No. 25-303

# In the Supreme Court of the United States

COOK COUNTY, ILLINOIS, ET AL.,

*Petitioners,*

v.

JOHN NAWARA,

*Respondent.*

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

## REPLY BRIEF FOR PETITIONERS


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## INTRODUCTION

Nothing in Nawara's brief should deter the Court from granting certiorari: neither Nawara's misstatement of the question presented by Petitioners, nor Nawara's notion that there is no conflict among the circuits, nor Nawara's wave-of-the-hand position that this case is a poor vehicle for Supreme Court review.

The question presented is whether the Americans with Disabilities Act ("ADA") defines all employer medical inquiries that violate 42 U.S.C. § 12112(d)(4) to be acts of discrimination "on the basis of disability" under § 12112(a), even if the employee has no actual or perceived disability. The question is not, as Nawara urges, whether nondisabled employees "can state a claim" or have "a private right of action" against employers for medical inquires that violate 42 U.S.C. § 12112(d)(4). Resp. 9, 11.

Nawara offers two principal arguments, neither of which overcome the substantial reasons for granting certiorari. *First,* Nawara is plainly wrong that the circuit courts are "unanimous" in his favor and there is no conflict among the circuit courts. Resp. 9-16, 17 n.3. As shown below, there are actual circuit splits that warrant this Court's review, in order to obtain uniformity of federal law and resolve the conflict.

*Second*, Nawara tries to parlay his mistaken notion that there are no conflicts among circuits into an argument that petitioner's policy and vehicle arguments are "misplaced." *Id*. 17-20. To reach such a conclusion, Nawara had to ignore the reality of what the decision below means for millions of workers in the public and private sectors, and hundreds of thousands

of businesses as well as local and state governments throughout Illinois, Indiana and Wisconsin. Pet. at 8-11. Moreover, Nawara's response does not dispute that this petition is of national importance, affecting a broad national array of businesses, agencies, and workers.

If allowed to stand, this decision would have an unfortunate and potentially dangerous impact. It would deter and chill employers in both the public and private sectors from asking employees to take, for example, fitness exams or anger management programs, or other tests necessary to work in a given job. Those programs are especially important for correctional employers like the Petitioners here, who have a constitutional duty to mitigate risks to jailed detainees and should not be subject to "discrimination" damages for doing so.

It cannot be right to interpret the ADA in a manner that puts so many businesses and workers at risk. This case presents a clean vehicle for resolving circuit conflicts and issuing a ruling that will guide employers, local governments and agencies, and employees across the country. There is a complete and final record; the facts are undisputed; the circuit court expressly decided the question presented; and the decision below is a pure matter of statutory construction. Certiorari is thus strongly warranted.

## I. There Is a Clear Conflict Among the Circuit Courts.

Nawara's argument that there is no conflict among the Circuit Courts below is unfounded. To reach his conclusion, Nawara first mischaracterizes the question presented. That question is not, as Nawara claims, limited to a narrow debate over whether

nondisabled employees "can state a claim" or have "a private right of action" against employers for medical inquires that violate 42 U.S.C. § 12112(d)(4).

At issue here is whether discrimination damages can legally be granted when Nawara never contended or established that he had an actual or perceived disability and the jury was never asked to find that his employer engaged in discrimination. As even Nawara concedes, a finding of discrimination is necessary here for an employee to recover back pay damages. Resp. 1. *See also* 42 U.S.C. § 12117 and 42 U.S.C. § 2000e-5(g)(2)(A). But the jury below made no finding of discrimination. Rather, the Seventh Circuit made that finding for the first time in its appellate decision.

Accordingly, the question presented is whether the ADA defines employees with no actual or perceived disability to be victims of discrimination on the "basis of disability." *See* 42 U.S.C. §§ 12112(a), (b)(6) & (d)(1).

There can be no dispute that the circuits are conflicted on this question. The Seventh Circuit below concluded that all violations of § 12112(d), without exception and regardless of an employee's actual or perceived disability, constitute discrimination on the basis of disability. The Sixth Circuit did the same in *Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566 (6th Cir. 2014) – a decision that relied heavily on regulations promulgated by the EEOC rather than engaging with the language of the ADA itself. In both the case below and *Bates*, the United States and EEOC intervened on appeal to urge this broad-brush position.

The Sixth Circuit and Seventh Circuit are outliers. Four other Circuit Courts have taken conflicting positions, and four more have taken unclear

approaches. Pet. 11-19. The result is a confusing patchwork of conflicts that only this Court can resolve.

**The Fifth Circuit**. The district court below (App'x 26a-27a) relied on *Armstrong v. Turner Indus. Inc.*, 141 F.3d 554 (5th Cir. 1998). *Armstrong* found a nondisabled job applicant who objected to a medical inquiry could not recover money damages under the ADA, even though he was denied a job – and in doing so recognized that the ADA does not deem a violation of § 12112(d), "in and of itself," to be the same thing as "disability discrimination." 141 F.3d at 560-61. This language directly conflicts with the Seventh Circuit's finding and was not limited to the narrow question of injury in fact, as Nawara claims. Resp. 13.

**The Tenth Circuit**. The district court below (App'x 26a) also relied on *Griffin v. Steeltek, Inc.*, 261 F.3d 1026 (10th Cir. 2001) ("*Griffin II*"). *Griffin II* held that a nondisabled job applicant who experienced a § 12112(d)(2) violation, but did not get a jury finding of discrimination, should get no more than nominal damages. The Tenth Circuit recognized that "compensatory damages are available under the ADA . . . 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.'" 261 F.3d at 1028-29. The Tenth Circuit drew a distinction between nominal damages for technical violations of the ADA where employees have no actual or perceived disability, and compensatory money for employees who experience true discrimination based on an actual or perceived disability.

*Griffin II* is in clear conflict with the decision below. Nawara attempts to wave away the conflict by

claiming that "only damages were at issue" in *Griffin II* and that Petitioners are not raising any questions about damages. Resp. 14.[1] This argument makes no sense. Damages are squarely at issue here. Both Nawara and the United States below asked the Seventh Circuit to expand the scope of damages available to him under the ADA, and the court obliged. It is meritless, and amounts to grasping at straws, for Nawara to claim that damages are not at issue.

**The Third Circuit.** In *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 514-16 (3d Cir. 2001), after engaging in a well-reasoned discussion of § 12112 of the ADA (and noting that it is "not a model of legislative clarity"), the court recognized that an employee who is not "regarded as" disabled should not recover for discrimination. Indeed, underscoring the conflict, the district court relied below (App'x 25a-26a) on *Green v. Joy Cone Co.*, 278 F. Supp. 2d 526 (W.D. Pa. 2003) – a case applying Third Circuit law to deny ADA back pay damages to a job applicant with no disability.

Nawara's cursory discussion of Third Circuit law sidesteps the conflict. He argues that *Tice* still leaves the door open for nondisabled plaintiffs in that circuit to "sue" for § 12112(d)(4) violations (Resp. 15) – but, again, that is not the question here. The question presented is whether a plaintiff with no ADA-defined disability can recover money remedies, including back pay, which require a finding of disability discrimination. Third Circuit law is in conflict with the decision below and the Sixth Circuit on this point.

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[1] Nawara cannot downplay this case by instead citing *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998) ("*Griffin I*"). (Resp. 8, 14). *Griffin I* was clearly superseded and limited by *Griffin II*, which denied the plaintiff damages for discrimination.

**The Second Circuit.** In *Kosiba v. Cath. Health Sys. of Long Island, Inc.*, No. 23-6, 2024 WL 3024652 (2d Cir. Jun. 17, 2024) the Second Circuit rejected the claim that a request at work to disclose plaintiff's vaccination status was a "forbidden, disability-related inquiry" under the ADA, because plaintiff was "neither disabled nor regarded as having a disability." *Id.* at *3 n.1. This language clearly conflicts with the Seventh Circuit below. Nawara's response asks this Court to disregard *Kosiba* because its conflicting language is in a footnote. Resp. 15-16. The fact that conflicting language only appears in a footnote does not make the language any less conflicting.

In addition, Nawara is wrong to assert (Resp. 15) that *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88 (2d Cir. 2003) trumps *Kosiba*. Unlike the *Kosiba* plaintiff, the *Conroy* plaintiff was a correctional officer with an actual or perceived disability – severe pulmonary disease. 333 F.3d at 92. Nawara quotes dicta in *Conroy* discussing the potential right of a nondisabled employee to sue under § 12112(d)(4) and challenge an employer's medical inquiries. 333 F.3d at 94. But the Second Circuit has never ruled that this type of claim is a viable basis for a claim for discrimination on the basis of disability. Only the Sixth and Seventh Circuits have gone that far, and those two circuits are in a minority.

**The Fourth, Eighth, Ninth and Eleventh Circuits.** As set forth in the Petition, the Fourth, Eighth, Ninth and Eleventh Circuits have taken an unclear and muddled approach to ADA provisions concerning employer medical inquiries. Pet. 17-19 (discussing *Coffey v. Norfolk S. Ry. Co.,* 23 F.4th 332 (4th Cir. 2022); *Cosette v. Minn. Power & Light*, 188 F.3d 964 (8th Cir. 1999); *Fredenburg v. Contra Costa Cnty.*

*Dep't of Health Servs.*, 172 F.3d 1176 (9th Cir. 1999); *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206 (11th Cir. 2010) and *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306 (11th Cir. 2013).

The only new case that Nawara cites from any of these four circuits, *Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009) (Resp. 11), is completely beside the point. The *Indergard* plaintiff claimed to have suffered discrimination due to a disabling knee injury at work. 582 F.3d at at 1051. *Indergard* never reached – nor was it asked to reach – the question of whether a nondisabled plaintiff could recover back pay or other monies for discrimination.

Nawara nonetheless argues that all four of these circuits are unanimous in his favor. Resp. 10-12. His argument only highlights the irreconcilable conflict between other circuits and the Fifth, Tenth, Third and Second Circuits – and it is wrong. Once again, Nawara relies on his revision of the question presented – whether nondisabled employees have a "private right of action" against their employers – rather than the actual question presented. Resp. 11-12. The question here is whether a nondisabled employee can recover damages that require a finding of discrimination on the basis of disability. The Fourth, Eighth, Ninth and Eleventh Circuits have not clearly answered that question, leaving those circuits in a state of confusion.

In short, as summarized above and shown in the Petition, the case law in multiple circuit courts is hopelessly conflicted and unclear. Unless this Court acts, employers across the country will remain uncertain about the ADA's scope, facing different rules under the same statutory language. This state of affairs leaves employers exposed to discrimination liability to nondisabled employees in some states but not others

and cannot be permitted to continue. This Court should resolve the conflict by granting certiorari.

## II. This Case is an Ideal Vehicle For Correcting Lower Courts' Misreading of the ADA.

Nawara fails to make a meaningful argument that Petitioner's policy and vehicle arguments are "misplaced."

*First,* it is hard to fathom Nawara's position that there is a "lack of disagreement among the courts of appeals" (Resp. 16) when it is so evident that in six circuits, there are conflicting decisions and reasoning, and in four other circuits, confusing decisions.

*Second*, Nawara's attempt to downplay the Sixth and Seventh Circuit's reliance on the EEOC only highlights that both *Bates* in the Sixth Circuit and the decision below did not limit their analysis to the text of the ADA. Instead, both circuits to varying degrees parroted the EEOC's position that employees with no actual or perceived disability may pursue discrimination claims. Resp. 16-17. *Bates* was especially egregious, devoting nine pages to applying wholesale an EEOC handbook, with a cursory parenthetical about *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) buried in the middle of its analysis. 767 F.3d at 574-81. Nawara writes: "*Bates* did *not* apply *Skidmore* deference." Resp. 17. On this Petitioners agree. *Bates* did not apply *Skidmore* deference. It applied *Chevron* deference – an outmoded interpretation method now forbidden by *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

*Third*, Nawara's claims about Congress's supposed "policy decision" to deem discriminatory all "unnecessary inquiries into medical status," even for

employees with no actual or perceived disability, cites *nothing* in the text, structure or legislative history of the ADA supporting his position. Resp. 18. In fact, the only hypothetical policy example Nawara gives, "forcing people to reveal their HIV status" (*id.*), describes an obvious *actual* disability. Congress has shown no clear policy intent to deem employees without disabilities to be victims of disability-based discrimination. And Nawara concedes that, as a matter of policy, law enforcement agencies should have greater leeway than public sector employers to conduct employee fitness exams. Resp. 18-20.

Nawara tries to sidestep this concession and use the jury verdict to conjure a vehicle problem. *Id.* But this case centers on a pure question of law and statutory construction, initially decided by the district court, and then decided again by the Seventh Circuit. The jury below found an ADA § 12112(d)(4) violation. The jury also awarded Nawara no emotional distress damages for the violation. The jury was not asked to make any other finding. The verdict form reserved the question about whether Nawara is entitled to back pay damages for the district court to decide – which is the pure question of law at issue in this Petition.

*Fourth*, Nawara's citations throughout his brief to 42 U.S.C. § 2000e-5 only underscore that the jury verdict creates no vehicle problem here. On its face, the statute says as follows: where "the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint" or has engaged in "discrimination," the court can grant "back pay" to an employee who was "discriminated against." 42 U.S.C. §§ 2000e-5(g)(1) and (g)(4). The jury was *not* asked to find if Nawara should get back pay because he was discriminated

against. That was a dispositive question of law below, and this is an ideal vehicle to resolve it.

Finally, Nawara fails to dispute that this case boils down to textual analysis of what Congress meant when it said to "include medical examinations and inquiries" in "the prohibition against discrimination in subsection (a)." 42 U.S.C. §§ 12112(a) & (d)(1). The district court correctly held that Congress meant simply to include "medical examinations and inquiries" in subsection (a)'s discussion of "other terms, conditions and privileges of employment." App'x 22a.

Congress did *not* say that all medical examinations and inquiries are inherently discriminatory, even if the employee has no actual or perceived disability. Yet the Seventh Circuit erred by reading that language into the ADA. It not only misread the ADA, but also misapplied rules of statutory construction and gave undue deference to the EEOC in the process. Pet. 24-32.

This case is a perfect vehicle to correct the litany of errors below. Review by this Court can align ADA discrimination law with Congress's intent to protect Americans with disabilities but not extend the law to those without an actual or perceived disability, which is what happened below. Review by this Court can also provide a ruling that applies consistently in all courts where ADA cases are filed and decided, thus creating a unified understanding of the reach of the ADA for all businesses and government agencies governed by the ADA.

## CONCLUSION

For the reasons above and the previously filed Petition, a writ of certiorari should be granted.

Respectfully submitted,

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