No. 20-1224

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

BRIEF IN OPPOSITION

Allan K. Townsend
Counsel of Record
Chad T. Hansen
MAINE EMPLOYEE RIGHTS GROUP
92 Exchange Street
Portland, ME 04101
(207) 874-0905
allan@employeerightslaw.attorney

QUESTION PRESENTED

Whether the court of appeals erred in holding that an employee whose disability makes performing the essential functions of a job more difficult, painful, or medically inadvisable is eligible to seek a reasonable accommodation under the Americans with Disabilities Act.

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STATEMENT OF THE CASE

A. Factual background

Respondent Brian Bell managed petitioner's store in Belfast, Maine. Pet. App. 2a. Overseeing a team of eight to twelve, he "trained, supervised, and evaluated employees, monitored accounting, tracked inventory, and set prices." *Id.*

Mr. Bell typically worked a two-week rotating schedule of 45 hours Monday through Friday or 49-49.5 hours Monday through Saturday. Resp. C.A. Br. 4; *see also* Order on Def.'s Mot. Summ. J. 3, ECF No. 44 (MSJ Order).[1] Some weeks, he worked an extra 15-30 unscheduled minutes. Pet. App. 2a.

For nearly a year, Mr. Bell worked for petitioner without incident. MSJ Order 3-4. Things took a turn, however, after two shift leaders left the store. Pet. App. 2a. The district supervisor refused to authorize overtime for other employees, Resp. C.A. Br. 7, leaving Mr. Bell to "ma[ke] up the difference himself," Pet. App. 2a. For two weeks, Resp. C.A. Br. 7, he worked fifteen-hour days and almost 100 hours a week, Pet. App. 2a.

Mr. Bell has Tourette's syndrome, attention deficit/hyperactivity disorder, and major depression. Pet. App. 2a. "He takes medication, but experiences motor tics, often accompanied by mild verbal noise, and he cannot concentrate easily." *Id.* Working fifteen hours almost every day, including weekends,

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[1] In denying petitioner's motion for summary judgment, the district court construed the evidence in the light most favorable to Mr. Bell. *See* MSJ Order 9-10.

exacerbated these and other symptoms. *Id.* Finally, one day at work, Mr. Bell "broke down." *Id.* 3a. "[E]xhausted, he began to tremble uncontrollably, his motor tics relentless." *Id.* He went outside to his truck to take a break, but his district supervisor "demanded that he return" to work. *Id.* Instead, after making sure that the store was appropriately staffed, Mr. Bell went to see his medical provider. Resp. C.A. Br. 9.

After learning that Mr. Bell had discussed these symptoms with his provider, petitioner advised him that he had to submit a "fitness for duty" form before returning to work. Pet. App. 3a. Mr. Bell's provider indicated that he could return to work in a few days "so long as he received an accommodation." *Id.* To prevent Mr. Bell from being regularly scheduled for excessive work hours, *see* Resp. C.A. Br. 9-10, she specified that "Mr. Bell because of his mental health issues should not be scheduled for more than 9 hours 5 days a week," Pet. App. 3a.

Treating this as a request for a "hard cap" on hours worked, petitioner denied the accommodation. Pet. App. 3a. When Mr. Bell then clarified that the requested cap was only on *scheduled* hours, not total hours, petitioner asked for a revised form. *Id.* Mr. Bell's provider declined to revise the form, deeming the original language adequate, but invited petitioner to contact her to discuss the request. *Id.* 3a-4a. Petitioner never did so. *Id.* 4a.

Seeking to get back to work, Mr. Bell sent an e-mail to his supervisor. MSJ Order 7. He wrote: "I am still hopeful that O'Reilly Auto Parts will accommodate me by permitting my return to work at the Belfast store as a store manager or Assistant Manager." *Id.* He again clarified that, when necessary,

he could "work some hours beyond" what was scheduled, "so long as [his] scheduled hours [were] limited to 45 hours per week." *Id.* Petitioner never replied. *See id.* Indeed, petitioner "conducted no further analysis of Mr. Bell's request." *Id.* at 16. Mr. Bell learned that he had been terminated when he received a letter in the mail informing him of what he would need to do to maintain his health insurance. Resp. C.A. Br. 14.

B. Procedural history

1. Mr. Bell filed suit against petitioner in federal district court in Maine, alleging among other things that petitioner failed to provide him with a reasonable accommodation in violation of the Americans with Disabilities Act. Pet. App. 4a.

The district court denied petitioner's motion for summary judgment. Pet. App. 4a. Based on the parties' pre-trial submissions, the court concluded that some ability to work extra hours on short notice was an "essential function" of the store manager position. MSJ Order 13. It rejected, however, petitioner's argument that the scheduling accommodation sought by Mr. Bell was necessarily incompatible with that function. *Id.* at 13-15. Rather, both what amount of extra work the job actually required and what work Mr. Bell could do beyond the scheduled hours he had requested were open factual questions. *See id.* at 14. Thus, while "the ability to work unscheduled hours at unpredictable times was an essential function of the Store Manager position . . . a reasonable jury could conclude that [Mr. Bell's] requested scheduling accommodation would have permitted him to work those hours if necessary." *Id.* at 15.

At trial, petitioner again argued that the requested accommodation was not reasonable because it was incompatible with the essential functions of the manager job, which it claimed included working "at least fifty hours a week, with the flexibility to do more[.]" Pet. App. 4a. Mr. Bell replied that the accommodation restricted only "scheduled" hours, and he would have been able to work additional hours from time to time as necessary. *Id.* On cross-examination, petitioner's counsel asked what would have happened if some need to work longer hours arose unpredictably on a particular day. *See id.* 73a-74a. Mr. Bell responded that he was "committed to the success of [his] store and if there was no other option, then [he] would have found a way" to get the job done. *Id.* 74a; *see id.* 4a.

Over Mr. Bell's objection, the trial court accepted petitioner's request to charge the jury that Mr. Bell had to prove he "*needed* an accommodation to perform the essential functions of the job[.]" Pet. App. 64a-65a, 69a (emphasis added). In its closing, petitioner took advantage of that instruction and "pivoted" its argument to the jury. *Id.* 5a. Where before it had argued that the requested scheduling accommodation would make it impossible to do the manager's job, now it emphasized that "the judge will instruct you that even if you have a disability, you're entitled to an accommodation only if you need that accommodation in order to do the essential functions of your job." *Id.* 4a-5a. Then, pointing to the colloquy about handling possible emergencies, it argued that Mr. Bell had admitted he did not "need" an accommodation in the first place. *See id.* 5a. If Mr. Bell could work long hours when necessary, counsel argued, then "he doesn't need the accommodation . . . [and] he is at least not entitled

to an accommodation under the law." *Id.* With that instruction and argument, the jury returned a verdict for petitioner. *Id.*

2. On appeal, Mr. Bell argued in part that the district court erred in instructing the jury that he had to prove he "needed" an accommodation to do his job, in the way the term "needed" was ultimately used in closing argument. Pet. App. 5a. The First Circuit agreed. *Id.* It held that an "employee who can, with some difficulty, perform the essential functions of his job without accommodation remains eligible to request and receive a reasonable accommodation." *Id.* 6a.

The court rejected petitioner's argument that its jury instruction was "functionally equivalent" to a pattern instruction, also given at trial, specifying that "an employee must demonstrate 'that the proposed accommodation would *enable* him to perform the essential functions of the job.'" Pet. App. 7a (emphasis added). The "needed" instruction given at trial "required an employee to demonstrate that he could not perform the essential functions of his job without accommodation." *Id.* 6a. The pattern instruction, by contrast, expressed "only the well-settled rule that a proposed accommodation must be 'effective,' leaving an employee able to perform the essential functions of the job." *Id.* (quoting *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 66 (1st Cir. 2020)).

The First Circuit likewise rejected petitioner's argument—again based on its theory that managers must work "at least fifty hours a week, with the flexibility to do more"—that "no reasonable jury could have found that Bell would have been able to perform the essential functions" of the manager's job. Pet. App. 7a. Like the district court at the summary judgment

stage, the court of appeals instead concluded that "[o]n this issue and on this record, a [properly instructed] jury could have found for Bell." *Id.* It accordingly vacated the district court's judgment in part and remanded for a new trial on Mr. Bell's failure-to-accommodate claim. *Id.* 7a-8a.[2]

REASONS FOR DENYING THE WRIT

Petitioner argues that an employee with a disability is not entitled to an accommodation unless he is utterly "unable to do the essential functions of the job" without one—that is, unless he "needs" an accommodation in the narrowest possible sense of the word. *See* Pet. App. 7a (internal quotation marks omitted). The First Circuit rejected that construction of the ADA, recognizing that a reasonable accommodation under the statute can also address the ways in which a disability makes a job more difficult, painful, or risky to the health of the employee. *See id.* That is an entirely sensible application of the statute, and petitioner's contrary interpretation lacks support. There is no conflict among the circuits on the question petitioner asks this Court to address, and in any event that question is not well presented on the facts of this case. There is no reason for further review.

I. The decision below properly applies the ADA.

At trial, the jury was instructed that an employee with a disability must demonstrate that he "*needed* an

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[2] The court of appeals did not address Mr. Bell's separate argument that petitioner failed to engage in good faith in the "interactive process" the ADA requires so that employers and employees can seek to identify mutually acceptable accommodations. *See* Resp. C.A. Br. 35-44; MSJ Order 15-17.

accommodation to perform the essential functions of his job." Pet. App. 5a. In its decision below, the First Circuit explained that that instruction "required an employee to demonstrate that he could not perform the essential functions of his job without accommodation." *Id.* 6a. It would therefore bar relief for any employee who could struggle through and perform a job—even if a disability made doing so harder, more painful, or more dangerous to the employee's health, and even if some reasonable accommodation could alleviate those extra burdens without imposing any undue hardship on the employer. Petitioner now urges this Court to grant review and hold that that instruction correctly states the law.

Unsurprisingly, the statute offers no support for that position. The ADA's text does not require a showing of "need" for an accommodation. Instead, it prohibits employers from discriminating against qualified individuals on the basis of disability. 42 U.S.C. § 12112(a). It defines a "qualified individual" as an employee who "with or without reasonable accommodation, can perform the essential functions" of the job in question. *Id.* § 12111(8). One form of discrimination is the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability[.]" *Id.* § 12112(b)(5)(A). And an accommodation can include "job restructuring" or "modified work schedules," *id.* § 12111(9)(B), such as the accommodation Mr. Bell sought, Pet. App. 3a.

An employee whose disability affects his job performance in some way, but who is nonetheless able to perform his job's essential functions "without accommodation," is still a "qualified individual"

entitled to ADA protection. *See* 42 U.S.C. § 12111(8). Requiring a plaintiff to demonstrate that he "needed" an accommodation because he was utterly unable to perform the essential functions of his job without one—the constraint petitioner seeks to impose—would run counter to that textual definition.

Regulations and guidance from the Equal Employment Opportunity Commission further undermine petitioner's position. A reasonable accommodation should "remove[] or alleviate[]" barriers to an "equal employment opportunity"—including "an opportunity to attain the same level of performance" as a nondisabled employee. 29 C.F.R. app. § 1630.9 (2020). And longstanding enforcement guidance specifically contemplates providing a reasonable accommodation to an employee who can perform the essential functions of a job but who experiences difficulty in doing so because of a disability. EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, "General Principles" (2002), https://perma.cc/VXX9-938J. As an example, the guidance states that providing a stool for a cashier with lupus would be a reasonable accommodation for disability-related fatigue, even though the cashier could perform her job's essential functions without the accommodation. *See id.*[3]

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[3] EEOC guidance documents, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance[.]" *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (internal quotation marks and citations omitted); *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008).

Petitioner's interpretation of the reasonable accommodation requirement likewise finds no support in this Court's precedent. *See* Pet. 10-11. On the contrary, in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002), the Court recognized that the ADA mandates reasonable accommodations that remove or alleviate barriers in the workplace so that employees with disabilities can enjoy "the *same* workplace opportunities that those without disabilities automatically enjoy." *Id.* at 397; *see also id.* at 417 (Scalia, J., dissenting) (noting that the ADA "clears away . . . obstacles *arising from* a person's disability"). Work-related pain or difficulty caused by a disability can surely prevent an employee from accessing "the *same* workplace opportunities" that a nondisabled employee can, even if it does not completely preclude an individual from performing a particular job. There is no reason to construe the ADA to bar reasonable-accommodation relief in such situations.[4]

In contrast to petitioner's strained argument for a rigid "need" requirement, the decision below adopts a sensible construction of the ADA. It holds only that a properly instructed jury could find, on the facts of this case, that Mr. Bell was entitled to a modified work

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[4] Petitioner cites this Court's use of the word "needs" in *Alexander v. Choate*, 469 U.S. 287 (1985), but that case was about Medicaid coverage of inpatient hospital care, not employment discrimination. *See* Pet. 11 n.2. Similarly, petitioner cites a footnote reciting the basic factors to be considered when deciding whether an individual is "otherwise qualified" for a job under the Rehabilitation Act in *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987). That case was about whether a teacher with a contagious disease was a "handicapped individual," not whether she was entitled to an accommodation. *Id.* at 275.

schedule or similar change that would accommodate his specific disability, minimize unnecessary difficulty and negative health effects at work, and at the same time allow him to continue performing the essential functions of his job. *See* Pet. App. 6a-7a. The right to request just that sort of reasonable accommodation lies at the heart of the ADA.

II. There is no conflict among the circuits.

Petitioner claims that the decision below conflicts with decisions of all the other regional circuits. Pet. 12-29. That is not correct. In a series of cases petitioner ignores, courts of appeals that have considered factual situations similar to the one in this case have ruled in a manner consistent with the decision below. Conversely, the cases petitioner cites either are irrelevant to the question presented or consider materially distinct factual circumstances.

A. Relevant circuit court decisions are consistent with the First Circuit's approach.

ADA accommodation cases present a myriad of factual variations, with correspondingly varied legal issues. *See, e.g.*, 2 Thomas R. Trenkner, Americans with Disabilities: Practice & Compliance Manual § 7:126 (2021). But in cases where an employee experiences disability-related pain or difficulty at work, courts of appeals have consistently recognized that an ability to perform a job's essential functions even without a reasonable accommodation does not bar the employee from seeking one.

On facts like those here, for example, the D.C. and Sixth Circuits have followed an approach consistent with the First Circuit's. In *Hill v. Associates for*

Renewal in Education, Inc., 897 F.3d 232 (D.C. Cir. 2018), a teacher with an amputated leg requested a classroom aide to minimize pain from prolonged periods of standing. *Id.* at 239. Even though he could perform the essential functions of the job without accommodation, the court held that "[a] reasonable jury could conclude that forcing Hill to work with pain when that pain could be alleviated by his requested accommodation violate[d] the ADA." *Id.*

The Sixth Circuit has likewise held that an employee can be entitled to a reasonable accommodation to alleviate disability-related pain or symptoms at work. In *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099 (6th Cir. 2008), for example, the court held that a cashier with degenerative osteoarthritis could be entitled to use a stool, because that accommodation would enable her to work "without pain." *See id.* at 1108; *see also EEOC v. Dolgencorp, LLC*, 899 F.3d 428, 432-35 (6th Cir. 2018) (diabetic sales associate should have been allowed to keep orange juice at her post in order to avoid hypoglycemic episodes, although she was able to perform essential functions without accommodation); *Gleed v. AT&T Mobility Servs., LLC*, 613 Fed. Appx. 535, 539 (6th Cir. 2015) (sales associate with a leg disability could be entitled to accommodation when he "needed a chair to work—as other employees do—without great pain and a heightened risk of infection").[5]

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[5] In light of these more recent and more relevant decisions from the Sixth Circuit, there is no basis for petitioner's reliance, Pet. 21-22, on the unpublished and factually inapposite decision

The Third, Fifth, and Ninth Circuits have also held that employers must accommodate employees whose disabilities negatively affect their work life, even if they are able to perform essential job functions without accommodation. In *Feist v. Louisiana Department of Justice*, 730 F.3d 450 (5th Cir. 2013), for example, the court held that an attorney with osteoarthritis of the knee could be entitled to free on-site parking, even though she could perform her job's essential functions without accommodation, because "reasonable accommodations are not restricted to modifications that enable performance of essential job functions." *Id.* at 453; *see also Colwell v. Rite Aid Corp.*, 602 F.3d 495, 504-05 (3d Cir. 2010) (Rite Aid employee with visual impairment entitled to a scheduling modification so that she did not have to drive at night, even though she was able to perform her essential job functions without accommodation); *EEOC v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1111-13 (9th Cir. 2010) (deaf accounting clerk could be entitled to sign-language interpreter for meetings, even though he was able to do essential job functions without an interpreter).

The Tenth Circuit has also repeatedly upheld accommodations for workers who were able to perform essential job functions without accommodation. *See Sanchez v. Vilsack*, 695 F.3d 1174, 1182 (10th Cir. 2012) (transferring a secretarial employee with brain

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in *Black v. Wayne Center*, 2000 WL 1033026 (6th Cir. July 17, 2000). *Id.* at *1, *3 (social worker with multiple sclerosis not entitled to complete paperwork from home, partly because she had "never had a problem performing her paperwork obligations at the office").

trauma to an office in a different city to facilitate access to medical treatment "not per se unreasonable, even if an employee is able perform the essential functions of her job without [accommodation]," under the Rehabilitation Act); *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 915-16 (10th Cir. 2004) (factory foreman with hip-related disabilities entitled to use a golf cart on the factory floor, even though he could perform all essential job functions without the accommodation).

These courts have all recognized that individuals who in some sense do not "need" an accommodation to perform essential job functions are nevertheless entitled to seek one when it would alleviate unnecessary pain, discomfort, or health risks to the employee caused by the way a particular disability interacts with the circumstances of a particular job or workplace. There is no reason to think that any of them would disagree with how the First Circuit resolved the present case, or that they would find its approach to be an "unmanageable burden[]" on employers. *See* Pet. 8.[6]

B. Petitioner's cases are either irrelevant or factually distinct.

Petitioner cites many cases in support of its claimed conflict. But most of these citations rely on mischaracterizations of quotations, and the rest are factually inapposite. In almost all, whether an

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[6] Petitioner misattributes this language to *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013). Pet. 8. In fact, it is from one of petitioner's briefs. Pet. of Def.-Appellee Reh'g En Banc 2.

employee "needs" a reasonable accommodation, in the sense at issue here, was neither disputed nor decided.

1. In six cases, petitioner's citation relies solely on the appearance of the word "need" in an opinion. But a court's passing, colloquial use of "need" in the context of an irrelevant or tangential legal question does not create a circuit conflict. In *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318 (3d Cir. 2003), for example, a bank manager with depression failed to adequately communicate her accommodation request to her employer. *Id.* at 321, 332-34. The court's statement that "Conneen had an obligation to truthfully communicate any *need* for an accommodation" has no bearing on this case. Pet. 18 (quoting *id.* at 333 (emphasis added)). Five more cases are similar.[7]

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[7] *See Dunlap v. Liberty Nat'l Prods., Inc.*, 878 F.3d 794, 800 (9th Cir. 2017) (upholding jury verdict for a shipping clerk with an elbow injury where defendant "was on notice of the need to accommodate" and did not consider her request for carts and other accommodations); *Johnson v. Bd. of Trs.*, 666 F.3d 561, 565 (9th Cir. 2011) (teacher whose professional certification had lapsed was ineligible for accommodation; noting in passing that an employee who "needs an accommodation to perform a job's essential functions" is entitled to one (quoting 29 C.F.R. app. § 1630.9(a) (2011))); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001) (plaintiff with obsessive-compulsive disorder could be entitled to accommodation where employer failed to engage in the interactive process despite being "aware of the need for accommodation"); *Batson v. Salvation Army*, 897 F.3d 1320, 1326 (11th Cir. 2018) (plaintiff with multiple sclerosis could not establish any "instance in which she needed an accommodation and was denied one"); *Flemmings v. Howard Univ.*, 198 F.3d 857, 862 (D.C. Cir. 1999) (administrative assistant with vertigo was not entitled to an accommodation when she failed to "substantiate[] her need for an accommodation" with medical documentation).

2. In five other cases, petitioner misconstrues a court's recitation of the basic failure-to-accommodate elements and standard. For example, petitioner cites the following language from *Mitchell v. Washingtonville Central School District*, 190 F.3d 1 (2d Cir. 1999): "*with reasonable accommodation* he could perform the essential functions of the position." *Id.* at 6 (emphasis added). According to petitioner, this language demonstrates that an employee who is able to perform his job's essential functions without an accommodation is barred from seeking one. Pet. 16. Three sentences later, however, the court quotes the complete language: "whether, in other words, [the plaintiff] was able to perform the essential functions of that job, *either with or without accommodation*." Mitchell, 190 F.3d at 6 (emphasis added). Moreover, *Mitchell*'s holding is inapposite: the court held that Mitchell was not "otherwise qualified" for his school custodian job because he had previously testified that he was totally disabled and had to remain sedentary at all times. *Id.* at 6, 9. There is no reason to believe the Second Circuit would disagree with the First Circuit's approach here.[8]

Similarly, in three cases petitioner selectively quotes a court's discussion of the failure-to-accommodate test—"we must determine whether any reasonable accommodation by the employer would enable [the employee] to perform [the essential] functions"—to suggest that a plaintiff who can already

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[8] Neither would the Third Circuit. *See Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 773-74 (3d Cir. 2004) (police officer could be eligible for job transfer because he was regarded as unable to carry firearms due to a psychiatric impairment).

perform a job's essential functions is barred from seeking an accommodation. *See* Pet. 21, 27. But those cases were resolved on the quite different ground that, on their facts, no accommodation would have allowed the employees in question to perform the essential functions of their jobs. In *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), for example, the court asked whether any accommodation was possible only because it had already satisfied itself that the employees in question could not possibly perform an essential job function (driving) *without* accommodation, due to their diabetes and impaired vision. *Id.* at 1395. Ultimately, the court determined that no reasonable accommodation would have enabled them to drive without undue safety risks. *Id.* Two other cases with analogous language were resolved on virtually identical grounds.[9]

3. Four of petitioner's cases turn on other points not at issue here. In *Lyons v. Legal Aid Society*, 68 F.3d 1512 (2d Cir. 1995), for example, the court held that requiring an employer to pay for a parking space near work could be a reasonable accommodation under the ADA. *See id.* at 1516-17. The court explained that an attorney's "ability to reach her office and the courts [was] an essential prerequisite to her work," but that the reasonableness of her requested accommodation—

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[9] *See Chiari v. City of League City*, 920 F.2d 311, 319 (5th Cir. 1991) (construction worker with Parkinson's disease not "otherwise qualified" because no reasonable accommodation would allow him to perform the job's essential functions without endangering himself or others); *White v. York Int'l Corp.*, 45 F.3d 357, 362 (10th Cir. 1995) (machine operator with an injured ankle produced no evidence that any reasonable accommodation would have enabled him to perform the job's essential functions).

having her employer pay for a parking space—was a question of fact to be developed on remand. *Id.* That result is not in any tension with the decision below. Three other cases were likewise decided on distinct doctrinal grounds.[10]

4. Finally, petitioner also cites a case from the Seventh Circuit on which it relied heavily in its petition for rehearing en banc. But that case is inapposite because there the plaintiff's disability had no bearing whatsoever on her job.

In *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013), the court held that a police officer with "unspecified 'psychological problems,'" *id.* at 622, was not entitled to an accommodation where "nothing in her complaint suggest[ed] that her disability affected her ability to do any aspect of her job," *id.* at 633. It explained that the plaintiff had been deemed "fit for duty" during four separate psychological evaluations and even questioned whether her allegations were sufficient to satisfy basic pleading standards. *Id.* at 630, 633. Those facts sharply distinguish the case from this one. Here, the dispute only began when Mr. Bell's disability directly affected his job performance, and Mr. Bell's medical provider cleared him to return to

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[10] *See Felix v. N.Y.C. Transit Auth.*, 324 F.3d 102, 103, 107 (2d Cir. 2003) (transit employee with insomnia not entitled to accommodation because the one she sought did not "arise because of [her] disability" (internal quotation marks omitted)); *Lowery v. Hazelwood Sch. Dist.*, 244 F.3d 654, 660 (8th Cir. 2001) (school security guard not entitled to accommodation because he did not convey that his request was related to a disability); *Rhoads v. FDIC*, 257 F.3d 373, 380, 388-90 (4th Cir. 2001) (financial analyst not entitled to accommodation because she failed to "make a sufficient showing of disability" with respect to her secondhand smoke-induced asthma and migraines).

work only with a scheduling accommodation. Pet. App. 2a-3a.

The *Brumfield* court noted that the ADA requires reasonable accommodation only when an individual is "otherwise qualified" for a job. 735 F.3d at 632. It then reasoned that "those who are able to perform the essential functions of [a] job even without reasonable accommodation" are just "qualified"—not "otherwise" qualified. *Id.* But contrary to petitioner's suggestion, Pet. 23-24, that language does not conflict with anything in the decision below.

Three sentences later, for example, the *Brumfield* court made clear that it was considering only a situation in which a disability was "*irrelevant* to an employee's ability to perform the essential functions of her job[.]" 735 F.3d at 632 (emphasis added). Throughout, the court limited its discussion to an employee who "was able to perform all essential functions of her job *without regard* to her physical or mental limitations," *id.* (emphasis added)—that is, whose limitations had "no bearing" on her ability to do her job, *id.* at 633. There is no reason to think that, in speaking of employees who are "fully qualified for the job without accommodation," *id.* at 632, the *Brumfield* court had in mind individuals who, like Mr. Bell, need some accommodation to do their jobs without unnecessary pain or difficulty caused by a disability.

That limited reading of *Brumfield* is consistent with the Seventh Circuit's own cases. *Brumfield* itself distinguished *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789 (7th Cir. 2005), which held that a sales associate who was "able to perform all of the aspects of her job but simply had trouble getting to and from her workstation" could nevertheless be entitled to an

accommodation. *Id.* at 802-03. The *Brumfield* court explained that *Sears*'s articulation of the relevant ADA standard "usually captures the essence of a failure-to-accommodate claim," but distinguished cases in which an employee's disability is simply "irrelevant" to her job performance. *Brumfield*, 735 F.3d at 631-33. This case does not fit into that narrow category.

Indeed, the Seventh Circuit has cited *Brumfield*'s failure-to-accommodate holding only once, in *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846 (7th Cir. 2015). That case involved a plaintiff whose doctor had "cleared [him] to return to work without accommodations," and the court held that because his disability had no effect on his ability to perform the essential functions of his job he was not entitled to any accommodation. *Id.* at 852. The case was therefore very similar to *Brumfield* itself—and very different from this case, in which Mr. Bell's healthcare provider cleared him to work only with an accommodation.

By contrast, in *Kauffman v. Petersen Health Care VII, LLC*, 769 F.3d 958 (7th Cir. 2014), a nursing home hairdresser's disability precluded her from pushing clients in wheelchairs, which a jury could find was a non-essential function of her job, but did not affect her ability to cut hair. *Id.* at 960-61. Faced with that more complicated situation, the court held that the plaintiff's claim could go to the jury because she could be eligible for an accommodation relating only to that non-essential function. *See id.* at 962-64. Similarly, in *Shell v. Smith*, 789 F.3d 715 (7th Cir. 2015), the court held that a transit system mechanic with hearing and vision impairments could be entitled to an accommodation related to the non-essential job

function of driving city buses, even though he could perform his essential job functions without any accommodation. *Id.* at 716, 721.

Thus, in *Brumfield* and *Hooper*, the court rejected accommodation claims because it viewed the plaintiffs' disabilities as irrelevant to their jobs. In *Kauffman* and *Shell*, the court allowed claims to proceed where the disabilities were relevant, even if they did not preclude the plaintiff from performing essential functions. And finally, at least one district court in the Seventh Circuit has expressly distinguished *Brumfield* and *Hooper* on precisely this basis, and on facts similar to those in this case. In *Luckett v. Dart*, 2017 WL 3386117 (N.D. Ill. Aug. 7, 2017), the court denied an employer's motion for summary judgment where a correctional officer's disability (PTSD) did not prevent him from performing essential job functions but was nonetheless "not *irrelevant* to his ability to perform his job." *Id.* at *11 (citing *Brumfield*, 735 F.3d at 633).

Especially in light of these later decisions, there is no basis for concluding that the Seventh Circuit would disagree with the court below about the proper resolution of the present case.[11]

III. Petitioner's question is not well presented in this case.

Even if there were disagreement among the lower courts on the question framed by the petition, this case

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[11] Petitioner also cites four secondary sources as evidence of the broad importance of the decision below. Pet. 12 n.3. But those sources mention the decision only as an example of a new case in this legal area; they do not accord it any special significance.

would not present that question in a posture suitable for review by this Court.

Petitioner's question rests on a critical factual proposition—that Mr. Bell "d[id] not need" an accommodation because he "c[ould] perform [his] job without" one. Pet. i. But petitioner has repeatedly changed its position on that central issue. In the district court, it first argued that "there were times when Bell simply *could not* do what his job required, or he would suffer psychic harm." Def.'s Mot. Summ. J. 12, ECF No. 37. And in the First Circuit, it argued that the word "need" in the jury instruction that it sought meant no more than "enable." Petr. C.A. Br. 19. Now it returns to the argument it made to the jury—that Mr. Bell is not entitled to seek an accommodation because he is able to do his job without one.

Moreover, the question petitioner now frames requires an understanding of the "job" in question and its essential functions. *See* Pet. i. But, like Mr. Bell's ability to work without accommodation, the essential functions of his job were contested at trial and will be again on remand.

As the district court recognized, "[d]etermining what constitutes an essential job function is a complex and fact-sensitive consideration that varies case-by-case." MSJ Order 11-12; *see also McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013); *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014); *Samson v. Fed. Express Corp.*, 746 F.3d 1196, 1200-01 (11th Cir. 2014). In denying summary judgment, the court concluded that "the ability to work long hours on short notice at unpredictable times was an essential function" of Mr. Bell's store manager position. MSJ Order 13. But the parties vigorously disputed how

much extra work was really required and how often. *See, e.g.*, *id.* at 14-15.

In that regard, petitioner claimed that it was "essential for store managers to work at least fifty hours a week, with the flexibility to do more[.]" Pet. App. 7a. Mr. Bell, on the other hand, pointed out that petitioner's job description made no mention of the "number or nature or extent of the hours" that a store manager should work. Pl.'s Opp'n to Def.'s Mot. Summ J. 8, ECF No. 40. He further testified that for ten months he had successfully managed the Belfast store while working, on average, only around 47 scheduled hours per week and rare unscheduled hours. *Id.* at 9, 12; Resp. C.A. Br. 3-4; *see* Partial Tr. Proceedings 17-18, 24-25, ECF No. 107. Both courts below properly recognized that resolving these disputes was a matter for the jury—and that a reasonable jury could resolve them for Mr. Bell. Pet. App. 7a; MSJ Order 14-15.

Nothing in the original jury's verdict reveals whether or how it resolved these questions. *See* Pet. App. 11a-14a. And by the same token, nothing in the verdict supports petitioner's current factual assertion—built into its statement of the question presented—that Mr. Bell could "perform [his] job without accommodation." Pet. i. Petitioner thus asks the Court to consider the question it presents on a set of facts posited by one side, disputed by the other, and not resolved by any trier of fact. The case should instead return to the district court. *See* Pet. App. 7a-8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Allan K. Townsend
Counsel of Record
Chad T. Hansen
MAINE EMPLOYEE RIGHTS GROUP
92 Exchange Street
Portland, ME 04101
(207) 874-0905
allan@employeerightslaw.attorney

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