No. 18-1139

IN THE SUPREME COURT OF THE UNITED STATES

BNSF RAILWAY COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE HR POLICY ASSOCIATION, *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Manufacturers and the HR Policy Association respectfully submit this brief as *amici curiae* in support of the petitioner.[1]

INTERESTS OF *AMICI CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact on any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The HR Policy Association (HRPA) is a public policy advocacy organization representing the chief human resource officers of major employers. HRPA consists of more than 375 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. At least ten days before the brief was due, counsel for *amici* served notice of the intent to file this brief on counsel for each party; pursuant to Rule 37.2(a), all parties have consented to its filing.

percent of the private sector workforce. Since its founding, one of HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

The members of NAM and HRPA are employers who have a vested interest in the outcome of this matter. As leading national and state-wide associations of employers, *amici* are keenly familiar with workplace disability issues, and can best explain why the business community as a whole will be adversely impacted unless the Ninth Circuit's decision is reviewed and set aside. These *amici* file this brief to assist the Court in evaluating the reasonableness and potential real-world consequences of the parties' positions. These *amici* are uniquely situated to address these considerations and support the Court's decision making.

BACKGROUND

Russell Holt applied for a position as a Senior Patrol Officer with petitioner BNSF. Consistent with section 102(d)(3) of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(d)(3), BNSF offered Holt a conditional offer of employment, subject to a post-offer medical examination. The examination revealed that Holt had previously suffered a back injury. In an effort to ascertain whether Holt's prior injury presently constituted an impairment, BNSF requested that he provide a current MRI scan and updated medical records, at his own expense. Holt declined to do so. Lacking the information to determine whether Holt presently suffered from an impairment that could limit his ability to perform the

essential functions of the position, BNSF withdrew its offer of employment.

Holt filed a charge with the Equal Employment Opportunity Commission (EEOC), which sued BNSF for alleged violations of the ADA. The district court granted partial summary judgment for the EEOC, holding that it had established a claim for disability discrimination under 42 U.S.C. § 12112(a). On appeal, the Ninth Circuit upheld the district court's finding of liability, albeit on different grounds: the court held that BNSF's conditioning of Holt's employment upon his completion of an additional medical examination (intended to determine *whether* in fact he had a physical impairment) in and of itself established that BNSF regarded Holt as *having* such an impairment, and the company's withdrawal of its conditional offer when Holt declined to undergo necessary testing was thus discrimination on the basis of disability. The Ninth Circuit further held that BNSF discriminated against Holt by requiring him to bear the cost of the additional examination.

BNSF timely filed a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This Court's review is urgently needed to resolve a conflict in the circuits created by the erroneous decision of the U.S. Court of Appeals for the Ninth Circuit on an issue of great importance to the broad spectrum of employers and industries represented by *amici*.

Amici respectfully request that this Court grant this petition for writ of certiorari for two reasons:

First, review is necessary because the Ninth Circuit's decision dramatically expands the scope of the "regarded as" prong of the ADA's definition of "disability" and will make virtually every otherwise lawful request by an employer for individualized examination or follow-on medical information a *per se* finding of coverage under the ADA. The Ninth Circuit's decision conflicts with the decisions of all of the other circuits which have addressed this question.

Second, review by this Court is necessary because the Ninth Circuit's decision places the burden of the full cost of otherwise lawful individualized examinations or requests for additional medical information permissible under the ADA on employers – a holding in conflict with the conclusions reached by all other circuit courts which have examined this issue.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION DRAMATICALLY AND IMPROPERLY EXPANDS "REGARDED AS" LIABILITY TO ENCOMPASS ANY INDIVIDUALIZED REQUEST FOR MEDICAL INFORMATION OR EXAMINATION

Review is warranted because the Ninth Circuit's ruling departs from and conflicts with all other circuit courts which have considered the question presented. The Ninth Circuit adopted a novel and wholly unprecedented interpretation of

"regarded as" coverage that dramatically expands the scope of that prong.

The ADA generally prohibits discrimination against a qualified individual "on the basis of disability." 42 U.S.C. § 12112. The ADA was amended in 2008 by the Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008), to provide that an individual is "regarded as" having a disability under the definition's third prong if the individual "establishes that 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).[2] Thus, under the ADA as amended, to establish coverage under the "regarded as" prong, an individual must prove that he or she is perceived as having a physical or mental impairment, irrespective of whether such impairment substantially limits or is perceived to substantially limit a major life activity.[3]

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[2] The purpose of this provision is to reject the reasoning of the Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which required that, for purposes of coverage under the "regarded as" prong, an individual needed to prove that he was perceived as having an impairment that substantially limited a major life activity, and reinstate the reasoning of the Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which had previously established a broader definition of "regarded as" coverage. Nothing in the legislative history of the ADAAA indicated a Congressional intent to expand "regarded as" liability to the facts presented in this case.

[3] Prior to the adoption of the ADAAA, to prevail on a claim of "regarded as" disability discrimination, a plaintiff had to prove both that an employer perceived him or her as having a

Recognizing that there are instances when a disability may unacceptably impair an employee's ability to perform the job, the ADA expressly permits an employer to seek health information from or require additional medical examinations of employees, and provides a comprehensive scheme that establishes when and under what conditions such inquiries and examinations are permissible. *See* 42 U.S.C. § 12112(d).

Under the Ninth Circuit's reasoning, any time an employer requires an employee to undergo an individualized medical examination *for the purposes of determining whether he has an impairment*, the employer is deemed to *per se* perceive the employee as having such an impairment, and thus "regard" the employee as disabled. In so doing, the court misapprehended the fundamental purpose of lawful medical examinations under the ADA, and instead adopted a tautological definition wherein if an employer seeks to determine whether an employee has an impairment, it must already assume that the employee has one.

As explicated in greater detail by petitioner, all of the other Circuit Courts of Appeal which have addressed this question have rejected this circular logic. Given the dramatic expansion of the scope of ADA liability attendant to the Ninth Circuit's interpretation, review by this Court to resolve this conflict is critical.

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disability and that the disability substantially limited or was perceived to substantially limit a major life activity.

A. THE NINTH CIRCUIT'S CIRCULAR LOGIC HAS BEEN REJECTED BY ALL OTHER CIRCUIT COURTS WHICH HAVE ADDRESSED THIS QUESTION

The question of whether a request for additional medical information to determine if an employee has an impairment in and of itself establishes that an employer "regards" the employee as having such an impairment has been thoroughly analyzed by six other Circuit Court of Appeals, each of which correctly concluded that it does not.

"[A] request to undergo an independent medical exam, by itself, is insufficient to establish that the defendants regard the plaintiff as having a disability." *Rawlins v. New Jersey Transit*, 431 F. App'x 145, 147 (2011) (citing *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001)). In *Rawlins* (issued after the ADA was amended in 2008 by the ADAAA),[4] the Third Circuit rejected the plaintiff's argument that the termination of his training as a bus driver for New Jersey Transit (NJT) violated the ADA because NJT "regarded him" as being disabled. *Id.* at 145. In support of his "regarded as" claim, Rawlins offered as evidence only the fact that NJT required him to undergo additional, independent testing of his vision, from his instructor's legitimate concern with his

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[4] The Ninth Circuit attempted to characterize the holdings of other Circuit Courts in certain cases as inapposite, insofar as they were decided prior to the effective date of the ADAAA; to the extent the holdings in those cases have been cited within the Circuit as governing law after the adoption of the ADAAA, the Ninth Circuit's attempt to distinguish them is unavailing.

visual acuity based on the instructor's observations during training. *Id.* at 146. The Third Circuit held that the fact that NJT required additional examination of plaintiff's vision, standing alone, could not establish that NJT "believed that he had an impairment." *Id. See also Tice v. Ctr. Area Training Support*, 247 F.3d 506, 516 (3d Cir. 2001) ("Because there is no other evidence besides the request for an IME submitted to establish the nature of [the employer's] 'regard' for Tice, we hold that Tice has not put forth sufficient evidence to create an issue of fact as to his entitlement to ADA protection [under the 'regarded as' prong].").

Noting that it had "not decided the question of whether an employer's request for an evaluation is, in and of itself, sufficient to show that the employer regarded the employee as disabled for purposes of the ADA," (and observing that all other courts of appeals to have addressed the issue had concluded that it is not), the Fourth Circuit found the Third Circuit's reasoning in *Tice* to be sufficiently persuasive such that it was "satisfied to affirm the award of summary judgment" against the plaintiff on his regarded as claim. *Coursey v. Univ. of Md. E. Shore*, 577 F. App'x 167, 174-75 (4th Cir. 2014). The Fourth Circuit has also recognized that where an employer doesn't know the extent of an employee's illness, its "repeated and strenuous efforts to secure [his] return to work" by seeking additional information as to the nature of his condition suggests that a claim of 'regarded as' discrimination on such facts "[flies] in the face of common sense." *Haulbrook v. Michelin N. Am.*, 252 F.3d 696, 703 (4th Cir. 2001).

The Sixth Circuit has likewise held that "[a] request that an employee obtain a medical exam may signal that an employee's job performance is suffering, but that cannot itself prove a perception of a disability . . . ." *Pena v. City of Flushing*, 651 F. App'x 415, 420 (6th Cir. 2016) (citing *Sullivan v. River Valley School District*, 197 F.3d 804, 811 (6th Cir. 1999). In *Pena*, the court rejected the employee's claim that his termination after he failed to submit to a fitness for duty examination (occasioned by observations of a deterioration in his mental condition) violated the ADA.

The *Pena* court went to great lengths to explain that even post-ADAAA, it could not find 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." *Id.* at 420 (explaining why *Sullivan* and prior cases finding no "regarded as" coverage did not turn on "substantial limitation" analysis and remain good law after the enactment of the ADAAA). The court "decline[d] to impose *per se* liability under the 'regarded as' provision in this circumstance," explaining that, "Otherwise, we would be reading § 12112(d)(4)(A) out of the ADA." *Id.* at 421.

The Tenth Circuit has similarly held that an employer's concern about an employee's known medical condition and request for medical clearance do not automatically infer nor compel a finding of "regarded as" coverage. As the court characterized one company's request for medical clearance where it had learned of a potential health condition: "Rather than evidence of a misperception of his condition, it

demonstrated that [the employer] *had arrived at no conclusion as to the actual nature of his condition*." *Fryer v. Coil Tubing Services, LLC*, 415 F. App'x 37, 44 (10th Cir. 2011) (rejecting "regarded as" claim) (emphasis added). *See also Lanman v. Johnson County,* 393 F.3d 1151, 1157 (10th Cir. 2004) ("Nor does the County's order that Ms. Lanman take a fitness for duty exam show that Ms. Lanman was perceived as mentally impaired.").

Holdings of the Seventh and Eighth Circuit are also in accord. The Seventh Circuit has held that the requirement of an additional medical examination did not establish that the employer regarded an employee as disabled. *See Wright v. Illinois Dept. of Corrections*, 204 F.3d 727, 732 (7th Cir. 2000) ("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 . . . .*") (emphasis added); s*ee also Sanchez v. Henderson*, 188 F.3d 740, 744 (7th Cir. 1999) ("Sanchez's only evidence for this assertion [that his employer "regarded him" as disabled] is Holman's request that he undergo a 'Fitness for Duty Examination', and the examiner's recommendation that he stop carrying mail. Yet this does not suggest a factual dispute concerning a perceived disability. Initially, Holman's order that Sanchez return to work indicates that she perceived him as *not* suffering from any impairment. Holman only asked for the examination after Sanchez refused the order. *It does not imply her having regarded him as disabled*.") (emphases added). The Eighth Circuit has reached the

same conclusion. *See, e.g., Wisby v. City of Lincoln*, 612 F.3d 667, 673 (8th Cir. 2010), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (observing that "employers are permitted to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims," and rejecting claim that employer's requirement that plaintiff undergo fitness-for-duty exam established that it regarded her as disabled); *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998)("Schulz's mere knowledge of behavior that could be associated with an impairment does not show that Cigna treated Cody as if she were disabled.").

Prior to the instant case, Circuit Courts of Appeals have uniformly arrived at the conclusion that an employer's request for medical information or examination, or its requirement of an individualized assessment where it is uncertain whether an employee may be able to perform the essential functions of the job, is not, in and of itself, sufficient to establish coverage under the ADA's "regarded as" prong. The decisions of these courts are based on a holistic reading of the statutory text of the ADA, its stated purposes, and the real-world implications of its holding. In contrast, the Ninth Circuit's decision – the only to arrive at an opposite conclusion – is grounded in none of these important considerations.

B. THE NINTH CIRCUIT'S DECISION CONFLATES CAUSE AND EFFECT BY CONSTRUING AN ATTEMPT TO DETERMINE WHETHER AN EMPLOYEE HAS AN IMPAIRMENT AS AN ASSUMPTION THAT THE EMPLOYEE IN FACT HAS AN IMPAIRMENT

Ignoring the reasoning of all circuit courts which had previously addressed the question, the Ninth Circuit, with limited analysis, concluded that where an employer is aware of a prior medical condition, any examination of that condition is evidence that the employer regarded the employee as being disabled.

The court reached this conclusion despite the agreement of both parties that "for BNSF to have regarded Holt as having a disability, BNSF must have regarded him as having a *current* impairment." 902 F.3d at 923 (emphasis in original). BNSF argued that it did not perceive Holt to have a current impairment, but rather, its inquiry was *intended to determine whether in fact he had a current impairment.* The EEOC in turn argued that since BNSF knew that Holt's prior injury was a permanent condition, BNSF must have known that Holt had an impairment. The Ninth Circuit expressly declined to "parse the nature of Holt's medical condition," *id.* at 924, and instead adopted a sweeping rule wherein if an employer is aware of *any* prior medical condition, its attempt to determine whether such a condition constitutes a present impairment is a *per se* indication that the employer regards the employee as disabled. *Id.* This

dramatically expands the scope of "regarded as" coverage beyond the text of the statute and the intent of both the ADA and its amendments.

The Ninth Circuit's decision assumes, *a priori*, that an inquiry about the existence of an employee's impairment is tantamount to an assumption that the employee has such an impairment. That is not the case in a conditional post-offer examination where the employer is seeking only to determine whether the employee is able to perform the essential functions of the job. Nor is it so when an employer, following an employee's medical leave, requires a fitness-for-duty examination *so that the employee may return to work*. Particularly in circumstances where an employer is making a concerted effort to bring the employee back to work, suggesting it is discriminating against him because it "regards him" as disabled "[flies] in the face of common sense." *Haulbrook*, 253 F.3d at 703.

The fundamental flaw in the Ninth Circuit's logic is made most clear by way of hypothetical example. Assume for a position such as working with immunocompromised patients, it is job-related and consistent with business necessity that an employee be demonstrably free of a certain blood-borne pathogen (constituting an impairment under the ADA). A preliminary test for the pathogen reliably indicates a negative finding, but results in some number of false positives that must be confirmed or refuted by a more detailed subsequent examination.

Applicants A, B, C, and D are each made conditional offers of employment, pending a medical examination and confirmation that they are free of the pathogen. Applicant A is tested and returns a reliable

negative result; Applicant A is hired. Applicants B, C, and D are tested; each returns a positive result and is required to undergo the more detailed test. Applicant B's follow-up test reveals that the earlier result was a false positive, and that she is in fact free of the pathogen. Applicant B is hired.

Applicant C's follow-up test confirms his earlier positive result; the employer withdraws its conditional offer of employment. Applicant D refuses to undergo the second test. Unable to determine whether Applicant D is free of the pathogen, the employer likewise withdraws its offer of employment.

Under the Ninth Circuit's reasoning, the withdrawal of Applicant C's offer is lawful: the employer has established that the employee has a disability that prevents him from performing the essential functions of the position. The withdrawal of Applicant D's offer, however, is *unlawful*, because the employer "regarded her" as having a disability (evidenced only by the requirement that she undergo the second test) and withdrew its offer based on that perception. This result is absurd: each applicant was held to the same lawful standard, namely, that he or she be free of the pathogen, and applicants were either employed or had their offers withdrawn based on that standard. That the employer's effort to determine whether a given applicant had the subject impairment is not evidence that it regarded any of them as being disabled, but rather merely an ADA-permissible effort to determine whether each was able to safely perform the functions of the job. That one of two identically-situated applicants is "regarded as" disabled while the other is not, when both are subject to exactly the same

treatment, demonstrates the Ninth Circuit's fallacious reasoning.

In sum, the Ninth Circuit's blanket rule is undone by the statutory text, the purpose of the ADA, and the absurd results and unintended consequences which it will entail as a practical matter. Insofar as the brunt of these burdens will be placed solely on the shoulders of countless employers, this Court's review of the Ninth Circuit's decision is vital.

II. THE NINTH CIRCUIT'S DECISION IMPROPERLY IMPOSES THE BURDEN ON EMPLOYERS TO PAY FOR INDIVIDUALIZED MEDICAL EXAMINATIONS IN CONTRAVENTION OF THE ADA AND IN CONFLICT WITH THE HOLDINGS OF ALL OTHER CIRCUITS

Petitioner correctly notes that the only two circuit courts which have addressed the question of whether an employer may terminate employment where an employee fails to obtain a medical test or examination at his own expense have come to the conclusion that the employer is so entitled. The Ninth Circuit's decision to the contrary offered no reasoned analysis, nor did it attempt to distinguish these cases in any meaningful way.

In *Porter v. United States Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997), the employer required an employee to undergo an examination to determine whether he would be able to return to work after back surgery, and informed the employee that "he would be responsible for paying for the evaluation." *Id.* at 245.

When the employee failed to undergo the examination, the company terminated his employment. *Id.* at 245-46. The court concluded that the employee's termination for failure to undergo an examination at his own expense did not violate the ADA: "Alumoweld's request for a fitness for duty exam was job related and consistent with business necessity and, thus, comports with the requirements of the ADA. Further, by refusing to undergo the exam, Porter *precluded the disclosure of information necessary to an evaluation of discriminatory discharge under the ADA*." *Id.* at 247 (emphasis added).

Similarly, in *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002), plaintiff O'Neal applied for a job as a police officer for the City of New Albany. *Id.* at 1001. As it did with all applicants, the City arranged for him to undergo a medical examination. *Id.* at 1002. O'Neal failed the medical examination conducted by the city's examiner because of "heart problems." *Id.* O'Neal's subsequently underwent an evaluation by his own cardiologist, who advised the city that his heart was in good condition; that his high blood pressure was well-controlled with medication; and that he had successfully completed a stress test which showed normal cardiac functioning. *Id.* Upon receiving this information, the city examiner concluded that O'Neal did not suffer from coronary disease, but refused to certify him as having passed the city's examination without additional testing at O'Neal's expense. *Id.* O'Neal declined to have these tests performed; consequently, his application was not approved and the city failed to hire him. *Id.*

The Seventh Circuit rejected O'Neal's claim, concluding that the city could lawfully require the medical examination and condition its offer on its results. *Id.* at 1009. Notably, neither the fact that O'Neal required follow-up testing, nor that such testing would be at his own expense, violated the ADA. *Id*. Moreover, the court found that the city's requirements were permissible under the ADA, and notwithstanding the fact that O'Neal required additional testing, satisfied the requirement that an examination is lawful only where "all entering employees are subjected to such an examination regardless of disability" in accordance with 42 U.S.C. § 12111(d)(3)(A).

The Ninth Circuit conceded that an employer could lawfully require that "everyone to whom it conditionally extended an employer offer obtain an MRI at their own expense." 902 F.3d at 926. Where an employer requires additional or individualized follow-on testing, however, the court assumed that requiring an employee to bear the costs violates the ADA insofar as the employer in that instance must regard the employee as having an impairment, and is accordingly "discriminating" on the basis of disability in requiring him to pay for additional examination. To the contrary, an examination or individualized inquiry *to determine whether an employee has an impairment* in and of itself does not demonstrate that the employer regards the employee as being disabled.

Addressing the question of which party is required to bear the costs of additional medical examinations, the Ninth Circuit observed that the ADA "is silent as to who must bear the cost of testing."

902 F.3d at 925. That may be so, but interpretive guidance issued by the EEOC, which enforces the ADA, expressly sets forth the circumstances under which an employer is required to pay for a medical examination (and, conversely, when it is not). [5] "Administrative interpretations of the ADA by the enforcing agency (here, the EEOC) 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigations may properly resort for guidance.'" *Porter,* 125 F.3d at 246 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)).

Under the Ninth Circuit's decision, an employer is liable for the expense of any follow-on examination it may lawfully require, irrespective of the circumstances. The Ninth Circuit arrived at this conclusion without reference to the reasoned guidance of the EEOC, which establishes when an employer must pay for medical examinations, and does not

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[5] *See, e.g., EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Q. 7 (2002) (where employer requires employee to use health care provider of employer's choice to substantiate existence of disability and need for reasonable accommodation, employer must pay all costs associated with visit); *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, Q. 22 (1997) (same); *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, Q. 11, 12 (2000) (same), respectively available at: https://www.eeoc.gov/policy/docs/accommodation.html; https://www.eeoc.gov/policy/docs/psych.html; and https://www.eeoc.gov/policy/docs/guidance-inquiries.html (each last viewed April 2, 2019).

require an employer to pay for medical examinations under the facts in this case. Rather, the court based its concerns on the "policy purposes" of the ADA, 902 F.3d at 925, as it unilaterally construed them.

Petitioner rightly notes that it is not the province of the Ninth Circuit to create statutory obligations where none exist, based on its own policy preferences. This is especially true in the instant case where the policy the court espouses, taken to its logical conclusion, leads again to an absurd result, to the detriment of those meant to be protected under the ADA. The Ninth Circuit conceded that an employer could require all employees or applicants to bear the cost of a given test; however, the court held it is only where an individualized test is necessary to determine whether an individual has an impairment that the employer must shoulder the burden. As a policy matter, this leads to the likely outcome that to avoid "regarded as" liability for imposing the costs of some tests on some individuals when necessary, employers will impose the costs of all tests on all individuals under all circumstances – hardly the outcome Congress could have intended in a statute intended to minimize the impact of disability in the workplace.

III. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THE FEDERAL GOVERNMENT'S OWN REGULATIONS REGARDING MEDICAL EXAMINATIONS IN FEDERAL EMPLOYMENT

The Ninth Circuit's decision is not only in discord with its sister circuits, but also, as a practical matter, with the practices of the federal government

itself with respect to medical examinations, and the allocation of the costs of such examinations.

Regulations promulgated by the Office of Personnel Management (OPM) set forth a range of circumstances under which the federal government as an employer may require medical examination of applicants and employees. These include circumstances highly analogous to the facts of the instant case: the government may require medical examinations for any position with established medical standards or physical requirements. *See* 5 C.F.R. § 339.301. Moreover, OPM's regulations provide that an agency may require a medical examination of an employee "[w]henever the agency has a reasonable belief, based on objective evidence, that there is a question about an employee's continued capacity to meet the medical standards or physical requirements of a position." *Id.* § 339.301(b)(3). Finally, directly on point to the instant case, OPM's regulations provide that where an offer of employment is made and conditioned on a post-offer medical examination, "*an applicant's refusal to be examined or provide medical documentation … may result in the applicant's removal from further consideration for the position.*" *Id.* § 339.102(c) (emphasis added).

The Ninth Circuit's decision is also in direct contravention to OPM regulations governing who must bear the burden of the costs of medical examinations. OPM's regulations expressly contemplate that after an initial examination by an agency physician, there may be instances in which an applicant or employee may be allowed (or required) to submit additional medical information to support his

medical eligibility. *See id.* § 339.304(b). In those instances, the regulations are unequivocal that the "*applicant or employee is responsible for payment of this further examination, testing and documentation*." *Id.* (emphasis added).

OPM's personnel policies are subject to the requirements of the ADA. *Id.* § 339.103(a). *Amici* do not suggest that the government is infallible, or that the regulations of one federal agency may fall short of the requirements of another agency or the statutes it enforces. *Amici* do submit that it is compelling that on each question presented in this case, the Ninth Circuit's conclusion directly contradicts the well-established policies and practices of the agency responsible for all employees of the nation's largest employer.

IV. IF ALLOWED TO STAND, THE NINTH CIRCUIT'S DECISION WILL INCREASE COSTS FOR EMPLOYERS ACROSS EVERY SECTOR OF THE ECONOMY, AND RESULT IN UNINTENDED CONSEQUENCES FOR EMPLOYEES

Finally, *amici* wish to focus the Court's attention on the broad, adverse impact of the Ninth Circuit's ruling which, if allowed to stand, will impose sweeping expense and liability on employers across all sectors of the economy.

As discussed *supra*, while the ADA generally prohibits discrimination against a qualified individual "on the basis of disability," 42 U.S.C. § 12112, it expressly permits an employer to seek medical information from or require examinations of

employees, and sets forth the circumstances under which such examinations or requests for information are permissible. *See* 42 U.S.C. § 12112(d).

In accordance with the longstanding interpretation of the foregoing plain language of the ADA, manufacturers both large and small regularly are called upon to make the types of inquiries at issue in this case. Until now, such inquiries had been repeatedly held by both the EEOC and federal courts to be entirely lawful. Employers in all sectors, including many safety-sensitive industries, are entitled to know whether their employees are fit to perform the essential functions of their jobs without immediately triggering liability for "regarding as disabled" any employee from whom they seek additional medical examinations or documentation. Equally so, hospitals and health care providers have a direct interest in monitoring the health and well-being of those employees who are in constant contact with vulnerable or compromised patients. Retailers, restaurants, and other service providers will likewise find themselves faced with a difficult choice by the Ninth Circuit's decision, absent review and reversal: either entirely forego necessary medical examinations (such as fitness-for-duty examinations), limit such examinations to cursory review with no follow-up or individualized assessment, or seek the information necessary to determine an employee's health status and immediately trigger liability for "regarding as disabled" any employee from whom it seeks additional medical examination or documentation.

Even those Ninth Circuit employers who are willing to trigger *per se* ADA liability in the interest of

ensuring a safe and healthy workplace will face significantly increased expense. This increased cost is especially true for many employers who are members of *amici*: large, multi-state employers operating across multiple jurisdictions, who will need to adopt and administer "two-tier" systems for evaluating, monitoring, and administering employee health, safety, and fitness-for-duty status, an increased (and in the absence of the Ninth Circuit's unprecedented holding, unnecessary) expense.

It is not only employers who will suffer the burden of this decision, but also employees and applicants. Employees working for or applying to the same employer in different states will be subject to unequal treatment. Co-workers (and members of the public at large) will face potential increased risk in those instances when an employer is not able to adequately ensure that its employees are able to safely perform the essential functions of their jobs.

The Ninth Circuit's decision also threatens to shift the cost of *all* medical examinations to employees, at least in some instances. The court explicitly noted that in most cases, an employer can shift the cost of workplace medical testing entirely to employees, so long as it does so for every single employee and applicant in every instance. It is reasonable to assume that some employers will see the only viable path as shifting the full cost of testing to employees in the interest of establishing that they are not discriminating "on the basis of disability."

The Ninth Circuit's decision will impact employers nationwide and in all sectors of industry (including, as explained in Part III, *supra*, the United

States government). Given the enormous significance and national impact of the appeals court's erroneous decision, the petition for a writ of certiorari should be granted.

CONCLUSION

The Ninth Circuit's decision creates immediate and direct conflicts with the decisions of all of the circuit courts which have addressed both questions at issue, and threatens to dramatically expand liability and cost under the ADA. For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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