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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The courts of appeals are deeply divided about an important and recurring question of federal law. The Seventh Circuit has adopted a per se rule that a "multimonth" period of unpaid leave can never be a reasonable accommodation required by the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, or the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, regardless of the circumstances of the employer or employee. The attempt of respondent Indianapolis Housing Agency (IHA) to rewrite the question presented so that it is limited to the circumstances of this case (BIO i) is ironic because the Seventh Circuit's per se rule does not permit a court to consider *any* circumstance other than the length of leave requested. At least four other circuits have squarely rejected that approach—and IHA's tepid protestations to the contrary do not hold up under scrutiny. IHA's primary legal contention (BIO 20) is that a person who cannot work for a finite period of time is not a qualified individual because *as a matter of law* she cannot perform the essential functions of her job. That cannot be correct; whether uninterrupted attendance is an essential function of a particular job depends at least in part on what the employer's leave policies are. Where, as here, an employer has a *policy* of permitting employees to take six months of leave, IHA's (and the Seventh Circuit's) per se rule is nonsensical. Because this case is an ideal vehicle for resolving the question presented, this court should grant the Petition in this case to resolve the entrenched circuit split.

I. The Courts Of Appeals Are Intractably Divided On The Question Presented.

The courts of appeals are deeply divided about whether, as a matter of law, a multimonth leave of absence can ever be a reasonable accommodation required by the ADA and Rehabilitation Act. IHA's repeated contention (BIO 10, 11) that no court of appeals has acknowledged the circuit split is puzzling in light of Judge Rovner's concurring decision *in this case* acknowledging that other courts of appeals "have rejected the per se rule" adopted by the Seventh Circuit "that an extended medical leave can never be a reasonable accommodation under the ADA." Pet. App. 7a. Moreover, the United States filed a Statement of Interest in the district court below, explaining that the First, Sixth, Ninth, and Tenth Circuits had held that extended unpaid leave can be a reasonable accommodation. Dist. Ct. Doc. 65, at 10-12 (May 19, 2016). Even a cursory review of the decisions in other circuits confirms the Seventh Circuit's per se rule directly conflicts with the law of the First, Sixth, Ninth, and Tenth Circuits.[*] *See* Pet. 12-16.

First, IHA's contention (BIO 15) that the First Circuit "does not in fact disagree with the Seventh Circuit's approach" has no basis in reality. IHA relies

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[*] IHA quibbles (BIO 11-12) with petitioner Golden's characterization of the Seventh Circuit's per se "multimonth" rule as applying to a request for leave lasting "longer than one month." A commonsense understanding of the term "multimonth" is "longer than one month." But even if it means only "at least two months" (*see* BIO 11), a per se rule applicable to unpaid leave of at least 62 calendar days conflicts just as starkly with the law of other circuits (and is just as wrong) as a per se rule applying to unpaid leave of at least 32 calendar days.

exclusively on *Echevarría v. AstraZeneca Pharmaceutical LP*, a decision that *reaffirmed* the First Circuit's earlier *rejection* of "appl[ying] per se rules—rather than an individualized assessment of the facts" in determining whether a requested accommodation is reasonable. 856 F.3d 119, 132 (1st Cir. 2017) (quoting *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000)). In *Echevarría*, the First Circuit simply applied the framework set out in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)—a framework not cited in the decision below—to determine whether the requested year-long leave of absence was reasonable on its face or in the circumstances of the particular case. 856 F.3d at 130-132. That is precisely the type of analysis that is precluded by the Seventh Circuit's per se rule. To suggest that the two approaches are in harmony, let alone the same, is baseless. In holding that the requested year-long accommodation was not reasonable in that case, moreover, the First Circuit emphasized both that its holding was "narrow" and that it was *not* holding "that a request for a similarly lengthy period of leave will be an unreasonable accommodation in every case." *Id.* at 132.

Second, IHA is similarly incorrect that the Sixth Circuit's decision in *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (en banc), is in line with the Seventh Circuit's rule. Although that decision acknowledged that "[r]egular, in person attendance is an essential function . . . of *most* jobs," *id.* at 762 (emphasis added), it did not adopt the Seventh Circuit's one-size-fits-all rule that a multimonth lapse in attendance can never be a required accommodation regardless of the circumstances. To the contrary, the en banc Sixth Circuit decided that case as this Court has instructed: by

engaging in a fact-specific analysis of the circumstances of the employer, the job in question, and the employee. *Id.* at 763. In other words, it engaged in precisely the type of inquiry that is precluded by the Seventh Circuit's per se rule. Since the decision in *Ford*, moreover, the Sixth Circuit has continued to hold that an extended leave of absence can be a required reasonable accommodation. *See*, *e.g.*, *Terre v. Hopson*, 708 Fed. Appx. 221, 228-229 (6th Cir. 2017).

Third, IHA's tepid suggestion (BIO 16) that the Ninth Circuit's approach does not indicate that the circuit split is intractable fares no better. That court has expressly held that "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." *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). IHA's complaint that the Ninth Circuit has not considered the Seventh Circuit's reasoning cannot be reconciled with *Nunes*, which squarely held that, if an employee's "medical leave was a reasonable accommodation, then her inability to work during the leave period would not automatically render her unqualified." *Ibid.* That is about as clear a rejection of the Seventh Circuit's reasoning as one could hope for.

Finally, IHA overreads then-Judge Gorsuch's opinion in *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014). That decision correctly explained that whether a particular accommodation is reasonable "usually depends on factors like the duties essential to the job in question, the nature and length of the leave sought, and the impact 'on fellow employees.'" *Id.* at 1162 (quoting *Barnett*, 535 U.S. at 400). Although the opinion undoubtedly expresses strong

skepticism that an unpaid leave lasting six months can ever be a reasonable accommodation, the opinion is careful *not* to adopt a per se rule to that effect. To wit, in responding to the rhetorical question whether "an employer [must] allow employees more than six months' sick leave or face liability under the Rehabilitation Act," the opinion states that "the answer is almost always no." *Id.* at 1161. That is not the same answer the Seventh Circuit gives (*i.e.*, always no). But even if it were, that would just mean that the legal rules applicable in the Seventh *and* Tenth Circuits directly conflict with those applicable in the First, Sixth, and Ninth Circuits. Far from being a reason to deny the Petition, that is a reason to grant it.

In sum, the courts of appeals are deeply divided about whether a multimonth leave of absence can ever be a reasonable accommodation under the ADA and Rehabilitation Act. At least four courts of appeals have held that such a determination must be fact-specific; the Seventh Circuit has precluded consideration of the facts. IHA's repeated criticism (BIO 11-16) that decisions conflicting with the opinion below are "decades-old" is mystifying. The longevity of such decisions illustrates just how entrenched the circuit split is, as does the Seventh Circuit's denial of rehearing en banc in this case in the face of Judge Rovner's separate opinion criticizing the per se rule and identifying the circuit split. This Court should grant the Petition in this case to resolve that split.

II. The Question Presented Is Important And Recurring.

The Seventh Circuit's per se rule is contrary to the text of the relevant statutes and to this Court's decisions construing those laws. If allowed to stand, it will have a devastating effect on many Americans with disabilities who work in the Seventh Circuit.

A. As explained in the Petition (at 21-22) and in the *amicus* brief on behalf of cancer survivors and organizations established to help cancer survivors, the Seventh Circuit's erroneous rule will have particularly dire consequences for individuals suffering from cancer and other serious diseases. Although Congress amended the ADA in 2008 to, *inter alia*, clarify that cancer and other serious illnesses qualify as disabilities under the Act, *see* Pet. 30-31, the decision below will largely exclude a huge proportion of those people from the ADA's protection. As *amici* explain (at 9-12), cancer survivors routinely require a multimonth leave of absence from work in order to obtain and recover from life-saving treatment. The same is true for employees with other serious diseases, including heart disease and kidney failure. *Amici* Br. 12-15. When those employees are fired instead of being granted the leave they need, the results are catastrophic. The loss of a job means not only the loss of income to the family, but often the loss of necessary health insurance. *Id.* at 16-17. And, critically, when employees with cancer are granted the leave they need to survive, they overwhelmingly return to work—62 percent within a year of diagnosis and at least 40 percent within six months. *Id.* at 15.

Although IHA purports to offer "society's deepest sympathy" for "[t]hose suffering from cancer and other

serious illnesses," BIO 21, Golden is not seeking sympathy—and neither are other individuals receiving treatment for life-threatening illnesses. What they seek is their congressionally created right to a reasonable accommodation that will allow them to work after receiving and recovering from life-saving treatments. "[S]ociety[]" has already spoken on this subject, through its elected representatives to Congress. And society decided that individuals suffering from cancer and other serious diseases deserve more than sympathy—they deserve to be considered disabled under the ADA and Rehabilitation Act, and they deserve the full extent of the protections afforded by those important statutes. The Seventh Circuit's view to the contrary should be corrected.

B. IHA's reliance (BIO 23) on "Congress's considered judgment" in enacting the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, is misplaced. It is true that the FMLA applies only to employers of a particular size and requires leave for employees only after they have been employed for a qualifying period of time. 29 U.S.C. § 2611(2) and (4). And IHA is correct that those limitations are "the product of legislative compromise" and "reflect Congress's considered judgment on how to strike the right balance between the needs of employees and employers" with respect to the rights mandated by the FMLA. BIO 23. But the balance struck there does not simply wipe out the *different* balance struck in the ADA and Rehabilitation Act. Those laws apply to a broader array of employers and do not require a minimum length of service before protecting an employee. But they include other significant limitations. Most notably, they apply only to employees with disabilities (as defined in

the Acts). And—*unlike* the FMLA—they do not require an employer to provide any accommodation that would impose an undue hardship on the employer. The FMLA includes no such escape valve, requiring employers to provide 12 weeks of leave even when doing so would impose an undue hardship. 29 U.S.C. § 2612. The FMLA's separate entitlement to unpaid leave has no bearing on the substance of the anti-discrimination mandate in the ADA and Rehabilitation Act.

C. IHA further errs in suggesting (BIO 24-25) that the analytical framework this Court set out in *Barnett* applies only to requests for reassignment and not to requests for reasonable accommodations more broadly. IHA notes that "reassignment is otherwise within the class of workplace alterations that can qualify as a reasonable accommodation." BIO 25 (citing 42 U.S.C. § 12111(9)). But so is time off of work. 42 U.S.C. § 12111(9). As IHA concedes, "[n]o one disputes that short periods of leave . . . can be a reasonable accommodation." BIO 27. The relevant difference between 29 days of leave and 62 days of leave is the degree of burden it imposes on the employer—an inquiry that is foreclosed by the Seventh Circuit's per se rule. The question in *Barnett* was what *kind* of reassignments could be required. The question here is what *kind* of absences from work can be required. Neither logic nor law suggests that the former question should be answered with a case-specific analysis and the latter with a per se rule. But that is what the Seventh Circuit held. This Court should grant the Petition to correct that error.

III. This Is An Ideal Vehicle To Decide The Question Presented.

IHA errs in contending (BIO 28) that this is "a particularly unsuitable vehicle for deciding whether a multimonth leave of absence could [ever] be a reasonable accommodation." This is an ideal vehicle because the issue is squarely presented and is outcome-determinative. Pet. 22-23. The only accommodation Golden sought was unpaid leave; instead of granting Golden's request, IHA fired her.

More to the point, IHA already had an existing policy of granting employees six months of unpaid leave when no other type of leave was appropriate. Although IHA concedes that such a policy exists, it asserts (BIO 31) that "the policy did not apply to petitioner at all" because she needed the leave for medical reasons. If true, that practice raises exactly the specter of disability-based discrimination that the ADA and Rehabilitation Act are intended to combat. The fact that IHA had an institutional *policy* of allowing six months of leave surely suggests, moreover, that permitting leave of that length would not impose an undue hardship on IHA—or at least that it would not *always* do so. That is precisely the type of "special circumstance[]" that would require a court to inquire whether the requested leave was "'reasonable' on the particular facts" of this case. *Barnett*, 535 U.S. at 405. Notably, IHA nowhere suggests that granting Golden's request would have imposed an undue hardship, or any hardship at all.

IHA's further contention that Golden could not prevail under any standard because she did not provide adequate medical documentation to establish her return-to-work date is a red herring for at least three

reasons. First, IHA does not suggest that was a basis for the Seventh Circuit's holding—and it indisputably was not. If this Court grants the Petition and reverses the decision below, IHA will remain free to raise that defense on remand.

Second, IHA's characterization of the evidence is incomplete. As noted in the Petition (at 8 n.3), the district court's alternative conclusion that Golden had not sufficiently documented her return date was incorrect, particularly under the standard applicable at summary judgment. IHA agrees (BIO 28-29) that the only information that is relevant is the information that was available at the time Golden was fired. Golden presented uncontradicted testimony that she asked for six months of leave—and the district court and court of appeals both concluded that IHA understood her request as such. Pet. App. 3a-4a, 13a-14a. It is therefore uncontroverted that Golden did not ask for indefinite leave. Golden also presented uncontradicted testimony that she repeatedly informed IHA's human-resources specialist both that she expected to return to work in August 2015 and about her treatment plan. Dist. Ct. Doc. 58, at 7 (Apr. 29, 2016). IHA terminated Golden automatically, without engaging in the required interactive process, *see* 29 C.F.R. § 1630.2(*o*)(3), that would have allowed Golden to submit the type of evidence IHA now says is required.

Finally, IHA's contention that Golden would lose on this basis simply highlights the deep divide among the courts of appeals about whether the ADA or Rehabilitation Act permits a bright-line rule that certain types of leave can *never* be a reasonable accommodation. As the First Circuit has explained:

> Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation.

García-Ayala, 212 F.3d at 648. The Ninth Circuit has similarly held that an employee requesting extended leave need not "show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation" as long as she can "satisfy the minimal requirement that a leave of absence could plausibly have enabled [her] adequately to perform her job." *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001). And the Sixth Circuit recently held that an employee's request for extended leave of an unspecified length was a request for a reasonable accommodation even though, as here, the employee's medical providers had not estimated her return date and her employer had not asked them to do so. *McMahon v. Metro. Gov't of Nashville*, No. 16-6498 (6th Cir. June 27, 2017), *petition for cert. filed*, No. 17-1124 (Feb. 7, 2018).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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