No. 12-707

IN THE

Supreme Court of the United States

UNITED AIR LINES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, the National Federation of Independent Business Small Business Legal Center, and the Society for Human Resource Management respectfully submit this brief *amici curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice of the *amici curiae's* intention to file this brief at least 10 days prior to its

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes close to 300 major U.S. corporations. EEAC's directors and officers are among industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the

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due date. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to preparation or submission of the brief.

nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 225,000 individual members, SHRM's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, SHRM's mission also is to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in over 100 countries.

Amici's members are employers, or representatives of employers, subject to the employment provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, as amended, and its implementing regulations. Many also are federal government contractors or subcontractors subject to the nondiscrimination and affirmative action requirements of Section 503 of the Rehabilitation Act of 1973 (Section 503), 29

U.S.C. § 793. *Amici's* members are firmly committed to the principles of equal employment opportunity and workplace nondiscrimination.

Amici's member companies routinely make reasonable accommodations to allow qualified employees with disabilities to perform essential job functions. In some cases, however, neither the employee nor the employer can identify a reasonable accommodation that will allow the employee to perform the essential functions of his or her current job. Thus, the issues presented in this case are extremely important to the nationwide constituencies that *amici* represent.

The court below, misconstruing this Court's ruling in *U.S. Airways, Inc. v. Barnett*, held incorrectly that the ADA entitles any employee who is prevented by disability from performing his or her current job to be reassigned to any vacant position for which he or she is minimally qualified, regardless of the competing interests or superior qualifications of other, nondisabled employees who are candidates for the position. In doing so, the ruling exacerbates a longstanding disagreement among the federal courts of appeals regarding the scope of an employer's legal obligations under the ADA, and departs from the sensible view that the duty to provide reasonable accommodations does not extend so far as to require preferential treatment of less-qualified individuals in contravention of the employer's competitive selection procedures.

Because of their interest in ensuring sound application of the nation's civil rights laws, *amici* collectively have filed several hundred briefs as *amicus curiae* before this Court, the U.S. Circuit Courts of Appeals and numerous federal trial courts in cases involving

a range of important issues, including the proper interpretation of the ADA. Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their expertise in these matters, *amici* are well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

United Air Lines (United) has a policy permitting reassignment as a reasonable accommodation where an individual with a disability no longer is able to perform the essential functions of his or her job. Pet. App. 13. While individuals with disabilities are given preferential treatment over equally-qualified, non-disabled individuals competing for the same job, they are not entitled to reassignment over a better-qualified candidate. *Id.*

The EEOC challenged the policy in federal court, arguing that preferential reassignment of minimally qualified employees with disabilities is mandatory under the ADA, unless the employer can demonstrate undue hardship. *Id.* According to the EEOC, this Court made clear in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), that the ADA requires preferential placement where needed to ensure equal employment opportunities for individuals with disabilities, and rejected the view that individuals with disabilities must compete against their non-disabled peers for open positions. Pet. App. 12.

United moved for dismissal, arguing among other things that under the Seventh Circuit's decision in *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), an employer never is required to reassign

a less qualified individual with a disability as an ADA reasonable accommodation where doing so would offend its policy of selecting the best qualified candidates for open positions. Pet. App. 23. The trial court agreed, and dismissed the EEOC's lawsuit. Pet. App. 27.

On the EEOC's appeal, a three-judge panel agreed with the EEOC's observation that, under *Barnett*, employers sometimes will be required to grant "preferences" in the form of workplace reasonable accommodations in order to "achieve the Act's basic equal opportunity goal." Pet. App. 17. It was not willing to go so far as to say that *Barnett* effectively overruled *Humiston-Keeling*, however. It thus affirmed the district court, but simultaneously invited the *en banc* court to decide definitively whether *Humiston-Keeling* survives *Barnett.* Pet. App. 19-20.

In response to the EEOC's petition for rehearing/ rehearing *en banc*, the panel issued a new decision, which reinstated the EEOC's lawsuit and expressly overruled *Humiston-Keeling*. Pet. App. 10-11. No judge voted in favor of *en banc* review. Pet. App. 1-2. Accordingly, the Seventh Circuit now holds that the ADA mandates reassignment as a workplace reasonable accommodation, even where the individual seeking the accommodation is not the most qualified for the position in question. Pet. App. 10-11.

SUMMARY OF REASONS FOR GRANTING THE PETITION

In *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), this Court held that under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, a request for job reassignment which, if honored,

would violate the terms of a bona fide seniority system is presumptively unreasonable and thus will not be required unless "special circumstances" exist to justify an exception to the general rule. This case presents the Court with the opportunity to resolve a troubling conflict in the courts regarding the proper application of *Barnett* to broader questions of reasonable accommodations under the ADA.

In ruling that reassignment as an ADA reasonable accommodation is *mandatory* as long as the individual with a disability is minimally qualified, the court below misconstrued *Barnett* as requiring preferential placement – in essence, a competitive advantage – purportedly to ensure equal employment opportunities for individuals with disabilities. It joins the Tenth Circuit, which long has subscribed to that view, but departs from the Eighth Circuit, which goes the other way.

Specifically, the Tenth Circuit – now joined by the court below – holds that reassignment to a vacant position as an ADA reasonable accommodation is mandatory, regardless of whether the individual with a disability is less qualified and therefore would not have been selected but-for his or her disability. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999); *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012). In contrast, the Eighth Circuit has held that an employer may refuse to reassign a less-qualified individual with a disability to a vacant position as a reasonable accommodation where doing so would violate its legitimate, nondiscriminatory competitive selection rules. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir.), *cert. granted*, 552 U.S. 1074 (2007), *and cert. dismissed*, 552 U.S. 1136 (2008).

The decision below thus exacerbates an already troubling conflict in the courts regarding the impact of *Barnett* on an employer's duty to reassign individuals with disabilities to open positions as a reasonable accommodation under the ADA. It also is inconsistent with the plain text and legislative history of the ADA – which mandates equal opportunity, not equality of result. Providing the type of competitive advantage contemplated by the Tenth and now the Seventh Circuit's mandatory reassignment rule goes beyond what is objectively reasonable. It also unjustly interferes with the unassailable right of employers to select and maintain the best qualified workforce available, and upsets the legitimate expectations of non-disabled employees to be judged solely on their merit.

REASONS FOR GRANTING THE PETITION

REVIEW OF THE DECISION BELOW IS NECESSARY IN ORDER TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND PROVIDE MUCH NEEDED CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The decision below, which held that the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq*., "does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer," Pet. App. 3, departs from decisions of other courts of appeals and fundamentally misconstrues this Court's holding in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). Given the growing conflict in the lower courts regard-

ing the scope of an employer's obligation to reassign an individual with a disability to a vacant position as a reasonable accommodation under the ADA, review of the decision below by this Court is sorely needed.

A. The Decision Below Threatens To Transform The ADA Into A Bona Fide Affirmative Action Law

The Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, prohibits discrimination in the terms, privileges and conditions of employment against qualified individuals with disabilities. It also imposes an affirmative duty on employers to provide workplace reasonable accommodations to qualified individuals with disabilities to the point of undue hardship, but does not mandate or otherwise dictate the imposition of any particular type of accommodation. Rather, any potential accommodation, including that of reassignment to a vacant position, simply must be effective in enabling the employee to perform the essential functions of the job, as well as objectively reasonable.

The ADA contemplates that such reasonable accommodations will operate to level the playing field for individuals with disabilities so as to ensure equal employment opportunities. The notion of mandating reassignment as a reasonable accommodation in all instances, even where the individual with a disability is not the most qualified candidate for the job, is antithetical to that basic and fundamental principle.

Yet the court below has joined the Tenth Circuit in reading the law as obligating employers to reject a better qualified candidate if an individual with a disability requests transfer into the position in question as workplace accommodation. *See Smith v.*

Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999). The D.C. Circuit also appears to have endorsed that view. *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998). Those decisions stand in stark contrast to others, including the Eighth Circuit's ruling in *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir.), *cert. granted*, 552 U.S. 1074 (2007), *and cert. dismissed*, 552 U.S. 1136 (2008), which rightly refuse to treat the ADA as an affirmative action statute. *See, e.g., Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444 (6th Cir. 2004); *Terrell v. USAir*, 132 F.3d 621 (11th Cir. 1998); *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995); *see also Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002) (applying *Barnett* to case brought under the Rehabilitation Act).

1. The ADA requires equality of opportunity, not equality of result

The ADA is virtually identical in aims and objectives to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which bars employers from discriminating on the basis of race, color, religion, sex or national origin. As this Court has observed, "The purpose of Title VII 'is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.'" *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) (citation omitted). The ADA does not depart from the basic principle that individuals have the right to compete on an equal basis regardless of personal characteristics unrelated to their actual ability to perform a particular job. Indeed, the ADA commands that individuals with disabilities be afforded equal employment opportunities, with reasonable accommodation where appropriate. It stops short, however, of requiring that such individuals be given

a competitive advantage in hiring, placement, transfer, layoff, or any other employment action.

In addition to ensuring that individuals with disabilities "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others," *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq.*, as amended, also requires covered federal contractors to adopt "an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities …." 29 U.S.C. § 791(b). The dual obligation to ensure equal employment opportunity and to practice affirmative action is cemented in the contract itself, which must contain a clause memorializing the contractor's commitment (1) not to discriminate against any applicant or employee because of a physical or mental disability, and (2) to take affirmative action to employ and advance qualified individuals with disabilities. *Id.*; 41 C.F.R. § 60-741.5.

The U.S. Labor Department's Office of Federal Contract Compliance Programs (OFCCP) enforces the Rehabilitation Act's affirmative action program requirements. Both OFCCP's existing and recently proposed administrative regulations distinguish between a contractor's duty not to discriminate and its affirmative action obligations. In 41 C.F.R. Part 60-741 Subpart B—Discrimination Prohibited (41 C.F.R. §§ 60-741.20-25), the current regulations explain that the term "discrimination" includes failing "to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its

business." 41 C.F.R. § 60-741.21(f)(1). Subpart C (41 C.F.R. §§ 60-741.40-45), separately identifies the contractors to which the affirmative action requirement applies, and describes all of the "ingredients" that must be included in a written affirmative action plan. 41 C.F.R. § 60-741.44.

Subpart C also references a covered contractor's obligation under 60-741.21(f) to provide reasonable accommodations to qualified individuals with disabilities. Recognizing the potential for confusion, OFCCP has sought to further clarify the difference between reasonable accommodations in the nondiscrimination context and reasonable accommodations in the affirmative action context. Its recently proposed revisions to Section 60-741.44(d) provide:

> Reasonable accommodation to physical and mental limitations. As is provided in § 60-741.21(a)(6), *as a matter of nondiscrimination*, the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. *As a matter of affirmative action*, the contractor must ensure that its electronic or online job application systems are compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software.

76 Fed. Reg. 77,056, 77,096 (Dec. 9, 2011) (emphasis added). Like the ADA, the Rehabilitation Act does not mandate any particular accommodation to ensure nondiscrimination, nor are actions other than those specifically mentioned in the statute and its imple-

menting regulations required in providing reasonable accommodations as a matter of affirmative action. The Rehabilitation Act's affirmative action requirements never have been construed as expansively as to require preferential reassignment and even if they were, that construction still would not be applicable to the ADA context.

In particular, although the Rehabilitation Act was the nation's first comprehensive, federal disability workplace nondiscrimination law and thus served as a model for the ADA, *see* H.R. Rep. No. 101-485, pt. 2, at 23 (1990), it is important to note that Congress chose not to incorporate into the latter the former's broader affirmative action requirements. In fact, when Congress passed the ADA in 1990, it made clear that it did not intend to require preferences, pointing out:

> By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.
>
> * * *
>
> [T]he employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation. But, *the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.*

H.R. Rep. No. 101-485, pt. 2, at 55-56 (1990); S. Rep. No. 101-116, at 26-27 (1989) (emphasis added). Indeed:

> If the Congress had intended to grant a preference to the disabled – a rather controversial notion – it would certainly not have done so by slipping the phrase "reassignment to a vacant position" in the middle of this list of reasonable accommodations. Indeed, the catch-all "and other similar accommodations for individuals with disabilities" strongly indicates that the Congress perceived each of the enumerated types of reasonable accommodation to be of the same character. If "reassignment to a vacant position" is read in context, therefore, it must mean that an employer is obligated – if another type of reasonable accommodation cannot be made in the disabled employee's current position – to allow a disabled employee to compete (on equal terms with non-disabled employees) for vacant positions. On this understanding of "reassignment to a vacant position," the phrase fits in with the common theme of regulating the relationship between disabled employee and employer without directly affecting non-disabled employees.

Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1315 (D.C. Cir. 1998) (Silberman, C.J., dissenting) (citation omitted).

For a number of years immediately following passage of the ADA, the EEOC's own ADA administrative regulations reinforced this no-preference congressional mandate, making clear that:

> Like the Civil Rights Act of 1964 . . . the ADA seeks to ensure access to equal employment opportunities based on merit. *It does not guaran-*

> *tee equal results, establish quotas, or require preferences* favoring individuals with disabilities over those without disabilities.

29 C.F.R. pt. 1630, App. (1999) (Background) (emphasis added). It was only in 2011, when it revised portions of its regulations to conform to the recently-enacted ADA Amendments Act (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2009), that the EEOC removed from its guidance any reference to "equal results," "quotas," or "preferences" in the accommodations context. The pertinent section of the agency's ADA regulations now reads:

> The reasonable accommodation that is required by this part should provide the individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.

29 C.F.R. pt. 1630, App. (2012) (Section 1630.9 – Not Making Reasonable Accommodation). Even this toned down language continues to emphasize the EEO nature of the statute and says nothing to suggest that the ADA is a preference statute in the traditional, affirmative action sense. And yet the EEOC argues here, as well as in sub-regulatory guidance and policy positions taken in other litigation, that individuals with disabilities who are minimally qualified categorically are entitled to reassignment as a reasonable accommodation, whether or not doing so would deprive a better-qualified, non-disabled worker of the opportunity in violation of the employer's legitimate, nondiscriminatory competitive

assignment rules.[2] The EEOC's current views on reassignment as a reasonable accommodation find no support in the statutory language or even the agency's own regulations, and have caused confusion among employers that regularly are faced with such requests, as well as among lower courts called upon to interpret the law.

In *Smith v. Midland Brake*, for instance, the Tenth Circuit expressly endorsed the EEOC's policy position that reassignment is required, even where the individual with a disability is not the most qualified for the job, reasoning that the ADA "must mean something more than merely allowing a disabled person to compete equally …." 180 F.3d at 1165. It found that if no reasonable accommodation can keep an employee in his or her current job, the employer's reasonable accommodation obligation is to reassign the employee to a vacant position so long as the employee is qualified for the job, and it does not impose an undue burden on the employer:

> Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.

Id. at 1169.[3]

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[2] In its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, for instance, the EEOC takes the position that an individual with a disability cannot be required to "compete" for a vacant position, nor must he or she be the "the best qualified individual for the position in order to obtain it as a reassignment." EEOC Compl. Man. (Apr. 29, 1999).

[3] Some courts – including the Seventh Circuit – have held that the ADA's inclusion of "reassignment to a vacant position" merely requires that reassignment be "considered." *See, e.g.,*

2. Some lower courts misinterpret *Barnett's* "preferences" language as sanctioning the application of federal affirmative action principles to the ADA nondiscrimination context, while others read it as foreclosing preferential placement decisions

Exacerbating the confusion is the EEOC's insistence that this Court's holding in *Barnett* fully supports its policy position. At issue is the proper meaning and interpretation of the following statement from *Barnett*:

> [P]references will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy.

535 U.S. at 397. The EEOC construes that passage as *mandating* preferential placement of individuals with disabilities over non-disabled persons who are objectively better qualified, thus ruling out the idea that individuals with disabilities *ever* must compete against their non-disabled peers for open positions.

Some courts agree with that interpretation, but others take an entirely different approach to *Barnett*. In *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002), for instance, the Seventh Circuit ruled that the Veterans Administration did not violate the Rehabilitation Act

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Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 678 (7th Cir. 1998); *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 581 (3d Cir. 1998).

by selecting the best qualified candidate for an open position over a lesser-qualified person seeking transfer to the job as a disability accommodation. It read *Barnett* as standing for the proposition that "an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system." 301 F.3d at 872.

Around the same time, however, the Third Circuit in *Shapiro v. Township of Lakewood* concluded that *Barnett* actually *rejected* the notion that an employer's disability-neutral selection rule "always takes precedence over a request for reasonable accommodation." 292 F.3d 356, 360 (3d Cir. 2002). Rather, it characterized *Barnett* as merely having established a two-part test for determining whether or not an employer was obliged under the ADA to transfer an individual with a disability to a vacant position:

> In *US Airways, Inc. v. Barnett*, the Supreme Court considered the question whether an employer may be required by the ADA's reasonable accommodation requirement to deviate from a disability-neutral rule. Rejecting the argument that such a rule always takes precedence over a request for reasonable accommodation, the Court expressed approval of lower court decisions holding that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an accommodation seems 'reasonable' on its face, i.e., ordinarily or in the run of cases" and that "once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific)

> circumstances that demonstrate undue hardship in the particular circumstances."

292 F.3d at 360-61.

The Court below declined to adhere to *Mays*, which concluded that under *Barnett*, an employer cannot be found to have violated its reasonable accommodation obligations under the ADA simply by refusing to pass over a better qualified candidate in order to make a place for the less-qualified individual with a disability, turning instead to *Shapiro's* more "helpful summary of the *Barnett* framework." Pet. App. 6 n.1. It said:

> [T]he *Mays* Court incorrectly asserted that a best-qualified selection policy is essentially the same as a seniority system. In equating the two, the *Mays* Court so enlarged the narrow, fact-specific exception set out in *Barnett* as to swallow the rule.

Pet. App. 9. And yet that is precisely what the Third Circuit did in *Shapiro*. Characterizing the question before the Court in *Barnett* generally as "whether an employer may be required by the ADA's reasonable accommodation requirement to deviate from a disability-neutral rule," 292 F.3d at 360, the Third Circuit in *Shapiro* "did not limit the applicability of the *Barnett* test to *specific types* of neutral policies; rather, it described the *Barnett* test as a 'two-step approach for cases in which a requested accommodation in the form of a job reassignment is claimed to violate a disability[-]neutral rule of the employer.'" *Haynes v. AT&T Mobility, LLC*, 2011 U.S. Dist. LEXIS 12066, at *11 (M.D. Pa. Feb. 8, 2011) (quoting *Shapiro*, 292 F.3d at 361) (emphasis added).

In contrast, the Eighth Circuit in *Huber v. Wal-Mart*, 486 F.3d 480 (8th Cir.), *cert. granted*, 552 U.S. 1074 (2007), *and cert. dismissed*, 552 U.S. 1136 (2008), held that because the ADA is "not an affirmative action statute," *id.* at 483 (footnote omitted), it does not obligate an employer to reassign an individual with a disability to a vacant position where doing so would offend its legitimate, nondiscriminatory policy of hiring the most qualified applicant for the job – a conclusion which, it said, "is bolstered by" *Barnett*. *Id*. In doing so, the Eighth Circuit declined to adopt the Tenth Circuit's view in *Midland Brake*, a pre-*Barnett* ruling, that "reassignment under the ADA results in automatically awarding a position to a qualified disabled employee regardless of whether other better qualified applicants are available, and despite an employer's policy to hire the best applicant." *Id.* (footnote omitted); *see also Marshall v. AT&T Mobility, LLC*, 793 F. Supp. 2d 761, 784 (D.S.C. 2011) (noting that while the Fourth Circuit has not yet ruled on the question, "most of the circuits which have examined the issue have found that the ADA is not an affirmative action statute and does not require such action") (citation omitted). Indeed, such a broad reading of the ADA is both antithetical to basic principles of equal employment opportunity and contrary to the statute.

B. Mandating Reassignment Of A Less Qualified Individual With A Disability As An ADA Accommodation Without Regard To An Employer's Nondiscriminatory, Competitive Selection Process Is Plainly Unreasonable

In any event, requiring that an employer – a producer of commercial goods and services, for

instance – place into a position an individual who is not the best qualified to perform the job is patently unreasonable, and this Court should step in to redirect those lower courts, like the court below, that have construed the ADA in such a manner.

The ADA defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business ...." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). In tandem with § 12112(b)(5), the ADA defines "qualified individual with a disability" as "an individual with a disability 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) (emphasis added).

Some lower courts read *Barnett* broadly to require that employers implement any requested accommodation that appears plausible, unless they can demonstrate that doing so would impose an undue hardship on business operations. A "plausible" accommodation does not automatically equate to a "reasonable" one, however. And since the plain text of the statute makes clear that an employer has no duty to an individual who is able to perform the job with an "unreasonable" accommodation, it follows that reassignment of a less-qualified person to a vacant position is never required, even if theoretically possible.

C. The Decision Below Disregards The Unassailable Prerogative Of Employers To Select Only The Best Qualified Candidates For Job Vacancies

Granting a competitive advantage to less-qualified individuals with disabilities in job assignments also would unfairly penalize other employees – those who otherwise would have been selected for the position – merely because they do not have a disability. This is true whether the employer's practice is to choose employees based on comparative qualifications or, as in *Barnett*, placement follows a seniority system. Indeed, "merit-based hiring policies are similar to seniority policies because both create expectations for employees concerning how vacant positions will be filled." Carrie L. Flores, SPHR, *Note: A Disability Is Not a Trump Card: The Americans with Disabilities Act Does Not Entitle Disabled Employees to Automatic Reassignment*, 43 Val. U. L. Rev. 195, 251 (2008). The court below disagrees:

> While employers may prefer to hire the best qualified applicant, the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy. To strengthen this critique, the EEOC points out the relative rarity of seniority systems and the distinct challenges of mandating reassignment in a system where employees are already entitled to particular positions based on years of employment.

Pet. App. 9.

Thus, according to the Seventh and Tenth Circuits, as well as the EEOC, the only justification an em-

ployer can offer for assigning the better qualified, non-disabled worker over the less qualified individual with a disability as an ADA accommodation is that selecting the latter would impose an undue hardship on the business's operations. That cannot be the law, nor is it in any way practical.

Furthermore, even assuming *arguendo* that such an accommodation ever could be construed as reasonable, forcing an employer to place into a competitive vacancy a less-qualified individual invariably would produce unacceptable inefficiencies, penalize career ambition, and discourage competition among employees, and thus almost always would impose an undue hardship on most businesses. As one commenter has observed, mandating job reassignment as an ADA accommodation causes "a greater reshuffling of the workplace environment [which] imposes greater burdens on employers and co-workers than do the other types of accommodations recognized by the ADA." Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 Wake Forest L. Rev. 439, 448 (2002). The author continues:

> For the employer, [ ] reassignment ... accommodations mean that it will not receive the work effort of employees who are trained and experienced in their current positions. ... Reassignment additionally limits an employer's discretion in filling vacant positions. ... These accommodations, accordingly, detrimentally affect management's overall flexibility and productivity.

Id.

CONCLUSION

Accordingly, the *amici curiae* Equal Employment Advisory Council, Chamber of Commerce of the United States of America, the National Federation of Independent Business Small Business Legal Center, and the Society for Human Resource Management respectfully request the Court grant the petition for a writ of certiorari.

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