No. 17-1113

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

BRIEF OF AMICI CURIAE CANCERLINC, ANN C. HODGES, PHYLLIS KATZ, NATIONAL COALITION FOR CANCER SURVIVORSHIP, AND BARBARA HOFFMAN IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amicus CancerLINC is a multi-purpose non-profit organization that seeks to ease the burden of cancer by providing education and referral to legal resources, financial guidance, and community services. Its staff and network of attorneys work to ensure that no cancer patient goes without necessary support services.

Amici Ann Hodges and Phyllis Katz are cancer survivors and the cofounders of CancerLINC. Amicus Hodges is Professor Emerita at the University of Richmond Law School. She is the author of several scholarly articles that bear on the issues in this case. Amicus Katz is an adjunct professor at the University of Richmond Law School. For a dozen years, she was the Director of the former Department of Employee Relations Counselors of the Commonwealth of Virginia.

Amicus National Coalition for Cancer Survivorship is a nonprofit that advocates for quality care for all people touched by cancer. It has worked with legislators and policy makers to represent cancer patients and survivors to improve their quality of care and quality of life.

Amicus Barbara Hoffman is a cancer survivor. She is one of the founders of the National Coalition for Cancer Survivorship and of the National Cancer Legal

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of amici's intention to file this brief. The parties have consented to this filing. No counsel for a party authored this brief in whole or in part, and no person other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Services Network. She is an Assistant Teaching Professor of Law at Rutgers Law School and has written extensively on employment rights of cancer survivors.

Amici believe that, if allowed to stand, the Seventh Circuit's decision challenged here would undermine the employment protections for cancer survivors that Congress established under the Americans with Disabilities Act.

INTRODUCTION

In 1991, amicus Phyllis Katz, then a single mother of two high-school children, was diagnosed with breast cancer. She had a mastectomy that revealed the cancer had spread to her lymph nodes. Despite extensive radiation and chemotherapy, Phyllis was diagnosed with Stage IV cancer in 1994—the cancer had spread to her spine. The only treatment thought effective was a bone marrow transplant. Phyllis knew that she would have to undergo extensive daily chemotherapy for about a month-and-a-half, then have a procedure to remove her white blood cells, followed by a month's hospitalization for the transplant, and then a month or more of home confinement and isolation. So, she went to her employer to disclose her need for leave and its likely duration. Her employer immediately responded that she was valued and it would accommodate any necessary leave. Phyllis worked every day except for the hospital stays and home confinement.

The ability to keep her job during this period allowed Phyllis to maintain her employer-provided health insurance. As a single mother, the continuation

of healthcare coverage was critical because her children were under her medical plan.

Although Phyllis was fortunate to have a supportive employer, many cancer survivors must rely on the Americans with Disabilities Act (ADA) to protect them from workplace discrimination. And in the decision below, the Seventh Circuit has held that people taking a multi-month leave of absence are *never* covered by the ADA, regardless of whether providing leave would actually burden the employer. Unless this Court corrects this categorical error, the ADA will no longer protect cancer survivors like Phyllis from discrimination, despite Congress's clear mandate to do so.

SUMMARY OF ARGUMENT

I. Cancer affects a significant portion of the population. Fifteen million Americans are cancer survivors—those recently diagnosed, in treatment, or living full lives after treatment. Over seven million are working age. As cancer treatments improve, the number of cancer survivors is expected to increase to twenty million by 2026. Cancer survivors are not the only people affected by the Seventh Circuit's rule. For example, many working-age Americans also suffer from kidney disease and heart disease. They must continue working after their treatment is over to support themselves and their families.

The Seventh Circuit's per se, no-multi-month-leave rule will harm cancer survivors, like petitioner Marytza Golden, as well as people with other serious illnesses, who likely can return to work but must first undergo intensive treatment lasting more than a month. If patients do not undergo curative treatments,

their cancer will worsen, generally leading to death. The average length of absence from work for cancer treatment is about five months. Surgeries for certain kinds of heart and kidney disease have similar recovery times. All of these people would be excluded from ADA employment protections under the Seventh Circuit's rule.

Forty percent of cancer survivors return to work within six months, and sixty-two percent return within a year. Although people who receive accommodations can successfully return to work, some are prevented from returning to work because of disability discrimination or other reasons. These people depend on employment for health insurance and income to pay for their treatment and may face foreclosure and bankruptcy if they lose their jobs.

The Seventh Circuit's per se rule exacerbates these problems. Someone living in the Seventh Circuit, like Marytza Golden, must risk termination to receive life-saving treatment. When she takes leave, she can be fired, regardless of the employer's ability to accommodate her. When she loses her job, she may also lose her insurance and ability to pay her medical bills.

On the other hand, when people living in the First Circuit are diagnosed with cancer, they may take a multi-month leave and keep their jobs unless granting leave would unduly burden their employers. *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648–49 (1st Cir. 2000). They can receive treatment, maintain their health insurance, take the time to recover, and then, in most cases, return to work.

II. By excluding many cancer survivors from ADA coverage, the Seventh Circuit's rule is at odds with the ADA's text and history. When Congress first considered the ADA, it heard testimony about employment discrimination from cancer survivors and interest groups and then indicated that cancer survivors were covered by the Act. Further, the Equal Employment Opportunity Commission's post-passage guidance documents indicate that cancer is a covered ADA disability.

Courts nonetheless often excluded cancer survivors from ADA coverage. Congress responded in 2008 with the ADA Amendments Act to clarify that the ADA covers cancer survivors. Congress amended the Act to expressly include people with impairments to "normal cell growth," 42 U.S.C. § 12102(2)(B), and impairments "in remission," *id.* § 12102(4)(D)—both references to cancer. If the Seventh Circuit's rule remains in place, these important statutory changes would have almost no practical effect. It therefore should be rejected.

III. The Seventh Circuit's rule arbitrarily distinguishes between multi-month leaves of absence and shorter leaves of absence, leading to anomalous results. For example, under the Seventh Circuit's rule, someone needing one week off per month is covered by the ADA no matter how many weeks she takes off. But someone who needs a single seven-week leave of absence is not. Also, the ADA would, in the Seventh Circuit's view, cover someone who chooses not to treat her cancer—potentially out of fear of termination—but not someone who chooses to combat it and needs more than a month's leave.

IV. The Seventh Circuit mistakenly relied on the Family and Medical Leave Act in narrowing the ADA's protections, wrongly thinking that because the former authorizes leave in some circumstances, the latter generally does not. But the FMLA explicitly directs courts not to do what the Seventh Circuit did: The FMLA does not "modify or affect any Federal … law prohibiting discrimination on the basis of … disability." 29 U.S.C. § 2651(a). Beyond that clear command, this Court's precedent gives full effect to two statutes, regardless of overlap, so long as each applies in situations where the other does not, as is true with the ADA and the FMLA.

ARGUMENT

The Americans with Disabilities Act seeks to eliminate discrimination against individuals with disabilities in all walks of life, including in employment. *See* 42 U.S.C. § 12101(a)(3), (b)(1). A disability is an impairment or record of impairment "that substantially limits one or more major life activities," such as eating or working. *Id.* § 12102(1)(A), (2)(A). Major life activities include the "operation of a major bodily function," such as digestive function or, of particular importance here, "normal cell growth." *Id.* § 12102(2)(B). The Act applies only to employees with disabilities who are "qualified." *Id.* § 12112(a). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions" of her job. *Id.* § 12111(8).

The ADA provides a non-exhaustive list of reasonable accommodations, including "job restructuring" or "part-time or modified work

schedules." 42 U.S.C. § 12111(9)(B). Under Equal Employment Opportunity Commission guidance, a reasonable accommodation may include "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment." 29 C.F.R. Part 1630, App. § 1630.2(o). An employer must make all reasonable accommodations unless it "can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A).

The Seventh Circuit's rule challenged here ignores this basic statutory structure—with its emphasis on accommodating the needs of people with disabilities while being sensitive to potential employer burden. Instead, it erects a rigid per se rule that anyone needing a temporary multi-month leave of absence is *never* a "qualified individual with a disability"—stopping the ADA analysis at its threshold and thus failing to account for the ADA's flexible, case-by-case analysis into reasonable accommodation and employer hardship. *See, e.g.*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 405-06 (2002).

The Seventh Circuit reasoned that "[a]n employee who needs long-term medical leave cannot work and thus is not a 'qualified individual' under the ADA." Pet. App. 5a (citing *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017)). Petitioner explains why that reasoning is wrong, Pet. 23–31, and we do not repeat that explanation here.

Instead, amici first describe the devastating impact the Seventh Circuit's rule would have on cancer survivors and others suffering from serious illnesses whose treatments commonly require more than a month's leave. We then explain why the Seventh Circuit's rule is at odds with the ADA's text

and history. Although the ADA Amendments Act of 2008 extends coverage to cancer survivors, the Seventh Circuit's no-multi-month-leave rule would effectively exclude a large proportion of these individuals from any protections under the ADA, rendering an important part of the Amendments Act inconsequential. We conclude by addressing two other points that support review of the Seventh Circuit's erroneous decision.

I. The Seventh Circuit's per se rule would harm many people battling cancer and other serious diseases.

A. Cancer affects millions of working-age Americans.

A significant portion of the population—forty percent of men and thirty-eight percent of women—will get cancer in their lifetimes. *Cancer Facts & Figures 2018,* Am. Cancer Soc'y, 2 (2018).[2] As of 2016, more than 15.5 million living Americans had a history of cancer. *Id.* at 1. Around forty percent are working age, "between the ages of twenty and sixty-four." Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 Wash. L. Rev. 1039, 1044–45 (2015); *see Cancer Treatment & Survivorship Facts & Figures 2016-2017*, Am. Cancer Soc'y, 2 (2016) (over eight million cancer survivors between twenty and sixty-nine years old).[3]

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[2] 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

[3] https://www.cancer.org/content/dam/cancer-org/research/

Cancer diagnoses are trending up, and the number of survivors is expected to reach 20.3 million by 2026. *Cancer Treatment & Survivorship Facts & Figures 2016–2017*, *supra*, at 2. This year alone will bring approximately 1.7 million new diagnoses. *Cancer Facts & Figures 2018, supra,* at 1. Fortunately, mortality rates are trending down, peaking in 1991 and declining more than twenty-six percent since. *Id.* The mortality rate for breast cancer, responsible for more cancer diagnoses than any other type, *see id.* at 4, has declined by thirty-nine percent since its 1989 peak, *id.* at 10. Mortality rates for kidney cancer, colorectal cancer, leukemia, and prostate cancer are also declining. *Id.* at 13, 15, 16, 22. As the number of cancer survivors increases, naturally, the number of cancer survivors who want to return to work also increases.

B. Treatment for cancer and other serious illnesses often takes more than a month.

These working-age cancer survivors often require more than a month of continuous employment leave for treatment and would lose the ADA's protections under the Seventh Circuit's per se rule. The length and impact of treatment varies significantly among individuals, cancer type, and stage at diagnosis. This Court's recognition that, under the ADA, the reasonableness of a workplace accommodation must be determined case-by-case, *see U.S. Airways, Inc. v.*

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cancer-facts-and-statistics/cancer-treatment-and-survivorship-facts-and-figures/cancer-treatment-and-survivorship-facts-and-figures-2016-2017.pdf

Barnett, 535 U.S. 391, 405–06 (2002), is thus especially salient for cancer survivors.

Treatment for cancer often includes surgery, chemotherapy, and/or radiation. *See Types of Cancer Treatment*, National Cancer Institute.[4] The average length of absence from work for cancer treatment is 151 days. *See* Anja Mehnert, *Employment and work-related issues in cancer survivors*, 77 Critical Reviews in Oncology/Hematology 109, 109 (2011). Chemotherapy often leaves the immune system compromised and returning to work too soon could lead to systemic infection and early death. *See How Chemotherapy Affects the Immune System*, Breastcancer.org.[5]

Breast and prostate cancer—among the most common types—illustrate how timelines for treatment can vary significantly even among people diagnosed with the same cancer type. On average, prostate cancer patients take twenty-seven days of leave—about five work weeks—for treatment. *See* Mehnert, *supra*, at 123–24. But time missed depends on both the patient's particular diagnosis and course of treatment. For example, when the cancer is "locally staged," that is, present only in the prostate, patients miss an average of 24.2 work days. Cathy J. Bradley, Kathleen Oberst & Maryjean Schenk, *Absenteeism from Work: The Experience of Employed Breast and Prostate Cancer Patients in the Months Following Diagnosis*, 15 Psycho-Oncology 737, 743 (2006). But when prostate cancer has spread to nearby areas, patients

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[4] https://www.cancer.gov/about-cancer/treatment/types.

[5] http://www.breastcancer.org/tips/immune/cancer/chemo.

miss an average of 39.8 days. *Id.* Men who had prostate surgery alone had "a median of 25 days absent from work," but men who had a combination of surgery, hormone therapy, and/or radiation treatments missed "a median of 30.5 days." *Id.* at 744.

Early-stage breast cancer survivors need an average of eleven months for treatment. Mehnert, *supra*, at 123. But even within breast cancer treatment, timelines vary considerably. One recent study reported a mean duration of 349 medical-leave days, while another reported a mean duration of 86 days, ranging from 11 to 929 days. *Id.* at 123. Another study reported that "35% of breast cancer patients were absent longer than one year." *Id.* Even when diagnosed at its earliest stages, the most common breast cancer treatment is mastectomy. *See Stage IA & IB Treatment Options*, Breastcancer.org;[6] *see also Sequence of Treatments*, Breastcancer.org.[7] The recovery period for mastectomy is around four weeks, or longer if the patient has reconstructive surgery at the same time. *Mastectomy*, Am. Cancer Soc'y.[8] Mastectomy and reconstructive surgery do not, however, end treatment for many women, as petitioner Golden's treatment shows. Pet. App. 2a-3a. After a mastectomy, women may receive chemotherapy, radiation, and/or hormone therapy,

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[6] http://www.breastcancer.org/treatment/planning/cancer_stage/stage_i.

[7] http://www.breastcancer.org/treatment/planning/sequence.

[8] https://www.cancer.org/cancer/breast-cancer/treatment/surgery-for-breast-cancer/mastectomy.html.

extending treatment for months after surgery. *See Sequence of Treatments*, *supra*. If this Court allows the Seventh Circuit's rule to stand, all of these cancer survivors who need more than a month for treatment will be excluded from the ADA's protections at the threshold, without any inquiry into whether accommodating leave would unduly burden the employer.

C. Denying ADA protection for people requiring more than a month of leave would harm people with other serious illnesses.

If not overturned, the Seventh Circuit's per se rule would also harm people with conditions other than cancer. For example, people needing an organ transplant would lose ADA coverage. In 2016, more than 33,000 organ transplants were performed in the United States. *2016 Annual Report*, United Network for Organ Sharing (UNOS).[9] Another 115,000 people are currently on wait lists. *Data*, UNOS.[10] The number of transplants is trending up, increasing by twenty percent in the past five years. *Id.*

Over the past thirty years, kidney and liver transplants have made up eighty percent of all transplants. *Data*, *supra.* Transplants are needed when the liver or kidney fails, generally from disease. Chronic kidney disease affects approximately fourteen percent of the population. *Kidney Disease Statistics for the United States*, National Institute of Diabetic

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[9] https://unos.org/about/annual-report/2016-annual-report/.

[10] https://unos.org/data/ (last visited Mar. 4, 2017).

and Digestive and Kidney Diseases.[11] When kidney disease reaches advanced stages, it leads to kidney failure, which affects more than 661,000 Americans. *Id.* Transplantees need "eight weeks or more after [a] transplant" to return to work. *Kidney Transplant*, National Kidney Foundation.[12] Liver transplants have similar recovery periods, with patients able to "go back to work a few months after surgery." *Liver Transplant*, Mayo Clinic.[13]

The Seventh Circuit's per se rule creates a particularly harsh anomaly for people with kidney failure. Treatment entails either non-curative care through dialysis—artificial filtering of waste from the blood—or a generally curative kidney transplant. Under the Seventh Circuit's rule, someone receiving dialysis, which "lasts about four hours and is done three times per week," is a qualified individual with a disability under the ADA because she needs only intermittent (though persistent and substantial) leave. *Dialysis*, National Kidney Foundation.[14] But, as noted, dialysis does not cure kidney disease; the "[a]verage life expectancy on dialysis is 5-10 years." *Id.*

A successful kidney transplant, on the other hand, "may allow [the patient] to live the kind of life you were living before you got kidney disease." *Kidney*

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[11] https://www.niddk.nih.gov/health-information/health-statistics/kidney-disease.

[12] https://www.kidney.org/atoz/content/kidney-transplant.

[13] https://www.mayoclinic.org/tests-procedures/liver-transplant/about/pac-20384842.

[14] https://www.kidney.org/atoz/content/dialysisinfo.

Transplant, *supra*. Survival rates for kidney transplant are very high—between ninety-five and ninety-eight percent. *Kidney Disease Statistics for the United States*, *supra.* Thus, the Seventh Circuit's rule protects people who choose a disruptive treatment that will only delay death, but does not protect people who receive treatment that will likely cure their disability. In the Seventh Circuit, then, patients could have a perverse incentive to avoid the best treatment to keep their employment.

The Seventh Circuit's per se rule would also harm people with heart disease. About ninety-two million Americans have some kind of heart disease. Emelia J. Benjamin et al., *Heart Disease and Stroke Statistics – 2017 Update A Report from the Am. Heart Ass'n*, 137 Circulation e146, e349 (2017). Though not all require intensive medical treatment, many must undergo surgery to treat their heart conditions. In 2010, 7.5 million Americans had inpatient cardiovascular surgery, *id.* at e585, the most common of which is coronary artery bypass surgery, *Coronary Artery Bypass Grafting*, National Heart, Lung, and Blood Institute.[15] That same year, 397,000 Americans underwent this surgery. Benjamin, *supra*, at e585. These patients have an excellent outlook, as the surgery completely relieves symptoms in most patients for ten to fifteen years and lowers the risk of future heart attacks. *Coronary Artery Bypass Grafting*, *supra*. But they commonly need six to twelve weeks or more before returning to work. *Id.*

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[15] https://www.nhlbi.nih.gov/health-topics/coronary-artery-bypass-grafting.

Another 106,000 Americans had heart valve surgery in 2010. Benjamin, *supra*, at e585. Like cancer, "[v]alve disease is not a condition that should be ignored when treatment is recommended." *Options and Considerations for Heart Valve Surgery*, Am. Heart Ass'n.[16] When the condition reaches that point, "the average survival rate without surgical intervention is only 50 percent after two years and only 20 percent after five years." *Id.* As with bypass patients, heart valve surgery survivors "enjoy a return to good health and add many years to their life." *Id.* This surgery's "normal recovery time … is usually four to eight weeks." *Heart Valve Surgery Recovery and Follow Up*, Am. Heart Ass'n.[17] With that recovery timeline, many patients would be categorically excluded from the ADA's protections under the Seventh Circuit's no-multi-month-leave rule, even when the leave required would not impose an undue hardship on the employer.

D. Lack of workplace accommodations can lead to devastating medical and financial hardship.

Although many cancer survivors require multi-month treatments, most are able to return to work. The majority—sixty-two percent—return to work within a year of diagnosis, and at least forty percent return to work within six months. *See* Anja Mehnert,

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[16] http://www.heart.org/HEARTORG/Conditions/More/HeartValveProblemsandDisease/Options-and-Considerations-for-Heart-Valve-Surgery_UCM_450787_Article.jsp#.WnOJ1qinE2w.

[17] http://www.heart.org/HEARTORG/Conditions/More/HeartValveProblemsandDisease/Heart-Valve-Surgery-Recovery-and-Follow-Up_UCM_450700_Article.jsp#.WnOLw6inE2w.

Employment and work-related issues in cancer survivors, 77 Critical Reviews in Oncology/ Hematology 109, 122 (2011). Once back on the job, cancer survivors are valuable employees, often working more hours and receiving higher pay than control groups. Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 Wash. L. Rev. 1039, 1052–53 (2015). But under the Seventh Circuit's rule, these individuals may not have a job to return to after treatment.

When employers do not accommodate serious illness, survivors often face financial ruin because of loss of health insurance and income. The Seventh Circuit's per se rule exacerbates this problem by removing protection from a significant segment of the population that needs time off for treatment. Requiring an individualized, hardship-based analysis of leave requests would ameliorate this problem by protecting employees from job loss when the employer has the resources to accommodate them.

A 2007 study found that sixty-two percent of bankruptcies were related to medical costs, because individuals had "lost significant income due to illness or mortgaged a home to pay medical bills." David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. Med. 741, 741 (2009). Nearly forty percent identified illness-related loss of income as the cause of their bankruptcy. *See id.* at 743. Losing health insurance is another major problem for those who are not accommodated. "Because health insurance is tied to employment for many in the United States, the lack of employment may lead to inability to pay for treatment

and necessary follow-up." Hodges, *supra*, at 1041. A gap in insurance coverage is a predictor of medical bankruptcy. Himmelstein, *supra*, at 744. Many families "had private coverage but lost it when they became too sick to work." *Id.* For those who lost coverage, "the family's out-of-pocket expenses averaged $22,568." *Id.* Ninety-two percent of people in medical bankruptcy reported that "high medical bills directly contributed to their bankruptcy." *Id.* Within medical bankruptcies, 24.4 percent reported being fired from their jobs, and 37.9 percent reported losing or quitting a job due to the illness. *Id.* The Seventh Circuit's rule worsens this problem, as many people will lose the ADA's protections during periods of critical treatment.

II. The Seventh Circuit's per se rule excludes a significant portion of cancer survivors, at odds with the ADA's text and history.

1. When Congress passed the ADA, it intended to protect cancer survivors. Some courts nonetheless held that cancer survivors were not covered. Congress then responded with the ADA Amendments Act, which clarified in express terms that cancer survivors are entitled to the Act's employment protections, subject to its reasonable-accommodation, undue-hardship framework. By excluding most cancer survivors from ADA coverage, the Seventh Circuit's rule cannot be squared with this history and should be overturned.

Before the ADA's 1990 passage, hearings held in 1985 and 1987 alerted Congress to workplace discrimination against cancer survivors. *See Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. and Labor*,

100th Cong. (1987).[18] Congress heard testimony that, based on "conservative" estimates, at least one million cancer survivors had suffered employment discrimination. *Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. and Labor*, 100th Cong. 41 (1987) (statement of Barbara Hoffman, National Coalition for Cancer Survivorship). Employers discriminated against cancer survivors by firing them, denying them promotions, or throwing them off company insurance policies. *See Emp't Discrimination Against Cancer Victims and the Handicapped*: *Hearing on H.R. 370 and H.R. 1294 before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. and Labor*, 99th Cong. 10, 19 (1985) (statements of Rep. Mario Biaggi, New York, and Robert J. McKenna, President, American Cancer Society). A few years later, when considering the ADA, Congress again heard testimony about cancer discrimination.[19]

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[18] *See also Emp't Discrimination Against Cancer Victims and the Handicapped: Hearing on H.R. 370 and H.R. 1294 Before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. and Labor*, 99th Cong. (1985).

[19] *See Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources*, 101th Cong. 259-62 (1989) (statement of Mary DeSapio, cancer survivor) (discussing her own firing after returning to work following treatment for cancer); *id.* at 252 (statement of Justin Dart, Chairperson, Task Force on the Rights and Empowerment of Americans with Disabilities) (naming cancer as a disability that leads to employment discrimination); *id.* at 313–14, 333 (statement of

Congress sought to eradicate this discrimination. As noted, the ADA's drafters intended to cover cancer from the beginning, with both chambers agreeing that cancer was a covered disability. *See* H.R. Rep. No. 101-485, pt. 2, at 51 (1990); S. Rep. No. 101-116, at 22 (1989).[20] Then-U.S. Attorney General Richard Thornburgh testified that he believed that cancer was a disability under the proposed legislation. *See Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 230 (1989) (statement of Richard Thornburgh).

After the ADA's passage, early EEOC guidance documents, intended to supplement federal regulation, make many references to cancer as a covered disability. An early update to the EEOC's Compliance Manual stated that "[m]ost forms of … cancer" substantially limit a major life activity. U.S. Equal Emp. Opportunity Comm'n, EEOC-M1A, *A Technical Assistance Manual on the Emp't Provisions (Title I) of the Americans with Disabilities Act*, App. E § 902.34 (1995); *see also* U.S. Equal Emp. Opportunity

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Arlene B. Mayerson, Disability Rights Education and Defense Fund) (presenting results of studies documenting discrimination against cancer survivors); *id.* at 383–89 (statement of Barbara Hoffman, Vice President, National Coalition for Cancer Survivorship) (urging Congress to pass the ADA because it would protect cancer survivors from discrimination).

[20] *See also Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the H. Comm. on Educ. and Labor*, 100th Cong. 13 (1988) (statement of Rep. Tony Coelho).

Comm'n, EEOC-M1A, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* at II-8 (1992) (stating that "people who have a history of a disability" include "people with a history of cancer"). And subsequent EEOC enforcement guidance explained that the ADA covered people needing leave because they suffered side effects from chemotherapy. *See* U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Mar. 1, 1999), 1999 WL 33305876, at *26.

2. Courts nonetheless excluded workers from coverage by holding that cancer was not a disability under the ADA. Specifically, courts held that if a cancer survivor could work, she did not have "a disability" that affected a major life activity, such as working and, thus, did not reach the question whether the needs of cancer survivors could be reasonably accommodated. *See, e.g.*, *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996); *Nave v. Wooldridge Constr.*, No. 96-2891, 1997 WL 379174 (E.D. Pa. June 30, 1997); *see also* Barbara Hoffman, *Between a Disability and a Hard Place: The Cancer Survivors' Catch-22 of Proving Disability Status Under the Americans with Disabilities Act*, 59 Md. L. Rev. 352, 376–94 (2000) (collecting cases). As a result, even after Congress passed the ADA, cancer survivors were still at risk of suffering discrimination because of their cancer.

3. Congress responded in 2008 with the ADA Amendments Act. The Amendments Act's text clarified that the ADA covers cancer survivors by changing the definition of "disability" in two ways.

First, it added a list of "major life activities" that, when substantially limited, make a person disabled. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553 (2008), *codified at* 42 U.S.C. § 12101(2). Among these major life activities, Congress included "normal cell growth," 42 U.S.C. § 12102(2)(B)—the impairment of which is the hallmark of cancer, *see What is Cancer*?, Am. Cancer Soc'y.[21] Second, Congress directed that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553 (2008), *codified at* 42 U.S.C § 12102(4)(D). By indicating that a "major life activity" is "normal cell growth" and that an impairment "in remission" can be a disability, Congress signaled quite clearly that cancer is a covered disability.

In the end, if left standing, the Seventh Circuit's per se rule would exclude many cancer survivors from ADA coverage, as the data reviewed above (at 9-15) shows. Courts excluded cancer survivors from ADA coverage once before, and Congress responded with a clear message in the Amendments Act: Cancer is a disability. But the Seventh Circuit did not listen. Instead, it ascribed to Congress an intent to provide cancer survivors formal ADA coverage but deny them multi-month leave, the one accommodation they need most to make their coverage a reality. That cannot be right.

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[21] https://www.cancer.org/cancer/cancer-basics/what-is-cancer.html.

III. The Seventh Circuit's per se rule creates legal and practical anomalies.

The Seventh Circuit's rule challenged here is quite simple: Anyone who needs a multi-month leave is not a "qualified individual with a disability" and thus never protected by the ADA. The Seventh Circuit gives no good reason for choosing multi-month leaves of absence instead of leaves of one week, three weeks, three months, or a year. And there is none: The definition of a "qualified individual with a disability" does not impose any work-time requirements. *See* 42 U.S.C. § 12111(8) (defining a "qualified individual with a disability" as "an individual who, with or without reasonable accommodation, can perform the essential functions of" her job).

But the ADA is not silent on leave. Rather than address leave in the "qualified individual with a disability" definition, as the Seventh Circuit has done, the ADA views leave as a question of "reasonable accommodation." As noted earlier, the ADA expressly identifies "part-time or modified work schedules" as a potential reasonable accommodation, 42 U.S.C. § 12111(9)(B), and the EEOC says that "accrued paid leave or providing additional unpaid leave for necessary treatment" can be a reasonable accommodation, 29 C.F.R. Part 1630, App. § 1630.2(o).

The Seventh Circuit acknowledged that "a short leave of absence—say, a couple of days or even a couple of weeks" may be a reasonable accommodation. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017). But that puts the Seventh Circuit's reasoning at war with itself. The basis of the Seventh Circuit's rule is that an individual who needs a multi-month leave of absence is not a "qualified

individual" because a "leave of absence does not give a disabled individual the means to work; it excuses his not working." *Id.* There is no reason why this logic should not apply with equal force to someone who needs "a couple of weeks" leave and someone who needs multiple months.

Because the Seventh Circuit does not apply the same reasoning to all leaves of absence, its rule leads to anomalous results, undercutting the logic of any per se rule. For instance, an employee diagnosed with breast cancer may require surgery with a eight-week recovery, but then be able to return to work with no impairments. Another employee may have an ongoing condition that forces her to take a week off every month for the duration of her employment. Under the Seventh Circuit's rule, the first employee is always considered legally unable to perform the essential functions of the job and thus categorically not disabled, but the second employee—who actually misses more work—is given the benefit of an individualized factual determination of whether her schedule is reasonable or imposes an undue hardship on the employer. *See* Pet. App. 7a–8a (Rovner, J., concurring). *See also supra* 13–14 (discussing similar anomaly in legal outcomes for patients undergoing kidney transplant compared to dialysis).

Or, take someone whose cancer is "in remission," whom the ADA presumptively covers. 42 U.S.C § 12102(4)(D). If her cancer went into remission because she took a multi-month leave for treatment, she would have been covered under the ADA when she was diagnosed, not covered during her multi-month treatment, and then suddenly covered again when her cancer went into remission. If, however, she chose not

to treat her cancer, either fearing termination or because her cancer was untreatable, she would have maintained her ADA coverage throughout. Put differently, the ADA covers someone with untreatable cancer and someone whose cancer is in remission, but not, according to the Seventh Circuit, someone who is in multi-month treatment fighting for her life.

IV. The Seventh Circuit mistakenly relied on the FMLA to narrow the ADA's coverage.

In defending its per se rule and rejecting a flexible, accommodation-based approach to leave, the Seventh Circuit has noted that "medical leave is the domain of the" Family and Medical Leave Act (FMLA). *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017); *see* 29 U.S.C. § 2612(a)(1) (allowing "12 workweeks of leave during any 12-month period" in specified circumstances). According to the Seventh Circuit, a contrary rule would transform the ADA into "an open-ended extension of the FMLA." *Severson*, 872 F.3d at 482. By relying on the FMLA to justify its narrowing of the ADA, the Seventh Circuit failed to account for the FMLA's text and the different purposes of each statute.

First, the FMLA's text precludes the Seventh Circuit's reasoning: "Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of … disability." 29 U.S.C. § 2651(a). This language refers to the ADA, enacted three years before the FMLA.

Beyond this direct, congressional denunciation of the Seventh Circuit's approach, overlapping statutes, this Court has observed, "do not pose an either-or

proposition." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). "Redundancies across statutes are not unusual," *id.* at 253, and, so, if giving effect to overlapping statutes "would not render one or the other wholly superfluous," "a court must give effect to both." *Id.* Here, each statute applies in situations where the other does not and viewing extended leave as a reasonable accommodation under the ADA would not render the FMLA superfluous.

In particular, the FMLA's primary (though not only) purpose is to allow employees to take leave to care for *others*: a sick family member or a child after birth or adoption. *See* 29 U.S.C. §§ 2612(a)(1), 2601(b). The ADA's primary purpose, on the other hand, is to protect the *employee's* ability to obtain or maintain her own employment, not her interest in taking care of others. The ADA thus seeks to eradicate discrimination on the basis of disability by requiring employers to provide employees with a wide range of "reasonable accommodation[s]," only one of which is leave. *See, e.g.*, 42 U.S.C. § 12111(9) (non-exclusive list of reasonable accommodations). The FMLA provides only leave and then only in specified circumstances. *See* 29 U.S.C. § 2612(a)(1). But when it does provide leave, it does so absolutely, without regard to the hardship leave might impose on the employer. In sum, the Seventh Circuit erred by relying on the FMLA to narrow the ADA's reach.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 2018