IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 0-50588

JEFF KAPCHE,

Plaintiff-Appellant

v.

CITY OF SAN ANTONIO,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This is an action under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12111-12117, involving a plaintiff with insulin-treated diabetes mellitus who was disqualified for a position as police officer, on the ground that driving is an essential function of the position and that drivers with insulin-treated diabetes present a safety risk to themselves and others. The Department of Justice has significant responsibilities for the enforcement of the ADA as well as the

Rehabilitation Act, 29 U.S.C. 791 *et seq.*, which is to be interpreted consistently with the ADA. See 42 U.S.C. 12117; 29 U.S.C. 794(a). In addition, federal law enforcement agencies are subject to Section 501 of the Rehabilitation Act, which prohibits discrimination in federal civilian employment on the basis of disability. 29 U.S.C. 791. Finally, the United States Department of Transportation is responsible for implementation of the Motor Carrier Safety Act of 1984, 49 U.S.C. 31131 *et seq.*, and, in that role, has issued regulations regarding licensing of individuals for the operation of commercial motor vehicles in interstate commerce. See 49 C.F.R. 391.41(b). Pursuant to Section 4018 of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107, 413 (1998), the Department of Transportation has recently submitted to Congress a report concluding that a safe and practicable protocol to allow some drivers with insulin-treated diabetes to operate commercial motor vehicles is feasible. A copy of this report is included as an addendum to the United States' brief.

STATEMENT OF THE ISSUE PRESENTED

The United States will address the following issue:

Whether this Court should abandon its rule that, as a matter of law, individuals with insulin-treated diabetes mellitus present a significant safety risk while driving, and therefore can be excluded from jobs for which driving is an

essential function, without violation of the Americans with Disabilities Act or the Rehabilitation Act.

STATEMENT OF THE CASE

Plaintiff Jeff Kapche has insulin-treated diabetes mellitus (ITDM). In February 1994, he applied for a position as a law enforcement officer with the San Antonio Police Department, but was disqualified for the position after he revealed in a medical examination that he had ITDM.

1. Following his disqualification by the San Antonio Police Department, Kapche filed this action against the City of San Antonio (City), alleging violations of Title I of the ADA. He seeks back pay, front pay, reinstatement if the court determines that front pay is not warranted, and compensatory and punitive damages (R. 814-817).[1/]

[1/] Citations to "R.__" refer to pages in the record on appeal. Citations to "R.E.

Tab __ at __" refer to documents in the Appellant's Record Excerpts by tab and page number. Citations to "Kapche Br. __" refer to pages in the plaintiff-appellant's opening brief in this appeal.

In 1998, the district court granted summary judgment to the City, relying on two previous Fifth Circuit decisions holding, as a matter of law, that persons with ITDM may be *per se* disqualified from positions in which safe driving is an essential function of the job. See *Kapche* v. *City of San Antonio*, 176 F.3d 840, 842 (5th Cir. 1999) (*Kapche I*) (citing *Chandler* v. *City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) (finding no violation of the Rehabilitation Act), cert. denied, 511 U.S. 1011 (1994); *Daugherty* v. *City of El Paso*, 56 F.3d 695 (5th Cir. 1995) (finding no violation of the ADA), cert. denied, 516 U.S. 1172 (1996)).

2. On appeal, this Court found "a genuine dispute of material fact regarding the safety risk posed by insulin-dependent drivers with diabetes mellitus." *Kapche I*, 176 F.3d at 847. It therefore vacated the summary judgment and remanded to the district court to consider the continued viability of the *per se* rule adopted in *Chandler* and *Daugherty*:

> [T]he time has come for a reevaluation of the facts that supported our prior *per se* holdings in *Chandler* and *Daugherty*. To this end, we vacate the district court's grant of summary judgment in favor of the City and remand for a determination whether today there exists new or improved technology -- not available at the time these cases were decided -- that could now permit insulin-dependent diabetic drivers in general, and Kapche in particular, to operate a vehicle safely.

Ibid. In reaching this result, this Court acknowledged the tension between the *per se* rule and the EEOC regulations requiring an individualized assessment of an

applicant's ability safely to perform the job. *Id*. at 844-847. But it concluded (in the absence of supervening en banc authority) that exceptions to the requirement of an individualized assessment were permissible. *Id*. at 846. The question, this Court stated, was whether the *Chandler-Daugherty* rule "remains scientifically valid." *Ibid*. at 846. This Court noted that both decisions had relied upon case law and Department of Transportation regulations. But both had "contemplated a departure from" the *per se* rule, "in the event that medical technology should advance to the point that insulin-dependent diabetics no longer pose a danger to themselves or others." *Id*. at 846. Since that time, this Court found, the Department of Transportation had amended its highway safety regulations to allow persons with ITDM to operate noncommercial vehicles, and there had been medical advances regarding the treatment of diabetes, as well as studies tending to demonstrate that drivers with ITDM would not pose a safety risk. *Ibid*. For that reason, this Court concluded, it was time to reconsider the factual basis of the *per se* rule. *Ibid*.

With respect to Kapche's claim, this Court found that the City had not performed an individualized assessment of his ability to perform the job. 176 F.3d at 847. Thus, if, on remand, the district court found "a sufficient factual basis for overcoming the per se rule of *Chandler/Daugherty*," it was to "open discovery (or

conduct a full blown merits trial) for a determination of Kapche's qualification to perform all of the essential functions of the job." *Ibid.*

3. On remand, the parties filed cross motions for summary judgment. Plaintiff contended that there have been significant advances in medical technology that undercut the basis for the rulings in *Daugherty* and *Chandler* (R. 744-763). Therefore, he argued, the *per se* rule should be abandoned, and the case should proceed to trial to allow the jury to determine whether he was qualified to perform the essential functions of the position for which he had applied (R. 763).

The City argued that it was entitled to summary judgment because those with ITDM "continue to pose a direct threat to others as a matter of law in positions (including that of San Antonio police cadet/police officer) that require the safe performance of driving or other essential functions in higher risk job circumstances" (R. 766). Even if the *per se* rule was abandoned, the City argued, it was entitled to summary judgment because Kapche was not qualified for the position without modification of its essential job functions, *i.e.*, the capacity to respond to emergencies on short notice. In such circumstances, the City argued, he would not have time to take the steps necessary to avoid a hypoglycemic episode (R. 787-803). In the alternative, the City argued that the district court should grant it partial summary judgment as to plaintiff's claim for damages because, even if

there is a basis for rejecting the *per se* rule *now*, *Chandler* was controlling law in the Circuit and therefore plaintiff was not qualified for the position when he applied for and was denied employment in 1994 (R. 804-805).

On July 7, 2000, the district court issued an order dismissing the case, without reviewing the *per se* rule established in *Chandler* and *Daugherty* (R.E. Tabs C, D). The court found that the City had refused to hire Kapche when those decisions were valid and the controlling law of the circuit. Thus, it concluded, the City was acting in accordance with the prevailing law at the time of the adverse employment decision, regardless of the present validity of the *per se* rule:

> Unless the Fifth Circuit or the United States Supreme Court – the only courts with the authority to overrule the Fifth Circuit's cases – find *Chandler* and *Daugherty* to have been erroneous at the time they were issued, those cases controlled (and justified) the City's decision. If, as the Fifth Circuit acknowledges, technology is available today that was not available in 1993 and 1995, the City cannot be held liable for refusing to hire Kapche in 1994.

(R.E. Tab D at 4). This appeal followed.

SUMMARY OF ARGUMENT

In *Chandler* v. *City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), cert. denied, 511 U.S. 1011 (1994), this Court adopted a rule that, as a matter of law, individuals with insulin-treated diabetes mellitus present a significant safety risk while driving, and can be excluded from jobs for which driving is an essential function, without

violation of the Americans with Disabilities Act or the Rehabilitation Act. This Court should now abandon that rule.

A judicially adopted *per se* rule is, in most contexts, inconsistent with the structure and purpose of the ADA, which was enacted to ensure that individuals with disabilities are considered for employment on the basis of their abilities, and not upon unfounded assumptions about their limitations. Determining whether an individual with a disability is qualified for a particular job and whether he or she poses a direct threat to others in the work place are individualized, factual inquiries that must be based upon up-to-date medical and other information. Where an employer uses a qualification standard that screens out individuals with a particular disability, it must prove that the standard is justified by business necessity and that a more individualized treatment of applicants is not feasible. A rule of law such as that adopted in *Chandler* precludes the kind of factual inquiry required by the statute, and lacks the flexibility to account for new medical and technological developments.

Significant changes have occurred since the decision in *Chandler* which make a judicially adopted *per se* rule particularly inappropriate here. As the record in this case demonstrates, medical and technological advances have improved the ability of individuals with insulin-treated diabetes to monitor and regulate their

blood glucose levels, thus substantially reducing the risk of hypoglycemia. The federal policies upon which *Chandler* relied also have changed. Federal law enforcement agencies now consider applicants with insulin-treated diabetes on a case-by-case basis. And the Department of Transportation has reported to Congress that it would be feasible to qualify individuals with insulin-treated diabetes for commercial driver's licenses.

In this case, there is a material dispute of facts as to whether the plaintiff is qualified for the position he seeks. For that reason, this Court should remand to the district court to resolve that factual dispute.[1/]

[2/] This brief does not address the two other questions presented by the plaintiff: whether the summary judgment evidence establishes that the City regarded the plaintiff as disabled; and whether the district court erred in refusing to follow this Court's mandate on remand. We note, however, that the City does not claim to have abandoned the challenged practice. Thus, assuming that the complaint should be read to assert claims for prospective injunctive relief as well as retrospective relief (see R. 816), plaintiff has standing to pursue this action and this Court has

jurisdiction to decide the questions presented on the merits. Cf., *Texas* v. *Lesage*, 120 S. Ct. 467, 468-469 (2000) (per curiam) (plaintiff may seek prospective relief if he alleges that defendant has ongoing discriminatory policy).

ARGUMENT

THIS COURT SHOULD ABANDON ITS RULE THAT, AS A MATTER OF LAW, INDIVIDUALS WITH INSULIN-TREATED DIABETES MELLITUS MAY BE EXCLUDED FROM JOBS FOR WHICH DRIVING IS AN ESSENTIAL FUNCTION

A. The *Per Se* Rule Is Inconsistent With The ADA, Which Requires Courts To Make Factual Inquiries In Determining Whether An Applicant Is A Qualified Individual With A Disability, Whether An Applicant Poses A Direct Threat, And Whether An Employer's Qualification Standards Are Justified By Business Necessity

1. Title I of the ADA prohibits employers from discriminating against qualified individuals with a disabilities. 42 U.S.C. 12112(a). The statute defines discrimination to include "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity[.]" *Id*. at 12112(b)(6). A "qualified individual with a disability" is "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." *Id*. at 12111(8).

The statute provides certain defenses to the employer, including the following:

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

Id. at 12113. "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id*. at 12111(3).

An overriding purpose of the ADA, like that of the Rehabilitation Act, 29 U.S.C. 791 *et seq*., is to guarantee that an individual's qualification for a position is based upon his or her ability to perform the essential functions of the job, and not upon "prejudice, stereotypes, or unfounded fear." *Sch. Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 (1987); see *id*. at 284-285; H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 33, 56-57 (1990) (House Report); S. Rep. No. 116, 101st Cong., 1st Sess. 7, 27 (1989) (Senate Report). Thus, whether a person with a disability is "qualified" requires an "individualized inquiry" based upon

"appropriate findings of fact." *Arline*, 480 U.S. at 287; cf., *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) ("whether a person has a disability under the ADA is an individualized inquiry").

Similarly, determining whether an individual poses a direct threat to the safety of others "must be based on medical or other objective evidence." *Bragdon* v. *Abbott*, 524 U.S. 624, 649 (1998). "Whether one is a direct threat is a complicated, fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all of the evidence about the nature of the risk and the potential harm." *Rizzo* v. *Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 764 (5th Cir. 1996); see *Rizzo* v. *Children's World Learning Ctrs., Inc.*, 213 F.3d 209, 211 (5th Cir. 2000) (en banc), cert. denied, 69 U.S.L.W. 3166 (U.S. Oct. 30, 2000) (No. 00-305); *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000) ("[d]irect threat focuses on the individual employee, examining the specific risk posed by the employee's disability") (citing 29 C.F.R. 1630.2(r))[1/]; see House Report, *supra*, at 57 (direct threat determination

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[3/] With respect to "direct threat," the EEOC's Title I regulations provide that:

> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This

assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

29 C.F.R. 1630.2(r).

"requires a fact-specific individualized inquiry resulting in a 'well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives'") (quoting *Hall* v. *U.S. Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988), additional citations omitted); Senate Report, *supra*, at 27 ("determination that an individual with a disability will pose a direct safety threat to others must be made on a case-by-case basis and not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies").[1/]

[4/] The EEOC's interpretive guidance for its regulation implementing Title I of the ADA provides that the direct threat test must be used in every case where a safety-based requirement is at issue. 29 C.F.R. Pt. 1630, App. § 1630.15(b) and (c). This Court disagreed in holding that the business necessity test, rather than the direct threat test, applies in cases involving safety-based qualification standards that apply to all employees of a given class. See *EEOC* v. *Exxon*, 203 F.3d at 873.

In like manner, an employer wishing to justify a qualification standard that screens out individuals with disabilities must demonstrate that it is "job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). Like the qualified individual and direct threat inquiries, the business necessity defense is a question of fact. Cf. *Bernard* v. *Gulf Oil Corp.*, 890 F.2d 735, 741-744 (5th Cir. 1989) (applying clearly erroneous standard to finding of business necessity in action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.), cert. denied, 497 U.S. 1003 (1990). It requires the employer to prove that "the risks are real and not the product of stereotypical assumptions." *Exxon*, 203 F.3d at 875. As the Senate Report explained, "this legislation prohibits use of a blanket rule excluding people with certain disabilities except in the very limited situation where in all cases physical condition by its very nature would prevent the person with a disability from performing the essential functions of the job, even with reasonable accommodations." Senate Report, *supra,* at 27.

An employer seeking to justify the blanket exclusion of all persons with a particular disability from a job or class of jobs, therefore, bears a heavy burden to demonstrate an objective, factual basis for its decision to depart from the individualized, case-by-case assessment of qualifications contemplated by the

ADA. An employer might establish a more narrowly-drawn standard to define which individuals with a particular condition are qualified for a position: for example, a standard disqualifying all those with ITDM who have had recent recurrent hypoglycemic incidents. In both cases the employer would need to demonstrate that conducting an individualized assessment is not possible. Of course, the more tailored the standard, the more likely it will be that the employer can meet its burden.

2. A judicially-adopted *per se* rule is ill-suited to the analysis of safety issues under the ADA. *First*, as explained above, the determinations whether an individual with a disability is qualified, whether he or she poses a direct threat, and whether a qualification standard is justified by business necessity all require fact-based inquiries. Once established, a rule of law pretermits these factual inquiries in all subsequent cases to which the rule applies.

Second, new medical and technological developments will often change the correlation between a particular physical or mental impairment and the abilities necessary to perform a job. A rule of law permitting employers to impose a blanket exclusion of all individuals with a particular disability from a job or class of jobs does not allow consideration of such technological developments on a timely basis even as they may be significantly changing individuals' abilities to

perform on the job. The Title I regulations provide that the direct threat inquiry must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. 1630.2(r). But a judicially-adopted *per se* rule will be based upon the state of medical knowledge and technology at the time the record was created in the first case adopting the rule, which may be quite different than the circumstances at relevant times in subsequent cases controlled by the *per se* rule. As the medical and technological facts change, the results of all the fact-based inquiries required by the ADA -- whether the plaintiff is qualified, whether he or she poses a direct threat, and whether an employment standard is justified -- may change as well. A rule of law deprives the courts of the flexibility to respond to such changes. Instead, it freezes in place the results of a factual inquiry that may well be outdated.

Third, a *per se* rule such as that set forth in *Chandler* fails to account for differences between jobs. Such differences may be relevant to an assessment of the necessary qualifications, the relationship between those qualifications and the condition at issue, and the risks involved in adopting a case-by-case consideration of applicants. In short, not all jobs requiring driving are the same because they do not necessarily require the same abilities or pose the same risks.[1/]

[5/] This brief does not address the standards applicable to regulations adopted by a

B. New Developments Since The Decision In *Chandler* Warrant Abandonment Of The *Per Se* Rule

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federal agency in a rulemaking proceeding and intended to ensure public safety.

1. In *Chandler*, an action under Section 504 of the Rehabilitation Act, 29 U.S.C. 794,[1/] this Court held that the plaintiff, who had insulin-dependent diabetes, was not "otherwise qualified" for a job in which driving was an essential function, concluding that "as a matter of law, a driver with insulin dependent diabetes * * * presents a genuine substantial risk that he could injure himself or others." 2 F.3d at 1395. In reaching that conclusion, *Chandler* relied upon Federal Highway Administration regulations disqualifying applicants with ITDM from obtaining commercial driver's licenses, and upon two reported decisions upholding the exclusion of individuals with ITDM from certain jobs. *Id*. at 1394-1395 & nn. 50, 51 (citing 49 C.F.R. 391.41(b) (1992); *Serrapica* v. *City of N. Y.*, 708 F. Supp. 64, 73 (S.D.N.Y.) (sanitation truck driver), aff'd, 888 F.2d 126 (2d Cir. 1989); *Davis* v. *Meese*, 692 F. Supp. 505, 521 (E.D. Pa. 1988) (FBI special agent), aff'd, 865 F.2d 592 (3d Cir. 1989)).

Daugherty extended *Chandler's* rule to the ADA, reasoning that the "direct threat" defense in the ADA recognized the same safety concerns encompassed by the definition of a qualified individual under the Rehabilitation Act. See 56 F.3d at

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[6/] Section 504 provides: "No otherwise qualified individual with a disability * * * shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]" 29 U.S.C. 794(a).

698. *Daugherty* concluded that the plaintiff, who had been removed from his position as a bus driver when he was diagnosed with ITDM, was not a qualified individual with a disability because he did not qualify for a commercial driver's license under Federal Highway Administration regulations. 56 F.3d at 697-698. The plaintiff did not contest this conclusion, but argued that the City was obligated to provide him a reasonable accommodation by applying for a waiver on his behalf under the regulations. *Daugherty*, however, held that this contention was precluded by *Chandler*. *Id*. at 697-698. While a waiver would avoid the legal constraints posed by the Department of Transportation exclusion, the court stated, it would not alter the plaintiff's medical condition, which, as a matter of law, rendered him "not 'otherwise qualified' to drive a bus under the Rehabilitation Act," and "not 'a qualified individual with a disability' for the position of bus driver" under the ADA. *Id*. at 698.

Circumstances have changed significantly since the decisions in *Chandler* and *Daugherty*. As plaintiff has set forth in detail, the medical evidence in the record in this case establishes that significant changes in medical technology have made it easier for individuals with ITDM to monitor their blood glucose levels and to maintain those levels within a safe range, thereby substantially reducing the risk of hypoglycemia (Kapche Br. 5-6, 15-23; R.E. Tab F). In addition, as discussed

below, the federal policies upon which *Chandler* relied have now changed. After exhaustively examining the question in a Congressionally-mandated study, the Department of Transportation has determined that individualized consideration of applicants with ITDM for commercial driver's licenses is feasible. In addition, neither the FBI nor any of the other law enforcement agencies within the Department of Justice currently employs a blanket exclusion of applicants with ITDM for law enforcement positions. Against this background, there is no justification for a judicial rule of law that disqualifies an entire class of applicants from such a broad range of jobs.

2. At the time of the decision in *Chandler*, Federal Highway Administration (FHWA) regulations provided that:

> A person is physically qualified to drive a motor vehicle if that person –
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> * * *
>
> (3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control[.]

49 C.F.R. 391.41(b) (1992).[7/]

[7/] In 1995, FHWA amended this regulation to refer only to a "commercial motor vehicle." See 60 Fed. Reg. 38,744-38,745 (1995). This change, however, was not intended to be a substantive one. Rather, it was one of a number of changes denominated "technical corrections to keep the Federal Motor Carrier Safety Regulations accurate and up to date." *Id*. at 38,739. The notice explained that "the term 'motor vehicle' is often used in these parts where 'commercial motor vehicle' would be more precise. The term 'motor vehicle' has been replaced with

'commercial motor vehicle' wherever appropriate." *Id*. at 38,740.

Chandler noted that this restriction had been in effect since 1970, and that FHWA had had occasion to revisit the exclusion numerous times, and had determined to retain it in the interest of safety. 2 F.3d at 1394-1395 & nn.46-49. Since the decision in *Chandler*, however, there have been several regulatory changes, including the institution of a waiver program which has allowed qualified individuals with ITDM to obtain commercial driver's licenses. Most recently, in July 2000, the Department of Transportation reported to Congress that it would be feasible to institute a program to qualify individual applicants with ITDM for commercial driver's licenses (Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin Treated Diabetes Mellitus to Operate Commercial Motor Vehicles in Interstate Commerce, July 2000 (DOT Report)).[1/]

In 1993 (the same year that *Chandler* was decided), after several years of study, FHWA instituted a waiver program for qualified drivers with ITDM (DOT Report at 7). To qualify for a waiver, applicants were required to have at least three years experience driving a commercial motor vehicle while using insulin, a safe driving record, and a favorable medical examination (DOT Report at 7, 9-10). The waiver program, which was created as part of a research program to assess the safety of drivers with ITDM, was subsequently suspended following *Advocates for*

[8/] This report is included in the separately-bound addendum to this brief.

Highway & Auto Safety v. *Federal Highway Administration*, 28 F.3d 1288 (D.C. Cir. 1994) (see DOT Report at 10-11)[1/]. The program was terminated in 1996, but those drivers who had been granted waivers were permitted to continue driving (DOT Report at 13-14). Their driving records became the basis for a study of the risks posed by drivers with ITDM (DOT Report at v, 44-45).

[9/] *Advocates* invalidated a similar waiver program for individuals with impaired eyesight.

Section 4018 of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107, 413 (1998), directed the Secretary of Transportation to consider whether individuals with ITDM should be considered for commercial motor vehicle permits on a case-by-case basis.[1/] In July 2000, the Department of Transportation submitted its report to Congress, concluding that "a safe and practicable protocol to allow some ITDM individuals to operate CMVs is feasible," and stating that the Federal Motor Carrier Safety Administration (FMCSA), was "evaluating alternatives for implementing a process for allowing individuals with ITDM to drive in interstate commerce" (DOT Report at i). The report summarized its conclusion:

> The report concludes that a safe and practicable protocol to allow some ITDM individuals to operate CMV's is feasible. The research on the treatment and management of ITDM, combined with the determinations of the medical panel, indicate that the disease and its adverse effects can be successfully controlled and monitored. Moreover, recent risk assessments provide evidence that diabetic CMV operators can perform in an acceptably safe manner. Finally, the program operated by the FAA and the reanalysis of the FHWA's diabetes waiver

[10/] The Secretary was directed to "determine whether a practicable and cost-effective screening, operating, and monitoring protocol could likely be developed for insulin treated diabetes mellitus individuals who want to operate commercial motor vehicles in interstate commerce that would ensure a level of safety equal to or greater than that achieved with the current prohibition on individuals with insulin treated diabetes mellitus driving such vehicles." Pub. L. No. 105-178, § 4018(a), 112 Stat. 413 (1998).

> program demonstrate that it is possible to screen and monitor ITDM individuals so that safe performance is feasible.

(DOT Report at vi).

In reaching this conclusion, the Department of Transportation reviewed the medical literature regarding treatment and management of patients with ITDM as well as risk assessment studies regarding diabetes and the operation of motor vehicles, examined the policies of other Department of Transportation components and of the States, and assembled a panel of physicians expert in the treatment of diabetes (DOT Report at i-vi). It found that, while the risk assessment evidence was not uniform, the more recent studies, including those examining drivers in the waiver program, demonstrate that individuals with ITDM are presently operating commercial motor vehicles safely, and that "it is possible to screen individuals with ITDM and have them safely operate CMVs" (DOT Report at 61). The medical evidence, it found, also supports individualized consideration of applicants with ITDM (DOT Report at 61-63). Individuals with prior severe hypoglycemia and/or with histories of hypoglycemia unawareness -- significant risk factors for future incidents of hypoglycemia -- can be identified and screened out (DOT Report at 62). In addition, medical and technological advances, including blood glucose monitors, new forms of insulin, better understanding of treatment

regimens, and better education for self-management of ITDM, combine "to greatly mitigate the risk of hypoglycemia" (DOT Report at 63). "This research-based knowledge will also make it possible to effectively monitor individuals who are operating in interstate commerce" (DOT Report at 63).

Based upon the medical evidence and review of the protocols adopted for earlier waiver programs,[1/] the report recommended a three-part protocol: screening of applicants to identify those qualified to drive commercial motor vehicles, guidelines for glucose management for qualified drivers, and monitoring of driving behavior and glucose management (DOT Report at 65). Detailed recommended requirements were included for each of these protocols (DOT Report at 65-69).

[11/] In addition to the waiver program for commercial motor vehicles instituted in 1993, the report examined protocols for waiver programs adopted by the Federal Aviation Administration for third-class (private) pilots and air traffic controllers

(DOT Report at iv, 29-32).

3. *Chandler* also relied upon *Davis* v. *Meese*, which upheld an FBI policy excluding all applicants with ITDM from consideration for the positions of special agent and investigative specialist. See 2 F.3d at 1395 & n.51. The district court in *Davis* found (based upon a 1988 record) that "[e]very insulin-dependent diabetic is constantly at risk of a hypoglycemic occurrence even under fully controlled conditions," and that the risk of such occurrences would increase with an irregular schedule involving delayed meals and unexpected physical exertion. 692 F. Supp. at 513. Moreover, the court found, there was "no way to predict accurately the probability or frequency of an insulin-dependent diabetic having a severe hypoglycemic episode." *Ibid*. Because of the job requirements for the special agent position and the public safety concerns implicated by the position, the court found that the blanket exclusion of those with ITDM did not violate the Rehabilitation Act. *Id*. at 516-521. It noted, however, that "[a]t some future time, medical science may be able to predict accurately on a case-by-case basis those insulin-dependent diabetics who present only a very slight or de minimus risk of having a severe hypoglycemic occurrence while on an assignment as a special agent or investigative specialist." *Id*. at 520.[1/]

[12/] *Serrapica*, the other decision cited by *Chandler*, did not involve a blanket ban of persons with ITDM. Rather it held that the City of New York had not violated the Rehabilitation Act when it disqualified the plaintiff from a job as sanitation

worker because he had uncontrolled diabetes. See 708 F. Supp. at 65-68. Indeed, the decision noted that the City had modified its employment criteria to permit the employment of those with diabetes who are "in good control of their disease through medication and diet." *Id*. at 69.

The FBI no longer has such a blanket policy of excluding all applicants with ITDM from the special agent position.[1/] Instead, it considers such applicants individually, based upon their medical history, treatment, and prognosis. The other law enforcement agencies within the Department of Justice (the U.S. Marshal's Service, the Bureau of Prisons, the Drug Enforcement Administration, and the Immigration and Naturalization Service) also evaluate applicants with ITDM on a case-by-case basis.

C. This Court Should Vacate The Judgment For The City And Remand To The District Court To Resolve The Factual Dispute Regarding Plaintiff's Qualification For The Position

For the reasons stated above, this Court should now abandon the *per se* rule adopted in *Chandler* and *Daugherty* that individuals with ITDM may, *as a matter of law*, be disqualified from positions for which driving is an essential function. Whether an individual plaintiff with ITDM is qualified for a particular job and/or whether that individual poses a direct threat in the workplace are questions of fact that should be determined on a case-by-case basis based upon the specific circumstances, including medical evidence, applicable to that plaintiff's claims. Where an employer has a qualification standard that disqualifies all or a subgroup of all individuals with ITDM from a job or class of jobs, the employer must prove,

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[13/] The investigative specialist position no longer exists at the FBI.

through objective evidence, that the standard is justified by business necessity. 42 U.S.C. 12113(a). Because such a blanket ban does not permit individualized consideration of each applicant, the employer must show that the standard is necessary and that no less generalized approach is feasible.

In this case, the summary judgment evidence indicates that there is a genuine dispute of material fact as to whether the plaintiff is qualified for the position he seeks. For that reason, this Court should remand to the district court to resolve that factual dispute.

CONCLUSION

This Court should abandon its rule that, as a matter of law, individuals with insulin-treated diabetes mellitus may be disqualified from positions for which driving is an essential element.

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