No. 09-_____ 09-379 SEP 25 2009

In The
Supreme Court of the United States

WILBUR ALLMOND,

Petitioner,

v.

AKAL SECURITY, INC., and ERIC HOLDER,
Attorney General of the United States,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

JOHN GRIFFIN
MAREK, GRIFFIN & KNAUPP
203 North Liberty Street
Victoria, Texas 77901
(361) 573-5500

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Boulevard
Houston, Texas 77008
(713) 526-5677

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTION PRESENTED

Under the Americans with Disabilities Act and the Rehabilitation Act, is it lawful for an employer to dismiss a worker with a disability merely because a conceivable situation "may" occur in which that employee would pose a risk to safety, without regard to how unlikely that occurrence might be?

PARTIES

The parties to this proceeding are set forth in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES:

Petitioner Wilbur Allmond respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 20, 2009.

OPINIONS BELOW

The February 20, 2009 opinion of the Court of Appeals, which is reported at 558 F.3d 1312 (11th Cir. 2009), is set out at pp. 1a-10a of the Appendix. The May 28, 2009 order of the Court of Appeals denying rehearing en banc, which is not reported, is set out at pp. 47a-48a of the Appendix. The September 28, 2007 Order of the District Court for the Middle District of Georgia, which is unofficially reported at 2007 WL 2904023 (M.D.Ga.), is set out at pp. 11a-46a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on February 20, 2009. A timely petition for rehearing en banc was denied on May 28, 2009. On August 13, 2009 Justice Thomas granted an application extending the time to file a petition for writ of certiorari until September 25, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set forth in the Appendix to the petition.

STATEMENT OF THE CASE

The Americans with Disabilities Act and the Rehabilitation Act forbid the use of qualification standards that discriminate against employees or applicants with disabilities. The courts of appeals apply different legal rules in determining when such a qualification standard is justified by a safety-related purpose. In 2001 the United States Marshals Service adopted a new medical standard for court security officers; based on that standard, the Marshals Service subsequently directed the dismissal of a number of court security officers who worked in federal courthouses throughout the country. Those dismissals were successfully challenged in several cases brought in the Fifth Circuit. In the instant case, however, on essentially the same record, the Eleventh Circuit upheld the disputed standard.

(1) The Adoption of The Unassisted Hearing Test

In the lower courts the screening of visitors and mail at a Federal courthouse, and certain other security tasks, are the responsibility of court security officers ("CSOs"). Courtroom security in a criminal case is provided by United States Marshals.[1] The CSOs are hired by and work for a number of different private firms who contract to provide that service to the United States Marshals Service ("USMS"). Respondent Akal Security, Inc. is one of those private firms, providing CSOs for the federal courts in Georgia and a number of other states.

Individuals working as CSOs have long been required to pass a physical examination, including a hearing test. Prior to 2001 applicants and current CSOs could use hearing aids when taking that test.[2] In 2001, however, the USMS proposed and the Judicial Conference adopted a new standard governing hearing tests, for the first time barring applicants and CSOs from using hearing aids to pass the hearing test. That change was part of the CSO Medical Standards adopted in that year. The original rationale and origin of the unassisted hearing test is a matter of dispute.[3]

---

[1] R 4-82, Ex. R.

[2] R 5-101, Ex. B (R 5-101 refers to Docket No. 101 in volume 5 of the record on appeal).

[3] The 2001 Medical Standards were developed in light of a series of interviews with a significant number of CSOs. Both

lower courts in the instant case attached importance to that study. (App. 8a, 42a). However, under questioning the official who conducted the study conceded that none of the CSOs interviewed had ever been asked any questions at all about either hearing aids or CSOs who used them. (R 4-78, Ex. 3-2, at 5, 14-15; 5-101, Ex. G, at 193-94).

There was testimony that during the discussions of the proposed medical standards the Judicial Conference Committee on Security and Facilities was advised that hearing aid batteries "may be prone to failure." (R 5-102, Attach. 4, Defendants' Response to Plaintiff's Statement of Facts, at 8 par. 44; see R 4-80, Ex. G, at 28 lines 10-19). In the instant litigation, however, the Department of Justice has never asserted that hearing aid batteries are less reliable than other batteries.

The government official who recommended adoption of the unassisted hearing test, Dr. Richard Miller, stated in a 2006 affidavit in this case that he was responsible for devising that standard. (R 4-78, Ex. 3-1, at 13 ("Dr. Cook did not create the CSO standards.")) But in 2002 Dr. Miller stated in a sworn deposition that Dr. Cook of the Naval Medical Center had framed the disputed standard. (Ruiz Tr., v. 2, at 197 ("Question. With regards to the hearing standards for court security officers, who developed the hearing standards" Answer: Dr. Lynn Cook. Question: And do you know what factors she considered in developing the hearing standards? Answer: No, I don't.")

Dr. Miller did not claim to know anything about the reliability or efficacy of hearing aids; he explained that before he made that recommendation he had "consulted" with Dr. Cook. (R 4-78, Ex. 3-1, at 13-14, Miller Decl., par. 23, 25; Ex. 3-2 at 7.) Several years later in the *Ruiz* case (see pp. 9-10, *infra*), however, Dr. Cook stated that she could not "recall any direct conversations at the time with Dr. Miller that he was performing that project." (Ruiz Tr., v. 2, at 436). The only information which Miller stated he received from Dr. Cook about possible failures of hearing aids was the generic argument made by the government in the courts below, that

> hearing aids are mechanical devices *and as such* are subject to loss, malfunction, and breakage. Batteries

This new requirement of an unassisted hearing test differed in several respects from the manner in which other possible impairments were dealt with under the 2001 CSO Medical Standards. First, applicants and CSOs are permitted to use corrective measures when taking tests other than the hearing test. For example, individuals taking the vision test are permitted to wear glasses or contact lenses. Second, unlike the automatic disqualification of individuals who fail the hearing test, most of the more than 150 medical conditions covered by the 2001 CSO Medical Standards merely "may" result in disqualification, but are assessed on an individualized "case-by-case" basis. Individuals with such medical conditions will be disqualified if there is an individualized determination that a condition "is likely to adversely affect safe and efficient job performance." Some conditions, such as color blindness or the use of a pacemaker are categorized as "generally disqualifying," but unlike the non-assisted hearing test even these conditions are not automatically a bar to employment as a CSO. Among the serious medical conditions which are assessed on a case-by-case basis, but are not even "generally" grounds for disqualification, are narcolepsy, congestive

---

> die and hearing aids may be dislodged in a physical confrontation.

(R 4-78, Ex. 3-2, at 15 (emphasis added)); see R 4-78, Ex. 3-1, at 13-14 (Miller received from Dr. Cook "input regarding ... the problems associated with hearing aids (as described below).")

heart failure, transient ischemic attacks and schizophrenia.[4]

In January 2001 Akal wrote to the USMS expressing concern about the legality of the medical standards.

> The new USMS medical qualifications are markedly more stringent than past practices. Akal is concerned that a strict pass/fail standard of these medical qualifications may expose both Akal and the USMS to liability under the Rehabilitation Act of 1973 [and] the Americans with Disabilities Act.[5]

Akal noted in particular that "in cases where a CSO is being disqualified for a condition that has existed for many years and has not affected performance in any way ... the liability of both parties is increased."[6] Akal noted that "[c]urrently many CSOs use hearing aids," and inquired whether there was "any USMS or Department of Justice regulation that allows for the imposition of the USMS medical qualifications on a categorical basis?"[7]

---

[4] R 4-78, Ex. 3-2, at 14; Ex. 3-3, at 12, 14.

[5] R 4-80, Ex. N, at 1.

[6] *Id.*, at 2.

[7] *Id.* at 2, 3. There are no such regulations. Exactly one month after Akal expressed those concerns to the Marshals Service, the Civil Rights Division of the Department of Justice began to take action against the Honolulu Police Department for requiring that police officers pass an unassisted hearing test. (R 5-101, Ex. P).

Following the adoption of the new standards, Akal appealed "every single one" of the orders of the USMS to terminate CSOs who could not pass the unassisted hearing test, desisting from those appeals only when ordered to do so by the United States.[8]

Following the adoption in 2001 of the unassisted hearing test rule, then-serving CSOs who utilized hearing aids were tested without hearing aids at annual physical examinations. Because of this change in testing method, the USMS ordered the dismissal of a number of CSOs throughout the country.[9]

(2) Fifth Circuit Litigation

Former court security officers who had been dismissed because of the unassisted hearing test have successfully brought suit under the ADA and the Rehabilitation Act in district courts in the Fifth Circuit.

David Gunnels worked as a court security officer at the federal courthouse in Houston; like Allmond he was an employee of Akal Security, Inc. In May 2002 Gunnels was dismissed because he was unable to pass the hearing test without his hearing aids.

---

[8] R 4-80, Ex. E, at 139, lines 2-22 and exhibits attached.

[9] E.g., *Ruiz v. Mukasey*, 594 F.Supp.2d 738 (S.D.Tex. 2008); *Foster v. The United States Marshals Services*, 2005 WL 3742804 (N.D.Tex. 2005); *Fromm v. MVM, Inc.*, 2004 WL 5355973 (M.D.Pa. 2004); *Wilson v. MVM, Inc.*, 2004 WL 765103 (E.D.Pa. 2004) (dismissal of ten year CSO employee); *Walton v. United States Marshals Service*, 2003 WL 23875599 (N.D.Cal. 2003) (dismissal of fourteen year CSO employee).

Gunnels sued Akal and the Attorney General under the ADA and the Rehabilitation Act.[10] The defendants defended the unassisted hearing test in *Gunnels*, relying on the same expert and many of the same arguments and documents subsequently proffered in the instant litigation. The district court ordered a jury trial, relying on the Fifth Circuit's decision in *EEOC v. Exxon Corporation*, 203 F.3d 871 (5th Cir. 2000). In *Exxon* the Fifth Circuit held that

> [i]n evaluating whether the risks addressed by a safety-based qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence.

203 F.3d at 875. In *Gunnels* (as in the instant case) the defendants had not met the Fifth Circuit standard.

> [T]he USMS has presented no evidence for the Court to consider the *Exxon* factors of business necessity such as ... the probability of occurrence, should a CSO with poor unaided hearing be allowed to work while wearing a hearing aid. The USMS states "[t]he inability to detect suspicious noises at the entrance may cause illegal contraband (i.e. guns, knives) to enter undetected," but the USMS fails to explain the probability of illegal contraband entering the building....

---

[10] *Gunnels v. Akal Security, Inc.*, Civil Action NO. V-02-132 (S.D.Tex.).

> The Court finds that there is a question of fact regarding ... the probability of occurrence of risks caused by allowing hearing aids in the workplace.

Gunnels v. Akal Security, Inc., 2004 U.S. Dist. LEXIS 31104 at *23-*24 (S.D.Tex.) The defendants subsequently settled *Gunnels* for substantial monetary relief. The United States' share of the settlement was $224,000; the amount paid by the private employer was not made public.

H. Terry Lee was hired as a Court Security Officer in 1996, during the era when the Marshals Service permitted CSOs to use hearing aids during the hearing test. Lee worked at the federal district court in Corpus Christi. In 2002 Lee was unable to pass a hearing test without use of his hearing aids; he was dismissed at the direction of the Marshals Service. Lee filed suit against Akal Security, Inc. and the Attorney General under the ADA and the Rehabilitation Act.[11] In March 2004 the defendants settled Lee's claim. The government's share of the settlement was $224,000; the amount paid by Akal was not made public.

Ramundo Ruiz was employed as a court security officer at the United States Courthouse in Victoria, Texas. In April 2006 Ruiz received the Distinguished District Award from the Director of the United States Marshals Service for his exemplary service. In October 2006, after he failed an unassisted hearing test, Ruiz was dismissed at the direction of the

---

[11] *Lee v. Akal Security, Inc.*, Civil Action NO. H-03-1752 (S.D.Tex.).

United States Marshals Service. Ruiz filed suit under the Rehabilitation Act.[12] The government moved for summary judgment on the grounds of business necessity, relying on the same expert, and essentially the same arguments and materials as in the instant case. After that motion was denied,[13] the case was tried to a jury. The district court's jury instruction regarding business necessity embodied the Fifth Circuit's *Exxon* standard.

> In evaluating whether the risks addressed by the standard constitute a business necessity, you should consider the magnitude of possible harm and the probability of occurrence.[14]

In response to special interrogatories the jury expressly rejected the government's business necessity defense. The district court subsequently denied the government's post trial motion for judgment as a matter of law, concluding that the evidence "supported the jury's finding that the decision of the Marshals Service to disqualify Plaintiff Ruiz from continuing to serve ... was not justified by business necessity."[15] The United States subsequently settled the *Ruiz* litigation for $750,000.

As part of the March 2004 settlements in *Gunnels* and *Lee*, the federal defendants agreed "to

---

[12] *Ruiz v. Mukasey*, NO. V-CA-07-56-H (S.D.Tex.).

[13] Order Regarding Defendant's Motion for Summary Judgment, Sept. 12, 2008, *Ruiz v. Mukasey*, Doc. 101.

[14] *Ruiz v. Mukasey*, Doc. 121 (Sept. 24, 2008).

[15] *Ruiz v. Mukasey*, 594 F.Supp.2d 738, 741 (S.D.Tex. 2008).

reevaluate the hearing standard for CSOs." The Marshals Service referred that obligation to the Committee on Security and Facilities of the Judicial Conference of the United States, which in 2005 referred it to the then newly created Committee on Judicial Security. In April 2007 the latter Committee decided to take no action on this matter, but instead to refer the issue back to the United States Marshals Service for resolution.[16] At some point following the *Gunnels* and *Lee* settlements the Marshals Service organized, but then cancelled, a meeting of audiologists to consider this problem.[17] We[18] are not aware of what other steps if any the Marshals Service may have taken to meet the government's obligations under those settlements.

(3) The Proceedings Below

Petitioner Allmond served for almost 30 years as a decorated police officer for the city of Columbus, Georgia, first as a patrol officer and later as a detective. During that career in law enforcement Allmond experienced no hearing-related problems, and was in fact unaware that his hearing might be imperfect. (App. 12a). In early 2003 Allmond applied to work as a CSO at the federal courthouse in Columbus, Georgia, and he was hired on April 1, 2003. CSOs

---

[16] Letter of David B. Sentelle to Hon. John F. Clark, Director, United States Marshals Service, April 30, 2007.

[17] R 7-154, Tr. of Hearing of Dec. 19, 2006, at 48.

[18] Counsel for petitioner represented the plaintiffs in both *Gunnels* and *Lee*.

for that federal courthouse are provided by Akal Security, Inc., a private firm under contract with the United States Marshals Service; Allmond was an employee of Akal. During the period that Allmond worked as a CSO at the federal courthouse he never used or owned a hearing aid.

Both before and after being hired Allmond took a series of hearing tests without use of a hearing aid. At least some of those test results did not meet the USMS unassisted hearing test standards. The USMS repeatedly deferred a final decision on whether Allmond satisfied the unassisted hearing standard, and permitted Akal to hire Allmond and employ him for a total of ten months.

In a letter dated February 2, 2004, however, the USMS notified Akal that Allmond did not meet the unassisted hearing requirement, and directed Akal to dismiss Allmond immediately. Allmond was fired by Akal on February 3, 2004. Allmond contacted a human resources officer for Akal and asked for an explanation of his dismissal. When he was told that the termination was based on the result of his hearing test, Allmond asked if he could use hearing aids. The Akal officer told Allmond that "[h]earing aids don't count."[19]

"It is undisputed that during the period that Allmond worked at the courthouse he did his job very well and never had any problems related to his

[19] R 4-80, Ex. K.

hearing or otherwise. Allmond never owned or wore hearing aids during his employment with Akal." (App. 16a-17a).[20] Neither Akal nor the USMS asserted that anyone in the courthouse even realized, as Allmond himself did not, that there was anything wrong with his hearing. The District Judge in Columbus wrote on Allmond's behalf.

> I am just surprised by the entire situation because I felt this CSO appeared to be in better physical shape than most of the other CSO's I see here and in Macon, and because I have had discussions with him on several occasions and he has never exhibited any problem in hearing what I had to say and responding appropriately.[21]

After a period of discovery the defendants moved for summary judgment on several grounds, including that the challenged unassisted hearing test was job-related and consistent with business necessity.[22] The

---

[20] Counsel for the defendants acknowledged that plaintiff's counsel "got Akal to admit they couldn't find a problem with his hearing up to the date he was disqualified. She got the government to admit that. There's no question about that." (R 7-154, at 18).

[21] R 5-104, Ex. W, at 6 (e-mail from Judge Clay Land to Terry Marrow, United States Marshals Service, Feb. 6, 2004).

[22] The defendants also urged that Allmond was not disabled under the terms of the ADA and the Rehabilitation Act. Allmond claimed the defendants regarded him as disabled, which would be sufficient under the terms of both laws. See 42 U.S.C. § 12102(2). The district judge denied summary judgment on that issue, concluding that

plaintiff acknowledged that a CSO must be able to hear to perform the essential functions of the job. The gravamen of the defendants' business necessity defense was that a hearing aid might malfunction or become dislodged at the precise moment when an emergency arose, impairing the hearing of the CSO, and leading to injury to judges, court personnel or others. The central dispute between the parties was whether the defendants were required, in order to establish safety-related business necessity, to establish the likelihood that such a safety-related series of events would actually occur.

The defendants argued that business necessity did not require evidence as to the likelihood that a particular safety-related problem would ever occur.[23] To establish business necessity, they insisted, a defendant need not adduce evidence as to "how often

---

> issues of fact remain for determination by a jury as to whether Defendants regarded Allmond as substantially limited in the major life activity of hearing.

(App. 29a). In addition, the defendants contended that Allmond was not a "qualified individual" and thus was not protected by the ADA. 42 U.S.C. § 12112(b)(6). The district court denied summary judgment on that ground as well, reasoning that

> except as to the hearing standard challenged by Allmond as unlawful, Defendants do not dispute that Allmond was qualified for the job.

(App. 38a).

The plaintiff also moved for summary judgment.

[23] R 7-154, at 33 ("[the plaintiff's counsel] couldn't cite a case that says you have to have a[n] epidemiological or statistical survey or peer reviewed [e]ssay to justify a screening mechanism.")

a CSO's hearing aid is going to fail."[24] All the law required, the defendants argued, is that an employer note that it is at least possible that the problem could arise. The defendant's Statement of Material Facts did not contain any assertion as to the frequency with which hearing aid problems actually occur, but asserted only that hearing aids are "*subject to* unexpected loss, malfunction, breakage, and battery failure" and "*may* be dislodged in physical confrontations."[25] The defendants did not contend that they had data – least of all conclusive data – as to how often hearing aids or hearing aid batteries break. "It may be a slight risk. I don't have a statistical basis for that, you know, I haven't done an epidemiology study."[26] The defendants candidly stated that their expert was unfamiliar with "'any studies or published articles' regarding the likelihood of mechanical failure in hearing aids, and was not aware of specific instances of failure."[27]

In the defendants' view they did not need any evidence, study or expert testimony about level of reliability of hearing, but could establish the business necessity defense simply by pointing out that

---

[24] R 5-107, Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment, at 9.

[25] R 3-75, Defendants' Statement of Material Facts, at 7 (emphasis added).

[26] R 7-154, at 29.

[27] R 5-102, Defendants' Response to Plaintiff's Statement of Facts, at 7.

> [e]very Tom, Dick and Harry knows that a hearing aid is a mechanical device. It's like your iPod, it's like your laptop, it can fail.

(R 7-154, at 33). The defendants' argument in support of this assertion was based on the broad assertion that *all* mechanical things can break.

> Just because no scientific survey says that "batteries fail unexpectedly" and "hearing aids (like any mechanical device) fail" does not mean that those assertions are "unsubstantiated." Indeed, such occurrences seem[ ] so obvious that judicial notice could be taken, much as the Judicial Conference apparently did.[28]
>
> [I]t is a simple fact of life that hearing aids, as mechanical devices, are subject to failure, as are their batteries.[29]

Allmond argued that the existence of a safety-related business necessity defense depends in part on the likelihood that the safety problem at issue will actually occur, and urged that an employer must adduce evidence as to the likelihood of that risk. Allmond expressly relied on the Fifth Circuit decision in *EEOC v. Exxon*.[30] Plaintiff emphasized that the defendants had presented "no evidence that a hearing

---

[28] R 5-107, Defendants' Reply to Plaintiff's Response to Defendants' Motion for summary Judgment, at 10.

[29] R 5-102, Defendants' Response to Plaintiff's Motion for Summary Judgment, at 13.

[30] R 7-154, at 43-44; R 4-99, Plaintiffs' Response to the Defendants' Motion for Summary Judgment, at 24.

aid has ever failed at a critical time for anyone in law enforcement, much less for a CSO."[31] Counsel for plaintiff noted that the defendants' expert had merely asserted in general terms that batteries and hearing aid components "can fail". (R 7-154, at 13-14). "That is not a scientific study.... [A]ny Tom, Dick and Harry, can say, well, yeah, something could happen, stuff happens." (R 7-154, at 13-14). "[T]his is an area in which data can be gathered, and [the defendant's expert] has not gathered it." (*Id.* at 16).

The district court concluded that the defendants were entitled to summary judgment with regard to their proffered business necessity defense. The district judge accepted the defendants' contention that proof of business necessity does not require any showing that there is a particular likelihood that the problem for which a disputed practice was designed will ever actually occur. The court reasoned that, in order to "show[ ] ... business necessity" an employer may simply rely on "'what if' thinking." (App. 42a). The employer need not offer any actual evidence that the hypothesized "what if" scenario is the least bit likely. The district court concluded that the challenged unassisted hearing test satisfied the business necessity standard regardless of whether the examination had been designed and adopted "based

---

[31] R 5-108, Plaintiff's Reply Brief in Support of His Motion for Partial Summary Judgment, at 6.

on events that may *never* occur." (App. 42a) (emphasis added). The district court granted summary judgment dismissing plaintiff's claims under both the ADA and the Rehabilitation Act.

The central issue on appeal, as in the district court, was whether employers are required as an element of a safety-related business necessity defense to establish that there is a significant risk of harm that would be avoided by application of a disputed qualification.[32] Allmond contended that the defendants were obligated to make such a showing.

> No one doubts that the ability to hear is important for Court Security Officers ... But the parties part company over the notion that *any* hypothetical risk means that an individual can be dismissed from [his or her] job no matter how competent [his or her] performance is.... [T]he legal standard is not whether there is a conceivable risk, but whether the risk is significant or substantial.[33]

Plaintiff urged the Eleventh Circuit to follow the Fifth Circuit decision in *EEOC v. Exxon* and the Third Circuit decision in *Verzeni v. Potter*, 109 Fed.Appx. 485 (3d Cir. 2004), which requires a

---

[32] The defendants also argued on appeal that the district court had erred in holding that there was sufficient evidence for a jury to find that the defendants regarded Allmond as disabled. The court of appeals did not address that issue.

[33] Reply Brief of Appellant Wilbur "Gene" Allmond, at 17, 21.

defendant to offer evidence of "the severity of the risk."[34]

The defendants insisted that proof of business necessity does not require evidence that there was in fact a substantial risk that the hypothesized problem would ever occur. The defendants did not argue that they had conclusively demonstrated that the probability of hearing aid failure is substantial or significant. The defendants contended only that hearing aids, "as mechanical devices", "can" or "may" fail.[35] Akal insisted that the defendants "need not have produced evidence of actual, prior hearing-aid failures."[36] Indeed, the defendants had conceded in the district court that they had no evidence that any problems related to hearing aids had ever arisen during the years when the CSOs included individuals who could only pass a hearing test using their hearing aids. The defendants took no position as to whether a hearing aid, assuming its batteries are changed on schedule, would fail once a week or

---

[34] *Id.* at 22 n.11, 24.

[35] Brief for the Attorney General, at 30 (certain circumstances "can" eliminate the effectiveness of a hearing aid; "there is always an unavoidable possibility of hearing aid malfunction or failure"), 32 ("malfunction and failure are inherent risks in mechanical devices such as hearing aids"); Brief on Behalf of Appellee Akal Security, Inc., at 34 (hearing aids ... may become dislodged, and their batteries may die), 44 (there is a "possibility that a hearing-aid will fail on the job") (emphasis omitted).

[36] Brief on Behalf of Appellee Akal Security, Inc., at 37 (capitalization omitted).

only once a century; on the defendants' view the difference was legally irrelevant. They urged that the mere fact that a hearing aid (like any mechanical device) could fail, no matter how unlikely that possibility, is sufficient by itself to establish the existence of business necessity.

The court of appeals affirmed on the grounds advanced by the defendants, holding that the mere fact that "hearing aids *may* malfunction, break, or become dislodged" suffices to establish the business necessity defense (App. 9a) (emphasis added). Under the court of appeals' decision no showing was required as to the actual likelihood that any of those events might ever occur. The court recognized that the dislodging, breakage or malfunction of a hearing aid would cause no harm unless they chanced to occur "at a critical moment" when some emergency was occurring. The Eleventh Circuit frankly acknowledged that the new unassisted hearing test could affect safety only in the context of "events that may never occur." (App. 9a n.7). But on the court's view the business necessity standard required only that there be any possibility – however unlikely – that a situation could arise in which the failure of a hearing aid coincided with the precise moment in time at which an emergency arose in which good hearing was essential.

Allmond filed a timely petition for rehearing en banc. The petition argued, inter alia, that the panel decision was inconsistent with the Fifth Circuit decision in *Exxon* and with the Third Circuit decisions in *Verzeni* and *Strathie v. Dept. of Transportation*, 716

F.2d 227 (3d Cir. 1983).[37] The court of appeals denied rehearing en banc. (App. 47a).

REASONS FOR GRANTING THE WRIT

I. THERE IS AN INTER-CIRCUIT CONFLICT REGARDING THE DEGREE OF RISK NECESSARY TO JUSTIFY THE EXCLUSION OF AN INDIVIDUAL WITH A DISABILITY

This case presents a question of recurring importance under the Americans with Disabilities Act, the Rehabilitation Act, and Title VII of the Civil Rights Act. All of these statutes prohibit the use of certain job qualification standards that have a discriminatory effect on the individuals protected by the act in question. Such qualifications may be deemed lawful if they are "necessary to safe ... job performance." *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). The court below, like other courts of appeals, has recognized that the standards under these three statutes are the same. (App. 7a n.6, 39).

For decades prior to the decision in the instant case the courts of appeals had held – under all three statutes – that the availability of a safety-based justification depends in part on the likelihood that employment of the worker in question would result in

[37] Petition for Rehearing En Banc of Appellant Wilbur "Gene" Allmond, at 10, 13, 14.

injury to others or to himself. In the instant case the Eleventh Circuit, at the urging of the United States, has held to the contrary that an employer can successfully defend a discriminatory qualification merely by showing that a potentially dangerous situation "may" occur, without offering evidence as to the likelihood that a situation will ever arise in which that employment of that individual would in fact result in harm.

A. The Americans With Disabilities Act

In the Fifth Circuit proof of business necessity requires more than a bare showing that a potentially dangerous situation "may" occur.

> In evaluating whether the risks addressed by a safety-based qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as *the probability of occurrence*. The acceptable *probability* of an incident will vary with the potential hazard posed by the particular position; a *probability* that might be tolerable in an ordinary job might be intolerable for a position involving atomic reactors, for example.

EEOC v. Exxon Corp., 203 F.3d 871, 875 (5th Cir. 2000) (emphasis added).[38] This requirement is codified in the

[38] The federal government expressly permits the individuals who guard the nation's atomic reactors to wear hearing aids when taking the required hearing test. 10 C.F.R. Pt. 73, App. B, part I(B)(2)(b).

Fifth Circuit Pattern Jury Instructions, which direct a jury "[i]n evaluating whether the risks addressed by the standard constitute a business necessity" to consider "[t]he probability of occurrence."[39] Utilizing the standard in *Exxon*, district courts in the Fifth Circuit have repeatedly rejected government summary judgment motions in cases challenging under the ADA and Rehabilitation Act the very medical qualification at issue in this case. Thus different legal standards apply to claims regarding CSOs at the federal courthouse in Gulfport, Mississippi and to claims regarding CSOs at the federal courthouse in Mobile, Alabama, only 75 miles to the East. Petitioner repeatedly urged the Eleventh Circuit to adopt the Fifth Circuit's *Exxon* standard.

The Ninth Circuit has expressly adopted the Fifth Circuit's *Exxon* rule as establishing the standard for showing the business necessity of a safety-based qualification. *Bates v. United Parcel Service*, 511 F.3d 974, 996 (9th Cir. 2007) (en banc) (quoting *Exxon*). The Ninth Circuit emphasizes that "[t]he 'business necessity' standard is quite high, and is not to be confused with mere expediency" 511 F.3d at 996 (quoting *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001)).

---

[39] Pattern Civil Jury Instruction 11.7.4 ADA-Business Necessity Defense, available at http://www.lb5.uscourts.gov/juryinstructions.

B. The Rehabilitation Act

The Rehabilitation Act generally forbids excluding an individual on the basis of disability from federal employment, or employment in a federally assisted program, if he or she is "otherwise qualified." 29 U.S.C. § 504(a). Unlike the Eleventh Circuit in the instant case, four circuits have held that such a showing of a lack of qualification under the Rehabilitation Act requires a demonstration that the risk which that exclusion avoids is a substantial one.

The Ninth Circuit has repeatedly rejected the suggestion that any increase in risk, no matter how small, is sufficient under the Rehabilitation Act to justify a safety-related qualification that excludes individuals with a disability. In *Bentivegna v. United States Department of Labor*, 694 F.2d 619 (9th Cir. 1982), the Secretary of Labor had rejected a claim under the Rehabilitation Act of an individual who had been dismissed because he had diabetes and an elevated blood sugar level. The Secretary reasoned that those circumstances demonstrated that Bentivegna was not qualified because he was "more prone to serious infections." 694 F.2d at 622. The Ninth Circuit overturned the Secretary's decision, insisting that proof of a more significant degree of increased risk was required.

> Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from

> work-related injuries.... [T]he [defendant] bore the burden of proving that [its exclusion standard] contributes cognizably to personal health and safety.

Id.

In *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985), an unsuccessful applicant sued the Postal Service after she was denied employment because she suffered from epilepsy. The district court had dismissed her complaint, reasoning that "an employer is justified in not employing a handicapped person if *he or she presents 'an elevated risk' of injury.*" 767 F.2d at 1421. The court of appeals reversed, holding that a mere "elevated risk" was insufficient to demonstrate that an individual was not qualified.

> This court's opinion in *Bentivegna* cannot fairly be interpreted as holding that an elevated risk of injury, without more, is sufficient to justify the refusal to hire an otherwise handicapped person.

767 F.2d at 1422.

> [I]n some cases, a job requirement that screens out qualified handicapped individuals on the basis of possible future injury is necessary. However, we hold that in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports.

> The question is whether, in light of the individual's work history and medical history, employment of that individual would pose *a reasonable probability of substantial harm*.

Id. (emphasis added).

The Seventh Circuit has expressly adopted the Ninth Circuit standard in *Mantolete*. *Knapp v. Northwestern University*, 101 F.3d 473, 483 (7th Cir. 1996) (quoting *Mantolete*; "[w]e agree this is the appropriate standard").

> A significant risk of ... physical injury can disqualify a person from a position if the risk cannot be eliminated.... But more than merely an elevated risk of injury is required before disqualification is appropriate. Any physical qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented, since almost all disabled individuals are at a greater risk of injury.

101 F.3d at 483.

In *Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir. 1983), the defendant utilized a qualification standard similar to that in the instant case; individuals who applied for a license to operate a school bus were required to pass a hearing test without a hearing aid. 716 F.2d at 228. The plaintiff, like the plaintiff in the instant case, challenged that uncorrected hearing test rule under the Rehabilitation Act. The Third Circuit held that the

plaintiff was qualified if, with or without some form of accommodation, he could perform the job of a school bus driver without "appreciable risk." 716 F.2d at 232-33. The defendant, like the defendant in the instant case, argued that hearing aids pose a risk of failure simply because they are mechanical devices.

> [T]he Department of Transportation points out that a hearing aid, like any other active mechanical device, is subject to sudden mechanical failure. This might occur, for example, if a hearing aid battery were to wear out.

716 F.2d 233. The court of appeals held that such a general argument was insufficient to demonstrate that Strathie was unqualified, particularly in light of the steps that could be taken – such as regularly checking the hearing aid batteries – to reduce any risk. *Id.* The defendant also urged that reliance on hearing aids was risky because "hearing aids can become dislodged." 716 F.2d at 232. The Third Circuit held that generalized assertion insufficient, particularly in light of evidence that some forms of hearing aids were less likely to be dislodged. The court also noted that (as in the instant case) the defendant permitted individuals to use glasses when taking a vision test, even though glasses also can be dislodged.[40] The court of appeals sustained Strathie's

---

[40] 716 F.2d at 732:

> That such an individual is allowed to obtain a school bus driver's license indicates that the Department

claim, holding that he had demonstrated that he was qualified to be a school bus driver.

In *Verzeni v. Potter*, 109 Fed.Appx. 485 (3d Cir. 2004), the Third Circuit held that where a defendant asserts a business necessity defense in an action under the Rehabilitation Act, the trier of fact must consider the likelihood, not merely the possibility, that injury would result in the absence of the disputed job qualification.

> [A] factfinder must face the same concerns that the Supreme Court addressed in [*School Board of Nassau County v.*] *Arline*[, 480 U.S. 273 (1987),] about the nature of the risk, the duration of the risk, the severity of the risk, and the probabilities that the disability will cause harm.

109 Fed.Appx. at 491. In the Third Circuit jurors are to be instructed that they must consider all of these factors, and that "they should not simply defer their individual judgments to health professionals." 109 Fed.Appx. at 493.

The Fifth Circuit holds that under sections 501 and 504 of the Rehabilitation Act

> an individual is not qualified for a job if there is a genuine *substantial* risk that he or she could be injured or could injure others, and the employer cannot modify the job to eliminate that risk.

---

views some safety risks as too remote to justify the denial of a school bus driver's license.

Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991) (emphasis added).

C. Title VII

The courts below noted that the business necessity standard under the ADA and under Title VII are presumed to be the same, and relied on Title VII cases in determining the controlling legal standard. (App. 7a n.6, 39).

The Fourth Circuit has repeatedly held that under Title VII a safety-related claim of business necessity requires a demonstration that the challenged qualification standard was necessary to avoid "significant risks." *EEOC v. Service News Co.*, 898 F.2d 958, 962 (4th Cir. 1990); *Wright v. Olin Corp.*, 697 F.2d 1172, 1190 (4th Cir. 1982). The Seventh Circuit requires the defendant to prove that in the absence of the disputed standard there would be a "substantial risk" of harm. *International Union, United Automobile, etc., Workers of America v. Johnson Controls*, 886 F.2d 871, 886 (7th Cir. 1989) (en banc), *reversed on other grounds*, 499 U.S. 187 (1991).

The Eighth Circuit has repeatedly held that "[a] neutral employment practice may be justified by business necessity only if the practice not only fosters safety ... but is essential to that goal." *EEOC v. Rath Packing Co.*, 787 F.2d 327-38 and n.10 (8th Cir. 1986); *Green v. Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975). The Fourth, Fifth and

Ninth Circuits have also adopted that distinction. *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 564 n.40 (5th Cir. 1988); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1289 (9th Cir. 1981); *Rock v. Norfolk & W. Ry. Co.*, 473 F.2d 1344, 1349 (4th Cir. 1973).

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE

The question presented strikes at the very heart of the ADA and the Rehabilitation Act. As the court of appeals correctly observed in *Bentivegna*, "almost all handicapped persons are at greater risk from work-related injuries." 694 F.2d at 622. A substantial portion of all individuals with disabilities could be denied employment if, as the Eleventh Circuit held, business necessity under the ADA and the Rehabilitation Act can be established merely by suggesting that there is a possibility, no matter how slight, that a situation "may" arise in which the employment of a disabled worker could lead to injury.

Similarly, in many common occupations the actions of one employee could impact the safety of others: factory workers, construction workers, drivers, teachers, and countless others. It would often be possible to imagine some far-fetched scenario that "may" occur in which a particular disability could result in injury to others. Under the Eleventh Circuit standard an employer's ability to hypothesize such a situation would be sufficient to justify dismissing

or refusing to hire countless individuals with disabilities.

The decision below is contrary to the EEOC's longstanding interpretation of the ADA. Since 1991 it has been the Commission's view that when an employer asserts that a disputed qualification requirement is justified under the ADA by safety-related business necessity, the employer must demonstrate that the requirement meets the "direct threat" standard in section 103(b) of the ADA. 42 U.S.C. § 12113(b). A showing of such a direct threat requires a demonstration that there is "a significant risk to the health or safety of others." 42 U.S.C. § 12111(3). In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999), the Solicitor General advanced this very interpretation of the standard for a showing of safety-related business necessity under the ADA.[41]

---

[41] Brief for The United States and the Equal Employment Opportunity Commission As Amicus Supporting Respondent, at 8 ("A qualification standard ... must be justified under the ADA in terms of job-relatedness and consistency with business necessity. In the case of qualification standards that are based on a safety rationale, that requires an inquiry into whether respondent would pose a 'direct threat' to the health o[r] safety of himself or others"), 22 ("The ADA requires safety-based standards to be shown to be necessary to avoid a direct threat to health or safety") (capitalization omitted), 23 (a "significant risk" is required).

This Court did not resolve whether a showing of safety-related business necessity under the ADA requires that an employer meet the direct threat standard. *Albertson's*, 527 U.S. at 569 n.15.

The interpretation of business necessity advanced by the government in the courts below is inconsistent with the manner in which the ADA has been enforced by the Civil Rights Division of the Department of Justice. On several occasions the Civil Rights Division has successfully objected to the practice of local law enforcement agencies of requiring police officers to pass an unassisted hearing test. In 2002 and 2003, the Civil Rights Division negotiated settlement agreements under the ADA with the Honolulu Police Department and the Cobb County, Georgia Police Department in which both departments agreed to end their practice of requiring police officers to pass an unassisted hearing test. Both settlement agreements recited that "[t]he United States alleges" the use of an unassisted hearing test for police officers is not "consistent with business necessity."[42] It is impossible to understand how a qualification not required by business necessity for police officers could nonetheless be warranted by business necessity for court security officers.

---

[42] Settlement Agreement Between the United States of America and the Honolulu Police Department, p. 1, par. 4; Settlement Agreement Between the United States of America and Cobb County, Georgia, p. 2 par. 7. (R 5-101, Ex. P). The Honolulu Police Department Agreement recited that

> [i]n support of this allegation, the United States relies, in part, on the presence of incumbent police officers employed by HPD who use a hearing aid to attenuate hearing loss and effectively meet their employment responsibilities.

Those are essentially the facts of the instant case.

The Eleventh Circuit's decision cannot be reconciled with this Court's interpretation of the Rehabilitation Act in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In *Arline* the employer asserted that the plaintiff was not qualified to work as a school teacher because she had had tuberculosis. The Court held that the plaintiff would be unqualified only if her employment would "expos[e] others to *significant* health and safety risks." 480 U.S. at 287 (emphasis added). "A person who poses a *significant* risk ... will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." 480 U.S. at 287 n.16. The assessment of an individual's qualification must consider not only "the severity of the ... potential harm to third parties," but also "the probabilities the disease will be transmitted and will cause varying degrees of harm." 480 U.S. at 288. Under *Arline* an individual is not unqualified merely because employing that individual "may" result in harm to others; there must be a determination as to how likely that injury really is.[43] Because the district court in *Arline* had held the plaintiff not qualified without making findings "as to the probability that she would transmit the disease," this Court remanded the case for further findings on those issues. 480 U.S. at 288-89.

---

[43] The defendant in *Arline* suggested that a worker who had had tuberculosis posed a risk to others, and was thus unqualified, regardless of the magnitude of that risk. Brief for Petitioners, *School Board of Nassau County v. Arline*, at 39 ("notwithstanding Respondent's attempts to characterize the risk of contagion as minimal, that risk is nevertheless real.")

If under the Rehabilitation Act the legality of a job qualification turns on the likelihood that that qualification is needed to avoid harm, the same must be true of the business necessity defense in the ADA. Section 501 of the ADA, 42 U.S.C. § 12201(a), provides that "[e]xcept as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973." The business necessity defense in sections 102(b)(6) and 103(a) of the ADA, 42 U.S.C. §§ 12112(b)(6) and 12113(3), cannot authorize the exclusion of an individual who would be "qualified" under, and thus protected by, the Rehabilitation Act. Because consideration of the probability of a risk is required in a determination of qualification under the Rehabilitation Act, it is also mandatory under the ADA.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The decision in the instant case turned on the difference between the indulgent Eleventh Circuit standard and the standard applied by other circuits. The courts below did not suggest, and the defendants never claimed, that the defendants had offered conclusive evidence – sufficient to meet the standard on summary judgment – that the risk asserted by the defendants was substantial or significant, or even that the defendants had proffered conclusive evidence of what that level of risk might be. The only issue

regarding which there was no genuine issue of material fact was that there "can" or "may" be a situation in which injury might result from employing a CSO who needed a hearing aid to pass the CSO hearing test. That truly minimal showing would be insufficient to permit summary judgment in the Third, Fourth, Fifth, Seventh, Eighth or Ninth Circuits.

There is compelling evidence in this case that any such risk would be exceptionally small. Plaintiff introduced expert testimony that hearing aids rarely fail.[44] There was undisputed evidence that security and safety emergencies in the federal courts are extremely uncommon. A study prepared by the primary author of the CSO Medical Standards concluded that a federal court security officer is likely to use physical force less than once in his or her entire career. The use of a firearm by a court security officer is so rare that the study could not even calculate its frequency.[45] Of course any such emergency, however rare, must be dealt with effectively. But, as the court below acknowledged, the employment of a security officer who needed a hearing aid could not reduce security unless the hearing aid happened to fail at precisely "the critical moment" when such an uncommon emergency arose. (App. 9a n.8). Even that unlikely coincidence in time would not matter unless the incident – unlike, for

---

[44] R 4-80, Ex. J, at 2.

[45] R 4-78, Ex. 3-3, at 9.

example, the need to stop a courthouse visitor who ran past the screeners – was one in which the level of the CSO's hearing mattered. In short, it is exceedingly unlikely that employing a CSO such as Allmond will ever lead to any form of injury.

There was also compelling evidence that actually employing CSOs who need hearing aids to pass a hearing test has never resulted in any harm. Akal itself pointed out in 2001 that "many CSOs use hearing aids," and that a significant portion of them could not pass an unassisted hearing test.[46] Yet the defendants acknowledged that during the period prior to 2001 when hearing tests for court security officers could be taken with a hearing aid there were no instances in which a court security officer anywhere in the nation was unable to respond to an emergency because of a problem with a hearing aid.[47] Indeed, the defendants conceded that they could not identify a single incident in which a hearing aid problem had ever impaired the performance of any federal,

---

[46] R 4-80, Ex. N, at 2-3. Akal noted that an estimated 60% of current CSOs could not meet the new Medical Standard, and that this was "primarily due to results from the audiometer, hypertension conditions and color vision."

[47] R 4-81, Plaintiff's Statement of Facts Regarding His Motion for Partial Summary Judgment, at 18 ("Akal has stipulated with Allmond that 'Akal is not aware of any incidents where one of its CSO's who wore a hearing aid failed to perform his duty because of difficulty with his hearing aid.'"). The defendants did not contest this statement. R 5-102, Defendants' Response to Plaintiff's Statement of Facts, at 4.

state or local law enforcement officer.[48] That was particularly significant because the defendants acknowledged that there was no evidence that other law enforcement agencies had required their employees to pass an unassisted hearing test.[49] Although federal law would require a report to the Food and Drug Administration if there were an injury or death as a result of the failure of a hearing aid, the government did not contend it had ever received such a report.[50]

If employing law enforcement officials who need a hearing aid to pass a hearing test entailed a significant risk, that danger would presumably have been widely recognized by agencies other than the Marshals Service. The defendants, however, identified no such agency which applies an unassisted hearing test requirement. To the contrary, the United States itself routinely permits the use of hearing aids for hearing tests for federal jobs at least as dangerous

---

[48] The Plaintiff's Statement of Facts Regarding His Motion for Partial Summary Judgment noted that "[n]either Akal nor the Government have produced any evidence that hearing aids have ever caused impaired performance of duties in the history of law enforcement in the United States." (R 4-81, at 9, par. 49). The defendants did not contest the correctness of that statement. R 5-102, Defendants' Response to Plaintiff's Statement of Facts at 9.

[49] Counsel for the defendants agreed that "there is not a scintilla of evidence that this practice ... is used down the street at ... the state courthouse, or the sheriff's department." (R 7-154, at 30). More generally, defense counsel stated "nobody else has this standard. That's exactly right." (*Id.* at 59).

[50] R 5-101, Ex. J-1 at 2; R 7-154, at 49.

and safety-sensitive as a courthouse security officer. For example, the Department of Justice allows hearing-aid assisted testing for guards at the Federal Bureau of Prisons.[51] The federal judiciary permits the use of hearing aids by individuals taking a hearing test to work as probation officers.[52] Prison guards and probation officers must deal with convicted federal offenders in circumstances less secure than a federal courthouse. If unassisted hearing tests are not necessary for the federal corrections officers at the federal supermax prison in Florence, Colorado, those tests cannot be required by business necessity for the CSOs who screen visitors to the federal courthouse in Columbus, Georgia.

---

[51] See http://www.bop.gov/policy/progstat/3906_019.pdf

[52] See http://www.uscourts.gov/fedprob/officer/medicalrequirements.html

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

JOHN GRIFFIN
MAREK, GRIFFIN & KNAUPP
203 North Liberty Street
Victoria, Texas 77901
(361) 573-5500

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Boulevard
Houston, Texas 77008
(713) 526-5677

Counsel for Petitioner

**Counsel of Record*

Blank Page