No. 17-___

IN THE

Supreme Court of the United States

MARYTZA GOLDEN,

Petitioner,

v.

INDIANAPOLIS HOUSING AGENCY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After working for her employer for 15 years, petitioner was diagnosed with cancer. She requested a six-month unpaid leave of absence to receive and recover from life-saving medical treatment that would enable her to return to work. Although petitioner's employer provides six months of unpaid leave to other employees, it denied petitioner's request and fired her.

Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, require a covered employer to provide a reasonable accommodation to a qualified employee with a disability unless the accommodation would impose an undue hardship on the employer. This Court has twice held that a determination of whether an employee is a qualified individual with a disability who can perform the essential functions of her job with or without a reasonable accommodation requires a case-specific and fact-intensive inquiry. But the Seventh Circuit—in conflict with at least six other courts of appeals—applies a per se rule that, as a matter of law, a multi-month leave of absence is always "beyond the scope of a reasonable accommodation" under the ADA.

The question presented, about which the circuits are intractably divided, is:

Whether, under the ADA and Section 504, a multi-month unpaid leave of absence is an unreasonable accommodation as a matter of law in all cases, regardless of the circumstances of the employer or employee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marytza Golden respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the *Federal Reporter* but is reprinted at 698 Fed. Appx. 835. The opinion of the district court (Pet. App. 9a-30a) is not published in the *Federal Supplement* but is available at 2017 WL 283481.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2017. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on November 9, 2017. Pet. App. 31a-32a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at Pet. App. 33a-38a.

INTRODUCTION

This case presents an ideal vehicle to resolve an entrenched circuit split on an important question of federal law. The Americans with Disabilities Act (ADA or Act) requires a covered employer to provide a reasonable accommodation to an otherwise qualified employee with a disability unless providing the accommodation would impose an undue hardship on the employer. This Court has held that, in evaluating whether a requested accommodation is reasonable,

courts and employers may not simply eliminate from consideration entire categories of accommodations without considering whether a particular accommodation would be reasonable under the circumstances of a specific case. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 405-406 (2002). The Court has similarly held that, to determine whether an employee is "otherwise qualified" under Section 504 of the Rehabilitation Act, a "district court will need to conduct an *individualized inquiry* and make appropriate findings of fact." *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 (1987) (emphasis added).

In spite of those clear holdings, the Seventh Circuit has adopted a rule—in conflict with at least six other courts of appeals—that a request for unpaid leave longer than one month is per se unreasonable regardless of the circumstances of the employer or the employee because "[a] multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA." Pet. App. 5a. As Judge Rovner recognized in her concurring opinion, that holding is "nonsensical," has no basis in the statutory text, and directly conflicts with decisions of other courts of appeals. *Id.* at 6a-7a. The Court should grant this Petition to correct the Seventh Circuit's erroneous legal rule and to resolve the entrenched circuit split.

This case presents an ideal vehicle for deciding the question presented because it demonstrates in two ways that the question is important and recurring. First, although the employer in this case had an existing policy of permitting employees to take up to six months of unpaid leave, petitioner Marytza Golden was fired when she asked to take advantage of that established policy in order to receive life-saving cancer

treatment and then return to work. Other employers—including two of the Nation's largest employers—have adopted similar policies permitting employees to take an extended unpaid leave of absence.[1] But in the Seventh Circuit, a court is *precluded* from considering the existence of such a policy when determining whether an employee's request for extended leave was reasonable under the ADA.

Second, this case illustrates the particularly devastating consequences of the Seventh Circuit's erroneous legal rule for the millions of working Americans (like petitioner) who are diagnosed with a survivable form of cancer. Cancer does not discriminate; it touches every sector of society and every part of the American workforce. Many forms of cancer are survivable today, provided patients are able to receive the appropriate treatment. But cancer treatments can be harsh and debilitating, requiring a patient to take time off of work in order to receive and recover from life-saving care. And most Americans rely on their employer-provided health insurance to help pay for medical treatment. In the Seventh Circuit, an employee who is diagnosed with cancer and asks for medical leave can be deprived of her job and her health

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[1] *See* Home Depot, *Medical Leave of Absence for Hourly and Salaried Associates* 8, https://leplb0180.portal.hewitt.com/web/homedepot/client-tooling-login/-/ucceDownloader?fileId=197158&ts=1492615095396 (last accessed Feb. 6, 2018) (explaining Home Depot's policy of permitting "up to one year unpaid Medical Leave" and more in some circumstances); IBM, *2017 IBM Benefits and Programs Summary* 14 (2017), http://www-01.ibm.com/employment/us/benefits/2017_IBM_Benefits_Summary_Regular_-_12.13.16_update.pdf (explaining IBM's policy of permitting "unpaid time away from work for an extended period").

insurance even when granting her request would not impose any hardship on the employer and even when the employer allows employees to take the same amount of time off for other reasons. That is wrong, and it is not what Congress intended.

STATEMENT OF THE CASE

1. a. Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.*, makes it unlawful for a covered employer to "discriminate against a qualified individual on the basis of disability in regard to . . . [the] discharge of employees, . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The Act provides that "the term 'discriminate against a qualified individual on the basis of disability' includes" the failure to provide a reasonable accommodation to a known limitation of an "otherwise qualified individual with a disability," unless the employer "can demonstrate that the accommodation would impose an undue hardship on" the employer. *Id.* § 12112(b)(5)(A).

The ADA includes statutory definitions for the critical terms in its antidiscrimination mandate. Three such definitions are relevant here. First, the Act defines "qualified individual" to mean "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Second, the Act defines "reasonable accommodation" to "include" altering existing facilities, as well as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of

examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." *Id.* § 12111(9). Finally, the Act defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors set forth" in the statute. *Id.* § 12111(10)(A). Those factors "include" "the nature and cost of the accommodation needed"; the overall size and financial circumstances of the employer and of the particular workplace; and "the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity," and the relationship between the workplace and the employer. *Id.* § 12111(10)(B).

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, similarly provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). In the employment context, Section 504 expressly incorporates the ADA's substantive liability standards. *Id.* § 794(d) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the [ADA].").

b. In *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), this Court set out a framework for determining at the summary-judgment stage whether an employee's requested accommodation is reasonable under the ADA. Initially, a plaintiff bears the burden of

establishing that her requested accommodation is "reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Id.* at 401. When an employee *cannot* make that showing, that is not the end of the inquiry. The employee at that point can defeat an employer's motion for summary judgment by "show[ing] that special circumstances warrant a finding that," although the requested accommodation is not "reasonable on its face," it *is* "'reasonable' on the particular facts" in light of "special circumstances." *Id.* at 405, 406. If an employee establishes that her requested accommodation is reasonable on its face or in her particular case, the burden then shifts to the employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances" in order to avoid liability. *Id.* at 402.

2. a. Petitioner Marytza Golden started working as a police officer for respondent Indianapolis Housing Agency (IHA) in 1999. Pet. App. 2a. In November 2014, after serving as an IHA police officer for 15 years, Golden was diagnosed with invasive breast cancer. *Id.* at 2a, 11a. In December 2014, she requested and was granted three months of leave pursuant to the Family and Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, 107 Stat. 6. *Ibid.* On December 18, 2014, Golden underwent a mastectomy and surgical removal of five lymph nodes. *Ibid.* The following day, her doctor completed a form describing the probable duration of her condition as "ongoing" and her anticipated period of incapacity as lasting from the date of her initial surgery "until released." *Ibid.* Her doctor noted that her exact course of treatment would be determined after surgery; that treatment

ultimately included chemotherapy and additional surgery. *Id.* at 2a-3a, 11a.

Golden's FMLA leave was scheduled to end on March 16, 2015. Pet. App. 11a. Realizing that she would not be able to return to work at that point, Golden applied for long-term disability leave on March 13. *Id.* at 3a. She represented on her application that she could not "perform [her] job descriptions safely," and her supervisor certified that her job could not be modified to accommodate her disability. *Ibid.* Her application was approved on April 21. *Ibid.*

Meanwhile, after being notified that her FMLA leave would soon expire, Golden accepted the four weeks of additional unpaid medical leave permitted by IHA custom. Pet. App. 3a, 12a. On March 31, Golden's doctor returned an updated form that continued to list the duration of her condition as "ongoing" and her period of incapacity as "until release." *Ibid.* Golden's final day of approved leave was April 13, after which her employment would be terminated if she did not return to work. *Ibid.*

On April 13 (her last day of approved leave), Golden arrived unannounced at IHA's human resources office and had a meeting with the office director and another employee. Pet. App. 3a, 13a. After she left the office, Golden sent an e-mail to the human resources employees requesting an additional unpaid leave of absence pursuant to IHA's established policy of permitting up to six months of unpaid leave when no other form of leave is appropriate. *Id.* at 3a-4a, 13a-14a. On April 15, IHA officials denied Golden's request for leave pursuant to that policy, and she was effectively terminated on April 14. *Ibid.*

b. Golden filed suit in the United States District Court for the Southern District of Indiana, alleging that IHA violated the standards under Title I of the ADA, as incorporated in Section 504 of the Rehabilitation Act, when it refused her request for an unpaid leave of absence and terminated her employment because she could not return to work due to her serious illness.[2] *See* Pet. App. 9a-10a, 18a. The United States filed a statement of interest in support of Golden. Dist. Ct. Doc. 65 (May 19, 2016). The district court granted summary judgment to IHA. Pet. App. 19a-30a.

The district court concluded that Golden's request for an additional six months of unpaid leave was unreasonable because of the length of the requested leave, relying on Seventh Circuit precedent indicating that leave of two months or more is not a reasonable accommodation. Pet. App. 21a-24a.[3] The district

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[2] As a recipient of federal funds, IHA is covered by Section 504 of the Rehabilitation Act. Pet. App. 10a. Because Section 504, when applied to claims of employment discrimination, expressly incorporates the legal standards for determining liability under Title I of the ADA, this Petition generally focuses on the standards applicable under the ADA. *See* 29 U.S.C. § 794(d) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the [ADA] . . . and the provisions of sections 501 through 504, and 510, of the [ADA] . . . , as such sections relate to employment.").

[3] The district court held that Golden's request was unreasonable for the additional (separate) reason that she could not establish at the time she requested the leave that she would be able to return to regular work at the conclusion of the leave.

court granted summary judgment to IHA, concluding that Golden "was not a qualified individual with a disability who was able to perform her position as Public Safety Officer with or without an accommodation." *Id.* at 29a.

c. The court of appeals affirmed. Pet. App. 1a-5a. In a brief opinion, the court explained that another panel of the Seventh Circuit had recently held that "'[a]n employee who needs long-term medical leave *cannot* work and thus is not a "qualified individual" under the ADA.'" *Id.* at 5a (quoting *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017), *petition for cert. filed*, Jan. 18, 2018 (No. 17-1001)) (brackets in original).

In that earlier decision, the panel had articulated a per se rule that a "multimonth leave of absence" is never a reasonable accommodation under the ADA. *Severson*, 872 F.3d at 479. That panel reasoned that "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working," and explained that, "[i]f the proposed accommodation does not make it possible for the employee to perform his job, then the employee is not a 'qualified individual' as that term is defined in the ADA." *Id.* at 481. The panel acknowledged that the ADA may require an employer to provide intermittent leave or a modified or part-time schedule over a long period of time as a reasonable accommodation, but held that an

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Pet. App. 24a-28a. In so holding, the court improperly construed evidence in the moving party's favor by discounting Golden's undisputed testimony that she informed IHA at the time of her request that she planned to return to work by August 2014. *Id.* at 26a.

employee's "'[i]nability to work for a multi-month period removes a person from the class protected by the ADA,'" regardless of the circumstances. *Ibid.* (quoting *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003) (brackets in original)); *ibid.* ("[A] long-term leave of absence *cannot be* a reasonable accommodation.") (emphasis added). And the panel rejected the view of the Equal Employment Opportunity Commission (EEOC) that long-term leave is a reasonable accommodation under the ADA in certain circumstances. *Id.* at 482.

Applying the per se rule articulated in *Severson*, the panel in this case held that, because "'[a] multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA,'" Pet. App. 5a (quoting *Severson*, 872 F.3d at 479), Golden's request for a long-term leave of absence "remove[d]" her "from the protected class under the ADA and the Rehabilitation Act." *Ibid.* The court thus affirmed the district court's grant of summary judgment to IHA. *Ibid.* ("While we sympathize with Golden's plight, clear circuit precedent controls this case.").

Judge Rovner filed a concurring opinion. Pet. App. 6a-8a. Although she agreed that the panel was bound by the earlier decisions in *Severson* and *Byrne*—and that the holdings of those earlier decisions dictated the outcome in this case—Judge Rovner explained that, in her view, those earlier decisions were wrongly decided. *Ibid.* She explained that "[t]he ADA, by its terms is meant to be flexible and to require individualized assessments of both the reasonableness of an employee's requested accommodation and the burden on employers." *Id.* at 6a. The Seventh Circuit's earlier "[h]olding that a long term medical leave can

never be part of a reasonable accommodation," she reasoned, "does not reflect the flexible and individual nature of the protections granted employees under the Act." *Ibid.*

Judge Rovner criticized the Seventh Circuit's distinction between permitting an employee to work part time for a long period of time—which can be a reasonable accommodation under the Act—and permitting an employee to take several months of leave and then return to work full time—which can never be a reasonable accommodation under the Seventh Circuit's rule. Pet. App. 6a-7a. "[W]hat sense does it make," she inquired, "that the ADA could require an employer to accommodate an employee with lupus who requires one week leaves, several times a year, every year," but could "never require an employer to accommodate an employee who needs a one-time leave of four or five months to recuperate from, for example, a kidney replacement." *Id.* at 7a. In her view, "[w]hether an employer can reasonably accommodate an employee who requires a leave of either the first or second type is a factual determination that can be made in the latter case just as easily as in the former." *Id.* at 7a-8a. Judge Rovner noted that other courts of appeals have rejected the per se rule embraced by the Seventh Circuit, *id.* at 7a, and explained that "[t]here is no reason to think that the ADA was meant to accommodate one type of disability over another or that the fact-intensive assessments required to determine undue hardship can be applied to some forms of leave but not others," *id.* at 8a.

d. On November 9, 2017, the court of appeals denied Golden's timely petition for rehearing en banc. Pet. App. 31a-32a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit is firmly committed to a legal rule that a multi-month leave of absence from work can *never* be a reasonable accommodation under Title I of the ADA or Section 504, even when an employer permits employees to take such a leave for reasons unrelated to disability and even when permitting such a leave would not impose *any* hardship on an employer. As Judge Rovner recognized, Pet. App. 6a-7a, that per se rule directly conflicts with decisions of other courts of appeals and has no basis in the statutory text. The rule also subjects working individuals with disabilities in the Seventh Circuit to a regime that is much harsher than that applied in most of the rest of the country and will have the effect of depriving working individuals who are diagnosed with cancer and other survivable diseases of accommodations that are required elsewhere. This case presents the cleanest vehicle this Court could hope for to decide whether the Seventh Circuit's per se rule is valid. This Court should therefore grant this Petition to hold that that rule is, as Judge Rovner put it, "nonsensical." *Id.* at 6a.

I. The Courts Of Appeals Are Intractably Divided Over The Interpretation Of An Important Federal Statute.

When Congress enacted the ADA, it intended "to provide clear, strong, *consistent*, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2) (emphasis added). But individuals with disabilities who work in the territory covered by the Seventh Circuit are subject to a harsh per se rule that has no basis in the

statute and does not apply anywhere else in the country. This Court should grant this Petition to overturn the Seventh Circuit's per se rule and restore national uniformity to the standards for enforcing the ADA.

A. In direct conflict with the Seventh Circuit, four courts of appeals have explicitly rejected the use of a per se rule to determine whether an employee's request for extended leave can be a reasonable accommodation required by the ADA. Two other circuits have more generally rejected the application of per se rules like the one embraced by the Seventh Circuit in assessing whether a requested accommodation was reasonable.

1. In *García-Ayala v. Lederle Parenterals, Inc.*, the First Circuit reversed the district court's holding that an employee's request for five months of medical leave in addition to the leave afforded by her employer's standard leave policies was "per se an unreasonable accommodation." 212 F.3d 638, 641, 647 (1st Cir. 2000). The First Circuit expressly rejected the district court's application of a per se rule to the employee's request for medical leave, explaining that adopting a per se rule would be inconsistent with this Court's admonition in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), that disability claims require "individualized attention." 212 F.3d at 647-650. The court held that "[t]hese are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes," *id.* at 650, and after conducting its own review of the record, it directed entry of summary judgment for the employee, *id.* at 649-650. The First Circuit's rejection of the approach adopted by the Seventh Circuit could not be more stark.

The Sixth Circuit has similarly rejected a "presumption that uninterrupted attendance is an essential job requirement" and that extended leave can therefore never be a reasonable accommodation required by the ADA. *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998). The plaintiff in that case had requested four months of medical leave, and the district court granted summary judgment to her employer, holding that the plaintiff was not "otherwise qualified" within the meaning of the ADA because she could not attend work during her period of medical leave. *Id.* at 778-779. The Sixth Circuit reversed, explaining that adopting such a per se rule would "dispense[] with the burden-shifting analysis" required by the ADA and would "eviscerate[] the individualized attention that the Supreme Court has deemed 'essential' in each disability claim." *Id.* at 782 (quoting *Arline*, 480 U.S. at 287). The court ultimately "conclude[d] that no presumption should exist that uninterrupted attendance is an essential job requirement, and f[ou]nd that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances." *Id.* at 783. That court later confirmed that it "has declined to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation" under the ADA. *Cleveland v. Fed. Express Corp.*, 83 Fed. Appx. 74, 78 (6th Cir. 2003).

The Ninth Circuit has also rejected the view embraced by the Seventh Circuit that an individual who requires extended medical leave cannot be a qualified individual with a disability who is entitled to a reasonable accommodation under the ADA. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999).

That court emphasized that the ADA applies to an individual with a disability who can "perform the essential functions of her job 'with or without reasonable accommodation.'" *Ibid.* (quoting 42 U.S.C. § 12111(8)). Noting that "[e]ven an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer," the court held that, if the plaintiff's "medical leave was a reasonable accommodation, then her inability to work during the leave period would not automatically render her unqualified." *Ibid.* Like the First and Sixth Circuits, the Ninth Circuit emphasized that "[d]etermining whether a proposed accommodation (medical leave in this case) is reasonable, including whether it imposes an undue hardship on the employer, requires a fact-specific individualized inquiry." *Ibid.* That court recently reaffirmed that an employee "is not precluded as a matter of law from being qualified simply because he was unable to work at the time of his termination" "because 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." *Villalobos v. TWC Admin. LLC*, --- Fed. Appx. ----, 2017 WL 6569587, at *2 (9th Cir. Dec. 26, 2017).

Finally, the Tenth Circuit has also rejected a per se rule that a multi-month leave of absence can never be a reasonable accommodation required by the ADA. In *Rascon v. US West Communications, Inc.*, that court rejected the employer's contention that an employee who needed a five-month leave of absence was not a qualified individual under the ADA because attendance was an essential function of the employee's job. 143 F.3d 1324, 1333 (10th Cir. 1998), *abrogated*

on other grounds by New Hampshire v. Maine, 532 U.S. 742 (2001). The court emphasized that a determination of whether attendance is an essential function of the job would turn on a fact-specific examination of the employer's leave policies and held that, although a request for indefinite leave would not be reasonable, the plaintiff's request for nearly five months of leave to receive treatment for post-traumatic stress disorder was a request for a reasonable accommodation required by the ADA. *Id.* at 1333-1335. More recently, in an opinion authored by then-Judge Gorsuch, the Tenth Circuit reaffirmed that an employee's request for more than six months of sick leave could not be rejected as a matter of law as unreasonable under the Rehabilitation Act. *See Hwang v. Kan. State Univ.*, 753 F.3d 1159, 1161 (10th Cir. 2014). Although the panel in that case expressed skepticism that leave longer than six months could be required as a reasonable accommodation in many cases, *id.* at 1161-1162, 1164, the court relied on this Court's decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), to explain that the reasonableness of a requested accommodation must be assessed in each case with reference to "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.* at 1162 (quoting *Barnett*, 535 U.S. at 400).

2. In addition, although the Second and D.C. Circuits do not appear to have confronted this question directly,[4] both courts have more generally rejected the

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[4] In *Graves v. Finch Pruyn & Co.*, the Second Circuit noted that "[m]ost other circuits and the [EEOC] have concluded that,

use of per se rules in deciding reasonable-accommodation questions.

For example, in the course of considering whether a later-than-usual daily start time could be a required reasonable accommodation under the ADA, the Second Circuit emphasized that "[a] court must avoid deciding cases based on 'unthinking reliance on intuition about the methods by which jobs are to be performed'" and must instead "conduct 'a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice.'" *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013) (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 140 (2d Cir. 1995)). The court explained the district court's error in rejecting the employee's reasonable-accommodation claim "'as a matter of law,'" *id.* at 125, based on its "assumption that physical presence" was an essential requirement of the job:

> This case highlights the importance of a penetrating factual analysis. Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment. While a timely arrival is normally an essential function, a court must still conduct a fact-specific inquiry, drawing all inferences in favor of the non-moving party. Such an inquiry was not conducted here.

Id. at 126. That approach faithfully adheres to this Court's instruction in *Barnett*—and directly conflicts

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in some circumstances, an unpaid leave of absence can be a reasonable accommodation under the ADA," but declined to decide the issue for itself because it was not pressed by the parties. 457 F.3d 181, 185 n.5 (2d Cir. 2006).

with the Seventh Circuit's adoption of a per se rule for leave-of-absence requests.

Similarly, in a Rehabilitation Act case, the D.C. Circuit flatly rejected an employer's argument that an employee's request for a flexible schedule was not a request for a reasonable accommodation because "the ability to work a regular and predictable schedule is, as a matter of law, an essential element of any job." *Solomon v. Vilsack*, 763 F.3d 1, 10 (D.C. Cir. 2014) (internal quotation marks omitted). "That is incorrect," the court explained, because "[d]etermining whether a particular type of accommodation is reasonable is commonly a contextual and fact-specific inquiry." *Id.* at 9-10. The court emphasized that "nothing in the Rehabilitation Act takes" a flexible "schedule off the table as a matter of law" when considering what sort of reasonable accommodation is required. *Id.* at 10. That correct holding also cannot be reconciled with the per se rule applied in the Seventh Circuit.[5]

B. Several other circuits have held that extended leave can be a reasonable accommodation under the ADA without expressly rejecting application of a per se rule. Although courts of appeals generally agree that indefinite leave is not a reasonable accommodation, the Fourth, Fifth, Eighth, and Eleventh Circuits have held that an extended leave of absence can qualify as an accommodation required by the ADA in

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[5] Because the employer in *Solomon* was a federal agency rather than a recipient of federal funds, the plaintiff sued under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, rather than under Section 504. 763 F.3d at 4-5. That Section also incorporates the substantive standards of Title I of the ADA. 29 U.S.C. § 791(f).

some circumstances. Those courts have generally expressed more skepticism about whether—or at least how often—a multi-month leave of absence is required under the ADA. But even when rejecting particular requests for such an accommodation, they have employed the case-specific approach mandated by *Barnett*.

The Fourth Circuit has explained, for example, that "a leave request will not be unreasonable on its face so long as it (1) is for a limited, finite period of time; (2) consists of accrued paid leave or unpaid leave; and (3) is shown to be likely to achieve a level of success that will enable the individual to perform the essential functions of the job in question." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 n.7 (4th Cir. 2013). The Fifth Circuit has similarly stated that "taking leave that is limited in duration may be a reasonable accommodation to enable an employee to perform the essential functions of the job upon return," as long as the employee intends to return to work and "specifie[s a] date to return." *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 419 (5th Cir. 2017). The Eleventh Circuit applies a similar rule. *See Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) (explaining that, "[w]hile a leave of absence might be a reasonable accommodation in some cases," a request for indefinite leave is not reasonable); *see also, e.g.*, *Billups v. Emerald Coast Utils. Auth.*, --- Fed. Appx. ----, 2017 WL 4857430, at *5-6 (11th Cir. Oct. 26, 2017) (per curiam); *Spears v. Creel*, 607 Fed. Appx. 943, 950 (11th Cir.

2015) (per curiam).[6] And the Eighth Circuit has explained that, even when "attendance is an essential function of [an employee's] job," the ADA may require an employer to provide a leave of absence as a reasonable accommodation unless doing so would impose an undue hardship on the employer. *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 n.5 (8th Cir. 2003) (explaining that a six-month leave of absence would impose an undue hardship in that case because of the nature of the employer's workforce).

C. The conflict between the Seventh Circuit's per se rule and the case-specific approach employed by most other circuits is entrenched and will not resolve itself. In her concurring opinion in this case, Judge Rovner acknowledged that "[o]ther courts have rejected the per se rule that an extended medical leave can never be a reasonable accommodation under the ADA," Pet. App. 7a, and expressed her view that the per se rule "is nonsensical," *id.* at 6a. The Seventh Circuit nevertheless denied Golden's petition for rehearing, signaling the court's commitment to adhere to its aberrant rule. The persistence of the Seventh Circuit's per se rule unreasonably deprives employees in that circuit of important protections under the ADA; it is also untenable for multi-jurisdictional employers who

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[6] The Eleventh Circuit has held that an employee requesting extended leave must demonstrate that the requested leave will permit her to perform the essential functions of her job "in the present or in the immediate future." *Wood*, 323 F.3d at 1314. Unlike the Seventh Circuit, however, the Eleventh Circuit has not established a firm limit on the length of leave that could be considered a reasonable accommodation, other than holding that an indefinite leave is unreasonable.

are currently subject to different ADA requirements in different circuits.

II. The Question Presented Is Important And Recurring.

This Petition presents an important and recurring question of federal law. If allowed to stand, the per se rule applied in the Seventh Circuit will continue to deprive employees with disabilities of the statutory protections Congress has afforded to them. The consequences for individuals like Golden are stark: she required more than one month of unpaid leave from her job in order to obtain and recover from life-saving cancer treatment. Instead, she was fired. For many people, the loss of a job means not only a loss of income but also the loss of health insurance. That one-two punch puts people at risk of serious financial trouble. Medical care is expensive even with insurance; the simultaneous loss of income and insurance just as medical debt is mounting can push even the most financially stable families into ruin. Indeed, loss of income due to illness is one of the major factors contributing to bankruptcy filings in this country. Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 Wash. L. Rev. 1039, 1045 (Oct. 2015) (Hodges). And a diagnosis of cancer significantly increases the likelihood of bankruptcy and home foreclosure—events that impose a cost on society at large as well as on cancer survivors and their families. *Id.* at 1046.

Although the dire consequences of the Seventh Circuit's rule are not limited to individuals who are diagnosed with cancer, cancer survivors in the Seventh Circuit will undoubtedly suffer as a result. More than 15 million cancer survivors live in the United States,

and approximately 1.7 million new cancer cases will be diagnosed this year. Am. Cancer Soc'y, *Cancer Facts & Figures 2018*, at 1 (2018), https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2018/cancer-facts-and-figures-2018.pdf. As cancer survival rates continue to improve, the number of working-age cancer survivors will continue to rise. Recent estimates are that approximately 40% of cancers survivors are between the ages of 20 and 64. Hodges 1044-1045. Many of those people rely on their employment as a source of income, health insurance, and dignity. When those people need time off of work in order to survive, the ADA should require an employer to provide it when doing so would not impose an undue hardship. But under the Seventh Circuit's rule, a court cannot even inquire into undue hardship when an employee needs more than a month of leave. That rule is particularly "nonsensical," Pet. App. 6a (Rovner, J., concurring), in light of the 2008 amendments to the ADA that, *inter alia*, extended the protection of the ADA to individuals diagnosed with survivable cancer and other illnesses that cause a temporary disability. *See* pp. 30-31, *infra*.

III. This Case Is An Ideal Vehicle For Deciding The Question Presented.

This case is an ideal vehicle for deciding the question presented for at least three reasons. First, the question is squarely presented because Golden was fired instead of being granted the additional six months of leave she requested. Second, the question is dispositive because Judge Rovner made clear in her concurrence that the Seventh Circuit's decision rests solely on application of its per se rule, with no

consideration of the facts and circumstances of this case. Pet. App. 6a ("Holding that a long term medical leave can never be part of a reasonable accommodation does not reflect the flexible and individual nature of the protections granted employees under the Act."); *id.* at 8a ("I continue to believe that a per se rule declaring that a long-term leave of absence can never be a reasonable accommodation under the ADA, as opposed to one requiring a factual determination of undue hardship, is contrary to the language of the Act."). Third, in light of IHA's existing policy of permitting the length of leave Golden requested, this is precisely the type of case in which a court must apply *Barnett*'s special-circumstances inquiry. The Court should thus grant this Petition to decide whether the ADA permits a court to apply a per se rule that extended leave can *never* be a reasonable accommodation.

IV. The Decision Below Is Wrong.

There is a reason the Seventh Circuit's approach conflicts with decisions from this Court and from nearly every other court of appeals: the Seventh Circuit's per se rule has no basis in the statute, the regulations, or common sense.

A. The Seventh Circuit's per se rule that, as a matter of law, a request for a "'multimonth leave of absence'" is in all circumstances "'beyond the scope of a reasonable accommodation under the ADA,'" Pet. App. 5a (quoting *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017)), cannot be reconciled with this Court's holdings that the reasonableness of a requested accommodation must be judged on an individual basis in light of the facts of each case.

In *Barnett*, this Court considered whether the ADA could ever require reassignment of an employee with a disability to a new position even though a different employee is entitled to hold the new position under an established seniority system. 535 U.S. at 395-396. The Court declined to give a one-size-fits-all answer to that question, explaining instead that the ADA requires an employer to provide reasonable accommodations that depart from disability-neutral workplace rules in some circumstances. *Id.* at 397-398. The Court then set out a framework for determining at the summary-judgment stage whether or when a departure from neutral rules is a reasonable accommodation under the ADA. *Id.* at 401-406.

The Court embraced a "practical view of the statute," explaining that an employee may defeat an employer's motion for summary judgment by "show[ing] that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." 535 U.S. at 402. The Court relied on various factors—including employee expectations of "fair, uniform treatment"—to determine that, on its face, an employee's request for a transfer that would disrupt an established seniority system is not a reasonable accommodation. *Id.* at 403-405.

But the Court did not stop there. Even accepting that an accommodation that would disrupt a seniority system is not reasonable on its face, the Court emphasized that "[t]he plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts." 535 U.S. at 405. The

Court thus held that, when a requested accommodation is not reasonable on its face, an employee may yet prevail if she satisfies her "burden of showing special circumstances" by "explain[ing] why, in the particular case," the requested accommodation "can constitute a 'reasonable accommodation' [under the ADA] even though in the ordinary case it cannot." *Id.* at 406. The Court suggested that such circumstances could arise where an a plaintiff can "show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter." *Id.* at 405. If an employee can demonstrate that a requested accommodation is reasonable either on its face or in the circumstances of the case, the burden then shifts to the employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402.

The Seventh Circuit has disregarded the *Barnett* framework, instead embracing a per se rule that, as a matter of law and without permitting any inquiry into the circumstances of a particular case, a multi-month leave of absence can *never* be a reasonable accommodation required by the ADA. That holding directly conflicts with this Court's holdings in *Barnett* and should be reversed. The Seventh Circuit in this case applied the per se rule articulated in *Severson* and derived from *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003). Although both of those cases were decided after this Court's decision in *Barnett*, neither case even references this Court's framework for determining whether an accommodation is reasonable under the ADA. The panels instead summarily concluded that an "extended leave," *Severson*, 872 F.3d at 481, of "a multi-month period," *Byrne*, 328 F.3d at 381,

can never be a reasonable accommodation under the ADA—without examining whether the nature of such an accommodation, including its effects on the employer and other employees, would render it "[un]reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett*, 535 U.S. at 402.

Even if one were inclined to believe that a multi-month leave of absence—like a departure from an established seniority system—is unreasonable on its face, *Barnett* clearly instructs that a plaintiff can still prevail if she can demonstrate that an extended leave would be reasonable in her particular case in light of "special circumstances." 535 U.S. at 406. The Seventh Circuit made no such inquiry in this case (or in *Severson* or *Byrne*), instead applying a per se rule that, as a matter of law, a leave longer than one month can never be a reasonable accommodation. That was error: the *Barnett* framework precludes adoption of such a per se rule. That error is particularly stark in this case because respondent has a policy of *permitting* employees to take up to six months of unpaid leave in certain circumstances. Where an employer has voluntarily adopted an extended-leave policy, it is nonsensical to declare that extending that policy to an employee with a disability is per se unreasonable.

The Seventh Circuit's per se rule also conflicts with this Court's decision in *Arline*, which construed the substantively-identical the requirements of Section 504. 480 U.S. at 275. The Seventh Circuit reasoned in this case that, because Golden could not return to work without a multi-month leave of absence, and because such an extended leave is per se unreasonable under the ADA, Golden is not a qualified individual with a disability under the ADA. Pet. App. 5a.

But this Court in *Arline* held that the qualified-individual inquiry (like the related reasonable-accommodation inquiry) is an "individualized inquiry" that depends on "findings of fact." 480 U.S. at 287. The Seventh Circuit's per se rule *precludes* the required individualized inquiry.

B. The Seventh Circuit's inflexible rule also finds no support in the statute or its implementing regulations.

Although the ADA does not define the term "reasonable accommodation," it provides that the "term 'reasonable accommodation' may include . . . part-time or modified work schedules . . . *and other similar accommodations* for individuals with disabilities." 42 U.S.C. § 12111(9)(B) (emphasis added). The statute therefore contemplates that an individual with a disability can be "otherwise qualified" even though she cannot perform the essential functions of her job at all for part of every day or for entire days at a time. *See* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(*o*)(2)(ii); *see also* Pet. App. 6a (Rovner, J., concurring) ("[T]he ADA may require an employer with a flexible work force to offer part-time work or a work-when-you-can schedule to accommodate an employee undergoing chemotherapy who cannot work a full day every day during a course of treatment that may last many months."). Moreover, the EEOC's implementing regulations specifically provide that "other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment." 29 C.F.R. pt. 1630 app. § 1630.2(*o*).

In contrast, the Seventh Circuit has adopted a per se rule that an employee with a disability who needs more than one month of leave in order to be able

to perform the essential functions of her job is *never* a qualified person with a disability because an unpaid leave of absence longer than one month is *never* a reasonable accommodation. Pet. App. 4a-5a; *Severson*, 872 F.3d at 480-482. That distinction makes no sense: the operative difference between six months of part-time work and two months of no work is a difference in the type or degree of burden an employer must shoulder. But that difference is relevant to whether a reasonable accommodation imposes an undue hardship, not to whether an accommodation is reasonable in the first place. Although the ADA does not require an employer to provide an accommodation that imposes an undue hardship, the Act does not deem that an accommodation that would impose an undue hardship on an employer is therefore unreasonable. To the contrary, the Act specifies that an employer will not be required to provide a "*reasonable accommodation*[] to the known physical or mental limitations of an otherwise qualified individual with a disability" if the employer "can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). The Seventh Circuit's per se rule improperly relieves employers of their burden of demonstrating that a multi-month leave of absence imposes an undue hardship when an employee can show that such leave would be reasonable.

The Seventh Circuit's absolute, one-size-fits-all rule also undermines "the flexible and individual nature of the protections granted employees under the Act." Pet. App. 6a (Rovner, J., concurring). This Court has indicated that the purpose of directing an individualized determination both of whether an employee is

covered by the ADA and of what accommodation, if any, an employer is required to provide, is to eliminate workplace decisionmaking that is "based on prejudice, stereotypes," *Arline*, 480 U.S. at 287, and assumptions that fail to take account of "special circumstances" that might indicate that ordinary rules should not apply, *Barnett*, 535 U.S. at 405. *See García-Ayala*, 212 F.3d at 650 ("These are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes."). The Seventh Circuit's per se rule *prohibits* a trier of fact from considering the individual circumstances of an employee and her employer when the employee seeks a leave of absence that exceeds one month. That arbitrary cap on the amount of unpaid leave the ADA can require an employer to provide does not—cannot—derive from the statute or the regulations because it is directly contrary to their individualized focus.

The Seventh Circuit's per se rule is particularly inappropriate where (as here) an employer has an established policy of permitting employees to take a multi-month leave of absence for at least some purposes. The existence of such a policy at least suggests that accommodating a request for an extended leave would not in all circumstances impose an undue hardship. And where an employer permits employees to take extended leave for reasons unrelated to disability but does not permit extended leave for disability-related reasons, that would raise the specter of exactly the type of discriminatory treatment that is prohibited by the Act. *See* 42 U.S.C. § 12112(a) (prohibiting covered employers from discriminating on the basis of disability in the "terms, conditions, and privileges of employment").

C. The Seventh Circuit's per se rule is a particularly bad fit for the current version of the ADA, which was amended by the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553. The ADAAA amended the definition of "disability" to include individuals with "a physical or mental impairment that substantially limits" "the operation of a major bodily function, including . . . normal cell growth." 122 Stat. at 3555; 42 U.S.C. § 12102(1)(A), (2)(B). One intended effect of that amendment was to reject earlier court decisions restricting the scope of the ADA's coverage in a way that excluded "individuals with impairments such as . . . cancer." 154 Cong. Rec. 18,517 (2008) (Statement of the Managers to Accompany S. 3406, the Americans with Disabilities Act Amendments Act of 2008). The ADAAA also extended the ADA's protection to at least some individuals with temporary disabilities who were not previously covered by the Act. 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(ix) (explaining that a short-term impairment can qualify as a disability under the Act if it substantially limits a major life activity); *see* 122 Stat. at 3558 (giving EEOC express authority to issue regulations on scope of coverage under ADAAA). As a consequence of those and other amendments, many individuals who are diagnosed with a disease or condition that is life-threatening but treatable are now covered by the ADA.

The extended protection afforded by the ADAAA will be substantially undercut by the Seventh Circuit's per se rule. As is evident in this case, the reasonable accommodation most likely to be needed by an employee who is diagnosed with a survivable form of cancer is time off from work to obtain and recover from

life-saving treatment. The same is true for individuals who require an organ transplant, experience a heart attack, or become seriously injured in a car accident. For some such employees, a part-time schedule that permits several hours away from work every day for an extended period for the purpose of receiving treatment may be sufficient. Others, including Golden, will require a block of time away from work. Nothing in the statute suggests that a request for the former accommodation should be analyzed in a drastically different way from a request for the latter. But that is what the Seventh Circuit has held. This Court should grant this Petition and reverse the decision below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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