No. _____

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

BRYAN P. NEAL
STEPHEN F. FINK
THOMPSON & KNIGHT LLP
1722 Routh Street
Suite 1500
Dallas, Texas 75201
Telephone: (214) 969-1700
bryan.neal@tklaw.com

ANDREW S. TULUMELLO
Counsel of Record
LUCAS C. TOWNSEND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 955-8500
atulumello@gibsondunn.com

Counsel for Petitioner BNSF Railway Company

QUESTIONS PRESENTED

The Americans with Disabilities Act of 1990 ("ADA") prohibits discrimination on the basis of "disability." One type of "disability"—called "regarded as" disability—exists when an employer takes an action the statute prohibits "because of an actual or perceived physical or mental impairment." Recognizing that medical information is often relevant to employment, however, the ADA authorizes employers to require job applicants and employees to undergo medical examinations and to respond to medical inquiries subject to certain conditions. This case arises out of an employer's medical-examination requirement made expressly to determine whether an applicant for a railroad police officer job could safely perform all of the required duties of the position. The Ninth Circuit held that a request for a follow-up medical test as part of the required examination established that the employer "regarded" the applicant as disabled and that, by requiring him to pay for the additional medical information, the employer "discriminated" against the applicant on the basis of a "regarded as" disability. The questions presented are:

1. Whether requiring an individualized medical examination as a condition of employment to determine whether a job applicant or employee can safely perform the required duties of the position establishes, in and of itself, that an employer "regards" the applicant or employee as disabled for purposes of a discrimination claim under the ADA.

2. Whether requiring an applicant or employee to pay for a required individualized medical examination establishes that an employer has unlawfully discriminated under the ADA.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

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PETITION FOR A WRIT OF CERTIORARI

BNSF Railway Company ("BNSF") respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit as amended on September 12, 2018 (Pet. App. 1a-29a) is reported at 902 F.3d 916. The district court's order granting summary judgment against BNSF (Pet. App. 30a-53a) is unreported but available at 2016 WL 98510.

JURISDICTION

The Ninth Circuit entered its judgment on August 29, 2018, and denied BNSF's timely petition for rehearing and rehearing en banc on November 30, 2018. Pet. App. 60a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), 42 U.S.C. §§ 12102 and 12112, as well as the relevant implementing regulations, 29 C.F.R. § 1630.2, are reproduced at Pet. App. 61a-65a.

STATEMENT OF THE CASE

BNSF operates one of the largest freight railroad networks in North America, with more than 32,000 miles of track in 28 states. The physical risks present

in the railroad industry are well documented, and BNSF is proud to maintain the highest standards of workplace safety for its employees and the public. Toward that end and like many employers—especially those with employees in safety-sensitive positions—BNSF requires medical examinations for job applicants, and conditions offers of employment on the applicant satisfactorily completing the medical examination. The examinations are essential to ensure that each employee can perform his or her job in a way that does not jeopardize the health and safety of the employee or others.

This case concerns "individualized" medical examinations, which are specific inquiries or follow-up testing in situations where an applicant discloses, or initial screening reveals, potential medical issues that could be relevant to the safe performance of the job. BNSF pays for the initial examination required of all applicants, but if follow-up medical testing is needed, the applicant must bear the expense of that individualized testing. BNSF's hiring practices in that way match the federal government's regulations for competitive-service and some excepted-service positions. *See* 5 C.F.R. § 339.304(d).

The Ninth Circuit held that requiring a prospective employee to undergo an individualized medical examination as a condition of employment *per se* establishes that the employer "regards" the prospective employee as disabled within the meaning of the ADA. That judgment conflicts with the holdings of at least six other circuits. Those circuits have squarely held that an employer does not *per se* "regard" a person as disabled when the employer requires an individualized medical examination to resolve uncertainty about

the employee or applicant's medical condition. The Ninth Circuit further held that requiring the employee or applicant to pay for the examination constitutes discrimination in violation of the ADA. That judgment conflicts with the holdings of at least two other circuits that have refused to impose ADA liability in materially indistinguishable circumstances, as well as the federal government's own regulations governing competitive-service hiring, which also require job applicants to pay for follow-up medical testing.

When an employer requires an individualized medical examination as a condition of employment for non-pretextual reasons, it does not imply, much less establish, that the employer has any particular perception of the individual. At most, the employer seeks only to resolve medical *uncertainty* about the potential existence of an impairment and—*if* an impairment exists—the applicant's or employee's ability to safely perform the essential functions of the position. Moreover, requiring an applicant or employee to bear the cost of the individualized medical examination is the practice of many employers, including private employers, state and local government employers, and the United States government. Nothing in the ADA prohibits these common-sense practices, and the Ninth Circuit based its contrary judgment on nothing more than the panel's preferred policy outcome. Left uncorrected, the decision below will have a substantial negative impact on countless employers with operations in that circuit and create inconsistent standards for employers around the nation whose operations directly implicate public safety.

A. Statutory Background

The ADA, as amended by the ADAAA, prohibits discrimination "on the basis of" disability. 42 U.S.C. § 12112(a). There are three types of "disability": "actual," "record of," and "regarded as." *Id.* § 12102(1)(A)-(C). This case concerns only individuals "regarded as having such an impairment." *Id.* § 12102(1)(C). That phrase applies when the individual "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." *Id.* § 12102(3)(A) (emphasis added).

Recognizing that disability differs from other types of protected categories under discrimination statutes, in that disability can affect the ability to perform a job, the ADA authorizes employers to require job applicants and employees to undergo medical examinations and to respond to medical inquiries. To balance that need with prohibiting discrimination, the ADA imposes a structure for such examinations and inquiries. 42 U.S.C. § 12112(d). Medical examinations and inquiries are prohibited before making an offer of employment. *Id.* § 12112(d)(2). After an offer is extended, the statute allows employers to *require* medical examinations and responses to medical inquiries. *Id.* § 12112(d)(3). The statute likewise allows employers to *require* medical examinations of employees in some circumstances. *Id.* § 12112(d)(4).

In 2008, Congress amended the ADA by enacting the ADAAA, which revised the ADA in significant but targeted ways. *See* Pub. L. No. 110-325, 122 Stat. 3553 (2008). Congress made no changes at all to the ADA's medical-examination provisions. Instead, the crux of

the amendment was aimed at the "substantially limits" aspect of each of the three types of disability recognized in the original statute.

Under the pre-amended statute, each part of the disability definition contained a "substantially limits" requirement: there had to be (A) an actual, historical, or perceived impairment (B) that is, was, or was perceived by the defendant to substantially limit a major life activity. *See Bragdon v. Abbott*, 524 U.S. 624, 632 (1998). Congress modified the substantially limits component in two ways: (1) by overturning certain decisions of this Court describing the standard for proving when an impairment "substantially limits" a major life activity, and (2) by adopting a new standard for regarded-as claims that eliminated entirely the need to show that an actual or perceived impairment "substantially limited" a major life activity. *See* Pub. L. No. 110-325, 122 Stat. 3553 (2008); 42 U.S.C. § 12102(4); 42 U.S.C. § 12101 note (Findings and Purposes of Pub. L. No. 110–325).[1] Thus, while there is no longer a "substantially limits" component, a regarded-as claim still requires an "actual or perceived physical or mental impairment." 42 U.S.C. § 12102(3)(A).

With respect to regarded-as disability claims in particular, Congress stated that one purpose of the ADAAA was "to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau*

[1] A marked document showing the changes made in the ADAAA is at: http://www.ada.gov/pubs/adastatute08mark.htm (last visited Feb. 26, 2019).

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…." 42 U.S.C. § 12101(b)(3) note. The *Arline* Court explained that the purpose of regarded-as coverage was to favor "actions based on reasoned and medically sound judgments" over speculation about medical conditions. 480 U.S. at 284-85.

B. Factual Background

Russell Holt applied for a position with BNSF as a Senior Patrol Officer in 2011. BNSF Patrol Officers are by statute certified police officers with the right to carry a firearm, use force, make arrests, and otherwise exercise crime-prevention responsibilities. *See* 49 U.S.C. § 28101. BNSF extended a conditional offer of employment to Holt. Because of the responsibilities and physical demands of the position, BNSF requires all Patrol Officer applicants to undergo a post-offer medical examination conducted by an independent contractor. BNSF pays for that examination. The examination revealed that Holt had a history of back problems requiring treatment, including a diagnosis of a spinal disc extrusion in 2007.

The contractor forwarded these results, along with Holt's partial medical history, to BNSF's in-house medical officer, Dr. Michael Jarrard, who determined that he lacked sufficient information about whether Holt currently could perform the Senior Patrol Officer job safely. To resolve the uncertainty—and in particular to determine whether the disc extrusion was resolved, or if not, its current status—Dr. Jarrard requested that Holt provide a current MRI scan and updated medical records. Holt provided none of the re-

quested information and claimed that he could not afford the cost of obtaining a new MRI scan. Because Holt did not complete the post-offer medical examination, BNSF designated Holt as having declined the conditional job offer.

C. Proceedings Below

Holt filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which sued BNSF for alleged violations of the ADA. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331 and ultimately granted partial summary judgment for the EEOC, holding that it had established a claim for disability discrimination under 42 U.S.C. § 12112(a), the ADA's general anti-discrimination provision. The district court held that requiring the MRI as a condition of Holt's job offer satisfied the "extremely low bar" for regarding an employee as disabled and constituted "facial 'discrimination.'" Pet. App. 47a-48a. The court rejected the EEOC's disparate-impact claim under 42 U.S.C. § 12112(b)(6). *Id.* at 41a-43a. At EEOC's request, the district court ordered a nationwide injunction against BNSF. *Id.* at 57a-59a. The parties stipulated to damages, and BNSF appealed.

The Ninth Circuit exercised jurisdiction pursuant to 28 U.S.C. § 1291 and affirmed the judgment of ADA liability under 42 U.S.C. § 12112(a), though on different reasoning, and on grounds not urged by the EEOC. The Ninth Circuit held that conditioning an offer of employment on the results of an individualized medical examination to explore reported medical issues—in and of itself—conclusively established that BNSF "regarded" Holt as disabled. Pet. App. 13a-17a. Although BNSF had cited numerous decisions from

other circuits concluding that an employer's request for an individualized medical examination does not establish that the employer regarded the individual as disabled, the Ninth Circuit panel rejected all of those cases as "unhelpful" because, in the panel's view, they were "superseded" by the ADAAA. *Id.* at 16a-17a. The panel also declined to "parse the nature of Holt's medical condition," deeming the factual medical record "irrelevant." *Id.* at 17a.

The Ninth Circuit panel then reasoned that BNSF discriminated against Holt in violation of 42 U.S.C. § 12112(a) by requiring him to pay for the medical test. Pet. App. 17a-24a. The panel rejected BNSF's argument that the relevant provisions were the medical-examination provisions of 42 U.S.C. § 12112(d) and that the employer's right under them to "require" examinations encompassed the ability to require examinations at the applicant's expense. The panel instead concluded that "[t]he statute is silent as to who must bear the costs of testing" and that "the ADA's policy purposes should control on the issue." Pet. App. 20a-21a. The Ninth Circuit panel also declared that "our holding here applies regardless of the cost of the medical test at issue, as well as the [prospective] employee's ability to pay." *Id.* at 21a n.9.[2]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision creates a 6-1 circuit split on whether requiring an individualized medical examination as a condition of employment estab-

[2] The Ninth Circuit did not reach EEOC's arguments under 42 U.S.C. § 12112(b)(6) that the district court had rejected.

lishes, by itself, that the employer regards the applicant or employee as disabled for purposes of the ADA. In addition, the Ninth Circuit's decision creates a 2-1 circuit split on whether requiring an applicant or employee to bear the cost of an individualized medical examination constitutes discrimination under the ADA, 42 U.S.C. § 12112(a). Each of those circuit-court conflicts warrants this Court's review. Moreover, the Ninth Circuit's holdings conflict directly with the federal government's processes for conducting medical examinations of applicants and employees. For that practical reason, review is also warranted.

I. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF SIX OTHER CIRCUITS ON WHETHER REQUIRING INDIVIDUALIZED MEDICAL EXAMINATIONS ESTABLISHES THAT THE EMPLOYER "REGARDS" AN APPLICANT OR EMPLOYEE AS DISABLED.

The 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 within the meaning of the ADA. Pet. App. 17a. In reaching that unprecedented holding, the Ninth Circuit expressed its core reasoning as follows:

> In 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, BNSF assumed that Holt had a "back condition" that disqualified him from the job unless Holt could disprove that proposition. And in rejecting Holt's application because it lacked a recent MRI, BNSF treated him as it would an

> applicant whose medical exam had turned up a back impairment or disability.

Id. The court's holding was expressly *not* factbound. The panel "decline[d] to parse" the record on Holt's medical condition, viewing the evidence as "irrelevant." *Id.* The court cited no case in support of its sweeping holding. *See id.* at 16a-17a.

A. The Ninth Circuit's Regarded-As Holding Conflicts With Six Other Circuits.

The Ninth Circuit's decision creates a 6-1 circuit split on the question of whether requiring an individualized medical examination as a condition of employment establishes that the employer "regards" the prospective employee as disabled as a matter of law. The Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits each have correctly held that an employer's request for an appropriately tailored individualized medical examination establishes only *uncertainty* over a person's ability to perform a particular job—and that such a request is *not*, as a matter of law, a conclusive determination that the employer "regards" the applicant or employee as having a disability.

1. The Third Circuit addressed the issue in *Tice v. Centre Area Transportation Authority*, 247 F.3d 506 (3d Cir. 2001). The employer required the employee, a bus driver, to undergo a follow-up medical examination before allowing him to return to work from a medical leave, and eventually terminated his employment. *Id.* at 510. He sued, alleging that the employer violated the ADA by requiring the medical examination. *Id.* The Third Circuit held that the employer's request for the examination "will *never*, in the absence of other

evidence, be sufficient to demonstrate that an employer 'regarded' the employee" as disabled within the meaning of the statute. *Id.* at 515 (emphasis added). As then-Chief Judge Becker explained, "[a] request for such an appropriately-tailored examination only establishes that the employer harbors *doubts* (not certainties) with respect to an employee's ability to perform a *particular* job." *Id.* The Third Circuit held that this does not violate the ADA because "[d]oubts alone do not demonstrate that the employee was held in any particular regard…." *Id.*; *accord Rawlins v. N.J. Transit*, 431 F. App'x 145, 147 (3d Cir. 2011) ("[A] request to undergo an independent medical exam, by itself, is insufficient to establish that the defendants regard the plaintiff as having a disability.").

The Fourth Circuit reached the same conclusion in *Haulbrook v. Michelin North America*, 252 F.3d 696 (4th Cir. 2001). There, the employer discharged the employee after he failed to meet with the company's doctor for a medical examination in connection with his return from a medical leave. *Id.* at 700. The Fourth Circuit held the employer had not "regarded" him as disabled because his employer's actions "simply reflect[ed] uncertainty about [his] condition." *Id.* at 704. The employer "did what an employer committed to meeting its ADA responsibilities in good faith would do: It sought to open a dialogue with [the employee] and obtain further, accurate information regarding his condition so that it could craft an appropriate accommodation." *Id.* The ADA, the court explained, does not permit employees "to refuse reasonable requests by their superiors for information and then plead their superiors' resulting lack of information as a 'regarded-as' disability." *Id.* at 705; *see also Coursey v. Univ. of Md. E. Shore*, 577 F. App'x 167, 174-75 (4th Cir. 2014)

(holding that employer's request for an evaluation of employee is not sufficient to establish regarded-as ADA coverage, and noting that of the courts of appeals to address the issue, "all have concluded" the same).

The Sixth Circuit held likewise in *Sullivan v. River Valley School District*, 197 F.3d 804 (6th Cir. 1999). Sullivan was a school teacher whose sudden strange behavior prompted concerns about his mental stability, leading the school to suspend him pending completion of a mental and physical fitness-for-duty examination. In his ADA lawsuit the Sixth Circuit held that the employer's requirement that he undergo mental and physical examinations to determine his fitness "is not enough to suggest that the employee is regarded as mentally disabled." *Id.* at 810. The court acknowledged the critical importance of permitting employers to use medical examinations to resolve doubts about an employee's ability to perform the essential functions of the position. The opposite holding—the one reached by the Ninth Circuit in this case—"would unnecessarily inhibit employers from any inquiry regarding the status of behavior on the part of an employee" that may undermine the employee's ability to perform his duties. *Id.* at 811 (citation omitted); *see also Pena v. City of Flushing*, 651 F. App'x 415, 420 (6th Cir. 2016) (rejecting argument that "referring an individual to a fitness for duty examination when the employer knows the employee has medical problems is a per se 'regarded as' violation").

The Seventh Circuit agreed in *Wright v. Illinois Department of Corrections*, 204 F.3d 727 (7th Cir. 2000). After successfully completing a physical agility

test required of all applicants, the Department of Corrections offered Wright a job as a correctional officer conditioned on his successful completion of a drug test and medical examination. *Id.* at 728. At orientation, he raised concerns that an ankle problem might keep him from marching or prolonged running. *Id.* The Department scheduled a special medical examination—one separate from the routine physical examination required of all applicants—to determine if Wright would be capable of performing the duties of a correctional officer. Wright failed to timely attend the examination and the Department declined to hire him. *Id.* at 729. The Seventh Circuit affirmed summary judgment for the Department on Wright's ADA claims, holding that the requirement of an additional medical examination did not establish that the Department regarded Wright as disabled:

> The record does not demonstrate that the Department acted out of 'myth, fear or stereotype' when it arranged for the examination by the doctor…. To the contrary, the record as a whole shows that the Department's request was merely an attempt to ascertain the extent of Mr. Wright's claimed impairment—an impairment the Department had not even considered to be a problem until Mr. Wright raised the possibility that his earlier injuries might impede him from meeting the specific demands of the particular job for which he was applying.

Id. at 732; *see also Sanchez v. Henderson*, 188 F.3d 740, 744 (7th Cir. 1999) (rejecting argument that requirement of medical examination for postal employee constituted regarding the employee as disabled).

The Eighth Circuit held the same in *Wisbey v. City of Lincoln*, 612 F.3d 667 (8th Cir. 2010) *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011). An emergency dispatcher sought intermittent medical leave, citing problems with concentration and motivation. *Id.* at 670. Her employer scheduled a follow-up fitness-for-duty examination to determine whether, given the reported symptoms, she could continue performing the functions of her job during non-leave periods. *Id.* A psychiatrist concluded that she was unfit for duty. *Id.* at 671. The Eighth Circuit rejected her ADA claims under 42 U.S.C. § 12112(a) and (d)(4)(A), holding that the required fitness-for-duty exam did not establish that the employer regarded her as disabled because "employers are permitted to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims, and fitness-for-duty exams are considered a reasonable means of making this determination." *Id.* at 673 (internal quotation marks and citation omitted); *see also Cody v. CIGNA Healthcare of St. Louis, Inc*., 139 F.3d 595, 599 (8th Cir. 1998) (request for a mental examination of an employee who had exhibited strange behaviors does not establish that the employer "regarded" the employee as disabled).

The Tenth Circuit held similarly in *Lanman v. Johnson County*, 393 F.3d 1151 (10th Cir. 2004). There, a County placed a deputy sheriff on leave and required a psychological fitness-for-duty examination based on the deputy's reported workplace behavior. *Id.* at 1154. The deputy resigned and alleged that the employer's requirement violated the ADA. *Id.* at 1157. The Tenth Circuit rejected her claim, holding that the

examination requirement did not show that the employer perceived her as having an impairment at all. *Id.* Instead, the Tenth Circuit held that employers must be permitted to use examinations to determine whether employees are fit for duty and that this principle is "especially true in professions like law enforcement where employees are responsible for the care and safety of others." *Id.*; *accord Fryner v. Coil Tubing Servs., LLC*, 415 F. App'x 37, 44 (10th Cir. 2011) ("[T]he ADA does not require an employer to unwittingly risk the safety of its employees or the public. Being temporarily uncertain of a situation is not the same as considering an employee disabled.").

2. The Ninth Circuit dismissed those decisions as "unhelpful" and "superseded by statute" because several of them predate the ADAAA. Pet. App. 16a-17a. The panel thought it significant that the ADAAA eliminated the requirement for regarded-as claims that an employer perceive an impairment to "substantially limit" a major life activity. But before having any perception about the *effect* of an impairment—whether it is substantially limiting—one must first perceive the *existence* of an impairment. And that requirement remains in place after the ADAAA, as the Ninth Circuit acknowledged. *Id.* at 14a ("The parties agree that for BNSF to have regarded Holt as having a disability, BNSF must have regarded him as having a *current* impairment.").

Not one of the decisions from other circuits turned on the distinction between a condition being "an actual or perceived physical or mental impairment," and such an impairment being regarded as one that "substantially limits" a "major life activity" as required under the pre-amended law. For example, in *Lanman*,

the Tenth Circuit expressly divided the "regarded as" question into two parts: first, did the medical-examination request constitute regarding the plaintiff as having an *impairment*, and second, even if it did, was it a substantially limiting impairment? *Lanman*, 393 F.3d at 1157. Yet in dismissing *Lanman* as "not persuasive," Pet. App. 16a, the Ninth Circuit disregarded entirely *Lanman*'s express holding that the employee could not establish that the employer "regarded" her as impaired simply because the employer required a medical test. 393 F.3d at 1157; *see also Tice*, 247 F.3d at 515 ("Doubts alone do not demonstrate that the employee was held in any particular regard…."); *Sullivan*, 197 F.3d at 811 (explaining that "requesting a mental evaluation does not indicate that an employer regards an employee as disabled").

The Ninth Circuit relied on language in the ADAAA that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). But the panel ignored the express limitation on the mandate of broad construction—"to the maximum extent permitted by the terms of this chapter." *Id.* The principle of construction does not override the substantive statutory provisions. As the Eighth Circuit has concluded, "Congress may have expressed an intent to apply a less rigorous standard to the question whether an impairment 'substantially limits a major life activity,'" *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1112 (8th Cir. 2016), but the Ninth Circuit's rule that a request for individualized medical examination automatically establishes "regarded as" disability is completely untethered to statutory text. "[A]n individual must first establish that he has a

qualifying impairment *before* the less 'extensive analysis' is applied to determine whether the impairment 'substantially limits a major life activity.'" *Id.* (emphasis added). The same is true of cases alleging a perceived rather than an actual impairment. *Id.* at 1112-13.

After the ADAAA took effect, the other circuits have continued to hold that requiring a medical examination does not establish that an employer regards an applicant or employee as disabled. For example, the Sixth Circuit expressly rejected the contention that, in the wake of the ADAAA, "referring an individual to a fitness for duty examination when the employer knows the employee has medical problems is a per se 'regarded as' violation." *Pena*, 651 F. App'x at 420. Quite the contrary, the Sixth Circuit reaffirmed its holding in *Sullivan*, noting that "[g]iven that the ADA allows employers to condition employment based upon [fitness for duty] examinations even after the 2008 Amendments, we decline to impose per se liability under the 'regarded as' provision in this circumstance." *Id.* at 421. The court explained that "the 2008 ADA Amendments did not alter our prior approach to 'regarded as' claims under the ADA based upon referrals to fitness for duty examinations." *Id.* at 422.

B. The Ninth Circuit's Unprecedented "Regarded As" Holding Is Contrary To The ADA.

The Ninth Circuit panel literally cited no precedent for the conclusion that the mere request for a medical examination, by itself, establishes that an employer "regards" an applicant as disabled. *See* Pet. App. 15a-17a. Instead, the panel relied only on "the

ADAAA's mandate…in favor of broad coverage of individuals" under the ADA. *Id.* (internal quotation marks omitted). But the Ninth Circuit's holding is contrary to the text and purpose of the ADA. To be liable under the ADA's general discrimination provision, an employer must have discriminated against an individual "on the basis of disability." 42 U.S.C. § 12112(a). The term "disability" includes "being regarded as having…an impairment." *Id.* § 12102(1)(C). An individual falls under this provision only "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." *Id.* § 12012(3)(A).

Whether BNSF regarded Holt as disabled within the meaning of the statute turns on whether BNSF "regarded" or "perceived" him to have a physical impairment. The plain meanings of the terms "regard" and "perceive" require more than that BNSF was *uncertain* about the current nature of Holt's back condition. "Regard" means to "consider or think of (someone or something) in a specified way," New Oxford Am. Dictionary (3d ed. 2010), or "to look at from a particular point of view," Webster's New Int'l Dictionary (3d ed. 2002). These definitions illustrate that to "regard" someone as disabled means to have formed an opinion or conclusion about that person; uncertainty is not sufficient. Similarly, "perceive" means "to recognize or identify," and "goes beyond simple observation." Webster's New Int'l Dictionary (3d ed. 2002); *see also* New Oxford Am. Dictionary (3d ed. 2010) (defining "perceive" as "interpret or look on (someone or something) in a particular way"). To "perceive" an impairment

thus means "[t]o achieve understanding of" the impairment. Am. Heritage Dictionary (5th ed. 2011). That is not possible if the employer lacks sufficient information to form an opinion as to whether there is an impairment. BNSF plainly had not recognized, identified, or achieved an understanding of Holt's condition when it required him to provide a current MRI scan and additional medical records. Indeed, that was the very purpose of the requested examination—to identify or understand *whether* Holt had a current impairment that would prevent him from safely performing the duties of a Senior Patrol Officer. The Ninth Circuit's decision did not engage with the statutory text at all.

The Ninth Circuit's holding is not factbound. The panel expressly declined to consider the medical evidence, finding it "irrelevant" to its legal holding. Pet. App. 17a ("[W]e decline to parse the nature of Holt's medical condition. Whether or not Holt's disc extrusion was a permanent condition is irrelevant here."). It held that the mere act of requesting additional medical information established "regarded as" disability discrimination, effectively recognizing a *per se* rule of law.

The Ninth Circuit's holding is also illogical. That a physician asks questions about a reported prior back condition does not establish that the physician (and the employer) believe there is an "impairment." Rather, the physician is attempting to discern *whether* there is a current impairment. Asking a question is not the same as assuming a particular answer to the question. Further, presented with Holt's disclosure of a past injury, it was reasonable—indeed, necessary—

for BNSF to investigate in order to resolve uncertainty over Holt's current status, both for his safety and the safety of others. In that situation, employers must be permitted to require medical examinations as a condition of employment without fear of incurring ADA liability. As the Tenth Circuit aptly observed in analogous circumstances, "[e]mployers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims….This is especially true in professions like law enforcement where employees are responsible for the care and safety of others." *Lanman*, 393 F.3d at 1157 (internal quotation marks omitted).

Not all employers have BNSF's single-minded commitment to safety. If left uncorrected, the Ninth Circuit's decision will discourage employers' exercise of their right to obtain medical information from applicants after making conditional offers or from employees during employment, potentially increasing workplace risks and, in the case of safety-sensitive jobs, risks to the general public.

II. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF TWO OTHER CIRCUITS THAT HAVE HELD THAT REQUIRING AN APPLICANT OR EMPLOYEE TO PAY FOR AN INDIVIDUALIZED MEDICAL EXAMINATION DOES NOT VIOLATE THE ADA.

After holding that BNSF *per se* regarded Holt as having an ADA impairment, the Ninth Circuit then held that BNSF's action in "condition[ing] Holt's job offer on Holt obtaining an MRI at his own expense" constituted unlawful discrimination against him. Pet.

App. 17a-24a.[3] That conclusion creates a separate 2-1 circuit split on the question of whether requiring an applicant or employee to bear the cost of an individualized medical examination constitutes discrimination within the meaning of the ADA.

A. The Ninth Circuit's Liability Holding Conflicts With Two Other Circuits.

The Fourth and Seventh Circuits have recognized that conditioning employment on completion of a medical examination at the individual's expense is not discrimination.

The Fourth Circuit squarely addressed the issue in *Porter v. United States Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997). The employer required an employee to undergo a functional capacity evaluation in connection with the employee's attempt to return from a medical leave of absence. *Id.* at 245. The employer told the employee "that he would be responsible for paying for the evaluation" and later "fired [him] because he did not undergo the functional capacities examination." *Id.* at 245-46. The Fourth Circuit rejected the employee's ADA discrimination claim. Drawing on the plain language of the statute and its administrative interpretations, the court held that "the ADA allowed [the employer] *to request* a medical examination from Porter and, therefore, the company's decision to terminate him did not violate the ADA." *Id.* at 246

[3] The court's discussion of that issue doubled as its holding that EEOC met its burden of proving that Holt was "subjected to an action prohibited under [the ADA]" as required to establish a regarded-as disability under 42 U.S.C. § 12102(3)(A). Pet. App. 14a n.6 (alteration in original).

(emphasis added). The failure to complete the examination also "precluded the disclosure of information necessary to an evaluation of discriminatory discharge under the ADA." *Id.* at 247.

The Seventh Circuit held likewise in *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002). There, the City offered O'Neal a job conditioned on successful completion of an entrance medical examination. *Id.* at 1002, 1008. O'Neal "flunked" the examination because of heart problems and later submitted evidence of normal cardiac functioning. *Id.* at 1002. The physician conducting the examinations for the local pension board "refused to certify O'Neal as having passed the examination without additional medical tests that would have cost O'Neal $1,500." *Id.* When O'Neal failed to complete the individualized examinations, the employer refused to forward his records for approval to hire. The Seventh Circuit concluded that O'Neal "ha[d] not shown any ADA violation," including misuse of the examination results under § 12112(d)(3). *Id.* at 1008, 1010. The employer "could lawfully require the medical examination—and condition the offer on the results" because there was no evidence it used the results to discriminate against O'Neal "on the basis of a disability." *Id.* at 1009-10.[4]

[4] It did not matter, as the Ninth Circuit mistakenly thought, that the plaintiff in *O'Neal* did not claim to be disabled. The Seventh Circuit noted that other circuits had held that a claim under the medical-examination provision could be asserted even without a disability. Yet it still said that the requirement of applicant-paid medical test results was permissible. 293 F.3d at 1010 n.2.

The Ninth Circuit cited no authority of any kind in departing from these decisions to hold that requiring an applicant or employee to pay for follow-up medical testing is facial discrimination.

B. The Ninth Circuit's Holding Based On The "ADA's Policy Purposes" Is Incorrect.

The Ninth Circuit panel reached its liability determination by stating that requiring an applicant to provide an MRI at the applicant's expense "is a condition of employment imposed discriminatorily on a person with a perceived impairment." Pet. App. 19a. That burden on applicants is not permitted by the medical-examination provisions of the ADA, the Ninth Circuit reasoned, because "[t]he statute is silent as to who must bear the costs of testing," and therefore, "the ADA's policy purposes should control on the issue." *Id.* at 20a-21a. The court then held as a "policy" matter that making an applicant bear the costs "will effectively preclude many applicants" from seeking employment, a consequence "at odds with" the ADA's purposes and that reflects a "cavalier attitude" toward persons with disabilities. *Id.* at 21a-22a, 23a n.11. The panel also surmised that employers "might use the cost of medical testing to screen out disabled applicants," and that a better approach was to place the burden of requested medical testing on employers. *Id.* at 23a.

Even if the statute *were* silent, the silence would not be license for the Ninth Circuit to weigh the pros and cons of various policy rationales and to decide as a mini-legislature what the ADA should have said but did not. Because the statute expressly authorizes employers to "require" medical examinations, silence

would imply that it is permissible (not prohibited) for BNSF to require the MRI without offering to pay. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("Indeed, it is quite mistaken to assume…that 'whatever' might appear to 'further[ ] the statute's primary objective must be the law.'") (last alteration in original) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam))); *accord New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (courts are not "free to pave over bumpy statutory texts in the name of…advancing a policy goal"); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (rejecting argument about meaning of statute because the result "would make 'good practical sense'").

But the statute is not silent. The ADA expressly allows an employer to "require" post-offer medical examinations of applicants. 42 U.S.C. § 12112(d)(3) (employer "may require a medical examination"); *cf. id.* § 12112(d)(4)(A) (for employees, employer "shall not require" medical examinations except in certain circumstances). The statute likewise authorizes employers to condition a job offer "on the results of such examination." *Id.* § 12112(d)(3). Authorized examinations include medically related follow-up examinations, *see* Pet. App. 20a, which the MRI here plainly was. The authorization for employers to require medical examinations and to obtain and use the results of the examinations necessarily includes the ability to require that the subject of the examination pay the associated costs. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 96, 192 (2012) (the "[a]uthorization of an act also authorizes a necessary predicate act").

Moreover, Congress knows how to place payment obligations on employers. *See* Family Medical Leave Act of 1993, 29 U.S.C. §§ 2613(a), 2613(c)(1), 2613(d)(1), 2613(e), 2614(c)(3)(A) (saying employer "may require" medical information, qualified in two of five instances by "at the expense of the employer."). Had Congress intended employers to pay for every medical test, even in a circumstance where the job applicant or current employee is seeking to secure a new benefit, it would have said so. *Cf. Wis. Cent.*, 138 S. Ct. at 2071-73 (relying on language differences and similarities in statutes addressing similar topics near the same time as relevant statutory context).

Declining to pay for a required medical examination does not constitute unlawful discrimination, as the Ninth Circuit erroneously held. Of course a physician may not request a follow-up medical test *for the purpose o*f deterring disabled applicants. Like other discrimination statutes, the ADA prohibits intentional discrimination. But there was no allegation that BNSF's request that Holt get an MRI was a pretext for discrimination. With no allegation of pretext, and with the deficiencies the district court identified in EEOC's disparate-impact claim, the Ninth Circuit concocted (and not for the first time) a new theory of discrimination that does not require a plaintiff to establish the elements of a disparate-impact *or* a disparate treatment claim. Indeed, according to the panel, requiring proof of intentional discrimination overlooks "both the difficulty an applicant would face in proving discriminatory intent and that while an employer may not intentionally seek to screen out disabled applicants, a cavalier attitude toward applicant-paid testing may effectively screen out persons with disabilities in a way that violated the ADA." Pet. App.

23a n.11. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 51-53 (2003) (Ninth Circuit "erred by conflating the analytical framework for disparate-impact and disparate-treatment claims" in holding that a neutral policy could still subject an employer to ADA liability because the policy "screens out" disabled applicants). The panel's theoretical concerns about pretextual requests for medical examinations did not authorize the court to rewrite the statute to substitute its judgment for Congress's.

Employers rely on medical examinations to determine whether applicants and employees can safely perform the physical requirements of a position, and requiring employers to pay for all individualized examinations would dramatically increase the cost of those examinations. The effect is particularly extreme because the Ninth Circuit made clear that its holding "applies regardless of the cost" of the required medical examination. Pet. App. 21a n.9. The increase in hiring costs and resulting likely decrease in the accuracy of hiring decisions would be especially acute for employers in safety-sensitive industries, such as law enforcement transportation, manufacturing, construction, and so forth—industries in which it is critically important to ensure that employees can perform their duties without injuring themselves or others.

III. THE NINTH CIRCUIT'S HOLDING OVERRIDES REGULATIONS APPLICABLE TO A SUBSTANTIAL PORTION OF FEDERAL GOVERNMENT JOBS.

The Ninth Circuit's decision also calls into significant doubt the practices of the federal government as an employer with respect to medical examinations and regulations governing such examinations promulgated by the Office of Personnel Management ("OPM")

that apply to U.S. government competitive-service (and some excepted-service) jobs. *See* 5 C.F.R. §§ 339.101-339.306. The OPM regulations, most recently updated in January 2017, take the opposite position on each of the Ninth Circuit's holdings: an employer's authority to require a medical examination from an applicant, to revoke a job offer for failing to complete the examination, and to require an applicant to pay for the examination. They also authorize medical examinations in other situations and expressly place the payment obligation on the applicant or employee. The federal government must comply with the ADA, as the OPM regulations expressly acknowledge. *Id.* § 339.103. The government will thus now either face ADA liability for its standard medical-examination practices as to applicants and employees in the Ninth Circuit or be required to modify those practices just in that circuit.

Although the final regulations changed somewhat from the original 2007 proposal, the proposal included the concepts of employer-required medical examinations and that an applicant or employee must pay for an examination conducted by his or her personal provider where the purpose of the examination is to secure a change sought by that person. *See* Medical Qualification Determinations, 72 Fed. Reg. 73,282, 73,284-85 (Dec. 27, 2007). Significantly, EEOC submitted comments to OPM, raising a number of ADA-compliance issues but did not mention the payment provision or suggest that a required examination would constitute regarding an applicant or employee as disabled. *See* Letter from Reed L. Russell, Legal Counsel, EEOC, to Mark Doboga, Deputy Assoc. Dir.,

OPM (Feb. 25, 2008).[5] EEOC's support in this case for the Ninth Circuit's holdings thus places the agency at odds with the government's position as employer—when that position was developed with EEOC's input as interpreter of the ADA.

Under the regulations, the government as employer may require medical examinations for any position with established medical standards or physical requirements. 5 C.F.R. § 339.301. Those positions include police and security guards with responsibilities similar to senior patrol officers at BNSF, as well as correctional officers, United States marshals, pharmacists, safety investigators and inspectors, customs officers, border patrol agents, and air traffic controllers.[6] The regulations list various circumstances in which an agency may require a medical examination of covered applicants and employees. They include:

> (1) Subsequent to a tentative offer of employment or reemployment (including return to work from medically based absence on the basis of a medical condition); [and]
>
> (3) Whenever the agency has a reasonable belief, based on objective evidence, that there is

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[5] Available at: https://www.eeoc.gov/eeoc/foia/letters/2008/ada_standard_medical_exam_disqualif.html (last visited Feb. 26, 2019).

[6] OPM, *Classification & Qualifications: General Schedule Qualifications Policies*, https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-policies/#url=Medical-Requirements (last visited Feb. 26, 2019).

> a question about an employee's continued capacity to meet the medical standards or physical requirements of a position.

Id. § 339.301(b).

The regulations authorize adverse action for failure to complete a medical examination. *See* 5 C.F.R. § 339.102(c) ("After a tentative job offer of employment conditioned on completion of a medical examination, an applicant's refusal to be examined or provide medical documentation, as defined below, may result in the applicant's removal from further consideration for the position."); *id.* § 339.303(a)(1) ("Refusal or failure to report for a medical examination ordered by the agency may be a basis for a determination that the applicant or employee is not qualified for the position" or "may be subject to adverse action."). The failure to complete a required medical examination is therefore a legitimate, nondiscriminatory reason to revoke a job offer in covered government positions.

The regulations also contain specific rules about payment for medical examinations, set out in § 339.304. Although the general rule stated in subsection (a) is that the agency pays for a medical examination when the agency selects the health-care provider or specifies a list of providers from which the applicant or employee must choose, 5 C.F.R. § 339.304(a), there are significant exceptions. In particular, the regulations mandate that an applicant or employee must pay for examinations by his or her own physician or provider when the applicant or employee is seeking some benefit from the agency, including being hired:

> An applicant or employee *must pay for a medical examination* conducted by his or her private licensed physician or practitioner where the purpose of the examination is to secure a change sought by an applicant *(e.g., new employment)* or by an employee *(e.g., a request for change in duty status, reasonable accommodation, and/or job modification)*.

Id. § 339.304(d) (emphases added).

That regulation covers situations where during the entrance-examination process the applicant sees his or her own physician to attempt to secure new employment. It also includes employee examinations in various situations in which the employee seeks a benefit, such as a reasonable accommodation or new employment. In all of those situations the employee must pay for the examination when the employee sees his or her personal physician.

Importantly, the regulations also specifically address a situation very similar to the one the Ninth Circuit reviewed here. They provide that after an initial examination, the agency physician will render a final medical determination and in some instances that determination "may reference supplemental medical examination, testing or documentation, which the applicant or employee may submit to the agency for consideration and further review relative to potential medical eligibility"—that is, follow-up medical information. 5 C.F.R. § 339.304(b). The regulation mandates that the "applicant or employee is responsible for payment of this further examination, testing and documentation." *Id.* That process is the same one that BNSF followed. After an initial medical examination,

BNSF's physician reviewed the information, determined that more information was needed, and identified that information for Holt.[7] That the Ninth Circuit found BNSF's actions unlawful strongly indicates that it would say the same about an agency's application of § 339.304(b) and (d), and thus calls into question an established federal agency employment practice—a practice that the EEOC approved in all relevant respects.[8]

The federal employment medical-examination practices just discussed are in stark contrast to both of the Ninth Circuit's legal holdings. First, far from demonstrating that an employer "regards" an applicant or employee as disabled, the regulations expressly acknowledge that medical examinations may be required for exactly the reason BNSF sought the

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[7] BNSF not being a federal government agency, Dr. Jarrard did not first render a "final medical determination," but in substance the process was the same.

[8] Consistent with the OPM regulations, EEOC has issued several guidance documents addressing medical examinations, including the specific circumstances in which the employer must pay for such examinations (such as when the employer directs the employee to a particular medical provider), from which it follows that the employer need not pay in other circumstances. *See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, Q. 11, 12; *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Q. 7; *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, Q. 2. These guidance documents are available at: http://www.eeoc.gov/policy/docs/guidance-inquiries.html; https://www.eeoc.gov/policy/docs/accommodation.html; https://www.eeoc.gov/policy/docs/psych.html (all last viewed Feb. 26, 2019).

MRI—to determine the "nature of a medical condition" that could affect safe and efficient performance. 5 C.F.R. § 339.102(a); *see also* Medical Qualification Determinations, 82 Fed. Reg. 5340, 5341 (Jan. 18, 2017) (describing requirement to provide medical *documentation* "to determine whether there is a medical condition that will affect safe and efficient performance of the essential duties of the position").

Second, the regulations make plain that there are numerous, common situations where under the federal employment scheme an applicant or employee must undergo medical testing and must pay the costs of the medical testing. The OPM necessarily views the payment regulations as consistent with the ADA. 5 C.F.R. § 339.103(a) ("actions under this part must comply with the…ADA"). Yet the Ninth Circuit's decision would treat the OPM's approach as *per se* disability discrimination. That significant impact of the Ninth Circuit's decision therefore presents another reason to grant review.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR ADDRESSING THEM.

The Ninth Circuit's decision creates circuit splits on recurring issues of national importance to employers in safety-sensitive industries and professions. Allowing it to stand will present significant operational problems for employers with multi-state operations that include the Ninth Circuit. BNSF, for example, operates in 28 states including every state within the Ninth Circuit's jurisdiction (except Alaska and Hawaii). BNSF and other employers will be forced to use Ninth-Circuit-specific practices with respect to employment-related medical examinations. And BNSF is

not alone. Other entities, including other multi-state transportation companies such as airlines, trucking, and other railroads, likewise will be required to develop and utilize Ninth-Circuit specific medical-examination practices. Otherwise, they run the risk that requiring any individualized medical examination—whether a follow-up examination of an applicant or a specific examination needed of an employee—will result in the applicant or employee being covered by the ADA's "regarded-as" provision, thereby presenting the risk of ADA liability. The Ninth Circuit contains nearly 20 percent of the nation's population. Permitting the Ninth Circuit's special ADA "regarded as" rule to stand will at best result in acute administrative hardships for multistate employers and at worst result in unwarranted and significant liability far beyond what Congress intended. These outcomes conflict with the ADA's original purpose of providing "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2).

The view that an employer declining to pay for the medical examination it required constituted discrimination in violation of the ADA is equally problematic. The Ninth Circuit arrived at that holding by finding the statute "silent" and choosing what it perceived as the best "policy" outcome, and even then by incorrectly equating the effects of the practice—which it described as reflecting a "cavalier attitude"—with intentional discrimination. Pet. App. 23a n.11.

This case presents an excellent opportunity for the Court to correct both holdings. The Court should grant certiorari and hold that requiring an applicant

or employee to undergo an individualized medical examination does not in and of itself mean the employer regards the individual as disabled under the ADA. Likewise, the Court should hold that the ADA does not impose on employers the obligation to pay for individualized medical examinations such that failing to do so constitutes discrimination.

The legal issues are also cleanly presented. The Ninth Circuit announced broad legal holdings that are not clouded by factual issues. To the contrary, the Ninth Circuit expressly "decline[d] to parse" the factual record related to Holt's individual injury, calling the medical record "irrelevant," Pet App. 17a, and the Ninth Circuit held squarely that requiring a prospective employee with an actual or perceived impairment to pay for a medical test constitutes discrimination in violation of the ADA "regardless of the cost of the medical test at issue, as well as the employee's ability to pay," *id.* at 21a n.9. Moreover, there is no alternative ruling on which to uphold the judgment below: The Ninth Circuit evaluated the EEOC's claim exclusively under the general discrimination provision in 42 U.S.C. § 12112(a), and the EEOC argued that Holt had a disability only under the "regarded as" provision.

Nor will the injunction issue remanded to the district court affect this Court's review. Liability under the ADA has been finally decided and the parties stipulated to damages. The only issue the Ninth Circuit remanded was the appropriate scope of an injunction, assuming the district court chooses to re-issue an injunction given the Ninth Circuit's holding that doing so satisfied the traditional four-factor test in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Pet.

App. 26a-28a. Nothing the district court would address on remand will alter the Ninth Circuit's liability determination. Moreover, the Ninth Circuit has stayed its mandate pending review by this Court. *See* Pet. App. 66a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRYAN P. NEAL
STEPHEN F. FINK
THOMPSON & KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1700
bryan.neal@tklaw.com

ANDREW S. TULUMELLO
Counsel of Record
LUCAS C. TOWNSEND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
atulumello@gibsondunn.com

Counsel for Petitioner BNSF Railway Company

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