No. 19-1514

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

QUINTON HARRIS, *et al.*,
Plaintiffs-Appellees,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Nebraska
No. 8:16-CV-00381-JFB-SMB

BRIEF OF AMICI CURIAE PUBLIC JUSTICE, IMPACT FUND, AARP, AMERICAN DIABETES ASSOCIATION, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS ARKANSAS, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY RIGHTS IOWA, DISABILITY RIGHTS LEGAL CENTER, DISABILITY RIGHTS NEBRASKA, DISABILITY RIGHTS TEXAS, LEGAL AID AT WORK, MID-MINNESOTA LEGAL AID, MISSOURI PROTECTION & ADVOCACY SERVICES, AND THE PROTECTION & ADVOCACY PROJECT IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Lindsay Nako
Daniel Nesbit
IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
(510) 845-3473

Karla Gilbride
PUBLIC JUSTICE, P.C.
1620 L Street, NW Suite 630
Washington, DC 20036
(202) 797-8600
kgilbride@publicjustice.net

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Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Public Justice, P.C., certifies that it is a professional corporation with no parent corporation or stock owned by any publicly held corporation.

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Public Justice, Impact Fund, *et al.*, certify that the following Amici are nonprofit corporations with no parent corporations or stock owned by any publicly held corporation:

- AARP
- American Diabetes Association
- Disability Rights Advocates
- Disability Rights Arkansas
- Disability Rights Education & Defense Fund
- Disability Rights Iowa
- Disability Rights Legal Center
- Disability Rights Nebraska
- Disability Rights Texas
- Impact Fund
- Legal Aid at Work
- Mid-Minnesota Legal Aid
- Missouri Protection & Advocacy Services
- The Protection & Advocacy Project

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INTEREST OF AMICI CURIAE[1]

Amici organizations, whose individual statements of interest are set forth in the attached motion for leave to file, are committed to ensuring civil rights and workplace equality.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress expressly based the Americans with Disabilities Act ("ADA" or "Act") on the 1964 Civil Rights Act. It addressed the lack of "legal recourse" for those experiencing "discrimination on the basis of disability," unlike the remedies available to those experiencing "discrimination on the basis of race, color, sex, national origin, religion, or age." 42 U.S.C. § 12101(a)(4). Congress understood that achieving the goal of eliminating workplace discrimination against people with disabilities would require both private and public enforcement, so it incorporated the full scope of enforcement mechanisms available under Title VII of the Civil Rights Act into the ADA. 42 U.S.C. § 12117(a).

[1] The parties and counsel for the parties have not authored or contributed money that was intended to fund preparing or submitting the brief. No person other than amici curiae contributed money that was intended to fund preparing or submitting this brief.

Consequently, plaintiffs bringing ADA claims have unfettered access to class action procedures in cases that meet the requirements of Federal Rule of Civil Procedure ("Rule") 23.

In this case, the district court took Congress at its word, applied the Rule 23 criteria, and certified a class alleging that a written, centralized employment policy violated the ADA. *Harris v. Union Pacific R.R. Co.*, 329 F.R.D. 616, 621–22, 628 (D. Neb. 2019). There was nothing extraordinary about this result; many courts have previously certified classes alleging common discriminatory employment policies.

Appellees Quinton Harris, *et al.*, explain in their answering brief why the district court's order was proper under Rule 23. *See generally* Br. of Plaintiffs-Appellees ("Appellees Br."). Amici write separately to address Appellant Union Pacific Railroad Company's (and their amici's) premise that the language of the ADA renders it fundamentally incompatible with class treatment, either because a class cannot be defined in such a way as to confer standing on all class members or because the ADA presents individualized issues not subject to classwide proof. Not only is the ADA compatible with class treatment, that is what Congress intended.

The ADA is a remedial civil rights statute like any other. This Court should analyze this pattern-or-practice class action as it would a pattern-or-practice class case pled under any other remedial civil rights statute. There is no reason to differ. The class certification principles are the same. The standing principles are the same. The liability principles are the same. The district court properly applied these principles, and its order granting certification should be affirmed.

ARGUMENT

I. The Americans with Disabilities Act is intended to eliminate discrimination, and class actions are critical to its enforcement.

Union Pacific and its amici would like to shift the Court's focus from the company's centralized discriminatory policy[2] to the individual employees subject to that policy. This attempt to focus on employees' alleged impairments harkens back to an outdated "medical model,"

[2] Appellees challenge Union Pacific's company-wide Fitness-for-Duty program, which (1) requires employees in certain positions to disclose specific health conditions, (2) excludes employees who disclosed these conditions from employment, and (3) requires that employees undergo a fitness-for-duty evaluation, the results of which are reviewed by a single doctor to determine who is fit for duty. *Harris*, 329 F.R.D. at 620.

under which "people with disabilities are often characterized as having individual attributes of incapacity and dependence." Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 Ind. L. J. 181, 186 (2008).

Congress passed the ADA in 1990 to replace the difference-entrenching medical model with a civil-rights framework that considers disability as a neutral characteristic, like race or gender, that should not interfere with equal treatment. *Id.* at 191. Congress recognized that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis" and intended for the ADA to remedy this problem by "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]" 42 U.S.C. § 12101(a)(8), (b)(1).

The Act's goals include "inclusion and integration" for people with disabilities, "extending to them the same civil rights protections provided to women and minorities beginning in 1964." H.R. Rep. No. 101-485, pt. 3, at 26 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 449.

In 2008, Congress amended the ADA and explicitly clarified that individuals "who have a record of a disability or are regarded as having a disability also have been subjected to discrimination" and fall within the Act's protection. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553-3555 (2008) (codified as amended at 42 U.S.C. § 12101(a)(1)).

Achieving the Act's goals requires private enforcement. *See Bruce v. City of Gainesville*, 177 F.3d 949, 952 (11th Cir. 1999) ("In Title VII cases as well as cases under the ADA, the enforcement of civil rights statutes by plaintiffs as private attorneys general is an important part of the underlying policy behind the law."). To this end, Congress specified that the ADA's employment provisions are subject to private enforcement in precisely the same fashion as Title VII. 42 U.S.C. § 12117(a) ("The powers, remedies, and procedures set forth in [Title VII] shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability . . . concerning employment."). These procedures have long included class adjudication of pattern-and-practice claims. *See, e.g.*, *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 750 (1976)

(adjudicating class pattern-and-practice claim under 42 U.S.C. § 2000e *et seq.*).

The Supreme Court recognizes the importance of class actions to enforcing civil rights laws. Class actions provide "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation and punctuation omitted). They also promote judicial economy by conserving "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)).

The efficiency of class actions is particularly evident where, by use of common proof, plaintiffs can establish the existence of a common policy or practice that resolves a legal question for an entire class. *See* 7AA Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 1776 (3d ed. 2019) (observing that "the class suit is a uniquely appropriate procedure in civil-rights cases, which generally involve an allegation of

discrimination against a group as well as the violation of rights of particular individuals."). For this reason, courts have certified classes pleading ADA violations based on a common policy or practice, even where those affected by the practice have varied disabilities or differ in other respects. *See Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418-19 (S.D.N.Y. 2012) (certifying class that challenged common city policy because "alleged 'injuries derive from a unitary course of conduct by a single system,'" despite the fact that "the class members have diverse disabilities and will not all be affected by the [city's policy in] the same way." (quotation omitted)); *Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 14-1455, 2016 WL 2347367, at *20, *22 (W.D. Pa. Jan. 27, 2016), report and recommendation adopted as modified, 2016 WL 1761963 (W.D. Pa. Apr. 29, 2016) (certifying nationwide class alleging centralized policy of failing to remediate architectural barriers under Title III of ADA) (collecting cases).

The district court conducted a rigorous analysis of the requirements of Rule 23 and determined, in its discretion, that this case was suitable for certification. *Harris*, 329 F.R.D at 627 ("[M]uch of the cases relies

[*sic*] on common proof. To allow individual lawsuits would duplicate this proof over and over again."). There are no grounds for decertifying the class.

II. The standing analysis is not heightened or unique under the ADA.

Union Pacific argues that the class should be decertified because "it includes many members who lack standing." Opening Br. for Appellant Union Pacific Railroad Company ("Appellant Br.") at 40. This argument depends on two flawed premises: first, that "every Union Pacific employee who was subjected to a fitness-for-duty evaluation [must show they are] a qualified individual with a disability under the ADA" in order to have standing to sue, *id.* at 41; and second, that former employees cannot pursue injunctive relief, *id.* at 42.

To the contrary, the ADA does not require any additional showing by named plaintiffs or the class to bring class claims, nor does it erect a special, heightened standing requirement.

A. The district court applied long-recognized standing principles when it certified the class.

At class certification, the focus of the standing inquiry is the individual standing of the class representatives. 1 William B. Rubenstein, *Newberg on Class Actions* § 2:3 (5th ed.). This Court "do[es] not require that each member of a class submit evidence of personal standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (quotation omitted). Rather, under *Avritt*, the class *definition* cannot sweep in members who would lack standing. *See id.* (class must "be defined in such a way that anyone within it would have standing" (quotation omitted)).

The class certified by the district court includes only employees who were or will be subject to Union Pacific's fitness-for-duty policy. *Harris*, 329 F.R.D. at 628. Any employee subject to this policy suffers a "concrete and particularized" injury that is either "actual or imminent"—actual for those who have already experienced it and imminent for those yet to experience it (or who risk experiencing it again). *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). That injury derives from Union Pacific's policy and is "fairly traceable to the

challenged conduct of the defendant." *Id.* at 1547 (citations omitted). For those still employed at Union Pacific, as well as former employees seeking reinstatement, the injury is "likely to be redressed by a favorable judicial decision." *Id.* (citations omitted).[3]

The certified class includes only members who would have standing. Some of those class members may not have damages, but that is not relevant at class certification. *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797–98 (8th Cir. 2014) (collecting authorities), *aff'd*, 136 S. Ct. 1036, 1050 (2016).

B. Union Pacific's policy injured all class members for purposes of the ADA and Article III.

Union Pacific asserts that not every member of the class is covered by the ADA, and that these statutorily uninjured people also lack standing. Appellant Br. at 41. This argument misstates both the ADA and standing law.

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[3] To the extent that this Circuit's analysis of standing in the class action context dovetails with the analysis of predominance, *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778–79 (8th Cir. 2013), the numerous common questions regarding Union Pacific's fitness-for-duty policy ensure that liability issues can be resolved by classwide proof. *Harris*, 329 F.R.D. at 626, 626 n.4.

1. The ADA's references to "disabilities" and "qualified individuals" pose no barriers to standing or class certification.

Union Pacific deems it "black-letter law" that only a qualified individual with a disability has standing to sue under the ADA.[4] *Id.* (citing *Bates v. Dura Auto. Sys., Inc.*, 625 F.3d 283, 285–86 (6th Cir. 2010)). Regardless of whether *Bates* was a correct statement of the law when it was decided, it is not relevant because (1) it was superseded by the 2008 amendments to the ADA, and (2) a uniform policy like that implemented by Union Pacific regards class members as disabled and requires no individualized showing of disability.

Bates addressed whether a plaintiff need be disabled to challenge discriminatory qualification standards or tests under Section 12112(b)(6), the provision at issue in the present appeal. 625 F.3d at 285 (citing 42 U.S.C. § 12112(b)(6)). The panel answered this question in the affirmative but relied on the statutory language before its amendment in 2008. *Id.* at 285 n.2 (declining to consider the 2008 amendments because the Sixth Circuit previously concluded they did not apply retroactively).

[4] Amici discuss the "qualified" portion of this standard in part III below.

As the *Bates* panel recognized, Section 12112(b)(6) is subsumed within the "General Rule," Section 12112(a), which prohibited discrimination "against a qualified individual with a disability because of the disability of such individual." *Id.* at 285. The 2008 amendments modified Section 12112(a) to outlaw "discrimination against a qualified individual on the basis of disability[.]" 42 U.S.C. § 12112(a). The change from "because of the disability of such individual" to "on the basis of disability" was intended to ensure that

> courts will begin their analysis by focusing on whether a person has proven that a challenged discriminatory action was taken because of a personal characteristic--in this case, disability--and not on whether the person has proven the existence of various complicated elements of the characteristic.

Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing on S.1881 Before the S. Comm. on Health, Educ., Labor, and Pensions, 110th Cong. 55 (2007) (statement of Prof. Chai R. Feldblum, Director of Federal Legislation Clinic, Georgetown Law Center).[5]

[5] Further minimizing the relevance of *Bates*, Appellees point out that the private right of action under the ADA is codified at Section 12117(a), which grants a cause of action to "any person alleging discrimination on the basis of disability." Appellees Br. at 23.

Both before and after the 2008 amendments, courts have read the ADA's prohibition on discriminatory standards and tests to focus on the discriminatory *effect* of the qualification standard or test rather than the disability status of the person bringing the claim. *See, e.g.*, *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007) (en banc) (hearing requirement for package drivers "is a *facially discriminatory* qualification standard because it focuses directly on an individual's disabling or potentially disabling condition"); *E.E.O.C. v. UPS Ground Freight, Inc.*, 319 F. Supp. 3d 1237, 1241–43 (D. Kan. 2018) (collective bargaining agreement provision that paid employees disqualified from driving for medical reasons less than those disqualified for nonmedical reasons was a facially discriminatory policy based on disability).

Even if Section 12112(b)(6) required a showing of disability, it would present no barrier to standing to challenge a uniform discriminatory policy. Under the ADA, a person has a disability if she: 1) has an actual disability, defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual;" 2) has a record of such an impairment; or 3) is regarded as having such an impairment. 42 U.S.C. § 12102(1). Union Pacific argues that Plaintiff

Baker has no disability but merely claims to be "regarded as" disabled. Appellant Br. at 25. For purposes of the ADA, however, that is sufficient.

The 2008 amendments also clarified that a person meets the "regarded as" definition of "disability"

> if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

Pub. L. No. 110–325, 122 Stat 3553, 3555 (2008) (codified as amended at 42 U.S.C. § 12102(3)).

Contrary to the hand-wringing of Amici U.S. Chamber of Commerce,[6] the Act's statutory text and history demonstrate that class members do not need to individually prove impairments that substantially limit their major life activities. When challenging an employment policy, it is sufficient to show that the employer regarded employees subject to the policy as disabled, a showing that is susceptible to classwide proof, consistent with the requirements of Rule 23.

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[6] Brief of the Chamber of Commerce of the United States of America, the National Association of Manufacturers & the National Retail Federation as *Amici Curiae* in Support of Appellant ("Chamber Br."), p. 14 n.2.

Here, Union Pacific removed plaintiffs and class members from their jobs in response to reportable health events in accordance with its fitness-for-duty policy. The EEOC has found that precisely this type of treatment demonstrates that a plaintiff was "regarded as" disabled by a covered entity. 29 C.F.R. § 1630.2(l)(1) (2018) (prohibited actions for establishing that a covered entity "regarded" the plaintiff as disabled include "placement on involuntary leave" and "exclusion for failure to meet a qualification standard").

Other ADA class actions and pattern-or-practice cases have analyzed disability under this "regarded as" prong. *See, e.g.*, *Parker v. Crete Carrier Corp.*, 839 F.3d 717, 724 (8th Cir. 2016) (applying "regarded as" definition of disability to employee's challenge of mandatory sleep study for those perceived as having or at risk for sleep apnea); *E.E.O.C. v. Amsted Rail Co., Inc.*, 280 F. Supp. 3d 1141, 1151 (S.D. Ill. 2017) ("Because Amsted has conceded it refused to hire Ingram because it feared he posed a safety risk in light of his prior [carpal tunnel syndrome] diagnosis and corrective surgery, no reasonable jury could fail to find it regarded him as disabled."); *Littlefield v. Nevada, ex. rel. Dep't of Pub. Safety*, 195 F. Supp. 3d 1147, 1154–55 (D. Nev. 2016)

(applicant rejected for position as Nevada Highway Patrol officer because of his monocular vision was "regarded as" having a physical impairment under the ADA); *Monaco v. City of Jacksonville*, 51 F. Supp. 3d 1251, 1261–62 (M.D. Fla. 2014) (holding that employees' claims of "regarded as" disability status, which alleged that city excluded anyone whose pension physical revealed a medical issue from its retirement system, "pertain to a uniform practice and . . . are capable of resolution on a class-wide basis").

There is nothing inconsistent about being an individual with a disability protected by the ADA and asserting disability-based discrimination on a classwide basis, especially when the basis of discrimination is the employer's uniform policy of treating all class members as impaired.

2. Employees who are removed, even temporarily, from their jobs suffer both an adverse employment action and a concrete, particularized injury.

Union Pacific also posits that those class members who were ultimately returned to their jobs, with or without restrictions, after undergoing the fitness-for-duty evaluation did not suffer an adverse employment action and thus lack standing. Appellant Br. at 41–42. The

question of whether a temporary loss of a job is an adverse employment action is a separate inquiry from whether such a job loss is an injury in fact for Article III purposes. Here, the class suffered both.

This Court has held that "an adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007) (quoting *Thomas v. Corwin*, 483 F.3d 516, 528 (8th Cir. 2007)). A complete loss of a job title and responsibilities, even if later reversed without an interruption to pay, certainly meets this standard. The EEOC also considers temporary job interruptions to be adverse employment actions, given their presence on the list of prohibited actions that employers may not take on the basis of a perceived disability. 29 C.F.R. § 1630.2(l)(1).

Even if being held out of a job because of a health condition did not constitute an adverse employment action under the ADA, which it does, it would still constitute an injury in fact for purposes of Article III. Class members experienced humiliation, loss of dignity, and feelings of second-class status when they were told to immediately stop performing the jobs they had been doing successfully and without incident for years

because of a health condition. This is precisely the sort of harm due to "overprotective rules and policies" and "exclusionary qualification standards" that Congress intended to combat when it enacted the ADA. 42 U.S.C. § 12101(a)(5).

Finally, continuing to work at or returning to Union Pacific injures every class member by exposing them to the risk of suffering the policy's effects again following another reportable health event, and the injunction the class seeks will redress that injury. *Spokeo*, 136 S. Ct. at 1549–50 (harm that is "actual or imminent, not conjectural or hypothetical" can constitute concrete injury for Article III purposes (quoting *Lujan*, 504 U.S. at 560)).

C. Former employee class members seeking reinstatement have standing to pursue injunctive relief under the ADA.

Union Pacific cites *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364–65 (2011), for the proposition that former employees lack standing to seek injunctive relief. Appellant Br. at 43. But the Supreme Court's analysis as to the former employees in *Dukes* was limited to back pay, 564 U.S. at 364–65; here, plaintiffs and class members who no longer work for Union Pacific also seek reinstatement. *Harris*, 329 F.R.D. at 628.

Dukes discussed former employees and injunctive relief in reaching its conclusion that claims for monetary relief were not "incidental" and could not be certified under Rule 23(b)(2). 564 U.S. at 364–65. Those concerns do not apply in a hybrid class action like this one, certified under both Rule 23(b)(2) and 23(b)(3), especially when former employees also seek reinstatement. *Chen-Oster v. Goldman, Sachs & Co.*, 251 F. Supp. 3d 579, 587-89 (S.D.N.Y. 2017) (analyzing the limits of *Dukes* and noting that while the plaintiffs pled claims for reinstatement, those claims fell outside the questions on which the Supreme Court granted certiorari).

This Court has also recognized that claims for reinstatement confer standing on former employees to seek injunctive relief. *True v. Nebraska*, 612 F.3d 676, 679 (8th Cir. 2010) (former employee seeking reinstatement had standing to pursue injunctive relief under 42 U.S.C. § 1983). Nothing in the ADA commands a different result. No special, class-defeating rules apply.

III. *Hohider v. United Parcel Service* should not govern the Court's review of class certification in the present appeal.

Finally, Union Pacific challenges certification because "certifying the class under the Title VII *Teamsters* framework . . . reliev[es] plaintiffs of their burden to prove the statutory elements of their ADA claims, while simultaneously denying Union Pacific its right to present individual defenses." Appellant Br. at 6. This argument relies primarily on the Third Circuit's decision in *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009). *Hohider* concluded that the district court erred in applying the evidentiary framework set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), to certify a class of employees challenging a company policy that denied accommodation to employees returning to work with medical restrictions. *Id.* at 172, 177. The Court should not rely on this out-of-circuit decision because it is distinguishable from the present case and wrongly decided.

A. *Hohider* analyzed a materially different set of legal claims and underlying facts.

Hohider is not relevant to the Court's analysis because it differs from the present appeal in material ways. Appellees described the differences

in the statutory language of Section 12112(b)(5), the reasonable accommodations provision at issue in *Hohider*, and that of Section 12112(b)(6), the prohibition on unlawful standards and tests at issue here. Appellees Br. at 47–48. However, there are at least two other distinctions that are worthy of note.

First, the *Hohider* class was made up of employees seeking to return to work with medical restrictions, whereas the *Harris* class alleges that they were removed from work after disclosing certain health conditions as required by Union Pacific's fitness-for-duty program. *Compare Hohider*, 574 F.3d at 172 *with Harris*, 329 F.R.D. at 620. The *Hohider* panel concluded that determining liability would require individualized assessments of each class members' ability to perform their job duties to determine whether UPS's actions were unlawful. *Hohider*, 574 F.3d at 192. In contrast, each Union Pacific employee was performing the essential functions of his or her job at the time of the adverse employment action, so no additional showing of their ability to perform their jobs, either with or without accommodation, should be required. *Harris*, 329 F.R.D. at 620.

Second, the *Hohider* plaintiffs challenged an informal, unwritten policy, whereas the *Harris* plaintiffs challenge a formal, written policy implemented by a central decisionmaker. *Compare Hohider*, 574 F.3d at 172 *with Harris,* 329 F.R.D. at 620. The lawfulness of Union Pacific's policy as written and implemented would be a foundational question in every single case brought by a class member. Resolving this question one time for the entire class is the precise purpose of Rule 23.

B. *Hohider* wrongly precluded class certification of ADA pattern-or-practice claims.

The *Hohider* panel erred in at least two ways when it reversed class certification. First, it conflated Rule 23 and *Teamsters*, resulting in a reversal of class certification based primarily on *Teamsters*, a non-class government action. Second, the panel overreached to the extent that it implied an individualized analysis of qualification is necessary for all claims of discrimination under the ADA, even those beyond the reasonable accommodations claim before it. Both of these errors are significant and should not be adopted by this Court.

1. *Hohider* failed to analyze the requirements of Rule 23.

In *Hohider*, the district court certified the class under Rule 23(b)(2) to seek appropriate equitable relief, including injunctive and

declaratory relief and incidental monetary damages. *Hohider*, 574 F.3d at 174–75. In reversing the district court's certification order, the *Hohider* panel focused on the district court's determination that the claims could be tried under "the '*Teamsters* framework,'" rather than any analysis of the Rule 23 factors. *Id.* at 176–77.

Rule 23 defines the class certification requirements, but *Hohider* hardly discusses Rule 23. It says only that the district court abused its discretion in certifying the class because "in this case the ADA's 'qualified' standard cannot be evaluated on a classwide basis in a manner consistent with Rule 23(a) and (b)(2)." *Id.* at 196.

The *Hohider* panel never states which provisions of Rule 23(a) the class failed to meet or how it failed to meet them. In a conclusory fashion, it reversed the district court's rulings that (1) the class satisfied numerosity and joinder was impracticable; (2) commonality was met as to the challenged policy and select other claims; and (3) the named plaintiffs were both typical and adequate. *Id.*; *id.* at 173–75. The *Hohider* decision does not provide any analysis of Rule 23(a) that could guide this Court.

The *Hohider* panel's contention that the ADA's "qualified" language requires an individualized inquiry that renders the class ineligible for certification under Rule 23(b)(2) also is incorrect. Rule 23(b)(2) requires a showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Section (b)(2) focuses on the actions of the *defendant* and is intended to address instances in which "a party is charged with discriminating unlawfully against a class." Fed. R. Civ. P. 23(b)(2), Advisory Comm. Note; *see also Amchem*, 521 U.S. at 614 ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of Rule 23(b)(2) cases]."). In *Hohider*, the class challenged a class-wide policy and sought class-wide injunctive relief. Nonetheless, the panel reversed the certification order, making no attempt to explain how the certified class's allegations failed to meet the requirements of Rule 23(b)(2).

Hohider lacks a meaningful analysis of how the class failed to meet the requirements of Rule 23 and therefore does little to assist this Court.

2. *Hohider* drew faulty distinctions between Title VII and the ADA.

The *Hohider* panel reversed class certification in part because it erroneously interpreted the ADA's protection of "qualified individuals" to mean that qualification should be individually proven *before* classwide liability can be established. The panel distinguished *Teamsters* and related cases by asserting that "[t]he ADA and Title VII, by their plain language, do not treat the qualification inquiry equivalently in their respective statutory schemes" because Title VII "does not speak to qualification." 574 F.3d at 190. In reaching this conclusion, the panel painted with an overly broad brush, erroneously suggesting that the ADA requires an individualized showing of qualification in all instances, such that no class action alleging unlawful discrimination under the ADA could ever be maintained.

To the contrary, nothing in the ADA implicitly or explicitly hinders the ability of plaintiffs to meet the requirements of Rule 23. Only the criteria set forth in Rule 23 determine when a class action may be maintained. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) ("By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to

pursue his claim as a class action."). Absent explicit language overriding Rule 23, a statute cannot impose additional requirements or define whether a case is eligible for class action status. *Id.* at 399–401.

Not only does the ADA lack explicit language precluding Rule 23 certification, it has been interpreted consistently with Title VII, which has a rich history of class actions that challenge a pattern or practice of discrimination. To the extent *Hohider* can be read to the contrary, it does not assist the Court and should be disregarded.

a. Title VII and the ADA both require individual plaintiffs to prove they are qualified.

The *Hohider* panel distinguished Title VII and the ADA on the ground that the ADA requires a showing of qualification, while Title VII does not. This distinction is wrong.

Although the plain language of Title VII does not include the word "qualified," the Supreme Court has interpreted the statute to require a showing of qualification or adequate job performance to establish a prima facie case of discrimination where plaintiffs lack direct evidence

of discrimination.[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This Court has restated the *McDonnell Douglas* standard as follows:

> To establish a prima facie case [of discrimination], [the plaintiff] must show (1) he is a member of a protected class, (2) *he met his employer's legitimate expectations*, (3) he suffered an adverse employment action, and (4) the circumstances give rise to an inference of discrimination (for example, similarly situated employees outside the protected class were treated differently).

Lake v. Yellow Transp, Inc., 596 F.3d 871, 874 (8th Cir. 2010) (emphasis added). *See also id.* ("Lake establishes his prima facie case if, setting aside [his challenged termination] he was *otherwise* meeting expectations or *otherwise* qualified."). Title VII does require a plaintiff to establish his or her qualifications. Amici U.S. Chamber of Commerce, *et al.*, are therefore wrong to claim that "a victim of racial

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[7] Title VII provides:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a)(1).

discrimination need not prove his job qualifications to be protected by Title VII." Chamber Br. at 13.

This Court expressly adopted the Title VII *McDonnell Douglas* burden-shifting framework for employment discrimination claims brought under the ADA.[8] *E.E.O.C. v. Prod. Fabricators, Inc.*, 763 F.3d 963, 969 (8th Cir. 2014). In *Product Fabricators*, the Court wrote:

> Pursuant to the ADA, to establish a discrimination claim, an employee must satisfy the *McDonnell Douglas* analysis and show that he (1) is disabled within the meaning of the ADA, (2) is a qualified individual under the ADA, and (3) has suffered an adverse employment action because of his disability.

Id. (punctuation and quotation omitted). Under the ADA, a "qualified" employee is one who can perform the essential functions of his or her position. 42 U.S.C. § 12111(8).

Regardless of the presence or absence of the word "qualified" in the respective statutes, both statutes require individual plaintiffs to show

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[8] The ADA's "General [R]ule" provides:

> 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).

that they are "qualified" to carry their initial burden of proving unlawful discrimination.

b. Pattern-or-practice claims use a different order of proof that is well suited to class treatment under Rule 23.

The Supreme Court has recognized for over forty years that plaintiffs challenging a *pattern or practice* of discrimination under Title VII bear a different burden than individuals challenging discrimination under the *McDonnell Douglas* burden-shifting framework. Pattern-or-practice claimants must "demonstrat[e] the existence of a discriminatory … pattern and practice." *Franks*, 424 U.S. at 751–52, 772–73. The burden then shifts to the employer to prove that each class member who seeks relief was not a victim of discrimination, which could include demonstrating that an employee was not qualified for the position at issue. *Id.* at 722–73.

Shortly after *Franks*, in *Teamsters*, the defendant company and union made the very same argument that Union Pacific makes here: "The company and union seize upon the McDonnell Douglas pattern as the only means of establishing a prima facie case of individual discrimination," meaning that the individual prima facie elements had

to be proven in order to establish liability, even when challenging a pattern or practice of discrimination. 431 U.S. at 358. The Court disagreed:

> The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Id. It cited *Franks* approvingly as an example of "*another* means by which a Title VII plaintiff's initial burden of proof can be met" where the class alleges "a broad-based policy of employment discrimination." *Id.* at 359 (emphasis added). *See also Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) ("The inquiry regarding an individual's claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will . . . be on . . . a pattern of discriminatory decisionmaking." (quotation omitted)). *Franks*, *Teamsters*, and *Cooper* apply with equal weight under the ADA because Congress incorporated the full scope of Title VII's enforcement mechanisms into the Act. 42 U.S.C. § 12117(a).

So, in a pattern-or-practice claim under *either* Title VII or the ADA, the focus of the first stage is whether the defendant engaged in a pattern or practice of discrimination. This question is perfectly suited to resolution on a classwide basis. An individual class member's entitlement to relief becomes relevant only if liability is established.

Several appellate and district courts have applied the *Teamsters* pattern-or-practice framework to ADA discrimination claims. *See, e.g.*, *Davoll v. Webb*, 194 F.3d 1116, 1148 (10th Cir. 1999) ("*Teamsters* sets forth a logical and efficient framework for allocating burdens of proof in pattern and practice employment discrimination suits, and we approve of the district court's use of that framework in this [ADA] case."); *E.E.O.C. v. Murray, Inc.*, 175 F. Supp. 2d 1053, 1059–60 (M.D. Tenn. 2001) (in case challenging discriminatory medical screening policy, "the EEOC is not required to prove that any individual job applicants or employees of Murray were qualified individuals with disabilities during the liability phase of the litigation"); *United States v. Morvant*, 843 F. Supp. 1092, 1094, 1096 (E.D. La. 1994) (pattern-or-practice claim by Department of Justice under Title III of ADA against dentist for refusing to treat HIV-positive patients).

The *Hohider* panel disregarded the reasoning of its sister circuits and other courts in a confusing exercise of mental gymnastics:

> In contrast to Title VII, [the ADA] does not prohibit discrimination against *any individual* on the basis of disability, but, as a general rule, only protects from discrimination those disabled individuals who are able to perform, with or without reasonable accommodation, the essential functions of the job they hold or desire.

574 F.3d at 191. *McDonnell Douglas* demonstrates that this sentence could easily be rewritten: "[Title VII] does not prohibit discrimination against *any individual* on the basis of [race], but, as a general rule, only protects from discrimination those [minority] individuals who are able to perform . . . the essential functions of the job they hold or desire." *See* 411 U.S. at 802. Both Title VII and the ADA make it unlawful to discriminate against qualified protected applicants.

Courts have universally concluded that "qualification" is a key factor in individual Title VII discrimination cases, one that a plaintiff must prove in order to show that the adverse employment action was the result of unlawful discrimination and not poor job performance. The presence of the "qualified" factor did not hinder the Supreme Court's conclusion that claims of systemic pattern-or-practice discrimination

could be substantiated with proof of "a pattern of discriminatory decisionmaking" brought on a classwide basis. *Cooper*, 467 U.S. at 876.

For all of the foregoing reasons, *Hohider* is distinguishable, wrongly decided, and should not inform the Court's analysis.

CONCLUSION

For all the foregoing reasons, Amici respectfully urge the Court to affirm the district court's order granting class certification.

Respectfully submitted,

/s/ Karla Gilbride

KARLA GILBRIDE
PUBLIC JUSTICE, P.C.
1620 L Street, NW Suite 630
Washington, DC 20036
(202) 797-8600

LINDSAY NAKO
DANIEL NESBIT
IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
(510) 845-3473

Counsel for Amici Curiae

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I hereby certify that:

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June 28, 2019

/s/ Karla Gilbride
Karla Gilbride

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I hereby certify that on June 28, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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