

No. 04-17295

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC BATES, ET AL.,

Plaintiffs-Appellees,

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellant.

On Appeal From the United States District Court
for the Northern District of California, No. C 99-2216 TEH,
The Honorable Thelton E. Henderson

**BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. (ATA)
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT**

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RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae American Trucking Associations, Inc. (ATA) is a non-profit organization incorporated under the laws of the District of Columbia. ATA has no parent corporation, and no publicly-held corporation owns ten percent or more of ATA.

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A panel of this Court held that the Americans with Disabilities Act (ADA) forbids appellant UPS from applying a hearing-based safety qualification—required by the Department of Transportation (DOT) for drivers of all commercial motor vehicles over 10,000 pounds—uniformly to all package-car drivers, including those driving trucks just below 10,001 pounds. *Bates v. United Parcel Service, Inc.*, 465 F.3d 1069 (9th Cir. 2006). This Court has ordered rehearing *en banc* and directed the parties to file briefs “addressing whether the rulings in *Morton v. United Parcel Service, Inc.*, 272 F.3d 1249 (9th Cir. 2001), concerning safety-based defenses under the [ADA], . . . should be reconsidered and overruled.” American Trucking Associations, Inc. (ATA) respectfully submits this brief as *amicus curiae* in support of UPS, with the consent of all parties and by motion.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Created in 1933, ATA promotes and protects the interests of the trucking industry. As the industry’s largest national trade group—a federation of nationwide motor carriers, state trucking associations, and specialized trucking councils and conferences—ATA today represents more than 37,000 companies and every type and class of motor carrier in America, including parcel-delivery companies such as UPS. In addition to advancing the trucking industry’s equities in legislative and regulatory settings and through media efforts, ATA frequently advocates its common interests in both state and federal court as party, counsel, or *amicus curiae*.

This case, arising at the intersection of employment law and matters of public safety, is of significant concern to ATA and its members. ATA and its member organizations share a profound and abiding interest in motor vehicle safety. In addition, the trucking industry is a major employer in the United States: over 8.6 million people were employed in trucking-related jobs across all industries in 2003, and more than 3 million were drivers. *American Trucking Trends 2004*, American Trucking Associations, Inc. (Alexandria, VA), available at <<http://www.atri-online.org/industry/index.htm>>. The ability to apply safety qualification standards uniformly is critical to ATA's members given the intense competition in the industry, its national scope, and the heavily-regulated context in which they operate. This appeal deals directly with the uniform application of federal safety standards.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

ATA and its members are firmly committed to the ADA and to principles of non-discrimination and equal opportunity. They gladly employ hearing-impaired people in office and maintenance jobs, as well as other jobs in which hearing loss does not directly impact public safety. Even in jobs that do affect safety, ATA's members are ever-mindful of, and sensitive to, the fundamental concerns embodied in the ADA and other discrimination statutes.

Yet this dedication to equal opportunity must be balanced against the reality that trucking companies play an integral role in public safety. In employing drivers

of commercial vehicles and operating their businesses, ATA's members must adhere to myriad federal, state, and other safety regulations—as well as industry- and company-specific guidelines—aimed at enhancing motor vehicle safety and protecting the public. Reflecting this shared industry value, ATA has as one of its core missions “to promote safety and security on our nation’s highways and among our drivers.” It has, for example, played a leading role in calling for tougher driver-training standards and pushing for primary safety-belt laws in every state. In short, while working to foster an environment of equal opportunity, ATA and its members must fulfill their essential commitment to protecting public safety through, among other things, careful and effective screening of commercial truck drivers.

The panel’s opinion in this case—and the *Morton* decision on which it rests—undermines the trucking industry’s ability to protect safety in at least two ways. First, the panel failed to give any evidentiary weight to the DOT hearing standard, rendering the agency’s considered judgment that a designated level of hearing is indispensable to safe commercial trucking irrelevant to UPS’s ADA defense. *Bates*, 465 F.3d at 1088-89 (following *Morton*, 272 F.3d at 1263-64). The ability to rely on uniform safety standards is critical to many members of the trucking industry. That imperative includes situations where, as here, a company applies a federal safety standard to all of its employees, even if a minority of the employees fall just outside of the agency’s general regulatory reach. Nothing in the ADA

prevents such reliance on uniform safety standards by motor carriers, and the fact that the government has found that standard critical to motor vehicle safety should be entitled to considerable—or at least *some*—weight in the ADA analysis.

Second, the panel followed *Morton* in wrongly superimposing the stringent “bona fide occupational qualification” (BFOQ) defense—borrowed from Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA)—onto the ADA’s “business necessity” defense. *Bates*, 465 F.3d at 1086 (following *Morton*, 272 F.3d at 1261-63). Moreover, the panel applied the test so restrictively that few, if any, trucking companies could defend against challenges to safety-based qualification standards brought in this Circuit. Such a narrow reading of the business necessity defense undercuts the national trucking industry’s ability to manage motor vehicle safety—not just with respect to the hearing of drivers, but also their vision and other necessary abilities.

ARGUMENT

I. The National Scope And Unique Character Of The Trucking Industry Make Uniform Reliance On Federal Safety Standards, Such As The DOT Hearing Standard, Essential For Many Companies.

The American trucking industry is immense in both size and scope, and it remains a core component of our national economy. It was a \$610 billion industry in 2003, accounting for 86.9% of the nation’s freight transportation. *American Trucking Trends 2004, supra*. The industry operates in every corner of America,

moving goods nationally from city to city, state to state, and coast to coast. It also plays a key role in the international movement of goods, transporting them to Canada and Mexico and moving imported goods to their final destination. *Id.*

The trucking industry is distinctive for reasons other than its scope. Because commercial motor vehicle operations can dramatically impact public safety, the industry is closely regulated at the federal, state, and local levels, which poses unique challenges and burdens for trucking companies. At the same time, the underlying safety risks expose trucking companies to heightened liability risks in their business. That risk impels companies to carry greater insurance and be increasingly selective in hiring drivers to operate their trucks across public streets and highways.

In such a national, heavily-regulated, safety-first industry, the need to employ rigorous *and* uniform safety standards is obvious. To operate efficiently and competitively, trucking companies need the ability to utilize consistent procedures and safety qualifications, not differing standards that compel them to operate on a state-by-state basis. And, in an environment of heavy federal regulation of a national industry, companies naturally may view existing safety regulations sanctioned by the federal government as the best—or possibly the only—source of *uniform* safety standards, even if they are not mandatory for some employees.

The DOT hearing standard at issue here is a prime example. *See* 49 C.F.R. § 391.41(b)(11). DOT has at times reconsidered this standard—including ordering

a study on the issue in the early 1990s and eliciting public comments—but it eventually affirmed its determination that a particular level of hearing is required to operate a commercial vehicle safely. *See Buck v. U.S. Dep't of Transp.*, 56 F.3d 1406, 1407-08 (D.C. Cir. 1995) (stating that DOT never was able to determine that public safety would be adequately protected if it lowered the hearing standard). The DOT hearing regulation thus stands as the governing qualification standard for an overwhelming part of the American trucking industry. It is, moreover, widely borrowed by states and other countries in their own motor vehicle safety laws. *See Hearing Disorders and Commercial Motor Vehicle Drivers*, Pub. No. FHWA-MC-93-W, prepared for DOT's Federal Highway Administration, at Pt. III, 2-20 (Mar. 1993). It is precisely the sort of federally-sanctioned physical qualification that trucking companies can look to not only as a mandatory part of their business, but also as a legitimate source for a uniform standard to apply in hiring drivers for all of their operations. In fact, the DOT-requested study reported that the private trucking companies surveyed applied DOT's hearing standard uniformly to all of their drivers, even those operating intrastate. *See id.*, at Pt. III, 24.

To be sure, DOT's hearing standard is *mandatory* only (as relevant here) for drivers of trucks weighing over 10,000 pounds. 49 U.S.C. § 31132(1). As UPS has pointed out, though, the 10,000-pound cutoff was based on a resources determination, not on safety. *See* UPS Br. 8; UPS Reply Br. 18-19. And as a practical matter,

where DOT has made the judgment that safe operations mandate a specific level of hearing for trucks over 10,000 pounds, it makes no sense from a business or safety perspective for a company to create and apply a substantively different standard for drivers that will operate trucks falling just under that limit. The evidence regarding the weight of UPS's vehicles nicely illustrates the point: a vast majority of UPS's vehicles weigh more than 10,000 pounds, and those weighing less than 10,001 pounds are only slightly less than that, ranging from 7,160 to 9,318 pounds. *Bates*, 465 F.3d at 1075. Requiring a company to formulate, justify, and impose entirely different standards for those lighter trucks would breed disuniformity and undercut its ability to manage its business and safety obligations effectively.

II. The Panel's Failure To Give Any Weight To The Existence Of The DOT Hearing Standard Will Unduly Harm The Ability Of Trucking Companies To Manage Safety.

While the panel acknowledged the DOT hearing standard in its opinion, its ADA analysis gave *no* evidentiary weight to the DOT's expert judgment that hearing is critical for safe operation of commercial trucks weighing more than 10,000 pounds.¹ As UPS has explained, that approach is wrong as a legal matter. *See* Pet'n

¹ The panel went well beyond *Morton* in this regard. It began by repeating *Morton's* questionable holding that the existence of the DOT standard *by itself* did not entitle UPS to judgment as a matter of law. *See Morton*, 272 F.3d at 1264-65. Yet in subsequently considering the entire record after a complete trial, the panel gave the DOT's judgment *absolutely no weight* in the evidentiary balancing. It did not even mention the standard among the supposedly "inconclusive" evidence.

for Reh’g *En Banc* 4-8. Moreover, from a practical perspective, it undermines the ability of trucking companies to manage public safety through uniform application of what is often the best source of qualifications: federal law.

As an initial matter, the ADA allows trucking companies to use physical qualifications even if they are not mandated by the government. The provisions that employees be “qualified” for the jobs they seek, 42 U.S.C. §§ 12111(8), 12112(a), and that employers do not violate the statute if they apply job-related qualifications commanded by business necessity, *id.* § 12112(b)(6), easily leave room for companies to adopt those qualifications necessary to protect public safety when hiring for certain safety-sensitive positions. The ADA’s legislative history confirms this understanding. *See* Brief *Amicus Curiae* of the Equal Employment Advisory Council in Support of Defendant-Appellant 13-15.

Particularly in light of the national scope and unique character of the industry (*see* Part I), the decision by trucking companies to adopt existing federal safety guidelines in these circumstances should be given wide latitude under the ADA. The federal motor vehicle laws make public safety a core concern, and they place a substantial burden on trucking companies to address that concern. Given the ADA’s acknowledgment that employers must be able to screen the abilities of those in safety-sensitive positions, it is reasonable for courts to afford considerable deference to trucking companies’ use of the government-sanctioned DOT hearing

standard for all commercial truck drivers. Indeed, it would be strange to review *de novo* the basis for a federal safety qualification merely because a company applied it to employees falling just outside of the regulation's scope. *Cf. Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555, 577 (1999) (stating that the ADA should not be read to obligate a company "to reinvent the Government's own wheel" by "justify[ing] *de novo* an existing and otherwise applicable safety regulation issued by the Government itself" merely because the regulation was subject to possible DOT waiver); *see also* UPS Supp. Br. 18-20; Pet'n for Reh'g *En Banc* 6.

Here, there is no basis to doubt the presumed validity of applying the DOT hearing standard across the board, even as to drivers of UPS's trucks not expressly regulated by the standard. As this Court noted in *Morton*, these smaller, non-DOT trucks tend to be used for residential and rural routes rather than transportation on highways. 272 F.3d at 1252. But hearing is obviously just as much (if not more) of a factor for drivers of trucks in that setting as it is for drivers of larger vehicles on highways. For example, while truck cab noise decreases the importance of hearing in heavier trucks on highways, hearing is more useful when driving in smaller, less noisy trucks in residential and rural settings. *See Hearing Disorders and Commercial Motor Vehicle Drivers*, at Pt. IV, 9-11. In addition, while drivers of heavy trucks on interstates encounter sirens and other noise-creating obstacles infrequently, those obstacles—from ambulances to by-standers to children and dogs—

are more frequently encountered in settings where lighter trucks are used. *See id.*, at Pt. IV, 14. The ability to hear such audible warnings is therefore all the more critical for those driving smaller trucks. The unique risks at stake in light-truck package delivery only confirm the need for the DOT standard.

At the least, the fact that DOT—an expert federal agency—has made a considered judgment that hearing is essential to the safe operation of regulated commercial motor vehicles is entitled to *some* weight in the evidentiary analysis. *See* Pet’n for Reh’g *En Banc* 5-8 (relying on *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985)). By failing even to mention this regulation as part of the evidentiary balancing, the panel unsettled the practice of many trucking companies that have erred on the side of safety and applied the federally-sanctioned standard to all employees driving trucks. *See Hearing Disorders and Commercial Motor Vehicle Drivers*, at Pt. III, 24. This Court should correct the panel’s error.

III. This Circuit’s Overly Stringent Formulation Of The Business Necessity Defense Would Threaten The Ability Of Trucking Companies To Ensure Public Safety.

Both Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(e)(1), and the ADEA, 29 U.S.C. § 623(f)(1), expressly include a BFOQ provision as an affirmative defense available to employers. A separate, and less stringent, business necessity defense is available under both statutes for disparate impact claims. *See* UPS Supp. Br. 6 (citing cases). In the ADA, by contrast, Congress included *only* a busi-

ness necessity defense.² Yet the *Morton* Court took the position that Congress “must have intended” that defendants satisfy the BFOQ test to obtain the ADA’s business necessity defense. 272 F.3d at 1261. The panel here, bound by *Morton*, applied this combined BFOQ/business necessity test. 465 F.3d at 1086. As UPS has argued, the *Morton* Court incorrectly construed the ADA’s business necessity defense. *See* UPS Supp. Br. 4-17. This Court should overrule *Morton*.

The panel in this case made matters worse by adding an especially demanding gloss to the combined BFOQ/business necessity defense. It first stated that the BFOQ test requires a defendant to show “that either (1) ‘substantially all [deaf drivers] present a higher risk of accidents than non-deaf drivers,’ or (2) ‘there are no practical criteria for determining which deaf drivers present a heightened risk and which do not.’” 465 F.3d at 1086 (quoting *Morton*, 272 F.3d at 1260). In applying that test, though, the panel faulted UPS for (1) failing to *disprove* the notion that “there are *some* deaf drivers who are as safe or safer than some or all of the hearing drivers that UPS employs,” such as those with prior accidents, *id.* at 1089 (emphasis in original); and (2) failing to disprove that any possible criteria can be created to determine whether a given deaf driver is safe, *id.* at 1091-92.

² There are sound policy reasons for having a less stringent test in the ADA than in Title VII or the ADEA. As the *Morton* Court stated, “actual physical impairments” such as ADA-protected disabilities “may correlate more readily with safety risks than surrogates for such impairments, such as age.” 272 F.3d at 1261 n.13. The same is surely true of Title VII factors such as race and gender.

It would be exceedingly difficult for a trucking company seeking to justify uniform application of a DOT standard to meet this BFOQ test—especially as applied by the panel. The Supreme Court has observed that BFOQ is an “extremely narrow exception,” *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985), and that the test is a stringent one compared to the “more lenient” business necessity defense, *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991). The panel’s treatment of the test only made it more restrictive.

As to the first prong, the panel’s rule—that UPS must refute the possibility that there are some deaf drivers who are less risky than some of UPS’s current drivers—is breathtaking in scope. It would require a trucking company to quantify the risk it faces from each of its current drivers, or categories of drivers, and to conduct exhaustive primary research or engage in extensive individualized assessments with prospective drivers who are hearing-impaired. It is difficult to imagine that the ADA requires such certain, exacting evidence of the need for a safety qualification. *See Criswell*, 472 U.S. at 419. It would stymie the ability of trucking companies to protect public safety if they were required to reach that degree of certainty before imposing a safety standard.³

³ In addition, the panel would wrongly make the business necessity defense depend on the type and amount of risk that a company has already assumed. It is difficult to see why a company loses its ability to apply a safety-based qualification standard—and defend it under the ADA—whenever it takes on some risk.

Neither could a company succeed on the business necessity defense under the panel's version of the second prong. Although the experts in the case testified that there were no known criteria for determining the safety of a given deaf driver, that was not enough for the panel. 465 F.3d at 1090-92. It held that because it could conceive of criteria that might be used or models that might be built to predict driver safety, UPS had failed to meet its burden. *Id.* Yet it is an unrealistic burden—and one at odds with the ADA's reasonable scope—to require companies to fund primary research in a context involving core matters of public safety. Indeed, at one time the DOT considered starting a waiver program that would allow it to study the degree to which hearing impairments affect motor vehicle safety, but it apparently could not make the requisite determination that such a program would not threaten public safety. *See Buck*, 56 F.3d at 1408. The panel, in effect, required UPS to conduct precisely that sort of study.

The practical effect of this Circuit's erroneous version of the business necessity defense would thus be detrimental to the trucking industry—and to public safety. In seeking to defend application of the federal DOT hearing standard across the board, companies would apparently be forced to produce studies and conduct extensive additional research to justify already-existing federal standards. If they did not succeed, companies would be left to navigate potentially divergent state standards. Members of the trucking industry would, in short, be handcuffed in their

attempts to promote and protect motor vehicle safety. And the impact would extend beyond the DOT hearing standard at issue here: for much the same reasons, trucking companies would face considerable difficulty in establishing the predicate for uniformly applying DOT's vision and other standards.

CONCLUSION

The *en banc* Court should hold that the DOT standard must be given proper weight and that the BFOQ test has no role in analyzing a business necessity defense under the ADA. For these reasons and others advanced by UPS, this Court should reject the panel's approach and vacate the district court's judgment.

Respectfully submitted.

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May 22, 2007

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(C)

I certify that, according to the word-count facility in Microsoft Word, this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 3,461 words and thus complies with Federal Rule of Appellate Procedure 29(d) and this Court's April 30, 2007 Order. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface, 14-point Times New Roman, using Microsoft Word 2002.

May 22, 2007

J. Brett Busby

CERTIFICATE OF SERVICE

I certify that on this 22rd day of May, 2007, I sent for filing an original and 30 copies of the foregoing Brief of American Trucking Associations, Inc. (ATA) as *Amicus Curiae* in Support of United Parcel Service, Inc. to the Clerk of the Court by overnight delivery, and I served two copies of the foregoing to each of the following addresses by overnight delivery:

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