No. 19-549

In the Supreme Court of the United States

HANNAH P., PETITIONER

v.

JOSEPH MAGUIRE, ACTING DIRECTOR OF THE 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

REPLY BRIEF FOR THE PETITIONER

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The government refuses to defend the court of appeals' ruling that an employer may point to so-called "misconduct" resulting from a disability to justify refusing to hire an otherwise qualified applicant, on the theory that the "misconduct" is somehow distinct from the disability that caused it. To the contrary, the government's opposition "takes no position" on that question. Br. in Opp. 15 n.4. And the government acknowledges (*id.* at 16) that other courts of appeals "routinely" apply the approach that petitioner advocates. Those courts correctly understand that conduct resulting from a disability is part of the disability, and they focus instead on whether a plaintiff's conduct renders her unqualified to perform the essential functions of the job. The government's only real quibble with the question presented is its cursory (and mistaken) assertion that treating the effects of a disability as generic "misconduct" would

excuse disability-based discrimination only "in a small number of cases." *Id.* at 10.

Indeed, the question presented is so manifestly worthy of review that the government's primary contention is that it is not actually presented in this case. The government insists (Br. in Opp. 11-15) that the court of appeals *really* meant to hold that petitioner's attendance issues made her unqualified for the permanent position she sought with the Office of the Director of National Intelligence (ODNI).

But that is simply not what the court of appeals held. The court of appeals expressly assumed that petitioner *was* qualified for the permanent position (Pet. App. 23a-24a), a conclusion consistent with her track record handling some of the nation's most demanding intelligence assignments. It held that ODNI could refuse to hire petitioner because her attendance and reporting issues offered a "nondiscriminatory" (*id.* at 27a) basis for doing so, *not* because those issues rendered her unqualified for the job. The court of appeals reached that conclusion even though it had "no doubt" that petitioner's conduct was caused by her "struggle with depression," because it held that "[m]isconduct—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 29a (quoting *Martinson* v. *Kinney Shoe Corp.*, 104 F.3d 683, 686 n.3 (4th Cir. 1997)). And there is no mystery about how the court of appeals reached the conclusion that misconduct resulting from a disability is fair game for adverse employment action—it was precisely the position the government had urged the court of appeals to adopt.

Whether that result is lawful goes to the core of the federal anti-discrimination statutes and has sharply

divided the courts of appeals. The question presented is important, and it is squarely presented in this case. The petition should be granted.

A. The Government Misreads The Decision Below

The government's defense of the decision below rests entirely on its contention that the court of appeals determined that petitioner was unqualified for the permanent position she sought. Br. in Opp. 11-15. But that contention is belied by the court of appeals' decision and by the arguments the government pressed in the courts below.

1. In addressing petitioner's claim for discrimination in hiring, the court of appeals expressly "assum[ed] that [petitioner] established a prima facie case of discrimination." Pet. App. 24a. Applying the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the court of appeals therefore decided this case on the premise that petitioner "was otherwise qualified" for the position she sought. Pet. App. 23a.

Nothing in the decision below suggests that the court of appeals departed from that premise. The court of appeals held that ODNI could justify its refusal to hire petitioner by pointing to her issues with attendance and reporting. Pet. App. 27a-29a. But the decision below did *not* hold that those issues rendered her unqualified. Rather, the court of appeals held that petitioner's attendance issues were a "nondiscriminatory" (*id.* at 27a) rationale for ODNI's decision—*i.e.*, a rationale purportedly distinct from petitioner's underlying disability. Although the court of appeals had "no doubt" that those issues were caused by petitioner's "struggle with depression" (*id.* at 29a), it nonetheless viewed them as conceptually distinct

from her disability because, in its view, "[m]isconduct—even misconduct related to a disability—is not itself a disability." *Ibid.* (quoting *Martinson*, 104 F.3d at 686 n.3). Under the court of appeals' reasoning, there was thus no need to consider—much less reject—petitioner's qualifications for the permanent position. Nor did the court of appeals consider whether ODNI could have adopted reasonable accommodations to address petitioner's depression had she been awarded the permanent position.

The government's contrary reading of the decision below principally relies (Br. in Opp. 11-12) on the court of appeals' citation of *Tyndall* v. *National Education Centers, Inc. of California*, 31 F.3d 209 (4th Cir. 1994). See Pet. App. 27a. In a parenthetical reference to that decision, the court of appeals characterized it as "finding an employee who cannot satisfy their employer's attendance policy cannot be considered 'qualified' for the purposes of the ADA." *Ibid.* (citing *Tyndall*, 31 F.3d at 213). But the court's reference to another panel's "finding" that *another* plaintiff in a *different case* was not qualified does not establish that the court here determined that petitioner was unqualified.[1]

Moreover, the court of appeals did not cite *Tyndall* in service of a conclusion that petitioner was

[1] The plaintiff in *Tyndall* was a schoolteacher, and the court of appeals emphasized in that case that "her position required that she teach the assigned courses during the scheduled class times and spend time with her students." 31 F.3d at 213. Petitioner, by contrast, had worked successfully in the past with a highly flexible schedule, "generally receiv[ing] glowing reviews from her supervisors," Pet. App. 4a, and earning a performance grade of "Excellent" and a performance-based bonus for the year that included the period in which her depression symptoms were at their worst, 2 C.A. App. 406-407, 658-660; see also Pet. 5-7.

unqualified. Rather, it cited *Tyndall* in support of the analytically distinct conclusion that petitioner's issues with attendance and reporting offered a "genuine, legitimate, and nondiscriminatory" basis for ODNI's employment decision. Pet. App. 27a. Thus, even the most charitable view of the *Tyndall* citation is that the court of appeals conflated the issues of qualification and the existence of a nondiscriminatory basis for the employer's actions. A crucial purpose of the statutory regime, however, is to keep those questions distinct.

The government also points to other passages of the decision below, which addressed other claims that petitioner had asserted. Br. in Opp. 12. Those portions are inapposite. For example, in addressing petitioner's claim that ODNI had unlawfully forced her to undergo a medical examination, the court of appeals observed that "[a]ttendance was * * * an essential function of [petitioner's] job" that "she was unable to fulfill." Pet. App. 17a. But that statement referred to the temporary position petitioner occupied at the time ODNI referred petitioner to an employee assistance program. See *id.* at 15a. It does not bear on whether petitioner was qualified for the permanent position she later sought and was denied because of her disability-caused conduct.

2. The government's revisionist reading of the decision below is also belied by the position the government took before the court of appeals. There, the government defended against petitioner's discrimination claim on the ground that ODNI's refusal to hire petitioner because of attendance issues was not based on her disability. It *did not* urge the court of appeals to conclude that petitioner was unqualified for the job. Because the government never argued that

petitioner was unqualified, it is implausible to read the court of appeals' opinion as having adopted that conclusion. Cf. *Coleman* v. *Thompson*, 501 U.S. 722, 740 (1991) (state postconviction court's decision "fairly appear[ed]" to rest on state law where court had granted motion to dismiss that raised only a state-law procedural defense and did not mention federal law).

The relevant portion of the government's brief summarized petitioner's prima facie case as requiring a showing that "(1) she was disabled * * * , (2) she was qualified to perform the essential functions of the job with or without reasonable accommodations, and (3) she was not hired because of her disability." Gov't C.A. Br. 16. The government then argued that petitioner "cannot meet the *third* requirement," because she could not "demonstrate that ODNI's decision not to hire her * * * was *because of* her depression, rather than because of her recent significant attendance and reporting problems." *Ibid.* (first emphasis added). In support of that conclusion, the government stressed that "the Fourth Circuit has held that attendance and reporting problems, even if related to the symptoms of a disability, are not themselves a disability." *Id.* at 18. The government also pressed the related argument that ODNI's refusal to hire petitioner was lawful because ODNI's concerns with petitioner's attendance provided a "legitimate, non-discriminatory reason for not hiring her." *Id.* at 19.

At no point, however, did the government argue that petitioner's attendance and reporting issues rendered her unqualified for the position she sought. The government had no need to do so—or to address the related issue of reasonable accommodations for petitioner's depression in the permanent position—because it treated ODNI's refusal to hire petitioner on

the basis of so-called "misconduct" resulting from her disability as something different from an employment decision on the basis of disability. The government's contention (Br. in Opp. 15) that it argued lack-of-qualification in the court of appeals as an "independent ground[]" for affirmance is thus belied by the record.

B. The Decision Below Squarely Implicates A Circuit Conflict

1. Once the government's misreading of the court of appeals' decision is corrected, the government's contention (Br. in Opp. 16) that the "decision below does not meaningfully conflict with any decision of another court of appeals" unravels. As the government itself observes, other courts have "routinely" addressed claims like petitioner's by "consider[ing] whether the plaintiff's inability to demonstrate reliable attendance prevented her from performing the essential functions of her position." *Ibid.* To be sure, the government offers that observation to support its contention that the decision below accords with a "consensus" in the courts of appeals. *Id.* at 19. But because the court of appeals did *not* determine in this case that petitioner's attendance and reporting issues rendered her unqualified (see pp. 3-7, *supra*), the government's observation in fact amounts to a concession that the decision below conflicts with the decisions of many other court of appeals. See also Br. in Opp. 18-19 (collecting cases addressing attendance issues under the rubric of qualification); Pet. 11-17 (same).

2. Even the government's account of the decision below does not bring the court of appeals into line with its sister courts. As noted above, the government contends that the court of appeals' reference to

Tyndall as "finding an employee who cannot satisfy their employer's attendance policy cannot be considered 'qualified' for the purposes of the ADA," Pet App. 27a (citing *Tyndall*, 31 F.3d at 213), was meant to describe petitioner. But for that to be true, the court of appeals' statement about "an employee" would have to be understood as extending to *any* disability-discrimination plaintiff whose disability leads to violations of an employer's attendance policy. The decision below would thus stand for a blanket rule that all such plaintiffs "cannot be considered 'qualified' for the purposes of the ADA." *Ibid.* (citing *Tyndall*, 31 F.3d at 213).

If the decision below is read in that (mistaken) way, it would still conflict with decisions of numerous other courts of appeals holding that "regular and predictable attendance is not per se an essential function of all jobs." *Humphrey* v. *Memorial Hosps. Ass'n.*, 239 F.3d 1128, 1135 n.11 (9th Cir. 2001); see also, *e.g.*, *McMillan* v. *City of New York*, 711 F.3d 120, 126 (2d Cir. 2013) ("Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment."); *Ward* v. *Massachusetts Health Research Inst., Inc.*, 209 F.3d 29, 35 (1st Cir. 2000) (holding that whether "a regular and reliable schedule" is an essential function of a position turns on "a fact-intensive inquiry into the pattern of the attendance problem and the characteristics of the job in question"); *Mason* v. *Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (holding that an evaluation of an attendance-related accommodation's reasonableness "must * * * be made on a case-by-case basis"). For that reason, certiorari would still be warranted even if the government were correct about what the court of appeals held below.

C. The Question Presented Is Important, And This Case Is A Sound Vehicle For Resolving It

The government labors heavily to diminish the practical significance of the question presented and to gin up a supposed vehicle defect. See Br. in Opp. 10, 18-20. Neither argument is persuasive.

1. The government asserts that resolution of the question presented will matter "only in a small number of cases" (Br. in Opp. 10) and "will rarely make any legal difference to the resolution of a Rehabilitation Act or ADA claim" (*id.* at 18). That is particularly true in cases involving employees with attendance issues, the government asserts, "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." *Ibid.*

To be sure, timely and regular attendance will often be an essential requirement of an employee or applicant's position. But that is not inevitably true, and resolving the question in a particular case therefore "requires a fact-intensive inquiry into the pattern of the attendance problem and the characteristics of the job in question." *Ward*, 209 F.3d at 35; see also *McMillan*, 711 F.3d at 126 (stressing "the importance of penetrating factual analysis"). Indeed, the impulse to declare timely attendance an essential element of every job is precisely the sort of categorical reaction that the Rehabilitation Act and Americans with Disabilities Act were designed to root out.

Moreover, the government dramatically understates the practical significance of the question presented in cases involving employees with disabilities that lead to attendance issues. In a slew of cases, courts that have conducted the required fact-intensive inquiry have concluded that timely or

regular attendance was *not* an essential function of the particular position at issue—or, at a minimum, that the issue presented a genuine dispute of fact. See, *e.g.*, *McMillan*, 711 F.3d at 126-127; *Humphrey*, 239 F.3d at 1135-1137; *Ward*, 209 F.3d at 35-36; *Hostettler* v. *College of Wooster*, 895 F.3d 844, 854-857 (6th Cir. 2018); *Mosby-Meachem* v. *Memphis Light, Gas & Water Div.*, 883 F.3d 595, 603-605 (6th Cir. 2018); *Burnett* v. *Ocean Props., Ltd.*, 327 F. Supp. 3d 198, 234 (D. Me. 2018); *Bridgewater* v. *Michigan Gaming Control Bd.*, 282 F. Supp. 3d 985, 997-998 (E.D. Mich. 2017); *Bisker* v. *GGS Info. Servs., Inc.*, No. CIV. 1:CV-07-1465, 2010 WL 2265979, at *4 (M.D. Pa. June 2, 2010); *Miller* v. *Verizon Commc'ns, Inc.*, 474 F. Supp. 2d 187, 199 (D. Mass. 2007); *EEOC* v. *MTS Corp.*, 937 F. Supp. 1503, 1510 (D.N.M. 1996); *Sawinski* v. *Bill Currie Ford, Inc.*, 881 F. Supp. 1571, 1574 (M.D. Fl. 1995); *EEOC* v. *AIC Sec. Investigation, Ltd.*, 820 F. Supp. 1060, 1063-1064 (N.D. Ill. 1993).[2]

Each of the cases cited in the text above would have come out differently under the approach adopted by the court of appeals in this case. In each one, the plaintiff's attendance issues could have been dismissed as "misconduct" that would justify an adverse employment action even without a showing that the plaintiff was unqualified. That so many courts applying the proper, fact-intensive approach ultimately did

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[2] See also, *e.g.*, *Husinga* v. *Federal-Mogul Ignition Co.*, 519 F. Supp. 2d 929, 951-952 (S.D. Iowa 2007) (recognizing genuine dispute of fact with respect to plaintiff's qualifications, but granting summary judgment for employer on other grounds); *Carlson* v. *InaCom Corp.*, 885 F. Supp. 1314, 1321 (D. Neb. 1995) (same); *Hall* v. *Janet Wattles Ctr.*, No. 94 C 50239, 1995 WL 254411, at *4 (N.D. Ill. Apr. 14, 1995) (denying employer's motion to dismiss on qualification grounds).

not deem plaintiffs with attendance issues to be unqualified confirms that resolution of the question presented here has the potential to affect the outcome in a significant number of cases.

2. Almost as an afterthought, the government glancingly suggests (Br. in Opp. 19-20) that the question of how to analyze so-called "misconduct" resulting from a disability is not "squarely presented" in this case because not all of petitioner's "absences and reporting problems arose from her depression." But the court of appeals had "no doubt" that petitioner's depression "was *the* cause of her attendance issues," Pet. App. 29a (emphasis added), and it decided the case on that basis. Thus, even if petitioner attributed a handful of her absences or late arrivals to causes other than her depression, the fact remains that the broader attendance issues that ultimately led ODNI to reject her employment application were the product of her diagnosed clinical depression. As a result, the government's half-hearted vehicle argument is no reason to deny review in this case.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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