No. _____

In the
Supreme Court of the United States

NICOLE OWENS,
Petitioner,
v.
STATE OF GEORGIA, GOVERNOR'S OFFICE OF STUDENT ACHIEVEMENT,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Americans with Disabilities Act as amended by the Americans with Disabilities Act Amendments Act, the Rehabilitation Act of 1973, and the Pregnancy Discrimination Act, an employer must provide reasonable accommodations to the known physical impairments of its otherwise qualified employees with disabilities.

The question presented is:

When an employee suffers from a physical or mental impairment that substantially limits her in one or more major life activities, what form must a request for accommodation take, i.e., what information must an employee provide to her employer to trigger an employer's obligation to engage in the interactive process and provide a reasonable accommodation to that employee under the ADA, the Rehab Act, and the PDA.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Nicole Owens and the State of Georgia, Governor's Office of Student Achievement.

DIRECTLY RELATED CASES

Owens v. State of Georgia, Governor's Office of Student Achievement, 52 F.4th 1327 (11th Cir. 2022), judgment entered November 9, 2022 and rehearing denied January 5, 2023

Owens v. State of Georgia, Governor's Office of Student Achievement, 1:19-CV-5683-MHC-LTW, 2021 U.S. Dist. LEXIS 182610 (N.D. Ga. Sept. 17, 2021)

Owens v. State of Georgia, Governor's Office of Student Achievement, No. 1:19-cv-05683-MHC-LTW, 2021 U.S. Dist. LEXIS 182611 (N.D. Ga. July 30, 2021)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nicole Owens respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on November 9, 2022.

OPINIONS BELOW

The November 9, 2022 opinion of the court of appeals is reported at 52 F.4th 1327 (11th Cir. 2022) and is contained at pp. 1-24 of Appendix A. The January 5, 2023 order denying rehearing en banc is set out at p. 76 of Appendix E.

The July 30, 2021 report and recommendation of the magistrate court, which is unofficially reported at 2021 U.S. Dist. LEXIS 182611 (N.D. Ga. July 30, 2021), is set out at pp. 52-75 of Appendix D. The September 17, 2021 decision of the district court, which is unofficially reported at 2021 U.S. Dist. LEXIS 182610 (N.D. Ga. Sept. 17, 2021), is set out at pp. 25-49 of Appendix B. The Judgment of the district court is set out at pp. 50-51 of Appendix C.

JURISDICTION

The decision of the Court of Appeals was entered on November 9, 2022. A timely petition for rehearing en banc was denied on January 5, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

A. Relevant provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* (the "Rehab Act")

Relevant provisions of the Rehab Act provide:

> (a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 29 USCS § 705(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.
>
> (b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of—
>
> (1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the

> assistance is extended, in the case of assistance to a State or local government;
>
> (d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq*.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

Under 29 U.S.C. § 705(20) Individual with a disability.

> (A) In general. Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who—
>
> (i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment . . .
>
> (B) Certain programs; limitations on major life activities. Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 2, 14, and 15, and titles II, IV, V, and VII of this Act [29 USCS §§ 701, 714, 715, 760 et seq.,

> 780 et seq., 791 et seq., 796 et seq.], any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).

B. Relevant provisions of the Americans with Disabilities Act, as amended by the Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. § 12112 *et seq.* ("ADA")

Relevant provisions of the ADA provide:

> (a) General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (5) (A) 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, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the

need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

C. Relevant provisions of the Pregnancy Discrimination Act, 42 U.S.C.S. § 2000e-2 ("PDA")

Relevant provisions of the PDA provide:

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 USCS § 2000e-

2(h)] shall be interpreted to permit otherwise.

INTRODUCTION

Plaintiff Nicole Owens worked without incident for the State of Georgia, Governor's Office of Student Achievement ("GOSA") from June 2016 through her unlawful termination on October 11, 2018. In early 2018, Ms. Owens notified GOSA that she was pregnant and that her pregnancy was high risk. On July 18, 2018, Ms. Owens gave birth by cesarean section and suffered childbirth-related complications that caused her to require two blood transfusions during childbirth, something less than three percent of women suffer during childbirth.

On August 6, 2018, Ms. Owens returned to work full-time remotely as accommodation for her childbirth-related impairments just nineteen days after giving birth. But Ms. Owens was not released to return to the office at that time. On September 11, 2018, Ms. Owens' obstetrician extended her remote work accommodation request and shared with GOSA that Ms. Owens would be released to return to the office on November 5, 2018.

On October 11, 2018, after Ms. Owens valiantly attempted to obtain additional information to provide more background to GOSA regarding her need to continue to work remotely until she was released to return to the office on November 5, 2018, GOSA's Executive Director, Dr. Cayanna Good, terminated Ms. Owens because she was not convinced that Ms. Owens' need for accommodation was not simply a personal preference. Dr. Good reached this conclusion

even though Ms. Owens' request for accommodation was supported by two obstetrician's notes and additional information regarding her impairments provided to GOSA by Ms. Owens.

Under the Rehab Act, an entity that receives federal funds may not discriminate against an employee because of her disability. 29 U.S.C. § 791. To establish a prima facie case of discrimination under the Rehab Act, Ms. Owens must establish only that that: (1) she is disabled; (2) she was a "qualified individual" at the relevant time, meaning she could perform the essential functions of her job with reasonable accommodation; and (3) . . . GOSA failed to accommodate her disability. *See Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001). For purposes of summary judgment, GOSA did not dispute that Ms. Owens was disabled as defined by the Rehab Act or that she was a qualified individual with a disability under the Rehab Act. (*See* Doc. 45-1, p. 6.) GOSA disputed only that it failed to accommodate Ms. Owens in violation of the Rehab Act. As such, the primary issue other than pretext decided by the Eleventh Circuit was that, according to the Eleventh Circuit, Ms. Owens' obstetrician's notes and the additional information regarding her impairment and need for accommodation provided by Ms. Owens was insufficient to trigger GOSA's accommodation obligations under the Rehab Act. App. A at pp. 1-3, 11-12. That issue is the basis for this petition for writ of certiorari and should this Court reverse and remand this case, Ms. Owens has also established pretext because the basis for her termination is invalid.

In 2008, the ADA was amended to reject the high burden placed on employees by courts narrowly interpreting the ADA's definition of disability under the act. In amending the ADA, Congress made clear that the scope of the ADA was intended to be broad and inclusive. 154 Cong. Rec. S8342, S8345 (daily ed. Sept. 11, 2008) (statement of the Managers). The ADA, as amended, also applied the same broad interpretation to the Rehab Act. 29 U.S.C. § 705(20(B). Since the amendment of the ADA and the Rehab Act, courts still, at times, just as the Eleventh Circuit did here, interpret the acts too narrowly and erect procedural hurdles that give employers a pass where they should be held accountable for their violations of the ADA and Rehab Act.

A circuit split exists regarding what precisely an employee must tell her employer regarding her impairment and need for accommodation to trigger the interactive process and to trigger an employer's duty to provide reasonable accommodations. The majority of the circuit courts of appeal that have addressed the issue require only that an employee notify her employer of her disability or impairment and request a specific accommodation to trigger an employer's duty to engage in the interactive process and accommodate the employee, both of which Ms. Owens did here. The Eleventh Circuit, however, has now raised an employee's burden in the accommodation process and concluded that the interactive accommodation process is not even triggered unless an employee notifies an employer of her specific diagnosis (not just identifies an impairment) and provides enough information to allow her employer to understand how the requested

accommodation would address the limitations her disability presents. App. A at p.12. The Eleventh Circuit is wrong in establishing this restrictive standard, rather than the permissive standard adopted in other circuits and, as such, this case is the perfect vehicle through which this Court can remedy this error.

STATEMENT OF THE CASE

Ms. Owens began employment with GOSA in June 2016 and worked full time for over two years without reprimand or discipline until her termination on October 11, 2018. Ms. Owens teleworked at least one day a week throughout her employment with GOSA as did most GOSA employees. Under GOSA's teleworking policy most employees were permitted to telework one day a week.

Felicia Lowe was the Human Resources Director for the Office of Planning and Budget ("OPB") and worked with GOSA in that capacity. OPB performs human resources functions for GOSA including administering Family and Medical Leave Act leave and assisting with reasonable accommodations under the Rehab Act. If a GOSA employee needed FMLA leave, they applied through OPB and, when the leave was approved, OPB would notify GOSA's Executive Director, Dr. Cayanna Good, who would then notify the employee's supervisor. If a GOSA employee needed a reasonable accommodation under the ADA or the Rehab Act, the employee was referred to OPB, which then worked with GOSA leadership to determine if an accommodation was possible. OPB/GOSA's ADA policy provides only the following with respect to requests for accommodation:

> If you are disabled or become disabled (meaning you have a mental or physical impairment substantially limiting one or more of the major life activities) and you require a reasonable accommodation, you must contact the HR Office to begin the interactive process, which will include discussing your disability, limitations, and possible reasonable accommodations that may enable you to perform the functions of your position, make the workplace readily accessible to and usable by you, or otherwise allow you to enjoy equal benefits and privileges of employment.

GOSA has a policy requiring employees who are on FMLA to be released to return to work by their doctor before they can return to the office.

In the spring and summer of 2018, Ms. Owens took intermittent FMLA leave because of her high-risk pregnancy and took continuous FMLA leave after she gave birth. On July 18, 2018, after a high-risk pregnancy, Ms. Owens gave birth to her child by cesarean section. Ms. Owens suffered childbirth-related complications arising from her cesarean section that required, among other things, two blood transfusions, and she shared this information with GOSA.

On August 3, 2018, Ms. Owens provided GOSA with an obstetrician's note requesting accommodation, noting "Nicole L. Owens was seen at our medical offices on 8/13/2018. She delivered a baby by cesarean section on 7/18/2018. She is doing well and may return

to working via tele-work from her home." The obstetrician's restrictions were based, in part, on the fact that Ms. Owens had two blood transfusions and other delivery-related complications of which GOSA was aware. GOSA relied on Ms. Owens' obstetrician's note in approving her August 2018 accommodation request to telework, and Ms. Owens was not provided with nor required to complete reasonable accommodation paperwork.

On August 6, 2018 Ms. Owens returned to work full-time working remotely based on her obstetrician's restriction. Throughout her time teleworking, Ms. Owens and her supervisor, Rosalind Tio, communicated frequently about her teleworking, her need to telework, and her workflow.

On September 11, 2018, Ms. Owens shared with Ms. Tio that she would need to continue to telework until November 5, 2018 based on complications from her July 18, 2018 cesarean section and delivery. On September 12, 2018, Ms. Owens provided Ms. Tio and Ms. Lowe with an obstetrician's note notifying GOSA that Ms. Owens could continue to telework until she was released to return to work in the office on November 5, 2018: "Nicole Owens was seen in our office on 9/11/18. She may return to work November 5, 2018. She may continue to telework at home until then."

After receiving Ms. Owen's obstetrician's note on September 12, 2018, GOSA decided that Ms. Owens would need to provide reasonable accommodation paperwork to continue to telework to determine if it was medically necessary or just her personal preference. Ms. Lowe – who was advising Dr. Good on

Ms. Owens' requests for accommodation – understood that the requests to telework were medically necessary since they came from a doctor.

Following GOSA's request for additional information, Ms. Owens communicated with her doctor frequently to attempt to get additional information regarding her need for accommodation for GOSA but had difficulty getting her doctor to complete the reasonable accommodation paperwork. Ms. Owens regularly communicated with GOSA about her efforts to obtain additional information from her doctor and the difficulty she was having in obtaining the same.

On September 14, 2018, Ms. Owens emailed Ms. Lowe and Ms. Tio regarding her efforts to get more information from her doctor about her need to telework until November 5, 2018 and notified them that her doctor was out of the office until September 24, 2018. Ms. Owens also asked if there was specific documentation that she needed to provide to her doctor to complete. Six days later, on September 20, 2018, Ms. Lowe sent Ms. Owens the specific reasonable accommodation paperwork she wanted Ms. Owens' doctor to complete but gave no deadline for the paperwork to be completed.

When Ms. Owens received the reasonable accommodation forms, including the HIPAA release, from Ms. Lowe, she provided everything to Kaiser through their records and release department. On Monday, October 1, 2018 at 7:15 am, Ms. Owens emailed Ms. Lowe responding to her Friday, September 28, 2018 2:30 pm email and informed her that she had not received the accommodation paperwork back from her doctor yet, Ms. Lowe and Ms.

Owens spoke, and Ms. Lowe gave Ms. Owens a one-day deadline of October 2 to have the paperwork completed by her doctor. On October 2, 2018, Ms. Owens emailed Ms. Lowe the following:

> I wanted to follow up . . . regarding my reasonable accommodation form and request. I am fully aware that . . . that the terms of my current telework arrangement is an agreement made between me and GOSA. My flexible telework time began as a transition between starting work 2 weeks post-op and coming back to the office full-time. I was medically advised to continue my telework schedule and submitted a letter from my physician for review. After being requested from GOSA to supply additional supporting documentation, my physician's office specifically requested a form to be submitted detailing what was being asked – and I submitted the form that was created on 9/24/18. I notified everyone that the process to get paperwork signed by the office typically takes time (as I experienced with FMLA and my short-term disability requests) and I cannot expedite internal processes out of my control. I have called to inquire about this with my physician's office numerous times. You notified me yesterday during our call that I had to obtain my completed reasonable accommodation form by the end of business today

> (10/2/2018) or I have to end my telework arrangement and return to the physical office on 10/3/2018. I am appreciative of the arrangement that has been extended to date, and I am capable of continuing in the same flexible capacity until 11/5 (as outlined by my physician). However, I am unable to expedite any paperwork and I am also unable to return to work at the physical office on 10/3/2018.

Ms. Lowe then shared this information with Dr. Good.

On October 2, 2018, Ms. Owens also emailed Ms. Tio informing her that she was still working with Ms. Lowe and attempting to get her accommodation paperwork completed by her doctor. On October 4, 2018, since she again had not heard back from Ms. Lowe, Ms. Owens emailed Ms. Lowe requesting a follow-up telephone call. On October 4, 2018, Ms. Owens also emailed Ms. Tio to inform her that she was following up with Ms. Lowe, and Ms. Tio forwarded the email to Ms. Beaudette and Dr. Good. On October 4, 2018, Ms. Lowe forwarded Ms. Owens a letter dated October 3, 2018, informing Ms. Owens that she needed to return the completed reasonable accommodation paperwork by October 10, 2018 or return to the office by October 11, 2018.

Because she was having so much difficulty getting her accommodation paperwork completed by Kaiser, Ms. Owens told GOSA that she would sign a release for them to speak with her doctor directly, but GOSA refused. Ms. Lowe did not ask Ms. Owens for a release so that she could speak with her doctor to clarify that her need to telework was medically

necessary, even though she was aware that she was entitled to do so under the ADA. GOSA made no efforts to obtain a release from Ms. Owens to speak with her doctor or to contact Ms. Owens' doctor to clarify any concerns it may have had.

On October 9, 2018, Ms. Owens emailed Ms. Lowe and Ms. Tio to let them know that she was still trying to get her doctor to complete the reasonable accommodation paperwork. The next day, on October 10, 2018, Ms. Tio prepared a memo to Dr. Good and Ms. Beaudette summarizing her recollection of Ms. Owens' accommodations and teleworking and noted:

> When Nicole began working from home full-time on August 6, she communicated with me that she planned to return to the office full-time by mid-September, pending clearance from her doctor. . . . She had a scheduled follow-up appointment with her doctor on September 11. On September 12, Nicole notified me that she would not be able to return to the office until November 5. She attached a letter from her doctor that stated "Nicole L. Owens was seen in our office on 9/11/18. She may return to work on November 5, 2018. She may continue to telework at home until then."

On October 10, 2018, Executive Director Good prepared a memo summarizing her knowledge of Ms. Owens' request for accommodation, writing:

> On September 11, 2018, Nicole Owens shared with her direct supervisor

> (Rosaline Tio) that she would need to continue to telework until November 5, 2018 based upon complications for her July 19 cesarean section delivery. Nicole Owens attached a letter from a physician with Kaiser Permanente that stated, "may return to work November 5, 2018. She may continue to telework at home until then."

On October 11, 2018 at 7:19 am, Ms. Owens emailed Ms. Lowe, and shortly thereafter emailed Ms. Tio, that she had still been unable to obtain the reasonable accommodation paperwork from her doctor and had not been released to return to the office. On October 11, 2018, the only paperwork GOSA had for Ms. Owens from her doctor indicated that she was not released to return to the office until November 5, 2018, and the agency did not have any documentation medically releasing her to return to work in the office. On October 11, 2018, when despite her continuing efforts to do so, Ms. Owens was unable to obtain paperwork (couched by GOSA and the Eleventh Circuit as Ms. Owens failing to return her paperwork and as Ms. Owns failing to return to the office, despite her not being released to do so and, thus, not being allowed to do so) other than her obstetrician's note supporting her need for reasonable accommodation, Dr. Good terminated Ms. Owens' employment with GOSA. Under GOSA's policy requiring a release to return to work after FMLA, Ms. Owens would not have been permitted to return to work in the office without a release to return to the office since the doctor had said she was only released to telework. At the time of her termination, Ms. Owens had been

working remotely full-time without incident since August 6, 2018. On September 11, 2018, Ms. Owens' obstetrician provided a note to GOSA explicitly stating that Ms. Owens could continue to telework as an accommodation for her impairments just as she had been since two weeks following her complicated cesarean section and that she would be released to return to in office work on November 5, 2018.

Plaintiff Owens subsequently filed suit in the United States District Court for the Northern District of Georgia on December 18, 2019, alleging that when Defendant GOSA terminated her employment rather that accommodate her physical impairments arising out of childbirth-related complications it did so in violation of her rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq*. (Section 504"), as amended by the Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. § 12101 *et seq*. ("ADA") and the pregnancy provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(k) ("Title VII, the "Pregnancy Discrimination Act," or the "PDA"). In support of her claims, Ms. Owens relied on admissions by GOSA that it was aware of her impairments, the reasons for those impairments, and her need for temporary accommodation to work remotely rather than in person until she was released by her obstetrician to return to the office.

The district court ultimately granted summary judgment concluding that Ms. Owens' obstetrician's notes, when read in the context of Ms. Owens' high risk pregnancy, cesarean section childbirth, and pregnancy-related complications including two blood

transfusions, all of which GOSA was aware of, were insufficient to establish Ms. Owens' need to telework as an accommodation for her childbirth-related disabilities through November 5, 2018. App. B at pp. 34-38. The district court also improperly construed facts and inferences in favor of GOSA and omitted relevant material facts altogether to reach the wrong conclusion that Ms. Owens, and not GOSA, caused the breakdown in the interactive process under the Rehab Act. App. B at pp. 38-45. As such and based on these erroneous conclusions, the district court improperly concluded that GOSA did not violate the Rehab Act and the PDA when it failed to accommodate Ms. Owens and instead terminated her employment. Ms. Owens timely appealed the erroneously granted summary judgment order.

On November 9, 2022, the Eleventh Circuit Court of Appeals affirmed the grant of summary judgment concluding that GOSA's obligation to engage in the interactive process with respect to Ms. Owens' request for accommodation was not triggered based on the information provided to GOSA by Ms. Owens and her obstetrician. App. A at pp. 3, 11-18. Specifically, the Eleventh Circuit held that "as a part of her initial burden to establish that a requested accommodation is reasonable under the Rehabilitation Act, an employee must put her employer on notice of the disability for which she seeks an accommodation and provide enough information to allow her employer to understand how the accommodation she requests would assist her. App. A at pp. 11-12. "Because Owens did not identify any disability from which she suffered or give GOSA any information about how her requested accommodation

– teleworking – would accommodate that disability, the district court correctly granted summary judgment." App. A. at p. 3. Based on these dispositive conclusions, the court of appeals did not address the issue of whether Ms. Owens or GOSA caused the breakdown in the interactive process. App. A at p. 12. The court did however conclude that Ms. Owens did not establish pretext because, in its opinion, she did not trigger the accommodation process at all. App. A at pp. 18-24.

Ms. Owens filed a timely petition for rehearing en banc. The Eleventh Circuit denied the petition. App. E at p. 76.

REASONS FOR GRANTING THE WRIT

I. The Circuits are Split Regarding the Question Presented

The circuit courts of appeal are divided regarding what notice an employee is required to provide an employer to trigger an employer's accommodation obligations under the Rehab Act and the ADA, although the majority of the circuit courts that have addressed the issue have established a much less rigorous standard than the Eleventh Circuit. The Third, Fourth, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits require only that employees disclose an impairment and make a specific request for accommodation for an employer's obligation to engage in the interactive process to be triggered – precisely what Ms. Owens did here. Yet here, in a case of first impression, the Eleventh Circuit took the most restrictive position on record in requiring not only that an employee disclose her diagnosis rather than just

her impairment, but also that the employee disclose enough information to allow her employer to understand how the accommodation she requests would assist her in accommodating her diagnosis for the interactive process to even be triggered. App. A at pp. 11-12.

Most circuits, including the Third, Fourth, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, require only that employees disclose that they might have a disability and that they have a desire for an accommodation. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) (holding that "the notice must make the employer aware of both the disability and the employee's desire for accommodations for that disability"); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346-47 (4th Cir. 2013) ("The duty to engage in an interactive process to identify a reasonable accommodation is generally triggered when an employee communicates to his employer his disability and his desire for an accommodation for that disability."); *EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621-22 (5th Cir. 2009) (where employee provided a doctor's note requesting an accommodation, accommodation process triggered even though note did not identify "medical condition involved"); *Dargis v. Sheahan*, 526 F.3d 981, 988, (7th Cir. 2008) ("When . . . the disabled worker has communicated his disability to his employer and asked for an accommodation so that he can continue working, the employer has the burden of exploring with the worker the possibility of a reasonable accommodation.") (internal quotation marks omitted); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (en banc), *vacated on other grounds by* 535 U.S.

391, 122 S. Ct. 1516 (2002) ("The interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation. An employee requesting a reasonable accommodation should inform the employer of the need for an adjustment due to a medical condition using 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'"); *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028 (10th Cir. 2011) ("the employer must know of both the disability and the employee's desire for accommodations for that disability" but the employee "is not required to use any particular language when requesting an accommodation but need only 'inform the employer of the need for an adjustment due to a medical condition.'" (citations omitted)); *Thompson v. Rice*, 422 F. Supp. 2d 158, 176 (D.D.C. 2006) ("In providing notice, the employee must supply 'enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.' … The request for accommodation does not have to be formal, and the words 'reasonable accommodation' do not have to be used, but the employer must be alerted to the condition and the need for accommodation." (citations omitted)). This standard is consistent with Congress's intent that the ADA and the Rehab Act be given broad and expansive coverage to protect disabled works and permit them to remain gainfully employed. A few illustrative cases supporting a less restrictive standard for triggering the interactive process are set forth below.

Illustrative Cases

In *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999), the employer contended that it was not on notice of an employee's need for accommodation, in part, because it was not aware of the employee's specific diagnosis, and like the Eleventh Circuit did here, the district court accepted this excuse for not engaging in the interactive process. *Id.* at 313-314. However, the Third Circuit reversed summary judgment to the employer concluding "[b]ased on this evidence, the school district had more than enough information to put it on notice that Taylor might have a disability, and therefore, in order to trigger the school district's obligation to participate in the interactive process, Taylor or her representative only needed to request accommodation." *Id.* As explained by the Third Circuit, "[w]e want to make clear that the school district's duty to participate in the interactive process is triggered if Taylor notified either Menzel who was Taylor's supervisor and East Pikeland's principal, or Ferrara, the school district's administrative assistant for personnel. Thus, if Taylor's son requested accommodations . . . then the school district would have a duty to participate in the interactive process regardless of how much [it] knew about Taylor's disorder. We would add that to trigger the school district's duty to participate in the interactive process, it is not essential that [it] knew the specific name of Taylor's condition." The Third Circuit concluded that "the employer must know of both the disability and the employee's desire for accommodations for that disability" noting that "[w]hat matters under the ADA are not formalisms about the manner of the request, but whether the

employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation. . . . [w]hat information the employee's initial notice must include depends on what the employer knows." *Id.* As recognized by the Third Circuit, "[t]o raise the bar for triggering the interactive process any further would essentially nullify the process." *Id.* at 314.

In *EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621-22 (5th Cir. 2009), an employer asserted that the interactive process was not triggered because a doctor's note did not identify the employee's impairment (like here) or a specific accommodation (unlike here). However, the Firth Circuit reversed the magistrate judge's summary judgment order concluding that "a jury . . . reasonably could find that" . . . the employee "therefore had adequately communicated the nature of her condition and her requested accommodations" even where the doctor's note did not identify the medical condition because the employer, just like GOSA did here, knew why the employee had been on medical leave and knew the release related to that condition. *Id.* Thus, the Fifth Circuit concluded, once the employee requested an accommodation, "the employer is required to engage in the interactive process so that *together* they can determine what accommodations might be available." *Id.* (emphasis in original, citations omitted).

In *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 803-804 (7th Cir. 2005), the Seventh Circuit reversed summary judgment to an employer and concluded the

interactive process under the ADA was triggered even though "notice is ambiguous as to the precise nature of the disability and what accommodations are appropriate and available." As noted by the Seventh Circuit, "[t]he ADA imposes on an employee the 'initial duty to inform the employer of a disability.' … This initial duty, however, requires at most that the employee indicate to the employer that she has a disability and desires an accommodation." *Id.* at 803. And the Seventh Circuit noted that "an employer cannot shield itself from liability by choosing not to follow up on an employee's requests for assistance, or by intentionally remaining in the dark." *Id.* at 804 (citations omitted). "The employee's responsibility to provide additional information arose within the interactive process and after the employer had sought clarification of the nature of employee's disability and whether proposed accommodations would meet the employee's needs. We did not hold . . . that an employee must make the employer 'aware of the full extent of [the employee's] disability' to trigger the interactive process." *Id.* (citations omitted).

In *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112-1114 (9th Cir. 2000) (en banc), *vacated on other grounds by* 535 U.S. 391, 122 S. Ct. 1516 (2002), the Ninth Circuit held that "[t]he interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation." An employee requesting a reasonable accommodation need only "inform the employer of the need for an adjustment due to a medical condition using 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'" *Id.* at 1112 (citations

omitted). The Ninth Circuit joined "the vast majority of our sister circuits in holding that the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and that this obligation is triggered by an employee . . . giving notice of the employee's disability and the desire for accommodation. In circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process." *Id.* at 1114.

II. The Eleventh Circuit's Decision is Wrong

In this case, the Eleventh Circuit recognized that "[t]his appeal requires us to answer a question of first impression about the Rehabilitation Act. We have held that, to trigger an employer's duty to provide a reasonable accommodation under the Rehabilitation Act, a disabled employee must (1) make a specific demand for accommodation and (2) demonstrate that such an accommodation is reasonable." App. A at pp 1-2 (citing *Frazier-White v. Gee*, 818 F.3d 1249, 1255-56 (11th Cir. 2016)). "But we have never addressed what information a disabled employee must provide to her employer to trigger the employer's duty to accommodate her disability." *Id.* And with the first opportunity to do so, the Eleventh Circuit departed from the majority view and articulated a restrictive standard regarding what notice triggers an employer's obligation to engage in the interactive process.

The Eleventh Circuit held that "as part of her initial burden to establish that a requested accommodation is reasonable under the Rehabilitation Act, an employee must put her

employer on notice of the disability for which she seeks an accommodation and provide enough information to allow her employer to understand how the accommodation she requests would assist her." App. A at p. 3. The Eleventh Circuit then concluded that even though Ms. Owens provided notice of her impairment, i.e., that she suffered childbirth-related complications arising from major surgery – a cesarean section – that required her to have two blood transfusions, and despite that Ms. Owen's provided two doctor's notes supporting her limitations and that she suffered an impairment, that Ms. Owens had not identified "any disability from which she suffered." App. A at pp. 11-18.) This conclusion, of course, ignores that Ms. Owens' obligation under the ADA and Rehab Act was to prove only that "she has a physical or mental impairment." 42 U.S.C.S. § 12102(2)(A). The conclusion also ignores that under Equal Employment Opportunity Commission regulations, a "physical impairment" is defined "as any physiological disorder or condition . . . affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic, skin; and endocrine." 29 C.F.R. § 1630.2(h)(1). Under the majority standard, the information provided by Ms. Owens and her obstetrician was enough to put GOSA on notice that she may be disabled and she absolutely requested a specific accommodation for that disability. *See EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621-22 (5th Cir. 2009) (reversing summary judgment where doctor's note that did not include impairment triggered notice to engage in the interactive process

when considered in context.) But the Eleventh Circuit chose not to follow this standard.

The Eleventh Circuit also concluded that Ms. Owens did not provide "GOSA any information about how her requested accommodation—teleworking—would accommodate that disability." App. A at p. 3. Again, under the majority view, this articulation of the standard ignores that a specific request for accommodation – such as Ms. Owens made here through her obstetrician – is all that is required to trigger an employer's duty to engage in the interactive process. *See EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 803-804 (7th Cir. 2005); *Chevron Phillips Chem. Co., LP*, 570 F.3d at 621-22.

Here, Ms. Owens' August 3, 2018 and September 11, 2018 obstetrician's notes, when read in the context of Ms. Owens' high risk pregnancy, cesarean section childbirth, and childbirth-related complications that included two blood transfusions, of all of which GOSA was aware, and Ms. Owens' request to telework through November 5, 2018 because of those impairments, would have been sufficient to trigger GOSA's obligation to engage in the interactive process under the Rehab Act and the ADA as interpreted by the majority of the courts of appeals that have addressed the issue. But because the Eleventh Circuit "raise[d] the bar for triggering the interactive process," the Eleventh Circuit has "essentially nullif[ied] the process." *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d. at 314.

III. This Case Presents an Excellent Vehicle to Address a Question of Great Importance

This is a straightforward case in which this Court could adopt the majority view and establish conclusively that an employer's duty to engage in the interactive process is triggered simply through an employee providing her employer with notice of her medical conditions or impairment (or circumstances from which that notice can be inferred) and a request for accommodation. This is consistent with the relaxed standards of the ADA as amended as applied to the Rehab Act and consistent with how the real world works. Without specific guidance from this Court, the lower courts, as in this case, will continue to constrict the rights provided to disabled employees by Congress.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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