

**CASE NO. 02-36151  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
SAN FRANCISCO, CALIFORNIA**

Fred Mancini, :  
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 Appellant, :  
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 v., :  
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 Union Pacific Railroad, :  
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 Appellee. :  
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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

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**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE  
AND BRIEF OF THE EPILEPSY FOUNDATION®, EPILEPSY FOUNDATION  
OF ARIZONA, EPILEPSY FOUNDATION OF IDAHO, EPILEPSY  
FOUNDATION OF NORTHERN CALIFORNIA AND ARIZONA CENTER FOR  
DISABILITY LAW AS AMICI CURIAE IN SUPPORT OF APPELLANT IN  
URGING REVERSAL**

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especially employment, the Epilepsy Foundation has, since its inception, worked to dispel the stigma associated with seizures, and has supported the development of laws, including the Americans with Disabilities Act, that protect individuals from discrimination based on these stereotypes and fears.

2. The Epilepsy Foundation of Arizona is dedicated to advancing the interests of the more than 53,000 people with epilepsy and seizure disorders in Arizona. Since its inception, the Epilepsy Foundation of Arizona has worked to dispel the stigma associated with seizures and supported the passage of civil rights laws that bar discrimination on the basis of disability. We believe it is imperative that people with epilepsy be protected under the Americans with Disabilities Act and that this case is extremely important in order to protect people with epilepsy from being discriminated against in the workplace.

3. The Epilepsy Foundation of Idaho is a statewide not-for-profit organization directed by volunteers and dedicated to helping all individuals in Idaho affected by epilepsy/seizure disorders overcome the associated problems through direct services, increased public and professional understanding, prevention and control of epilepsy and its consequences.

4. The Epilepsy Foundation of Northern California serves the nearly 90,000 people with epilepsy in the region. The Epilepsy Foundation has worked to diminish the difficulties people with seizures encounter in employment and support the protections the Americans with Disabilities Act affords to those with epilepsy.

5. The Arizona Center for Disability Law is a non profit public interest law firm and the protection and advocacy system for persons with disabilities in Arizona. The Center represents numerous individuals with epilepsy in a variety of Americans with Disabilities Act matters as well as providing education and training on disability-related issues for persons with epilepsy within Arizona.

6. The Epilepsy Foundation et al. are deeply concerned that the District Court's interpretation of the Americans with Disabilities Act ("ADA") in effect leaves people with epilepsy unprotected by the ADA. This result is contrary to the mandate of the ADA, and threatens the great progress our country has made in integrating people with seizure disorders into the mainstream of American life. Thus, the accompanying brief addresses issues of importance to all people with epilepsy, seizure disorders and other disabilities.

7. The Epilepsy Foundation et al. have reason to believe that its brief will supplement rather than reiterate the arguments made by Appellant.

8. Appellee has not provided written consent to this motion. The Epilepsy Foundation et al. therefore requests leave of this Court. See Fed. R. App. P. 29(a).

WHEREFORE, the Epilepsy Foundation, Epilepsy Foundation of Arizona, Epilepsy Foundation of Idaho, and Epilepsy Foundation of Northern California, requests that this Court give leave for the Epilepsy Foundation to file the accompanying brief *amici curiae* in support of Appellant, Fred Mancini, in urging reversal of the District Court's decision in this case.

Respectfully submitted,

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## **STATEMENT OF THE ISSUES AND INTEREST OF AMICI CURIAE**

The central issues in this case are whether the District Court erred in holding that Appellant Fred Mancini's epilepsy is not a disability under the Americans with Disabilities Act ("ADA") and, by extension, whether people with epilepsy are within the class of persons Congress intended to protect when it enacted the ADA. This Court's disposition of these issues will impact all similarly situated persons within this Court's jurisdiction. Amici Curiae, Epilepsy Foundation and its affiliates, Epilepsy Foundation of Arizona, Epilepsy Foundation of Idaho, and Epilepsy Foundation of Northern California therefore respectfully submit the following:

The Epilepsy Foundation® is a nonprofit corporation founded in 1968 to advance the interests of 2.3 million Americans with epilepsy and seizure disorders. Together with its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders.

The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, including the Americans with Disabilities Act, that protect individuals from discrimination based on these stereotypes and fears.

The Arizona Center for Disability Law is a non profit public interest law firm and the protection and advocacy system for persons with disabilities in Arizona. The Center represents numerous individuals with epilepsy in a variety of

Americans with Disabilities Act matters as well as providing education and training on disability-related issues for persons with epilepsy within Arizona.

The Epilepsy Foundation of Arizona represents the interests of the more than 53,000 people with epilepsy and seizure disorders in Arizona. Since its inception, the Epilepsy Foundation of Arizona has worked to dispel the stigma associated with seizures and supported the passage of civil rights laws that bar discrimination on the basis of disability. We believe it is imperative that people with epilepsy be protected under the Americans with Disabilities Act and that this case is extremely important in order to protect people with epilepsy from being discriminated against in the workplace.

The Epilepsy Foundation of Idaho is a statewide not-for-profit organization directed by volunteers and dedicated to helping all individuals in Idaho affected by epilepsy/seizure disorders overcome the associated problems through direct services, increased public and professional understanding, prevention and control of epilepsy and its consequences.

The Epilepsy Foundation of Northern California serves the nearly 90,000 people with epilepsy in the region. The Epilepsy Foundation has worked to diminish the difficulties people with seizures encounter in employment and support the protections the Americans with Disabilities Act affords to those with epilepsy.

The Epilepsy Foundation, its affiliates and the Arizona Center for Disability Law are deeply concerned that the District Court's interpretation of the ADA in effect leaves people with epilepsy unprotected by the ADA. This result is contrary to the mandate of the ADA, and threatens the great progress our country has made in promoting the full integration of people with seizure disorders into the mainstream of American life.

## **SUMMARY OF THE ARGUMENT**

The District Court erred in holding that Appellant, Fred Mancini, is not disabled under the Americans with Disabilities Act ("ADA"). The ADA's definition of disability covers individuals whose physical impairment substantially limits one or more major life activities, or who are regarded as having such an impairment.

Epilepsy is a chronic brain disorder, characterized by recurrent seizures. While the seizures themselves may last only a few seconds or minutes, the impact of the condition is more profound and long-lasting. People with epilepsy must contend with the stigma of seizures, tailor their daily schedules to fit rigorous medication schedules, take daily precautions to avoid additional seizures and live with the constant threat of another seizure occurring at any time. Many, including Mr. Mancini, are unable to drive for extended periods of time as a result of seizure activity, and are thereby significantly limited from engaging in the major life activities of caring for oneself, social interactions, and working. Many people with chronic seizures experience cognitive impairment and memory loss, often worsening over time. The physiological changes brought about by seizures and/or the side effects of medications also limit the individual's ability to engage in sexual relations and reproductive activities. People with epilepsy have a mortality rate that is at least two to three times that of the general population, and in Mr. Mancini's age group mortality rates approach five times the rest of the population. Those with epilepsy are also significantly limited in the major life activity of working, as evidenced by an unemployment rate five times greater than that in the general population. A medical diagnosis of epilepsy is a bar to employment as a commercial truck driver, as a pilot, and entry into the military branches of service. In many localities, epilepsy is a bar to service as a firefighter. In short, epilepsy is a physical impairment that substantially limits many major life activities, even

when treated with medication, and therefore, qualifies as a disability under the ADA. This conclusion is consistent with Congress' express intent when it enacted the law, to protect those with epilepsy from pervasive discrimination.

Furthermore, Mr. Mancini was regarded by the company as having a physical impairment that substantially limits his ability to engage in the major life activity of working. After Mr. Mancini had seizures, rather than reassign Mr. Mancini to a vacant position in the office or elsewhere in the company, the company concluded he was unable to perform any job because his medical restrictions made him unable to perform certain aspects of his present job, and put him on extended medical leave. (Farrow Aff. ¶4, 7.)

The District Court's decision effectively denies people with epilepsy the rights and protections afforded by the ADA. This result is contrary to the intent of Congress in enacting the ADA. The Epilepsy Foundation therefore urges this Court to reverse the lower court's decision and hold that Mr. Mancini is disabled under the ADA as a matter of law and to recognize that epilepsy can substantially limit one or more major life activities even when some of its symptoms, i.e. seizures, are controlled.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN HOLDING THAT MR. MANCINI'S EPILEPSY IS NOT A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT.**

The Americans with Disabilities Act ("ADA") defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or ; (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2)(a) (1999). The

District Court erred in holding that Mr. Mancini's epilepsy does not satisfy the definition of disability under this definition.

**A. Epilepsy is an actual disability under the Americans with Disabilities Act.**

Under the Americans with Disabilities Act and its implementing regulations, a physical impairment includes “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological . . . .” 29 C.F.R. § 1630.2(h)(1) (2000); See also 45 C.F.R. § 84.3(j)(2)(i)(2001)(Department of Health, Education and Welfare Regulations implementing identical provisions under the ADA's companion law, Rehabilitation Act of 1973.) Epilepsy, a neurological disorder characterized by recurrent seizures, is a physical impairment under the Americans with Disabilities Act. See Otting v. J.C. Penney Co., 223 F.3d 704 (8th Cir. 2000) (recognizing that epilepsy is a physical impairment under the Americans with Disabilities Act). While epilepsy's symptoms, i.e. seizures, usually only last between 15 seconds and two minutes, the impairment itself is a chronic health condition that imposes substantial limits on an individual's quality of life, physiologically, physically, psychologically, socially and economically. Mr. Mancini's particular form of epilepsy, temporal lobe epilepsy, (also known as “complex

partial seizures,”) substantially limits the major life activities of reproduction, caring for oneself, social interaction, breathing and work.

**1. Epilepsy is a physical impairment that affects the central nervous system.**

Seizures are only a symptom of epilepsy. The condition itself is a chronic neurological disorder that affects various parts of the body and impairs consciousness and conscious interaction with the environment. While epilepsy may be treated with medication or controlled through lifestyle changes, surgery, dietary modifications and assistive technology, every person, even those whose conditions are “well controlled”, like Mr. Mancini, is at risk for a breakthrough seizure. A “breakthrough seizure” is a seizure that occurs randomly after a long period of no seizure activity and may be triggered by such common occurrences as a viral illness, stress, irregular sleep schedule, hormonal changes or changes in medication. See Nancy Santilli, Selection and Discontinuation of Antiepileptic Drugs, in Managing Seizure Disorders: A Handbook for Health Care Professionals (N. Santilli ed. 1996) (identifying illness as a cause of breakthrough seizures); Steve Schachter, Treatment of Seizures, in The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide (S. Schachter & D. Schomer eds. 1997) (identifying lack of sleep and changes in medication as causes of breakthrough seizures); Andrew G. Herzog et al., Three Patterns of Catamenial Epilepsy, 38

Epilepsia 1082 (1997). Although approximately fifty-five percent (55%) of people with epilepsy can expect to be free from seizures with proper medication and treatment, the rest will only experience partial control of seizures, and at least twenty percent (20%) cannot have seizures controlled by any current medication or treatment. Charles E. Begley et al., The Cost of Epilepsy in the United States: An Estimate from Population-Based Clinical and Survey Data, 41(3) *Epilepsia* 342, 342 (2000).

Physiologically, seizures are sudden, unexpected, uncontrolled episodes of excessive electrical discharges of brain cells, accompanied by sensory, motor and/or behavioral changes. See H. Gastaut, Dictionary of Epilepsy, Part 1: Definitions (1973) (defining "epilepsy"). There are many different types of seizures and many different causes. There are two general categories of seizures: (1) "partial seizures," which are seizures whose onset is limited to a part of one cerebral hemisphere, and (2) "generalized seizures," which are seizures that, from onset, are diffused throughout the brain. Partial seizures may also become "secondarily generalized," as do Mr. Mancini's seizures. This means that the abnormal focal discharges responsible for the partial seizure subsequently spread throughout the brain, resulting in generalized tonic-clonic seizures.

Partial seizures, the most common type, are also the most difficult to recognize and control. Therefore, it can be a considerable time between onset of

seizures and recognition that one has epilepsy. Some people who are unfamiliar with this type of seizure may mistakenly believe that the individual is daydreaming, intoxicated, or high on drugs. There are two types of partial seizures: (1) "simple partial seizures"<sup>1</sup> and (2) "complex partial seizures," which Mr. Mancini experiences.

During complex partial seizures, the person will lose sensory and motor control. His consciousness may also be impaired partially or totally. Practically, this means that the person experiencing the seizure cannot interact normally with the environment, has impaired responsiveness, and usually will not remember what happened during the episode. Indeed, the individual may be so oblivious to pain and his surroundings during a seizure that he may place a hand directly on a hot surface, incurring serious burns or other injuries, and be completely unaware until the ictal period (the period of the actual seizure) has passed. Impaired consciousness, sleepiness or confusion may continue for a period of time after the seizure passes, the so-called post-ictal period. This phase varies greatly from person to person but averages twenty to thirty minutes, followed by slow re-entry to awareness of the environment. In some the post-ictal period of sleepiness and confusion can last for hours or even up to three days.

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<sup>1</sup> During simple partial seizures, consciousness is maintained but the individual loses sensory and motor control. Generally, during such a seizure, the individual can still interact with the environment, but the seizure will limit specific functions, such as speech or movement. Generally, though, the individual does

Frequently, complex partial seizures are manifested by "automatisms," repetitive complex motor activity that is purposeless, undirected, and inappropriate. Some common examples of automatisms are lip smacking, repetitious swallowing or chewing and fidgeting with fingers or hands. Some people will, during a complex partial seizure, disrobe, run, scream, flail or exhibit excessive fear. In Mr. Mancini's case, the seizures are characterized by loss of consciousness, an inability to walk, talk or interact with the environment as well as visual hallucinations and thrashing. (Mancini Aff. ¶ 19.)

Generalized tonic clonic seizures, such as the ones Mr. Mancini also has, are convulsive seizures that result from a complete loss of muscle tone and massive muscle contractions. Typically, the person's eyes roll up or turn to the side, and the individual may bite his tongue. Loss of continence is common as is irregular respiration. When respiration returns to normal and the convulsions cease, the individual enters the post-ictal period described above. The seizures themselves usually last between one and two minutes, and may result in injury to the individual if the person hits his head or otherwise strikes an object during the seizure. How to Recognize and Classify Seizures & Epilepsy; A Guide for Allied Health Professionals, 10, 13 (Epilepsy Foundation ed. 2002). For these reasons, epilepsy satisfies the regulatory definition of "impairment".

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not lose muscle control or fall.

**2. Mr. Mancini's epilepsy substantially limits him in the major life activities of work, reproduction, caring for oneself, sustaining life, and social interaction.**

Under the Americans with Disabilities Act, an impairment is "substantially limiting" if it "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." Toyota Motor MFG., KY, Inc. v. Williams, 534 U.S. 184, 185 (2002). In that case, the Court held that carpal tunnel syndrome could substantially limit the major life activity of performing manual tasks if it affected the individual's ability to perform manual tasks outside the workplace as well as on the job. Id. at 185. The Equal Employment Opportunity Commission (EEOC) implementing regulations further direct that, in determining if an impairment is substantially limiting, that the nature and severity of the impairment should also be considered. 29 C.F.R. § 1630.2(j)(2) (2000). The regulations also provide that an impairment is substantially limiting "if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population . . . ." 29 C.F.R. § 1630.2(j)(1) (2000) (defining "substantially limits"); see also Bragdon v. Abbott, 524 U.S. 624, 641 (1998) (holding that an impairment is substantially limiting even if the difficulties resulting from the impairment are not "insurmountable"). When all of these factors

are considered together, Mr. Mancini's epilepsy substantially limits one or more major life activities.

**a. The District Court erred in evaluating Mr. Mancini's epilepsy in its hypothetical controlled state, rather than evaluating Mr. Mancini's actual condition.**

In Sutton v. United Airlines, 527 U.S. 471 (1999), the Supreme Court held that in determining whether an individual has a disability under section 12102(2)(a) of the ADA, measures -- both positive and negative -- taken to mitigate or correct the effects of the impairment must be considered. In reaching this conclusion, the Court reasoned that a person must be evaluated in his actual, "present" state, rather than his hypothetical state. See id. at 482.

The District Court ignored this mandate when it determined that Mr. Mancini was not "actually" disabled. Without discussion, the court concluded that Mr. Mancini's epilepsy did not substantially limit any major life activities because his seizures are controlled so long as he is on medication. (Mem. Decision and Order at 8.) Yet as the court's opinion itself shows, Mr. Mancini's seizures were not controlled even though he was regularly taking medication due to a viral illness. Thus, his condition when controlled by medication has no bearing on whether he is actually disabled; it is only a hypothetical state. His actual, present state was as a person with partially uncontrolled epileptic seizures whose major life

activities, as discussed in the following sections, were substantially limited by his physical impairment.

**b. Epilepsy substantially limits Mr. Mancini in the major life activity of work.**

Under the ADA's implementing regulations, to show that a disability is a substantial limitation on the major life activity of work, the plaintiff must show that he is precluded from a broad class of jobs as compared to the average person with comparable training, skills and abilities. 29 C.F.R. § 1630.2(i) (2000) (defining "major life activities" to include work). See also Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) (assuming without deciding that the EEOC's regulations are valid); Deppe v. United Airlines, 217 F.3d 1262 (9<sup>th</sup> Cir. 2000) (holding that working is a major life activity). It is not enough just to be precluded from performing one particular type of job. Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523 (1999).

In Murphy v. United Parcel Service, the Court concluded that as a matter of law, the aggrieved's hypertension was not a substantial limitation on the major life activity of work because it only prevented him from holding a mechanic position that required certification by the Department of Transportation (DOT). It was company policy, and not federal law, that required him to have DOT certification, so other mechanic jobs at other companies would still be available to him. Id. at

523. By contrast, Mr. Mancini is limited not only in one particular job but rather in a broad class of jobs. And he is limited not only by company policy as was Mr. Murphy, but like the plaintiff in Reynolds v. Brock, Mr. Mancini is restricted from these jobs by federal, state and local law.

In Reynolds v. Brock, a former government employee with epilepsy sued her former employer for discrimination under the Rehabilitation Act of 1973, after she was fired. 815 F.2d 571 (9<sup>th</sup> Cir. 1987). On appeal, the court held that she had a handicap under the Rehabilitation Act because her epilepsy substantially limited her in the major life activity of work. Id. at 574. In reaching this conclusion, the court considered the following factors: (1) the fact that people with any history of epilepsy are ineligible to drive trucks in interstate commerce; (2) that people with epilepsy are ineligible for “hazardous” jobs in the federal civil service unless they have been seizure-free without medication for two years; (3) that people with epilepsy are ineligible to enlist in the military until they are seizure-free for five years; (4) that people with epilepsy are ineligible in many states for a driver’s license until they are seizure-free for a specified period; and (5) people with epilepsy have an unemployment rate two times higher than the national average, and an underemployment rate even higher than that. Id. at 574. Unfortunately, many of these restrictions remain in force today, limiting Mr. Mancini in a variety of classes of jobs. Notably, the language of the implementing regulations under

the Rehabilitation Act and the Americans with Disabilities Act are identical. See 29 C.F.R. § 1613.702(c) (Rehabilitation Act); 29 C.F.R. § 1630.2(i) (ADA). See Toyota Motor Mfg. v. Williams, 534 U.S. 184, 193-94 (2002) (noting that Congress intended the definition of disability in the ADA to be construed “in accordance with pre-existing regulatory interpretations”). We urge this Court to follow suit, and find Mr. Mancini substantially limited in the major life activity of work for similar reasons.

Mr. Mancini is, like Ms. Reynolds, precluded by law from the broad class of jobs of driving trucks in interstate commerce generally, as well as intrastate commerce in many states. 49 C.F.R. § 391.41 (2002) (barring people who take anticonvulsants or who have a current or history of epilepsy from obtaining a federal commercial license.) See also, e.g., Cal. Code Ch. 7 § 15250 (2002) (adopting federal standards); Hawaii Rev. Stat. § 122-3 (adopting federal standards for all commercial vehicles except taxi cars); see also Nevada Admin. Code ch. 483, § 803 (2002) (adopting federal standards but permitting exceptions in limited situations). Mr. Mancini is also precluded from holding a job where company policy, like that of Union Pacific Railroads, requires employees in non-driving positions to hold a federal commercial drivers license. (Farrow Dep. at 52).

Mr. Mancini is also barred from working as a firefighter. To become a firefighter, one must meet medical criteria and a physical endurance test. (Mancini

Dep. at 11-12). Notably, a history of seizures in the last five years while off medication is grounds for disqualification. National Fire Protection Association Standard 1582 (2000). For a person like Mr. Mancini who is unable to maintain seizure control without medication, this medical certification requirement is, in effect, a permanent bar to employment as a firefighter. Mr. Mancini is thus substantially limited in the major life activity of working because he cannot become a firefighter.

Mr. Mancini's epilepsy also limits his employment opportunities generally. It is estimated that at least twenty-five percent (25%) of working-age people with epilepsy are unemployed; among those whose seizures are poorly controlled, the unemployment rate is even higher. See *Epilepsy: A Report to the Nation* 11 (Epilepsy Foundation of America ed. 1999). By way of comparison, during the same time period, the unemployment rate for the general population was only five percent (5%). See *id.* Notably, this rate is significantly higher than at the time the court decided *Reynolds v. Brock*, when the unemployment rate was only two times higher. 815 F.2d 571, 574 (1987). The fluctuation in rate implies that the unemployment rate for people with epilepsy remains at about 25 percent, even as the overall unemployment rate for the general population changes. The primary causes of this high unemployment rate among persons with epilepsy are the frequency of seizures and the attitudes of employers. Despite the existence of

federal and state civil rights laws, employers continue to discriminate against people because of their epilepsy. Indeed, sixty-four percent (64%) of individuals with epilepsy indicated in a survey that they were unemployed as a direct result of their seizures. See id.; see also, R.A. Hicks & M.J. Hicks, Attitudes of Major Employers Toward the Employment of People with Epilepsy: A 30-Year Study, 32(1) Epilepsia 86-88 (1991); W. Allen Hauser & D.C. Hesdorffer, Employment in Epilepsy: Frequency, Causes and Consequences 273, 279 (Epilepsy Foundation of America ed. 1990). For those who are able to obtain jobs, the probability of continued employment is also significantly lower (26 percent among men and 21 percent among women) for people with controlled seizures than among those who do not have seizures at all. See Epilepsy: A Report to the Nation, *supra*.

Also, the rate of underemployment (employment in positions below one's level of skill) is significantly higher among persons with epilepsy than among the general population.<sup>2</sup> See Begley, *supra* at 342, 347. People with epilepsy are less likely than the average person to hold a professional job. Indeed, people with epilepsy are typically employed in low-skilled, low-paying menial jobs. See Epilepsy: A Report to the Nation, *supra*. One community study found that while thirty-two percent (32%) of the general population was engaged in managerial and

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<sup>2</sup> A 1999 study of the cost of epilepsy found that the average man would experience a thirty-four percent (34%) decline in productivity over his lifetime as a result of his epilepsy. See C.E. Begley et al.,

professional jobs, only twenty-two percent (22%) of people with epilepsy were so employed. In that same community, fifteen percent (15%) of people with epilepsy were employed in lower level jobs in the service and manual labor sectors compared to only nine percent (9%) of the general population. Hauser & Hesdorffer, Employment, supra. This trend is in part explained by the lower educational levels among people with epilepsy.<sup>3</sup> Morrell, supra. In short, a diagnosis of epilepsy significantly limits an individual's employment opportunities and ability to retain a job. Mr. Mancini can never drive a truck in interstate commerce, and may never become a firefighter. Because of his seizure condition and the need to take extra time off from work when he gets a viral illness, Mr. Mancini will likely also have difficulty maintaining steady work in the future. These limits combined with the generally dismal forecast for people with epilepsy amount to substantial limitations on Mr. Mancini's ability to engage in the major life activity of work. We urge this Court to adopt its own reasoning in Reynolds v. Brock, and to find that Mr. Mancini is disabled under the Americans with Disabilities Act as a matter of law because he is substantially limited in the major life activity of work.

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The Cost of Epilepsy in the United States: An Estimate from Population-Based Clinical and Survey Data, 41(3) *Epilepsia* 342, 347 (2000).

<sup>3</sup> Epilepsy can cause high absenteeism among high school students and may, depending on the medication and severity of the condition, affect cognitive function and memory recall. This in turn affects the learning process .

**c. Epilepsy substantially limits Mr. Mancini in the major life activity of reproduction.**

Epilepsy imposes significant physiological and psychological limitations on a man's ability to engage in the major life activity of reproduction. See McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9<sup>th</sup> Cir. 1999) (holding that procreation and engaging in sexual relations are major life activities). In Bragdon v. Abbott, the Supreme Court, upon reviewing the evidence concerning the risk of transmitting HIV to an unborn child and the economic and legal costs of the condition, opined, "[i]n the end, the disability definition does not turn on personal choice. 524 U.S. at 641. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." Id. In that case, the Court found that asymptomatic HIV substantially limited the major life activity of reproduction because of the risk of transmitting the disease through sexual intercourse (20 to 25 percent) or through childbirth (which was at least 8 percent but as high as 25 percent). Id. The impact of epilepsy on reproduction function is even more profound and pervasive than that of HIV.

Recent studies show that among those with temporal lobe epilepsy, the genetic risk of transmitting temporal lobe epilepsy to an offspring ranges from two (2) to five (5) percent (2-5%); some studies of particular families have found that the rate can be as high as fifty percent (50%). S.F. Berkovic, Familial Epilepsies:

Quality of Life Issues in Genetic Research, 55 (supp. 1) *Neurology* S3 (2000); S. Kalachikov et al., Mutations in LGI1 Cause Autosomal-Dominant Partial Epilepsy with Auditory Features, 30 *Nature Genetics* 1 (2002) (finding that epilepsy can be transmitted in an autosomal dominant trait).

Sexual dysfunction and reproductive dysfunction are also significantly more common in people with epilepsy than in those without epilepsy. Mimi Callanan, R.N., Sexual Assessment & Intervention for People with Epilepsy, 3(1) *Clinical Nursing Practice in Epilepsy* 7 (1996); Andrew Herzog, Disorders of Reproduction and Fertility, in Epilepsy: A Comprehensive Textbook 2013, 2017 (J. Engel, Jr. and T.A. Pedley eds. 1997) (hereinafter *Disorders*); Sexual dysfunction is defined as a marked decrease in sexual desire, erectile dysfunction, and an inability to ejaculate or premature ejaculation. Callanan, *supra*. Reproductive dysfunction in men includes diminished potency and abnormal sperm characteristics, which in turn affects their ability to impregnate a woman. Herzog, Disorders, *supra*. One study concluded that thirty-eight to seventy-one percent (38%-71%) of men with epilepsy experience reproductive dysfunction. *Id.* Notably, sexual and reproduction dysfunction are more common in patients with temporal lobe epilepsy than any other type of epilepsy, and obtaining seizure control does not affect this condition. Callanan, *supra*. Herzog, Disorders, *supra*. Scientists speculate that the dysfunction is brought about by both the disruption to the limbic function and the

impact of seizures on normal hormone levels, as well as the impact of medicines used to control seizures. *Id.* Carbamazepine, more commonly known by the brand name Tegretol®, which Mr. Mancini was taking at the time, (Mancini Aff. at ¶7), in particular has been found to alter the level of testosterone and bring about reproductive dysfunction. *Id.* Dysfunction also has psychological consequences. Sexual and reproductive dysfunction associated with epilepsy can lead to depression, anxiety, and conflict in interpersonal relationships, which in turn leads to greater social isolation and lower marriage rates. Callanan, *supra*. Indeed, men with epilepsy are thirty to sixty percent (30-60%) less likely to have a child than their siblings without epilepsy. Herzog, Disorders, *supra*. And only fifty-one percent (51%) of men with epilepsy marry compared to sixty-three percent (63%) of men without epilepsy; a twelve percent (12%) difference is hardly inconsequential. Martha Morrell, M.D., The Physiological and Psychological Consequences of Epilepsy, 1(7) *Advanced Studies in Medicine* 294, 300 (2001). These effects – a significant risk of passing the condition on to offspring, higher rates of sexual and reproductive dysfunction, lower marriage rates and lower rates of procreation – when viewed together or by themselves comprise a significant limitation on the major life activity of reproduction, and occur as a direct result of the impairment itself, whether or not it the seizures are controlled with medication.

**d. Epilepsy substantially limits Mr. Mancini in the major life activity of social interaction.**

The stigma associated with epilepsy combined with the physical limits imposed by the condition substantially limits the major life activity of interacting with others. See *McAlinden v. County of San Diego*, 192 F.3d 1226, 1234 (9<sup>th</sup> Cir. 1999) (holding that interacting with others is a major life activity).

Indeed, in enacting the ADA, Congress recognized that the irrational fears and misperceptions about disabilities, including epilepsy, can be as debilitating as the impairments themselves. See 136 Cong. Rec. S7422, S7442 (1990) (statement of Sen. Harkin) ("[T]he fear of epilepsy was once so great that people with this disease were believed to be possessed by the devil and were shut out of schools and the workforce."<sup>4</sup> The Supreme Court itself has also recognized that epilepsy is a stigmatizing condition. See *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 284 (1987). Today, despite advances in medical knowledge and laws such as the ADA, this stigma persists.<sup>5</sup> Indeed, for many people with epilepsy, the stigma associated with the condition and the social isolation that accompanies it is

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<sup>4</sup> Historically, seizures were viewed as a frightening and horrible disease that afflicted both body and soul. People thought that those with seizures were possessed by demons or were mentally ill. See, e.g., L. Eisenberg, *Sociocultural Perspectives, in Epilepsy: A Comprehensive Textbook* 41 (1997). As a result of these beliefs, people with epilepsy were subjected to horrific treatment, ranging from physical violence to extreme physical isolation, such as incarceration in institutions. See *id.* In fact, people who suffered from epilepsy were institutionalized until the latter half of this century. See *id.*

<sup>5</sup> The prevalence and persistence of irrational fears led the U.S. Centers for Disease Control Conference on Public Health and Epilepsy to conclude that the stigma associated with epilepsy and the factors which contribute to it should be addressed as a top priority. See Eisenberg, *supra* note 3, at 12.

a major concern of living with epilepsy. See Robert S. Fisher et al., *A Large, Community-based Survey of Quality of Life and Concerns of People with Epilepsy: Part 1*. Address at the American Epilepsy Society Annual Meeting, San Diego, Cal. (Dec. 9, 1998).

Temporal lobe epilepsy is particularly stigmatizing. People with temporal lobe epilepsy are often believed, incorrectly, to suffer from personality disorders because these seizures occur in the same part of the brain that is responsible for emotions, and because of the unusual behavior that characterizes complex partial seizures. Michael Hills & Peter Baker, *Relationships Among Epilepsy, Social Stigma, Self-Esteem and Social Support*. 5 J. Epilepsy 231, 232 (1992).

Stigma affects social interactions on two levels. On the most basic level, it affects the individual's self esteem. People with epilepsy typically internalize society's negative perceptions (i.e. the stigma) and as a result, experience lowered self-esteem. Hills & Baker, *supra*. Stigma also affects interpersonal relations: the greater the level of stigma, the greater the social isolation. *Id.*; Morrell, *supra*. People with epilepsy may avoid social situations, including going to public places or engaging in intimate sexual relations, for fear of having a seizure. Hills & Baker, *supra.*; Callanan, *supra*. The physical effects of the condition, such as sexual dysfunction, may cause depression and conflict in interpersonal relationships. Lower than average marriage rates are just one way in which

conflict in interpersonal relationships is manifested.<sup>6</sup>

Seizures are also physically isolating and can stress social relationships. When a person has a seizure, certain physical activities, such as climbing or swimming, may be restricted for a specific period of time, and driving privileges may be suspended for an extended period. Losing the ability to drive has a major impact on the person's life. Not only is it more difficult to get to work, but the individual needs to find alternative transportation to do such common activities as shop for food, go to doctor's visits, and attend social functions. Public transportation is not always an alternative, either because service is limited or because it is not accessible in the individual's area. The alternative then is to rely on friends and family for ride, which stresses those relationships, or forego the activity altogether which leads to social isolation. In other words, epilepsy substantially effects social interaction.

**e. Epilepsy substantially affects Mr. Mancini's ability to engage in the major life activity of breathing.**

Mr. Mancini's ability to engage in the major life activity of breathing is substantially limited by his epilepsy. See 29 C.F.R. § 1630.2(i) (2000). As the Supreme Court recognized in Bragdon v. Abbott, a major life activity can be

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<sup>6</sup> See Morrell , supra.

substantially limited even if the impact has not been physically demonstrated as long as the risk of the effect is real and significant. 524 U.S. at 641.

In that case, the Court held that a man with asymptomatic HIV was substantially limited in the major life activity of reproduction because the risk of transmitting the disease to a sexual partner or unborn child was so high. Id. Notably, in that case, there was no allegation or evidence in the record that the man had transmitted the disease to either a partner or a child. The fact that the risk existed and that the risk was significant (at least 8 percent) was sufficient for the Court. Id. For people with epilepsy, it is the significant increase in the risk of premature death that substantially limits a major life activity.

Experts have known for a long time that, compared to the general healthy population, the death rate in people with epilepsy is at least doubled. W. Allen Hauser & D.C. Hesdorffer, Facts About Epilepsy (Epilepsy Foundation of America 1990) (hereinafter Facts). Among people aged 5 to 44 years, the death rate is five times higher than in the general population. Compared to their healthy peers, young people aged 20 to 40 years with poorly controlled epilepsy are also more susceptible to sudden, unexplained death (SUDEP). J.E. Leestma et al., A Prospective Study on Sudden Unexpected Death in Epilepsy, 26 Ann. Neurol. 195 (1989); J.R. Gates, Sudden Death in Epilepsy, 6 Med. J. Allina 20 (1997). SUDEP occurs more often in men than in women. Leestma, et al., supra. Studies

estimate that two to eighteen percent (2-18%) of all deaths in people with epilepsy are due to SUDEP. Morrell, *supra*; T. Tomson, Mortality in Epilepsy, 247 J. Neurol. 15 (2000); Linda Carroll, Mounting Data on Epilepsy Point to Dangers of Repeated Seizures, N.Y. Times, Feb. 18, 2003 at F5 (10 to 15 of every 10,000 deaths in people with epilepsy). Though the cause of SUDEP is not fully understood, lower oxygen saturation levels as a result of repeated seizures has been identified as one possible cause. Morrell, *supra*. Suicide is also more common among people with epilepsy than the general population; the rate among people with epilepsy is two to five times higher than in the average population. W. Allen Hauser & D.C. Hesdorffer, Mortality, in Epilepsy: Frequency, Causes and Consequences 297 (Epilepsy Foundation of America ed. 1990). Moreover, each year, 42,000 people die from status epilepticus, i.e., continuous seizures that last more than ten minutes, and many more suffer brain damage as a result. Twenty-five percent (25%) of those who experience status epilepticus have epilepsy. R.J. DeLorenzo et al., Status Epilepticus in Children, Adults, and The Elderly. 33(Supp.4) *Epilepsia* S25 (1991). In short, an individual with epilepsy runs a significant risk of dying at a much younger age than those without epilepsy.

This risk is a substantial limitation on the major life activity of breathing just like the risk of transmitting a potentially fatal disease to a sexual partner or unborn child is a substantial limitation on the major life activity of reproduction. Mr.

Mancini is, therefore, disabled under the statute.

**f. Epilepsy substantially limits Mr. Mancini in the major life activity of caring for oneself.**

In E.E.O.C. v. United Parcel Service, 306 F.3d 794 (9<sup>th</sup> Cir. 2002), this Court held that to be substantially limited in a major life activity other than work, the aggrieved must have an impairment that substantially limits him in his daily life, not just in his work. In that case, this Court concluded that neither of the plaintiffs were disabled by their monocular vision because they were not prevented from using their vision in daily life; that is, they could drive, read, use tools and play sports. Id. at 803. By contrast, Mr. Mancini's impairment does significantly affect the way he cares for himself on a daily basis. See Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128 (9<sup>th</sup> Cir. 2001) (holding that caring for oneself is a major life activity).

Though seizures are a physiological phenomena, they have both physical and psychological consequences. During Mr. Mancini's seizures, he loses the ability to walk, talk, control his muscles, and interact with the environment. (Mancini Aff. ¶ 19.) This in turn affects his ability to engage in routine activities such as working, socializing, gardening, driving, eating, cooking and even going to the bathroom. People with epilepsy are also at greater risk of injury; fractures and burns are major hazards. Epilepsy: A Report to the Nation , supra, at 12.

Moreover, Mr. Mancini, like others with epilepsy, experiences consequences even after the seizure has ended. During the post-ictal period, the individual often experiences memory problems, disorientation and exhaustion for hours or days following the seizure. Additionally, when Mr. Mancini has a viral illness, he must, under his doctor's orders, refrain from working for seven to ten days after the illness because of the risk of having a seizure. See Gerard Letter Jan. 31, 2002.

Epilepsy affects not only one's physical health and physical ability to perform daily tasks. It can also alter the person's daily schedule and behavioral patterns. The person must adjust his daily schedule and activities to avoid possible seizure triggers, such as exhaustion and stress, and to accommodate medication schedules. Adhering to a rigid sleep schedule, avoiding alcohol, setting work breaks and lunch periods to accommodate medication schedules, and avoiding work that requires irregular shifts or night time shifts are some of the most common schedule modifications.

The side effects of medications also require schedule modifications and affect the individual's ability to carry out routine tasks. Carbamazepine, which Mr. Mancini was taking at the time, for example, may cause slurred speech, blurriness, nausea, dizziness, and diplopia. It may affect cognitive function, causing memory and recall problems in some individuals. Kimford J. Meador, M.D., Cognitive Outcomes and Predictive Factors in Epilepsy, 58(Supp. 5) *Neurol.* S21, S23

(2002). Indeed, Mr. Mancini suffered such drowsiness from his medicine that his doctor needed to change his medication. These limitations on one's physical capacity in turn affect his ability to participate in routine activities. After having a seizure, or when trying out new medicines, the individual will have to refrain from common activities such as driving until the proper medication schedule has been determined and seizure control regained. This in turn requires making alternative arrangements for rides, using more time-consuming public transportation, or foregoing certain activities altogether, including work, food shopping and social activities, until he is able to drive safely. One's daily schedule is also subject to unexpected, but time-consuming interruptions. Mr. Mancini, like others with epilepsy, makes frequent trips to the emergency room because of his seizures. See, e.g., Dep. Ex. 2 (Mancini Emergency Room Report, May 9, 2000), Dep. Ex. 4 (Mancini Emergency Room Report June 30, 1993).

Mr. Mancini is also limited in his ability to care for himself by the psychological effects of epilepsy. Psychological effects include the fear of having another seizure at any time, low self esteem, and enduring the stigma that is associated with seizures. Fifty percent (50%) of people with epilepsy reported that the single worst thing about epilepsy was living with the fear of another seizure. See Epilepsy: A Report to the Nation, supra, at 11.

These physical and psychological limitations, combined with the effects of

epilepsy on Mr. Mancini's physical abilities, are significant. Most people when they are ill do not need to miss work once they are feeling better, nor are most people physically incapacitated by a physical impairment for any part of the day. Mr. Mancini is, however, because of his epilepsy. He is, in short, significantly limited in his ability to physically care for himself on a daily basis.

For all of the foregoing reasons, we ask this Court to reverse the lower court.

**B. The District Court erred in holding that Mr. Mancini was not “regarded as” disabled.**

The District Court erred in holding that Mr. Mancini was not regarded as disabled. Under the Americans with Disabilities Act, an individual has a “disability,” regardless of whether he actually has a physical impairment that substantially limits one or more major life activities, if he has been “regarded as” having such an impairment. 42 U.S.C. § 12102(2)(c) (2000). When the major life activity is work, the individual must show that he was regarded as substantially limited in a broad class of jobs, not just one particular job. Sutton v. United Airlines, Inc., 527 U.S. 471, 492 (1999). In that case, twin sisters alleged that the airline regarded them as substantially limited in the major life activity of work because it concluded their poor vision made them ineligible for the position of global airline pilot. The Court concluded that the sisters were not regarded as disabled in a broad class of jobs, since they could still work as a commercial pilot,

or as a pilot for a courier service. Id. at 493. By contrast, in the instant case, Mr. Mancini was not regarded as substantially limited in just one job but in a broad class of jobs.

The District Court erred because it assumed, without question, that the only way to comply with the medical restrictions was to suspend Mr. Mancini. Under the Americans with Disabilities Act, however, the employer is required to provide a reasonable accommodation. 42 U.S.C. § 12112(b)(5)(A) (2000); 29 C.F.R. § 1630.2(o) (2000). The employer, once it knows of an employee's disability, also has an obligation to engage, in good faith, in an interactive discussion with the employee to identify such accommodations. 29 C.F.R. § 1630.2(o)(3) (2000). In situations where an individual's medical condition makes it impossible for the person to perform his job for a specific period of time, possible reasonable accommodations include reassigning nonessential job functions to other coworkers or temporarily reassigning the individual to a vacant position. 29 C.F.R. § 1630.2(o)(2)(ii)(2000) (listing job restructuring, part-time or modified work schedules, and reassignment to a vacant position as possible reasonable accommodations). In the case before the court, the record does not show, nor did the lower court consider, whether the employer offered any accommodations, including a possible reassignment to a vacant position in the administrative office, for example. There is no evidence in the record that such an accommodation was

offered, or even that the appellee-employer engaged in a discussion about possible reasonable accommodations. Instead, the record shows that company officials considered the restrictions and the impact of the restrictions on this one particular job. After summarily concluding that he could not be accommodated in this one particular job without imposing an undue burden on other employees, it decided to put Mr. Mancini on unpaid leave. (Farrow Aff. ¶ 4.) It in effect regarded him as being unable to perform any job at the company, whether on the track or in the office. That is, the company regarded Mr. Mancini as being substantially limited in the major life activity of working in the broad range of jobs offered by the railroad company.

## **II. PEOPLE WITH EPILEPSY ARE WITHIN THE CLASS OF PERSONS CONGRESS INTENDED TO PROTECT WHEN IT ENACTED THE AMERICANS WITH DISABILITIES ACT.**

The legislative history of the ADA makes clear that Congress intended that persons with epilepsy would fall within the definition of disability under the Act. In fact, epilepsy is repeatedly cited throughout the legislative history as an example as a covered disability. See, e.g., S. Rep. No. 101-116, at 22, 31, 39, 62 (1989); H.R. Rep. No. 101-485(II), at 51-52, 62, 72, 79-80, 104 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 303; H.R. Rep. No. 101-485(III), at 28-29, 33, 42, 50 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 445. Notably, Congress was aware that many

people with epilepsy use medication to control its effects. See, e.g., H.R. Rep. No. 101-485(II), at 52; H.R. Rep. No. 101-485(III), at 28, 29; see also 135 Cong. Rec. E1575 (1989) (statement of Rep. Coelho) (testifying that an overwhelming majority of people with epilepsy use medication to control the condition). In short, even though Congress was aware that the effects of epilepsy could be mitigated either by medication, it still recognized that the underlying impairment itself is a disability under the ADA. Not to acknowledge that Mr. Mancini is disabled would undermine Congress' intent in enacting the ADA to protect people with epilepsy and other disabilities from discrimination.

### **CONCLUSION**

The judgment of the District Court holding that Mr. Mancini is not disabled should be reversed as a matter of law. Alternatively, we ask this Court to set out the legal standard under which a person with epilepsy can establish that they are disabled under the Americans with Disabilities Act.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief contains 6,995 words, and is printed in Times Roman 14 -point font, a monospaced typeface which has 10 characters per inch.

BY \_\_\_\_\_  
Alexandra K. Finucane, Esquire

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Counsel for Appellant, E.W. Skip Carter; Cooper & Larsen, 151 North 3<sup>rd</sup> Avenue, Suite 210, P.O. Box 4229, Pocatello, ID 83250-4229, and to Counsel for Appellee, Jeffrey J. Devashrayeee, Esq., Union Pacific Railroad Company, 280 South 400 West, Salt Lake City, UT 84101-1151, on this the 13th day of May, 2003.

BY \_\_\_\_\_  
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