No. 07-405

In the Supreme Court of the United States

NAOMI WALTON, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

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

BRIEF FOR FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in concluding that petitioner failed to demonstrate that respondents "regarded" her as disabled within the meaning of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq*.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 18a-37a) is reported at 492 F.3d 998. The order of the district court granting summary judgment (Pet. App. 38a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2007. An amended opinion was issued on June 26, 2007. A petition for rehearing was denied on September 7, 2007. The petition for a writ of certiorari was filed on September 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, prohibits employment discrimination by fed-

eral agencies against qualified individuals with disabilities. The Rehabilitation Act incorporates the standards of the Americans with Disabilities Act of 1990 (ADA) to determine whether a person is an individual with a disability. 29 U.S.C. 791(g); see 29 C.F.R. 1614.203(b). The ADA defines the term "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2).

2. Petitioner was employed by Akal Security, Inc., as a Court Security Officer in the United States District Court for the Northern District of California. Pet. App. 19a. Pursuant to Akal's contract with the United States Marshals Service (USMS), Court Security Officers must meet certain medical requirements, and must undergo annual physical examinations to assess their compliance with USMS standards. *Ibid*. The current standards are based on a study by the Office of Federal Occupational Health, adopted by the Judicial Conference of the United States, which identified particular job functions essential to the Court Security Officer position. *Id.* at 19a-20a. Among those essential job functions is "the ability to determine the location and source of sound." *Id.* at 20a.

In November 2001, as part of her required annual medical examination, petitioner took a hearing test. Pet. App. 20a. The results, which were reviewed by the Office of Federal Occupational Health, revealed a disparity in hearing between petitioner's two ears sufficiently great to affect her ability to localize sound. *Ibid*.

Consistent with USMS policy, petitioner was notified of the potentially disqualifying condition and afforded an opportunity to provide further information or test re-

sults before a final recommendation was made regarding her eligibility. Pet. App. 20a. Petitioner submitted a second hearing test; after analyzing the results, the Office of Federal Occupational Health concluded that petitioner was "[n]ot medically qualified to perform the essential functions" of the Court Security Officer position. *Ibid*. In particular, the medical review informed petitioner:

> You have a significant hearing impairment according to the results of the tests provided by you from Gould Medical Foundation. According to the test results you have only one functioning ear. With only one functioning ear, you are unable to localize the direction of sound, an essential job function. Hearing aids may malfunction or become dislodged in critical situations. Your job requires the ability to detect where sound is coming from. Your inability to do so poses a significant risk to the health and safety of yourself, other law enforcement officers, and the public.

Id. at 21a.

The USMS notified Akal that petitioner was not medically qualified to continue as a Court Security Officer, and Akal terminated her employment. Pet. App. 21a.

3. Petitioner brought suit against various federal agencies and officials, alleging she had been terminated in violation of the Rehabilitation Act and the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Pet. App. 21a. Petitioner acknowledged that she does not actually have a disability, as that term is used in the Rehabilitation Act. *Id.* at 22a, 44a. She instead argued primarily that she is "a person with a disability within the meaning of the Acts because she was 'regarded as' disabled." *Id.*

at 22a, 45a. The district court rejected that claim and granted summary judgment for respondents, holding that petitioner had failed to establish a prima facie showing of disability under any definition. *Id.* at 38a-56a.

4. The Ninth Circuit affirmed. Pet. App. 18a-37a. The court of appeals held that, to state a "regarded as" disability claim, a plaintiff must show "that the employer believes that the plaintiff has some impairment, and provide evidence that the employer subjectively believes that the plaintiff is substantially limited in a major life activity." *Id.* at 25a; see *id.* at 23a (citing *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)). Absent "direct evidence" of such a "subjective belief," the court held that a plaintiff "must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment." *Id.* at 25a. In all cases, the court noted, "a plaintiff must show that her employer regards her as substantially limited in a major life activity and not just unable to meet a particular job performance standard." *Id.* at 24a (citing *Murphy* v. *UPS*, 527 U.S. 516, 524 (1999)).

Applying that test, the court of appeals held that petitioner had produced no evidence that respondents regarded her as substantially limited in any major life activity. Although petitioner claimed that her disqualification under the USMS's hearing standards itself provided evidence that the USMS regarded her as substantially limited in the major life activity of hearing, the court rejected that argument, noting that evidence of a belief that petitioner could not safely perform her job is not equivalent to evidence that she was substantially limited in a major life activity. Pet. App. 25a-27a. Because the USMS's disqualification did not bear on how

it believed petitioner's hearing "compared to how unimpaired individuals normally use their hearing in daily life," the court held that petitioner had failed to show that the USMS had subjectively believed her limitation to be substantial when it was not. *Ibid.* (citing *Toyota Motor Mfg., Inc.* v. *Williams*, 534 U.S. 184, 200-201 (2002)).

The court of appeals found that petitioner also failed to demonstrate that her perceived inability to localize sound objectively constituted a substantial limitation on the major life activity of hearing. Petitioner's primary evidence in this regard was a report from her medical expert, which contained neither analysis nor a factual basis for its opinion. Pet. App. 27a-28a. The court held that such a "conclusory report fail[ed] to raise a genuine issue of material fact" as to the objective severity of petitioner's perceived impairment. *Ibid.* Petitioner's only other evidence was a report by Dr. Lynn Cook for the Immigration and Naturalization Service, stating that auditory localization was necessary for certain activities, but that visual cues could aid localization to compensate with only "minor drawbacks." *Id.* at 29a-30a. Reasoning that such compensatory measures "must be taken into account in judging whether an individual possesses a disability," the court held that petitioner had failed to raise a genuine issue of material fact concerning whether her inability to localize sound constituted a substantial limitation on hearing. *Id.* at 29a-30a (quoting *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 565 (1999)).[*]

[*] Petitioner claims that these compensatory measures "had not previously been addressed by the parties or by the district court." Pet. 6. That contention is incorrect. The district court referred to Dr. Cook's finding that "visual localization of a sound source is generally just as

The court of appeals also rejected petitioner's claims that respondents regarded her as substantially limited in the activities of working and localizing sound. Pet. App. 30a-34a. The court rejected petitioner's working claim because she had offered no evidence about the range of jobs from which she might be precluded, and "[a]n allegation that the employer regards the impairment as precluding the employee from a single, particular position is insufficient" to support such a claim. *Id.* at 30a-31a (citing *Murphy*, 527 U.S. at 523). The court held that petitioner likewise "provide[d] no authority for her argument that the ability to localize sound is a major life activity." *Id.* at 33a.

Finally, the court of appeals rejected petitioner's argument that she is disabled on the basis of having a record of impairment because she had failed to raise a genuine issue of material fact concerning whether the impairment identified in her medical reports is substantially limiting. Pet. App. 35a (citing 29 C.F.R. 1630.2(k)).

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accurate" as auditory localization, though "not nearly as efficient," in determining that Dr. Cook's report regarded inability to localize sound as merely "inconvenient" and not necessarily substantially limiting. Pet. App. 52a. The government likewise argued before the Ninth Circuit that petitioner's perceived impairment should be evaluated by "taking into account any methods available for her to compensate for such an impairment," and that Dr. Cook's report showed that impaired auditory localization was at most "inconvenient" because "individuals may compensate for lost localization through 'non-acoustic cues' including sight and source familiarity, and * * * visual localization is 'generally just as accurate' as auditory localization, although it is not as quick." Gov't C.A. Br. 32-34 (citations omitted). Petitioner did not contest the propriety of considering that evidence until her petition for rehearing. C.A. Pet. for Reh'g 8-12 (Aug. 10, 2007).

ARGUMENT

The court of appeals correctly concluded that petitioner failed to make a prima facie showing that she is an individual with a disability within the meaning of the Rehabilitation Act. The court's decision is fact-bound and does not conflict with any decision of this Court or of any other court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly concluded, based on the record evidence, that petitioner had not raised a genuine issue of material fact that respondents regarded her as disabled. Pet. App. 18a-37a.

a. To establish a prima facie claim of disability under the "regarded as" prong of the ADA's definition of disability, 42 U.S.C. 12102(2)(C), which is incorporated by the Rehabilitation Act, a plaintiff must show that a covered entity believes (1) that the plaintiff "has a substantially limiting impairment that [he or she] does not have," or (2) that the plaintiff "has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 489 (1999).

Petitioner does not dispute the court of appeals' conclusion (Pet. App. 26a-27a) that she presented no direct evidence that respondents regarded her as substantially limited in a major life activity. Petitioner instead focuses (Pet. 11-13) on the court of appeals' discussion of whether petitioner may nevertheless establish a prima facie "regarded as" disability claim on the ground that respondents regarded her as having an impairment—the inability to localize sound—that, as an objective matter, substantially limits a major life activity. Petitioner contends that the court of appeals erred by considering mitigating measures—specifically, her ability to localize

sound by using visual cues, as opposed to auditory localization—in determining whether her perceived impairment in auditory localization was, as an objective matter, substantially limiting.

Petitioner's contention, which she raised for the first time in a petition for rehearing, see note *, *supra*, is incorrect. This Court has specifically stated that "mitigating measures must be taken into account" in determining whether a particular physical or mental impairment substantially limits a major life activity. *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 565 (1999); see *Murphy* v. *UPS*, 527 U.S. 516, 521 (1999). The Court has further noted that such measures include "measures undertaken, whether consciously or not, with the body's own systems." *Albertson's, Inc.*, 527 U.S. at 566.

Although the analysis in these cases concerned claims of actual disability, rather than "regarded as" disability, the court of appeals correctly determined that the same analysis applies in the circumstances of this case. See Pet. App. 29a. A plaintiff is "regarded as" disabled only if a covered entity believes that the plaintiff is actually disabled: that is, that the plaintiff has "a physical or mental impairment that substantially limits one or more * * * major life activities. 42 U.S.C. 12102(2)(A) and (C). The concepts of "substantially limits" and "major life activity" are the same whether a plaintiff alleges that she is actually disabled or that she is regarded as disabled. Thus, as the court of appeals concluded, when an employer believes that an individual has a physical or mental impairment but (1) the employer does not believe, as a subjective matter, that the impairment is substantially limiting, and (2) the impairment can be mitigated in such a way that the impairment does not, as an objective matter, substantially limit

major life activities, then the employer does not regard the plaintiff as disabled within the meaning of the Rehabilitation Act.

b. Petitioner contends that the decision below conflicts with this Court's decisions in *Sutton* and *Murphy*, which "decide[d] 'regarded as' disabled claims without consideration of the mitigating measures which overcame the actual disabilities." Pet. 8. That is incorrect. The Court in those cases had no occasion to consider mitigating measures in this context, since it held in both cases that petitioners' "regarded as" disability claims failed for other reasons. *Sutton*, 527 U.S. at 493 (holding that petitioners had failed to establish that they were regarded as substantially limited in the major life activity of working because they had alleged that their visual impairments were regarded as precluding them from holding only a single job, that of global airline pilot); *Murphy*, 527 U.S. at 525 (holding that the petitioner had failed to establish that he was regarded as substantially limited in the major life activity of working because "the undisputed record evidence demonstrate[d] that petitioner is, at most, regarded as unable to perform only a particular job").

c. Petitioner also contends (Pet. 11-12) that the decision below conflicts with the decisions of other courts of appeals. That contention is also incorrect. In *Rodriguez* v. *ConAgra Grocery Products Co.*, 436 F.3d 468 (2006), the Fifth Circuit, applying a Texas antidiscrimination statute modeled on federal antidiscrimination law, rejected an employer's argument that it had not regarded an employee as substantially limited in major life activities because he had diabetes, but rather because he was unable to control his diabetes, and that such "failure to control [a] controllable impairment" is not protected by

the ADA. *Id.* at 477-478. The Fifth Circuit concluded that a "failure to control" rule is inapplicable to "regarded as" disability claims, because "[n]o one can 'control' a nonlimiting impairment that *by definition is merely 'regarded as' substantially limiting.* Such an *imagined* condition cannot—and thus need not—be controlled." *Id.* at 479. In this case, because there is no evidence that respondents subjectively regarded petitioner's impairment as substantially limiting, the question, as the court of appeals formulated it, is whether respondents should nevertheless be considered to have regarded petitioner as disabled because they believed she had an impairment that was, as an objective matter, substantially limiting. The decision below properly proceeded on the premise that objectively limiting conditions, unlike "imagined" ones, can be mitigated; that conclusion does not conflict with the Fifth Circuit's decision in *Rodriguez*.

Nor does the decision below conflict with *MX Group, Inc.* v. *City of Covington*, 293 F.3d 326 (6th Cir. 2002). In that case, the Sixth Circuit held that, where the evidence showed that a city and related parties had withheld the necessary permission to open a methadone clinic because they believed that the clinic's potential clients would be recovering drug addicts whose addiction substantially limited their major life activities, see *id.* at 341-342, there was no need to consider the "mitigating effects of methadone" in applying the "regarded as" prong of the ADA's definition of disability, *id.* at 340. The Sixth Circuit did not, however, hold that such an inquiry would be inappropriate in a case, such as this, in which the record contained no similar evidence of subjective belief that the plaintiff had a substantially limiting impairment.

Finally, in *Capobianco* v. *City of New York*, 422 F.3d 47 (2005), the Second Circuit noted that "[a] 'regarded as' claim turns on the employer's perception of the employee and is therefore a question of intent, not whether the employee has a disability." *Id.* at 57 (internal quotation marks and citations omitted). The court did not, however, hold that consideration of whether a perceived impairment constitutes a disability, taking mitigating measures into account, is irrelevant to determining the employer's intent—particularly in a case in which the record contains no other indication that the employer perceived the plaintiff's impairment as substantially limiting.

2. Petitioner also contends (Pet. 13-16) that the court of appeals' analysis of the mitigating effects of visual localization conflicts with this Court's decision in *Sutton* and the decisions of other courts of appeals. That contention is without merit.

Contrary to petitioner's contention, the court of appeals in this case did not disregard *Sutton*'s conclusion that use of a mitigating measure "does not, by itself, relieve one's disability," and that an individual has a disability within the meaning of the ADA if, notwithstanding the use of mitigating measures, "that individual is substantially limited in a major life activity." 527 U.S. at 488. Rather, the court of appeals correctly applied that principle in this case. The court did not hold that visual localization, by itself, defeats a claim of disability; it rather held petitioner had presented no evidence showing that "auditory localization, as mitigated by visual localization, is an objectively severe restriction on the use of an individual's hearing compared to how unimpaired individuals normally use their hearing in daily life." Pet. App. 30a.

For similar reasons, the decision below does not conflict with *EEOC* v. *J.H. Routh Packing Co.*, 246 F.3d 850 (6th Cir. 2001), which reiterated that "[c]ontrolling a disability does not necessarily mean removing a disability." *Id.* at 855. The Sixth Circuit in *J.H. Routh* declined to dismiss a case at the pleadings stage without discovery into whether an individual's epilepsy was substantially limiting, despite the fact that he took medication to control its symptoms. *Id.* at 855. Petitioner, by contrast, was afforded the opportunity to demonstrate that an inability to localize sound remains substantially limiting even after compensating with visual cues. She failed to do so, and the court of appeals properly granted summary judgment to respondents. Pet. App. 29a-30a.

Nor does the decision below conflict with the Second Circuit's conclusion that "mitigation refers to amelioration of the impairment itself, not simple avoidance of activities affected by the impairment." *Capobianco*, 422 F.3d at 59 n.9. The court of appeals did not suggest that petitioner could mitigate her inability to localize sound by refraining from attempting to do so, but rather by supplementing auditory localization with visual localization. Nothing in *Capobianco* suggests that such mitigation should be ignored in determining whether an individual's perceived impairment rises to the level of a substantial limitation on a major life activity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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