NO. 20-_____

In the Supreme Court of the United States

O'REILLY AUTO ENTERPRISES, LLC,
D/B/A O'REILLY AUTO PARTS,

Petitioner,

v.

BRIAN BELL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN MORRIS, ESQ.
COUNSEL OF RECORD
JAMES M. PETERSON, ESQ.
RACHEL M. GARRARD, ESQ.
STEVEN M. BRUNOLLI, ESQ.
HIGGS FLETCHER & MACK LLP
401 WEST A STREET, SUITE 2600
SAN DIEGO, CA 92101
(619) 236-1551
JMMORRIS@HIGGSLAW.COM

MARCH 1, 2021 *COUNSEL FOR PETITIONER*

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QUESTION PRESENTED FOR REVIEW

The Americans with Disabilities Act ("ADA") requires employers to provide reasonable accommodations to permit employees with disabilities to perform the essential functions of their jobs. Here, the Court of Appeals for the First Circuit held an employee can establish a claim for failure to accommodate even if they can perform their job without accommodation. The Question Presented is:

Does the ADA require employers to provide accommodations to employees who do not need them?

CORPORATE DISCLOSURE STATEMENT

All parties to this proceeding appear on the cover of this petition. O'Reilly Automotive, Inc. wholly owns Ozark Services, Inc. which wholly owns O'Reilly Auto Enterprises, LLC, dba O'Reilly Auto Parts.

LIST OF PROCEEDINGS

United States Court of Appeals for the First Circuit

No. 18-2164

Brian Bell, *Plaintiff, Appellant,* v. O'Reilly Auto Enterprises, LLC, d/b/a O'Reilly Auto Parts, *Defendant, Appellee.*

Date of Opinion, Judgment: August 21, 2020

Date of Rehearing Denial: October 2, 2020

United States District Court District of Maine

Docket No. 1:16-cv-00501-JDL

Brian Bell, *Plaintiff,* v. O'Reilly Auto Enterprises, LLC, d/b/a O'Reilly Auto Parts, *Defendant.*

Date of Jury Verdict: July 20, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS, ORDERS AND JUDGMENTS

REHEARING ORDER

RELEVANT STATUTORY PROVISIONS

DOCUMENTS RELATED TO JURY INSTRUCTIONS

TABLE OF CONTENTS – Continued

Page

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

O'Reilly Auto Enterprises, LLC, dba O'Reilly Auto Parts ("O'Reilly") hereby petitions this Court for certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit—reported at 972 F.3d 21—on which O'Reilly asks the Court to issue a writ of certiorari is attached at Petitioner's Appendix ("App.") 1a-8a.

The order of the Court of Appeals denying O'Reilly's petition for rehearing is attached at App.15a-16a.

JURISDICTION

The Court of Appeals filed its decision reversing the judgment in favor of O'Reilly on August 21, 2020. *See* App.1a. The Court of Appeals filed its order denying O'Reilly's petition for rehearing on October 2, 2020. *See* App.15a.

This Court has jurisdiction over this matter under 28 U.S.C. § 1254, which provides: "Cases in courts of appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal

case, before or after rendition of judgment or decree." 28 U.S.C. § 1254.

This petition is timely pursuant the Court's order dated March 19, 2020, extending the deadline "to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." Order List: 589 U.S. (citing Rules of the Supreme Court of the United States, Rules 13.1 and 13.3).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12112

This petition involves interpretation of 42 U.S.C. § 12112 ("Discrimination")—part of the ADA (42 U.S.C. § 12101 *et seq.*)—which provides that "no covered entity shall discriminate against a qualified individual on the basis of disability."

Specifically, this petition involves interpretation of 42 U.S.C. § 12112(b)(5)(A) ("Section 12112(b)(5)(A)"), which defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee. . . . "

STATEMENT OF THE CASE

A. Factual Background

The plaintiff, Brian Bell ("Bell")—who is afflicted with Tourette's syndrome and attention-deficit/hyperactivity disorder—was employed by O'Reilly as a store manager in Belfast, Maine. App.2a.

Consistent with Bell's job description when he was hired (and as true for all O'Reilly store managers), Bell was scheduled to work slightly more than ten-and-a-half hours per day, five or six days per week; and, as the effective "store owner," was required to work whatever hours or schedule was necessary and to be available all days to cover extra shifts and address the myriad issues that confront a small business daily. App.2a. There came a time when Bell lost two shift leaders, leaving only a few employees who could open and close the store, so Bell "made up the difference," sometimes working 15-hour days and more than 100 hours per week. App.2a. Bell became overwhelmed, broke down, and one day left the store to rest in his truck. App.3a. Bell's supervisor told him to return to the store, but that incident prompted Bell to consult his mental health provider for guidance as to his work schedule. App.3a.

Knowing that Bell had consulted with his doctor, O'Reilly told Bell he could return to work after his health care provider filled out a form confirming his fitness for duty. App.3a. Indeed, Bell's mental health provider cleared him to return to work contingent on him not being scheduled "for more than 9 hours a

day, five days a week." App.3a. Bell's district manager reasonably read the doctor's note to require a "hard cap" on Bell's working hours and denied the request, since Bell's limitation did not satisfy O'Reilly's essential job functions required of all store managers (to work at least 50-plus hours per week and be available daily to cover extra shifts and resolve all random issues). App.3a.

According to Christopher Watters ("Watters"), O'Reilly's district manager, Bell did not necessarily agree with his doctor and was adamant he could get a Fitness for Duty form modified "to say what it needed to say to benefit him coming back." App.78a. But Bell's mental health provider declined to revise the form, believing it would undermine the validity of the original form. App.3a-4a, 70a-71a. Ultimately, because Bell was unable to meet the essential functions of his job, O'Reilly terminated his employment. App.3a-4a, 78a.[1]

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[1] To further understand O'Reilly's decision, Bell confirmed that "the way [his health care provider] and [he] envisioned this Fitness for Duty form working, it was going to be up to [him] depending on how [he] felt on any given day whether [he] could or could not work beyond those limits." In other words, the question was going to be whether, at the moment, he "felt up to it." App.74a.

Watters testified that "predictability" was essential for store managers like Bell and confirmed that stores need to have "a plan in place so that there is someone there who[,] if things get crazy, unexpected situations come up, people quit, people get sick, trucks break down, whatever it may be, there's someone there to step up and take care of business." App.77a-78a. That did not give Watters the confidence he needed in Bell's ability to do his job.

B. Procedural History

1. The District Court: Jury Verdict for O'Reilly

Bell sued O'Reilly in federal district court in Maine, alleging O'Reilly violated the ADA when it failed to provide Bell with a reasonable accommodation. App.4a.

The case proceeded to trial, where Bell's position was that he requested a reasonable accommodation and O'Reilly rejected it. App.4a. O'Reilly responded that the request would have prevented Bell from performing a store manager's essential functions (working at least 50 hours per week and being available to handle all "unexpected situations"). App.4a, 77a-78a. For his part, Bell confirmed that he knew store managers were expected to work at least nine-and-a-half and often more than ten hours per day; that, even after his provider restricted him to nine hours per day, he "would have done what was needed" to keep his job; that he was "committed to the success of my store"; and that, "if there was no other option, then I would have found a way." App.72a-76a; *see* App.4a. As such, Bell conceded he was capable of working 50-plus hours per week and meeting all other essential functions of his job, even without an accommodation.

At the close of evidence, the parties and the district court discussed jury instructions. As pertinent to this petition, O'Reilly's counsel explained that Bell's failure-to-accommodate claim was "different in a sense" from his disability discrimination claim because it required him to show not only that he was disabled, but also that there was an "impact on [his] ability to work." App.63a. That is, O'Reilly's counsel explained, Bell was "only entitled to an accommodation, if at all, if he can prove that he needed that accommodation in order

to work, in order to do his job." App.63a. Bell's counsel did not disagree, but responded that Bell's need was "subsumed" in another instruction—one explaining that the proposed accommodation "would enable [Bell] to perform the essential functions of the job." App.64a.

The district court considered the arguments and indicated its tentative conclusion as follows:

> Well, it seems to me that proof that he needed an accommodation to perform the duties of this job is a correct statement of the law and, furthermore, that the proposed accommodation would have enabled him to perform the essential functions of the job is also a correct statement of the law and they're different.

App.64a.

Later, Bell's counsel conceded "it's possible that [Bell] could have continued to work without this accommodation," but still insisted it would have been "easier" for him with the accommodation, and that "it's not just that [O'Reilly] needed to make it possible [for Bell] to do the job, they could also make it easier to do the job." App.66a. The district court rejected that suggestion, stating: "'Easier' seems imprecise to me." App.66a.

The district court took the issue under consideration, but ultimately instructed the jury consistent with O'Reilly's position that, to prevail on his failure-to-accommodate claim, Bell had to prove that he was "disabled," that he "needed an accommodation to perform the essential functions of the job," that the proposed accommodation (restricting his hours) was "reasonable" and "would enable him to perform the essential functions of the job," and that O'Reilly "did

not reasonably accommodate his disability." App.68a-69a.

The jury returned a special verdict, finding that Bell had not proven O'Reilly was liable for disability discrimination, failure to accommodate, or retaliation under either the ADA or the Maine Human Rights Act. App.11a-14a.

2. The Court of Appeals: Reversed for a New Trial

Bell appealed and the United States Court of Appeals for the First Circuit reversed, holding the district court "erred when it instructed the jury that, for a disabled employee to make out a failure-to-accommodate claim, he must demonstrate that he needed an accommodation to perform the essential function of his job." App.7a (emphasis in original).

Specifically, the Court of Appeals ruled that "[a]n employee who can, with some difficulty, perform the essential functions of his job without accommodation remains eligible to request and receive a reasonable accommodation." App.6a. The opinion continued:

> For this reason, to make out a failure-to-accommodate claim, a plaintiff need only show that: (1) he is a handicapped person within the meaning of the Act; (2) he is nonetheless qualified to perform the essential functions of the job (with or without reasonable accommodation); and (3) the employer knew of the disability but declined to reasonably accommodate it upon request.

App.6a.

O'Reilly filed a petition for rehearing en banc, explaining that the decision conflicted with the authoritative decision of the Seventh Circuit Court of Appeals in *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013) ("*Brumfield*")—holding that an employee who is fully qualified for the job without accommodation "is not entitled to an accommodation in the first place"—and would "impose upon employers new and unmanageable burdens." *Brumfield*, 735 F.3d at 632. Both the original panel and the en banc panel of the Court of Appeals denied that petition. *See* App.9a-10a.

C. Basis for Federal Jurisdiction

The district court had original subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1332, and supplemental jurisdiction over the related Maine Human Rights Act claims pursuant to 28 U.S.C. § 1367.

The Court of Appeals for the First Circuit had jurisdiction over Bell's appeal from the judgment upon jury verdict in favor of O'Reilly pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

This petition satisfies both of the applicable considerations governing review on certiorari. Rules of the Supreme Court of the United States, Rule 10.

First, the decision of the First Circuit concerns an important question of federal law regarding employment discrimination with broad application throughout the United States. It is an issue that has not been but should be settled by this Court. Second, the decision of the First Circuit conflicts with every other Circuit that has addressed the issue either directly or indirectly. It is an area of law that requires clarity and consistency which, given the conflict among the Circuits, can only come from this Court.

I. THIS PETITION PRESENTS AN IMPORTANT ISSUE OF LAW REGARDING THE ADA AND DISABILITY DISCRIMINATION THAT APPLIES THROUGHOUT THE UNITED STATES.

The ADA—the successor to the Rehabilitation Act of 1973 (Pub. L. No. 93-112) (the "Rehabilitation Act")—provides broad nondiscrimination protection for individuals with disabilities in employment (Title I), in public services (Title II), and in public accommodations operated by private entities (Title III). 42 U.S.C. § 12101 *et seq.* Enacted in 1990—and amended in 2008 by the "ADA Amendments Act" (Pub. L. No. 110-325)—the ADA is a civil rights statute intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

In the 30 years since it was enacted, the ADA has been the subject of thousands of lower court decisions, consuming an increasing percentage of the civil dockets of federal district courts all over the country. *See* App. 90a-97a (statistics compiled by the Judiciary Data and Analysis Office of the Administrative Office of the U.S. Courts). In fact, ADA cases—a subcategory of civil rights cases—have increased almost 400% since 2005, accounting for 10,773 filings in 2017 alone. App.91a.

Since its enactment, this Court has heard more than two dozen ADA cases covering a broad spectrum of subjects ranging from whether one whose disability is mitigated by medications is deemed to be disabled (*Sutton v. United Air Lines*, 527 U.S. 471 (1999)) to whether asymptomatic HIV is a disability under the ADA (*Bragdon v. Abbott*, 524 U.S. 624 (1998)), whether the 11th Amendment bars employees of a state from recovering damages from the state for violations of the ADA (*Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)), whether collective bargaining agreements providing for disability benefits preclude recovery under the ADA (*Wright v. Universal Maritime Service Corp*, 525 U.S. 70 (1998)), whether receipt of social security disability benefits precludes recovery under the ADA (*Cleveland v. Policy Management Systems, Corp.*, 526 U.S. 795 (1999)), whether the ADA applies to state prisons and prisoners (*Pennsylvania Department of Prisons v. Yeskey*, 524 U.S. 206 (1998)), and whether an employee's request for an accommodation takes priority over a company's existing seniority system (*U.S. Airways v. Barnett*, 535 U.S. 391 (2002)).

However, this Court has never directly addressed the scope of an employer's duty to provide reasonable accommodations to disabled employees who are otherwise qualified to perform the essential functions of their job without accommodation. It is an issue that impacts thousands of cases a year, in every Circuit Court of Appeals and probably every district court in the United States. It warrants the authoritative resolution only this Court can provide.[2]

In sum, the decision of the Court of Appeals in this case marks a radical departure from 30 years of jurisprudence regarding the ADA—seeking to balance the statutory objectives of equal access and equal

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[2] The issue presented here was not precisely raised but was at least foretold by this Court's decision in *Alexander v. Choate*, 469 U.S. 287 (1985), decided under the predecessor Rehabilitation Act. In that case, alleging discrimination based on allegations of "disparate treatment" (not failure to accommodate), the Court first acknowledged the "two powerful but countervailing considerations" inherent in the statute: "the need to give effect to the statutory objectives and the desire to keep [the statute] within manageable bounds." *Id.* at 299. However, recognizing the "legitimacy of both goals and the tension between them," the Court still focused its analysis of who was "otherwise qualified" with reference to the "ultimate question" of the modifications necessary to meet the "needs of the handicapped." *Id.* (emphasis added).

The Court expressed a similar sentiment in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987), another case decided under the Rehabilitation Act. There, the Court observed that most cases would require "individualized inquiries," but emphasized that employers need only consider whether reasonable accommodations are appropriate when the handicapped person is otherwise "not able to perform the essential functions of the job." *Id.* at 287, n.17. The implication for this case is that, if an employee is *already* able to perform the essential functions of the job, no accommodation is needed.

employment for disabled persons within "manageable bounds." It also threatens to impose an infinite duty on employers to provide otherwise qualified disabled employees with not only what they need to achieve equal access, but also what they simply desire to make their job "less difficult." If that is indeed what the law requires, the pronouncement should come from this Court and should apply consistently in all federal courts.[3]

II. THE DECISION FROM THE FIRST CIRCUIT CONFLICTS WITH EVERY OTHER CIRCUIT THAT HAS CONSIDERED THE ISSUE.

The decision in this case is an anomaly, contrary to the express purpose of the ADA—to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."

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[3] The significance of the First Circuit's decision in *Bell v. O'Reilly*, 972 F.3d 21 (1st Cir. 2020) on the national discourse concerning employment discrimination cannot be overstated. Indeed, the case has already been excerpted and reported upon in at least four prominent and influential secondary sources covering employment law developments.

Each of those resources states some small variation of the holding of that case—that even employees who can perform the essential functions of their jobs without accommodation remain eligible to request and receive reasonable accommodations under the ADA. *See Americans With Disabilities: Practice & Compliance Manual* (Thomson Reuters, February 2021 Update), §§ 7:130, 7:410, 7:420; Gary S. Marx, *Disability Law Compliance Manual* (Thomson Reuters, December 2020 Update), § 2:2; Merrick Rossein, *Employment Discrimination Law and Litigation* (Thomson Reuters, December 2020 Update), § 23:43; James O. Castagnera et al., *Accommodation for Employees Who Can Perform Job Without Accommodation With Some Difficulty*, TERMINATION OF EMPLOYMENT BULLETIN, October 2020, at NL6.

42 U.S.C. § 12101(b)(2). It is also contrary to the specific statutory language defining what it means to "discriminate against a qualified individual on the basis of disability"—which requires employers to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual." *See* 42 U.S.C. § 12112(a). The law should not compel employers to accede to the predictably endless requests of disabled employees who have no known limitations impeding their ability to perform the essential functions of their jobs simply to make them "less difficult."

As O'Reilly now demonstrates, the decision of the First Circuit is not only illogical and contrary to several statements made by this Court throughout the years, but also contrary to the pronouncements, direct or indirect, of every other Circuit Court of Appeals. The conflict cannot abide in this context, where concepts of employment discrimination under the ADA must be applied consistently in all district courts and appellate courts throughout the United States. However, with the conflict now manifest, clarity can only come from this Court.

1. The First Circuit

The Court of Appeals in this case ruled it was error for the district court to have instructed the jury that "for a disabled employee to make out a failure to accommodate claim, he must demonstrate that he needed an accommodation to perform the essential functions of his job." App.5a (emphasis in original). Rather, the Court of Appeals held, even employees who can already perform the essential functions of their job—albeit "with some difficulty"—can request an accommodation. App.6a. Specifically, the Court of Appeals

stated that, to prevail on a failure-to-accommodate claim:

> a plaintiff need only show that: (1) he is a handicapped person within the meaning of the Act; (2) he is nonetheless qualified to perform the essential functions of the job (with or without reasonable accommodation); and (3) the employer knew of the disability but declined to reasonably accommodate it upon request.

App.6a.

O'Reilly submits that ruling fails to comprehend the distinction between a claim under the ADA for discrimination based on "disparate treatment" and one for discrimination based on a "failure to accommodate." In both cases, a plaintiff must prove he is "handicapped" within the meaning of the ADA, and that he is "otherwise qualified" (meaning he can perform the essential functions of the job, with or without accommodation). 42 U.S.C., §§ 12101, 12112. If the employee meets those two standards (is "disabled" but "otherwise qualified"), then the employer cannot engage in disparate treatment, that is, cannot treat the disabled employee any differently than other employees just because of that disability.

But where the claim is one for discrimination based on a failure to accommodate, the employee surely must also establish he <u>needs</u> the accommodation requested. Otherwise, if employees can now demand accommodations simply to make their jobs "less difficult," the fundamental relationship between employers and employees will be turned on its head and employers will be exposed to endless demands—each

demand compelling engagement in the cumbersome "interactive process" necessary when an employee merely makes a request—and then infinite litigation that will destroy the fine balance intended by the anti-discrimination provisions of the ADA. Yet, that is presently the state of the law in the First Circuit.

2. The Second Circuit

Contrary to the First Circuit, decisions from the Second Circuit comprehend the nuance suggested in this petition—the critical distinction between a claim of discrimination based on disparate treatment and one based on allegations of a failure to accommodate. The Second Circuit accomplishes the proper balance intended by the ADA by making clear that, in the failure-to-accommodate context, a claimant must, in addition, establish a need for the requested accommodation.

For instance, in *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1 (2d Cir. 1999), a former high school head custodian sued his school district seeking damages under the ADA for the school's alleged failure to provide reasonable accommodation for his disability. *Id.* at 4. The district court granted summary judgment for the school district, ruling that the plaintiff was estopped by reason of prior inconstant statements in social security proceedings from asserting he could only perform in a sedentary position. The Court of Appeals affirmed, ruling:

> [T]o make out a prima facie case under the ADA, [the plaintiff] was required to show (1) that he was an individual who had a disability within the meaning of the statute; (2)

> that the School District had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position sought; and (4) that the School District refused to make such accommodations.

Id. at 6 (emphasis added). *See also Felix v. N.Y.C. Transit Authority*, 324 F.3d 102, 107 (2d Cir. 2003) ("The ADA mandates reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; it does not authorize a preference for disabled people generally."); *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1516 (2d Cir. 1995) ("[T]he [ADA's] accommodation obligation does not require the employer to make accommodations that are 'primarily for the [individual's] personal benefit,' such as an 'adjustment or modification [that] assists the individual throughout his or her daily activities, on and off the job,' or to provide 'any amenity or convenience that is not job-related.'" (quoting 29 C.F.R. Pt. 1630, App'x at § 1630.9 ("Interpretative Guidance on Title I of the Americans with Disabilities Act")).

In sum, the Second Circuit, unlike the First Circuit, does not permit a disabled individual to pursue a claim for failure to accommodate when—like Bell in this case—they can already perform the essential functions of their job without an accommodation. And, as O'Reilly now demonstrates, all of the remaining Circuit Courts of Appeal comport with the Second Circuit and stand in direct contradiction with the First Circuit.

3. The Third Circuit

Case law from the Third Circuit also recognizes the obligation of a plaintiff in a discrimination case involving allegations of failure to accommodate to have a need for the requested accommodation.

In *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3d Cir. 2004), a former police officer who suffered from depression sued the police department alleging discrimination under the ADA. *Id.* at 755. The district court granted summary judgment in favor of the police department, ruling that the officer's limitations did not significantly restrict him. *Id.* The Court of Appeals reversed, concluding there was at least a question of fact whether the officer's limitations would prevent him from working in what it called "a broad class of jobs." *Id.* According to the Court of Appeals, to prove his failure-to-accommodate claim, the plaintiff had to show:

> (1) that there was a vacant, funded position; (2) that the position was at or below the level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the essential duties of this job with reasonable accommodation. If the employee meets his burden, the employer must demonstrate that transferring the employee would cause unreasonable hardship.

Id. at 770 (quoting *Donahue v. CONRAIL*, 224 F.3d 226, 230 (3d Cir. 2000) (emphasis added)).

As the Court of Appeals explained it, what constitutes a "reasonable accommodation" can be derived from regulations governing the Equal Employment

Opportunities Commission ("EEOC"), which refers to disabilities "in need of an accommodation":

> [T]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitation.

Id. at 771 (citing 29 C.F.R., § 1630.2(o)(3)) (emphasis added).

Similarly, in *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318 (3d Cir. 2003), a former employee brought an action against her former employer based on a claim the employer failed to accommodate her psychiatric disability. *Id.* at 321. The Court of Appeals affirmed, ruling there was no genuine issue of material fact to support a conclusion the employee was terminated due to her disability. *Id.* In the process, however, the Third Circuit repeatedly affirmed that a plaintiff must justify a "need for an accommodation." *See e.g.*, *id.* at 333 ("[The employer] cannot be held liable for failing to read [the employee's] tea leaves. [The employee] had an obligation to truthfully communicate any need for an accommodation, or to have her doctor do so on her behalf. . . . ").

4. The Fourth Circuit

The Court of Appeals for the Fourth Circuit has explained O'Reilly's point precisely, focusing on the critical distinction between a discrimination claim

based on disparate treatment and one based on a failure to accommodate.

In *Rhoads v. F.D.I.C.*, 257 F.3d 373 (4th Cir. 2001), a former bank employee who suffered from asthma and migraines brought an action against the FDIC, claiming discrimination based on disparate treatment and failure to accommodate. *Id.* at 376. The district court granted summary judgment in favor of the FDIC and the Court of Appeals affirmed as to those claims (though it reversed on the plaintiff's retaliation claim for reasons not germane here). *Id.*

In its opinion, the Court of Appeals first explained that, for both her disparate treatment claim and her failure-to-accommodate claim, the plaintiff had to prove she was "disabled" within the meaning of the ADA. *Id.* at 387. In the footnote that followed, the Court of Appeals explained the critical differences between those two claims:

> In a wrongful discharge case under the ADA, a plaintiff makes out a prima facie case by demonstrating that "(1) he is within the ADA's protected class; (2) he was discharged; (3) at the time of his discharge, he was performing the job at a level that met his employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination."
>
> In a failure-to-accommodate case, a plaintiff establishes a prima facie case by showing (1) that he was an individual who had a disability within the meaning of the statute; (2)

> that the [employer] had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position . . . ; and (4) that the [employer] refused to make such accommodations.

Id. at 387, n. 11 (emphasis added).

The clear implication of the case, however, is that employees cannot establish a prima facie case if they are disabled but already capable of performing the essential functions of their job without accommodation.

5. The Fifth Circuit

In *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), one city employee with impaired vision and another with insulin dependent diabetes filed a class action lawsuit against the city after it adopted a driver safety program that established physical standards for city employees who drive on public roads as an essential part of the job. *Id.* at 1388-89. The plaintiffs alleged the program discriminated against them in violation of the Rehabilitation Act. *Id.* at 1389.

The district court certified two classes of plaintiffs and rendered judgment in their favor, but the Court of Appeals reversed, holding that city employees with impaired vision or insulin dependent diabetes were not "handicapped" under the statute. *Id.* at 1390-93. The Court of Appeals explained:

> [T]o determine whether an individual is otherwise qualified for a given job, we must conduct a two part inquiry. First, we must determine whether the individual could perform the essential functions of the job, *i.e.*,

> functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

Id. at 1393 (footnotes excluded).

In a similar vein, the Court of Appeals in *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991) articulated a "two-part inquiry," asking first if a disabled employee can perform the essential functions of his job and, second, "if we determine that [the plaintiff] is not able to perform the essential functions of the job, we must decide whether any 'reasonable accommodation' by the City would enable [the plaintiff] to perform those functions." *Id.* at 315. Implicit in that statement is the conclusion that, if the plaintiff is already able to perform the essential functions of their job, there is no need for the employer to provide an accommodation.

6. The Sixth Circuit

The Sixth Circuit has also made the point directly that accommodations are only necessary for disabled employees who need them. In *Black v. Wayne Center*, 225 F.3d 658 (6th Cir. 2000)—an unpublished decision, citable under Sixth Circuit rules as "instructive" or "helpful," *see Sheets v. Moore*, 97 F.3d 164, 167 (6th Cir. 1996); *Combs v. International Insurance Co.*, 354 F.3d 568, 593 (6th Cir. 2003)—a jury found in favor of the plaintiff who claimed her employer violated the ADA by failing to accommodate her need to work

occasionally from home due to "exacerbations of Multiple Sclerosis." *Black*, 225 F.3d at 1.

The Court of Appeals reversed, based largely on the plaintiff's acknowledgement in opposition to the employer's motion for summary judgment that she "was able to perform all the essential requirements of the job at the time she sought accommodation." *Id.* at 3. As the Court of Appeals explained:

> [The plaintiff] cites no authority for what is apparently her view that the ADA requires an employer to provide accommodations even for employees who, although disabled, are able to perform the essential functions of the job without accommodation. Our research turns up no such authority; indeed, inasmuch as it is plaintiff's burden to demonstrate that a proposed accommodation is objectively reasonable, we think that where plaintiff is able to perform the job without accommodation, plaintiff cannot demonstrate the objective reasonableness of any desired accommodation.

Id. (emphasis added) (internal citations omitted).

7. The Seventh Circuit

The Seventh Circuit also made the point directly. In *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013), the City of Chicago dismissed a police officer after requiring her to submit to a series of psychological examinations. *Id.* at 622. The officer sued the City under the ADA. *Id.* The district court dismissed the officer's case for failure to state a plausible claim, and the Court of Appeals ultimately affirmed (though

it held the officer's psychological problems did not prevent her from performing her job). *Id.*

Discussing the term "otherwise qualified individual" as it appears in the reasonable-accommodation provisions of the ADA, the Court of Appeals concluded the test had "two steps." *Id.* at 632. The first step is whether the employee meets the employer's "legitimate selection criteria," and the second is whether the employee is "capable of performing the job's essential functions" with or without reasonable accommodations. *Id.*

However, the Court of Appeals explained the second step itself encompasses two categories: those who can perform the essential functions of the job even without accommodation, and those who could do so only if their employer were to make an accommodation for their physical or mental limitations. *Id.* Thus, the Court of Appeals explained, "an employer's accommodation duty is triggered only in situations where an individual who is qualified on paper requires an accommodation in order to be able to perform the essential functions of the job." *Id.* (citations omitted). The Court of Appeals concluded:

> It follows that an employer need not accommodate a disability that is irrelevant to an employee's ability to perform the essential functions of her job—not because such an accommodation might be unreasonable, but because the employee is fully qualified for the job without accommodation and therefore is not entitled to an accommodation in the first place.

Id.

The Court of Appeals underscored the point, explaining further as follows:

> A disabled employee who is capable of performing the essential functions of a job in spite of her physical or mental limitations is qualified for the job, and the ADA prevents the employer from discriminating against her on the basis of her irrelevant disability. But since the employee's limitations do not affect her ability to perform those essential functions, the employer's duty to accommodate is not implicated.

Id.

8. The Eighth Circuit

The Eighth Circuit has also made the point directly that accommodations are only necessary for disabled employees who need them.

In *Lowery v. Hazelwood School District*, 244 F.3d 654 (8th Cir. 2001), a school district terminated a school security guard, mentally and physically impaired by childhood polio, when he failed to respond adequately to several student pranks. *Id.* at 656-57. The security guard sued the school district under the ADA, alleging both disparate treatment and a failure to accommodate by moving him to a custodial position. *Id.* at 656. The district court entered summary judgment in favor of the school district, ruling that the plaintiff failed to establish a prima facie case and the Court of Appeals affirmed. *Id.*

With respect to the disparate treatment claim, the Court of Appeals ruled there was no credible evidence the employee was treated differently than

similarly situated employees. *Id.* at 658-59. The Court of Appeals ruled the failure-to-accommodate claim also failed because the employee never conveyed to the school district that he required an accommodation. *Id.* at 660. The Court of Appeals explained:

> [The employee's] 1996 request [to be transferred to a position as a custodian] was apparently a response to his suspension, and he does not argue that he indicated that he needed an accommodation for his disability. Moreover, because Lowery argues that he was capable of performing the essential functions of the security position, he cannot argue that he was entitled to any accommodation.

Id. (emphasis added) (internal citations omitted).

9. The Ninth Circuit

In *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001), a medical transcriptionist with obsessive compulsive disorder brought an action against his former employer alleging he was terminated in violation of the ADA. *Id.* at 1130, 1133. The district court granted summary judgment in favor of the employer, ruling as a matter of law that it satisfied its duty to reasonably accommodate the plaintiff's disability. *Id.* at 1133.

The Court of Appeals reversed, ruling: "Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations." *Id.* at 1137 (emphasis added). *See also id.* at 1138 (confirming an employer's

continuing obligation to find a reasonable accommodation once the employer is aware that "the initial accommodation is failing and further accommodation is needed").

Similarly, in *Dunlap v. Liberty Natural Products, Inc.*, 878 F.3d 794 (9th Cir. 2017), a former employee who worked as a shipping clerk sued her former employer, alleging the employer subjected her to disparate treatment and failed to accommodate her disability (pain in both elbows) in violation of the ADA. *Id.* at 796-97. The jury returned a verdict for the plaintiff in the district court and the employer appealed. *Id.* at 797. The Court of Appeals affirmed, concluding the district court had erroneously conflated the elements of a claim for disparate treatment and failure to accommodate, but the error was harmless in this case "because the employer was on notice of the need to accommodate." *Id.* at 800. *See also Johnson v. Board of Trustees of the Boundary County School District*, 666 F.3d 561, 567 (9th Cir. 2011) (recognizing that "a failure-to-accommodate claim is analytically distinct from a claim of disparate treatment or impact under the ADA" and that, under guidelines issues by the EEOC, the obligation to make reasonable accommodation is owed only to an individual with a disability if the employee "needs a reasonable accommodation to perform the job's essential functions").

10. The Tenth Circuit

In *White v. York International Corporation*, 45 F.3d 357 (10th Cir. 1995), a discharged employee sued his former employer under the ADA, alleging his employer had failed to accommodate a disability that prevented him from standing for longer than two

hours. *Id.* at 359. The district court granted summary judgment in favor of the employer because the plaintiff had failed to produce any evidence supporting his contention that he could perform the essential functions of his job with reasonable accommodations. *Id.*

Affirming summary judgment, the Court of Appeals adopted from the Fifth Circuit the "two-part test for determining whether a person is qualified within the meaning of the ADA":

> First, we must determine whether the individual could perform the essential functions of the job, *i.e.*, functions that bear more than a marginal relationship to the job at issue.
>
> Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

Id. at 361-62 (quoting *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993)).

11. The Eleventh Circuit

In *Batson v. Salvation Army*, 897 F.3d 1320 (11th Cir. 2018), a former employee diagnosed with multiple sclerosis brought an action alleging that her employer denied her reasonable accommodation in violation of the ADA. *Id.* at 1322. The district court granted summary judgment in favor of the employer, and the Court of Appeals affirmed:

> The problem for [the plaintiff] is that she has offered no evidence that before her FMLA

> leave and her termination she needed either of the accommodations she previously had requested generally. . . .
>
> We agree with [the plaintiff] that the record establishes [the employer's] intent to deny her accommodation, but without evidence of a specific instance in which she needed an accommodation and was denied one, she cannot establish a failure to accommodate.

Id. at 1326 (emphasis added).

12. D.C. Circuit

Finally, in *Flemmings v. Howard University*, 198 F.3d 857 (D.C. Cir. 1999), an administrative assistant brought an action against a university asserting a claim of discrimination under the ADA for failing to reasonably accommodate her Meniere's disease and vertigo. *Id.* at 858. The district court granted summary judgment in favor of the employee and the university appealed. *Id.* The D.C. Circuit reversed, ruling the plaintiff could not prevail because her requests for a revised work schedule were made prior to a specific date "when she had not substantiated her need for any accommodations." *Id.* at 861.

13. Summation

The First Circuit ruled it was error to instruct the jury in a failure-to-accommodate case that the plaintiff had to prove he needed an accommodation. Every other Circuit Court of Appeals disagrees and rules that, in a failure to accommodate case, employers are only obliged to make accommodations employees need to perform the essential functions of their job. That is the sensible analysis, consistent with the goals and the language of the ADA, and that is an analysis that should be applied consistently in all federal courts.

CONCLUSION

The issue presented here is important and has broad application in employment cases throughout the United States. The conflict between the First Circuit and all other Circuit Courts of Appeal is pronounced and irreconcilable. Clarity in this area of law is critical, and it can only come from this Court.

For those and all the reasons stated above, O'Reilly respectfully requests that this Court issue a writ of certiorari to review the ruling of the Court of Appeals in this case.

Respectfully submitted,

JOHN MORRIS, ESQ.
COUNSEL OF RECORD
JAMES M. PETERSON, ESQ.
RACHEL M. GARRARD, ESQ.
STEVEN M. BRUNOLLI, ESQ.
HIGGS FLETCHER & MACK LLP
401 WEST A STREET, SUITE 2600
SAN DIEGO, CA 92101
(619) 236-1551
JMMORRIS@HIGGSLAW.COM

COUNSEL FOR PETITIONER

MARCH 1, 2021