the Ninth Circuit's holding follows directly from the statutory text and settled disparate-treatment principles.

A. No other court of appeals has addressed the question presented.

BNSF contends that the Ninth Circuit's decision conflicts with decisions of the Fourth and Seventh Circuits. Pet. 21-23. Those decisions did not address the question presented, and the Ninth Circuit specifically distinguished them. Pet. App. 21a-22a nn. 8, 10.

In *Porter v. U.S. Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997), an employer fired a worker who refused to undergo a functional capacity examination after a back injury. *Id.* at 245. The Fourth Circuit rejected the worker's ADA claim, holding that the request for the examination complied with the ADA because it was "job related and consistent with business necessity." *Id.* at 246 (quoting 42 U.S.C. § 12112(d)(4)). The court also held that the worker could not prevail on his discrimination claim because he had failed to establish that he was disabled. *Id.* at 247. The court noted in passing that the worker would have had to pay for the examination. *Id.* at 245. But the court did not address the legality of that requirement under the ADA (the question presented here) because the worker had not raised the issue. To the contrary, his only ADA claim was that the employer could not require any examination at all. *Id.* at 246-47; *see* Appellant Br. 9-19, *Porter*, *supra* (No. 96-1441) (1996 WL 33417823).

In *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002), an employer required a job applicant to get medical tests at his own expense. *Id.* at 1002. The court rejected the applicant's contention that the tests violated Section 12112(d)'s prophylactic restrictions on medical examinations. *Id.* at 1007-10. But as the Ninth Circuit emphasized, the employee in *O'Neal* could not have asserted a discrimination claim under Section 12112(a) because (unlike Mr. Holt) he had "conceded that he did not have a disability" and thus "did not argue that the burden of paying for testing was imposed on him on account of his disability." Pet. App. 21a n.8; *see O'Neal*, 293 F.3d at 1009-10.

B. The question presented is not important.

BNSF has thus cited no other decision addressing the question whether the ADA allows an employer to require a job applicant to pay for a medical test because it regards the applicant as having an impairment. We have found only one—a recent district court decision likewise holding that the imposition of such a discriminatory burden violates the ADA. *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d 1141, 1155 (S.D. Ill. 2017). A question that has arisen so infrequently and received such scant attention in the lower courts does not warrant this Court's review.

One reason the question presented seldom arises is that at least thirty states have civil or criminal laws prohibiting employers from requiring job applicants to pay for medical tests under any circumstances. Ohio, for example, provides that an employer may not "require any prospective employee or applicant for employment to pay the cost of a medical examination required by the employer as a condition of employment." Ohio Rev. Code Ann. § 4113.21(A).[5] Washington, where this case arose, has

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[5] *See* Ark. Code Ann. § 11-3-203(a); Cal. Lab. Code § 222.5; Colo. Rev. Stat. § 8-2-118(1); Haw. Rev. Stat. § 388-6(6); 820 Ill. Comp. Stat. § 235/1; Ky. Rev. Stat. Ann. § 336.220; La. Rev. Stat. Ann. § 23:897(A); Me. Rev. Stat. tit. 26, § 592; Mass. Gen. Laws Ann. ch. 149, § 159B; Mich. Comp. Laws Ann. § 750.354a; Minn. Stat. Ann § 181.61; Mont. Code Ann. § 39-2-301; Neb. Rev. Stat. § 48-221; N.H. Rev. Stat. Ann. § 275:3; N.J. Stat. Ann. § 34:11-24.1; N.Y. Lab. Law § 201-b; N.C. Gen. Stat. § 14-357.1; N.D. Cent. Code Ann. § 34-01-15; Okla. Stat. Ann. tit. 40, § 191; Or. Rev. Stat. Ann. § 659A.306; 43 Pa. Cons. Stat. Ann. § 1002; R.I. Gen. Laws § 28-6.2-1; S.D. Codified Laws § 60-11-2; Utah Code Ann.

not imposed that prohibition on all employers, but has made it a misdemeanor for "any common carrier by rail" to "require any employee or applicant for employment to pay the cost of a medical examination . . . required by the employer as a condition of employment." Wash. Rev. Code Ann. § 81.40.130.

BNSF suggests that the Ninth Circuit's decision will disrupt its uniform practice of requiring job applicants to bear the cost of whatever individualized medical tests BNSF deems necessary. Pet. 26, 32-33. But it is unclear how BNSF could reconcile such a practice with these laws, which apply in most of the states where it operates.

C. The Ninth Circuit's decision is correct.

Section 12112(a) makes it unlawful to "discriminate against a qualified individual on the basis of disability" in "job application procedures" or "hiring." As the Ninth Circuit held, that perfectly describes BNSF's demand that Mr. Holt pay for an expensive medical test because of his perceived impairment.

1. "[D]isparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or other protected characteristic." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (brackets, ellipsis, and citation omitted). To establish a disparate-treatment claim under the ADA and other similar statutes, therefore,

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§ 34-33-1; Vt. Stat. Ann. tit. 21, § 301; Va. Code Ann. § 40.1-28; W. Va. Code Ann. § 21-3-17; Wis. Stat. Ann. § 103.37; Wyo. Stat. Ann. § 27-11-113.

a plaintiff must show that he falls within the protected class, that his employer subjected him to a covered adverse employment action, and that "the protected trait actually motivated the employer's decision." *Id.* (citation omitted).

Each of those requirements is satisfied here. Mr. Holt is protected by the ADA because BSNF perceived him as having a physical impairment. Pet. App. 17a; *see* 42 U.S.C. § 12102(3)(A). Conditioning a job offer on the applicant's willingness to pay for a $2,500 test plainly qualifies as an adverse action with respect to "job application procedures" or "hiring." 42 U.S.C. § 12112(a). And it is equally plain that Mr. Holt's "protected trait"—his perceived impairment—"actually motivated [BNSF's] decision." *Raytheon*, 540 U.S. at 52. After all, Dr. Jarrard explicitly stated that he was requiring the MRI "due to" Mr. Holt's back condition. Pet. App. 8a.

The Ninth Circuit's decision thus rests on the unexceptionable proposition that an employer engages in disparate treatment under Section 12112(a) if it "impos[es] an additional financial burden on a person with a disability because of that person's disability." Pet. App. 21a; *see Taylor v. BNSF Holdings, Inc.*, 904 F.3d 846, 848 (9th Cir. 2018) (reiterating this holding).

2. BNSF offers no persuasive response to that straightforward analysis. It emphasizes that a different provision—Section 12112(d)(3)—"allows an employer to 'require' post-offer medical examinations." Pet. 24. But the Ninth Circuit did not disagree. It made clear that BNSF is perfectly free to require job applicants to take medical tests—and even to require all applicants to pay for those tests (at least

as far as the ADA is concerned). Pet. App. 20a & n.7. It held only that BNSF discriminated in violation of Section 12112(a) by subjecting Mr. Holt to a financial burden "because of" his perceived impairment. *Id.* 21a. Nothing in Section 12112(d) authorizes such disparate treatment. Just the opposite: Congress expressly provided that employer-mandated medical tests must comply with *both* Section 12112(d)'s special restrictions *and* Section 12112(a)'s general non-discrimination rule. 42 U.S.C. § 12112(d)(1).

BNSF also asserts that "the Ninth Circuit concocted . . . a new theory of discrimination" because "there was no allegation that BNSF's request that Holt get an MRI was a pretext for discrimination." Pet. 25. But it is BNSF that seeks departs from hornbook disparate-treatment principles. This Court has repeatedly instructed that the question in a disparate treatment case is "whether the protected trait . . . actually motivated the employer's decision." *Raytheon*, 540 U.S. at 52 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). Here, Dr. Jarrard's email provided *direct* evidence that Mr. Holt's protected trait—his perceived impairment—actually motivated the adverse action. And when a plaintiff proves his case with "direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic," there is no need for any separate inquiry into pretext. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015).

3. The Solicitor General, for his part, does not appear to disagree with the Ninth Circuit's holding that the ADA prohibits an employer from "imposing an additional financial burden on a person with a disability because of that person's disability." Pet.

App. 21a. Instead, he seeks to recast the facts of this case to take them outside that well-founded rule. SG Br. 20-25. That reframing is unpersuasive.

The Solicitor General starts in the right place, acknowledging that the question is whether the EEOC "identif[ied] a decision by [BNSF] that was motivated by disability." SG Br. 21. But his analysis immediately goes astray by presuming that "[n]o one argues that [BNSF] acted with a discriminatory motive in requiring Holt to obtain a follow-up MRI." *Id.* That is just not so. Recall that, in this context, to say that an employer acted with a "discriminatory motive" is simply to say that it acted "because of an actual or perceived physical or mental impairment." 42 U.S.C. § 12102(3)(A); *see Raytheon*, 540 U.S. at 52. And at the risk of belaboring the point, Dr. Jarrard *admitted* that his decision to require Mr. Holt to obtain an MRI at his own expense was "due to"—that is, because of, or motivated by—Mr. Holt's perceived impairment. Pet. App. 8a.

The Solicitor General is quite right that "an employer may require job applicants to undergo 'follow-up examinations' (like MRIs)" without "running afoul of the ADA's prohibition on disparate treatment." SG Br. 21. But that is assuredly not because such follow-up examinations are never motivated by the applicants' impairments. To the contrary, common sense suggests—and this case illustrates—that employers often request a follow-up examination precisely *because* they believe the applicant has an impairment that may prevent him from doing the job.

Instead, follow-up examinations generally do not violate Section 12112(a) because a mere request for a medical examination, without more, is not a covered

"adverse employment action." 9 *Larson on Employment Discrimination* § 154.02 (2019); *cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61-63 (2006) (explaining that the parallel provision of Title VII reaches only actions that "affect employment or alter the conditions of the workplace"). The ADA affirmatively authorizes medical examinations in some circumstances, 42 U.S.C. § 12112(d), and other provisions of the statute require employers to have an accurate understanding of employees' disabilities and any associated limitations, *see, e.g.*, *id.* § 12112(b)(5) (reasonable-accommodation requirement). A request that an applicant or employee undergo a medical examination, without more, thus does not constitute discrimination in violation of Section 12112(a)—even if (as will often be true) it is motivated by an actual or perceived impairment.[6]

Here, though, BNSF did not just require Mr. Holt to undergo an MRI; it also demanded that he pay for it. And unlike a mere request for a medical examination, conditioning a job on an out-of-pocket expenditure of $2,500 is plainly an adverse employment action. No one would doubt, for example, that an employer had violated Section 12112(a) if it required a job applicant to pay a $2,500 application fee because of his disability.

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[6] A request for a medical examination still must comply with the restrictions in Section 12112(d), which apply whether or not the request was motivated by disability—indeed, whether or not the affected individual even has a disability. *See* 42 U.S.C. § 12112(d).

The Solicitor General does not appear to dispute that requiring an applicant to pay for a $2,500 test is the sort of adverse action that would violate Section 12112(a) if the requirement were imposed because of the applicant's disability. He asserts, however, that Mr. Holt was not subjected to that adverse action because of his disability, but rather because of what the Solicitor General characterizes as BNSF's "policy of declining to pay for any follow-up MRI," whether or not it perceives the affected applicant as having an impairment. SG Br. 23-24.

The problem with that account is that BNSF itself decides, on an individualized basis, which applicants will be required to obtain follow-up MRIs—and thus to bear the associated cost. Pet. App. 8a; *see* SG Br. 22-23. In this case, BNSF placed Mr. Holt into that disfavored class solely because it perceived him as having a physical impairment. Pet. App. 17a. The fact that BNSF may also place other, nondisabled employees into the same disfavored class does not change the fact that *Mr. Holt* was subjected to less favorable treatment because of his perceived impairment. He thus has a valid disparate treatment claim because his "protected trait actually played a role" in BNSF's "decisionmaking process" and had "a determinative effect" in bringing about the adverse employment action. *Hazen Paper*, 507 U.S. at 610.

As should be clear, the point is not that BNSF's practices have a disparate impact on persons with disabilities (though they almost certainly do). *Cf.* SG Br. 24-25. BNSF did not act based on some neutral factor that is merely "correlated" with perceived impairments. *Hazen Paper*, 507 U.S. at 608. Instead, it made an individualized decision to place Mr. Holt

in a disfavored class *because of* his protected trait. That is textbook disparate treatment.

III. The Solicitor General's disagreement with the Ninth Circuit and the EEOC does not justify a GVR.

Although the Solicitor General agrees that this case does not satisfy this Court's certiorari standards, he argues that the Court should GVR so that the Ninth Circuit can reconsider the second question presented in light of his views. The Court should decline that invitation, which would stretch the GVR procedure beyond its justification and past use.

1. This Court has emphasized that its "GVR power should be exercised sparingly." *Lawrence v. Chater*, 516 U.S. 163, 173 (1996). "Respect for lower courts, the public interest in finality of judgments, and concern about [the Court's] own expanding certiorari docket all counsel against undisciplined GVR'ing." *Id.* at 174. Even in the Court's most expansive description of its GVR authority, therefore, it stated that a GVR is "potentially appropriate" only when some new development creates "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Id.* at 167. Even then, the Court stressed that "[w]hether a GVR order is ultimately appropriate depends further on the equities of the case." *Id.* at 167-68.

One potential basis for a GVR is a confession of error by the United States or another party that prevailed below. The Court has cautioned that it "should not mechanically accept any suggestion from the Solicitor General that a decision rendered in

favor of the Government by a United States Court of Appeals was in error." *Lawrence*, 516 U.S. at 171 (brackets and citation omitted). But a confession of error by the Solicitor General (or any litigant) will often warrant a GVR because it typically means that "the prevailing party. . . has now repudiated the legal position that it advanced below." *Stutson v. United States*, 516 U.S. 193, 195 (1996). Ours is an adversarial system, and there is usually good reason to allow a court of appeals to reconsider if the party that previously supported its holding changes course and would urge a different result on remand.

2. This case does not involve such a confession of error. The United States is not a party to this suit, which was brought by the EEOC. Pet. App. 10a; *see* 42 U.S.C. § 2000e-5(f). The Solicitor General represents the EEOC in this Court, but Congress vested the Commission with independent litigating authority in the lower courts, including the courts of appeals. 42 U.S.C. § 2000e-4(b)(2). And in exercising that authority, the EEOC is not bound to adhere to the Solicitor General's legal positions.[7]

The Solicitor General's brief in this case is not signed by any attorney from the EEOC and does not otherwise purport to reflect the Commission's views. It also does not state that the EEOC would urge the Ninth Circuit to adopt the Solicitor General's position after a GVR. As a result, this is not a case in which a

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[7] *See, e.g.*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116 n.12 (2d Cir. 2018) (describing opposing briefs filed by the EEOC and the Department of Justice), cert. granted, No. 17-1623 (Apr. 22, 2019).

remand would present the court of appeals with a prevailing party that has changed positions. Instead, the only intervening development for the Ninth Circuit to consider would be the Solicitor General's expressed disagreement with its original decision.

With all respect to the Solicitor General, such disagreement has never been, and should not become, sufficient grounds for a GVR. Several times each Term, for example, the Solicitor General responds to this Court's call for the views of the United States by filing a brief disagreeing with some aspect of the decision below.[8] When that happens, the Court either grants or denies plenary review based on its usual certiorari standards. It never GVRs to direct the court of appeals to reconsider the issue simply because the Solicitor General has taken a different view. And that is because the Solicitor General's disagreement, without more, does not justify upsetting a judgment and imposing "the delay and further cost entailed in a remand." *Lawrence*, 516 U.S. at 168.[9]

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[8] *See, e.g.*, SG Br. 18-23, *Airline Serv. Providers Ass'n v. Los Angeles World Airports*, 139 S. Ct. 2740 (2019) (No. 17-1183); SG Br. 7-8, *Atl. Richfield Co. v. Christian*, 139 S. Ct. 2690 (2019) (No. 17-1498); SG Br. 9, *City of Cibolo v. Green Valley Special Util. Dist.*, 139 S. Ct. 783 (2019) (No. 17-938).

[9] The Court has sometimes GVR'd in cases where the Solicitor General's brief set forth the position of an agency whose views were entitled to deference on the question presented. *See, e.g.*, *Lawrence*, 516 U.S. at 174; *Raquel v. Educ. Mgmt. Corp.*, 531 U.S. 952 (2000) (No. 99-1489). Here, however, the only agency with any claim to deference is the EEOC, not the Department of Justice. *See* 42 U.S.C. §§ 12116, 12205a.

3. The Solicitor General does not cite—and we have not found—any case in which the Court GVR'd based on a confession of error that did not reflect the views of the entity with authority to litigate the case in the court of appeals. Several Justices have argued that even the Court's existing practice of GVR'ing based on the positions of the Solicitor General is in some circumstances insufficiently respectful of the lower courts. *See, e.g.*, *Myers v. United States*, 139 S. Ct. 1540, 1541 (2019) (Roberts, C.J., dissenting); *Nunez v. United States*, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 252 n.36 (10th ed. 2013) (collecting examples). The Court should decline the invitation to expand that practice still further.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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