No. 06-3108

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

SCHNEIDER NATIONAL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Eastern District of Wisconsin, No. 04-875
The Honorable William C. Griesbach

PETITION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR REHEARING EN BANC

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STATEMENT PURSUANT TO F.R.A.P. 35(b)(1)

The Equal Employment Opportunity Commission (EEOC) petitions for rehearing en banc. F.R.A.P. 35(b). This case merits en banc review for the following reasons: First, en banc consideration is necessary to secure uniformity of this Court's decisions. F.R.A.P. 35(a)(1). The panel's ruling that an employer who treats a licensed commercial driver as if his diagnosis disqualifies him from any job that requires driving on public roads does not regard him as having a "disability" as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(2), conflicts with prior decisions of this Court. *See DePaoli v. Abbott Labs.*, 140 F.3d 668 (7th Cir. 1998); *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997). Second, rehearing en banc is further warranted because the panel resolved a question of exceptional importance, *see* F.R.A.P. 35(a)(2): The panel's holding that the ADA "does not touch" an employer's refusal to employ an otherwise qualified individual because it wants to avoid even the slightest risk of injury, death, or potential liability associated with his perceived disability, *see EEOC v. Schneider National, Inc.*, No. 06-3108 (7th Cir. Mar. 21, 2007) (op.) at 9, conflicts with the text and purpose of the ADA, and with decisions of the Supreme Court, *see School Board of Nassau County v. Arline*, 480 U.S. 273, 281-85, 287-88 (1987); and this Court, *see Branham v. Snow*, 392 F.3d 896, 905-08 (7th Cir. 2004); *Knapp v. Northwestern Univ.*, 101 F.3d 473, 483-85 (7th Cir. 1997).

FACTUAL STATEMENT

Jerome Hoefner worked for over 13 years as a driver for Schneider National, Inc., North America's largest trucking company, which recognized him for his exemplary safety record. Br. at 4-6.[1] In 2002, on the day after his son's wedding, Hoefner fainted after attending church on an

[1] The EEOC's appellate brief (Br.) and reply brief (Reply), are available electronically on this Court's website, http://www.ca7.uscourts.gov/briefs.htm, and contain citations to the district court record to support all factual assertions. All materials filed in the district court are available electronically via the

empty stomach and three hours sleep, and was diagnosed with neurocardiogenic syncope. Br. at 6-7. After several weeks of medical testing, doctors prescribed medication and released him to resume driving for Schneider without restriction. *Id.* at 9. Hoefner continues to take the medicine and has not fainted since. *Id.* at 13. Every physician who has since examined him has recertified his commercial driver's license, *id.*, and thus has necessarily found, in accord with Federal Motor Carrier Safety Administration (FMCSA) regulations, that he has "no established medical history or clinical diagnosis of ... any ... condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle." *See* 49 C.F.R. § 391.41(b)(8).[2]

Based solely on Hoefner's diagnosis, Schneider disqualified him from driving for the company under "a 'zero tolerance policy' for drivers with neurocardiogenic syncope," adopted in 2001 after another driver had a fatal accident. Op. at 3; Br. at 9-10. Under that policy, Schneider automatically and permanently disqualifies, without exception, anyone so diagnosed from driving "in any capacity that requires a commercial driver's license." Br. at 10; Reply at 19-21. Schneider requires a commercial driver's license for any job that entails driving "on a public highway." *Id.* at 20. Schneider's policy permits no individualized inquiry into whether a driver effectively controls his condition with medication or is medically certified to drive commercial vehicles under FMCSA regulations. Br. at 10.

According to Wendy Sullivan, a nurse who manages Schneider's occupational health department, Schneider disqualified Hoefner from driving "because his physician diagnosed him

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ECF link on the website of the U.S. District Court for the Eastern District of Wisconsin, https://ecf.wied.uscourts.gov. A copy of the panel opinion is attached as an addendum to this petition.

[2] The FMCSA regulates commercial motor vehicles and prescribes qualification standards – including testing, licensing, training, physical, and medical requirements – for commercial drivers. *See* Br. at 4-5; 49 C.F.R. § 391.1(a) (defining "commercial motor vehicle" as a vehicle or combination of vehicles that: has a loaded weight over 26,000 pounds; or is designed to carry at least 16 passengers; or is used to transport hazardous materials); op. at 2.

with a condition that we indicate and believe is not ... safe to drive a commercial vehicle." Reply at 9. "Under Schneider's policy," Sullivan explained, "anyone with neurocardiogenic syncope is disqualified [from] driving for Schneider because a driver with this condition may faint which would certainly result in serious injury or death to himself and others as well as significant damage to equipment and property." *Id.* at 7. For this reason, Schneider "automatically consider[s]" "[a]ny person" with Hoefner's diagnosis "a direct threat." Br. at 11-12. "Direct threat" is "inherent to the diagnosis," Sullivan testified, and "other trucking companies are wrong in their belief that these drivers are not automatically disqualified." *Id.*

Schneider accordingly informed Hoefner by letter, "You will not be allowed to return to work, as a driver" because "we simply cannot take the risk that while driving, you would lose consciousness" and "put you and the motoring public in grave danger." Br. at 13. Schneider suggested that Hoefner consider applying for "open non-driving positions," and terminated his employment in May 2003, when his short-term disability benefits expired. *Id.* The next month, Hoefner began his current job hauling hazardous chemicals for another trucking company. *Id.*

The EEOC sued, claiming Schneider treated Hoefner as if his syncope diagnosis substantially limits his ability to work as a truck driver – a class of jobs for which he has the requisite license, training, skills, and experience – because it mistakenly believes his risk of fainting poses a direct threat to the driving public. Br. at 17. Schneider admitted "Hoefner was physically qualified" to drive commercially, and "explicitly waived" reliance on a statutory direct threat defense.[3] *Id.* at 14. On summary judgment, the district court held, as a matter of law, that Schneider did not regard Hoefner as having a disabling impairment. *See id.* at 14-17.

[3] The ADA provides "a defense to a charge of discrimination under this chapter that an alleged application of qualification standards ... that ... deny a job ... to an individual with a disability has been shown to be job-related and consistent with business necessity," *see* 42 U.S.C. § 12113(a), and that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to

PANEL DECISION

A panel of this Court found "nothing to suggest that Schneider has a mistaken understanding of neurocardiogenic syncope." Op. at 3. "No doubt," the panel conceded, "the risk that a person afflicted with this disorder will faint while driving is small . . . [b]ut Schneider is entitled to determine how much risk is too great for *it* to be willing to take." *Id.* at 4. Without a "policy against hiring drivers with neurocardiogenic syncope," the panel hypothesized, 2% (or 260) of Schneider's 13,000 drivers might have the condition, and the "risk that at least one of them would have [an] ... accident could not be thought wholly negligible, and the liability implications for Schneider ... could be calamitous." *Id.* at 5. The panel acknowledged that "Schneider may be excessively risk averse" due to the prior "unfortunate accident," yet decided that, "as there is no evidence that Schneider exaggerates the severity of Hoefner's condition and the risk he poses as a driver, there is no violation of the [ADA]." *Id.* at 5-6. In the panel's view, an employer who "might ... correctly believe that the risk of a particular type of accident was 1 in 100,000, yet ... because it ... had had an experience of the risk materializing, might be unwilling to assume the risk," has made a "decision irrelevant to liability under the [ADA]." *Id.* at 6.

Even "if this is wrong," the panel continued, "the EEOC must still lose because there is no evidence that Schneider considers neurocardiogenic syncope to impair any 'life activity' other than driving a truck for Schneider, and perhaps for some other truck companies," which "is too esoteric a capability to be judged a 'major' life activity." *Id.* at 6. "In a 'regarded as' case, such as this," the panel stated, "the claimant … would have to show that the employer believed that the claimant had a condition that would disable him from working in a broad range of jobs**.**" *Id.* at 7. A mistaken belief "that a person with neurocardiogenic syncope should not be permitted to

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the health or safety of other individuals ...." 42 U.S.C. § 12113(b). The ADA defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3).

drive big trucks or trucks that carry passengers or hazardous chemicals," the panel decided, does not demonstrate ADA coverage because it does not encompass "a broad range of jobs." *Id.* at 9.

"[I]f Schneider would not have employed Hoefner ... even in a truck-driving job that did not have to meet federal safety standards," the panel allowed, "there would then have been some basis for thinking that Schneider had exaggerated Hoefner's condition and mistakenly thought him disabled from a broad range of jobs even though he was not." Op. at 9. Yet "[e]ven then," the panel concluded, "the EEOC would not have made its case, because Schneider's" perception that Hoefner was precluded from a "broad range" of truck driving jobs "would be consistent with the company's having decided to set a higher safety standard than law or custom requires." *Id.* According to the panel's reading of *Sutton v. United Air Lines*, 527 U.S. 471 (1999), "that is a decision the [ADA] does not touch." Op. at 9.

ARGUMENT

I. Rehearing En Banc Is Required Because the Panel Disregarded Circuit Precedent in Deciding, as a Matter of Law, that Schneider Did Not Regard Hoefner as Having a Medical Condition that Substantially Limits Him in Working.

The panel misconstrued the EEOC's theory of statutory coverage and departed from circuit precedent in holding, as a matter of law, that Hoefner does not have a "disability," as defined by the ADA. The definition of "disability" includes "being regarded as having" a physical impairment that "substantially limits" a "major life activit[y]." 42 U.S.C. § 12102(2). Working is a major life activity. *Sinkler v. Midwest Property Management*, 209 F.3d 678, 684 (7th Cir. 2000); 29 C.F.R. § 1630.2(i). "In the context of working," this Court has recognized, "'substantially limits' means '**significantly restricted in the ability to perform a class of jobs** or a broad range of jobs in various classes as compared to the average person having comparable

training, skills and abilities.'" *Moore v. J.B. Hunt Transp.*, 221 F.3d 944, 953 (7th Cir. 2000) (emphasis added) (quoting 29 C.F.R. § 1630.2(j)(3)(i)).

The panel held that "[i]n a 'regarded as' case, such as this, the claimant … would have to show that the employer believed that the claimant had a condition that would **disable him from working in a broad range of jobs.**" Op. at 7 (emphasis added). Under this standard, the panel held, "Schneider would be home free even if it mistakenly believed that a person with neurocardiogenic syncope should not be permitted to drive" commercial motor vehicles, because such a restriction would not disqualify him from "**a broad range of jobs**." *Id.* at 9 (emphasis added). But this standard was inapplicable because the EEOC's claim is that Schneider treated Hoefner as if his syncope diagnosis significantly restricts his ability to work in the **class** of truck driving jobs. Br. at 17-18; Reply at 1-2.

The panel thus misconstrued the EEOC's theory of ADA coverage, and ignored Circuit precedent recognizing that a condition that significantly restricts an otherwise qualified person's ability to perform jobs requiring a specialized license – such as truck driving – substantially limits him in working in a "class of jobs" and thus demonstrates ADA coverage. Drawing on EEOC regulations and guidance, *see* 29 C.F.R. § 1630.2(j)(3)(ii), this Court discerns that "in order to define a meaningful class of jobs, we must look to the training, knowledge, skills, and ability required to perform the particular work, as well as the geographic area reasonably available to the plaintiff." *DePaoli v. Abbott Labs.*, 140 F.3d 668, 672-73 (7th Cir. 1998). The Court in *DePaoli*, 140 F.3d at 673, further explained:

> If a disability substantially limits a person from holding a job for which she has a specialized license, and the person would need to undergo significant new training to become qualified for positions of comparable responsibility elsewhere, that fact too would help draw the line between the class of jobs relevant to the ADA and those that are too remote from the position at issue. So, for example, in *Best v. Shell Oil Co.*, 107 F.3d 544, [548] (7th Cir. 1997), this court found that the plaintiff had

> alleged enough to survive summary judgment when he presented evidence tending to show that his disability might preclude him from all truck drivers' jobs, not just the job he had done for Shell.

In *Best*, this Court held that an individual whose impairment "substantially limit[s] his ability to work as a truck driver," or who is so perceived, is "substantially limited in the major life activity of working." 107 F.3d at 548-49. "The precise question" on appeal from summary judgment was "whether Best's impaired knee substantially limited the major life activity of working, or if it simply prevented him from performing one narrow job for one employer." *Id.* at 548. This Court found sufficient evidence for a "reasonable trier of fact [to] find … that Shell perceived Best as having a disability that prevented him from working as a truck driver for the company," and cited the following evidence in support of reversal: the conclusion of Shell's doctor "that Best 'would have difficulty maintaining this position at this time'" and should "'consider *alternative work duties on a fulltime basis for the future*'"; an evaluator's comment during a driver performance evaluation that "Best was not safe and *should not be driving*"; and a plant manager's statement that Shell's doctor "'had stated that Best's knee would not take the long hours of abuse required by the job *and that Best should find another line of work*.'" *Id.* (emphases in opinion). In particular, the Court considered it significant that Shell "placed Best on long term disability and looked for a non-driving job Best could perform." *Id.* at 548-49.

Like the employer in *Best*, Schneider decided Hoefner "could no longer perform the essential functions of the job (driving)"; placed him on disability leave; informed him that he would "not be allowed to return to work, as a driver, with Schneider" because he posed an unacceptable safety risk; and suggested he "consider applying for [open non-driving] positions." *See* Br. at 28. Schneider deemed Hoefner medically disqualified from every job that entailed driving on public roads, regardless of vehicle type (van, tanker, tractor-trailer, flatbed, or

sleeper); location or route (yard, local, regional, long-distance, dedicated, or variable); nature of cargo (hazardous or non-hazardous); schedule (overnight or daytime); or driver configuration (team or solo). *See* Reply at 21; Br. at 2-3. From this undisputed evidence, "a trier of fact could find that [Schneider] perceived [Hoefner] as having a disability that prevented him from working as a truck driver for the company," or any other trucking company, and therefore substantially limited in working. *See Best*, 107 F.3d at 548-49.

The panel's ruling, as a matter of law, that Schneider did not treat Hoefner as if his diagnosis substantially limits him in working cannot be reconciled with this Court's holding in *Best* or the analysis prescribed in *DePaoli*. Although this precedent was brought to the panel's attention, *see* Br. 22, 26-30; Reply at 21-24, neither case is cited, let alone discussed, in the panel opinion. The panel instead relied on two cases that are plainly distinguishable, op. at 9: *Baulos v. Roadway Express Inc.*, 139 F.3d 1147, 1151-53 (7th Cir. 1998), and *EEOC v. J.B. Hunt Transport, Inc.*, 321 F.3d 69, 74-77 (2d Cir. 2003). This Court in *Baulos* held that two drivers whose sleep disorders made them "unable to perform the particular position at Roadway that entailed driving sleeper trucks" were not substantially limited in working because the "record does not support a finding that plaintiffs' impairment of driving sleeper trucks would disqualify them from **most other truck driving positions (class of jobs)**." 139 F.3d at 1154 (emphasis added). Similarly, in *J.B. Hunt*, the Second Circuit held that the company's perception that applicants taking certain prescription drugs were unfit to drive "40-ton, 18-wheel trucks over long distances for extended periods" was "a limitation on a particular job within a larger group of jobs" since "persons licensed to drive" such vehicles "are also qualified to drive various types of small and large trucks, including tractor-trailers, moving trucks, and cargo vans." 321 F.3d at 75.

Sutton is likewise distinguishable. The plaintiffs in *Sutton* were regional pilots who could not meet United Air Line's vision standard for global airline pilots. 527 U.S. at 475-77. The Supreme Court held the plaintiffs "failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working," having "allege[d] only that [the airline] regards their poor vision as precluding them from holding positions as a 'global airline pilot,'" which "is a single job." *Id.* at 493. The Court reasoned that "[i]f jobs utilizing an individual's skills … are available, one is not precluded from a substantial class of jobs," and identified "a number of other positions utilizing [plaintiffs'] skills, such as regional pilot and pilot instructor to name a few, that are available to them." *Id.* at 492-93. Unlike the vision standard in *Sutton*, which disqualified the plaintiffs from a single position, Schneider's "zero tolerance" syncope policy, op. at 3, disqualified Hoefner entirely from all "other positions utilizing [his] skills" as a commercial driver. *See Sutton*, 527 U.S. at 493. A person at constant risk of "los[ing] consciousness" and "put[ting himself] and the motoring public in grave danger," Br. at 13, in any job that requires driving "on a public highway," Reply at 20, cannot work as a truck driver. *See id.* at 15-17 (distinguishing *Sutton*).

The panel inexplicably found "nothing to suggest that Schneider has a mistaken understanding of neurocardiogenic syncope," op. at 3, and "no evidence that Schneider exaggerates the severity of Hoefner's condition and the risk he poses as a driver." *Id.* at 6. But Schneider's explanation of its "zero tolerance" syncope policy amply demonstrates its mistaken perception of the diagnosis. Schneider disqualified Hoefner "because his physician diagnosed him with a condition that we indicate and believe is not ... safe to drive a commercial vehicle"; considers Hoefner and "any person who has [his] diagnosis ... a direct threat" because "direct threat" is "inherent to the diagnosis" of neurocardiogenic syncope; and believes "other trucking

companies are wrong in their belief that these drivers are not automatically disqualified." *See* Br. at 11-13; Reply at 7-10. If those assessments were accurate, as the panel suggests, op. at 3 & 6, Hoefner would not have been medically released, without restriction, to resume driving for Schneider or subsequently hired elsewhere to drive a big rig hauling hazardous chemicals. Nor would every physician who has examined Hoefner since his diagnosis have certified that he has no diagnosis of a condition likely to cause loss of consciousness. *See supra* at 2.

Rather, if Hoefner were actually as impaired as Schneider perceives him to be, there is no question his condition would substantially limit his ability to work as a truck driver – the class of jobs for which he has the requisite training, skills, ability, and specialized license, and that he has safely performed for the past 17 years. Under Circuit precedent, there is, at the very least, "a genuine issue of material fact as to whether [Hoefner] is regarded [by Schneider] as unable to perform a class of jobs utilizing his skills," *see Murphy v. United Parcel Service*, 527 U.S. 516, 524 (1999), and thus within ADA coverage. En banc review of the panel decision to the contrary is therefore necessary to secure uniformity of this Court's decisions. F.R.A.P. 35(a)(1).

II. Rehearing En Banc Is Warranted Because the Panel's Holding that Schneider May Lawfully Refuse to Employ Hoefner To Avoid Any Risk, However Slight or Remote, Associated with His Perceived Disability Is Fundamentally Inconsistent with the ADA.

The panel's ruling that "the [ADA] does not touch" Schneider's refusal to employ any qualified driver who has a medical condition Schneider regards as disabling, op. at 9, is directly contrary to the text and purpose of the ADA. Assuming Hoefner has a disability within ADA protection (because Schneider "exaggerated [his] condition and mistakenly thought him disabled from a [class] of jobs," *id.*), the panel held, Schneider's decision to disqualify him based on his perceived disability "would be consistent with the company's having decided to set a higher safety standard than law or custom requires." *Id.* Under the panel's reading of *Sutton*, "that is a

decision the [ADA] does not touch." *Id.* In the panel's view, "Schneider is entitled to determine how much risk is too great for *it* to be willing to take," *id.* at 4, and its adoption of a "'zero tolerance' policy for drivers with neurocardiogenic syncope," *id.* at 2, to avoid a safety risk – however slight or remote – associated with their diagnosis is a "decision irrelevant to liability under the [ADA]." *Id.* at 6.

The panel opinion fundamentally misconstrues the ADA and, if allowed to stand, will seriously undermine ADA enforcement in this Circuit. The ADA prohibits employment discrimination against "a qualified individual with a disability," 42 U.S.C. § 12112(a), and defines "disability" to include those regarded as having a substantially limiting impairment. 42 U.S.C. § 12102(2)(C). Assuming, as the panel does, that Schneider regards Hoefner's diagnosis as disabling, op. at 9, and that Hoefner is qualified to drive commercial vehicles without posing a direct threat to safety (as Schneider has conceded, *see* Br. at 14), the ADA by its terms prohibits Schneider from refusing to employ him because of his condition. The panel's view that *Sutton* holds otherwise is mistaken. While an employer "'is free to decide that some limiting, but not substantially limiting impairments make individuals less than ideally suited for a job,'" op. at 4 (quoting *Sutton*, 527 U.S. at 491), an employer's belief that an individual's impairment disqualifies him from a class of jobs – like truck driving – signifies that it regards him as disabled and imposes a burden to show that the basis for disqualification is "job-related and consistent with business necessity," or that the individual "pose[s] a direct threat" to health or safety. 42 U.S.C. §§ 12112(b)(6); 12113(a) & (b); *see* Br. at 37-40.

The panel considered Schneider justified in excluding any driver with neurocardiogenic syncope because it had previously employed a driver with that diagnosis who had a fatal accident of undetermined cause while driving for Schneider. *See* op. at 3-6. Yet Schneider's blanket

exclusion of all drivers with neurocardiogenic syncope – without an individualized assessment of each person's medical condition, capabilities, and safety risk – is precisely the discrimination Congress meant to prohibit in enacting the ADA and extending coverage to individuals regarded as disabled. *See* Br. at 31-40; Reply at 3-5. The "purpose of the regarded as prong is to cover individuals 'rejected from a job because of the "myths, fears and stereotypes" associated with disabilities,'" and to prohibit discrimination founded on "misperceptions [that] often 'resul[t] from stereotypic assumptions not truly indicative of individual ability.'" *Sutton*, 527 U.S. at 489 (quoting *Arline*, 480 U.S. at 284). The panel recognized that the prior accident was "the reason for [Schneider's] belief" "that anyone with Hoefner's condition should be disqualified from driving Schneider's trucks as 'a matter of safety and direct threat,'" but failed to appreciate that Schneider's adoption of a "'zero tolerance' policy," op. at 3, reflects the very "stereotypic assumptions not truly indicative of individual ability" that the ADA was meant to combat. *Sutton*, 527 U.S. at 489. To the contrary, the panel decided that even though "Schneider may be excessively risk averse," its "experience of the risk materializing" excuses the company's "zero tolerance" of drivers with the same medical diagnosis as "a decision irrelevant to liability under the [ADA]." Op. at 4-5. Far from being "irrelevant to liability," *id.*, Schneider's decision to adopt this blanket exclusionary policy establishes liability under the ADA, unless justified by a statutory defense (which Schneider "has explicitly waived," Br. at 14).

The Supreme Court's opinion in *Arline* (modified to reflect the pertinent facts of this case) exposes the flaw in the panel's reasoning:

> The Act is carefully structured to replace such reflexive reactions to actual or perceived [disabilities] with actions based on reasoned and medically sound judgments: the definition of ["disability"] is broad, but only those individuals who are both [disabled] *and* otherwise qualified are eligible for relief. The fact that *some* persons who have [neurocardiogenic syncope] may pose a serious [safety] threat to others under certain circumstances does not justify excluding . . . *all* persons with

> actual or perceived [disabling syncope]. Such exclusion would mean that those accused of being [unsafe] would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent.

480 U.S. at 284-85. The Court in *Arline* held that a school teacher with recurrent tuberculosis was covered by the Rehabilitation Act, and the four-prong "direct threat" analysis governed whether, notwithstanding the risk of contagion, she was "otherwise qualified" for her job. Congress modeled the ADA's third definition of "disability," as well as the defense of "direct threat," *see supra* note 3, on the rationale of *Arline*. *See Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) ("The ADA's direct threat provision stems from the recognition in [*Arline*, 480 U.S. at 287], of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks."); Br. at 32 (*Arline* provides rationale for ADA's "regarded as" coverage) (quoting ADA legislative history and EEOC guidance).

The *Arline* Court further observed that this individualized approach to determine whether a person is within statutory coverage – *i.e.*, whether she has a "disability" and is "qualified" – was "consistent with [the approach] taken by courts that have addressed the question whether the Act covers persons suffering from conditions other than contagious diseases that render them a threat to the safety of others." 480 U.S. at 285 n.14. "Because few, if any, activities in life are risk free," the Court has more recently confirmed, "*Arline* and the ADA do not ask whether a risk exists, but whether it is significant." *Bragdon*, 524 U.S. at 649. Consistent with *Arline*, this Court has recognized that "blanket exclusions" based on actual or perceived disability "are generally unacceptable," and "[a]ny physical qualification based on risk of future injury must be examined with special care if the [ADA] is not to be circumvented." *Knapp v. Northwestern*

Univ., 101 F.3d 473, 483 (7th Cir. 1996). This Court has held that such risk assessments must determine

> "…whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.... In applying this standard, an employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job."

Id. (quoting *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985)). This Court has more recently held that the ADA's "direct threat" affirmative defense, which requires an individualized multi-factor analysis, governs whether the IRS violated the ADA in disqualifying an applicant with insulin-dependent diabetes from the job of criminal investigator because "the demands of the job would place him at risk of 'subtle and/or sudden incapacitation,' which 'would place the applicant and others (other Special Agents, the public) at an extreme risk of safety that would be unacceptable." *Branham v. Snow*, 392 F.3d 896, 905-08 (7th Cir. 2004).

Obviously, as the panel recognized, Schneider cannot meet this Court's standard to justify disqualifying, as an unacceptable safety risk, every driver (including Hoefner) diagnosed with neurocardiogenic syncope. Op. at 4 ("No doubt the risk that a person afflicted with this disorder will faint while driving is small."). Presumably for this reason, Schneider waived any direct threat defense and conceded that Hoefner is qualified to drive commercial vehicles without posing a significant safety risk. Because the panel, in holding that "Schneider is entitled to determine how much risk is too great for *it* to be willing to take," *id.*, effectively exempts Schneider (and every other employer) from compliance with the standards imposed by Congress, rehearing en banc is warranted.

CONCLUSION

Because the panel decision conflicts with Circuit precedent and resolves a question of exceptional importance, the EEOC urges this Court to grant rehearing en banc.

Respectfully submitted,

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ADDENDUM

***EEOC v. Schneider National, Inc.*, No. 06-3108 (7th Cir. Mar. 21, 2007)**

CERTIFICATE OF SERVICE

I, Dori K. Bernstein, counsel for Plaintiff-Appellant, the Equal Employment Opportunity Commission, certify that on May 3, 2007, two copies of the Petition for Rehearing En Banc were sent by first class U.S. mail to the following counsel of record for Defendant-Appellee Schneider National, Inc.:

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