No. 17-1001

IN THE
Supreme Court of the United States

RAYMOND SEVERSON,

Petitioner,

v.

HEARTLAND WOODCRAFT, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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Respondent Heartland Woodcraft, Inc. does not refute that the circuits are openly and sharply split on the question presented: whether there is a *per se* rule that a finite leave of more than one month cannot be a "reasonable accommodation" under the ADA. Nor is there any dispute that this petition squarely presents that question. That is ample reason by itself for this Court to grant review. Whether an employee may take a finite leave of more than one month as a reasonable accommodation should not depend on whether the employee works within the Seventh Circuit or elsewhere.

Review also is warranted because the Seventh Circuit's decision runs afoul of the statutory text and this Court's precedent. According to the Seventh Circuit, an employer never can be required to allow an employee to take a leave of absence of more than one month as a reasonable accommodation—even if the employer concedes that the leave would not pose any hardship whatsoever, and even if the employer regularly grants leaves of similar durations in other contexts. This is wrong under *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987), and *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391 (2002), which make clear that the ADA eschews *per se* rules and requires case-specific analyses.

1. The circuit split in this case is clear and entrenched. Heartland has not cited a single case outside of the Seventh Circuit applying its *per se* rule that a finite leave of more than one month *cannot* be a reasonable accommodation under the ADA. *See* Pet.

App. 3a, 8a; *see also Golden v. Indianapolis Hous. Agency*, 698 F. App'x 835, 837 (7th Cir. 2017), *petition for cert. filed*, Feb. 7, 2018 (No. 17-1113). To the contrary, the First, Sixth, Ninth, and Tenth Circuits all hold that such a leave *can* be a reasonable accommodation—and that courts therefore must look to the facts of the case to evaluate whether the requested leave is a reasonable accommodation or undue hardship. *See* Pet. 14–21.

Like the court below, Heartland insists that an employee needing a leave of more than one month cannot be a "qualified individual" under the ADA. *See* BIO 9–16. But the qualified individual and reasonable accommodation inquiries are two sides of the same coin here. Because the ADA defines "qualified individual" as one who can perform the essential job functions "with or without reasonable accommodation," *see* 42 U.S.C. § 12111(8), whether an employee needing a leave is a qualified individual will turn on whether that leave is a reasonable accommodation. One of the cases cited by Heartland makes exactly that point: "Logically, if temporary leave can reasonably accommodate an employee in the performance of her essential functions, that same employee cannot be deemed unqualified to perform her essential functions by virtue of having requested the leave." *Stallings v. Detroit Pub. Schs.*, 658 F. App'x 221, 225 n.1 (6th Cir. 2016). Many of the cases cited by Heartland echo this point and *reject* the position taken by Heartland and the court below—an indication of just how isolated the Seventh Circuit's rule is. *See, e.g., id.* (concluding that "insofar as [the

district court] relied on plaintiff's request for temporary leave to find her unqualified, this was error"); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1135–36 (9th Cir. 2001) (holding that "where a leave of absence would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA").

Heartland muddies the waters by repeatedly citing cases that involve a sharply different situation than the present case: an employee who may not be able to work *even after the requested leave*, either because the employee (1) conceded that he or she would never be able to return to work[1] or (2) needed to take an indefinite leave[2]. The courts of appeals largely agree

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[1] *See Gamble v. JP Morgan Chase & Co*, 689 F. App'x 397, 402–03 (6th Cir. 2017) (employee "incapable of working for another 20 years" was not a qualified individual); *Stallings,* 658 F. App'x at 226 (employee who "would remain incapacitated" even after the requested leave was not a qualified individual); *Walraven v. Geithner*, 363 F. App'x 513, 514–15 (9th Cir. 2010) (employee asserting "total disability" was not a qualified individual); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir. 2000) (employee who was "totally disabled" was not a qualified individual).

[2] *See Colón-Fontánez v. Mun. of San Juan*, 660 F.3d 17, 35–36 (1st Cir. 2011) (employee indefinitely unable to attend work regularly, as had been the case for years, was not a qualified individual); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) ("wait[ing] indefinitely for [employee's] medical conditions to be corrected" was not a reasonable accommodation); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 757 (5th Cir. 1996) (employer "was not required to make reasonable accommodation

that a permanent or indefinite leave is not a reasonable accommodation under the ADA. They reason that, since the employee cannot establish that

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in the form of an indefinite leave"); *Boileau v. Capital Bank Fin. Corp.*, 646 F. App'x 436, 441 (6th Cir. 2016) (leave was not a reasonable accommodation where the employee would be incapacitated "every one to two months for the duration of her life"); *Maat v. Cty. of Ottawa*, 657 F. App'x 404, 413 (6th Cir. 2016) ("because [employee's] requested leave was not definite in duration, it could not have been a reasonable accommodation"); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 763 (6th Cir. 2015) (*en banc*) (working from home indefinitely was not a reasonable accommodation); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996) ("unpaid medical leave indefinitely" was not a reasonable accommodation), *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012); *Anderson v. Inland Paperboard and Packaging, Inc.*, 11 F. App'x 432, 438 (6th Cir. 2001) (employee on indefinite leave was not a qualified individual); *Larson v. United Natural Foods W. Inc.*, 518 F. App'x 589, 591 (9th Cir. 2013) ("indefinite, but at least six-month long, leave" was not a reasonable accommodation); *Robert v. Bd. of Cty. Comm'rs of Brown Cty., Kan.,* 691 F.3d 1211, 1218–19 (10th Cir. 2012) ("indefinite reprieve" from performing essential job functions was not a reasonable accommodation); *Hudson v. MCI Telecomm. Corp.*, 87 F.3d 1167, 1168 (10th Cir. 1996) ("unpaid leave of indefinite duration" was not a reasonable accommodation); *Wood v. Green*, 323 F.3d 1309, 1312 (11th Cir. 2003) ("accommodation of indefinite leaves . . . was not reasonable"); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1226 (11th Cir. 1997) (leave "for an indefinite period-not just a month or two" was not a reasonable accommodation). Heartland also relies on cases in which the employee was not qualified for other reasons inapplicable here. *See Melange v. City of Center Line*, 482 F. App'x 81, 86 (6th Cir. 2012) (employee never requested accommodation); *Johnson v. Bd. of Tr. of Boundary Cty. Sch.*, 666 F.3d 561, 567 (9th Cir. 2011) (employee lacked required certification).

she will be able to return to work, she cannot show that she can perform the essential functions of her job even "with [the] accommodation" —*i.e.*, because even after the leave she might not be able to work. *See, e.g. Wood*, 323 F.3d at 1313–14; *Duckett*, 120 F.3d at 1226; *Hudson*, 87 F.3d at 1169.

That plainly is not this case, however. It is undisputed that Severson needed a *finite leave* to recover from his disability-related surgery, and that he was cleared to return to work as expected following that period. Pet. App. 4a–5a, 14a. The circuits are sharply divided on whether a *finite leave* of more than one month can be a reasonable accommodation under the ADA. *See* Pet. 14–24. The First, Sixth, Ninth, and Tenth Circuits hold that it can, because the finite leave is an accommodation that allows the employee to recover and return to performing his job duties; the Seventh Circuit holds that it cannot. *See id.* Simply put, Heartland's cherry-picked quotes from cases involving permanent and indefinite leaves do not bear on the circuit split in this case, much less undermine it.

Heartland's suggestion that the circuits may move into alignment on the question presented, *see* BIO 17–25, similarly is wrong. In just the last two years, the First, Sixth, and Ninth Circuits have reaffirmed that a request for a finite leave of more than one month must be examined on its facts—not by resorting to *per se* rules. *See, e.g., McDonald v. Town of Brookline*, 863 F.3d 57, 65–66 (1st Cir. 2017) (relying on circuit precedent that "a leave of absence and leave extensions are reasonable accommodations in some

circumstances" and will "turn[] on the facts of the case", when evaluating jury instructions on an employee's claim that a three-month leave was a reasonable accommodation); *Echevarría v. AstraZeneca Pharm. LP*, 856 F.3d 119, 132–33 (1st Cir. 2017) (holding that "we need not—and therefore do not—decide that a request for a [twelve-month] period of leave will be an unreasonable accommodation in every case"); *Stallings*, 658 F. App'x at 225 n.1 (holding that an employee needing a four-month leave could be a qualified individual, because "[i]n the right circumstances, temporary leave can serve as a reasonable accommodation"); *Villalobos v. TWC Administration LLC*, --- F. App'x ---, No. 16-55288, 2017 WL 6569587, at * 2 (9th Cir. Dec. 26, 2017) (holding that "one form of reasonable accommodation can be an extended leave of absence that will, in the future, enable an individual to perform his essential job duties").

Unsurprisingly, therefore, Heartland is incorrect in suggesting, *see* BIO 20–21, that the Sixth Circuit's *en banc* decision in *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015), adopted the highly restrictive Seventh Circuit rule. To the contrary, in that case, the Sixth Circuit conducted a fact-specific inquiry to determine whether an employee's request to work from home indefinitely and on an indeterminate schedule was a reasonable accommodation. *Id.* at 762–63. And following *Ford Motor*, the Sixth Circuit has continued to hold that finite extended leave can be a reasonable accommodation—and has continued to conduct fact-specific inquiries when analyzing such

claims. *See, e.g., Terre v. Hopson*, 708 F. App'x 221, 228–29 (6th Cir. 2017); *Stallings*, 658 F. App'x at 225–27; *Maat*, 657 F. App'x at 412–14. Indeed, the Sixth Circuit recently went a step further, holding that even an indefinite leave can be a reasonable accommodation. *See McMahon v. Met. Gov't of Nashville and Davidson Cty.*, No. 16-6498 (6th Cir. Jun. 27, 2017), *cert petition filed*, Feb. 7, 2018 (No. 17-1124).

Heartland's attempt to distinguish *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014), *see* BIO 17–18, fares no better. Although the panel expressed doubt that a leave of more than six months could be a reasonable accommodation, it still did not rule that such a leave was unreasonable as a matter of law. *Id.* at 1161–64. The panel instead applied the fact-specific analysis required by *Barnett,* which it noted "usually depends on factors like the duties essential to the job in question, the nature and length of the leave sought, and the impact on fellow employees." *Id.*, *citing Barnett*, 535 U.S. at 400 (internal quotation marks omitted). The circuits thus remain clearly split on the question presented.

2. The question presented was outcome-determinative in this case. The district court granted summary judgment to Heartland based solely on the Seventh Circuit's *per se* rule that a leave of multiple months is not a reasonable accommodation, and the Seventh Circuit affirmed based solely on its *per se* rule. *See* Pet. App. 3a, 8a, 27a–28a. Neither court addressed whether the leave would have been

reasonable or an undue hardship on the facts of the case.

Both should be questions for the jury to decide on this record. Heartland told Severson that it was transferring him to the second-shift "lead" position very shortly after the injury that re-triggered his back-related disability. Pet. App. 3a–4a. Heartland argues that it was an undue hardship to keep the incumbent in that second-shift "lead" role during Severson's leave, because that incumbent was not performing well enough. BIO 28–29. But that is exactly what Heartland did. It did not hire a replacement for Severson until just days before Severson was cleared to work without restrictions, and the incumbent remained in the position in the meantime. *See* Pet. 10; BIO 28–29. Heartland even conceded below that "[i]f Severson had reapplied, as he was invited to do, he likely would have been offered the position once his restrictions were lifted." Heartland 7th Cir. Brief (ECF 24) at 38. On these facts, a jury could conclude that Severson's requested leave would have been a reasonable accommodation and not an undue hardship to Heartland.

3. Heartland similarly is incorrect that this issue does not matter because courts do not find extended leaves to be reasonable accommodations. *See* BIO 29–30. To the contrary, courts regularly find a material issue of fact, sufficient to survive the employer's motion for summary judgment, as to whether a finite leave of more than one month is a reasonable accommodation. *See, e.g., Dark v. Curry Cty.*, 451 F.3d 1078, 1090 (9th Cir. 2006); *Cleveland v. Fed.*

Express Corp., 83 F. App'x 74, 79 (6th Cir. 2003); *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000); *Rascon v. U.S. West Commc'ns, Inc.*, 143 F.3d 1324, 1333–35 (10th Cir. 1998), *overruled on other grounds by New Hampshire v. Maine*, 532 U.S. 742 (2001); *Johnson v. Dist. of Columbia*, 207 F. Supp. 3d 3, 16–17 (D.D.C. 2016); *Dunn v. Chattanooga Publ'g Co.*, 993 F. Supp. 2d 830, 844-45 (E.D. Tenn. 2014); *Casteel v. Charter Comms. Inc.*, No. C13-5520 RJB, 2014 WL 5421258, at ** 2, 7 (W.D. Wash. Oct. 23, 2014); *LaFlamme v. Rumford Hosp.*, No. 2:13-cv-460-JDL, 2015 WL 4139478, at ** 1, 15–16 (D. Me. July 9, 2015); *Hutchinson v. Ecolab, Inc.*, No. 3:09cv1848(JBA), 2011 WL 4542957, at * 10 (D. Conn. Sept. 28, 2011); *Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 720 F. Supp. 2d 694, 702–03 (E.D. Pa. 2010).

4. Finally, the Seventh Circuit's *per se* rule is wrong. It is irreconcilable with the text of the ADA, which defines "qualified individual" as one who can perform the essential job functions "with or without reasonable accommodation." 42 U.S.C. § 12111(8). An employee needing a finite leave of course cannot perform the job without accommodation. But he *can* perform the job *with* accommodation—that is, after taking the leave. The EEOC regulations implementing the ADA thus state that "accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment." *See* 29 C.F.R. pt. 1630 app. § 1630.2(o).

Heartland argues that a leave of more than one month cannot be a reasonable accommodation because "[t]he definition of 'qualified individual' speaks in the present tense" and "an employee's ability to do the job with the help of the proposed accommodation must be measured at the time the adverse employment decision is made." *See* BIO 11. This does not make sense. Taken to its logical extension, it would mean that even one day of leave could not be a reasonable accommodation, as the employee could not work in that moment. This also is inconsistent with the statute, which includes as examples of reasonable accommodations "part-time or modified work schedules" and "other similar accommodations"—again, accommodating an employee who cannot work. 42 U.S.C. §12111(9)(B); *see also* Pet. App. 7a (recognizing that the examples of reasonable accommodations in the ADA are not an exhaustive list).

Moreover, this Court's precedent makes clear that the qualified individual, reasonable accommodation, and undue hardship inquiries under the ADA are case-specific. As the Court stated in *Arline*, to determine whether an employee is a qualified individual under the ADA, "the district court will need to conduct an individualized inquiry and make appropriate findings of fact." 480 U.S. at 287. In *Barnett*, the Court similarly rejected rigid adherence to *per se* rules when analyzing the reasonableness of an accommodation. 535 U.S. at 401–02, 405–06. The Court instead held that, at the summary judgment stage, the employee has the burden to show that the

accommodation is reasonable "ordinarily or in the run of cases" or "that special circumstances warrant a finding that . . . the requested 'accommodation' is 'reasonable' on the particular facts," and the employer then has the burden to show "undue hardship in the particular circumstances." *Id.* While Heartland argues that the "special circumstances" part of this framework applies only when the accommodation at issue is deviating from the employer's seniority system (as were the particular facts in *Barnett*), *see* BIO 13–14, that contention is unsupported and nonsensical. This Court's decisions thus make clear that the ADA requires case-specific inquiries—not *per se* rules.

Finally, the provisions of the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, entitling eligible employees to up to twelve weeks of unpaid leave in certain circumstances, do not supersede the ADA reasonable accommodation requirements, as Heartland suggests. *See* BIO 3–4, 11–13. As Heartland concedes, the FMLA and ADA have different purposes, have different eligibility requirements, and cover different types of leaves. *See id.* Nothing in the FMLA suggests that it repeals by implication any part of the ADA. Where an employee needs a temporary leave because of his disability, and that leave would not cause an undue hardship to his employer, there is no reason that the FMLA should foreclose him from taking the leave as a reasonable accommodation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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