No. 23-362

In The Supreme Court of the United States

PERRY HOPMAN,

Petitioner,

v.

UNION PACIFIC RAILROAD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. The question presented in the petition is whether the court of appeals erred in holding that the right of employees to reasonable accommodation under the ADA is limited to accommodations that enable employees to perform the essential functions of the job and accommodations that provide access to existing employer-provided programs and services. Pet. i, 19-39. That question was addressed in parts I (App. 3a-6a) and IIA (App. 12a-14a) of the Eighth Circuit's opinion. Neither respondent nor the court of appeals raised any objection to the manner in which Hopman litigated that issue below.

The passage in the court of appeals opinion on which respondent relies is in, and concerns, only part IIB (App. 14a-15a) which addresses a distinct question, whether employees have "a right to work without mental or psychological pain." App. 15a. The court of appeals did not hold that the plaintiff had failed to preserve the separate issue in part IIB. The appellate court's criticism was essentially stylistic; Hopman may have advanced the argument, but he failed to also separately list it in the "statement of issues" required by Fed. R. App. P. 28(a)(5). App. 15a. The court below did not hold, and respondent does not argue, that an issue clearly argued in the body of an appellate brief is forfeited if it is not also separately listed in the introductory Rule 28(a)(5) statement of issues.

2. The nature of the legal standard adopted by the court of appeals is not in dispute. Employees with

disabilities may be entitled to a reasonable accommodation of that disability in only two circumstances: the accommodation must be needed to perform an essential function of the job, or the accommodation must be needed to provide equal access to already existing "employer-provided or sponsored services." Br. Opp. 9, (quoting App. 14a). That interpretation dramatically limits in the Eighth Circuit the circumstances in which an employee with a disability has a right to accommodation.

First, for many individuals with disabilities the accommodation that they need is not a measure to enable them to do their jobs, but action which affects their well being in other ways. As the cases set out in the petition detail, individuals with disabilities often need accommodations to obtain medical treatment, to reduce the risk of injury or illness related to their disability, or to avoid physical pain or suffering that could be caused by that disability. We set forth in an Appendix the relevant portions of the EEOC Guidance regarding reasonable accommodations for employees with diabetes; almost all of those accommodations address physical well-being, not to performing essential functions. Brief App. 1a-7a.

Second, these types of accommodations often will not involve an existing program or service that is already being provided to employees without disabilities. As to some types of accommodations, there would never be any such employer-provided service for non-disabled workers. In the instant case, the accommodation sought by Hopman was to bring his service dog to

work; the court below held that under the Eighth Circuit standard Hopman could only obtain that accommodation by showing that the employer provided service dogs to non-disabled workers. App. 33a; Br. Opp. 8. No employer does that. In other situations, the right to an accommodation would be a matter of happenstance, depending on each employer's particular practice. If an employee needed to sit on a stool to avoid aggravating an illness or injury, he or she could only obtain that accommodation if the particular employer in question already happened to provide stools to others; if not, the employer would be under no obligation even to permit the worker to bring his or her own stool to work.

3. Although the parties repeatedly disagree about the holdings in decisions of the courts of appeals other than the Eighth Circuit, there is no dispute about one central fact. No other court of appeals (and no state court) applies to ADA reasonable accommodation claims the narrow legal standard adopted by the Eighth Circuit. Respondent does not claim that the instant case would have been decided the same way outside the Eighth Circuit. The disability-specific EEOC guidelines, regarding the types of accommodations employers should provide, remain in effect outside the Eighth Circuit. That difference in outcome and practice creates practical problems which this Court should grant review to resolve.

Respondent contends that *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 253 (1st Cir. 1999), "did not . . . 'hold' that [the plaintiff's accommodation claim]

was actionable." Br. Opp. 14. That is not correct; the court held that the plaintiff's affidavit seeking accommodation of his hearing disability (because he was unable "to work comfortably") had "satisfied the[] . . . requirements," and the court overturned the dismissal of that claim. 194 F.3d at 265. Respondent asserts that the decision in *Bell v. O'Reilly Auto Enterprises, LLC*, 972 F.3d 21 (1st Cir. 2020), was "silen[t] on th[e] issue of whether accommodations are limited to 'existing employer provided program[s]'." Br. Opp. 14. But the silence was critical; the court held that "to make out a failure to accommodate claim, a plaintiff need *only* show" three things, none of which included the existence of such an employer-provided program. 972 F.3d at 24 (emphasis added).

Respondent contends that *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010), "was an essential functions case. . . ." Br. Opp. 15. That is not correct. Because of the plaintiff's vision impairment, it was dangerous for her to drive at night when her shift lasted into or began in the evening. She never missed a day of work for that reason, but because of her disability commuting at night created considerable problems. The Third Circuit held "that changing Colwell's working schedule to day shifts in order to alleviate her disability-related difficulties in getting to work is a type of accommodation that the ADA contemplates." 602 F.3d at 504. The footnote in *Colwell* quoted by respondent concerns a different case, in which a worker once at work (unlike Colwell) was unable to do her job. 602 F.3d at 505 n.8.

Respondent asserts that *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993), "merely rejected the argument" that job transfers can never be a reasonable accommodation. Br. Opp. 19. That is incorrect. Having rejected that argument (at 998 F.3d 739-40), the court went on to also hold ("[f]urthermore") that qualified disabled individuals are entitled to a reasonable accommodation to "pursue therapy or treatment for their handicaps." 998 F.2d at 740.

Respondent contends that *Sanchez v. Vilsack*, 695 F.3d 1174 (10th Cir. 2012), "h[e]ld *only* that 'a transfer accommodation for medical care or treatment is not per se unreasonable, even if an employee is able to perform the essential functions of her job without it.' " Br. Opp. 18 (quoting 695 F.3d at 1182) (emphasis in brief). That is not correct. The dispute in *Sanchez* was not about whether transfers were subject to some special standard, but about what purposes would justify any type of accommodation. The Tenth Circuit relied on decisions in the First, Seventh and Ninth Circuits, and in the Tenth Circuit itself, which had held that various types of accommodations were required where needed for medical treatment. 695 F.3d at 1181-82. Respondent argues that a transfer for medical treatment would be an available accommodation in the Eighth Circuit "*[i]f* an employer were to offer job transfers to similarly situated employees without disabilities. . . ." Br. Opp. 18 (emphasis added). The Tenth Circuit standard is not subject to such a limitation.

Respondent asserts that *EEOC v. Charter Communications, LLC*, 75 F.4th 729, 739 (7th Cir. 2023),

"was an essential-functions case" because it "held only that a modified work schedule may be required as an accommodation if it is necessary to enable the employee to 'safely' perform an essential function of his job." Br. Opp. 20. But adding an adverb like "safely" fundamentally changes the essential-functions standard, in a manner inconsistent with the Eighth Circuit standard, and in a manner broad enough to include the instant case. Without his service dog, Hopman could not perform the essential functions painlessly or healthily. But under the Eighth Circuit standard, an essential-functions accommodation is required only when necessary to enable a worker to "perform" the job functions. App. 3a, 4a, 8a, 9a. The plaintiff in *Charter Communications* could have done that.

Respondent contends that the Sixth Circuit in *Gleed v. AT&T Mobility Services*, 613 Fed.Appx. 535 (6th Cir. 2015), held that the plaintiff was entitled to use a chair only because another worker had been permitted to do so, making the chair an existing "employer-provided benefit." Br. Opp. 16. That is not correct. Under the Sixth Circuit's standard, the fact that a chair had been provided to another worker was relevant only because it "suggests that AT & T *could have* provided one to [the plaintiff]." 613 Fed.Appx. 540 (emphasis added). The accommodation was legally required because the plaintiff needed the chair "to work—as other employees do—without great pain and heightened risk of infection." 613 Fed.Appx. at 539. That is how the District of Columbia Circuit

interpreted *Gleed* in *Hill v. Associates for Renewal in Education, Inc*., 897 F.3d 232, 239 (D.C. Cir. 2018).

Respondent argues that the plaintiff in *Hill v. Associates for Renewal in Education, Inc.*, 897 F.3d 232 (D.C. Cir. 2018), would have prevailed under the Eighth Circuit standard, because the accommodation sought (a classroom aide) had been made available to other teachers. Br. Opp. 18. But the legal standards in *Hill* and the instant case are clearly different. The availability of aides to other teachers, which would be a necessary element in a claim in the Eighth Circuit, was irrelevant in the District of Columbia Circuit. That circumstance played no role in the D.C. Circuit's analysis, which required only a showing that the problem for which an accommodation was sought—pain and exhaustion experienced by the plaintiff in the absence of an aide—were related to his disability. 897 F.3d at 237-40.

4. The court of appeals based its narrow interpretation of the law largely on what it regarded as the position of the EEOC. But the Commission does not construe the ADA in this crabbed manner.

The court of appeals cited section 1630.2(o)(1)(iii) of the regulations, which requires an employer to provide reasonable accommodations needed to permit an employee with a disability "to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." App. 6a, 12a; 29 C.F.R. § 1630.2(o)(1)(iii). The phrase "benefits and privileges," the court insisted, meant

employer-sponsored or employer-maintained facilities or services. *Id*. And the regulation so construed, the Eighth Circuit insisted, was controlling unless "contrary to the commands of the statute. . . ." *Id*.[1] But the ordinary meaning of the term "benefit," in the context of employment, is not limited to employer-provided facilities or services, but also includes advantageous aspects of the job that are not provided by the employer. For example, "[a]mong the benefits of being a judge are . . . a high level of prestige and respect."[2] "There are several benefits you'll be able to enjoy [as a teacher]; for example . . . make an impact . . . job satisfaction . . . valuable relationships with students."[3] The wording of the regulation does not exclude this broader meaning.

The opinion asserted that the EEOC has "consistently defined" its regulations to mean that the reasonable accommodations available to employees are limited to either accommodations that enable the performance of essential functions, or accommodations that enable access to employer-provided services or programs. App. 13a (quoting 29 C.F.R. Part 1630 App. § 1630.9); see Br. Opp. 22-23. But the Guidance in Part 1630 makes clear that accommodations are not limited

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[1] Whether an agency regulation is entitled to such deference is the question presented in *Loper Bright Enterprises v. Raimondo*, No. 22-451.

[2] https://legalknowledgebase.com/which-benefits-are-part-of-being-a-judge, visited Jan. 21, 2024.

[3] https://www.teachersoftomorrow.org/blog/insights/benefits-of-being-a-teacher, visited Jan. 21, 2024 (bold omitted).

to such services or programs. The section 1630.9 guidance begins with the admonition that "[t]he obligation to make reasonable accommodation . . . applies to *all* employment decisions. . . ." 29 C.F.R. Part 1630 App. § 1630.9 (emphasis added). The section 1630.2(o) guidance identifies as forms of reasonable accommodations actions that expressly are *not* about employer provided services or programs.

> It may also be a reasonable accommodation to permit an individual with a disability the opportunity to provide and utilize equipment, aids or services that an employer is *not required to provide* as a reasonable accommodation. For example, it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog to the employee.

29 C.F.R. Part 1630 App. § 1630.2(o) (emphasis added).

The court of appeals argued that the EEOC Technical Assistance Manual regarding the employment provisions of the ADA states that employees must have equal access to "*employer-provided or sponsored*" services or facilities. App. 14a (quoting EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with disabilities Act, § 3.3 (1992)) (emphasis in opinion); see Br. Opp. 23. But the Manual's list of employer-provided programs and services quoted in the opinion is expressly not exclusive; it is preceded by the words (omitted from the opinion) "**For example**." (Bold in original) (Brief App.,

9a). The Technical Assistance Manual states that "[t]he obligation to provide a reasonable accommodation applies to all aspects of employment." (Brief App., 8a). The Manual emphasizes that reasonable accommodations can include permitting an employee to bring to or use at work things that the employer did not provide, specifically citing a service dog as an example. *Id*., 10a, 12a. And the Manual requires employers to provide reasonable accommodations that permit employees to access things that the employer itself did not provide, such as outside medical care, access to public transportation, repair of a prothesis or equipment, and training in the use of an assistive devise or guide dog. *Id*., 10a-11a, 12a.

Respondent suggests that the EEOC brief in *Gleed v. AT&T Mobility Servs., Inc*., stated that action needed to avoid pain or exacerbating a medical condition could not be a reasonable accommodation unless the accommodation provided access to some employer-provided service. Br. Opp. 24. We set out in the appendix the entire discussion of this issue in the EEOC brief, which makes clear that the Commission does not interpret the law in this narrow manner. Brief App. 15a-16a. The EEOC brief concluded that the plaintiff in that case was entitled to a reasonable accommodation that would involve "making modifications or adjustment that would enable him to avoid aggravating his pain or other symptoms of his disability while working" (*id*. 16a), an obligation that was in no way conditioned on the changes involving access to any employer-provided service or program.

The disability-specific EEOC guidances do far more than "merely recite the generic ADA requirements that a plaintiff must proffer a reasonable accommodation. . . ." Br. Opp. 24. Those guidances repeatedly include as reasonable accommodations measures that clearly do not involve employer-provided facilities or services. See Pet. 31-34. Virtually all the reasonable accommodations set out in the EEOC guidance regarding diabetes, for example, are services or materials from a source other than the employer. That guidance refers repeatedly to the requirement that employers accommodate workers by giving them leave from work so that they can receive third-party medical treatment for diabetes or training about how to manage that condition. Brief App. 1a, 2a, 41a-47a. Employers must also modify work schedules or other practices to permit employees with diabetes to inject insulin, or to eat snacks, in order to control blood glucose levels. *Id*., 2a. The medication and food at issue would ordinarily be provided by the employees themselves, not by the employer.

5. Respondent asserts that the court of appeals held that "[a] service dog is primarily for the personal benefit of the individual, and therefore is not a 'type of reasonable accommodation' as a matter of law." Br. Opp. 29 (quoting Pet. App. 15a). But that is not what the court of appeals held. Rather, the court reasoned that a service dog, like a wheelchair, is not an accommodation that an employer (at least generally) would "be required to *provide*. . . ." Br. Opp. 15a (emphasis

added) (quoting App. 15a (29 C.F.R. Part 1630 App. § 1630.9)). But Hopman was not asking respondent to provide a service dog; he only wanted permission to bring to work the service dog he already had. Although an employer would not (absent unusual circumstances) be required to provide a worker with a wheelchair, an employer's refusal to permit a worker to bring his or her wheelchair to work would ordinarily violate the ADA.

Respondent argues that even if this Court were to overturn the decision of the court of appeals, it would ultimately prevail on remand because "[f]ederal regulations prohibit petitioner's requested accommodation." Br. Opp. 30-31. The possibility that a respondent would on remand prevail on an as-yet-unresolved issue does not ordinarily weigh against granting review of a question that otherwise warrants consideration by this Court. The court of appeals expressly did not address this issue. App. 10a n.2. Respondent will be free to advance this argument on remand.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States, or the court

should defer action in this case pending the decision in *Loper Bright Enterprises v. Raimondo*, No. 22-451.

Respectfully submitted,

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