No. 04-

IN THE

SUPREME COURT OF THE UNITED STATES

LORRAINE "JADE" MCKENZIE,

Petitioner,

v.

MARK BENTON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF NATRONA COUNTY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit correctly held, in conflict with five other circuits, that the burden of proving whether a plaintiff in an Americans with Disabilities Act case is a "direct threat" to others lies with the plaintiff when there is a "special risk" associated with the job in question.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case that Petitioner bore the burden of proving that not only that her employer discriminated against her because of her disability, but also that she did not pose a "direct threat" to the safety of others.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 388 F.3d 1342. The district court case entered judgment on the jury verdict, App., *infra*, 22a, without opinion. A prior opinion of the court of appeals in this case, App., *infra*, 23a is reported at 242 F.3d 967.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2004. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Sections 3, 101, 102, and 103 of the Americans with Disabilities Act, 42 U.S.C. §§ 12102, 12111, 12112, and 12113, and accompanying regulations, 29 C.F.R. § 1630.2(r), and interpretive guidance, 29 C.F.R. § 1630 App., are reprinted in the Appendix. *See* App., *infra*, 41a-48a.

STATEMENT OF THE CASE

This case presents an important and recurring question arising under the Americans with Disabilities Act ("ADA" or "Act"), 42 U.S.C. §§ 12101-12213, on which the federal courts of appeals have split three ways: Which party has the burden of proof when an employer alleges that an individual was denied employment because she posed a "direct threat"

to others that could not be overcome by a reasonable accommodation?

The jury in this case determined that Petitioner Jade McKenzie was a qualified individual with a disability within the meaning of the ADA when she sought reemployment with Respondent Sheriff Mark Benton. The jury further determined that Benton discriminated against McKenzie because of her disability. The trial court instructed the jury, over McKenzie's objections, that McKenzie "must prove, by a preponderance of the evidence, that she did not pose a direct threat to herself or others." The jury found that McKenzie failed to prove that she did not pose a direct threat, and judgment was entered for Sheriff Benton.

1. The ADA's Prohibition of Discrimination. The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), and "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

Title I of the Act prohibits employers from discriminating in hiring decisions against a qualified individual with disability because of the individual's disability. 42 U.S.C. § 12112(a); *Raytheon Co*. v. *Hernandez*, 540 U.S. 44, 46 (2003). The statute defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual, "a record of such an impairment," or "being

regarded" by the employer "as having such an impairment." 42 U.S.C. § 12102 (2).[1]

2. Affirmative Defense. Section 103 of the Act provides an affirmative defense to discrimination, where the employee poses a "direct threat" to the health or safety of others. 42 U.S.C. § 12113(b). Specifically, Section 103 provides:

> (a) In general
>
> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
>
> (b) Qualification standards
>
> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12113. "Direct threat," in turn, is defined in Section 101 as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). The "direct threat" defense is thus available to an employer that has

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[1] McKenzie contended at trial that she was disabled within the meaning of the ADA because Benton regarded her as disabled, or because she had a record of disability.

discriminated against an individual in violation of 42 U.S.C. § 12112(a), if the following conditions are met:

1. The discrimination was the result of employing a qualification standard;

2. The qualification standard required that the individual not pose a significant risk to the health or safety of others in the workplace;

3. Because of the individual's disability, he or she did pose such a risk; and

4. The risk could not be eliminated with a reasonable accommodation.

The question presented here is which party has the burden of proving whether the plaintiff posed a significant risk because of her disability.

3. The Facts of This Case. Jade McKenzie worked for ten years as a deputy sheriff in the Natrona County Sheriff's office without a negative performance evaluation. App. *infra*, 2a-3a. During her tenure, McKenzie was promoted twice, first to corporal and later to sergeant. *Id.* With her second promotion, McKenzie was assigned duties as a shift supervisor within the department. *Id.* at 23a.

In her tenth year with the sheriff's office, McKenzie sought marriage counseling. R. 2:117-18. Through therapy, McKenzie discovered that the problem stemmed from sexual abuse by her father during McKenzie's childhood. R. 2:118-119. As McKenzie continued treatment with a psychologist, she developed symptoms of post-traumatic stress and other disorders. App., *infra*, 3a. McKenzie's treatment included medication, therapy, and intermittent hospitalization. The treatment also required that McKenzie take significant time off from work. *Id.* McKenzie's therapist, Darlene Bayuk, testified that it was essential to her treatment that McKenzie

release her anger at her father. R. 3:382-3. Bayuk testified that she recommends that patients who have been victims perform physical acts to express this anger such as throwing darts at a photograph or similar measures. R. 3:398. McKenzie went to her father's gravesite, where she knew it was not illegal to discharge a firearm, and fired her personal revolver into her father's grave. App., *infra*, 3a; *see also id.*, 36a & n.7 (noting the sheriff's admission that firing the gun was not illegal). Thereafter, McKenzie voluntarily resigned her position while she sought additional treatment. *Id.* at 3a.

After she completed treatment and her psychologist certified that she was fit to return to work, McKenzie sought reemployment with then-sheriff Dovala.[2] *Id.* at 3a. Dovala told McKenzie that her application would be considered for future openings with the department. *Id.* Sheriff Dovala admitted, however, that when openings subsequently arose he discussed the possibility of hiring McKenzie with his staff and decided that she would not be considered because of her prior psychological problems. *Id.* at 4a-5a, 29a-30a. A year later, McKenzie met with Dovala and asked to be considered for a position as a deputy sheriff or any other position within the department. *Id.* at 4a-5a, 24a. The sheriff told her that he would not consider her application because of her prior mental instability, even if she passed a psychological examination. *Id.* As the court of appeals put it, "Sheriff Dovala said that members of his staff told him that 'based upon what they knew about what had happened in the previous year,' McKenzie 'would be better off in some other field.'" *Id.* at 4a.

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[2] At the time of the events in this case, the sheriff of Natrona Country was David Dovala. Respondent Mark Benton subsequently replaced Dovala as sheriff. App., *infra*, 5a n.1.

4. Procedural History. McKenzie brought this action in the District Court for the District of Wyoming. She alleged that the sheriff of Natrona County, Wyoming, discriminated against her in violation of the ADA when he refused to rehire her because of her prior mental disability. The district court (Downes, C.J.) initially granted summary judgment in favor of the sheriff, finding that McKenzie could not show that she was she disabled under the ADA. The Tenth Circuit reversed, concluding that McKenzie had made out a prima facie case of discrimination under the ADA. App., *infra*, 23a-40a.

On remand, the case was tried to a jury, which found that McKenzie was disabled within the meaning of the ADA, that she was otherwise qualified for the position of deputy sheriff, and that the sheriff had discriminated against her because of her disability. App., *infra*, 2a. The district court, however, instructed the jury that McKenzie bore the burden of proving not only these elements of an ADA discrimination claim, but also bore the burden of proving that she did not pose a "'direct threat' to the health and safety of herself and her co-workers." App., *infra*, 21a. The jury found that she had not carried this burden. *Id.* at 2a.

5. The Court of Appeals' Opinion. McKenzie appealed the district court's judgment, arguing, *inter alia*, that the trial court erred in instructing the jury that she bore the burden of proving that she did not pose a direct threat to herself or others. App., *infra*, 7a. The Tenth Circuit affirmed.

The court reviewed its prior cases dealing with claims that an employee was a "direct threat," noting that in *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000), it "discussed the split among the federal appellate courts regarding which party bears the burden of proof on the presence or lack of a 'direct threat.'" App., *infra*, 18a. After reviewing decisions of the First, Fifth, and Eleventh Circuits,

the court concluded that the burden of proving direct threat falls on an ADA plaintiff in some circumstances. *Id.* The court cited *Borgialli* and *Rizzo* v. *Children's World Learning Centers, Inc.*, 213 F.3d 209, 213 n.4 (5th Cir. 2000) (en banc) ("*Rizzo III*"), for the proposition that "the burden may fall on the employer, but with an exception: where the essential job duties necessarily implicate the safety of others, then the burden may be on the plaintiff to show that she can perform those functions without endangering others." *Id.* (marks and alterations omitted).[3] The court also quoted the First Circuit's holding in *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997), that "[w]here those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others." *Id.* The court noted the conflicting holdings of the Second and Ninth Circuits that defendant bears the burden of proving the affirmative defense that plaintiff is a "direct threat." *Id.* at 19a n.5.

The court went on to hold that because there was "a special risk to others, co-workers and the public, who are exposed to the danger of a firearm in the control of McKenzie . . . it was not error for the trial judge to instruct the jury that McKenzie bore the burden of proof on not being a direct threat." *Id.* at 19a.

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[3] The quoted language from *Rizzo III* describes a party's argument rather than the court's view. *See Rizzo III*, 213 F.3d at 213 n.4. The Fifth Circuit's position on the burden of proof of the direct threat defense is discussed *infra*, part I.B.

REASONS FOR GRANTING THE WRIT

I. There Is An Acknowledged Circuit Split Over Which Party In An ADA Case Bears The Burden Of Proving A "Direct Threat."

The Tenth Circuit's opinion in this case correctly recognizes the existence of a split among the federal courts of appeals over which party bears the burden of proving whether an employee poses a direct threat to the safety of others. App. *infra*, 19a. The opinion recognizes three positions taken by the courts of appeals: The minority view, adopted by a single circuit, is that plaintiff always bears the burden. Two circuits hold that defendant bears the burden unless the essential functions implicate the safety of others or the job entails special risk. And the majority view, adopted by four circuits, is that defendant bears the burden of proving "direct threat." Other courts have also noted this split. *E.g.*, *Hutton* v. *Elf Atochem N. Am.*, 273 F.3d 884, 893 n.5 (9th Cir. 2001) (collecting cases); *Rizzo III*, 213 F.3d at 213.

The circuit split warrants review by this Court.[4] Indeed, as explained below, the disagreement among the circuits is even more pronounced than would appear from the Tenth Circuit's opinion. In addition to the Tenth Circuit and the five other circuits cited in its opinion, the Seventh Circuit has recently reaffirmed its prior holding that "it is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation." *Branham* v. *Snow*, No. 03-3599, 2004 U.S. App. LEXIS 26262 (7th Cir. Dec. 17, 2004) (marks and

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[4] The Court regularly grants review in ADA cases to resolve issues on which the courts of appeals are divided. *See, e.g.*, *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73 (2002); *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002); *Board of Trs. of the Uni*v. *of Ala.* v. *Garrett*, 531 U.S. 356 (2001); *Sutton* v. *United Air Lines*, 527 U.S. 471 (1999).

citation omitted). Moreover, the Tenth Circuit incorrectly implied that the Fifth Circuit's opinion in *Rizzo III* comported with its own opinion and that of the First Circuit. As explained below, the Fifth Circuit places the burden on defendant in all circumstances where "direct threat" would constitute a defense to discrimination.

A. The Eleventh Circuit Requires An ADA Plaintiff To Prove That She Is Not A "Direct Threat."

The Eleventh Circuit stands alone in employing a categorical approach that places the burden of proving the absence of "direct threat" on plaintiffs. In *Moses* v. *American Nonwovens, Inc.*, the court stated, "The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." 97 F.3d 446, 447 (11th Cir. 1996). The court has not deviated from *Moses* since it was decided. *E.g.*, *Waddell* v. *Valley Forge Dental Assocs.*, 276 F.3d 1275, 1280 (11th Cir. 2001). In *Waddell*, the court explained its view that if a plaintiff cannot prove the absence of direct threat, "he is not a qualified individual and therefore cannot establish a prima facie case of discrimination." *Id*.[5]

B. The Burden Of Proof In The First And Tenth Circuits Depends On The Nature Of The Employment.

The First Circuit is the only court of appeals, other than the Tenth Circuit below, to hold that the burden of proof of direct threat depends on the nature of plaintiff's employment.

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[5] This is not the first ADA case to present a split among the federal circuits implicating *Moses*. In *Echazabal*, the Court noted that the Ninth Circuit opinion below conflicted with *Moses*. 536 U.S. at 78.

In *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), the court stated:

> We hold that, in a Title I ADA case, it is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore "qualified." Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.

Id. at 144. The court further opined that "[t]here may be other cases under Title I where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden." *Id.* The First Circuit reached this conclusion only after concluding that "the statutory scheme does not clearly resolve this debate," and looking to the legislative history of the ADA. *Id.* at 143.

Despite legislative history clearly stating that "if the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless *the employer can demonstrate* that the applicant's disability poses a direct threat to others in the workplace," the court held that the employee may required to show the absence of such risk. *Id.*, quoting H.R. Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469 (emphasis added). The court found that the legislative history of the ADA indicates that the affirmative defense of Section 103 was intended to codify the direct threat standard of this Court's holding in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987). According to the First Circuit, "*Arline* considered direct threat to be part of the 'qualification' analysis under § 504 [of the Rehabilitation Act] as to which plaintiff bears the burden." 110 F.3d at 143. Although it stated that "unlike the Rehabilitation Act, the

ADA's definition of 'qualified individual' does not address risk posed to others," the court nonetheless found that the legislative history shows that "Congress intended" the two definitions to be "comparable." *Id.* at 144.

While both the First and Tenth Circuits' positions depend on the nature of the plaintiff's employment, the two courts' holdings are not entirely identical. The plaintiff in *Amego* was responsible for distributing prescription drugs to disabled individuals under her care. The court found that this was an "essential function" of the job, and plaintiff could be required to prove that she could perform this function safely in light of her two attempted suicides by overdose. *Id.* In McKenzie's case, however, the court below recognized that the "case does not involve some of the circumstances of *Amego, Inc.*, such as the safety of others where the essential functions involve the care of others unable to care for themselves." App., *infra*, 19a. The court held instead that "there is a special risk to others, co-workers and the public, who are exposed to the danger of a firearm in the control of McKenzie." *Id.*

C. The Second, Fifth, Seventh, And Ninth Circuits Require The Defendant To Prove The "Direct Threat" Affirmative Defense To Discrimination Under The ADA.

Four circuits have held that, because it is an affirmative defense, defendant bears the burden of proving that an employee poses a "direct threat."

The Ninth Circuit addressed the question of burden of proof of "direct threat" in *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). The court stated, "Because this is an affirmative defense, Wal-Mart bears the burden of proving that Nunes is a direct threat." *Id.* The court went on to explain that courts evaluating a direct threat defense should consider (i) "whether the employer has demonstrated that the employee cannot perform the job

without a significant risk of harm"; and (ii) "whether the employer can make a reasonable accommodation, without undue hardship to the employer, so that the employee can perform her job without such risk." *Id.* at 1248. The court reaffirmed that defendant bears the burden of proving the direct threat defense in *Hutton*, 273 F.3d at 893 & n.5, and noted the growing split among the circuits.

The Second Circuit also has held that defendant bears the burden of proving the direct threat affirmative defense. The court unequivocally stated in *Hargave* v. *Vermont*, 340 F.3d 27 (2d Cir. 2003), that "[i]n the employment context, it is the defendant's burden to establish that a plaintiff poses a 'direct threat' of harm to others." The court cited its prior holding in *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001). In *Lovejoy-Wilson*, the district court had rejected defendant's affirmative defense "that the plaintiff is not a qualified individual because she poses a direct threat to the health or safety of other individuals in the workplace," but had held that she was not a qualified individual with a disability. *Id.* at 219 & n.6 (marks omitted).

The *Lovejoy-Wilson* court conducted a wide examination of the "direct threat" defense, first examining the language of the defense in ADA Section 103 and the definition of "direct threat" in Section 101, then the further definition of "direct threat" contained in EEOC regulations, 29 C.F.R. §1630.2(r). The court cited the ADA's legislative history for the proposition that "'the plaintiff is not required to prove that he or she poses no risk,'" H.R. Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469. 263 F.3d at 220. The court went on to cite this Court's holdings that an individualized assessment of an employee's ability to safely perform the essential functions of his job is required to protect disabled individuals from discrimination based on "prejudice, stereotypes, or unfounded fear." *Id.*, quoting *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 (1987), *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569

(1999). Ultimately, the court held that defendant "has failed to provide any evidence that the plaintiff poses a significant risk of substantial harm." *Lovejoy*, 263 F.3d at 220. The court therefore declined to affirm the district court's holding that plaintiff was not a qualified individual with a disability.

In *Rizzo* v. *Children's World Learning Center, Inc.*, the Fifth Circuit confronted the issue of which party to an ADA suit has the burden of proving direct threat over the course of three separate published opinions. The case involved a teacher's claim that her employer had discriminated against her because of a hearing impairment. The Fifth Circuit initially reversed the district court's grant of summary judgment. 84 F.3d 758, 760 (5th Cir. 1996) ("*Rizzo I*"). On the burden of proof, the court held, "As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat." *Id.* at 764.

On remand from *Rizzo I*, the jury held in favor of the plaintiff and awarded damages. On appeal, the court again considered the burden of proof of direct threat. *Rizzo* v. *Children's World Learning Centers, Inc.*, 173 F.3d 254 (5th Cir. 1999) ("*Rizzo II*"). Because the defendant put forth two assignments of error based on the burden of proof, the *Rizzo II* court examined the issue extensively. *Id.* at 258. The court took a nuanced view, starting with the proposition that plaintiff must prove she is a "qualified individual with a disability," and that plaintiff's burden can include proving the absence of a direct threat. *Id.* at 262 & n.13. However, according to the *Rizzo II* court, that burden requires plaintiff to prove compliance with a purported safety requirement only if the requirement does not tend to screen out the disabled. *Id.*[6] Because the purported safety requirement at

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[6] While the *Rizzo II* court claimed to disagree with the Eleventh Circuit in *Moses*, "only insofar as that opinion allows for no exceptions," the exception the Fifth Circuit articulated – for requirements that tend to (...continued)

issue in *Rizzo* tended to screen out teachers with a hearing disability, the court held that defendant bore the burden of establishing non-compliance with the safety requirement. *Id.* at 259-60 ("We hold that, in accord with the federal regulations, when a court finds that the safety requirements imposed tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat.")

The Fifth Circuit granted rehearing en banc. The en banc majority held that the district court did not commit plain error when it instructed the jury that defendant bore the burden of proof of direct threat. *Rizzo III,* 213 F.3d at 209. The *Rizzo III* court concluded that no objection had been made to the jury instruction, and thus reviewed the instruction only for plain error. The *Rizzo II* opinion on the burden of proof, however, addressed not only the defendant's appeal of the jury charge, but also its appeal of the failure to grant judgment as a matter of law. *Rizzo II*, 173 F.3d at 258. Because the latter issue was not before the en banc court, *Rizzo II*'s holding that defendant has the burden of proof of direct threat so long as the purported safety requirement tends to screen out the disabled remains the authoritative precedent of the Fifth Circuit.

Lastly, the Seventh Circuit agrees with the Second, Fifth, and Ninth, that the defendant has the burden of proving the direct threat defense. The court most recently discussed the issue in *Branham* v. *Snow*, No. 03-3599, 2004 U.S. App. LEXIS 26262 (7th Cir. 2004). The court there adhered to its prior holding that "'it is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation."

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screen out the disabled – covers all cases where "direct threat" would be asserted as a defense to discrimination. 173 F.3d at 259-60.

Id. at *24 (quoting *Dadian* v. *Vill. of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001)). The court then noted the conflicting holdings of the various circuits, including the instant case. *Id.* at *25 n.5. After discussing the possible reason for the split, the court held, "We see no reason to revisit the established law of this circuit in this case. Our earlier decision finds support in the plain wording of the statute and in common sense." *Id.* [7]

II. The Question Presented Is Important And Recurring.

The ADA was intended to ensure that the disabled – and those regarded as disabled by their employer – are provided equal opportunity without regard to stereotypes and prejudices. Although the "direct threat" defense sets a sensible and necessary boundary on the ADA's prohibition of discrimination, it can provide an outcome-determinative opportunity to introduce stereotypes and prejudices at trial when the burden is placed on plaintiff to prove the negative proposition that she does not pose a direct threat to others.

In the instant case, the sheriff admitted that his decision not to rehire McKenzie was based on what he and his staff knew about her past mental problems. At trial, Benton called a Chicago police supervisor who testified as an expert that it was reasonable for a police supervisor to refuse to rehire McKenzie "based solely on his knowledge of [her] mental

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[7] Although the Eighth Circuit has not directly addressed the question presented, it has held that the employer bears the burden of proving the analogous "business necessity defense" of ADA Section 103(a). *Belk* v. *Southwestern Bell Tel. Co.*, 194 F.3d 946 (8th Cir. 1999). And at least one judge on that court has concluded that the burden of proving direct threat should lie with defendant. *Stafne* v. *Unicare Homes*, 266 F.3d 771, 779 (8th Cir. 2001) (Lay, J., dissenting) ("the employer in posing an affirmative defense must carry the burden of proof that the individual poses a direct threat to the safety of those in the workplace").

health history." App., *infra*, 6a. Further, McKenzie's doctors were asked on cross examination whether there was any way to guarantee or predict whether episodes related to post-traumatic stress disorder might recur. *Id.* at 4a. In such circumstances, where defendant exploits the prejudices and stereotypes associated with mental illness, it is hardly surprising that the jury found that McKenzie had failed to prove that she was not a direct threat.

The numerous cases that form the split here attest that the issue is not only important but also recurring. In the short time since the case below was decided, the Seventh Circuit has had occasion to address the issue again. *Branham*, 2004 U.S. App. LEXIS 26262. Absent this Court's intervention, the outcome of ADA cases will depend not on their merits, but on the circuit in which the plaintiff has the fortune (or misfortune) to reside.

III. Further "Percolation" In The Courts Of Appeals Will Not Develop This Issue Further.

Over the course of nine years, seven circuits have spoken on the question of which party bears the burden of proving the "direct threat" defense in an ADA case. After variously examining the language of the ADA, its implementing regulations, and its legislative history, these courts have come to at least three different conclusions. These conflicting positions are not likely to be reconciled absent review by this Court. As noted above, the Fifth, Seventh, Ninth, and Tenth Circuits have acknowledged the conflicting opinions of other circuits. Several courts of appeals have opined that the plain language of the ADA does not clearly answer the question as to the burden of proof. *E.g.*, *Branham*, 2004 U.S. App. LEXIS 26262, at *25 n.5; *Rizzo III*, 213 F.3d at 213 n.4; *Amego*, 110 F.3d at 143. The arguments have now been fully developed, and the courts of appeals have staked out their positions. The issue is ripe for

a decision of this Court to resolve the conflict and restore uniformity to federal law in this area.

IV. The Burden Of Proof Of "Direct Threat" In An ADA Case Is Properly Borne By The Defense.

The lower court decisions placing the burden of proof of "Direct Threat" on ADA plaintiffs are unpersuasive. These courts mistakenly equate the ADA's use of "qualification standard" as part of the direct threat defense of Section 103 with Section 102's prohibition of discrimination against "qualified individuals." The courts therefore conclude that in order to prove that she is a "qualified individual," plaintiff must also prove the absence of direct threat. *See Waddell*, 276 F.3d at 1280.

The "direct threat" language in the ADA does not appear in the definition of a "qualified individual," but in Section 103, which is entitled "Defenses." 42 U.S.C. § 12113. The plain meaning of Section 103 is thus that the existence of a "direct threat" is an affirmative defense. This Court has characterized Section 103 as creating "an affirmative defense for action under a qualification standard" that "may include 'a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Echazabal*, 536 U.S. at 88. As with other affirmative defenses, the burden of proof is properly placed on the defendant. *E.g.*, *L. E. Waterman Co.* v. *Modern Pen Co.*, 235 U.S. 88 (1914) ("The burden of proof is upon the defendant company to prove the affirmative defense set up by the answer.").

Further, this Court has required that defendants bear the burden of proving "direct threat" in actions under Title III of the ADA. *See Bragdon* v. *Abbott*, 524 U.S. 624, 653 (1998) ("The [defendant] was required to establish that there existed a genuine issue of material fact" regarding the existence of a "direct threat."); *see also id.* at 655 (Stevens, J., concurring) ("I do not believe petitioner has sustained his burden of adducing evidence sufficient to raise a triable issue of fact on the significance of the risk posed . . . ."). While the dissent in *Bragdon* disagreed with the Court's conclusion that the defendant had adduced sufficient evidence on "direct threat," it did not take issue with the burden of proof. *See id.* at 663 (Rehnquist, C.J., dissenting) ("[I]t is clear to me that petitioner has presented more than enough evidence to avoid summary judgment on the 'direct threat' question.").

An inquiry into whether an individual poses a "direct threat" under the ADA must be individualized and based on the best current medical or other objective evidence. *Bragdon*, 524 U.S. at 649 (interpreting "direct threat" provision of Title III of the ADA). The EEOC's regulations applicable to Title I of the ADA have incorporated this Court's standard as articulated in *Bragdon* and *Arline*:

> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. 1630.2(r). The EEOC's interpretive guidance goes further, stating that in determining whether an employee poses a direct threat:

> *The employer* should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, *the employer* must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, *the employer* must identify the aspect of the disability that would pose the direct threat.

29 C.F.R. 1630 App. (emphases added). Because the employer must make this inquiry, the employer should also be required to prove the basis of its decision if the matter winds up in court. The regulations and their interpretive guidelines indicate EEOC's view that the defendant-employer has the burden of proving that the employee posed a direct threat.[8]

Finally, the legislative history supports placing the burden of proving direct threat on defendants. As the *Amego* court recognized, the House Report states that "if the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless *the employer can demonstrate* that the applicant's disability poses a direct threat to others in the workplace." H.R. Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. at 469 (emphasis added). The Report further states that the amendment defining "direct threat" "sets a clear, defined standard *which requires actual proof of significant risk to others*." *Id.*[9] This language implies that

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[8] The EEOC has consistently advanced this position in litigation. *See, e.g.*, *Stafne*, 266 F.3d at 779 & n.6 (noting EEOC's amicus brief on the burden of proof issue); *Amego*, 110 F.3d at 137.

[9] An example given in the House Report of how the direct threat defense should be applied highlights the disparity between Congress's intent and the result in this case: "For example, an employer may not (...continued)

the employer, not the employee, has the burden of proving that there is a "significant risk."

As the Seventh Circuit recently stated, placing the burden of proving the direct threat defense on the defendant "finds support in the plain wording of the statute and in common sense." *Branham*, 2004 U.S. App. LEXIS 26262, at *25 n.5. "The [employer] is in the best position to furnish the court with a complete factual assessment of both the . . . qualifications of the candidate and of the demands of the position." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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assume that a person with a mental disability, or a person who has been treated for a mental disability, poses a direct threat to others. This would be an assumption based on fear and stereotype." H.R. Rep. No. 101-485, pt. 3, at 468. This is exactly the assumption that the jury was allowed to find reasonable under the district court's allocation of the burden of proof.