No. ____

In the Supreme Court of the United States

COUNTY OF COOK AND THOMAS J. DART, IN HIS OFFICIAL CAPACITY AS HEAD OF THE COOK COUNTY SHERIFF'S OFFICE

Petitioners,

v.

JOHN NAWARA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Americans with Disabilities Act ("ADA"), it is unlawful for an employer to discriminate against its employees "on the basis of disability."42 U.S.C. § 12112(a). The ADA defines "disability" as an actual or perceived impairment that substantially limits a major life activity. 42 U.S.C. § 12102. The Seventh Circuit below read §§ 12112(a), (d)(1) and (d)(4) of the ADA together to hold Defendants liable for discrimination, even though it was undisputed that the Plaintiff had no actual or perceived disability. This holding is in conflict with decisions of the Second, Third, Fifth and Tenth Circuits, and deepens a conflict between those courts and the Sixth Circuit.

The question presented is: Does the Americans with Disabilities Act allow an employer to be held liable for discrimination on the basis of disability where the employee has no physical or mental impairment and is not regarded as having such an impairment.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Cook County, Illinois and Thomas J. Dart, in his official capacity as Sheriff of Cook County, Illinois, were the defendants in the District Court and appellees in the Court of Appeals below.

Respondent John Nawara was the plaintiff in the District Court and appellant in the Court of Appeals below.

The United States was a party to the Court of Appeals proceedings, as an *amicus* supporting Nawara. The Court of Appeals also gave the United States leave to intervene and participate in oral argument below.

RELATED PROCEEDINGS

Nawara v. County of Cook, No. 1:17-cv-02393 (N.D. Ill.). Judgment entered on February 15, 2022, with corrections to judgment ordered March 9, 2022 and July 29, 2022.

Nawara v. County of Cook, Nos. 22-1393, 22-1430, 22-2395 & 22-2451 (7th Cir.). Judgment entered on April 1, 2025, rehearing en banc denied May 14, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cook County, Illinois and Thomas J. Dart in his official capacity as Sheriff of Cook County respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Court of Appeals opinion (App. 1a- 15a) is published at 132 F.4th 1031 (7th Cir. 2025). The District Court opinion (App. 16a-28a) is published at 570 F. Supp. 3d 594 (N.D. Ill. 2021).

JURISDICTION

The judgment of the Seventh Circuit was entered on April 1, 2025. The Seventh Circuit denied petitioners' timely petition for rehearing on May 14, 2025. Upon timely application to Justice Barrett, this Court allowed Defendants a 30-day extension of the certiorari petition deadline to September 12, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The ADA's statutory provisions at issue here are set forth in the appendix to this petition at App. 34a-36a.

INTRODUCTION

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities," or "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(1).

The District Court below, consistent with law in the Second, Third, Fifth and Tenth Circuits, denied discrimination damages to a plaintiff who undisputedly had no disability and was not perceived as disabled, although his behavior at work led his employer to request a fitness-for-duty examination. *Compare* App. 1a-15a *with Kosiba v. Cath. Health Sys. of Long Island, Inc.*, Case No. 23-6, 2024 WL 3024652, at * 3 n.1 (2d Cir. Jun. 17, 2024); *Tice v. Ctr. Area Trans. Auth.*, 247 F.3d 506, 514-16 (3d Cir. 2001); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 561 (5th Cir. 1998) and *Griffin v. Steeltek, Inc.*, 261 F.3d 1026, 1028 (10th Cir. 2001) ("*Griffin II*").

The Seventh Circuit reversed. It held there was liability for discrimination under 42 U.S.C. § 12112(d)(4), which states that employers "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." The Seventh Circuit found that provision, read together with §§ 12112(a) and (d)(1) of the ADA, created a "discrimination" claim for an employee who undisputedly did not meet the ADA definition of a person with a disability.

The Seventh Circuit's approach lacks support in any clear text of the ADA, or in the history and

structure of the ADA. It also deepens a clear and widespread circuit conflict. *Compare* App. 1a-15a and *Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566 (6th Cir. 2014) *with Kosiba*, 2024 WL 3024652, at * 3 n.1; *Tice* 247 F.3d at 514-16; *Armstrong* 141 F.3d at 561 and *Griffin II*, 261 F.3d at 1028.

Only this Court can resolve the circuit split and restore the correct textual and common sense meaning of the ADA. Discrimination "on the basis of disability" should apply to an employee with actual or perceived major impairments, not an individual like the plaintiff here. The petition should be granted, and the District Court ruling below should be reinstated.

STATEMENT

I. Background.

Plaintiff John Nawara is an officer employed by the Cook County Sheriff. In 2016, his then-supervisor, correctional superintendent Karen Jones-Hayes, reported that Nawara had an angry outburst and shouted curses at her while on duty at the secure hospital where detainees of the Cook County Jail are taken for medical treatment. R. 421-7.[1]

In response to his supervisor's complaint, Nawara was called to a meeting with the Cook County Sheriff's human resources ("HR") department. R. 421-10, 421-13 & 421-19. At the meeting, Nawara had contentious interactions with an HR director, Rebecca Reierson, and an occupational nurse, Winifred Shelby, both of whom asked Nawara to see a doctor for a fitness-for-duty examination. R. 322 at 395-402; R. 327 at 1380-1406. Shelby wrote that the referral was due to "concerns about anger management, including [Na-

[1] We cite the district court record as "R. ____."

wara's] ability to manage a detainee population without losing his temper." R. 421-28.

During the HR meeting, Nawara objected to and refused to sign medical record release forms that Shelby asked him to sign. Nawara attested that the reason for his refusal was his belief that the forms did not comply with the Health Insurance Portability and Accountability Act ("HIPAA"). R. 220-3, at ¶ 17; R. 325 at 1032-1033.

Because Nawara refused to sign the record release forms or take a fitness evaluation, he was put on paid leave. R. 364-1.

On April 26, 2017, Nawara was taken off the payroll and put on unpaid leave. R. 432-1; App. at 3a. His refusal to take the fitness-for-duty examination continued. *Id.* In August 2017, Nawara ended his holdout and signed a revised medical records release form. R. 89 at ¶ 91(b). He saw a psychologist, Diana Goldstein, for the fitness-for-duty examination, which he passed. R. 329 at 1595-1664. He returned to duty and to paid work in September 2017. R. 432-1.

II. The District Court Proceedings.

While he was refusing to sign the release form, Nawara filed this lawsuit, R. 1, alleging in relevant part that petitioners' conduct violated 42 U.S.C. § 12112(d)(4) of the ADA. The case proceeded through trial and verdict on Nawara's ADA § 12112(d)(4) claim.

In the charge to the jury, the jurors were not asked or instructed to find that Nawara had a mental or physical impairment or that the Defendants regarded him as having such an impairment. R. 332 at 1965-1981, R. 302. Likewise, the District Court did not use the words "discriminate" or "discrimination" in its

charge to the jury. R. 332 at 1965-1981, R. 302. Rather, the jury was instructed to find a violation of the ADA if they concluded either the fitness-for-duty assessment or the related medical records request was not justified by a job-related or business necessity. *Id*.

The jury found the Sheriff's Office violated the ADA. R. 332 at 2067-2070, R. 304. The verdict form left for the District Court to decide whether Nawara was entitled to "lost earnings" damages. *Id*. The jury also found that Nawara had not proven any emotional harm and awarded him zero dollars in emotional distress damages. *Id*. The District Court entered a judgment finding Defendants liable but awarding no money damages. Nawara moved to amend or alter the judgment to award him "back pay." R. 305. His motion argued that the jury's finding of a § 12112(d)(4) violation also amounted to a finding of unlawful discrimination entitling him to lost earnings relief under Title VII of the Civil Rights Act of 1964.

The District Court denied Nawara's motion and issued an opinion holding that "on the facts of this case, [the] violation of § 12112(d)(4) did not constitute disability discrimination." App. at 17a. The District Court noted that at no point during or prior to trial did Nawara "claim to have an actual or perceived disability," and found the ADA's "general anti-discrimination provision," 42 U.S.C. § 12112(a), was "not before the jury." App. at 19a-20a.

The District Court read § 12112(a) of the ADA together with § 12112(d). App. at 21a-22a. Subsection (a) says that employers shall not "discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions,

and privileges of employment." App. at 35a. Subsection (d)(1) in turn states that "the prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries." *Id.*

Reading both sections together, the District Court construed them to mean that "medical examinations and inquiries" are "under the umbrella" of subsection (a)'s "other terms, conditions, and privileges of employment." App. at 22a. On the basis of that reading of the statute, the District Court concluded that medical examinations or inquiries that violate § 12112(d)(4) only rise to the level of disability discrimination when the employee subject to the examination has a "disability" as defined in the ADA (App. at 29a)—i.e., if the employee has an actual or perceived impairment that substantially limits a major life activity.

The District Court also found that in this "unusual case" of an employee who was not disabled or perceived as disabled, back pay damages for discrimination was not appropriate. App. at 29a. Rather, the appropriate measure of damages was for Nawara's "emotional distress," which the jury had found to be zero dollars. *Id.*

Following motions to reconsider that ruling, the District Court reaffirmed its opinion and again denied Nawara any money damages because he had not proved discrimination as defined by the ADA. The District Court issued a final order limiting his relief for the ADA violation to restoration of any lost seniority credits for his missed months of work, but denying money damages. R. 413.

III. The Court Of Appeals Proceedings.

Nawara appealed the District Court's decision, and on appeal, the United States intervened as an *amicus* on Nawara's behalf. Both the United States and Nawara argued that the Court of Appeals should deem all violations of § 12112(d)(4), regardless of intent and regardless of whether the plaintiff had an actual or perceived disability, to discriminate on the basis of disability.

On April 1, 2025, the Court of Appeals reversed the District Court, finding Defendants liable for discrimination under the ADA. On that basis, it held Nawara may recover back pay under the ADA and Title VII, which the Court read together as entitling lost earnings damages to plaintiffs who prove discrimination on the basis of disability. App. at 9a-10a & 14a (citing and applying the ADA's enforcement provision, 42 U.S.C. § 12117, which incorporates Title VII's provision allowing recovery of back pay in cases of discrimination). *See also* Title VII at 42 U.S.C. § 2000e-5(g).

The Court of Appeals read ADA §§ 12112(a), (d)(1) and (d)(4) together to define all violations of (d)(4) to discriminate on the basis of disability, regardless of the employer's intent and regardless of whether the employee has an actual or perceived disability. App. at 14a-15a. On that basis, it found Nawara should be awarded back pay damages for discrimination.

On May 14, 2025, the Court of Appeals denied rehearing. This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit held the Cook County Sheriff liable for engaging in disability discrimination, despite it being undisputed that Nawara is not disabled, and that the Sheriff did not even perceive him as disabled. Correctional facilities in the Seventh Circuit now face a Hobson's choice—either turn a blind eye to potential dangers posed by employees, taking on the risk of liability to detainees if those dangers are realized, or take protective action via a fitness assessment, on pain of statutory liability under the ADA for doing so.

More broadly, the Seventh Circuit decision reaches, with limited exceptions, a very large number and range of employers. The ADA applies to all public and private employers engaged in activity that affects commerce and who employ 15 or more people—with exceptions only for the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or a private membership club that is a tax-exempt organization. 42 U.S.C. § 12111(5).

The decision below thus has a sweeping impact on businesses and their employees throughout the Seventh Circuit, as shown by statistics from the U.S. Census Bureau, 2022 SUSB Annual Datasets by Establishment Industry.[2] In Illinois, there are over 96,000 busi-

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[2] *See* U.S. Census Bureau, 2022 SUSB Annual Data-Sets by Establishment Industry, *at* https://www.census.gov/data/tables/2022/econ/susb/2022-susb-annual.html (last visited Sept. 5, 2025). An excel chart available at this government resource includes data for each State showing, among other things, the number of business establishments with 20-99 employees, 100-499 employees, and over 500 employees and the total number of employees in each category of business establish-

ness establishments employing over 4.7 million employees which are impacted.[3] In Indiana, the decision impacts over 57,400 business establishments employing over 2.4 million employees; and in Wisconsin, the decision impacts over 50,802 business establishments employing more than 2.2 million employees.[4] Taken together, the Seventh Circuit decision reaches more than 300,000 establishments and over 9.3 million employees working there.

In addition, the Seventh Circuit decision impacts all state and local governments, which are active in an array of public service arenas such as public safety, education, public health, transportation, infrastructure, social services, and economic development, among others. Illinois has over 752,000 state and local government employees; Indiana has over 294,000 state and local government employees; and Wisconsin has over 384,000 state and local government employees.[5] In the three

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ment. *See* https://www2.census.gov/programs-surveys/susb/tables/2022/us_state_6digitnaics_2022.xlsx, Excel sheet columns E, G and H (last visited Sept. 5, 2025). These data provide conservative estimates because the Census Bureau does not break out data specific to establishments of 15 to 19 employees, which are covered by the ADA, and we therefore do not report data about these smaller covered businesses.

[3] *See* Illinois data at *id.*, Excel sheet lines 154271, 154272, and 154274. The data we reference are conservative estimates of impact because the Census Bureau presentation does not break out data specific to establishments of 15 to 19 employees, which are covered by the ADA, and those smaller covered businesses are not included in the data we report here.

[4] *See* Indiana data at *id.*, Excel sheet lines 168358, 168359 and 168361 and Wisconsin data at *id.*, Excel sheet lines 550791, 550792, and 550794.

[5] See U.S. Bureau of Labor Statistics via FRED®, Federal Reserve Bank of St. Louis for statistics about state and local gov-

states together, there are over 1,430,000 state and local government employees covered by the ADA. If the decision below stands, among other things, it will substantially impact any state or local government in the Seventh Circuit which requires an employee who has no actual or perceived disability to take a fitness-for-duty examination—presumably the large majority of employees asked to take a fitness assessment.

The Seventh Circuit's decision manifestly warrants this Court's review. First, the circuits are now hopelessly divided on whether the ADA allows plaintiffs who are neither disabled nor perceived as disabled to seek damages. Second, that conflict implicates a matter of great importance, as the United States expressly admitted when it intervened in this matter below. That is particularly true given that the Seventh Circuit's decision here deters employers in industries reliant on workplace safety or institutional security from taking even modest steps to maintain such environments with a fitness exam. This is more so in situations where the government authorizes and empowers its employees, from law enforcement officers or tax collectors, to control civic functions and civilians

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ernment employees (accessed September 2, 2025). In Illinois, there are over 154,000 state government employees, https://fred.stlouisfed.org/series/SMS17000009092000001, and over 608,000 local government employees. https://fred.stlouisfed.org/series/SMU17000009093000001A. In Wisconsin, there are over 98,000 state government employees, https://fred.stlouisfed.org/series/SMS55000009092000001, and over 286,000 local government employees, https://fred.stlouisfed.org/series/SMU55000009093000001A. In Indiana, there are over 115,000 state government employees, https://fred.stlouisfed.org/series/SMS18000009092000001, and over 274,000 Indiana local government employees, https://fred.stlouisfed.org/series/SMU18000009093000001A.

themselves. Third, this case is an excellent vehicle for the question presented, which was squarely addressed in the proceedings below, and is crucial to the final judgment entered by the Seventh Circuit. Fourth, and to put it plainly, the decision below was wrong—the ADA protects from discrimination people who actually have, or are perceived to have, disabilities, and neither can be said of the plaintiff here.

I. The Circuits Are Hopelessly Divided On Whether Employees Who Are Neither Disabled Nor Perceived As Disabled May Recover Damages For Discrimination Claims Under the ADA.

The Court of Appeals decision deepens a significant conflict among circuit courts over whether plaintiffs who are not disabled or perceived as disabled may recover damages for discrimination under 42 U.S.C. § 12112(d). The Second, Third, Fifth, and Tenth Circuit Courts of Appeal do not allow employees without ADA-defined disabilities to recover discrimination damages under the ADA. The Sixth and Seventh Circuits take the view that any violation of 42 U.S.C. § 12112(d)(4) is "discrimination" regardless of whether a plaintiff has a disability or perceived disability. The Fourth, Eighth, Ninth and Eleventh Circuits have taken yet additional positions that do not easily fit the positions or results of other circuits.

The circuit splits alone present an issue of tremendous importance. The splits have led to a confusing patchwork of inconsistent rulings in § 12112(d) cases, with different outcomes across the country. Federal law should be uniformly interpreted, and employers with locations in multiple states should not be burdened by inconsistent ADA interpretations in

lower courts. Only this Court can resolve the many circuit splits.

A. The Second, Third, Fifth And Tenth Circuits Recognize That The ADA Does Not Support Damages For Discrimination Unless The Plaintiff Is Disabled Or Perceived As Disabled.

The District Court's now-reversed holding was rooted in the jurisprudence of other Courts of Appeal outside the Seventh Circuit. *See* App. at 26a-28a (following Fifth and Tenth Circuit authority due to the absence of any controlling Seventh Circuit case law). As the District Court correctly recognized, those jurisdictions draw a critical distinction between an employer's technical or non-discriminatory violation of § 12112(d), for which limited relief might be appropriate, and an act of discrimination on the basis of disability under the ADA and Title VII. *Id.*

The Fifth Circuit first broached the topic of non-discriminatory violations of § 12112(d) in *Armstrong v. Turner Indus. Inc.*, 141 F.3d 554 (5th Cir. 1998). The plaintiff sued a prospective employer who asked for a urine test, claiming the test violated § 12112(d)(2)'s rule prohibiting employers from asking for unnecessary medical examinations of prospective employees. *Id.* at 559-60. The Fifth Circuit granted summary judgment in favor of the employer, and stated that there was no "indication either in the text of the ADA or in its legislative history that a violation of the prohibition against preemployment medical examinations and inquiries, in and of itself, was intended to give rise to damages liability." 141 F.3d at 561. *Armstrong* thus supported the District Court's conclusion

that some violations of § 12112(d) can be technical or non-discriminatory. App. at 26a.

The Fifth Circuit returned to § 12112(d) in *Taylor v. City of Shreveport*, 798 F.3d 276 (5th Cir. 2015), where it addressed a complaint by nondisabled police officers who challenged their department's sick leave policy. *Taylor* did not overrule *Armstrong*. Importantly, *Taylor* noted that a "prohibited medical examination or inquiry *may* constitute a form of employment discrimination under the ADA," *Id.* at 282-283 (emphasis added). *Taylor* did not say that "prohibited medical examinations" under § 12112(d)(4)—that is examinations that are not job-related or based on business necessity—are automatically deemed to be discrimination on the basis of disability.

The Tenth Circuit has expressly recognized the crucial distinction between discriminatory and technical violations of § 12112(d). In *Griffin v. Steeltek, Inc.*, 261 F.3d 1026, 1028 (10th Cir. 2001) ("*Griffin II*"), a jury found the defendant had violated ADA § 12112(d)(2), the provision of the ADA that forbids medical inquiries to prospective job applicants unless there is a job related or business necessity for inquiring. In *Griffin II*, the defendant asked a job applicant if he had ever filed a workers' compensation claim and if he had any "physical defects which preclude you from performing certain jobs." *Id.* at 1028. The plaintiff applicant refused to answer the latter question even though he was not disabled. *Id.* The Tenth Circuit did not allow plaintiff to recover money damages or attorney fees and limited him to nominal damages, reasoning that the jury found that while the defendant had "technically violated § 12112(d)(2)(A) by asking a prohibited question," the plaintiff did not establish any injury and likewise did not establish that the

defendant "engaged in intentional unlawful discrimination" because of a disability. *Id*. at 1029.

The Third Circuit likewise distinguishes between discriminatory and non-discriminatory violations of § 12112(d). *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 514-16 (3d Cir. 2001) affirmed summary judgment against a bus driver whose employer asked him to see a doctor before returning from sick leave. *Tice* noted that "even an improper IME [independent medical examination] request, without more, might not be sufficient to demonstrate that an employee was 'regarded as' disabled." 247 F.3d at 515. *Tice* noted: "it is not clear from the text of the ADA itself" whether employees without disabilities can file suit under § 12112(d)(4). *Id*. at 516-17. *See also Green v. Joy Cone Co*., 278 F. Supp. 2d 526, 539-42, 544 (W.D. Pa. 2003) (when plaintiff did not allege an actual or perceived disability, there was no *per se* ADA "discrimination" under § 12112(d)(2) when her employer asked her to sign a release that might allow future access to her medical records).

Last year, the Second Circuit found there is no liability for discrimination under § 12112(d)(4) without a plausibly alleged actual or perceived disability. In *Kosiba v. Cath. Health Sys. of Long Island, Inc*., No. 23-6, 2024 WL 3024652 (2d Cir. Jun. 17, 2024) (granting motion to dismiss), a nursing home employee challenged the home's COVID-19 vaccination requirements on several grounds including a disability discrimination claim under § 12112(d)(4) of the ADA. The Second Circuit rejected the claim that an employee's "requirement to disclose his vaccination status was a forbidden, disability-related inquiry" because plaintiff was "neither disabled nor regarded as having a disability, and [defendant employer] never inquired into

whether he had a disability." *Id.* at *3 n.1.

In sum, the Second, Third, Fifth and Tenth Circuits have all declined to read language into § 12112(d) allowing employees to recover money damages for discrimination unless they were actually disabled or an employer perceived them as disabled.

B. The Sixth Circuit And Seventh Circuit Deem Discriminatory All "Medical Examinations and Inquiries" That Violate 42 U.S.C. § 12112(d)(4).

The Sixth and Seventh Circuits hold that all violations of 42 U.S.C. § 12112(d)(4) rise to the level of discrimination, regardless of an employee's disability status. The first case in either Circuit to reach that conclusion was *Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566 (6th Cir. 2014). In *Bates*, plaintiffs sued their employer for discrimination under § 12112(d)(4) in connection with a workplace drug testing program whereby employees who tested positive were asked to provide proof of medical prescriptions. 767 F.3d at 566.

Bates found a triable issue of fact about whether the drug testing program met the definition of "medical examination" and if so whether the examination was justified by a job-related or business necessity. *Id.* at 579-80. *Bates* found this issue triable regardless of whether any individual plaintiffs were disabled or perceived as disabled. *Id.* The Sixth Circuit noted a tension between § 12112(b)(6) and § 12112(d), and conceded that under § 12112(b)(6), only plaintiffs who have actual or perceived disabilities can sue for discrimination. *Id.* at 572. The Sixth Circuit declined to apply § 12112(b)(6)'s limitation, holding that §

12112(d)(4) trumped § 12112(b)(6). *Id.* at 572, 578-79.

The Sixth Circuit also found § 12112(d) to be ambiguous and deferred to a guidebook from a federal administrative agency, the Equal Opportunity Employment Commission (EEOC), to resolve the ambiguity. 767 F.3d at 574. Engaging in a lengthy discourse about the EEOC's compliance guidebook, the Sixth Circuit relied on one passage in the guidebook—not the statute—which stated that employers are liable for unlawful discrimination if they ask employees if they are "taking any prescription drugs or medications, [or did] in the past." *Id.* at 578.

Moreover, the Sixth Circuit gave *Skidmore* deference to the EEOC's statutory interpretation. 767 F.3d at 574 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). As noted in greater detail in Part IV below, the Sixth Circuit's purported application of *Skidmore* did not conduct the historic comparative analysis that *Skidmore* requires. *Bates* was an outright capitulation to the EEOC, reflected an outmoded approach to statutory interpretation akin to *Chevron* deference, and cannot be squared with this Court's admonition against undue deference to agencies like the EEOC. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 373 (2024).

The Seventh Circuit opinion in this case is aligned with the Sixth Circuit. The Seventh Circuit favorably cited *Bates* and EEOC enforcement guidelines and, just like in *Bates*, allowed the United States to intervene as an *amicus* on behalf of the EEOC. App. at 12a (citing *Bates*); *id.* at 13a n.3 (citing EEOC guidelines); *id.* at n.4 (citing and commending the United States for its *amicus* intervention, which encouraged adoption of both *Bates* and the EEOC guidelines).

The Seventh Circuit went even further than *Bates* in siding with the EEOC. It purported to apply a close textual reading of § 12112 and concluded based on that analysis that all violations of § 12112(d)(4) must be considered discrimination on the basis of disability. App. at 12a-14a. The Seventh Circuit also purported to follow Tenth Circuit precedent, App. at 11a, but the Seventh Circuit misapprehended Tenth Circuit law: it cited only the first opinion in *Griffin v. Steeltek Inc.*, 160 F.3d 591 (10th Cir. 1998) ("*Griffin I*"), and omitted the later history in that case. The omission matters. In *Griffin I*, the Tenth Circuit held that a job applicant with no disability could still bring suit under § 12112(d)(2) after a prospective employer asked if he had any physical defects. 160 F.3d at 591. But in *Griffin II*, three years later, the Tenth Circuit *barred the same plaintiff* from getting any more than nominal damages for this technical violation of § 12112(d), reasoning there was no "unlawful intentional discrimination" behind the improper question. *Griffin II,* 261 F.3d at 1026.

Here, the District Court found Defendants liable for only a technical, non-discriminatory violation of § 12112(d)(4) and limited Nawara's relief to restored seniority credits. The District Court's ruling closely mirrored *Griffin II*, and the Seventh Circuit's reversal of the ruling creates a conflict with *Griffin II*.

C. The Fourth, Eighth, Ninth And Eleventh Circuits Have Taken An Unclear Approach

The Fourth, Eighth, Ninth and Eleventh Circuits have considered § 12112(d) but have not clearly weighed in on the question of whether an employee with no actual or perceived disability can recover

damages for discrimination.

Over 25 years ago, the Ninth Circuit held that a plaintiff who had recovered from a serious physical impairment could file suit under § 12112(d)(4) to challenge a fitness-for-duty examination, even though she was no longer disabled. *Fredenburg v. Contra Costa Cnty. Dep't of Health Servs.*, 172 F.3d 1176, 1182-83 (9th Cir. 1999). *Fredenburg* stopped short of saying that the plaintiff would also be deemed a victim of discrimination under § 12112(a) if she prevailed on her subsection (d)(4) claim. Further, *Fredenburg* distinguished § 12112(d)(4) from subsection (d)(1), on the ground that subsection (d)(1) "categorically directs courts to treat medical examinations as *possible* evidence of discriminatory conduct" and applicable to "individuals with a disability." *Id.* at 1182-83 (emphasis added). The Ninth Circuit did not explain when or how a medical examination of a nondisabled employee might rise from "possible" to actual discrimination.

The Eighth Circuit wholesale adopted *Fredenburg*. *See Cosette v. Minn. Power & Light*, 188 F.3d 964, 971 (8th Cir. 1999) (allowing a nondisabled plaintiff to file suit over an unnecessary fitness-for-duty exam). As in the Ninth Circuit, the Eighth Circuit has left unclear when examination of a nondisabled employee without job-related or business necessity crosses the line from "possible" to actual discrimination.

The Eleventh Circuit viewed unnecessary drug testing as the basis for ADA discrimination damages under § 12112(d)(2), in *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206 (11th Cir. 2010). *Harrison* found that subsection (d)(2) violations, which apply only to job applicants, rise to the level of discrimination. *Id.* at 1213. In reaching that conclusion, the

Eleventh Circuit heavily relied on Congress's intent to avoid job applicants revealing "hidden disabilities" during a pre-employment health screening and losing out on work "before their ability to perform the job was even evaluated." 593 F.3d at 1212 (citing H.R. Rep. No. 485, Pt. II, 101st Cong., 2d Sess. 42-43 (1990)).

The Eleventh Circuit's focus on job applicants who unwittingly reveal "hidden disabilities" leaves in question whether *incumbent* employees, like Nawara, have any grounds to sue for discrimination under § 12112(d)(4), the basis of the claim below. It is self-evident that incumbent employees, like Nawara here, will have had their ability to perform the job evaluated and approved long before any issue arose under § 12112(d)(4). These incumbent employees do not have the same "hidden disability" concerns that applied to job applicants in the *Harrison* case.

Finally, the Fourth Circuit, when affirming summary judgment for a railroad employer in a § 12112(d)(4) case after the plaintiff challenged its drug-testing program, has noted that "improper medical inquiry claims under the ADA § 12112(d)(4)(A) stand apart from general claims of discrimination under § 12112(a) and do not require the plaintiff to show he is disabled." *Coffey v. Norfolk S. Ry. Co.,* 23 F.4th 332, 336 n.1 (4th Cir. 2022) (citing *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1310 (11th Cir. 2013)). *Coffey* did not explain whether the Fourth Circuit views improper medical inquiry claims by employees without actual or perceived disabilities as creating discrimination liability triggering Title VII's damages provisions.

D. The Circuit Splits Cannot Be Resolved Without This Court's Intervention

The patchwork of different rules in nine different circuits weighs heavily in favor of, and indeed calls out for, this Court's review of the Seventh Circuit's decision.

The conflict among other lower courts is problematic and presents an issue of tremendous importance to a broad swath of private and public employers who are governed by the ADA. Without this Court's intervention, inconsistent lower court rulings will proliferate with differing results in different jurisdictions.

One can readily envision that requests for fitness for work exams by hospitals, other health care providers, manufacturers, retailers, schools, transportation services, construction businesses, police and other law enforcement agencies, and many other businesses and agencies will result in very different reactions and legal protections depending on the state in which the business operates and where the employee works. Indeed, the same company operating in different circuits could be subject to very different liability exposure under the ADA simply because of the circuit in which a facility is located.

Given the deep gulf among multiple circuits, only this Court can and should resolve the different approaches and split in application of the ADA.

II. The Question Presented Implicates A Matter Of Great Practical Importance.

This case presents a substantial and important question of federal law: Whether employers discriminate "on the basis of disability" under the ADA if they make medical inquiries about employees who are not disabled.

Recognizing this case's importance, the Court of Appeals below allowed intervention by counsel at the United States, including counsel at the EEOC, as *amicus curiae* on behalf of Nawara. As United States counsel wrote at the time: "This case presents an *important question* regarding the availability of back pay for violations of [the ADA's] prohibition against subjecting incumbent employees to unjustified medical exams or disability-related inquiries, 42 U.S.C. § 12112(d)(4), committed *against employees without disabilities*." United States Amicus Br., 7th. Cir. Dkt. No. 35, at 1-2 (emphasis added).[6]

The decision below sweeps broadly. It applies to all employers in Illinois, Indiana and Wisconsin. There are many instances among many different types of employers where an anger management evaluation—or indeed, other types of mental or physical health examinations—may be required to show fitness for work.

Moreover, this case has national implications

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[6] Because the United States intervened below before the Presidential transition in 2025, it would be appropriate for this Court to call for the views of the Solicitor General to determine if the United States (1) continues to interpret the ADA in the manner it argued below and (2) continues to believe that the issue presented here is one of nationwide importance.

for workplace anger management programs that employers across the country offer to their employees. The Court of Appeals decision below deemed an "anger management" referral at an HR meeting to be an act of workplace discrimination. If the decision below stands, employees may now file discrimination claims any time a supervisor has reason to suggest an employee seek an anger management evaluation that the employer will pay for—even where the employee has no disability. Many employers may opt to discontinue workplace anger management programs rather than run this litigation risk.

This case also has important national implications for law enforcement work. Nawara was a correctional officer who lost control of his temper and shouted curses at a superior officer in a setting where respect for authority and chain of command was of paramount importance. The risks to fellow officers and the public if officers' anger management issues cannot be addressed without fear of litigation are manifest and serious. There is a clear public interest in allowing law enforcement agencies to ask for assurance, through an anger management evaluation, that officers can control themselves in a volatile setting. If the decision below stands, law enforcement agencies may think twice before referring officers for anger management evaluations—because to do so will risk an ADA discrimination lawsuit.

The District Court below wisely recognized that an unintentional violation of § 12112(d)(4) out of concern over Nawara's ability to manage a detainee population without losing his temper was merely a technical violation of the ADA and not a *per se* act of discrimination. The Seventh Circuit decision below, however, creates a rigid *per se* discrimination rule that

may deter correctional facilities from seeking fitness evaluations of officers charged with the care of detainees.

In fact, this tension, if taken to its natural endpoint, could call into question the very constitutionality of the ADA itself, as applied to measures taken by correctional facilities to mitigate risks posed by their employees. After all, if reasonable measures required by the Constitution to protect detainees are now deemed under the ADA to be acts of discrimination, then the ADA is unconstitutional to the extent that it prohibits those measures. Rather than await the inevitable suit challenging the ADA's as-applied constitutionality—a suit that would undoubtedly warrant this Court's attention—this Court should act now to correct the Seventh Circuit's mistaken interpretation of the ADA, which wrongly opens the door to such outcomes. It should go without saying that such tension, implicating the safety of countless detainees in this nation's correction facilities, is a matter of national importance warranting this Court's review.

More broadly, the Seventh Circuit decision has wide implications for employee fitness examinations in any industry in Illinois, Indiana, or Wisconsin where a safe and secure workplace is important. Employers in those states who wish to conduct fitness assessments of their employees are now in a hopeless position with liability risks on all sides. Employers who opt to refrain from employee fitness assessments risk liability for ignoring risks to other employees and the public. Employers who conduct fitness assessments now run the risk of discrimination liability to nondisabled employees. The circuit split below heightens that liability risk. This Court should act now to resolve that split and give much-needed clarity about

the ADA's meaning.

Last, and certainly not least, it is important for this Court to bring the ADA back in line with Congress's express intent to protect individuals with actual disabilities from discrimination. The framers of the ADA and Title VII could not have had in mind plaintiffs like Nawara, who belonged to no protected class, had no trouble getting hired for jobs in both law enforcement and private security, and had no impairment. Nawara missed time at work only because he felt that release forms handed to him at an HR meeting did not comply with HIPAA. He held out for months on returning until the release forms were amended to his liking. Once the issue with the release form was resolved, Nawara returned to work. He remains on active duty as a sheriff's officer to this day. It is difficult to see how deeming Nawara a victim of "discrimination" does anything to eliminate bigotry and prejudice toward people with actual disabilities.

III. This Case Is An Excellent Vehicle For The Question Presented.

This case is an ideal vehicle to resolve the crucial question of whether plaintiffs without disabilities can recover damages for discrimination under § 12112. The outcome below was not an interlocutory ruling, it was a final judgment on the merits that turned entirely on the question of how to interpret § 12112 of the ADA. The question was squarely presented below, was fully preserved on appeal by both parties, and was outcome-determinative in the District Court and then again in the Seventh Circuit. There are no disputed questions of fact before this Court. Indeed, it is undisputed that plaintiff Nawara, who remains actively employed as a peace officer by the defendants, and had no actual or perceived

disability.

The District Court did not allow damages for disability discrimination under its interpretation of actionable "discrimination" under the ADA. The Seventh Circuit *did* allow disability discrimination damages solely on the basis of its contrary interpretation of the ADA. The legal views of many other circuits are in conflict with the Seventh Circuit's conclusion, further buttressing why this case is an excellent vehicle to resolve the question presented.

If there is further delay in deciding the question presented, courts across the country will apply highly conflicting or confused views of the same fact pattern, *i.e.*, a situation where the employee neither has an impairment nor is perceived as impaired but claims a right to discrimination damages under the ADA. There are substantial economic and social consequences for both employers and employees, as the ADA governs an enormous number of businesses, non-profits, and local and state governments. The Court should and can resolve the question presented here to end the uncertain patchwork of conflicting rules in lower courts and decide on a single legal threshold for allowing disability claims to proceed: that recovery for discrimination under the ADA requires a plaintiff who has an actual or perceived disability.

IV. The Seventh Circuit's Interpretation Of The ADA Is Wrong, And Not All Violations Of 42 § 12112(d)(4) Discriminate On The Basis Of Disability.

The Seventh Circuit agreed that Nawara has no actual or perceived disability and never claimed to

have one. App. at 7a.[7] The Seventh Circuit nonetheless found that Defendants discriminated against Nawara "on the basis of disability" under 42 U.S.C. §§ 12112(d)(1), 12112(d)(4) and 12112(a), which it read together broadly to define all employee medical examinations without a job-related or business necessity as discrimination. Defendants ask this Court to reverse the Seventh Circuit's decision, and respectfully submit that the Second, Third, Fifth and Tenth Circuits, as well as the District Court's well-reasoned ruling and judgment below, are the better interpretive approach to the ADA.

Defendants direct this Court to at least seven separate errors of reasoning and statutory interpretation in the decision below.

First, and as a matter of fundamental principles, the decision below flouts the cardinal rule that words in a statute should be understood according to their ordinary and natural meaning. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824) (finding that framers of the Constitution "must be understood to have employed words in their natural sense, and to have intended what they have said."). The Seventh Circuit's definition of ADA "discrimination" departs radically from the ordinary and natural meaning of

[7] Indeed, the Seventh Circuit has found many times that perceived anger and other extreme emotional issues, without more, do not meet the ADA's definition of disability. *See, e.g., Kurtzhals v. Cnty. of Dunn*, 969 F.3d 725, 730 (7th Cir. 2020); (finding a police officer was properly referred for a fitness examination for anger issues); *Weiler v. Household Finance Corp*., 101 F. 3d 519, 524 (7th Cir. 1996) ("The major life activity of working is not 'substantially limited' if a plaintiff merely cannot work under a certain supervisor because of anxiety and stress related to his review of her job performance"). Under those cases, Nawara's perceived "anger management" issues were not disabilities.

that word. Black's Law Dictionary defines "Discrimination" as "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX Trans., Inc. v. Ala. Dep't of Rev.*, 562 U.S. 277, 286 (2011) (citing Black's Law Dictionary 534 (9th ed. 2009)). *See also* 562 U.S. at 286-87 (citing Webster's Third New International Dictionary 648 (1976) for the proposition that "discriminates" means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit"). The Court of Appeals' definition of what it means to discriminate on the basis of disability bears no resemblance to this commonly understood meaning of the word "discrimination."

Second, the Seventh Circuit misapplied the very canons of statutory construction that it cited, which weigh wholly in Defendants' favor. The Seventh Circuit deemed dispositive, and quoted at length, the last antecedent or nearest reasonable referent rule of construction. App. at 12a (quoting and relying on canons of statutory construction in Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts ("Scalia and Garner") 127,133 at §§ 18, 20 (2012)).

But the actual rule, which this Court expounded on in its seminal opinion in *Barnhart v. Thomas*, 540 U.S. 20, 26 (2000), is that when interpreting statutory language that modifies other statutory text, judges should apply modifying language to the *last* noun phrase (the "last antecedent") or the *last* adverbial phrase (the "nearest reasonable referent") in the statutory text. Scalia & Garner §§ 18, 20. The rule is well-established, deeply rooted, and reflects sound logic. And the rule avoids overbroad results when reading statutes, as Scalia and Garner noted

when detailing a list of historic examples where courts wisely followed this rule to avoid bizarre or absurd results. Scalia & Garner § 18 (noting that the rule avoids a long-rejected reading of Article II of the Constitution under which a Vice President does not become President if the President dies or resigns).

The Seventh Circuit applied the nearest reasonable referent rule in an upside down and backwards fashion. The court below purported to use the rule in connection with § 12112(d)(1), which states: "The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries." Subsection (a), however, is a long sentence with multiple clauses, stating in full: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

Congress did not explain exactly how it intended to "include" the phrase "medical examinations or inquires" in that long sentence. Congress may have meant to include "medical examinations and inquires" in the phrase "basis of disability," or it may have meant to include "medical examinations and inquiries" in the phrase "other terms, conditions and privileges of employment." Under a proper application of the last antecedent or nearest reasonable referent rule, "medical examinations or inquiries" should apply to the *last* phrase of Subsection (a): "other terms, conditions and privileges of employment." That was, of course, precisely the conclusion that the District Court reached below. The last antecedent or nearest reasonable referent rule as applied in *Barnhart* requires that

the District Court judgment be reinstated.

Third, the decision below ignores the structure of the ADA—specifically, the rules that Congress provided in § 12112(b) for "Construction" of what it means to discriminate on the basis of disability. Subsection (b)(6) clearly defines discrimination in the context of employee testing as:

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

42 U.S.C. § 12112(b)(6) (emphasis added).

Congress's intent, as expressed in subsection (b)(6), was clear: it sought to protect employees "with a disability" from discrimination in on-the-job testing. The Seventh Circuit used subsection (d) below to expand the definition of discrimination in a way that disregards the employee's disability status and renders subsection(b)(6) a dead letter. Subsection (d)(1) is, according to its own title, a "general" provision, and it stands outside subsection (b)'s rules of construction. The general statement in subsection (d)(1) cannot override the specifics of subsection (b)(6)'s rules of construction.

Fourth, and in a similar vein, the Seventh Circuit wrongfully glossed over 42 U.S.C. § 12112(b)(6), disregarding the long-accepted canon that every word and every provision of a statute is to be given effect.

See, e.g., United States v. Butler, 297 U.S. 1, 65 (1936) ("words cannot be meaningless, else they would not have been used"); Scalia & Garner § 26 ("If possible, every word and every provision is to be given effect"). Here, Subsection (b)(6) explains clearly that employee testing rises to the level of discrimination only if it seeks to screen out someone "with a disability." This language parallels and should be constructed to apply to limit discrimination liability for medical testing under § 12112(d)(4). By skipping over § 12112(b)(6) entirely, the Seventh Circuit improperly gave no effect to that language.

Fifth, the text of § 12112(d)(1) is notable for what Congress did *not* say. The text says that the prohibition against discrimination in subsection (a) "shall include" medical examinations and inquiries. It does not say that "any and all" medical examinations and inquiries rise to the level of discrimination. The courts cannot read words into the law that Congress did not actually use. *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (Congress must make its intent "explicit in the statute" or "at least" in legislative history); *id.* at 396 n.4 ("Congress' silence in this regard can be likened to the dog that did not bark.") (citing Arthur Conan Doyle, "Silver Blaze," in The Memoirs of Sherlock Holmes (1894)).

Sixth, the Seventh Circuit decision is not consistent with the history and purpose of the ADA. Congress enacted the ADA in 1990 with the purpose of eliminating "discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). As originally written, § 12112(a) of the ADA stated a general rule prohibiting discrimination against employees "because of disability." In 2008, Congress amended § 12112(a) to change "because of disability" to "on the

basis of disability," and added clarifying language stating that the statute protects any "qualified individual with a disability." *See* Pub. Law 110-325 (S. 3406) (Sept. 25, 2008). This change reinforced the boundaries of the ADA as a statute covering only those individuals with actual or perceived disabilities. In 2008, just like in 1990, Congress's purpose was to remedy "prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers" for people "with physical and mental disabilities." 42 U.S.C. § 12102(a)(2). Congress nowhere stated a purpose of expanding the definition of "discrimination" to employees without any actual or perceived major impairments.

Last, and certainly not least, the Seventh Circuit's approach as well as the Sixth Circuit *Bates* decision showed undue deference to the EEOC's statutory interpretation. That approach is inconsistent with *Loper Bright*, 603 U.S. at 369, which overruled *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984) and held that agencies like the EEOC have no special competence in resolving statutory ambiguities. *Bates* was egregiously wrong and should not have carried any weight with the Seventh Circuit below. Although *Bates* purported to apply discretionary *Skidmore* deference in that case, it crossed well over the line separating *Skidmore* from *Chevron*.

Skidmore teaches that a court should defer to an administrative agency's statutory interpretation only after a court determines that the agency has thoroughly considered a statute's ambiguous language and has consistently interpreted the statute over changing Presidential administrations. *Skidmore*, 323 U.S. at 140. With respect to the Sixth Circuit, it failed

to do that analysis in *Bates*. Instead, it devoted several pages to reciting and adopting language wholesale from an EEOC guidebook promulgated under the Clinton Administration. *Id.* at 578-79. It did not assess the guidebook for consistency with statutory language or later ADA case law, or for consistency with guidelines promulgated by the EEOC during other Presidential administrations. The *Bates* opinion was a total surrender by that court to the EEOC—or, put another way, *Bates* was a *Chevron* decision thinly disguised as a *Skidmore* analysis.

The *Bates* opinion should have carried no weight with the Seventh Circuit in the wake of *Loper Bright*, in which this Court decisively overturned *Chevron*. Nonetheless, the Seventh Circuit cited and agreed with *Bates* below, went out of its way to commend the United States for its brief intervening in this appeal to argue the EEOC's views, and made a point of finding that its opinion was consistent with the EEOC's definition of "discrimination" in 29 C.F.R. § 1630.4(a)(2). There is more than a hint of resistance to *Loper Bright* in this language. Lower courts cannot, and should not, be allowed to get around *Loper Bright* by dressing up old, outmoded *Chevron* reasoning in *Skidmore* clothing. The EEOC's guidebook purporting to broaden the definition of "discrimination" beyond its plain, common and natural meaning, cannot and should not provide the rule of decision in this case.

Correcting any one of the Seventh Circuit's mistaken approaches to statutory construction defeats the Seventh Circuit decision. Taken together, the application of these well-respected rules entirely undercuts the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 12, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED APRIL 1, 2025

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 22-1393, 22-1430, 22-2395, & 22-2451

JOHN NAWARA,

Plaintiff-Appellant, Cross-Appellee,

v.

COOK COUNTY AND THOMAS J. DART,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:17-cv-02393 — **Rebecca R. Pallmeyer**, *Judge.*

Argued May 17, 2023 — Decided April 1, 2025

Before Ripple, Scudder, and Lee, *Circuit Judges.*

Lee, *Circuit Judge.* John Nawara, a former correctional officer at Cook County Jail, initiated several altercations with other county employees. The Cook County Sheriff's Office determined that Nawara needed to undergo a fitness-for-duty examination before returning to work. And, as part of this process, it required Nawara to sign two medical information release forms. Nawara

resisted at first but eventually relented. But before he did, he sued Cook County and Sheriff Thomas Dart in his official capacity (collectively "the Sheriff"), alleging that the examination requirement and inquiry into his mental health violated § 12112(d)(4) of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*

Nawara prevailed at trial, but the jury awarded him zero damages. Nawara then filed a post-trial motion, requesting equitable relief in the form of back pay and lost pension benefits as well as restoration of his seniority.[1] The court granted the latter, but denied the former concluding that the Sheriff's violation of Nawara's rights under § 12112(d)(4) cannot support an award of back pay.

Nawara now appeals the district court's denial of his request for back pay. In turn, the Sheriff cross-appeals the court's order restoring Nawara's seniority. We affirm the district court's restoration of Nawara's seniority, but because the ADA defines a violation of § 12112(d)(4) to be discrimination "on the basis of disability," we reverse the district court's denial of Nawara's request for back pay and remand for further proceedings.

I

John Nawara joined the Cook County Sheriff's Office in 1998. He was working as a correctional officer

1. Because there is no reason to differentiate between back pay and lost pension benefits for the purpose of this appeal, we will refer to both simply as "back pay."

in 2016 when he had a series of heated altercations with his superior officer, Superintendent Karen Jones-Hayes. Several weeks later, he engaged in another contentious interaction with Rebecca Reierson, a human resources manager, and Winifred Shelby, an occupational health nurse. As a result, Reierson and Shelby required Nawara to undergo a fitness-for-duty examination before returning to work, and the Sheriff placed Nawara on paid leave.

To initiate the examination process, Shelby instructed Nawara to submit two signed medical information authorization forms—one allowing medical providers to send his information to the examination company, and the other permitting the Sheriff's Office to collect his information from medical providers to send to the company expediting the process. Despite repeated requests, Nawara refused to submit the executed forms, and the process stalled.

Nawara's paid leave ended on April 25, 2017, and he was placed on unpaid leave, during which he worked other jobs. Nawara eventually decided to return to the Sheriff's Office and provided the authorization forms in August 2017. After undergoing the fitness-for-duty examination, he was declared fit for duty and returned to work as a correctional officer on September 26, 2017. In September 2019, Nawara became a Cook County Sheriff's police officer.

While on leave, Nawara filed this lawsuit, alleging that the Sheriff's actions violated 42 U.S.C. § 12112(d)(4). After a trial, the jury agreed with Nawara that the

examination requirement and related requests for medical records violated § 12112(d)(4)(A). That provision prohibits an employer from requiring a medical examination or inquiring about an employee's disability status unless it is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). The jury, however, awarded no damages.

Nawara then filed a post-trial motion requesting equitable relief in the form of back pay and the restoration of his seniority. After reviewing the pertinent statutory provisions, the district court determined that a plaintiff, like Nawara, must have a disability or perceived disability for a violation of § 12112(d)(4) to constitute discrimination on account of disability. *Nawara v. County of Cook*, 570 F. Supp. 3d 594, 600–01 (N.D. Ill. 2021). And because the remedy provision applicable here, 42 U.S.C. § 2000e–5, bars a court from awarding back pay where an employee suffers an adverse employment action "for any reason other than discrimination" on account of disability, the court denied Nawara's request and entered judgment accordingly. *Id.* (citing 42 U.S.C. § 2000e–5(g)(2)(A)). The court also declined to issue an order restoring his vacation days, holidays, sick days, and seniority.

Nawara subsequently moved to amend the judgment under Fed. R. Civ. P. 59(e), arguing that the district court had failed to fully evaluate his request for the restoration of his seniority. Upon closer examination, the district court agreed and granted Nawara's request to restore his seniority based on the Supreme Court's allowance of such relief in *Franks v. Bowman Transportation Co.*,

424 U.S. 747, 770, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976). *See Nawara v. County of Cook*, No. 17 C 2393, 2022 U.S. Dist. LEXIS 143997, 2022 WL 3161805, at *2 (N.D. Ill. Feb. 15, 2022), *corrected*, 2022 U.S. Dist. LEXIS 143980, 2022 WL 3161838 (N.D. Ill. July 29, 2022).

At that point, the Sheriff moved to amend the judgment restoring Nawara's seniority. According to the Sheriff, the court had ignored a prior stipulation stating that seniority would be restored to Nawara "if the Court awards back pay." In the Sheriff's view, because the district court denied back pay, Nawara was not entitled to his seniority. The district court, however, disagreed and denied the Sheriff's motion. *Nawara*, 2022 U.S. Dist. LEXIS 143980, 2022 WL 3161838, at *3. Both sides have appealed the respective rulings.

II

A. § 12112(d) and Back Pay

In his appeal, Nawara contends that the district court erred by construing the relevant statutes in a way that renders him ineligible for back pay. Thus, this case presents a question of statutory interpretation that we review *de novo*. *United States v. Patel*, 778 F.3d 607, 613 (7th Cir. 2015). And, as in any case of statutory construction, "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436, 139 S. Ct. 2356, 204 L. Ed. 2d 742 (2019). If "that examination yields a clear answer, judges must stop."

Id. For where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (quoting *Caminetti v. United State*s, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)).

Our analysis starts with the statutory provision giving rise to Nawara's claim—42 U.S.C. § 12112. This section begins with a broad proscription: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).[2]

Later in subsection (d), the statute provides that "[t]he prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries." *Id.* § 12112(d)(1). And, as applied to current employees, this means:

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2. The ADA defines "covered entity" as an employer, employment agency, labor organization, or joint labor-management committee, 42 U.S.C. § 12111(2), and a "qualified individual" as an "individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," *id.* § 12111(8). Unless it matters, we will refer to the former as "employer" and the latter as "employee." In addition, the term "disability" means: (1) "a physical or mental impairment that substantially limits one or more major life activities," (2) "a record of such an impairment," or (3) "being regarded as having such an impairment." *Id.* § 12102(1)(A)–(C).

> [An employer] shall not require a medical examination and shall not make inquiries of an employee as to *whether such an employee is an individual with a disability or as to the nature or severity of the disability*, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Id. § 12112(d)(4)(A) (emphasis added).

Based on this language, we have held that an employee may invoke § 12112(d)(4)(A) even if he is not disabled or perceived to be disabled. *See Kurtzhals v. County of Dunn*, 969 F.3d 725, 730 (7th Cir. 2020). And that is what we have here. Nawara has never claimed that he was disabled or that the Sheriff perceived him to be disabled. This is helpful to keep in mind as we review the remedies available under the ADA.

The ADA's enforcement provision, § 12117, incorporates the "powers, remedies, and procedures set forth in [42 U.S.C.] sections 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9." 42 U.S.C. § 12117(a). In so doing, it makes available to ADA plaintiffs the same remedies available to Title VII plaintiffs. *See Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010).

Subsection 2000e–5(g) addresses the availability of back pay. 42 U.S.C. § 2000e–5(g). It begins with the general rule that a "court may ... order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, *with or*

without back pay[,] ... or any other equitable relief as the court deems appropriate." *Id.* § 2000e–5(g)(1) (emphasis added); *see Vega v. Chi. Park Dist.*, 12 F.4th 696, 707 (7th Cir. 2021) ("Title VII affords wide latitude to fashion an award that fits the circumstances peculiar to the case[.]") (internal quotation marks and citation omitted).

The next subsection, however, contains a substantial limitation: "No order of the court shall require ... the payment to [a plaintiff] of any back pay, if such individual was ... suspended, ... or discharged for *any reason other than discrimination* on account of race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e–5(g)(2) (emphasis added).

Recall that the jury found that the Sheriff had violated § 12112(d)(4)(A) by requiring Nawara to undergo a fitness-for-duty examination and disclose his medical records. But the jury did not find (because it was not asked to) that Nawara had a disability or a perceived disability. Accordingly, as the Sheriff sees it, the unlawful conduct, as determined by the jury, was for a "reason other than discrimination on account of" disability, and § 2000e–5(g)(2) precludes Nawara from recovering back pay.

Pushing back, Nawara offers two arguments. First, he points out that § 2000e–5(g)(2) does not mention "disability" at all; thus, Nawara posits, the provision applies only to cases involving Title VII claims and not ADA claims. Alternatively, Nawara contends, the ADA counts a violation of § 12112(d)(4)(A) as a form of "discrimination on account of disability" and, thus,

§ 2000e–5(g)(2)'s bar does not apply. We believe that Nawara is wrong on the first point but right on the second.

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). While the ADA addresses other "major spheres of public life" such as public services and public accommodations, *see Lacy v. Cook County*, 897 F.3d 847, 852 (7th Cir. 2018), "Title I of the ADA ... is devoted to eliminating employment discrimination," *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 834 (7th Cir. 2005).

To that end, § 12112(a) prohibits "discrimination ... on the basis of disability" as to the "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). And § 12117(a) incorporates § 2000e–5 in its entirety, including all the "powers, remedies, and procedures" attendant to it. *Id.* § 12117(a). Thus, § 12117(a) requires us to replace in § 2000e–5(g)(2)(A) the phrase "discrimination on account of race ... national origin" with "discrimination on account of disability" while leaving the remainder of the subsection intact. This is the most natural reading of § 12117(a).

Nawara's preferred construction, on the other hand, would lead to nonsensical results. He argues that the district court erred "when it rewrote the statute and added the term 'disability' to 42 U.S.C. § 2000e–5(g)(2)(A)." But if we were to maintain the language of § 2000e–5(g)(2) as is (as Nawara proposes), § 12117(a)'s incorporation of § 2000e–5 would mean that *no* ADA claimant would be able to recover back pay even if he or she were able to prove

discrimination due to disability. *But see Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 608 (6th Cir. 2018) (affirming the award of back pay where a jury found discrimination due to disability); *Stragapede v. City of Evanston*, 865 F.3d 861, 868 (7th Cir. 2017), *as amended* (Aug. 8, 2017) (same); *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 731 (5th Cir. 2007) (same). Moreover, Nawara's interpretation would place § 2000e–5(g)(2) at odds with subsection (g)(1), which expressly permits the court to award back pay in ADA cases. Therefore, we agree with the district court that, in the context of the ADA, § 2000e–5(g)(2) precludes back pay when an employer acts unlawfully for any reason other than "discrimination on account of disability."

But our analysis does not end there. This construction of § 2000e–5(g)(2) leads to the second question—does the Sheriff's violation of § 12112(d)(4)(A) count as discrimination on account of disability even absent evidence that Nawara had a disability or a perceived disability? Our examination of the statutory text leads us to answer yes.

We return to the general rule—§ 12112(a) prohibits "discrimination ... on the basis of disability" as to the "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In turn, § 12112(d)(1) explains that "[t]he prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries." 42 U.S.C. § 12112(d)(1). In the district court's view, these two provisions taken together merely add "medical examinations and inquiries" to the various

ways, enumerated in § 12112(a), that an employer might discriminate against a disabled individual. Under this reading, being subject to medical examinations and inquiries is a means of discriminating, not discrimination in and of itself. This interpretation, however, suffers from several flaws.

First, reading § 12112(d)(1) merely to add medical examinations and inquiries as additional examples of unlawful discrimination under § 12112(a) would render § 12112(d)(1) surplusage because a medical examination and inquiry will *always* be a job application procedure or a term or condition of employment. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 176 (2012) ("If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision ... and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.").

Furthermore, incorporating § 12112(d) wholesale into § 12112(a) is an odd fit, because the latter requires the ADA claimant to have a disability or perceived disability, *see* § 12102(1)(A)–(C), while the former permits an individual to file a claim even though he may not. *See Kurtzhals*, 969 F.3d at 730 (noting § 12112(d)(4)(A) "applies to all employees, with or without an actual or perceived disability"); *see also Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998) ("It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability.") (internal quotation marks and citation

omitted). Nor is it satisfactory to say that subsection (d)(1) operates entirely separately from subsection (d)(2), (3), or (4), because (d)(1) sets forth the "general" rule as the title indicates. *See Yates v. United States*, 574 U.S. 528, 540, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (stating that, although "headings are not commanding, they supply cues" as to Congress's intent).

The better construction of § 12112(d)(1) can be gleaned from its text. It refers to the "prohibition against discrimination referred to in subsection (a)." Employing the "nearest-reasonable-referent" canon of construction, Scalia & Garner, Reading Law, at 152, we take "referred to in subsection (a)" as modifying "discrimination." And the "discrimination" referenced in § 12112(a) is "discrimination *against a qualified individual on the basis of disability*." Thus, returning to the language in § 12112(d)(1), § 12112(a)'s prohibition on discriminating against a qualified individual on the basis of disability "shall include" § 12112(d)'s prohibition on requiring a medical examination or inquiry as described in § 12112(d)(4)(A). Put another way, to prove a violation of § 12112(d)(4) is to prove discrimination on the basis of disability under § 12112(a). *Accord Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566 (6th Cir. 2014) ("The ADA ban of 'discriminat[ion] ... on the basis of disability' thus encompasses medical examinations and disability inquiries involving employees.").

The Sheriff disagrees with such a construction, arguing that it goes against the commonly understood meaning of "discrimination." But the colloquial use

of a word does not necessarily bind its meaning in a particular statute. *See Bostock v. Clayton County*, 590 U.S. 644, 665–67, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) ("[C]onversational conventions do not control ... legal analysis."). After all, Congress can define "discrimination ... on the basis of disability" however it likes. And here, Congress effectuated the broad remedial purpose of the ADA by including medical examinations and inquiries into an employee's disability status within the definition of "discrimination ... on the basis of disability."

Nor is this unique to § 12112(d). For example, § 12112(b)(6) prohibits "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability." Similarly, § 12112(b)(3) forbids "utilizing standards, criteria, or methods of administration ... that have the effect of discrimination on the basis of disability; or ... that perpetuate the discrimination of others who are subject to common administrative control[.]" Moreover, § 12112(b)(4) proscribes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association[.]" And § 12112(b) expressly includes all of this conduct—whether or not the target individuals are disabled—within the phrase "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(b).[3]

3. This construction is also consistent with the Equal Employment Opportunity Commission's own definition of "discrimination" in its regulations governing the ADA. *See* 29 C.F.R. § 1630.4(a)(2) (defining the term "discrimination" to include requiring medical examinations and inquiries).

In sum, read together, § 12112(a) and § 12112(d)(1) define a violation of § 12112(d)(4)(A) to constitute discrimination on the basis of disability under § 12112(a). Consequently, § 12112(d)—drawing as it does on Title VII's remedial structure—authorized Nawara to recover back pay for the Sheriff's ADA violation.[4]

B. Restoration of Seniority

That leaves the Sheriff's cross-appeal. The Sheriff contends that we must vacate the award of restored seniority as moot because, starting in 2019, Nawara ceased to work as a correctional officer and became a police officer in a separate department within the Sheriff's Office.

"A case that becomes moot at any point during the proceedings is no longer a Case or Controversy for purposes of Article III, and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 584 U.S. 381, 385–86, 138 S. Ct. 1532, 200 L. Ed. 2d 792 (2018) (internal quotation marks omitted). "The party asserting mootness bears the burden of persuasion." *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 491 (7th Cir. 2004).

To the Sheriff's point, after Nawara transferred to the Cook County Sheriff's police department, he joined a different union and his seniority clock was reset for police assignments. The Sheriff, however, has made no

4. We take this opportunity to commend the United States for its amicus brief which provided a helpful discussion of the relevant statutory provisions.

attempt to show that Nawara's increased seniority would be useless to him as a police officer in the Sheriff's Office. This failure of proof alone is fatal to the Sheriff's position.

In any event, we note that the relevant collective bargaining agreements between the Sheriff's Office and the police officers' union (which are publicly available government documents) provide that, in the event of a tie in seniority in the police department, the employee's seniority in the Sheriff's Office will be used to break the tie.[5] Thus, it appears that the restoration of Nawara's seniority could benefit him even in his current employment. Accordingly, the Sheriff's invocation of mootness fails.

III

For these reasons, we AFFIRM the judgment to the extent that it restores Nawara's seniority but REVERSE the judgment as to Nawara's ability to request back pay. This case is remanded for further proceedings consistent with this opinion.

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5. *See* Collective Bargaining Agreement § 4.2, effective December 1, 2017 through November 30, 2020, https://opendocs.cookcountyil.gov/hu-man-resources/labor-agreements/2017-2020/2017-2020_FOP_County_Police_Officers.pdf; Collective Bargaining Agreement § 8.1, effective December 1, 2020 through November 30, 2025, https://opendocs.cookcountyil.gov/human-resources/labor-agreements/2020-2025/2020-2025_FOP_OPR_CBA.pdf.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED NOVEMBER 4, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 17 C 02393

JOHN NAWARA,

Plaintiff,

v.

COUNTY OF COOK, A UNIT OF LOCAL GOVERNMENT, THOMAS DART, IN HIS OFFICIAL CAPACITY AS SHERIFF OF COOK COUNTY, ILLINOIS, KAREN JONES-HAYES, MATTHEW BURKE, REBECCA REIERSON, AND WINIFRED SHELBY, IN THEIR INDIVIDUAL CAPACITIES,

Defendants.

Filed November 4, 2021

Judge Rebecca R. Pallmeyer

Appendix B

MEMORANDUM OPINION AND ORDER

John Nawara was temporarily removed from his position as a correctional officer at the Cook County Sheriff's Office ("CCSO"), pending a fitness-for-duty examination. Nawara believed that CCSO's testing demand violated his rights under the Americans with Disabilities Act ("ADA") and, while on leave, he filed this lawsuit. After several months of leave, however, Nawara underwent the examination, was found fit for duty, and immediately returned to work. His case proceeded to a jury trial, and on March 5, 2020, the jury entered a general verdict for Nawara, finding that CCSO had violated the ADA [304]. This court then denied CCSO's renewed motion for judgment as a matter of law [360], but withheld judgment on whether CCSO's violation of 42 U.S.C. § 12112(d)(4) constituted discrimination on the basis of disability and thus whether Nawara was entitled to back pay. The parties have since submitted supplemental briefing [366, 371] on the issue.

The court concludes that on the facts of this case, CCSO's violation of § 12112(d)(4) did not constitute disability discrimination. Thus, Nawara is not entitled to back pay. The court also denies Nawara's request for an injunction barring CCSO's continued use of the medical release forms in question.

BACKGROUND

The court presented the facts of this case in its March 29, 2021 ruling. *See Nawara v. Cnty. of Cook*, No. 17 C

2393, 2021 U.S. Dist. LEXIS 59509, 2021 WL 1172742 (N.D. Ill. Mar. 29, 2021). As relevant here, Nawara argued at trial that CCSO violated 42 U.S.C. § 12112(d)(4) by unlawfully forcing him to undergo a fitness-for-duty exam and making him sign medical disclosure forms. 2021 U.S. Dist. LEXIS 59509, [WL] at *7–8. Nawara does not claim to have an actual or perceived disability and did not seek punitive damages for his ADA claim. (*See* Second Am. Compl. [89] ¶¶ 108–117.) The jury entered a general verdict for Nawara, but awarded him no emotional distress damages [304]. This court rejected CCSO's renewed argument in its post-trial motion for judgment as a matter of law [312, 314] that no reasonable jury could have found that CCSO violated § 12112(d)(4). *See Nawara*, 2021 U.S. Dist. LEXIS 59509, 2021 WL 1172742, at *12.

In that decision, the court also addressed Nawara's motion for back pay and equitable relief [305]. CCSO had argued that an enforcement provision of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e-5(g)(2)(A), prohibits courts from awarding back pay in cases where a plaintiff experienced an adverse employment action "for any reason other than discrimination" on the basis of disability. (CCSO Backpay Resp. [347] at 2.) Because Nawara did not claim to have an actual or perceived disability, CCSO contended that the § 12112(d)(4) violation was not discrimination on the basis of disability and Nawara was not entitled to back pay. (*Id.*) The court concluded, however, that the parties' briefing on this issue was inadequate and declined to decide the issue of back pay. The court ordered the parties to provide supplemental briefing on "whether improper medical inquiries or examinations in violation of

§ 12112(d)(4) constitute discrimination under the ADA for purposes of a backpay award." *Nawara*, 2021 U.S. Dist. LEXIS 59509, 2021 WL 1172742, at *14. The court now addresses that supplemental briefing.

DISCUSSION

A. Back Pay

"A plaintiff who wins a favorable verdict on an ADA claim is presumptively entitled to backpay." *Stragapede v. City of Evanston, Ill.*, 865 F.3d 861, 868 (7th Cir. 2017), *as amended* (Aug. 8, 2017). The back pay statute contains an exception, however, barring that remedy where the employer carried out the employment action for "any reason other than discrimination on account of" disability.[1] 42 U.S.C. § 2000e-5(g)(2)(A). The jury in this case determined that CCSO had engaged in an unlawful employment action: violating the ADA—but not violating the ADA's general anti-discrimination provision, which prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability," *see* 42

1. Subsection 2000e-5(g)(2)(A) is an enforcement provision of the Civil Rights Act of 1964, and it only refers to discrimination on account of "race, color, religion, sex, or national origin." However, a provision of the ADA "mak[es] § 2000e-5(g) applicable to the ADA." *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 840 (7th Cir. 2013) (citing 42 U.S.C. § 12117(a)). The statute's legislative history and caselaw suggest it applies to disability discrimination as well. *Nawara*, 2021 U.S. Dist. LEXIS 59509, 2021 WL 1172742, at *14 n.9.

U.S.C. § 12112(a), and which was not before the jury.[2] (Jury Instructions [302] at 24.)

Rather, the jury found that CCSO had violated § 12112(d)(4), which prohibits employers from "requir[ing] a medical examination . . . [or] mak[ing] inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). An employer can "make inquiries into the ability of an employee to perform job-related functions," *see id.* § 12112(d)(4)(B), and other provisions in subsection (d) prohibit certain inquiries and examinations in the preemployment and employment entrance contexts. *Id.* §§ 12112(d)(2), (3). To establish a violation of § 12112(d)(4)(A), Nawara did not need to offer evidence that he had an actual or perceived disability or that anybody at CCSO subjected him to the fitness-for-duty process because of that disability. *See Kurtzhals v. Cnty. of Dunn*, 969 F.3d 725, 730 (7th Cir. 2020) ("[Subsection 12112(d)(4)(A)] applies to all employees, with or without an actual

2. Under § 12112(a), a plaintiff must establish that (1) "he is disabled; (2) he is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) the adverse job action was caused by his disability." *Richardson v. Chi. Transit Auth.*, 926 F.3d 881, 886 (7th Cir. 2019) (citation omitted). The ADA defines "disability" as: (1) "a physical or mental impairment that substantially limits one or more major life activities," (2) "a record of such an impairment," or (3) "being regarded as having such an impairment." *Id.* (quoting 42 U.S.C. § 12102(1)).

or perceived disability."). And Nawara offered no such evidence of a disability. Thus, this case now presents a single question: does a violation of § 12112(d)(4) constitute discrimination on the basis of a disability, even when the plaintiff has not alleged that he has an actual or perceived disability?

In addressing this question, Nawara begins with the language of the ADA as codified in Title 41. Subsection 12112(a), entitled "General rule," states:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Subsection 12112(d) is entitled "Medical examinations and inquiries," and its subsection (d)(1) (entitled "In general") states, "The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries." Nawara interprets this language to mean that all unlawful medical examinations and inquiries constitute "discrimin[ation] against a qualified individual on the basis of disability" as outlawed in subsection (a), regardless whether the plaintiff has an actual or perceived disability. Defendant, on the other hand, interprets it to mean that while medical examinations are included in the list of subsection (a) employment practices, they constitute unlawful discrimination only when done

in such a way as to "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). The court agrees with Defendant.

Subsection (a) lists a number of employment actions that will be unlawful if carried out in such a way as to "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). By "includ[ing] medical examinations and inquiries" in this "prohibition against discrimination as referred to in subsection (a)," subsection (d)(1) intends to include medical examinations and inquiries on this list—or, alternatively, to include them under the umbrella of "other terms, conditions, and privileges of employment." And because medical examinations and inquiries belong on the subsection (a) list, they are discriminatory only if they "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). So, while an employer may *unlawfully* require a medical examination or inquiry if those actions are not "job-related" or "consistent with business necessity" under § 12112(d)(4)(A), those unlawful actions are not inherently *discriminatory* under § 12112(d)(1).[3]

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3. The court notes that in an unpublished opinion, the Seventh Circuit similarly construed subsection (d) in reference to subsection (a), explaining: "[I]t seems clear that in order to assert that one has been discriminated against because of an improper medical inquiry, that person must also have been otherwise qualified [under the ADA]." *Hunter v. Habegger Corp.*, No. 97-2133, 1998 U.S. App. LEXIS 4167, 1998 WL 104635, at *13 (7th Cir. Mar. 5, 1998). The Seventh Circuit also determined that the defendant's wrongful inquiry into an applicant's workers' compensation history did not automatically entitle him to back pay and damages; rather, the

Subsection 12112(b) lends further support to this interpretation. Subsection (b), entitled "Construction," states that subsection (a)'s term "discriminate against a qualified individual on the basis of disability" includes certain practices, including practices that have a disparate impact on persons with disabilities or practices that fail to make reasonable accommodations. Nawara's interpretation of subsection (d)(1) suggests that, like the practices listed in subsection (b), unlawful medical examinations and inquiries are inherently a form of "discriminat[ion] against a qualified individual on the basis of disability." But the statute states that each employment practice listed in subsection (b) is unlawful when done "because of" or "on the basis of" the individual's disability, *see* §§ 12112(b)(1), (3)–(4), or when it has an adverse effect on an employee "with" or "who has" a disability. *See* §§ 12112(b)(2), (5)–(7). In other words, this subsection provides no support for the contention that an unlawful action against a person who has not alleged a disability constitutes disability discrimination under the ADA.

The limited case authority also supports this court's conclusion. The Seventh Circuit has not yet decided

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court concluded that in order to receive any non-injunctive relief, plaintiff needed to show he would have been hired, but for the wrongful inquiry. *Id.* And the *Hunter* plaintiff could not establish this, because while the court assumed he was disabled, the record did not support that he was otherwise qualified. 1998 U.S. App. LEXIS 4167, [WL] at *14. The court notes, however, that to the extent *Hunter* holds that plaintiffs must be qualified individuals with a disability to bring § 12112(d) claims, it does not appear to survive more recent caselaw. *See Kurtzhals*, 969 F.3d at 730.

whether a violation of § 12112(d)—without plaintiff alleging a disability—constitutes discrimination. As already noted, like other circuits, our Court of Appeals has held that a plaintiff may sue for violations of § 12112(d) without claiming or proving a disability.[4] *See Wright v. Ill. Dep't of Child. & Fam. Servs.*, 798 F.3d 513, 522 & n.24 (7th Cir. 2015); *O'Neal v. City of New Albany*, 293 F.3d 998, 1007 (7th Cir. 2002). But none of these courts have held that such violations constitute discrimination on the basis of disability, even where the plaintiff has not shown an actual or perceived disability. And some cases suggest the opposite. In *Harrison v. Benchmark Elecs. Huntsville, Inc.*, a job applicant without a qualifying disability sued the defendant under § 12112(d)(2) for asking follow-up questions in response to a positive drug test. 593 F.3d 1206, 1209–11 (11th Cir. 2010). Interpreting subsection (d)(1), the Eleventh Circuit explained that it "incorporates § 12112(a)'s general rule that to maintain an *action for discrimination itself*, a plaintiff must be disabled under the ADA," but it does not bar non-disabled plaintiffs from bringing claims under § 12112(d)(2). *Id.* at 1213 (emphasis added). Similarly, in *Frendenburg v. Contra Costa Cnty.*

4. The Seventh Circuit has also held that an involuntary medical examination—allegedly a violation of § 12112(d)(4)—did not warrant punitive damages (which require a malicious or reckless "discriminatory practice"), because, given the novelty of plaintiff's legal theory, defendant did not have the requisite state of mind. *See EEOC v. Flambeau, Inc.*, 846 F.3d 941, 947–48 (7th Cir. 2017). That case concerned whether plaintiff had a personal stake in the litigation, and was decided on mootness grounds. *See id.* at 946. The court did not discuss or determine whether violating § 12112(d)(4) constitutes disability discrimination.

Dep't of Health Servs., the Ninth Circuit held that the plaintiff could sue her employer under § 12112(d)(4)(A) for forcing her to undergo fitness-for-duty examinations. 172 F.3d 1176, 1180–82 (9th Cir. 1999). The Ninth Circuit rejected the district court's conclusion that subsection (d)(1)'s reference to subsection (a) meant that plaintiff had to establish she was a "qualified individual with a disability" to bring suit, explaining that subsection (d)(1) does not apply to subsection (d)(2), (3), or (4); rather, subsection (d)(1) "directs courts to treat medical examinations as *possible evidence* of discriminatory conduct. Within this context, *only qualified individuals with a disability* have a cause of action." *Id.* at 1181–82 (emphasis added).

Despite several opportunities, Nawara has not identified (nor has the court found) a single case in which a court awarded back pay to a plaintiff in response to a § 12112(d) violation, where the plaintiff did not assert that the defendant discriminated against her on the basis of an actual or perceived disability. To the court's knowledge, *Green v. Joy Cone Co.* is the only case that deals with this question, and *Green* supports this court's decision. 278 F. Supp. 2d 526 (W.D. Pa. 2003). There, a job applicant brought a § 12112(d)(2) claim and sought back pay after her prospective employer required her to provide access to her medical records. *Id.* at 529-30. The plaintiff did not bring a claim for discrimination on behalf of a disability, nor did the court identify her as having a disability. *Id.* at 538. The Western District of Pennsylvania found that the plaintiff was not entitled to pecuniary relief, including back pay. *Id.* at 544–45. The court explained that § 2000e-5(g)(2)(A) prohibits courts from granting back pay to individuals

who are "refused employment . . . for any reason other than discrimination" and found that "[s]ince Ms. Green [by raising only a § 12112(d)(2) claim] is not claiming to have been discriminated against on account of disability, the issuance of back pay is inappropriate under the law."[5] *Id.* at 544.

Other courts have similarly declined to award damages for violations of § 12112(d) to plaintiffs who provide no evidence of discrimination on the basis of disability. *See Armstrong v. Turner Indus.*, 141 F.3d 554, 560 (5th Cir. 1998) ("The magistrate judge determined that there was no evidence indicating the employment action in question was tainted by disability discrimination, and consequently it does not constitute a compensable injury."); *see also Griffin v. Steeltek, Inc.*, 261 F.3d 1026, 1028–29 (10th Cir. 2001) ("Compensatory damages are available under the ADA, however, only if the plaintiff establishes that the employer not only technically violated § 12112(d)(2)(A) by asking a prohibited question, but also that by doing so it actually engaged in unlawful intentional discrimination." (internal quotations omitted)).

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5. Nawara argues that the court cannot rely on *Green* in this decision because the court previously considered *Green* in its March 28, 2019 Motion to Dismiss opinion [187] and found the case "unpersuasive," as it dealt with subsection (d)(2) instead of subsection (d)(4). *Nawara v. Cnty. of Cook*, No. 17 C 2393, 2019 U.S. Dist. LEXIS 52632, 2019 WL 1399972, at *6 (N.D. Ill. Mar. 28, 2019). There, however, the issue was whether the medical release forms constituted an "inquiry" and thus fell within the scope of subsection (d)(4). The distinction between subsections (d)(2) and (d)(4) is immaterial to the issue of back pay, as Nawara's argument assumes that subsection (d)(1) applies to all medical inquiries under § 12112(d).

The caselaw Nawara does cite in support of his argument is not persuasive. First, he points to the two cases that this court identified in its March 29, 2021 decision: *Taylor v. City of Shreveport*, 798 F.3d 276 (5th Cir. 2015), and *Transp. Workers Union of Am., Loc. 100, AFL-CIO v. NYC Transit Auth.*, 342 F. Supp. 2d 160 (S.D.N.Y. 2004). In *Taylor*, police officers filed a putative class action against the city alleging, among other things, that the department's sick leave policy violated § 12112(d)(4)(A). In discussing this claim, the Fifth Circuit stated, "[A] prohibited medical examination or inquiry may constitute a form of employment discrimination under the ADA." *Taylor*, 798 F.3d at 282. Similarly, in *Transport Workers*, labor unions representing municipal mass-transit workers sued New York City and alleged, among other things, that the transit authority's sick leave policy violated § 12112(d)(4)(A). *Transp. Workers*, 342 F. Supp. 2d at 162. There, the Southern District of New York explained, "Peculiar to [ADA] Article I's definition of discrimination is that it include[s] medical examinations and inquiries." *Id.* at 164 (citing 42 U.S.C. §§ 12112(a), (d)(4)(A).)

That "a prohibited medical examination or inquiry *may* constitute a form of employment discrimination under the ADA," *Taylor*, 798 F.3d at 282 (emphasis added), does not mean that it *is* employment discrimination. An employer-imposed medical examination—like an employer's act of hiring, advancing, discharging, or taking any other action listed in § 12112(a)—constitutes employment discrimination only where the adverse action was taken on the basis of the employee's disability.

Thus, the court's holding today in no way prevents future litigants from securing an award of back pay following an employer's violation of § 12112(d). But such a successful plaintiff must show—as Nawara cannot—that they were discriminated against on the basis of their disability.

Neither is the court persuaded by the ruling of the District of New Mexico in *Gonzales v. Sandoval Cnty.*, 2 F. Supp. 2d 1442 (D.N.M. 1998). There, the court awarded back pay to a plaintiff who had succeeded on his claim under § 12112(d)(4)(A). *Id.* at 1446. In a portion of the decision that did not concern back pay, the court stated that "the prohibited [medical] inquiry [was] itself a form of discrimination under the ADA." *Id.* (citing 42 U.S.C. § 12112(d)(1)). Notably, this conclusory statement was not necessary for the court to award the plaintiff back pay; the jury in that case had specifically found that the defendant discriminated against the plaintiff on the basis of the plaintiff's disability. *Id.* at 1444. Therefore, the precise issue in this case—whether to award a non-disabled plaintiff back pay following a successful claim under § 12112(d)(4)(A)—was not before the court. Regardless, to the extent the court in *Gonzales* would have made that statement even had the jury not found disability discrimination (independent of the unlawful medical inquiry), this court respectfully disagrees.[6]

6. Other cases that Nawara cites are of little relevance. *See U.S. EEOC v. Gulf Logistics Operating, Inc.*, 299 F. Supp. 3d 832, 835 (E.D. La. 2018) (refusing to grant a motion to dismiss a § 12112(d)(4)(A) claim only because "Defendant fail[ed] to request dismissal of the two claims actually pleaded in the complaint"); *see also Buchanan v. City of San Antonio*, 85 F.3d 196, 198–200 (5th

Finally, Nawara argues that without the threat of back pay as a remedy, § 12112(d) is rendered "toothless." (Pl.'s Suppl. Brief [366] at 7.) The court disagrees. A successful § 12112(d) claim brought by an employee who is a qualified individual with a disability—the class of persons ordinarily protected by the ADA—would merit the court's consideration of an award of back pay. Even in the unusual case such as this one, where a non-disabled, non-discriminated against employee alleges a violation of § 12112(d), the employee may still seek monetary remedies such as punitive and emotional distress damages, so long as the facts support them.

The court concludes, from the language and structure of § 12112 and relevant caselaw, that an unlawful medical examination as occurred here does not constitute discrimination on the basis of disability where the plaintiff has neither claimed nor proven any perceived or actual disability. As Nawara has not provided any other reason that CCSO's violation of § 12112(d)(4) should constitute discrimination on the basis of disability, the court concludes he is not entitled to back pay. The court likewise denies Plaintiff's request that CCSO should restore the vacation days, holidays, and sick days that he used and the seniority that he would have accrued during the period in question.[7]

Cir. 1996) (reversing, for reasons unrelated to the district court's decision to award back pay, a district court's mid-trial decision to grant a plaintiff's motion for judgment as a matter of law as to a § 12112(d)(2) claim).

7. Defendant makes additional arguments that do not change the outcome of this case. Defendant cites *Armstrong*, where the

B. Enjoining CCSO from future use of forms

Finally, in his motion for back pay and equitable relief, Nawara also asked the court to enjoin CCSO from continuing to engage in this type of behavior in the future. In deciding whether to grant an injunction the court "must consider whether the employer's [unlawful] conduct could possibly persist in the future." *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 840 (7th Cir. 2013). Nawara's request alleges other instances in which CCSO's Human Resources department unlawfully refers employees for fitness-for-duty exams, but he has provided little evidence that this problem persists. And to the extent that Nawara's request refers to the medical release forms in question, the record shows that neither form is still in use. (Trial Tr. [321–332] at 294:2-302:13, 1536:3-10.) The request for injunctive relief is thus denied.

Fifth Circuit mentioned in a footnote that a § 12112(d)(2) violation must be not only the but-for cause of a plaintiff's injury, but also the "legal or proximate cause." 141 F.3d at 560 n.16. But the Fifth Circuit was concerned about an attenuated causal chain: in that case, the unlawful medical inquiry prevented plaintiff from gaining employment because it ultimately led to questioning that revealed that he had lied on his written application. *Id.* at 560 n.16, 556–57. The link between Nawara's lost wages and the fitness-for-duty exam is not so attenuated. Defendant additionally revisits arguments that this court rejected in its earlier opinion, including an argument surrounding *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618 (7th Cir. 2018), and an argument that Nawara's injury is not cognizable because it arose from a mere order to undergo an unlawful fitness-for-duty exam, rather than from the exam itself. The court need not address these arguments again.

Appendix B

CONCLUSION

For the foregoing reasons, the court rejects in full Plaintiff's motion for back pay and other equitable relief [305].

ENTER:

Dated: November 4, 2021 /s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MAY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

Nos. 22-1393, 22-1430, 22-2395, & 22-2451

JOHN NAWARA,

Plaintiff-Appellant
Cross-Appellee,

v.

COOK COUNTY AND THOMAS J. DART,

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.

Appendix C

No. 1:17-cv-02393

Rebecca R. Pallmeyer,
Judge.

Filed May 15, 2025

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc, no judge in regular active service has requested a vote on the petition for rehearing en banc and the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for rehearing and petition for rehearing en banc is **DENIED**.

APPENDIX D — EXCERPTS OF STATUTES 42 USCS § 12102, PART 1 OF 3 AND 42 USCS § 12112, PART 1 OF 4

42 USC § 12102, PART 1 OF 3

§ 12102. Definition of disability

As used in this Act:

(1) Disability. The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

* * *

Appendix D

42 USC § 12112, PART 1 OF 4

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—

* * *

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

* * *

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

Appendix D

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

* * *

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

* * * *