Nos. 17-3508 and 18-2199

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARK RICHARDSON,

Plaintiff-Appellant,

v.

CHICAGO TRANSIT AUTHORITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 16 CV 03027
The Honorable Judge John Robert Blakey

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION SUPPORTING APPELLANT MARK RICHARDSON AND URGING REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos: 17-3508 and 18-2199

Short Caption: Mark Richardson v. Chicago Transit Authority

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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None

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Attorney's Printed Name: Daniel B Kohrman

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None

Attorney's Signature: /s/ William Alvarado Rivera Date: August 27, 2018

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation are dedicated to addressing the needs and advancing the interests of older workers. To that end, they litigate and file amicus briefs to address practices that threaten the employment rights of older Americans. In particular, they seek proper interpretation of laws enacted to prevent and redress discrimination that harms older workers, such as the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq. (2012), including provisions of the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325 (Sept. 25, 2008). *See, e.g.*, *Summers v. Altarum Inst.*, 740 F.3d 325 (4th Cir. 2014) (brief of amicus

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amici state that this brief was not authored in whole or in part by any party or their counsel, and that no person other than amici, their members, or their counsel contributed any money intended to fund the preparation and submission of this brief.

curiae AARP supporting appellant, in ADA appeal resulting in reversal of summary judgment for employer); *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008) (same). Approximately one-third of AARP's members are employed full-time or part-time, and still others are seeking employment. Disproportionate numbers of older workers have one or more actual "disabilities," and/or a record thereof, and/or are "regarded as" having a disability by their employers. The ADA protects all such persons. Addressing obesity as an ADA impairment—including extreme obesity, the health condition here at issue—is particularly relevant to AARP's membership, as adults over age 40 experience disproportionate rates of obesity.[2]

SUMMARY OF ARGUMENT

The district court committed fundamental errors which, individually and cumulatively, warrant reversal and remand for application of proper legal standards and a re-examination of the evidence in the record.

The district court's central legal error was to misapprehend the significance of ADAAA reforms supporting Richardson's claims that his extreme obesity is an ADA "impairment." In particular, the ADAAA greatly eased the proof required to demonstrate ADA coverage under the "regarded as" prong of the Act's definition

[2] Centers for Disease Control and Prevention, *Obesity Facts* (June 12, 2018), https://www.cdc.gov/obesity/data/adult.html.

of "disability."[3] The court also erred in dismissing the ADAAA's mandates favoring "broad construction" of "disability" generally and disfavoring "extensive analysis" of coverage-related fact contentions. As a result, the court gave undue credence to pre-ADAAA court decisions and to *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016), which relied on such outdated precedent.

Further, the district court badly misinterpreted the facts here. Appellant Richardson is "extreme[ly]" overweight, yet the CTA, his employer, kept him out of work, and later discharged him, based on more than his "weight," a mere "physical characteristic." Rather, the CTA and its agents acted on what they knew and perceived about his *health* and, specifically, his condition of "obesity," which an overwhelming consensus of medical authorities now deems to be a disease. These sources show that in most instances, obesity, and, in particular, extreme obesity, satisfies the ADA's definition of a covered "impairment": "a disorder or condition . . . affecting one or more body systems." 29 C.F.R § 1630.2(h)(1). Thus, the court should not have relied on case law misunderstanding "weight" and "obesity" to be identical and, further, addressing challenges, unlike here, exclusively focused on workplace weight restrictions.

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[3] Amici herein urge the Court to reverse and remand for reconsideration on the issue of disability. Amici take no position on Richardson's claims that he was qualified to drive when terminated or that his dismissal was due to disability bias. Amici also take no position on issues in appeal No. 18-2199.

The ADA and its regulations suffice to show that Richardson's evidence of obesity bias presents viable claims of both actual and perceived ADA-covered impairments. The district court erred in accepting the parties' invitation to, instead, construe ambiguous agency guidance as to when the "physical characteristic" of weight—rather than the medical condition of "obesity"—may qualify as such. In this case, at least, such a short-cut should be rejected as a dead-end.

INTRODUCTION

A. Factual and Procedural Background

For nearly seventeen months, the Chicago Transit Authority ("CTA") refused to let Mark Richardson, a successful, veteran employee, return to work from medical leave, then terminated his employment as a bus driver, due to concern about his obesity. Appellant's Appendix ("A") at A013-14. Richardson, who was 47 years old when discharged by the CTA,[4] challenged his 2012 dismissal under the ADA. He alleged that he was qualified to drive, but "regarded as" unable to do so and, on that basis, subject to illegal disability-based discrimination by the CTA. A001-03. But, the district court did not consider Richardson's claims on their merits. Instead, it granted the CTA summary judgment on preliminary

[4] *Richardson v.CTA*, No. 16 CV 0327 (N.D. Ill.) (docket no. 94-2 at 7) (filed April 20, 2017) (Charge of Discrimination, Exhibit A to Complaint, Exhibit 1 to Defendant's Local Rule 56.1(a)(3) Statement of Undisputed Material Facts in Support of Motion for Summary Judgment).

grounds, a finding that Richardson had no actual physical "impairment," nor any condition the CTA perceived as such and, thus, no ADA-covered "disability."[5] A025-26. The court reached its "no impairment" conclusion—that Richardson had no actual or perceived "physiological disorder or condition . . . affecting one or more body systems," 29 C.F. R. § 1630.2(h)(1)—despite the ADAAA's lenient legal standards as to "disability" as well as substantial record evidence that the CTA fired him because it viewed various aspects of his obesity as materially affecting his health and hampering his ability to do his job.

The district court's ruling clashes with basic, broadly-accepted facts about obesity. Obesity, generally, and extreme obesity, in particular, is a "disease" with major effects on multiple body systems."[6]

B. Statutory and Regulatory Background

The district court's decision ignored the plain language of the ADA defining "disability," 42 U.S.C. § 12102(1), and of its regulation defining "impairment," 29 C.F.R. § 1630.2(h)(1). This is especially significant as, in 2008, Congress amended

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[5] Richardson claimed ADA coverage based on the third of three prongs of the definition of disability: "being regarded as having" a covered "impairment." 42 U.S.C. § 12102(1)(C). He did not allege an actual disability, i.e., "a physical or mental impairment that substantially limits one or more major life activities . . ." or "a record of such an impairment," *id.* § 12102(1)(A), (B). *See* A002, A017.

[6] *See generally*, Brief of Amici Curiae The Obesity Action Coalition, The Obesity Society, et al., in Support of Appellant, Mark Richardson, and Urging Reversal ("OAC Brief").

the ADA in numerous respects inconsistent with the court's analysis. In particular, Congress significantly altered the third prong of the ADA's definition of disability—the one at issue here—by adding text allowing an individual to demonstrate a "regarded as" disability simply by establishing an impairment, *regardless of its severity*. *See* 42 U.S.C. § 12101 (note) (ADAAA § 4(a)).[7]

The district court ignored these salient factors in favor of a peripheral source. It mistakenly stressed ambiguous EEOC guidance language pre-dating the ADAAA, yet remaining in the interpretative appendix to the EEOC's ADA regulations, opining that the "physical characteristic" of "weight" may not be an "impairment" if it is "within 'normal range' and [is] not the result of a physiological disorder." A017–18.[8] The court ruled that weight outside the normal

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[7] "An individual [now] meets the requirement of 'being regarded as having such an impairment' [in § 12102(1)(C) by] establish[ing] that he or she has been subjected to an action prohibited under [the ADA] 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*." 42 U.S.C. § 12102(3)(A) (emphasis added). Formerly, an employer must have "regarded [a claimant] as having," *id.* § 12102(1)(C), a "substantially limit[ing]" impairment, as denoted in § 12102(1)(A).

[8] Thus: "The definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, lefthandedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of physiological disorder." "Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act" ("Guidance"), 29 C.F.R. Pt. 1630, App. § 1630.2(h) ("Physical or Mental Impairment"). The U.S. Equal Employment Opportunity Commission ("EEOC") issued the Guidance on July 26, 1991, 56 Fed. Reg. 35734, and most recently amended it at 76 Fed. Reg. 17003, Mar. 25, 2011.

range, too, must have been the result of a physiological disorder to be an ADA "impairment." A023, A025.

Prior to the ADAAA, federal courts often dismissed workplace bias cases brought by persons with serious medical conditions like diabetes, cancer, and epilepsy, without considering the merits of these claims, due to a finding that such plaintiffs lacked proof of a covered "disability." *See, e.g., Orr v. Wal-Mart Stores*, 297 F.3d 720 (8th Cir. 2002) (diabetes); *Ellison v. Software Spectrum, Inc*., 85 F.3d 187 (5th Cir. 1996) (cancer). *Accord* 29 C.F.R. Pt. 1630, App. at 2 ("lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities"). Much as the district court did here, courts found employees and applicants *not impaired enough* to have an ADA-covered condition, though employers deemed them *too impaired* to be hired or kept on. *See, e.g.*, Kerri Stone, *Substantial Limitations: Reflections on the ADAAA,* 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 523 & n.74 (discussing, "as some scholars have called it, the 'catch-22' that plaintiffs confront[ed] as they s[ought] to establish the requisite ability and disabilities for protection under the Act" before the ADAAA).

Congress enacted the ADAAA to end what amounted to a default on the ADA's original promise. *Hostettler v. College of Wooster*, No. 17-3406, 2018 U.S. App. LEXIS 19612, *3 (6th Cir., July 17, 2018) ("years of court decisions

narrowly defining who qualifies as an individual with disabilities left the ADA too compromised to achieve its purpose. In response, Congress [acted] to invalidate those decisions and[,]" thereby, "to 'restore the intent and protections of the [ADA],'" citing the ADAAA, Pub. L. No. 110-325 (preamble)). As a result, conditions formerly found to be beyond ADA protection now are routinely covered.[9] The district court failed to honor this intent.

Above all, the district court misinterpreted a key component of the 2008 reforms—a strengthened definition of a "regarded as" disability:

> The ADA now covers . . . someone who is . . . subjected to discrimination because they are "regarded as having . . . an actual or perceived physical or mental impairment *whether or not* the impairment limits or is perceived to limit a major life activity." 42 U.S.C. §§ 12102(1)(C), 3(A) (emphasis added). The amended "regarded as" provision reflects the view that "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are just as disabling as actual impairments." 29 C.F.R. Pt. 1630, App. § 1630.2(l) [citations to ADA legislative history omitted]).

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[9] *See, e.g.*, EEOC, *Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA)* (Under "the ADAAA, individuals who have diabetes should easily be found to have a disability . . . because they are substantially limited in the major life activity of endocrine function."), https://www.eeoc.gov/laws/types/diabetes.cfm; *see also* 29 C.F.R. § 1630.2 (j)(3)(ii), (iii) ("Predictable Assessments") (identifying impairments that "will, as a factual matter virtually always be found to impose a substantial limitation on a major life activity").

Cannon v. Jacobs Field Servs. N. Am., 813 F.3d 586, 591-92 (5th Cir. 2016); *see also Sheets v. Interra Credit Union*, No. 1:14-CV-265 JD, 2016 U.S. Dist. LEXIS 10668, *13 (N.D. Ind., Jan. 29, 2016) (citing *Silk v. Bd. of Trs., Moraine Valley Cmty. Coll., Dist. No. 524*, 795 F.3d 698, 706 (7th Cir. 2015) (applying 42 U.S.C. § 12102(3)(A)) ("Since Congress amended the ADA in 2008, a mere perception of impairment is sufficient to support a regarded as claim.").[10] The court failed to adequately consider the expanded scope of "regarded as" claims.

C. The District Court's Errors

The district court neglected to take seriously Richardson's claim that his "extreme" obesity may be an ADA "impairment" and, thus, *on its own*, may be an ADA-covered "disability." A023. Yet, it is well established that, *by itself*, "[o]besity is a complex disorder involving an excessive amount of body fat," usually "diagnosed when . . . body mass index (BMI) is 30 or higher" and, further, that persons with obesity are "especially likely" to have health problems "related to [their] weight."[11]

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[10] *See* Stone, *supra* at 534-35 & n. 134 ("Perhaps most significantly, the ADAAA . . . revisit[ed] and reform[ed] the definition of one who is 'regarded as' disabled. [Now], any non-minor impairment, so long as it has an actual or projected duration of more than six months, that is shown to have engendered discrimination, will bring a plaintiff within the statute's protection."). Richardson's condition is plainly "non-minor": i.e., not "transitory and minor." 42 U.S.C. § 12102(3)(B).

[11] Mayo Clinic, *Obesity*, https://www.mayoclinic.org/diseases-conditions/obesity/symptoms-causes/syc-20375742 (last visited Aug. 27, 2018) (emphasis added); *see*

Because the district court mischaracterized this case as merely involving Richardson's "weight," the court went on to cite pre-ADAAA EEOC Guidance language—regarding weight as an ADA impairment—as requiring Richardson to produce proof of an underlying causal physical disorder. The court thus ignored evidence: that Richardson's extreme obesity itself constituted an actual impairment; and that the CTA perceived it as such —i.e., the CTA's suspension of him on medical grounds and the alarm concerning his physical condition expressed by CTA employees.[12] Hence, the court found a lack of triable proof of an actual or a perceived ADA-covered "impairment." A017, A018-26.

In misconstruing Richardson's claims of impairment, the district court also greatly underestimated the expansive scope of ADAAA directives to assure "broad" construction, 42 U.S.C. § 12102(4)(A), and to end courts' overly "extensive analysis" of the "disability" issue. *Id*. § 12101 (note) (ADAAA, § 2(b)(5)). As a result, the court strayed beyond its duties at summary judgment. By declaring unequivocally that "Severe Obesity by Itself is Not a Physical

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generally OAC Brief. BMI is a measure relating weight to height. OAC Brief at 11-12. Thus, like weight, it is a physical characteristic, not a physiological condition.

[12] *See* A011–16; Appellant's Separate Appendix ("SA"), at SA007-08, SA010-11 (¶¶ 38-48, 57-62). *See esp. id*. ¶¶ 43-44 (Bus Instructor McElroy "worried [Richardson's] sweating . . . could lead to an episode" of cardiac difficulty, showed Richardson was "unhealthy," and led him to consider "stopp[ing] [Richardson's]

Impairment Under the ADA," A017, the court effectively—and improperly—rendered its own expert medical judgment. Ironically, the court also erred in faulting Richardson for not presenting his own expert testimony demonstrating an impairment, A025, a step not required post-ADAAA.

The trial court erred still further by refusing to consider whether Richardson could show that the CTA perceived him as having an ADA impairment, reasoning that the ADA does not cover the perceived impairment that he sought to prove. A024-26. Yet, it has always been central to some "regarded as" claims that an employer perceives an impairment that does not, in fact, exist.

Reprising the pre-ADAAA pattern, the district court cut short its analysis and declined to reach questions that Congress declared to be "the primary object of attention in cases brought under the ADA": that is, "whether entities covered . . . have complied with their obligations," 42 U.S.C. § 12101 (note) (ADAAA § 2(b)(5)). Instead, as was so common before the ADAAA, the court granted summary judgment on the issue of "disability" alone, without addressing Richardson's qualifications or the CTA's rationale for terminating him. *See* A025-26.

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assessment"); ¶ 59 (Richardson "found medically unfit" by the CTA); ¶ 62 (due to a "medical condition" the CTA "precluded [Richardson] from working").

ARGUMENT

THE ADA'S TEXT AND REGULATIONS ESTABLISH THAT OBESITY—ESPECIALLY "SEVERE" OBESITY—MAY CONSTITUTE AN ADA "IMPAIRMENT" AND, THUS, A "REGARDED AS" DISABILITY.

The ADA's text and regulations clearly establish that the plaintiff presented a sufficient basis for a jury to consider whether he has an actual or perceived ADA "impairment" and, thus, an ADA-covered "regarded as" "disability." The district court's contrary conclusions warrant reversal of the judgment granted below.

A. The District Court Misapplied the Amended "Regarded As" Prong of the ADA's Definition of "Disability."

This appeal proceeds within the narrow context of an ADA claim seeking no "reasonable accommodation." Appellant Richardson asserted that he could do the job he was forced to leave without any adjustment. A002 (Complaint, ¶15) (claiming ability to perform all essential job functions). Hence, he requested relief from the outset solely under 42 U.S.C. § 12102(1)(C). *Id.*, ¶ 13. This approach limited the relief that Richardson could claim. *See* 42 U.S.C. § 12201(h) (no reasonable accommodation claim permitted under the "regarded as" prong of the ADA's definition of disability). However, Congress and the EEOC have emphasized that, accordingly, "[c]overage under the 'regarded as' prong of the definition of disability should not be difficult to establish." 29 C.F.R. Pt. 1630, App. § 1630.2(l) (citing ADAAA legislative history).

Indeed, Congress stressed "in enacting the ADAAA" that the "regarded as" prong should play a central role in carrying out the purpose of the Amendments Act to make proof of "disability" much easier, by constituting the go-to claim in cases not involving a request for reasonable accommodation. 29 C.F.R. Pt. 1630, App. §1630.2(l). Specifically, the lead managers of the ADAAA in the U.S. House of Representatives declared:

> [W]e expect [the first] prong of the definition to be used only by people who are affirmatively seeking reasonable accommodations or modifications.

Id. (Statement of Representatives Hoyer (D., Md.) and Sensenbrenner (R., Wis.), 154 Cong. Rec. H8294-96 (daily ed. Sept. 17, 2008), at 6).

Prior to the ADAAA, "except in rare circumstances, obesity [wa]s not considered a disabling impairment," 56 Fed. Reg. 35,726, 35,741(July 26, 1991) (original EEOC Guidance), due to the strict requirement that it be shown to substantially limit major life activities.[13] The ADAAA should have changed this, at the very least in "regarded as" cases, in which the "substantially limits" requirement does not apply. 42 U.S.C. § 12102(1)(A), (3)(A). Such a change is all the more appropriate in light of a medical consensus that obesity has significant effects on multiple major body systems, *see* OAC Brief, § I.B (discussing medical

[13] Under *Toyota Motor Mfg., Kentucky, Inc. v. William*s, 534 U.S. 184, 197 (2002), overruled by the ADAAA, "substantially limits" had "to be interpreted strictly to create a demanding standard."

literature documenting effects of obesity on the circulatory, cardiovascular, musculoskeletal, lymphatic, and endocrine systems.). Rather than focusing on the ADAAA's generous "regarded as" language and the EEOC's generous regulatory definition of "impairment," which together effectively define some impairments as covered disabilities, however, the district court took an unfortunate analytical detour. It focused, instead, on ambiguous EEOC guidance addressing whether the mere characteristic of "weight [not] within 'normal' range"—rather than the separate identifiable disease of extreme obesity—constitutes a cognizable "impairment." The court thereby denied Richardson the intended benefit of the amended "regarded as" prong.

B. Proper Application of the ADAAA's Interpretative Principle Favoring Broad Construction Supports Richardson's Claim that His Severe Obesity Constitutes a "Regarded As" Disability.

Two other core principles enshrined in law by the ADAAA also favor a different outcome in this case on the issue of whether Richardson's extreme obesity constitutes an ADA "disability." First, the amended ADA requires that "disability . . . be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A); *see also* 29 C.F.R. § 1630.1(c)(4). Second, Congress explicitly expressed its intent "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 42 U.S.C.

§ 12101 (note) (ADAAA, § 2(b)(5)); *see also* 29 C.F.R. §§ 1630.1(c)(4). The district court's reasoning cannot be reconciled with either precept.

The district court briefly noted the expansive intent of the ADAAA, but abruptly dismissed it as irrelevant. A018 (stating that in the ADAAA, Congress "narrow[ed] certain definitions not at issue in this case," and, "[n]otably the definition of physical impairment did not change"). On this basis, the court relied on decisions "[b]oth before and after passage of the ADAAA" following a restrictive approach to determining whether obesity may constitute an ADA "impairment." *Id*. It rejected post-ADAAA rulings "finding that extreme obesity may qualify as a disability . . . regardless of whether it results from an underlying physiological disorder." A018–A23.

The district court's casual side-stepping of the ADAAA clashes with a fair reading of the law's text. The Amendments Act did more than surgically excise a few small aspects of the *Toyota* decision (and others) with which Congress disagreed. Rather, it approved a new approach altogether, affecting the ADA as a whole, "to the maximum extent permitted by [all, not just some of] the terms of this chapter." 42 U.S.C. § 12102(4)(A). Modifying the definition of disability changed the ADA comprehensively, and this impact—especially the broadened

"regarded as" prong—extends to the term "physical impairment."[14] The ADAAA's changes to the "regarded as" prong caused the term "impairment," absent the qualifier "substantially limits," to become a far more important component of proving a "disability" for such claims.[15]

The district court disregarded Congress's intent in enacting the ADAAA by relying on cases that either pre-dated the Act's expansion of rights or improperly discounted its impact. *See* A018-25 (discussing *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997), *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006), and *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016)). Other courts have recognized the fault in this approach. *See, e.g., Snyder v. Livingston*, No. 1:11-CV-77, 2012 U.S. Dist. LEXIS 59193, *23 (N.D. Ind., Apr. 27, 2012) (stating, in a "regarded as" case, that "relying on cases applying the pre-amendment version of the ADA is unpersuasive"); *Haley v. Cmty. Mercy Health*

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[14] *See* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 266 (2010) ("What was new . . . was the decision to use the 'regarded as' prong as the vehicle for providing nearly universal coverage in the nondiscrimination context [b]y covering almost any person discriminated against because of an impairment.").

[15] Of course, a "regarded as" claimant still must show that "he or she was subjected to an action prohibited under [the ADA] because of an actual or perceived . . . impairment." 42 U.S.C. § 12102(3)(A).

Partners, No. 3:11-cv-232, 2013 U.S. Dist. LEXIS 11193, *35 (S.D. Oh., Jan. 28, 2013) (same reasoning). *Morriss* post-dates the ADAAA, but likewise embraced the canard that the ADAAA did not affect the definition of impairment, and justified following *Francis* and *Watkins* on that faulty foundation. 817 F.3d at 1109-11.

C. This Case Presents Obesity-Based Disability Bias and Should Not Be Treated as Exclusively Involving Weight-Based Bias.

The decisions in *Francis* and *Morriss*, as well as *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997)—the ruling followed in *Watkins*—all involved a fundamentally different "disability" coverage issue. First, they arose from challenges to strict numerical weight restrictions, rather than, as in this case, to a more complex pattern of bias, in which the CTA allegedly, at most, "had a practice of referring" drivers above a fixed weight for assessment of driving skills. A012. *See Francis*, 129 F.3d at 285 (discussing alleged unfair, adverse consequences "for failing to meet a general weight standard"); *Morriss*, 817 F3d at 1106 ("BNSF's policy was not to hire a new applicant for a safety-sensitive position if his BMI equaled or exceeded 40"); *Andrews*, 104 F.3d at 805 (challenge to "Ohio State Highway Patrol . . . maximum weight limits, for all of its troopers").

In addition, Richardson pointed to *statements* about his condition (and *impressions* thereof held) by CTA personnel—including "instructors" on whom key decisionmakers relied, SA230-32, 234 (Swopes Dep. at 43-53, 58-60)—to

show the CTA's perception that he had an ADA impairment. In contrast, the plaintiffs in *Morriss*, et al., tried to demonstrate a "regarded as" disability merely based on their employer sanctioning them for noncompliance with a weight standard. *See Francis*, 129 F3d. at 282-83; *Morriss*, 817 F.3d at 1106-07 (plaintiff claimed that his weight-based exclusion showed that BNSF regarded his elevated BMI as an impairment); *Andrews*, 104 F.3d at 808 ("the officers . . . averred that Ohio perceives them to be impaired based upon excessive weight and lack of cardio-respiratory endurance and strength"); *Watkins*, 463 F.3d at 442 (analysis closely tracking *Andrews* and *Francis*).

Here, the CTA disputed that it required "all drivers weighing over 400 pounds" to pass safety exams. A012. Thus, the district court should have examined in greater detail plaintiff's physical condition and the ways the CTA may have regarded him as impaired by his obesity. A011-16 (CTA reports noting Richardson's "unhealthy" "sweating," his need "to lean against the bus while performing [a] pre-trip bus inspection," his girth, and his "size," not just his weight).

Further, *Francis*, *Watkins*, and *Morriss* addressed ADA claims based on assertions of unfair treatment due to weight alone. As a result, *Morriss* and *Watkins* found conclusive a passage in the EEOC's ADA Guidance "distinguish[ing] between conditions that are impairments and physical . . . characteristics that are

not impairments," i.e., excluding "physical characteristics such as . . . weight . . . that are not within 'normal' range and are not the result of a physiological disorder." 29 C.F.R. Pt. 1630, App. §1630.2(h) Physical or Mental Impairment. *See Morriss*, 817 F.3d at 1108-09 (discussing Guidance and corresponding discussion in *Watkins*, 463 F.3d at 442-43).

In both cases, as here, a heated dispute arose regarding proper interpretation of the EEOC's Guidance. Plaintiff Morriss and the EEOC argued that it instructs that weight outside the normal range on its own may be an ADA "impairment" so long as it "affects 'one or more body systems' as defined in 29 C.F.R. § 1630.2(h)(1)"; and weight within "normal range" may qualify if a claimant also can show a weight condition is "the result of a physiological disorder." *Morriss*, 817 F.3d at 1108;[16] *see also Watkins*, 463 F.3d at 441 (EEOC asserting that an ADA impairment may be shown by "weight problems caused by a physiological condition" or by "morbid obesity . . . regardless of the cause."). Both courts rejected this position, however, finding that weight alone, whether within or beyond normal range, absent an "underlying physiological disorder or condition," constitutes a mere "physical characteristic" and may not be an ADA "impairment."

[16] *Accord Morriss v. BNSF Ry Co.*, No. 14-3858 (8th Cir.), Brief of U.S. Equal Employment Opportunity Commission as Amicus Curiae on Behalf of Appellant Melvin Morris in Support of Reversal (filed Mar. 23, 2015) (Entry ID 4257449) at pp. 16-22.

Morriss, 817 F3d at 1109, 1112; *Watkins*, 463 F.3d at 442 (also citing *Andrews* for ruling that "a physical characteristic must relate to a physiological disorder to qualify as an ADA impairment"). *Francis* reached the same result, while not specifically discussing the Guidance, holding that the plaintiffs' weight-based claims alleged a physical characteristic, not adequate proof of a condition or disorder constituting an ADA impairment. 129 F.3d at 286.[17] Since Richardson has advanced far more than mere proof of his weight and an adverse employer decision due to it, the district court should not have limited its analysis to precedent and agency guidance regarding weight-based ADA claims.[18]

Parsing the Guidance's text on how to show a weight-related impairment was unwarranted. While the Guidance generally is important to construing the ADA, it is "not controlling upon the courts," in each specific detail. *Duda v. Bd of Educ*., 133 F.3d 1054, 1060 n.12 (7th Cir. 1998). Doing so was misguided in this instance because the ADA's "regarded as" provisions and its regulation defining "impairment" are unambiguous. *See Joseph v. Holder*, 579 F.3d 827, 833 (7th Cir. 2009) (observing that deference to agency interpretations of a regulation "is

[17] Amici herein support the reading of the weight guidance favored by Richardson and the EEOC. However, amici do not believe that construing the weight guidance is necessary to resolve this case, which concerns obesity, not just excess weight.

[18] *See Shell v. BNSF Ry. Co.*, No. 15-cv-11040, 2018 U.S. Dist. LEXIS 35150, *10-11 (N.D. Ill., Mar. 5, 2018) (following *Morriss*, in challenge to weight limits, yet, allowing an obese plaintiff's "regarded as" claim to proceed on other grounds).

warranted only when the language of the regulation is ambiguous," quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)). If "[a]n agency may not interpret its regulations in a manner so as to nullify the effective intent or wording of a regulation," *Joseph*, 579 F.3d at 833 (quoting *Bahramizadeh v. United States INS*, 717 F.2d 1170, 1173 (7th Cir. 1983)), surely a court should not do so.

To be sure, Richardson himself contends that the EEOC's Guidance justifies his "regarded as" claim based on his "extreme" overweight (and/or BMI). But Richardson's case is not confined to reliance on the Guidance or his weight alone. Rather, he also points to aspects of his employer's conduct, utterances, and writings regarding him that are more logically associated with his having a serious medical condition, the disease of obesity (*see* § D., below). And, further, a party's preference that a court rule on specific grounds (in this case, perhaps, both parties' preference that the case be decided based on the EEOC's ambiguous weight guidance) should not be determinative, where, as here, compelling alternative grounds exist based on statutory and regulatory text.

D. Treating Excess Weight and Obesity as Synonymous Is Inconsistent with Sound Science.

This Court also should resist the parties' invitation to rule based on the EEOC's weight guidance, given the inconsistency of many decisions construing it with a prevailing medical consensus that obesity, generally, and extreme obesity, in particular, is a disease significantly affecting multiple body systems.

The decisions interpreting the EEOC's weight guidance favored by the district court improperly are flawed in many respects. For one, they treat excess "weight" and "obesity as interchangeable, although these terms are not synonymous. *See* OAC Brief at 26. While "weight" is merely a "physical characteristic," "obesity" is not; rather, it is a "physiological disorder or condition." *Id.*[19] Thus, *Morriss*, following *Francis*, erred in declaring that "obesity, by itself, does not qualify as a physical impairment because 'physical characteristics that are not the result of a physiological disorder' are not considered impairments." *Morriss*, 817 F.3d at 1109. This nod to the Guidance misquotes it as addressing "obesity," not "weight." And it contradicts "[t]he overwhelming consensus in the medical community" that "[o]besity is not merely a physical descriptor, a lifestyle choice, or a risk factor for other diseases—it is a disease in and of itself." OAC Brief at 15; *see id*. at 15-21 (discussing conclusions of, inter alia, the American Association of Clinical Endocrinologists, the American Medical Association, the American Heart Association, and the World Health Organization). *Morriss* similarly erred in stating that, "consistent with the EEOC's own

[19] *See also* Obesity Medicine Association ("OMA"), *Definition of Obesity*, https://obesitymedicine.org/definition-of-obesity/ ("Webster's dictionary defines obesity as 'a condition characterized by the excessive accumulation and storage of fat in the body.' The [OMA]'s definition . . . is 'a chronic, relapsing, multifactorial, neurobehavioral disease, wherein an increase in body fat promotes adipose tissue dysfunction and abnormal fat mass physical forces, resulting in adverse metabolic, biomechanical, and psychosocial health consequences.'").

definition[,] to constitute an ADA impairment obesity, even morbid obesity, must be the result of a physiological condition." 817 F.3d at 1109 (quoting *Watkins*, 463 F.3d at 443). Again, there is no EEOC "definition" of when "obesity" may be an impairment, just the agency's guidance on when it believes "weight" may qualify as such. And, further, obesity is itself a "physiological condition." Thus, to demand that obesity also "be the result of" such a condition was superfluous.

No better is *Watkins*'s repeated use of terms reflecting confusion about obesity: i.e., "non-physiological morbid obesity" and "non-physiologically caused obesity." 463 F.3d at 439-41. The implication that obesity is something other than a physiological phenomenon cannot be squared with sound medical science.

Likewise, the district court gave undue credence to superficially relevant, yet in truth inapplicable precedent and, as a result, also fell into error. For instance, the district court described *Morriss*, *Francis* and *Watkins* as "holding that obesity qualifies as an actual impairment . . . only if it occurs as a result of a physiological disorder or condition." A018-19. Similarly, the court declared that "Severe Obesity by Itself is Not a Physical Impairment Under the ADA." A017. The district court only reached such contorted, unequivocal conclusions by assuming that excess "weight" is the same as "obesity," A025 (referring to "a physical characteristic such as obesity"), and, accordingly, that obesity cannot be, by itself, a "disorder or condition . . . affecting one or more body systems," 29 C.F.R. § 1630.2(h)(1). Yet,

it most certainly can be. *See* OAC Brief, § I.B. Likewise, the district court adopted *Morriss'* misconception that obesity is not itself a physiological "disorder or condition" and, thus, to be an ADA impairment, it must be "*caused by* an *underlying* physiological disorder or condition." A023, A025 (emphasis added). This, too, is flatly inconsistent with the current scientific consensus regarding obesity. OAC Brief at 20-21. Rather, obesity, generally, and extreme obesity, in particular, is a chronic disorder, and, moreover, according to the vast majority of the medical establishment, itself affects multiple body systems. *Id.* at 22-25.

E. The ADA Does Not Require Richardson to Present Expert Testimony to Demonstrate that His Obesity Is an ADA-Covered Impairment.

The district court compounded its prior errors by faulting Richardson for failing to offer expert testimony "establishing that [his extreme] obesity resulted from a physiological disorder." A024-25. The district court acknowledged that such evidence anchored a pre-ADAAA finding of a "regarded as" obesity "disability" in *Cook v. R.I. Dep't of Mental Health, Retardation and Hosps.*, 10 F.3d 17, 20 (1st Cir. 1993), under identical standards pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The court then observed that the "plaintiff has provided no [such] evidence," A025, ignoring Congress's intent that proving "disability" post-2008 should not require such "extensive analysis." 42

U.S.C. § 12101 (note) (discussing ADAAA, § 2(a)(5)); *see also* 29 C.F.R. § 1630.1(c)(4).

The district court also ignored ample authority permitting "regarded as" claimants to establish an ADA-covered impairment absent expert medical testimony. For instance, in *Snyder v. Livingston*, the plaintiff "presented enough evidence from which a reasonable jury could conclude that [an Indiana medical practice] regarded her as disabled." 2012 U.S. Dist. LEXIS 59193 at *25-26. Thus, "Defendants' reliance on case law applying the pre-amendment ADA fail[ed] to show that calling Snyder mentally unstable [wa]s insufficient as a matter of law to establish that Snyder was *not* regarded as disabled under the amended, more expansive version of the ADA . . . according to [which] this Court is not supposed to engage in an extensive analysis of whether Snyder is disabled under the ADA, but rather [to] focus on whether [the employer] has complied with its obligations and whether discrimination has occurred." *Id.; see also Nutall v. Reserve Marine Terminals*, No. 1:14 CV 4738, 2015 U.S. Dist. LEXIS 170997, *17-18 (N.D. Ill., Dec. 22, 2015) ("a reasonable jury could certainly find that Plaintiff was 'regarded as' disabled" based on evidence of beliefs and statements about the plaintiff on the part of an employer's agent involved in adverse action against the plaintiff); *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 858-59 (9th

Cir. 2009) (even in an actual disability case, "a plaintiff's testimony may suffice to establish a genuine issue of material fact" as to the issue of disability).

Further, the district court misconstrued *Cook* as demanding proof that "severe obesity *results from* an *underlying* physiological disorder or condition." A025 (emphasis added). It did no such thing. Rather, the First Circuit found that the plaintiff's obesity *itself* constituted a substantially limiting impairment. *Cook*, 10 F.3d at 23 (discussing "testimony that [the plaintiff's] morbid obesity is a physiological disorder involving dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems.").[20]

F. The Failure to Consider Richardson's Claim that the CTA Perceived His Obesity as an ADA-Covered Impairment Warrants Reversal of the District Court's Dismissal Order.

Even if this Court declines to revisit the district court's analysis of Richardson's extreme obesity as an actual ADA impairment, it must reverse due to the trial court's failure to separately consider his claim that the CTA perceived his obesity to be a "disorder or condition . . . affecting one or more body systems." 29 C.F.R. § 1630.2(h)(1). The trial court refused to do so, stating that as Richardson could not show his obesity to be an actual impairment, the CTA could not have

[20] The First Circuit also rejected the notion that federal protection against disability bias "is linked to how an individual became impaired, or whether an

concluded otherwise. Yet, both before and after enactment of the ADAAA, courts have upheld claims based on a perceived impairment despite finding no plausible actual impairment. *See, e.g., Silk v. Bd. of Trs., Moraine Valley Cmty. Coll.*, 795 F.3d at 708 (post-ADAAA case); *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 195-96 (7th Cir. 2011) (declaring, in a pre-ADAAA case, that "the 'regarded as' prong is an important protection that should not be nullified by creating an impossibly high standard of proof").

The district court's summary rejection of a "perceived as" impairment claim cheated Richardson of the chance to highlight evidence of the subjective beliefs of CTA agents that Richardson was "unhealthy," "medically unfit," and in danger of cardiac distress. *See supra*, n. 12. This would have allowed him to focus on his employer's perceptions—indeed, to offer proof that the CTA "regarded [him] as having" an ADA impairment in the traditional, pre-ADAAA sense, in which the mental state of the employer, not objective medical evidence, is key. *See Miller*, 643 F.3d at 196 **(**explaining that "the employer's subjective perception of the degree of [the plaintiff's] impairments can be addressed through circumstantial evidence, including reasonable inferences [from] evidence of the employer's perceptions").

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individual contributed to his or her impairment." *Id.* at 24; *accord Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 801 (N.D. Ill. 1996).

CONCLUSION

For the reasons set forth above, amici urge the Court to reverse the decision of the district court and remand for further proceedings.

Date: August 27, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6538 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

Dated: August 27, 2018

/s/ Daniel B. Kohrman
Daniel B. Kohrman

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on August 27, 2018, the foregoing Brief of Amici Curiae AARP and AARP Foundation Supporting Appellant Mark Richardson and Urging Reversal, was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Seventh Circuit using the appellate CM/ECF system filed electronically, and pursuant to Circuit Rule 31(e), in non-scanned PDF format. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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