No. 07-1598

In The
Supreme Court of the United States

DELIA RUIZ-RIVERA,

Petitioner,

v.

PFIZER PHARMACEUTICALS LLC.,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

A. This Court Should Review the First Circuit's *Per Se* Rule Barring "Regarded As" Claims Where the Employer's Perception of Disability is Based on a Treating Physician's Report

The summary judgment record, taken in the light most favorable to Ms. Ruiz, shows that Pfizer's company doctor regarded her impairment as at least disqualifying her from any job in her plant, and that Pfizer's Assistant Personnel Manager regarded that impairment as disqualifying her from any job in the entire pharmaceutical industry. Pet. App. 30-31. Under this Court's jurisprudence, that evidence is sufficient to create a triable issue that the company "regarded" Ms. Ruiz as substantially limited in the major life activity of working. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491-493 (1999). But the court of appeals held, as a matter of law, that the perceptions of Pfizer's company doctor and Assistant Personnel Manager could not establish a perceived disability under the Americans with Disabilities Act (ADA), because those perceptions were based on the restrictions Ms. Ruiz's own physician imposed. Pet. App. 20-21. As we showed in our petition – and the company makes no real effort to dispute – that holding is flatly inconsistent with the statutory text. See Pet. 13-18. That text reaches any case in which an individual is "regarded" by her employer "as having [a substantially limiting] impairment." 42 U.S.C.

§ 12102(2)(C). Nothing in the text excludes cases in which the employer's perception is based on the reports of its employee's treating physician. By reading an unexpressed exception into the "regarded as" provision's unqualified text – and requiring plaintiffs to come forward with a particular type of evidence that the statute does not, on its face, require – the court of appeals contravened this Court's precedents. See *Desert Palace v. Costa*, 539 U.S. 90, 98-99 (2003); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 211-212 (1998).

More important for present purposes, the court of appeals' decision exacerbated a conflict in the circuits. As we showed in our petition (at 11-13) the First Circuit's holding follows cases from the Sixth, Eighth, and Tenth Circuits. But its ruling conflicts with the decisions of two circuits that have upheld "regarded as" claims where the employer's perception of the plaintiff's disability rested on reports of the plaintiff's own physician: the Third Circuit's decision in *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180 (3d Cir. 1999) – which specifically rejected the rule the First Circuit adopted here, see *id.* at 190-191 – and the Ninth Circuit's decision in *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996), cert. denied, 520 U.S. 1162 (1997). Although Pfizer attempts to deny the conflict, the company's arguments are unavailing.

As to Judge Becker's decision for the Third Circuit in *Taylor*, the company attempts to distinguish the case on its facts. The company contends that *Taylor* "was premised on the fact that the

defendant in that case perceived the plaintiff as disabled 'based on a *mistaken interpretation* of his medical records.'" Br. in Opp. 6 (quoting *Taylor*, 177 F.3d at 188) (emphasis in Br. in Opp.). But that does not distinguish the cases. Pathmark, the employer in *Taylor*, made the same sort of mistake Pfizer made here. Pathmark erroneously concluded based on Taylor's physician's report "that [Taylor] was unable to perform *any* Pathmark job." *Taylor*, 177 F.3d 188. Similarly, Pfizer's company doctor interpreted Ms. Ruiz's physician's restrictions as disqualifying Ms. Ruiz from all jobs in the plant, and the company's Assistant Personnel Manager interpreted those restrictions as disqualifying her from all jobs in the industry. The *entire basis* of Ms. Ruiz's claim of discrimination is that those interpretations were mistaken – that she was in fact "a *qualified* individual with a disability who was *able to perform* the essential functions of her position." Amd. Cplt. ¶ 49 (emphasis added). Because the lower courts granted summary judgment to Pfizer on the ground that Ms. Ruiz did not have a disability, she never had the opportunity to prove that the company's perception was mistaken.[1]

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[1] Pfizer suggests (at 8) that *Taylor* is irrelevant because it was decided before this Court's decision in *Sutton*, *supra*. As we showed in the petition (at 16-17), *Sutton* said absolutely *nothing* about the evidence on which a plaintiff can rely to establish that her employer "regarded" her as having a disability. In any event, the Third Circuit has continued to rely on *Taylor*'s "regarded as" holding since *Sutton*. See *Williams v. Philadelphia Housing*

(Continued on following page)

Pfizer does not deny a conflict with the Ninth Circuit's decision in *Holihan*. Instead, the company argues that subsequent Ninth Circuit decisions are in accord with the First Circuit's decision here.[2] See Br. in Opp. 8-9 (citing *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997), and *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789 (9th Cir. 2001)). But those decisions do *not* support the First Circuit's holding barring *as a matter of law* those "regarded as" claims that are based on an employer's recognition of restrictions imposed by the plaintiff's treating physician. Rather, they stand only for the proposition that an employer's recognition of those restrictions will not *always* establish that the employer regarded the employee as having a *substantially limiting* impairment. In *Thornton*, 261 F.3d at 798, the court found "no specific evidence that McClatchy viewed [the plaintiff] as substantially limited" and held that the mere fact that McClatchy took steps to accommodate the plaintiff did not establish that it regarded her as having an ADA-covered

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Auth. Police Dept., 380 F.3d 751, 769-770 (3d Cir. 2004), cert. denied, 544 U.S. 961 (2005).

[2] The company also suggests (at 8) that *Holihan*'s interpretation of "substantially limits" is inconsistent with *Sutton*'s interpretation of that term. Whether or not that is true, nothing in *Sutton* undermines *Holihan*'s reliance on employer perceptions that are based on the reports of the plaintiff's treating professionals. See Pet. 16-17. In any event, the Ninth Circuit has continued to rely on *Holihan*'s "regarded as" holding since *Sutton*. See *Deppe v. United Airlines*, 217 F.3d 1262, 1266 & n.14 (9th Cir. 2000).

disability. In *Thompson*, 121 F.3d 541, the court found that "[t]he evidence does not establish that the hospital viewed Thompson as precluded from performing a broad class of jobs." The court noted that the defendant hospital made the plaintiff "aware of another job opportunity at the hospital," and that the defendant thought she could perform "several possible jobs in the nursing industry." *Id.* Here, unlike in *Thornton* and *Thompson*, the statements of Pfizer's company doctor and Assistant Personnel Manager constitute specific evidence that the company viewed Ms. Ruiz as substantially limited – and, indeed, unable to work in the plant or the industry.

As a last resort, Pfizer asserts that the court of appeals did not refuse to consider evidence of the company's recognition of the restrictions imposed by Ms. Ruiz's treating physician. The court's decision, the company suggests, rests on a fact-based assessment that Ms. Ruiz simply did not present sufficient evidence. Br. in Opp. 9-10. But that suggestion flies in the face of the First Circuit's decision. In opposing summary judgment, Ms. Ruiz relied on two pieces of evidence to show that the company perceived her as substantially limited in the major life activity of working: the company doctor's statement that she could not work anywhere in the plant, and the Assistant Personnel Manager's statement "that, because of the conditions imposed by her physicians, there was no opportunity for her to work at Pfizer or at any other pharmaceutical company." Pet. App. 6, 30. As a purely factual matter, these statements certainly

tend to show that Pfizer perceived Ms. Ruiz as substantially limited in working under the test set forth in *Sutton*, 527 U.S. at 491-493.[3] But the court of appeals specifically refused to assess the *factual* inferences that might be drawn from those statements. Instead it held that, as a matter of law, they could not be used to support a "regarded as" claim. See Pet. App. 20 ("Ruiz Rivera may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim."); *id.* at 21 ("Any reliance on Dr. Felix's statements or opinion, based entirely on Ruiz Rivera's own doctor's recommendations, cannot support a regarded as claim."). That holding exacerbates a conflict in the circuits and is entirely unwarranted by the ADA's text. This Court's intervention is necessary to resolve the conflict and vindicate the supremacy of the statutory language Congress adopted.

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[3] Contrary to the company's suggestion (at 12), Ms. Ruiz is not attempting to "use Pfizer's lawful refusal to provide her with an accommodation as the basis for her regarded as claim." Ms. Ruiz's claim rests not on the denial of accommodation but on the *express statements* of Pfizer officials regarding the limiting effects of her impairment. To the extent that Pfizer is arguing that a contrary inference can be drawn from those statements, that is a matter for the trier of fact. Because Ms. Ruiz was the nonmoving party, all reasonable inferences from the summary judgment record must be drawn in her favor.

B. This Court Should Review the First Circuit's Heightened Pleading Standard for "Regarded As" Claims

As we showed in our petition (at 18-22), the court of appeals held that this Court's decisions in *Sutton*, *supra*, and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), dictated that "regarded as" claims "require an even greater level of specificity [in pleading] than other claims." Pet. App. 16. To plead such a claim, the court held, "a plaintiff must select and identify [in the complaint] the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment." *Id.* Although Ms. Ruiz's complaint included a number of specific allegations concerning the company's perception of her impairment – including a specific reference to the company doctor's statement regarding *his* perception of its limiting effects, see Pet. 5 (citing the complaint)[4] – the court of appeals found her pleading insufficient because she failed to satisfy its heightened pleading standard. As we showed (at 20-21), that holding implicates significant confusion in the lower courts regarding the effect of this Court's decision in *Twombly*. It also conflicts with the Sixth

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[4] Pfizer asserts that the allegation that it "terminated plaintiff because of her perceived disability," Amd. Cplt. ¶ 45, "is the *only* allegation made in the Complaint in connection to Ruiz's claim for perceived disability." Br. in Opp. 13. As the portions of the complaint quoted at page 5 of our petition show, that is not so.

Circuit's decision in *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 854 (6th Cir. 2001), which held that "the substantially limited major life activity need not be specifically identified in the pleadings." It conflicts as well with the Seventh Circuit's decision in *Mattice v. Memorial Hosp.*, 249 F.3d 682, 685 n.3 (7th Cir. 2001), which rejected the notion that *Sutton* "creat[ed] a heightened pleading standard." And it conflicts with the Ninth Circuit's decision in *Skaff v. Meridien North America Beverly Hills LLC*, 506 F.3d 832, 841-842 (9th Cir. 2007), which specifically rejected the notion that *Twombly* requires or permits courts to impose a heightened pleading standard in ADA cases.

Pfizer responds to these cases with a series of spurious distinctions. The company notes (at 17) that *J.H. Routh* was filed by the EEOC on behalf of an individual employee rather than by the individual employee himself – a fact that makes no difference whatsoever to the relevant legal standard. The company also asserts that *J.H. Routh* "was not a perceived disability case." *Id.* But that is simply false. The EEOC asserted present- *and* perceived-disability claims before the Sixth Circuit, see Final Br. for the EEOC, *EEOC v. J.H. Routh Packing Co.*, 2000 WL 35466788 at *24-*25 (2000), and that court's holding that "the substantially limited major life activity need not be specifically identified in the pleading," *J.H. Routh*, 246 F.3d at 854, does not limit itself to present-disability claims. The company argues (at 17-18)

that *Mattice* did not involve the major life activity of working. But that case in fact specifically addressed the question whether *Sutton* "require[d] that a plaintiff allege the inability to work in a broad class of jobs" and answered that question in the negative, though it cautioned that "under *Sutton*, a plaintiff can plead himself out of court by alleging as his disability the inability to work in a *limited* class of jobs." *Mattice*, 249 F.3d at 685 n.3 (emphasis added). And the company notes (at 18) that *Skaff* involved Title III (the public accommodations title) rather than Title I (the employment title) of the ADA. But that is irrelevant. *Skaff*'s holding that *Twombly* does *not* demand a heightened pleading standard in ADA cases, 506 F.3d at 841-842, conflicts with the First Circuit's holding here that *Twombly does* demand such a standard.

Pfizer finally suggests (at 18-19) that this case is not an apt "vehicle" to address the conflict over pleading standards under the ADA, because the First Circuit's adoption of a heightened pleading standard was merely an "alternative" holding. That suggestion might make a difference if the First Circuit's *other* "alternative" holding were defensible. But, as we have shown, it is not. Indeed, it independently warrants a grant of certiorari. Because each of the First Circuit's two "alternative" holdings conflicts with the decisions

of other circuits and of this Court, this Court should grant certiorari to address both of them.[5]

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[5] If the Court believes that the reliance-on-treating-physician question warrants certiorari but the heightened-pleading question does not, it would be appropriate for the Court to grant certiorari limited to the first question presented in the petition. There is reason to doubt whether the First Circuit's resolution of the pleading question was truly independent of its resolution of the treating-physician question. For example, the court's pleading analysis cited only a single allegation in the complaint regarding Pfizer's perception of Ms. Ruiz's impairment. Pet. App. 15-16. The court rather puzzlingly failed to acknowledge the allegation in the complaint that set forth the company doctor's statement of his perception of the limiting effect of that impairment. Amd. Cplt. ¶ 36. That omission might be explained by the court's conclusion that the company doctor's perception was based on Ms. Ruiz's physician's report and thus was irrelevant on the merits. In such circumstances, the Court could appropriately grant certiorari on the first question presented and then, after its ruling on the merits, remand for further consideration of the pleading question in light of that ruling and Fed. R. Civ. P. 15. See *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 458 (2006) (*per curiam*) ("The Court of Appeals should determine in the first instance whether the two aspects of its decision here determined to have been mistaken were essential to its holding."); *Bradshaw v. Stumpf*, 545 U.S. 175, 187-188 (2005) (addressing one issue raised by court of appeals' opinion and remanding to give court of appeals opportunity to consider how this Court's disposition implicated another possibly related question).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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