No. 20-1357

IN THE
Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS,
WELD COUNTY, COLORADO,
Petitioner,

v.

LAURIE EXBY-STOLLEY,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

SEAN MAROTTA
Counsel of Record
REEDY C. SWANSON
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
sean.marotta@hoganlovells.com

Counsel for Petitioner

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INTRODUCTION

Failure-to-accommodate claims under the Americans with Disabilities Act are among the most frequent federal cases, but the circuits are deeply divided on the fundamental question of whether a plaintiff must prove that her employer's failure to accommodate her disability has a nexus to the terms and conditions of her employment. This conflict fairly cries out for this Court's review.

Exby-Stolley buries the split and attempts to minimize it by ginning up nonexistent intracircuit splits. But even if Exby-Stolley were correct about every circuit's practices—and she is not—she could at most establish *six* intracircuit conflicts, on top of seven courts

aligned with the Tenth Circuit. Such rampant confusion will not resolve itself without this Court's intervention.

Perhaps recognizing this, Exby-Stolley primarily claims that the petition depends on resolution of an antecedent, disputed question regarding the scope of the adverse-employment-action element. But the scope of the element logically *follows* the question in this case—whether the element exists. And that makes this case a *superior* vehicle for addressing the question presented because it does not require the Court to define the adverse-action requirement's precise contours.

Exby-Stolley thus identifies no barrier to review. The Tenth Circuit wrongly decided a threshold legal question, teeing up a potentially unnecessary second jury trial. If this petition succeeds, this litigation will either end or—at most—undergo a highly circumscribed remand. The Court should grant review to finally bring clarity to this important and often-recurring federal question.

ARGUMENT

I. THE SPLIT IS REAL AND DEEPLY ENTRENCHED.

1. Exby-Stolley relegates the division of authorities that consumed the en banc Tenth Circuit (Pet. 11-12) and led off the petition (*id.* at 12-23) to the middle of her brief. Opp. 20-32. That arrangement is telling. When Exby-Stolley eventually addresses the split, she cannot explain it away.

D.C. Circuit. The D.C. Circuit requires—as Exby-Stolley ultimately recognizes (at 30-31)—that an ADA failure-to-accommodate claim be "in regard to some adverse personnel decision or other term or condition

of employment." *Marshall* v. *Federal Express Corp.*, 130 F.3d 1095, 1099 (D.C. Cir. 1997); *see also Duncan* v. *Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001) (en banc). She nevertheless maintains that the court has jettisoned the requirement through some combination of *Aka* v. *Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc), and *Hill* v. *Associates for Renewal in Education, Inc.*, 897 F.3d 232 (D.C. Cir. 2018).

Any apparent tension is easily reconciled: Neither *Aka* nor *Hill* concerned the adverse-employment-action requirement. The only statutory element at issue in *Aka* was whether the plaintiff was a "qualified individual." 156 F.3d at 1300 (quoting 42 U.S.C. §12112(b)(5)(A)). *Hill* likewise did not involve a contested adverse employment action; the plaintiff had allegedly been fired. 897 F.3d at 235. There is no reason to assume an intracircuit split because the court has issued subsequent opinions that do not address uncontested elements. *See Citizens for Resp. & Ethics in Washington* v. *Federal Election Comm'n*, 993 F.3d 880, 893 (D.C. Cir. 2021) ("When faced with a claim of conflicting precedents," the D.C. Circuit strives "whenever possible" to "harmonize later decisions with existing authorities.").

First Circuit. The First Circuit likewise requires failure-to-accommodate plaintiffs to demonstrate an "adverse employment action," *Colón-Fontánez* v. *Municipality of San Juan*, 660 F.3d 17, 32 (1st Cir. 2011), implementing the ADA's requirement that the employer's refusal to accommodate must have "affected the terms, conditions, or privileges of the plaintiff's employment," *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999); *see also*

Bergeron v. *Cabral*, 560 F.3d 1, 7-8 (1st Cir. 2009) (noting connection between phrase "adverse employment action" and "the material terms or conditions" of employment), *abrogated on other grounds by Maldonado* v. *Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009).

Citing exclusively cases omitting the adverse-employment-action requirement, Exby-Stolley claims a discrepancy. Opp. 23-24. But the First Circuit itself explained any apparent inconsistency when it said that the element "that [the] plaintiff suffered in the terms and conditions of her employment" often "require[s] no discussion." *Calero-Cerezo* v. *U.S. Dep't of Justice*, 355 F.3d 6, 20 n.3 (1st Cir. 2004); *see* Pet. 18. Exby-Stolley has no response.[1]

Second Circuit. In the Second Circuit, Exby-Stolley tries to find a distinction between its holding that an "alleged failure to accommodate" must have "*caused* the plaintiff's" adverse employment action and a requirement that plaintiff have suffered an adverse employment action. Opp. 25. But if the adverse employment action were unnecessary, then it wouldn't matter whether the refusal to accommodate caused it.

Exby-Stolley also offers a handful of cases in which the adverse-employment-action requirement went unmentioned in connection with the failure-to-accommodate claim. But these cases either involved an adverse employment action, *see Brady* v. *Wal-Mart Stores, Inc.*, 531 F.3d 127, 134 (2d Cir. 2006); *Graves* v. *Finch Pruyn & Co.*, 457 F.3d 181, 184 (2d Cir. 2006);

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[1] Exby-Stolley alludes to First Circuit model jury instructions, but does not cite them. *See* Opp. 20-21 n.3, 23. To our knowledge, the First Circuit does not issue model civil jury instructions.

Mitchell v. *Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 4 (2d Cir. 1999), or otherwise did not require the court to address the element, *see Noll* v. *International Bus. Machs. Corp.*, 787 F.3d 89, 96-97 (2d Cir. 2015) (existing accommodations were reasonable); *Lyons* v. *Legal Aid Soc'y*, 68 F.3d 1512, 1515 (2d Cir. 1995) ("only question" at issue was whether request was unreasonable "as a matter of law").

Eighth Circuit. Exby-Stolley ultimately cannot deny that the Eighth Circuit has, for nearly two decades and with only one published exception, included an adverse-employment-action requirement in its case law. *See* Opp. 26-27.[2] She instead claims that this consistent position has always been dicta. This approach to precedent is deeply inconsistent; for other circuits, Exby-Stolley claims there is *no* adverse-employment-action requirement merely because some opinions have omitted it when resolving cases on other grounds. In any event, she is wrong: In *Fenney* v. *Dakota, Minnesota & Eastern Railroad Co.*, the Eighth Circuit reversed a decision granting summary judgment only after concluding that the plaintiff introduced adequate evidence of "constructive demotion." 327 F.3d 707, 717-718 (8th Cir. 2003). And in *Kelleher* v. *Wal-Mart Stores, Inc.*, the court affirmed summary judgment for the employer on a failure-to-accommodate claim solely because plaintiff "failed to show she suffered an underlying adverse employment action." 817 F.3d 624, 632 (8th Cir. 2016).

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[2] *Kammueller* v. *Loomis, Fargo & Co.* did not arise under federal law, but, with one exception not relevant here, applies the "same standard" used in ADA cases. 383 F.3d 779, 784 (8th Cir. 2004).

Exby-Stolley also protests that two cases before *Fenney* did not mention the adverse-employment-action requirement. *See* Opp. 27-28. But neither purported to comprehensively describe the cause of action, and both were resolved on other grounds. *See Ballard* v. *Rubin*, 284 F.3d 957, 964 (8th Cir. 2002) (plaintiff "never requested accommodation"); *Kiel* v. *Select Artificials, Inc.*, 169 F.3d 1131, 1136-37 (8th Cir. 1999) (en banc) (plaintiff received reasonable accommodation). And, regardless, the Eighth Circuit required an "adverse employment action" in failure-to-accommodate cases before *Ballard* and *Kiel*. *See Benson* v. *Northwest Airlines, Inc.*, 62 F.3d 1108, 1111-12 (8th Cir. 1995).

Ninth Circuit. Exby-Stolley concedes that multiple, published Ninth Circuit decisions "do mention" an adverse-employment-action "element in failure-to-accommodate cases." Opp. 28. But, she claims (at 28-29) the circuit is practically aligned with the Tenth because it found the requirement satisfied in *EEOC* v. *UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010). That case, however, merely reflects that the Ninth Circuit has adopted a broader view of what constitutes an adverse employment action. *See Ray* v. *Henderson*, 217 F.3d 1234, 1240-43 (9th Cir. 2000). It does not mean the Ninth Circuit considers the element satisfied "in *all* cases." Opp. 29.

Federal Circuit. By now, the flaw in Exby-Stolley's analysis of the Federal Circuit's precedent is familiar: She cites two cases—one unpublished—that do not purport to set out all elements of a failure-to-accommodate claim and reject the plaintiffs' claims on unrelated grounds. *See Office of Senate Sergeant at Arms* v. *Office of Senate Fair Emp. Pracs.*, 95 F.3d 1102,

1107 (Fed. Cir. 1996); *Thibeault* v. *Merit Sys. Prot. Bd.*, 611 F. App'x 975, 977, 978-979 (Fed. Cir. 2015) (per curiam). Neither is inconsistent with the adverse-employment-action requirement recognized elsewhere. *See* Pet. 23.

2. Exby-Stolley also briefly contends that the split lacks real-world consequences. But this question concerns the basic elements of an ADA failure-to-accommodate claim; even Exby-Stolley recognizes "that the issue presented is likely to recur." Opp. 20.

The question is also foundational to the ADA's implementation. The threshold elements shape ADA compliance programs and prospective plaintiffs' decisions about whether to initiate litigation. Pet. 24. Once a case is underway—and contrary to Exby-Stolley's suggestion (at 21)—district courts regularly look to circuit cases incorporating an adverse employment action into the elements of a failure-to-accommodate claim. *See, e.g.*, *LeBarron* v. *Interstate Grp., LLC*, ___ F. Supp. 3d ___, 2021 WL 1177792, at *4 (D. Nev. 2021) (citing *Samper* v. *Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012)); *Carlentine* v. *Duggan*, No. 8:19CV251, 2020 WL 1820129, at *2-3 (D. Neb. Apr. 10, 2020) (citing *Gardea* v. *JBS USA, LLC*, 915 F.3d 537, 541 (8th Cir. 2019)); *Rosado* v. *Fondo del Seguro del Estado*, No. 08-2264 (GAG), 2012 WL 405403, at *6 (D.P.R. Feb. 8, 2012) (citing *Colón-Fontánez*, 660 F.3d at 32)).[3] In short, the split is real and fundamental to ADA accommodation

[3] Exby-Stolley looks (at 26, 29) to the Eighth and Ninth Circuits' model jury instructions to try to minimize the split's impact, but as we explained, case law controls over the model instructions in both circuits. Pet. 20 n.3, 22 n.4. Exby-Stolley has no answer.

cases. There is no prospect it will self-correct. The Court should step in.

II. THERE IS NO BARRIER TO THIS COURT'S REVIEW.

A. There Is No "Antecedent" Issue.

Exby-Stolley's leading argument—that there is an "antecedent" issue obstructing this Court's review, *see* Opp. 1—gets things exactly backwards. The question Exby-Stolley describes (at 12-16) concerns how *stringent* the adverse-action requirement is. The petition, by contrast, asks whether the adverse-action requirement *exists at all*. Pet. i. The question presented is therefore the truly antecedent one: If ADA accommodation cases have no adverse-employment-action element, there is no need to determine how stringent it is.

Exby-Stolley's mistake rests on her belief that, by using the phrase "adverse employment action," the petition endorses one particularly narrow view of that phrase. *See* Opp. 15. That is wrong: The petition, like many lower-court opinions, uses the phrase "adverse employment action" as a shorthand for the ADA's cumbersome 25-word "terms, conditions, or privileges" phrase. Pet. 5. But the petition does not ask the Court "to mark out the metes and bounds of that phrase" because there is no need to in this case. *Id.* at 31.

To resolve this case, the Court need only decide whether an adverse-employment-action requirement exists in ADA failure-to-accommodate cases; it need not decide whether the requirement would be satisfied by an employee whose working conditions subject him to "constant pain." Opp. 36. That is because the only

adverse-employment-action theory Exby-Stolley preserved in the District Court is discharge, which all agree is an adverse employment action. *Infra* p. 11.

Judge McHugh's en banc dissent illustrates the correct logical sequencing. First, she identifies the "two express requirements of § 12112(a)." Pet. App. 77a (McHugh, J., dissenting). Then, she "turn[s] to" the logically subsidiary question: "the plaintiff's burden under the in-regard-to clause." *Id.* at 101a. As Judge McHugh's analysis demonstrates, requiring a plaintiff to show some "adverse employment action" or "other detrimental alteration in the terms, conditions, or privileges of employment," *id.*, does not dictate any particular "level of actionable harm," Opp. 13.

The United States' brief below likewise reflects this distinction. The Government explains that "to prevail on a failure-to-accommodate claim under Title I, a qualified individual must show that a denied accommodation pertains to her terms, conditions, or privileges of employment." U.S. C.A. Br. 14. The Government then argues, consistent with its position in *Peterson* v. *Linear Controls, Inc.*, that some circuits have interpreted the adverse-employment requirement too strictly. *See* U.S. C.A. Br. 14-19; U.S. Br. at 7-8, 18-20, *Peterson* v. *Linear Controls, Inc.*, No. 18-1401 (U.S. Mar. 20, 2020) ("U.S. *Peterson* Br.").

The petition here implicates only the first question: *whether* an adverse employment action must be shown. That makes this case an ideal vehicle; indeed, cases directed to the requirement's scope might founder because of *this* antecedent issue. The Court should grant review.

B. The Question Presented Is Outcome-Determinative And Review Is Not Premature.

Exby-Stolley contends this petition is "interlocutory" because the County may prevail following a new trial. Opp. 18-19. Alternatively, she insists she could prevail even if the County is right about the question presented because she also preserved a theory of *constructive* discharge. Neither possibility is a reason to defer review.

1. It is no obstacle that the County might succeed on other grounds after a second trial. *See id.* This Court regularly reviews cases in which a district court resolves a case on threshold legal grounds and the court of appeals reverses for additional litigation. *See, e.g.*, *Nestlé USA, Inc.* v. *John Doe I*, No. 19-416; *Gabelli* v. *SEC*, 568 U.S. 442 (2013). And here, the Tenth Circuit stayed its mandate—ensuring that the parties have not expended resources toward a second, and potentially unnecessary, trial. Pet. App. 201a; Minute Order, *Exby-Stolley* v. *Board of Cty. Comm'rs, Weld Cty.*, No. 16-1412 (10th Cir. Apr. 21, 2021).

Nor would a second trial helpfully develop the record. *Cf.* Stephen M. Shapiro et al., *Supreme Court Practice* 285 (10th ed. 2013) (certiorari appropriate where "court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation"). The question presented is a purely legal issue of statutory construction: The facts do not illuminate the answer.

Virginia Military Institute v. *United States*, 508 U.S. 946 (1993) ("*VMI*"), which Exby-Stolley admits was "idiosyncratic," Opp. 20, does not counsel a wait-and-

see approach. That case involved the constitutionality of VMI's single-sex admission policy. *VMI*, 508 U.S. 946 (Scalia, J., respecting the denial of certiorari). Given the subject matter, both the liability and remedial phases implicated certiorari-worthy questions, so this Court deferred review until both were complete. *See id.* There is no comparable reason to defer here.

2. Exby-Stolley's attempt to revive her constructive-discharge theory is likewise no barrier to review. For starters, her effort is futile: The District Court, Tenth Circuit panel, and en banc dissenters all concluded that Exby-Stolley failed to preserve a constructive-discharge claim. *See* Pet. 31. Exby-Stolley does not rebut their analysis, nor does she question the panel's conclusion that she made "no mention of constructive discharge" in her amended complaint or her submission in the final pretrial order. Pet. App. 176a-177a; *see* Opp. 17 (claiming, without citation to the record, only that "the County was * * * *aware* of the" constructive-discharge claim (emphasis added)). If the Court reverses, the case will end.

But even if Exby-Stolley can attempt to relitigate constructive discharge, the question presented still matters. If the decision below is right, Exby-Stolley need not prove *either* discharge *or* constructive discharge on remand.[4] But if the County is right, Exby-Stolley must establish some reason for the lower courts to reconsider their preservation analysis and a jury must find she was constructively discharged. Thus, even if some litigation remains, its course will

[4] The footnote Exby-Stolley cites (at 17) identified issues not addressed by the en banc opinion. *See* Pet. App. 7a n.1. It did not suggest—or even consider—whether the District Court would *need* to address constructive discharge on remand.

greatly differ depending on the answer to the question presented.

III. THE TENTH CIRCUIT'S DECISION IS WRONG.

The en banc majority's analysis rewrites Congress's text, ignoring basic rules of statutory interpretation. *See* Pet. 26-28. Section 12112(b) does not provide examples that satisfy the entire general rule set out in subsection (a). Instead, subsection (b) gives examples of conduct satisfying only "the term 'discriminate against a qualified individual on the basis of disability.' " 42 U.S.C. § 12112(b).

Exby-Stolley can reconcile the Tenth Circuit's analysis with the statutory text only by suggesting that "the statutory phrase 'terms, conditions, or privileges' " of employment "refers to *all other attributes* of the employer-employee relationship." Opp. 13 (emphasis added). On this reading, the requisite nexus can always be assumed.

That reading requires "ignor[ing] * * * twenty-five words adopted by Congress," Pet. App. 81a-82a (McHugh, J., dissenting), disregarding this Court's longstanding direction to read statutes "so that no part will be inoperative or superfluous." *Clark* v. *Rameker*, 573 U.S. 122, 131 (2014) (internal quotation marks omitted).

Contrary to Exby-Stolley's suggestion (at 34), the United States has not endorsed her unbounded view of "terms, conditions, or privileges." On the contrary, the Government recognizes that clause *does* impose an evidentiary obligation on plaintiffs and does not embrace literally anything an employer does. *See* U.S. C.A. Br. 14; *accord* U.S. *Peterson* Br. 10 ("Importantly, there are limits on the scope of the 'terms, conditions, or privileges of employment' covered by [Title VII].").

It has simply disagreed with some circuits about the contours of the necessary showing. *Supra* p. 9.

Ultimately, as her policy arguments reveal, Exby-Stolley would prefer to litigate the adverse-employment-action requirement's scope. *See* Opp. 35-36. But this case does not present that question. The petition asks whether an ADA failure-to-accommodate plaintiff must show *any* nexus between the requested accommodation and the "terms, conditions, or privileges" of employment. The Tenth Circuit—like six courts of appeals before it—arrived at the wrong answer to that question. This Court should grant and reverse.

CONCLUSION

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

Respectfully submitted,

SEAN MAROTTA
Counsel of Record
REEDY C. SWANSON
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
sean.marotta@hoganlovells.com

Counsel for Petitioner

JUNE 2021