No. 17-1537

In The
Supreme Court of the United States

PATRICIA MORRISON,
Administrator for the Estate of Tommy Morrison,

Petitioner,

v.

QUEST DIAGNOSTICS INCORPORATED, JOHN HIATT, DR. MARGARET GOODMAN, NEVADA STATE ATHLETIC COMMISSION, and MARC RATNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

MORRISON replies to Respondents' A: WAIVER and B: BRIEF IN OPPOSITION.

A. NEVADA ATHLETIC COMMISSION; DR. MARGARET GOODMAN; AND MARC RATNER, COLLECTIVELY "NSAC", FILED A WAIVER ON MAY 29, 2018

1. NSAC's Continued Nondisclosure, And Fraudulent Concealment Of A Material Fact

NSAC had the opportunity, and obligation, to address in part: " . . . *any perceived misstatement of fact or law in the petition. . . .*" *(Supreme Court Rule 15.2)*, **but filed a Waiver**.

Since February 10, 1996, TOMMY, unknowingly, with blameless ignorance, was forced to believe he failed the Nevada Athletic Commission licensing regulation.

It is well settled under Nevada law that suppression or nondisclosure of a material fact, which a party is bound in good faith to disclose, is equivalent to a false representation. *See Midwest Supply, Inc. v. Waters*, 89 Nev. 210, 510 P.2d 876, 878 (1973).

2. NSAC's Continued False Representations And Suppression Of Rule NAC 247.027 On February 10, 1996, Forms The Basis Of An Equitable Estoppel, Forbidding NSAC From Pleading The Statute Of Limitations Against A Cause Of Action, For Breach Of Fiduciary Relations

In 1996, the true, but fraudulently concealed 'regulation' documented in the *Nevada Supreme Court Library*, was:

> **NAC 467.027 Physical examination of boxer.**
>
> **1. Any boxer who has applied for a license or a renewal of his license must be examined by a physician certified by the commission, to establish the boxer's physical and mental fitness for competition.**
>
> **2. Any boxer licensed by the commission who participates in a boxing contest outside Nevada may be required to take this examination again before being allowed to box in Nevada.**

Undisputed by NSAC, TOMMY was certified physically and mentally fit for competition and be licensed to fight on February 10, 1996. TOMMY was in compliance with the undisclosed *recorded* regulation. *See APP. 1. NAC 467.027 from 1978 to 2018.*

3. NSAC's Actions And Omissions On February 10, 1996, Violated The Administrative Procedure Act ("APA"), On Nevada Administrative Rulemaking Title 18, Chapter 233B

If it were not for two newly filed lawsuits supporting MORRISON's Petition, NSAC's continuing fraud and deceit would remain concealed. *See Harrison, et al. v. Mattis, et al.*, Case 1:18-cv-00641; *Voe v. Mattis, et al.*, Case 1:18-cv-01251 (May 30, 2018), regarding 'unconstitutional' HIV Policy and APA Violation. NSAC also did not complete *mandatory* steps before changing its regulations singling out TOMMY:

- Discuss and Draft proposed regulation in compliance with Open Meeting Law;
- Consider impact;
- conduct an analysis;
- Provide notice of intent;
- Send draft regulation language to Legislative Counsel Bureau;
- Conduct public hearing;
- Draft statement describing regulation and rulemaking proceeding, methods used, reasons for the Rule;
- Prepare and file the Form of Administrative Regulations and statement with Legislative Counsel;

- After approval and review by Legislative Commission, regulation is filed with Secretary of State;
- File copy bearing seal of Secretary of State with State Library and Archives Administrator.

NSAC, knowingly and fraudulently continue[d] to make false representations to TOMMY, media, public, lower courts and to MORRISON, from 1996 to present day. Even to this Court, by way of its WAIVER.

4. NSAC's Immediate, Indefinite, Worldwide, Suspension On TOMMY Was Unlawful; Unconstitutional; Arbitrary; Capricious; An Abuse of Discretion; Violative of the APA; Americans with Disabilities Act ("ADA"); and 14th Amendment

NSAC's actions were unlawful based not only on the procedural violation of the APA, and its own NSAC regulations, but also arbitrary and capricious, in violation of constitutional provisions *and* did not articulate a rational connection between *scientific facts* and the unlawful policy choice it forced upon TOMMY. If ADA, APA, and the Constitution really allow this, then NSAC should make its case here.

When stigma, fear and prejudice actually drive specific acts of discrimination, the ADA covers such discrimination under the **"regarded as"** prong of the definition of disability. *See 42 U.S.C. §12102(2)(C)*

(1994). NSAC ***'regarded* TOMMY *as'*** having a virus. A virus that TOMMY never had.

MORRISON's claims are real and result from NSAC's specific omissions, actions and inactions. To this day, pity, exclusion, and shame are the pervasive attitudes toward TOMMY, his legacy, and family resulting from Respondents' *illegal, unlawful, unconstitutional*, actions and events commencing February 10, 1996.

NSAC's *absence of any effort* to evade review of MORRISON's Petition and constitutional issues it uniquely raises, only highlights NSAC's realization of the weakness of its position in this case.

Even now, no evidence of mandatory APA procedures validates the current **NAC 467.027 *Section 3(b)***: "*show that the applicant or unarmed combatant is not infected with the human immunodeficiency virus";* not effective until *22 months later on* ***December 02, 1997***. Accordingly, NAC 467.027 Section 3(b) should be vacated based on continuing procedural violations. The Court should find NSAC in *continuing violation* of the ADA, APA, and 14th Amendment. **NO amateur boxer has ever been subjected to this unconstitutional 'regulation'.**

The Federal Government *can* constitutionally "encroach" on an area previously 'regulated' solely by the 'states', as already addressed by this Court. *See United States v. International Boxing Club of New York*, 348 U.S. 236 (1955) (where the U.S. Supreme Court decided that even though the matches were indeed of a "local" nature, the fact that they were promoted, televised,

and broadcasted on a multistate level made them amenable to ***Federal Law***).

Having no documented basis for forcing an immediate, indefinite, worldwide suspension on TOMMY's profession, all on one day, makes NSAC's actions "arbitrary and capricious." Even if NSAC had been presented with a 'lab report' from QUEST in 1996, QUEST now concedes, *20 years later*, that all TOMMY's 'lab reports' are not even a condition of HIV, or HIV infection.

5. NSAC Did Not Dispute Facts Or Law In MORRISON's Petition

NSAC does not dispute TOMMY was repeatedly found medically fit to fight on February 10th, 1996, nor does it dispute QUEST's long overdue ***confession*** in court in 2016, that the tests chosen, performed, and reported on a 'lab report or orally' were never, *and still not*, a condition or diagnoses of any disease, including the human immunodeficiency virus, "HIV".

NSAC does not dispute that it may not simply *assume* a threat exists but must establish through objective, medically supportable methods, studies, if a risk could even occur in the Ring to a *professional* boxer, when it doesn't occur to an *amateur* boxer or in any other sport. NSAC's insistence on accepting the "say-so" of a *corporation*, QUEST, rather than the studies of the *National Institutes of Health ("NIH") or Health and Human Services ("HHS")* suggests it was looking in the wrong place to falsely justify an end to TOMMY's profession, *coincidentally* on course to fight **Mike Tyson**.

MORRISON's due diligence uncovered Dr. Anthony Fauci of the **NIH** citing "the risk of transmission is so small as to be **unmeasurable**" *Nightline: AIDS and Boxing (ABC television broadcast,* ***February 13, 1996****).*

6. NSAC Essentially Crosses Over To Support MORRISON's Petition

Interestingly, NSAC, during this Petition stage, revamped its website promoting ADA. (**NAC 467.027** ***Section 3(b)*** does not comply with ADA.) *See* **boxing.nv.gov**.

NSAC is *an agency* of the **Nevada Department of Business & Industry** (a cabinet level agency in Nevada State government ensuring the **legal** operation of its businesses in order *to protect consumers* by maintaining a fair and competitive regulatory environment). The *Nevada Department of Business & Industry* promotes ADA. *See* **business.nv.gov**.

NSAC's counsel, **Nevada District Attorney General's office**, signed the WAIVER. The *Attorney General's office* promotes ADA. **(NAC 467.027** ***Section 3(b)*** **does not comply with ADA, or APA, or 14th Amendment).** *See* **ag.nv.gov.**

MORRISON's Petition is not solely about the law. The facts also reflect certain public policy aspects, especially after **serious scientific questions** have been brought to light about NSAC's 'conclusions'. All national boxing commissions, boxing applicants, and

public at large, have been fraudulently misled by NSAC to accept the decision-making of QUEST and its *solo* 'lab report' *as* a ready-made diagnosis, condition, of 'HIV infection', *when it is not.*

With over 50 boxing commissions just in the USA, thousands of applicants, and millions of fans worldwide, the issues are of **national importance**, worthy, and essential of this Court's immediate review to ensure, not just amateur boxers, but also *professional* boxers, can participate fully in the mainstream of society.

The lower courts' rulings impact parties far beyond the sport of boxing and this case poses consequences for discrimination in general, and will impede medical research, treatment and quality control. Review is warranted in this case, and NSAC does not argue otherwise.

NSAC's failure to defend its contemporaneous explanation by picking and choosing among applicants is reason enough for this Court's plenary review of the constitutional question. If any tradition is relevant here, it is the constitutional tradition of equal treatment for all.

B. QUEST DIAGNOSTICS INC., AND JOHN HIATT; COLLECTIVELY "QUEST", FILED A BRIEF IN OPPOSITION ("BIO") ON JUNE 11, 2018

1. QUEST's BIO Actually Bolsters This Case For Certiorari

QUEST's BIO is as notable for what it does not say as for what it does. It omits any argument that the Ninth Circuit's restrictive rule is correct or even permissible under the ADA, Discovery Rule; Fraudulent Concealment Doctrine, Continuous Treatment Doctrine, Continuous Course of Treatment Doctrine, and 14th Amendment, specifically designed to protect its victims such as TOMMY.

Evidence is present that not only did TOMMY see, hear, read and rely upon the misrepresentations made by QUEST and NSAC, but so did the lower courts.

QUEST has proffered no authority that a stronger party (QUEST/NSAC) to a contract can require a weaker party (TOMMY) *to waive the protection of a federal statute* that is specifically designed to protect the weaker parties' federal right. Indeed, it would be surprising if Respondents could find such authority. If this were law, then we would expect NSAC to require boxers to waive federal statutory rights to get a license. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945). To be an effective waiver, a party "should be apprised of all the facts: of those which create the forfeiture, and those which will necessarily influence its judgment in consenting to waive it." *See Combs v.*

Equitable Life Ins. Co., 120 F.2d 432, 438 (4th Cir. 1941).

Under the **Supremacy Clause** of the **United States Constitution, Congress** may preempt **state common law** as well as **state statutory law** through federal legislation. *U.S. CONST. art. VI. §2; Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-27 (1981).

A grant of summary judgment is appropriate only where the moving party has demonstrated that there is no genuine issue of material fact. *Id*. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). MORRISON has demonstrated that there is more than a scintilla of evidence creating a genuine issue of material fact on which a jury could reasonably find for TOMMY.

The very purpose of ADA is to overcome state-law hostility to arbitration, which still is rampant today. *See, e.g.*, *DirectTV, Inc. v. Imburgia*, 136 S.Ct. 463, 468 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

2. QUEST's Objections Can Only Be Resolved By Granting Certiorari

This Court's practice permits a party to make *any* argument before this Court in support of a claim, as long as the claim was pressed or passed upon. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The "traditional rule is that once a federal claim is properly presented a party can make any

argument in support of that claim; parties are not limited to the precise arguments they made below." *Id*. (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)) (internal brackets and quotation marks omitted). Here MORRISON pressed the statute of limitations defense, and the courts below passed upon the issue. Thus, before this Court, MORRISON is free to make any argument.

3. QUEST's BIO Reveals A Glaring Weakness In Its Defense Of This Case

Respondents take advantage of a defense based on the statute of limitations where the Ninth Circuit uniquely holds Respondents' intentional, knowing, and fraudulent concealment of facts and documents from the lower courts, TOMMY, physicians, the public, and MORRISON, as acceptable conduct. The Ninth Circuit's permissive standard of fraudulent concealment and continuing violations warrants this Court's intervention to provide guidance and uniformity not only nationally in the sport of boxing, but for the general public at large.

What MORRISON's Petition really reveals is not any weakness in TOMMY's case, but rather a glaring weakness in Respondents' case. For example, No ICD-9-CM codes are even present on any of QUEST's extrinsic evidence. ICD codes identify known diseases published by the World Health Organization. The **ICD code** for 'HIV' infection since 1987 has been **042.0-044.9**. *(U.S. Department of Health and Human Services*

Vital statistics mortality data, multiple cause detail, 1968-1998. World Health Organization. Manual of international statistical classification of diseases, injuries, and causes of death. Based on recommendations of the ninth revision conference, 1975, adopted by the 29th World Health Assembly. Geneva, Switzerland: World Health Organization; 1977. National Center for Health Statistics. Vital Statistics of the United States, 1994. Washington, D.C.: Public Health Service, Center for Disease Control and Prevention, National Center for Health statistics; 1997).

QUEST has "never told" about its technological challenges and elaborate *20 yearlong* fraud of exaggerated, false, misleading statements about its technology, business, testing, reporting, AND when QUEST subpoenaed TOMMY's **FINAL DIAGNOSIS**, it immediately concealed it from the courts.

C. MORRISON'S QUESTIONS PRESENTED ARE IMPORTANT, QUEST'S RESISTANCE TO THEM IS STRONG

1. This Court is presented with clean issues of important but unresolved law. By QUEST's objections, and NSAC's silence, Respondents finally concede that this Court should resolve the exceptionally important questions.

2. In short, QUEST's peculiarly strong resistance to this particular Petition can be explained only by its strong desire to avoid the questions this Petition alone forces it to confront.

3. QUEST's resistance is self-evident. QUEST would prefer to obscure details of its fraudulent scheme, as this case makes it clear. QUEST prefers not to talk about the *14th Amendment*, this case would oblige it to.

4. This case is a prime example of how the Ninth Circuit's lax approach toward 'HIV' encourages and facilitates the pharmaceutical industry, QUEST, to manipulate evidence, coerce confessions and give misleading testimony committing fraud on the grounds of negative misrepresentations, omissions, and fraudulent concealment.

D. THE LOWER COURT'S DECISION WILL IMPEDE MEDICAL RESEARCH, TREATMENT, AND QUALITY CONTROL

1. Tests like those used by QUEST, can make independent validation of its test results for 'HIV infection' impossible when suppressing and concealing packet inserts containing instructions, cut-off markers, *inter alia*, to ensure the accuracy, reliability and 'intended use' of QUEST's assays used on TOMMY.

2. Accordingly, Congress has mandated federal regulators, or an approved professional organization, to conduct quarterly inspections of a laboratory's performance of most tests. *See Clinical Laboratory Improvement Amendments of 1988*, Pub.L.No. 100-578, §2, 102 Stat. 2903 (1988), codified in relevant part at 42 U.S.C. §263a(f)(3); 42 C.F.R. §493.801. The *College of American Pathologists* accomplishes this by using,

among other techniques, comparisons between results of participating laboratories. S*ee CAP, What Is Proficiency Testing*, at http://tinyurl.com/dkoncq.

3. No such "peer comparisons," determining unequivocal 'HIV infection' are available for QUEST's assays because no other *competing* 'clinical laboratory' confirms their 'screening' tests are FDA approved as 'diagnostic' tests for 'HIV infection'.

4. Undisputed:

- QUEST 'lab report' fraudulently guarantees 'true infection status', but **now** does not dispute scientific facts that **healthy humans, dogs, cows, mice, also test "positive"** on its tests.
- 1991: Journal JAIDS: "there is no 'gold standard' laboratory test that defines the true infection status." *See Sheppard HW, et al. 4:819-23.*
- 1999: Journal Ann. Int. Med: "viral load tests for HIV-1 were neither developed or evaluated for the diagnosis of HIV infection." *See Rich J, et al. 130:37-39.*

5. The lower courts were forbidden, by Respondents, from using scientific knowledge captured by TOMMY's case. This Court's review is urgently needed to further prevent QUEST's abuse of power.

E. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW AND RIPE FOR CERTIORARI

1. Nothing prevents or even complicates this Court's resolution of the Questions Presented.

2. The ADA was enacted nearly 30 years ago, and the consistent understanding and interpretation of its laws has been the opposite of what the Ninth Circuit now says it should be.

3. The Ninth Circuit was supposed to review findings for clear error (*see FRCP 52(a)(6)*), instead it created a double standard by failing to protect the *14th Amendment* to the same extent they protect *other* constitutional rights.

4. "States offering no evidence or anecdotes in support of [a] restriction should not prevail under intermediate scrutiny." *See Florida Bar v. Went For It Inc.*, 515 U.S. 618, 628 (1995).

F. "EQUAL JUSTICE UNDER LAW"

1. Whether "state" statute of limitations can be applied to the cumulative effects of Respondents' Continuing Fraudulent Concealment; Continuing Course of Treatment; Continuing Negligence; Discovery Rule; Continuing Violation of the APA and ADA "regarded as" positive for HIV; 14th Amendment; Suppression and Nondisclosure of a Material Fact, are important questions this Court has never decided upon, and other circuits remain split.

2. The decision below threatens major harm to the health-care system. This problem is not hypothetical. This lawsuit arose when TOMMY died and the **Final Diagnosis on the postmortem report of *September 17, 2013*** (authored and signed by experts in the field of HIV/AIDS), announced TOMMY did not have HIV, nor any AIDS diseases. **QUEST subpoenaed AND withheld this document from the courts.** This case was timely filed on July 24, 2014.

3. Moreover, if Respondents are correct that the Ninth Circuit's analysis of their extrinsic evidence resolved this case, then the especial importance of **Death Certificates, Final Diagnoses**, and **Postmortem Reports** are being undermined by the Ninth Circuit.

4. **NAC 467.027 Section 3(b)** remains in continuing violation of APA, ADA and 14th Amendment, until this case is heard by the U.S. Supreme Court Justices.

CONCLUSION

For reasons set forth above, and in the Petition, MORRISON urges the Court to grant certiorari, summarily reverse the decision of the Ninth Circuit, or

in the alternative, grant MORRISON's Petition and schedule this case for full briefing and argument.

Dated June 20th, 2018 Respectfully submitted,

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Estate of Tommy Morrison