No. 18-15662

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUNNY ANTHONY,

Plaintiff-Appellant,

v.

TRAX INTERNATIONAL CORP.,

Defendant-Appellee.

On Appeal from the United States District Court for Arizona, Tucson, Hon. Eileen. S. Willett, Magistrate Judge (Case No. 2:16-cv-02602-ESW)

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE AND IN FAVOR OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that the Chamber of Commerce of the United States of America is not a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

Dated: October 23, 2018

s/ Joseph R. Palmore
Joseph R. Palmore

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and every region of the country.

An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs on issues of concern to the business community. This is one such case. Because nearly every business acts as an employer in some capacity, the Chamber's members have a keen interest in seeing this Court properly apply employment discrimination laws, like the Americans with Disabilities Act of 1990 (ADA), according to their terms.

The Chamber and the business community also have a particular interest in the interpretive principles applied to federal regulations. Given the breadth of government regulations, virtually every Chamber member has at least some portion of its business regulated by federal agencies, including the Equal Employment

[1] Pursuant to Appellate Rule 29(a)(4)(E), amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties were timely notified of amicus's intent to file this brief and consented to its filing.

Opportunity Commission (EEOC). These businesses have a strong interest in proper application of judicial deference doctrines like the one articulated in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff in this case, Sunny Anthony, admits she was never qualified to work as a technical writer for defendant Trax International Corporation. She has no bachelor's degree—a mandatory requirement for her former job. Summary judgment was warranted on that ground alone because the ADA permits only "qualified individuals" to recover for employment discrimination.

According to Anthony and the EEOC, however, the Court must ignore her inability to satisfy the basic qualifications of the Technical Writer I position because Anthony successfully concealed her inadequate credentials while employed by Trax. That contention has no basis in the ADA's text, history, or structure, and the district court correctly rejected it. Employers should not be subject to the burdens of defending an ADA claim at trial when plaintiffs cannot establish an essential element of their discrimination claims—*i.e.*, that they were "qualified."

To avoid the plain terms of the statute, the EEOC's amicus brief erroneously asks the Court to defer to its litigation attorneys' reading of an EEOC regulation.

But the regulated public is entitled to fair notice of what the law requires. The EEOC's approach would deprive employers of that notice by elevating an agency's position in litigation over the plain text of both the statute and the implementing regulation. That regulation defines a "qualified individual" as someone who "[1] satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, *and*, [2] with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m) (emphasis and numbering added); *see* 29 C.F.R. Pt. 1630, App. to § 1630.2(m) (insisting that this determination "be made in two steps," the first of which must be "to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.").

But the EEOC now asserts that its regulation's "so-called 'two-step' test" does not apply "in all cases," and that courts should *not* consider the "skill, experience, education" requirement at all unless an employee's qualifications are sufficiently "relevant" to the employer's motivation. EEOC Br. 11, 23. No regulation could overcome the plain statutory text. And this is not an interpretation of the regulation; it is a wholesale revision of it. If the EEOC no longer supports its own regulation, it can try to change it through notice-and-comment rulemaking. But the agency cannot amend the rule in an amicus brief and then demand

deference for that litigation position. The EEOC's attempt to do so here well illustrates the vice of deference to agency interpretations of regulations.

ARGUMENT

I. PLAINTIFF'S ADA CLAIM FAILS AS A MATTER OF LAW BECAUSE SHE WAS NEVER A "QUALIFIED INDIVIDUAL"

A. Plaintiff Is Not A "Qualified Individual" Because She Lacks The Education Needed For The Technical Writer I Position

Plaintiff's suit fails for the simple reason that she cannot satisfy an essential element of her claim—namely, she is not and never was a "qualified individual" under the ADA.

1. The ADA's text and history show the centrality of the "qualified individual" limitation

Title I of the ADA protects only qualified individuals: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . employment." 42 U.S.C. § 12112(a). As this Court has recognized, "[t]he term 'qualified' limits the protection of Title I of the Act." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir. 2000). The statute defines a "qualified individual" as someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

Title I of the ADA thus protects a narrower class of persons than do other statutes addressing employment discrimination. The Age Discrimination in

Employment Act (ADEA), for example, bars employers from discriminating "against *any* individual . . . because of such individual's age." 29 U.S.C. § 623(a) (emphasis added). Title VII of the Civil Rights Act likewise prohibits discrimination "against *any* individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added). Even other provisions of the ADA (*e.g.*, those prohibiting retaliation) apply broadly to "*any* individual." 42 U.S.C. § 12203(a) (emphasis added).

But to bring a discrimination claim under the ADA, "an employee bears the ultimate burden of proving that [she] is (1) disabled under the Act, (2) a 'qualified individual with a disability,' and (3) discriminated against 'because of' the disability." *Bates v. UPS, Inc.*, 511 F.3d 974, 988 (9th Cir. 2007) (en banc). Unless plaintiffs establish both qualification and disability, courts need not analyze employers' reasons for terminating them. *See Johnson v. Bd. of Trustees of Boundary Sch. Dist.*, 666 F.3d 561, 562-67 (9th Cir. 2011). Under the ADA, someone who is not qualified for a job simply has no right to demand the job.

Congress intentionally limited Title I of the ADA to "qualified individuals" so that it would more closely resemble its statutory predecessor, the Rehabilitation Act of 1973. When the ADA was enacted, the Rehabilitation Act prohibited government agencies from excluding an "otherwise qualified individual . . . solely by reason of his or her handicap." 29 U.S.C. § 794(a) (1988 ed.). The

Rehabilitation Act's regulations defined "[q]ualified handicapped person" as one who, among other things, "[m]eets the experience and/or education requirements (which may include passing a written test) of the position in question." 29 C.F.R. § 1613.702(f) (July 1, 1990 ed.). The ADA's legislative history reveals that Congress modeled Title I's "qualified individual" limitation after "the definition used in regulations implementing section 501 and section 504 of the Rehabilitation Act." H.R. Rep. No. 101-485, pt. 2, at 328 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337. Congress did so "to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers." *Id.*

Consistent with Congress's intent, the EEOC's regulations implementing the ADA have, for more than twenty-five years, defined "qualified individual" as a person who "[1] satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and, [2] with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m); *see* 56 Fed. Reg. 8579 (Feb. 28, 1991) ("As directed by the legislative history, the regulations are modeled on those implementing section 504 of the Rehabilitation Act."). As the EEOC has explained, the "first step" in the "qualified individual" analysis "is to determine if the individual satisfies the prerequisites for the position, such as

possessing the appropriate educational background, employment experience, skills, licenses, etc." 29 C.F.R. Pt. 1630, App. to § 1630.2(m).

2. Plaintiff was never qualified for the Technical Writer I position because she lacks a bachelor's degree

This Court analyzes the "qualified individual" requirement under the EEOC's longstanding two-step framework. "The court first examines whether the individual satisfies the 'requisite skill, experience, education and other job-related requirements' of the position. The court then considers whether the individual 'can perform the essential functions of such position' with or without a reasonable accommodation." *Bates*, 511 F.3d at 990. In other words, "unless a disabled individual independently satisfies the job prerequisites, she is not 'otherwise qualified,' and the employer is not obligated to furnish any reasonable accommodation." *Johnson*, 666 F.3d at 565-66 (holding former teacher was not a "qualified individual" as she lacked the requisite teaching credentials).

Plaintiff here is not a "qualified individual" and thus cannot assert an ADA claim—regardless of Trax's reasons for firing her. As the district court recognized, "the employment application for the Technical Writer I position stated that it is a mandatory requirement that the applicant possess a bachelor's degree." ER5. Plaintiff admits that she has never held a bachelor's degree, despite stating on her application that she did. ER6. Even aside from plaintiff's incorrect statement, her admitted failure to satisfy a basic job-related requirement of the

Technical Writer I position confirms that she was never a "qualified individual" under the ADA. ER6-ER7.

B. Plaintiff's Contrary Arguments Lack Merit

The district court applied this straightforward logic and correctly granted summary judgment to Trax. Neither plaintiff nor the EEOC has offered this Court any sound reason to reverse and require a trial on ADA claims brought by an individual who admittedly was never qualified.

1. McKennon*'s after-acquired evidence rule does not apply to the ADA's qualified individual requirement*

Plaintiff contends that the district court erred by relying on "after-acquired evidence"—her admission during discovery that she never satisfied the prerequisite of having a bachelor's degree. Br. 11-21. According to plaintiff, the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), "forbids a defendant from introducing facts that were unknown at the time of hiring or termination in order to escape liability for discrimination." Br. 12.

Plaintiff's reliance on *McKennon* is misplaced. The Court held in *McKennon* that "after-acquired evidence of wrongdoing" by an employee could not be used to show that the employer had acted with nondiscriminatory motives under the ADEA. 513 U.S. at 356. Because an "employer could not have been motivated by knowledge it did not have," and because the employee's "misconduct was not discovered until after she had been fired," the Court held that the employer

could not claim the plaintiff "was fired for the nondiscriminatory reason." *Id.* at 359-61.

McKennon is inapposite. Most obviously, that case involved the ADEA, which unlike the ADA covers "*any* individual," such that an ADEA claimant's "qualifications are irrelevant to the existence of the prima facie case of discrimination." *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996). The opposite is true here: "An ADA plaintiff bears the burden of proving that she is a 'qualified individual.'" *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999); *see Johnson*, 666 F.3d at 564 (requiring plaintiff to "show that she was 'qualified' at the time of the alleged discrimination").

Unlike the discriminatory intent issue presented in *McKennon*, a plaintiff's ability to prove that she is a "qualified individual" under the ADA "has nothing to do with the motivation behind her employer's action." *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998). It turns instead on objective considerations: "skill, experience, [and] education." 29 C.F.R. § 1630.2(m). Individuals possessing the requisite credentials are qualified; individuals lacking those credentials are not. *Id.* An employer's mental state is irrelevant because, unless the plaintiff "first has established a *prima facie* case that he was qualified for the job," an employer "has no obligation even to articulate a legitimate business reason for its decision." *McNemar v. Disney Store,*

Inc., 91 F.3d 610, 621 (3d Cir. 1996), *abrogated on other grounds by Cleveland* 526 U.S. 795 (1999).

2. Plaintiff's overbroad misreading of McKennon *conflicts with precedents of this Court and its sister circuits*

Plaintiff's misreading of *McKennon* contravenes the decisions of this Court and its sister circuits. Consider for example this Court's precedents applying the ADA's statutory predecessor, the Rehabilitation Act. In that context, this Court has made clear that the analytically distinct issues of "qualification" and "motive" are not governed by the same standards. *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).[2] While evidence obtained during litigation cannot be "admitted as an after-the-fact effort to demonstrate a nondiscriminatory motive," such "post-decision evidence" *is* "admissible to rebut the appellant's claim that she was qualified for the position." *Id.* And that is true even after *McKennon*. As the Second Circuit has held, "the rule announced in *McKennon* has no application"

[2] Although *Mantolete* was later called into question by the non-precedential decision in *Junot v. Maricopa County*, 67 F.3d 307 (Table) (9th Cir. 1995), this Court has continued to cite *Mantolete* or follow the same approach after *Junot*. *See, e.g.*, *Lau v. Gonzales*, 146 F. App'x 866, 867 (9th Cir. 2005) (citing *Mantolete* in rejecting Rehabilitation Act claim); *Graham v. Connie's Inc.*, 173 F.3d 860, 1999 WL 173633, at *1 (9th Cir. 1999) ("[I]n the almost five months Connie's employed Graham, unbeknownst to Connie's, he had never had a valid medical certificate or waiver. Because a valid Class A CDL was a prerequisite qualification for Graham's job, Graham was not 'qualified.'").

where "after-acquired evidence" is used to show plaintiffs are not "'otherwise qualified.'" *Teahan v. Metro-N. Commuter R.R. Co.*, 80 F.3d 50, 55 (1996).

The same rule should apply to the ADA, particularly given its close textual and historical connection to the Rehabilitation Act. *See supra* pp. 4-6. As this Court has recognized, "Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA." *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995). It would thus make little sense, and flout time-honored principles of statutory construction, to fashion different rules for the same language in the two statutes. *See United States v. Freeman*, 44 U.S. 556, 564 (1845) ("[A]ll acts *in pari materia* are to be taken together."); *Branch v. Smith*, 538 U.S. 254, 281 (2003) (Scalia, J., plurality op.) (describing this as "the most rudimentary rule of statutory construction").

The Court should also decline plaintiff's invitation to disregard precedential decisions of other courts. The Fifth Circuit, for example, has permitted use of "after-acquired evidence" to show that a plaintiff was "not a qualified person" under the ADA. *McConathy*, 131 F.3d at 562-63 ("*McKennon* involves the use of after-acquired evidence for a different reason than here, and is therefore not on point."). The Third Circuit also has held that *McKennon* does not preclude use of "after-acquired evidence" when determining a plaintiff's "status as a qualified individual." *McNemar*, 91 F.3d at 620-21 (rejecting EEOC's contrary reading of

McKennon). Relatedly, the Sixth Circuit has held that courts may consider "after-acquired evidence" in determining whether a plaintiff suffers from a "serious health condition" under the Family and Medical Leave Act of 1993. *Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109, 1112 (1997) (reasoning that *McKennon*'s rule applies to "the employer's motive" but does not apply to "the objective existence of a serious health condition").

In arguing for a different rule, Plaintiff mistakenly relies on *Bowers v. NCAA*, 475 F.3d 524 (3d Cir. 2007). Yet *Bowers* did not involve a plaintiff (like Anthony) who indisputably lacked the necessary qualifications *at the time of the alleged discrimination*. Rather, the after-acquired evidence in *Bowers* was "inconclusive" as to whether the plaintiff was qualified during the relevant period. 475 F.3d at 535-37. The evidence there showed only that the plaintiff committed disqualifying acts years *after* the alleged discrimination, "at which point Bowers' [conduct] was irrelevant for purposes of establishing liability." *Id.* *Bowers* is thus inapposite because Anthony indisputably was *never* a qualified individual under the ADA—not now, not when she was hired, and not when she was discharged.

II. THIS COURT SHOULD REJECT THE EEOC'S ATEXTUAL MISREADING OF SECTION 1630.2'S UNAMBIGUOUS "QUALIFIED INDIVIDUAL" STANDARD

As discussed, the EEOC's regulations implementing the ADA have, for more than a quarter of a century, required satisfaction of a two-part test for

someone to be a "qualified individual." 29 C.F.R. § 1630.2(m). This Court, as well as every other circuit to address the issue, has long followed that two-part test without qualification. *Bates*, 511 F.3d at 990.[3]

Yet the EEOC now argues as amicus curiae that the plain terms of its regulation and "the so-called 'two-step' test" do not apply "in all cases." EEOC Br. 11, 23. The EEOC instead asserts that Section 1630.2(m)'s "skill, experience, education" requirement is merely an "extra step" that "should apply only where particular qualifications are relevant to the employer's decision-making." *Id.* at 23. According to the EEOC (at 24), this new position "is entitled to deference" under *Auer v. Robbins*, 519 U.S. 452 (1997).

The EEOC's argument fails at every turn. "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). It does not compel deference to the creation of ambiguity, nor does it countenance an agency's ad hoc rewriting of a regulation. *Id.* (holding that agencies may not, "under the guise of interpreting a regulation,"

[3] *See, e.g.*, *Kilcrease v. Domenico Transp. Co.*, 828 F.3d 1214 (10th Cir. 2016); *Jarvela v. Crete Carrier Corp.*, 776 F.3d 822 (11th Cir. 2015); *McBride v. BIC Consumer Prod. Mfg. Co.*, 583 F.3d 92 (2d Cir. 2009); *Hohider v. UPS, Inc.*, 574 F.3d 169 (3d Cir. 2009); *Mulloy v. Acushnet Co.*, 460 F.3d 141 (1st Cir. 2006); *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040 (8th Cir. 2005); *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247 (6th Cir. 2000); *Bay v. Cassens Transp. Co.*, 212 F.3d 969 (7th Cir. 2000); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997).

"create *de facto* a new regulation"). Even when ambiguity exists, courts afford no deference to agency interpretations that are "plainly erroneous or inconsistent with the regulation." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quotations omitted). After all, "[i]t is axiomatic that an agency must adhere to its own regulations." *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (Scalia, J.).

Because of these principles, the EEOC's position here merits no deference. This Court's decision in *Johnson* is instructive. There, a teacher whose certificate had lapsed alleged that the school board violated the ADA by firing her without providing a "reasonable accommodation" (*i.e.*, allowing her to teach without the required credentials). *Johnson*, 666 F.3d at 562-64. The school board argued that no such accommodation was required because, without a valid teaching certificate, the plaintiff was "unqualified pursuant to the first step of the two-step qualification inquiry." *Id.* at 565-66. The EEOC filed an amicus brief arguing that, regardless of the regulation's text, courts must consider whether a plaintiff could *become* "qualified" with "reasonable accommodation" "under the first step of the qualification inquiry." *Id.* This Court rejected the EEOC's interpretation as being "at odds with the plain text of the regulation." *Id.* at 566 n.7. Because Section 1630.2(m) expressly mentions "reasonable accommodation" under the second step of the test, but not the first, this Court held that "such omission was

deliberate." *Id.* at 565-66 & n.7. The EEOC could not engraft that provision onto the first step of the test through a "litigation position." *Id.*

The same logic applies here. The EEOC's effort to revise the "qualified individual" test in this case (like its attempt in *Johnson*) is flatly inconsistent with Section 1630.2(m)'s plain text and thus warrants no deference. The regulation states that a "qualified" individual is one who above all else "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires." 29 C.F.R. § 1630.2(m). That language is plain, categorical, and easily understood. It provides no exception for admittedly unqualified individuals (like Anthony) who obtained employment through "resume fraud." *Contra* EEOC Br. 17-27.

Tellingly, the EEOC never suggests that Section 1630.2(m) is ambiguous or that it contains interpretive gaps requiring agency resolution. The agency simply ignores the threshold issue of ambiguity, which is reason enough to reject its atextual position. *In re Estate of Covington*, 450 F.3d 917, 922 (9th Cir. 2006) ("The text of § 4.232 is plain; we need not defer to the agency's interpretation."). Even so, the EEOC demands deference for its new interpretation, asserting that the district court should have somehow divined that "the two-step test applies only where the individual's credentials are relevant to the employer's decision-making." EEOC Br. 24-25. According to the EEOC (at 25), employers are subject to ADA

liability "even though the employee would be unable to show that she satisfied the employer's 'job-related requirements' when challenging the adverse action."

But that simply reads the first step out of Section 1630.2(m)'s two-part test, and the EEOC makes no attempt to explain how its atextual position derives from the regulation's language (or, for that matter, the statute the regulation interprets). Nor could it. Section 1630.2(m) cannot plausibly be read to suggest (as the EEOC does) that an individual can be "qualified" even if she *lacks* "the requisite skill, experience, education and other job-related requirements of the employment position." 29 C.F.R. § 1630.2(m). That is not an interpretation of the rule; it is a rewriting of it. *Auer* deference does not apply in such circumstances. *Christensen*, 529 U.S. at 588 (rejecting agency interpretation contrary to "regulation's obvious meaning"); *see Hines v. United States*, 60 F.3d 1442, 1450 (9th Cir. 1995) (rejecting agency reading "inconsistent with the language of the instruction"), *abrogated on other grounds by United States v. Olson*, 546 U.S. 43 (2005).

To make matters worse, the EEOC's new position upends settled reliance interests and cannot be reconciled with the agency's past pronouncements. The EEOC's interpretive guidance for example makes clear that "[t]he determination of whether an individual with a disability is 'qualified' should be made in *two steps*." 29 C.F.R. § Pt. 1630, App. (emphasis added); *cf.* EEOC Br. 11 (now disparaging the "*so-called* two-step test" (emphasis added)). Likewise, the EEOC's past

decisions and amicus briefs—including its brief in *Johnson*—stated unequivocally that "the EEOC applies a *two-step process* to determine whether an individual with a disability is 'qualified.'" Brief for the United States and EEOC as Amici Curiae, *Johnson v. Bd. Of Trustees Boundary Cty. Sch. District*, No. 10-35233, 2010 WL 5162539, at *4 (9th Cir.) (emphasis added).[4] Many judicial decisions have relied on these agency pronouncements as well: "The EEOC regulations divide this inquiry into *two parts*." *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002) (emphasis added).[5]

That the EEOC's new approach abruptly departs from the settled understanding of Section 1630.2(m) confirms that no deference is warranted. *Christopher*, 567 U.S. at 155-56 (cautioning courts not to defer "when the agency's interpretation conflicts with a prior interpretation"). As this Court and the Supreme Court have held, courts need not defer to agency interpretations "that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v.*

[4] *See Spitznagel v. Runyon*, EEOC Pet. No. 03960103, 1997 WL 314753, at *8 (June 6, 1997) ("The Interpretive Guidance suggests that determining whether an individual is qualified should be made in two steps."); *see* Brief of EEOC as Amicus Curiae, *Waddell v. Valley Forge Dental Assocs., Inc.*, No. 00-14896, 2000 WL 34013283 (11th Cir.) (same).

[5] *See, e.g.*, *Reed v. Heil Co.*, 206 F.3d 1055, 1062 (11th Cir. 2000) ("Determining whether an individual is 'qualified' for a job is a two-step process."); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999) ("This inquiry has two prongs."); *Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1059 (7th Cir. 1998) ("When a plaintiff satisfies both steps in this definition, he is a 'qualified individual with a disability.'").

Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988); *see Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) (rejecting agency interpretation never before articulated "in any legally-binding regulation or in any official agency interpretation of the regulation"); *Covington*, 450 F.3d at 922 (rejecting agency interpretation that was "not even supported by its own Interior Board of Indian Appeals' ('IBIA') case law"). The Court should follow the same course here.

III. *AUER*'S CONTINUED VALIDITY IS IN DOUBT

The EEOC's invocation of *Auer* deference is not only wrong for the reasons discussed above, it also demonstrates why "*Auer*'s continued vitality is a matter of considerable debate." *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 742 n.1 (9th Cir. 2017) (Callahan, J., dissenting in part); *see M.R. v. Dreyfus*, 697 F.3d 706, 716 n.13 (9th Cir. 2012) (Bea, J., dissenting from denial of rehearing en banc) (same). That debate soon may end given the emerging consensus that *Auer* "is 'on its last gasp.'" *Garco Const., Inc. v. Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from the denial of certiorari).

The Chamber recognizes that this Court is bound by *Auer* and other decisions of the Supreme Court. That does not change the outcome here—as explained above, the EEOC's "interpretation" of its regulation fails even under *Auer*. *See supra* pp. 13-18. But it bears emphasis that this case is a poster child for

all that is wrong with *Auer* deference. The agency is effectively attempting to rewrite its regulation through litigation. That deprives regulated entities of fair notice and absolves courts of their fundamental responsibility to interpret the laws and thereby provide an important check on the political branches.

A. *Auer* Harms Employers By Increasing Regulatory Uncertainty

Auer deference harms regulated parties by encouraging agencies to adopt vague regulations that they can later modify, and *re*modify, informally without public input or procedural safeguards. *Christopher*, 567 U.S. at 158. By circumventing the notice-and-comment process, *Auer* undermines the important, stabilizing function of the APA's procedures and renders employers unable to ascertain the precise contours of the regulatory landscape. *Id.* (explaining how *Auer* "'frustrat[es] the notice and predictability purposes of rulemaking'").

Indeed, employers cannot sensibly determine *ex ante* the legality of their actions when agencies promulgate textually malleable regulations that they are then free to revise at will. *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). As Justice Thomas and others have observed, "[b]y enabling an agency to enact vague rules and then to invoke [*Auer*] to do what it pleases in later litigation, the agency (with the judicial branch as its co-conspirator) frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *United Student Aid Funds, Inc. v. Bible*, 136 S.

Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (quotations omitted); *see Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part) (recognizing this as one of many "substantial reasons why the [*Auer*] doctrine may be incorrect"); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring) (same).

This case presents an even more extreme situation because the regulation in question is not vague or malleable; it clearly refutes the agency's current position. Either way, *Auer* impermissibly "results in an accumulation of governmental powers by allowing the same agency that promulgated a regulation to change the meaning of that regulation at its discretion." *Garco*, 138 S. Ct. at 1052-53 (quotations, brackets omitted).

The Justices' concerns about *Auer* are well-founded. When agencies engage in notice-and-comment rulemaking, they publish proposed rules in the Federal Register and consider the views of interested parties. 5 U.S.C. § 553(b). That process promotes "fairness" and "informed administrative decisionmaking" by allowing agencies to impose new regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). But agency revisions asserted outside that process can easily go unnoticed and unchallenged. The *Auer* doctrine has thus created a world in which regulated entities cannot fully apprehend the liability regimes in which they

operate without attempting continuously to monitor court dockets, amicus briefs, agency websites, and enforcement letters sent to other companies.

Indeed, this case exemplifies why the APA requires notice-and-comment rulemaking before agencies alter substantive regulations. Rather than publish a proposed revision to Section 1630.2(m)'s mandatory two-step test in the Federal Register, EEOC's litigation counsel instead simply asserts that revision in an amicus brief. This short cut deprives employers of any opportunity to have their voices heard and deprives the agency of valuable input from interested parties. It also deprives the public of fair notice: instead of looking to the Code of Federal Regulations to determine what rules govern their conduct, employers must instead canvas the EEOC's litigation filings to discover when the agency has created an atextual exception to Section 1630.2(m). That state of affairs is plainly at odds with the "fundamental principle in our legal system" that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see Christopher*, 567 U.S. at 155-56 (requiring agencies to "provide regulated parties fair warning of the conduct [a regulation] prohibits or requires" (quotations omitted)).

B. *Auer* Harms Employers By Depriving Them Of Independent Judicial Review

In addition to depriving regulated parties of fair notice, *Auer* deprives them of the basic right to independent judicial review, contrary to the APA's express

statutory requirements and fundamental separation-of-powers principles. It is thus no wonder that *Auer* "has recently been cast into doubt." *Dreyfus*, 697 F.3d at 716 n.13 (Bea, J., dissenting).

The APA. Under Section 706 of the APA, "the *reviewing court* shall . . . determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added). That provision "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring) (observing that *Auer* ignored Section 706 and relied instead on *Seminole Rock*, "a case decided before the APA"). It is "the responsibility of the court to decide whether the law means what the agency says it means"—not the other way around, as the EEOC suggests. *Id.*

Separation of Powers. The APA reflects basic separation-of-powers principles intended to protect the regulated public against overreaching by the political branches. Article III grants the judiciary the power and duty to "exercise its independent judgment in interpreting and expounding upon the laws." *Id.* at 1217 (Thomas, J., concurring). By contrast, an "agency, as part of the Executive Branch, lacks the structural protections for independent judgment." *Id.* at 1220. It is thus "critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties," which necessarily requires defining "the legal meaning of the regulation." *Id*. at 1219.

Applying *Auer* here would therefore "amount to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Id.* at 1217. As Madison wrote in Federalist 47, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Framers knew "that, when unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). But courts "abandon the judicial check" when, under *Auer*, they "refuse even to decide what the best interpretation is under the law." *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring). *Auer* is thus "a dangerous permission slip for the arrogation of power" as it "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker*, 568 U.S. at 620-22 (Scalia, J., concurring).

Policy. Nor do administrative policy concerns justify application of *Auer* deference. Agency expertise may be relevant to the decision to *adopt* a regulation, but it is irrelevant to the purely interpretive task of resolving ambiguity in a regulation. *Perez*, 135 S. Ct. at 1222-24 (Thomas, J., concurring). As is true for all legally binding rules, ambiguities in a regulation should be resolved by applying the traditional tools of interpretation to determine the best reading of the text—and

it is judges, not agencies, who are the experts in that field. *Id.* at 1222. Thus, as the author of *Auer*, Justice Scalia, later recognized, *Auer* deference "has no principled basis," and it never did. *Decker*, 568 U.S. at 617-22 (Scalia, J., concurring) ("The first case to apply it, *Seminole Rock*, offered no justification whatever.").

CONCLUSION

For these reasons, and those in defendant-appellee's brief, the Court should affirm.

Dated: October 23, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This amicus curiae brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 32-1(a) because it is 5,582 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), if applicable. The brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

Dated: October 23, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 23, 2018.

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