No. 19-549

In the Supreme Court of the United States

HANNAH P., PETITIONER

v.

JOSEPH MAGUIRE, ACTING DIRECTOR, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner could not prevail on her claim alleging hiring discrimination based on disability in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, because her significant problems with workplace attendance and reporting—even after she had received multiple reasonable accommodations for her disability—rendered her unqualified for the position she sought.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 916 F.3d 327. The opinion of the district court (Pet. App. 63a-76a) is not published in the Federal Appendix but is available at 2017 WL 3202726.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2019. A petition for rehearing was denied on June 25, 2019 (Pet. App. 79a-80a). On September 18, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 23, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, generally prohibits federal agencies from discriminating against "individuals with disabilities." 29 U.S.C. 791(b). In cases alleging discrimination in employment, the Rehabilitation Act incorporates the standards of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* See 29 U.S.C. 791(f) (Supp. V 2017); 29 C.F.R. 1614.203(b). Under the ADA, an employer may not "discriminate against a qualified individual on the basis of disability." 42 U.S.C. 12112(a). "The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of" the job that the individual "holds or desires." 42 U.S.C. 12111(8); see 29 C.F.R. 1630.2(m). The ADA requires that "consideration shall be given to the employer's judgment as to what functions of a job are essential." 42 U.S.C. 12111(8); see 29 C.F.R. 1630.2(n)(3)(i).

Courts typically review Rehabilitation Act or ADA claims alleging disability discrimination in hiring by using a burden-shifting framework borrowed from *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). See *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 49 & n.3 (2003); see also Pet. App. 23a. In that framework, the plaintiff has the initial burden to establish a prima facie case of discrimination, meaning the plaintiff must introduce evidence to show that she is disabled; that she was qualified for the position she sought; and that she suffered an adverse employment action (including not being hired for a position) on the basis of her disability. See, *e.g.*, *Shaner* v. *Synthes (USA)*, 204 F.3d 494, 500 (3d Cir. 2000). If the plaintiff establishes a prima facie case, then the burden shifts to the employer to provide

a legitimate, nondiscriminatory reason for its decision. *Ibid.* If the employer provides a legitimate and nondiscriminatory reason, then the plaintiff bears the ultimate burden of persuasion and must show by a preponderance of the evidence that the employer's proffered reason was a pretext for discrimination. *Id.* at 500-501.

2. Petitioner was previously employed by the Office of the Director of National Intelligence (ODNI) on a five-year term contract. Pet. App. 3a.

Although petitioner was diagnosed with depression in 2011, she initially was able to perform her duties at ODNI without accommodations. C.A. App. 19-20. From November 2013 to January 2015, petitioner successfully worked on a high-profile ODNI project that required irregular hours. See Pet. App. 4a-5a. Because of that project's unusual needs, petitioner's working hours shifted from the typical ODNI schedule to "a 'maxi flex' schedule" in which she "start[ed] and end[ed] work later than traditional business hours." *Id.* at 5a (citation omitted). After the project ended, both petitioner and her supervisors expected that her work schedule would eventually return to a more typical schedule, including an earlier start time. See C.A. App. 88-89, 460-461, 495, 519-520.

Beginning in January 2015, however, after the high-profile project ended, petitioner started exhibiting serious attendance and reporting problems. C.A. App. 76, 413. Petitioner acknowledged in her Second Amended Complaint that "[i]n late February and March, [she] began having trouble getting to work at a reasonable time and even missed some days of work due to her condition." *Id.* at 284. Petitioner also signed a form documenting "numerous days" during this period "when she * * * arrived extremely late (post 2:00 p.m.) or ha[d] not

shown up at all with no notice to her supervisor or communication with anyone on the [ODNI] staff." *Id.* at 412-414.

By March 2015, petitioner's attendance and reporting problems were adversely affecting the work of her office and her co-workers. She "arrived to work well after normal business hours and racked up numerous unplanned absences." Pet. App. 5a. She also often failed to notify her supervisors of her unplanned absences in a timely fashion, which required her supervisors to spend "'significant time and energy'" attempting to track her down, and to "assign work that might have been assigned to [petitioner] to other analysts." *Id.* at 7a (citation omitted); see C.A. App. 78, 413, 510. Petitioner gave various explanations for her repeated absences and late arrivals, including some reasons unrelated to her disability, such as tasks tied to home remodeling. C.A. App. 118, 122. As a result, "multiple * * * supervisors had 'informal counseling sessions'" with petitioner to "'urge her' to notify them if she was going to be late or absent." Pet. App. 6a (quoting C.A. App. 413).

On March 19, 2015, one of petitioner's supervisors approached her "to address her attendance issues." Pet. App. 6a. Petitioner and her supervisors worked together to develop a reasonable accommodation that would assist her in adhering to her work schedule while meeting ODNI's "staffing needs." *Ibid.* The plan allowed petitioner to delay the start of her work day until 10 a.m., and permitted her to send an email to her supervisors if she was going to be late. *Ibid.*; see C.A. App. 114, 116. The plan stated that, if petitioner had not arrived or sent an email by 11 a.m., a supervisor would call her to check in. Pet. App. 6a.

Petitioner, however, "did not follow the plan." Pet. App. 6a-7a. The very next day, petitioner failed to email her supervisors until 11:05 a.m., when she said she would be in "around 12:30" because she was "running some last minute errands" for her new house. C.A. App. 118. The next week, petitioner was on scheduled leave for home renovations, which she extended by one day. *Id.* at 114, 120. On the first day she was to return, she did not email her supervisors until 11:56 a.m., when she informed them that she was "swamped with contractor stuff" and would not be coming to work. *Id.* at 122.

The following day, when petitioner had not arrived or contacted her supervisors by 12:30 p.m., C.A. App. 413, one of her supervisors revised her accommodation plan to put the "onus" on her to contact a supervisor in advance if she was going to be in after 10 a.m. Pet. App. 7a (quoting C.A. App. 90). But petitioner failed to follow that modified plan, too, on the first two days it was in place. *Ibid.*

On April 9, three weeks after petitioner's initial accommodation plan had been put in place, her supervisors met with her about referring her to the Employee Assistance Program (EAP), a voluntary counseling service, to help her resolve her attendance and reporting problems. Pet. App. 8a. Her supervisors had scheduled an appointment for the next day (a Friday). *Ibid.* Petitioner signed the EAP referral, C.A. App. 414, and attended that EAP session, but she also told her supervisors at the April 9 meeting that her medical providers had suggested she take leave, Pet. App. 8a. On the first business day after petitioner's EAP session, her supervisor told her that he was willing to authorize medical leave. *Ibid.* Petitioner, however, told her supervisor

that her leave request was "on hold," without further explanation. *Ibid.* (citation omitted).

Despite petitioner's participation in EAP, her attendance and reporting problems continued throughout April 2015. See Pet. App. 9a. She provided various explanations for her numerous absences and late arrivals, including traffic, C.A. App. 182, and a migraine, *id.* at 184. On April 27, petitioner requested a meeting with her supervisor to discuss her desire to take leave. See Pet. App. 9a; C.A. App. 41-42. The next day, petitioner requested four weeks of leave. C.A. App. 42-43. One of petitioner's supervisors stated that she would approve the leave request, but explained that she wanted petitioner to keep a May 1 appointment with the EAP counselor. *Id.* at 43. Petitioner took four weeks of leave beginning on May 5, after she had signed a Letter of Expectations confirming her attendance and reporting plan for her return. Pet. App. 9a.

In all, "the record evidences no less than 13 attendance issues that occurred in the 46 days between [ODNI's] first attempt to accommodate [petitioner] on March 19, 2015, and the revised plan made on May 4, 2015," when petitioner went on leave. Pet. App. 27a; see *id.* at 28a n.7 (detailing petitioner's attendance and reporting problems during this time).

Shortly after petitioner returned to work on June 1, 2015, she interviewed for the Program Mission Manager Cyber Position (Cyber position), a permanent position at ODNI. Pet. App. 10a. Petitioner did not disclose her recent attendance and reporting problems to the interview panel, which recommended that she be hired. See C.A. App. 48-50. But the selecting official, ODNI Chief Management Officer Mark Ewing, did know of petitioner's repeated problems with attendance

and reporting, *id.* at 217, 220-222, and he determined that petitioner should not be permanently hired "at this time" because her "recent performance is not consistent with a potentially good employee." Pet. App. 10a (citation omitted); see C.A. App. 232. Although Ewing expected that petitioner might be selected for another position if her attendance improved, C.A. App. 304-305, 588-589, petitioner did not apply to any other permanent position at ODNI in the eight months before her term appointment ended, see Pet. App. 10a.

3. After exhausting her administrative remedies, petitioner brought this suit alleging various violations of the Rehabilitation Act and the Family and Medical Leave Act of 1993 (FMLA), 5 U.S.C. 6381 *et seq.*, 29 U.S.C. 2601 *et seq.* See Pet. App. 67a. As relevant here, petitioner claimed that ODNI's decision not to hire her for the Cyber position because of her recent attendance and reporting problems constituted discrimination based on disability in violation of the Rehabilitation Act. *Id.* at 69a. The district court entered summary judgment in favor of the defendant. *Id.* at 63a-76a, 77a-78a. The court found that "even if" petitioner could establish a prima facie case of discrimination, she could not "rebut the legitimate, non-discriminatory reason" that ODNI gave for declining to hire her for the Cyber position—namely, her "significant attendance and reporting problems." *Id.* at 69a.

4. The court of appeals affirmed in part, reversed in part, and remanded in a divided opinion. Pet. App. 1a-62a. As relevant here, the panel majority affirmed the district court's conclusion that ODNI was entitled to summary judgment on petitioner's Rehabilitation Act claim based on ODNI's decision not to hire her for the Cyber position.

a. The court of appeals determined that ODNI had provided petitioner with multiple reasonable accommodations to address her attendance and reporting problems, including offering her a delayed starting time and more convenient options to contact her supervisors if she would be arriving even later, as well as referring her for EAP counseling that might help her meet her work obligations. Pet. App. 12a-13a; see C.A. App. 114, 116. Yet despite those accommodations, petitioner's attendance and reporting problems persisted, Pet. App. 13a, both immediately after she agreed to a revised schedule on March 19, 2015, *id.* at 6a-7a, and continuing with no fewer than 13 documented problems over the next 46 days, *id.* at 27a. The court also found that "'a regular and reliable level of attendance'" was "an essential function of petitioner's job"—as it is for "'most jobs'"—and "the record amply demonstrates [petitioner] was unable to fulfill" that function even with a modified schedule to reasonably accommodate her disability. *Id.* at 17a (citation omitted).

The court of appeals then analyzed the facts in the record under the *McDonnell Douglas* burden-shifting framework. Pet. App. 23a-24a. The court found that "[e]ven assuming that [petitioner] established a prima facie case of discrimination (which [ODNI] disputes), she cannot succeed" on her claim alleging disability discrimination in hiring because she had not rebutted the legitimate, nondiscriminatory reason given by ODNI for declining to hire her for the Cyber position: her inability to demonstrate regular and reliable attendance even with a revised schedule to accommodate her disability. *Id.* at 24a. The court stated that "a continuous attendance issue is a legitimate reason for withhold-

ing an employment benefit," and "an employee who cannot satisfy their employer's attendance policy cannot be considered 'qualified' for the purposes of the ADA." *Id.* at 27a (quoting *Tyndall* v. *National Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994)). The court rejected as unsupported by the record petitioner's contentions that she did not actually have significant attendance and reporting problems, *id.* at 27a-28a, 29a-30a, and that ODNI had invoked those problems only as a pretext for disability discrimination, *id.* at 24a-26a.

Finally, the court of appeals rejected petitioner's argument that ODNI was not permitted to decline to hire her on the basis of her attendance and reporting problems because those problems were caused by her disability. Pet. App. 28a-29a. The court stated that, although it did not doubt that petitioner's "struggle with depression was the cause of her attendance issues," ODNI was "permitted to take [petitioner's] attendance issues into account in its decision whether to hire her" for the Cyber position, because the Rehabilitation Act "'does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition.'" *Id.* at 29a (citation omitted).[1]

b. Chief Judge Gregory concurred in part and dissented in part. Pet. App. 37a-62a. He would have held

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[1] The court of appeals also affirmed the dismissal of the remainder of petitioner's claims under the Rehabilitation Act, and the dismissal of her claim alleging retaliation in violation of the FMLA. Pet. App. 36a. The court reversed the judgment in favor of ODNI on petitioner's claim that ODNI had unlawfully interfered with her right to take medical leave under the FMLA, and the court remanded for further proceedings on that claim. *Ibid.* The district court has held the case in abeyance pending the petition for a writ of certiorari. D. Ct. Doc. 92 (July 29, 2019).

that petitioner's attendance issues were not severe or pervasive enough to justify ODNI's decision not to hire her permanently, and that petitioner should have been permitted to argue to a jury that ODNI's proffered reasons for its decision were a pretext for discrimination based on disability. *Id.* at 47a-53a.

c. The court of appeals denied petitioner's request for rehearing en banc. Pet. App. 79a-80a.

ARGUMENT

Petitioner contends (Pet. 10-34) that the court of appeals erroneously held that ODNI could justify its decision not to hire her permanently by pointing to "'misconduct'" that resulted from her disability, "thereby avoiding any inquiry into whether that 'misconduct' renders the plaintiff unqualified for the position in question." Pet. 11. But petitioner's characterization of the court of appeals' opinion as "avoiding any inquiry" into whether she was unqualified is not correct. The court plainly determined that ODNI legitimately deemed petitioner not "qualified" within the meaning of the Rehabilitation Act, because the record shows that she was not capable of maintaining regular and reliable attendance at work even with reasonable accommodations. Pet. App. 27a (citation omitted). That determination was correct, it is heavily dependent on the particular facts of this case, and it does not conflict with the decision of any other court of appeals. While some courts have suggested that certain kinds of severe and persistent employee misconduct connected to a disability can justify an adverse employment action without regard to whether the misconduct renders the employee unqualified, that proposition could potentially make a legal difference only in a small number of cases, and this is not one of them. Further review is unwarranted.

1. The court of appeals correctly concluded that petitioner's Rehabilitation Act claim alleging disability discrimination in hiring fails on this record. That determination does not warrant further review.

Petitioner's central claim is that the court of appeals' decision "'short-circuit[ed] the required analysis' of whether an employee is qualified," as that term is used in the Rehabilitation Act, by holding that employers can justify "adverse actions taken on the basis of disability-caused conduct *regardless* of whether the employee is otherwise qualified." Pet. 28 (citation omitted); see, *e.g.*, Pet. 9, 11, 17-18. But that is not an accurate description of the court of appeals' decision. Rather, the court held that the record supported ODNI's non-discriminatory explanation that it did not hire petitioner permanently because her "perpetual issues with attendance, timeliness, and reporting absences to her superiors"—even after receiving multiple reasonable accommodations for her disability—rendered her unqualified for the position she sought. Pet. App. 24a; see *id.* at 24a-30a.

In the relevant portion of its opinion, the court of appeals cited its decision in *Tyndall* v. *National Education Centers, Inc. of California*, 31 F.3d 209, 213 (4th Cir. 1994), for the proposition that "an employee who cannot satisfy their employer's attendance policy *cannot be considered 'qualified'* for the purposes of the ADA." Pet. App. 27a (emphasis added). The court then recounted petitioner's "no less than 13 attendance issues that occurred in the 46 days" after ODNI reasonably accommodated her disability. *Ibid.*; see *id.* at 12a-14a (rejecting petitioner's argument that ODNI did not provide reasonable accommodations). And the court stated that, "[i]n addition to possessing the skills necessary to perform the job in question, an employee

must be willing and able to demonstrate th[o]se skills by coming to work on a regular basis," *id.* at 27a (citation omitted; brackets in original). The court therefore found that ODNI was "permitted to take [petitioner's] attendance issues into account in its decision whether to hire her for the Cyber position." *Id.* at 29a.

The court of appeals' conclusion that ODNI legitimately deemed petitioner unqualified for the Cyber position in light of her attendance and reporting problems was reinforced by other portions of the court's opinion rejecting most of her other claims. After discussing record evidence that petitioner's "attendance issues impacted her performance, the performance of her peers, and the performance of her supervisors," Pet. App. 7a, the court found that ODNI "had a reasonable belief that [petitioner's] ability to perform the essential functions of her [term] job was impaired by her repeated issues with attendance and timely reporting," *id.* at 17a. Indeed, petitioner conceded below that "regular attendance" was "an essential function of her job" that she was unable to perform in April 2015, Pet. C.A. Br. 37—the period after she had already received a reasonable accommodation and before she took leave as another reasonable accommodation, see Pet. App. 13a-14a. The court then observed that, "[e]xcept in the unusual case where an employee can effectively perform all work related duties at home," an employee who cannot maintain regular and reliable attendance "cannot perform *any* of [her] job functions, essential or otherwise." *Id.* at 17a (citation omitted). And the record shows that Ewing, the supervisor who recommended against hiring petitioner permanently, believed that petitioner's recent record of attendance and reporting problems cast doubt

on her ability to perform the essential functions of the Cyber position. See Gov't C.A. Br. 34-35.

That petitioner would have preferred yet another, different accommodation in the Cyber position—*i.e.*, a permanent maxi-flex schedule, see Pet. 28—makes no legal difference. The court of appeals explained why the multiple accommodations that petitioner received for her disability were reasonable, Pet. App. 12a-14a, and further explained that "[t]he Rehabilitation Act does not require an employer to provide the exact accommodation that an employee requests," *id.* at 14a.[2] ODNI was entitled to a measure of deference for its judgment that reliable attendance was necessary to perform the essential functions of the Cyber position. See 42 U.S.C. 12111(8); 29 C.F.R. 1630.2(n)(3)(i).

Petitioner responds that the court of appeals "assumed that [she] was qualified for the permanent position she sought despite any attendance issues," and "did not require her employer to show otherwise in order to obtain summary judgment." Pet. 28 (citing Pet. App. 24a). Those contentions too are incorrect. The court was willing to assume merely that petitioner had stated, as part of her *prima facie case*, that she was qualified for the position she sought. Pet. App. 24a ("Even assuming that [petitioner] established a prima facie case of discrimination (which [ODNI] disputes), she cannot succeed on her claim."). The court could make that assumption because it found that ODNI had carried its burden to offer a legitimate, non-discriminatory

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[2] Petitioner does not challenge before this Court the court of appeals' finding that she received multiple reasonable accommodations in her term position, nor does petitioner contest the court of appeals' finding that she continued to have multiple attendance and reporting problems after she received those accommodations.

reason for declining to hire her permanently: her demonstrated inability to maintain reliable attendance at ODNI even with reasonable accommodations. See *ibid.*; see also *id.* at 17a, 24a-30a.[3]

To be sure, the court of appeals went on to say that "the Rehabilitation Act 'does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition.'" Pet. App. 29a (citation omitted). But the court made that statement in response to petitioner's argument that, "because her disability was the cause of her attendance issues, [ODNI] could not withhold an employment benefit from her on that basis." *Id.* at 28a-29a. The petition does not continue to advocate that unduly broad argument; petitioner instead now acknowledges (Pet. 11-12) that attendance problems caused by a disability *can* be a basis for an adverse employment decision if they render the employee unqualified for the relevant position. As explained above, the court of appeals applied just that standard, and simply concluded that the facts in this record did not support petitioner's Rehabilitation Act claim. The court's application of the legal principle that

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[3] Petitioner correctly does not argue before this Court that the government "conceded" that she was "'otherwise qualified'" for the Cyber position. Pet. C.A. Petition for Reh'g 10 (emphasis omitted). As the government explained in the court of appeals, it never made that concession. See Gov't C.A. Br. in Opp. to Petition for Reh'g 12-13. The government has instead maintained that petitioner's inability to demonstrate consistent and reliable attendance in her term-limited position caused her supervisors to doubt that she would be able to demonstrate reliable attendance in the Cyber position, as necessary to perform the essential functions of that position. See Gov't C.A. Br. 34-35.

petitioner advocates to the particular facts of this case does not warrant this Court's review.

Insofar as the court of appeals' opinion can be read to accept the "misconduct" rule to which she objects, the court's conclusion would at the very most rest on two distinct rationales, either of which the court viewed as independently sufficient to affirm the summary judgment in ODNI's favor on petitioner's hiring-discrimination claim: first, petitioner's attendance and reporting problems rendered her unqualified for the position she sought, Pet. App. 27a; second, petitioner's attendance and reporting problems constituted "blatant and persistent misconduct" that justified ODNI's decision not to permanently hire her, even if that behavior was "potentially tied to a medical condition" and irrespective of whether she was qualified to perform the essential functions of the Cyber position, *id.* at 29a (citation omitted). The government's brief to the court of appeals presented both of those arguments as independent grounds for affirming the summary judgment in ODNI's favor on petitioner's hiring-discrimination claim. See Gov't C.A. Br. 17-23. But even if the court's opinion is read that way, the court's first independent holding is fully sufficient to support its judgment in ODNI's favor, and any additional statements in the opinion are not a basis for this court's review.[4]

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[4] Because the court of appeals resolved this case on the ground that petitioner's attendance and reporting problems rendered her unqualified for the position she sought, the government takes no position, for purposes of this brief, on how a court should analyze a Rehabilitation Act claim involving an employee with a known disability who was unable to demonstrate reliable attendance but who was nevertheless qualified to perform all the essential functions of her job.

2. The court of appeals' decision below does not meaningfully conflict with any decision of another court of appeals. Petitioner's claim to a circuit split depends exclusively on her contention that the Fourth Circuit declined to consider whether her repeated attendance and reporting issues rendered her unqualified for the position she sought. See Pet. 17-18. But as explained above, the Fourth Circuit *did* determine that ODNI legitimately concluded that petitioner was unqualified: her attendance and reporting issues persisted even after she received reasonable accommodations, and ODNI was entitled to consider that history when considering her for the Cyber position. See pp. 11-14, *supra*.

Petitioner significantly overstates the extent of the difference between the approaches of some courts of appeals to disability-discrimination claims. In cases like this one, involving employees with attendance and reporting issues, courts have routinely considered whether the plaintiff's inability to demonstrate reliable attendance prevented her from performing the essential functions of her position. For example, petitioner points to the Fourth Circuit's decision in *Martinson* v. *Kinney Shoe Corp.*, 104 F.3d 683 (1997), as an example of the "misconduct" rule to which she objects. Pet. 17 (citation omitted); see Pet. 25-26. But the Fourth Circuit ruled in favor of the employer in *Martinson* on the ground that the plaintiff "was not qualified to perform at least one essential function of his position" as a shoe salesman. 104 F.3d at 686. (The court found that the plaintiff's epilepsy prevented him from providing adequate security against shoplifters. *Id.* at 687.) The Fourth Circuit merely said in a footnote that "misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire

an employee on that basis." *Id.* at 686 n.3. But the court in *Martinson* had no occasion to apply that rule, just as the court here had no occasion to apply that rule in light of the court's conclusion that ODNI could legitimately deem petitioner not qualified for the permanent position she sought.

Petitioner contends that the Fifth Circuit has similarly permitted an employee to be fired for misconduct caused by his disability "[w]ithout * * * discussing whether the plaintiff remained qualified for the position." Pet. 18 (citing *Hamilton* v. *Southwest Bell Tel. Co.*, 136 F.3d 1047 (5th Cir. 1998)). But *Hamilton* did not involve an employee with attendance or reporting problems. See *ibid.* (noting that the plaintiff was fired "for an emotional outburst"). In other cases that do resemble the facts here, the Fifth Circuit's analysis has focused on whether the employee was qualified for the relevant position. In *Hypes* v. *First Commerce Corp.*, 134 F.3d 721 (5th Cir. 1998) (per curiam), a case involving an employee who was terminated for "excessive absenteeism and tardiness" that the plaintiff alleged was related to his chronic lung disease, *id.* at 723, the Fifth Circuit held that the plaintiff could not prevail on his ADA claims because he "was not 'otherwise qualified' for his job," *id.* at 726. The court found that "it was an essential function of [the plaintiff's] job, as a member of a team, that [he] be in the office, regularly, as near to normal business hours as possible, and that he work a full schedule," but the plaintiff "could not arrive at work early enough or often enough to perform the essential functions of the job" even after receiving reasonable accommodations. *Ibid.* *Hypes* indicates that, in a case like this one, the Fifth Circuit would reach the same result as the Fourth Circuit did here.

Moreover, the courts of appeals' decisions in *Martinson* and *Hypes*, like the decision below, show that the "misconduct" analysis attacked by petitioner will rarely make any legal difference to the resolution of a Rehabilitation Act or ADA claim. The question presented by the petition could potentially matter only in a case where a plaintiff with a known disability committed some type of "misconduct"; the misconduct was caused directly by the plaintiff's disability; *and* the misconduct did not prevent the plaintiff from being qualified for the relevant position. But this case does not fit that pattern for the reasons explained, see pp. 11-14, *supra*, so it does not provide any opportunity to consider petitioner's arguments about how such a case should be resolved. Indeed, cases like this one involving employees with serious attendance and reporting problems are particularly unlikely to raise the question presented, because an employee who cannot reliably show up for work will rarely be able to perform the essential functions of a job and thus will rarely be qualified. See Pet. App. 17a.

Contrary to petitioner's suggestion of a circuit conflict (Pet. 10-24), the courts of appeals largely agree in their analysis of disability-discrimination cases involving employees with serious attendance and reporting problems. The courts of appeals whose decisions petitioner endorses (Pet. 10-17)—the First, Second, Ninth, and Tenth Circuits—have each held that an employer can base a personnel decision on an employee's failure to meet attendance requirements if the record shows that a lack of reliable attendance prevents the employee from performing an essential function of the relevant job, even with reasonable accommodations. See, *e.g.*, *Colón-Fontánez* v. *Municipality of San Juan*, 660 F.3d 17, 33-36 & n.15 (1st Cir. 2011); *McMillan* v. *City of*

New York, 711 F.3d 120, 126-127 (2d Cir. 2013); *Humphrey* v. *Memorial Hosps. Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001), cert. denied, 535 U.S. 1011 (2002); *Mason* v. *Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119-1124 (10th Cir. 2004). The remaining courts of appeals have reasoned similarly that reliable attendance is necessary to perform the essential functions of most jobs, and that an employee who cannot demonstrate reliable attendance in such a job, even with reasonable accommodations, is not qualified for purposes of the ADA or the Rehabilitation Act. See, *e.g.*, *Miller* v. *University of Pittsburgh Med. Ctr.*, 350 Fed. Appx. 727, 729 (3d Cir. 2009); *Tyndall*, 31 F.3d at 213 (4th Cir.); *Hypes*, 134 F.3d at 726-727 (5th Cir.); *Denman* v. *Davey Tree Expert Co.*, 266 Fed. Appx. 377, 379-380 (6th Cir. 2007); *Waggoner* v. *Olin Corp.*, 169 F.3d 481, 484-485 (7th Cir. 1999); *Spangler* v. *Federal Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002); *Jackson* v. *Veterans Admin.*, 22 F.3d 277, 279-280 (11th Cir.), cert. dismissed, 513 U.S. 1052 (1994); *Carr* v. *Reno*, 23 F.3d 525, 529-530 (D.C. Cir. 1994); cf. *Law* v. *United States Postal Serv.*, 852 F.2d 1278, 1279-1280 (Fed. Cir. 1988) (per curiam).

In light of the circuit courts' consensus in cases involving employees with serious attendance and reporting problems, there is no reason for further review of the decision below, which accords with that consensus.

3. Finally, the question of how to analyze disability-related conduct under the Rehabilitation Act is not squarely presented here for the additional reason that not all of petitioner's attendance and reporting issues arose from her disability. Contrary to petitioner's assertion (Pet. 28), the court of appeals' statement that petitioner's "struggle with depression was the cause of

her attendance issues," Pet. App. 29a, should not be read as a finding that *all* of her absences and reporting problems arose from her depression. On the preceding page of its opinion, the court noted that petitioner attributed at least three of her attendance and reporting issues to her car being towed, traffic, and a migraine. See *id.* at 28a n.7. Moreover, unrebutted record evidence showed that petitioner had attributed other absences and tardiness to non-disability-related reasons such as "last minute errands" and being "swamped with contractor stuff." C.A. App. 118, 122. The Rehabilitation Act did not prohibit ODNI from declining to hire petitioner permanently based on attendance and reporting issues that were not caused by her disability. See, *e.g.*, *Greer* v. *Emerson Elec. Co.*, 185 F.3d 917, 922 (8th Cir. 1999) (finding it relevant to a disability-discrimination claim that "the record reveals that many of [the plaintiff's] absences resulted from various, non-serious ailments, unrelated to her depression").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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