No. 23-997

In the Supreme Court of the United States

KARYN D. STANLEY,
Petitioner,

v.

CITY OF SANFORD, FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF DISABILITY RIGHTS LEGAL CENTER, DISABILITY RIGHTS ADVOCATES, THE NATIONAL DISABILITY RIGHTS NETWORK, THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, PUBLIC JUSTICE, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND THE NATIONAL EMPLOYMENT LAW PROJECT AS AMICI CURIAE SUPPORTING PETITIONER

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STATEMENT OF INTEREST[1]

Disability Rights Legal Center (**DRLC**) is a non-profit legal organization founded in 1975 to represent and serve

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus or his counsel made a monetary contribution intended to fund the brief 's preparation or submission.

people with disabilities as they continue to struggle against ignorance, prejudice, insensitivity, and lack of legal protections in their endeavors to achieve fundamental dignity and respect. DRLC assists people with disabilities in obtaining the benefits, protections, and equal opportunities guaranteed to them under federal and state law, including the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Individuals with Disabilities in Education Act. DRLC's mission is to champion the rights of people with disabilities through education, advocacy, and litigation. DRLC is generally acknowledged to be a leading disability public interest organization. DRLC also participates in various amicus curiae briefs in a number of cases affecting the rights of people with disabilities.

Disability Rights Education and Defense Fund (DREDF) is one of the oldest and most respected national disability rights organizations in the United States. Based in Berkeley, California, DREDF is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy, and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

Disability Rights Advocates (DRA) a national nonprofit with offices in Berkeley, Chicago, and New York City, is one of the leading disability rights law firms in the country, recognized for its high-impact litigation and its expertise regarding issues affecting people with disabilities. DRA is dedicated to ensuring dignity, equality, and

opportunity for people with all types of disabilities, and to securing their civil rights. To accomplish those aims, DRA represents clients with disabilities in complex and precedent-setting class action and impact cases throughout the United States.

National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there are P&A and CAP organizations affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Public Justice is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. Public Justice has a strong interest in ensuring that those harmed by discriminatory conduct are able to seek justice under federal civil rights laws.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country focused on empowering workers' rights attorneys. NELA is comprised of lawyers who represent

workers in labor, employment, and civil rights disputes. NELA advances workers' rights and serves lawyers who advocate for equality and justice in the American workplace, including for workers with disabilities. NELA represents workers with disabilities across the United States and is invested in the impact that this decision will have on those individuals.

The National Employment Law Project (NELP) is a national non-profit with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, especially those with disabilities, receive the full protection of labor and employment laws, including protections for disabled workers. On behalf of NELP's community-based partners, including worker centers, unions, and other worker-support organizations in communities across the fifty states, NELP has litigated and participated as amicus curiae in numerous cases in federal circuit and state courts and the U.S. Supreme Court addressing the importance of workplace protections.

Amici include many of the leading disability rights and civil rights advocacy organizations in the country. These groups are deeply concerned with the decision under review, which holds that people may not sue their employers for discrimination in violation of the Americans with Disabilities Act (ADA) after leaving their employment. That ruling flouts the plain terms of the ADA, as well as Title VII of the Civil Rights Act upon which the ADA was explicitly modeled. It would subject millions of retired workers around the country to discriminatory treatment on the basis of their disability. And it flouts the ADA's basic purpose of ensuring that people with disabilities enjoy the full right to participate in society that others enjoy. Amici

therefore submit this brief to urge the Court to reverse this erroneous and troubling decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Too often, people with disabilities have found themselves excluded from a world that was not designed to accommodate them and often discriminated against them. "[H]istorically, society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). As a result, this significant segment of society was traditionally left out and left behind other Americans "in such critical areas as employment," "access to public services," and "public accommodations," among others. *Id.* § 12101(a)(3). To combat the systematic discrimination and exclusion of individuals with disabilities, Congress enacted the Americans with Disabilities Act (ADA), which seeks to fulfill the "Nation's proper goal[]" of "assur[ing] equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals" (*id.* § 12101(b)(2), (7))—"bring[ing] persons with disabilities into the economic and social mainstream of American life," H.R. Rep. No. 101-485, pt. 2, at 50 (1990). "To effectuate its sweeping purpose," Congress enacted a broad suite of protections for individuals with disabilities, reaching numerous areas of "public life"—"forbid[ding] discrimination" in "employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001) (citations omitted).

In designing the ADA's statutory tools for combatting the marginalization of people with disabilities in the workplace, Congress drew upon the tools it had previously developed to protect other marginalized groups: the protec-

tions against discrimination "on the basis of race, color, religion, sex, and national origin" in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2. Congress deliberately "modeled" the ADA after Title VII, US *Airways* v. *Barnett*, 535 U.S. 391, 420 (2002) (Souter, J., dissenting)—copying many of its provisions virtually verbatim. Congress's purpose in doing so was clear: to create a "clear and comprehensive national mandate to end discrimination against individuals with disabilities," H.R. Rep. No. 101-485, pt. 2, at 22-23 (1990), that was just as broad as the protections of Title VII, *see also* 42 U.S.C.S. § 12101(b)(1). This ensured that the nation's civil rights laws would afford people with disabilities the same dignity and equal treatment as enjoyed by members of other historically marginalized groups.

Yet to the court below and certain other circuit courts around the country, the ADA's "comprehensive" suite of protections for persons with disabilities contains a gaping hole—one that is conspicuously absent from Title VII. To these courts, the ADA protects workers before and during their employment, but not *after*—even when they are forced to leave their jobs as the result of a disability. These courts have held that workers' rights to sue their employers for disability discrimination blink out of existence once they leave their employment, even though Title VII would allow former employees to sue in exactly the same circumstances. That result leaves employers free to deprive disabled retirees of the benefits they offer to their other retirees. The upshot is that the ADA's protections against discrimination mean the least when they are needed the most—when workers with disabilities have lost their jobs and will often be unable to perform the functions required

for another one. These workers should not be denied access to post-employed benefits that nondisabled workers enjoy.

Nothing in the ADA requires this perverse result. And the blinkered interpretation upon which that result depends is at war with the ADA's plain text. That interpretation conflicts squarely with this Court's precedent on Title VII—which should govern the identical terms of the ADA both as a matter of interpretive convention and simple common sense. It also relegates individuals with disabilities to a second-class status, with fewer litigation rights than their brothers and sisters protected by Title VII—even though Congress plainly demands parity. And that interpretation inhibits, rather than fosters, the broad participation in society by disabled people that Congress sought to foster by enacting the ADA.

It is therefore essential that the Court reject the pernicious interpretation of the ADA adopted by the court of appeals. The Court should instead interpret the ADA to be in harmony with Title VII and hold that the ADA permits retirees to bring suit to challenge discrimination in the provision of post-employment benefits.

ARGUMENT

The Court should harmonize the ADA with Title VII of the Civil Rights Act by holding that the ADA permits retirees to bring suit to challenge discrimination in respect to post-employment benefits.

Perhaps the surest indication that Congress meant to allow former employees to bring suit under the ADA to challenge discrimination in respect to post-employment benefits is that Congress explicitly modeled the ADA on

Title VII. As Title VII allows workers to sue their former employers to challenge discrimination with respect to post-employment benefits, parity demands that the Court interpret the ADA to provide the same. It is essential for the Court to reject the rigid interpretation of the ADA that would provide otherwise.

A. In crafting the ADA, Congress mirrored Title VII, which protects retirees' right to sue with respect to post-employment benefits.

When Congress enacted the ADA, it explicitly sought to establish "civil rights protections for persons with disabilities that are parallel to" Title VII. H.R. Rep. No. 101-485, pt. 3, at 48 (1990). Indeed, Congress lifted many of the ADA's provisions directly from Title VII. And there is no question that Title VII allows former employees to sue for discrimination in their post-employment benefits.

1. For instance, the ADA's "general rule" on discrimination prohibits any "covered entity" from discriminating in "compensation" and the "terms, conditions, and privileges" of employment. 42 U.S.C. § 12112(a). This phrasing is virtually identical to the employment discrimination provision in Title VII. *See* 42 U.S.C. § 2000e-2(a) (providing that "it shall be an unlawful employment practice for an employer" 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") (emphasis added).

This Court has interpreted Title VII to cover former employees. *See Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that "the term 'employees,' as used in § 704(a) of Title VII" covers "former employees"). The

Court has also interpreted the "terms, conditions, or privileges" of employment referenced in Title VII to include post-employment benefits, even when they "accrue" only after "a person's employment is completed." *Hishon* v. *King & Spalding*, 467 U.S. 69, 77 (1984); *see also Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073, 1081 (1983) (Marshall, J., joined by Brennan, White, Stevens, and O'Connor, JJ.).

Congress plainly expected the ADA to reach these benefits as well. *See Americans with Disabilities Act of 1988: Joint Hearing Before the Subcomm. on the Handicapped of the S. Comm. on Lab. and Hum. Res. and the Subcomm. on Select Educ. of the H. Comm. on Educ. and Lab.*, 100th Cong., 2d Sess. (1988) (referring to "benefits"); H.R. Rep. No. 101-485, pt. 2, at 55-56 (1990) (referring to "fringe benefits," which include retirement benefits, *see Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 654 (2006)); *see also* 135 Cong. Rec. S5456 (daily ed. May 9, 1989) (statement of Sen. Tom Harkin) ("Discrimination made illegal under the ADA includes harms—such as segregation, exclusion, or *denial of benefits*, services, or other opportunities that are as effective and meaningful as those provided to others—resulting from actions or inactions that discriminate by effect as well as by intent or design.") (emphasis added).

2. In crafting the ADA, Congress also lifted the remedial provisions from Title VII and deposited them wholesale into the Act—to make sure that the Act's remedies would be available on the broadest possible terms. Indeed, the ADA explicitly incorporates "[t]he powers, remedies, and procedures set forth" in Title VII, making those "powers, remedies, and procedures" available to "any person

alleging discrimination on the basis of disability" under the ADA. 42 U.S.C. § 12117(a). Those remedies are available to any "person claiming to be aggrieved" under the ADA to bring a "civil action." 42 U.S.C. § 2000e-5(f)(1).

A number of those remedies—such as "reinstatement" (*see* 42 U.S.C. § 2000e-5)—are clearly available to those who are suing their employers for discrimination once the employment relationship is over. "[O]ne does not 'reinstate' current employees, that language necessarily refers to former employees." *See Robinson*, 519 U.S. at 342. And for that reason, these remedies had been invoked numerous times by former employees complaining of discrimination in the provision of post-employment benefits years before Congress enacted the ADA. *See, e.g.*, *Florida* v. *Long*, 487 U.S. 223, 228 (1988); *City of Los Angeles, Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 706 (1978).

By importing the same terminology from Title VII into the ADA, Congress plainly intended to bring along the settled meaning accompanying it. When "courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates *** that the new provision has that same meaning." *Lightfoot* v. *Cendant Mortg. Corp.*, 580 U.S. 82, 95 (2017) (describing the "prior construction canon").

Accordingly, to harmonize the provisions of Title VII and the ADA—and protect the connection between the two acts that Congress obviously sought to foster—they must be given the same scope of protection. And that means protecting the rights of former employees to sue for discrimination.

B. The amendments to the ADA only broadened former employees' right to sue under the ADA and strengthened the Act's connections to Title VII.

As Petitioner notes, Congress has amended the ADA on multiple occasions, significantly broadening and clarifying issues concerning "who" could bring a claim, "what" substantive rights were covered under the Act and "when" workers could sue to vindicate those rights. *See* Pet. Br. 1-3. With each statutory revision made to address these issues, Congress strengthened the ADA's connections to Title VII, and broadened the protections granted to former employees under the Act, further cementing their right to sue for discrimination in the provision of post-employment benefits.

1. In answering the question of "when" individuals can bring an ADA claim, the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, § 3, 123 Stat. 5 (2009), clarifies that an unlawful employment practice "occurs" every time a "discriminatory compensation decision" is "adopted," every time a person becomes "subject to" the decision, and every time that person becomes "affected" by the decision, "including each time wages, benefits, or other compensation is paid." 42 U.S.C. § 2000e-5(e)(3)(A). As a result, "every discriminatory paycheck or other compensation resulting, in whole or in part, from an earlier discriminatory pay decision or other practice" is another occurrence that serves as the basis for a lawsuit under the ADA. *See* H.R Rep. No. 110-237, at 3. (2007). That means every discriminatory benefits check also produces a separate violation of the Act—and separate grounds to sue.

2. Congress also amended the substance of the ADA's anti-discrimination protections—the "what" of proving a

claim for disability discrimination—in ways that made clear that employers could not discriminate against retired and disabled employees in respect of their post-employment benefits.

One of these changes came with the ADA Amendments Act of 2008 (the 2008 Act), Pub. L. No. 110-325, 122 Stat. 3553, which relaxed the requirements for proving discrimination. As originally enacted, the ADA prohibited "discriminat[ion] against a qualified individual *with a disability because of the disability* of such individual," 42 U.S.C. § 12112(a) (2006) (emphasis added). Yet the 2008 Act modified Section 12112(a) to prohibit "discriminat[ion] against a qualified individual *on the basis of disability*." *See* 42 U.S.C. §§ 12111(8), 12112(a) (emphasis added). Congress clarified that this change was meant to de-emphasize any need for ADA plaintiffs challenging disability discrimination to meet any technical definition of "disabled"—such as showing that they have been diagnosed with a condition that "substantially limits" them in any "major life activit[y]"—*see* 42 U.S.C. § 12102 (quoting *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002))—so long as they could show that their employers discriminated against them because their employers *regarded them* as having a disability. In relaxing this proof requirement, Congress meant to ensure that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 42 U.S.C. 12102. 154 Cong. Rec. H8286-03, H8294 (daily ed. Sept. 17, 2008) (statement of Rep. Howard McKeon) (noting that the Fair

Pay Act codified Congress's desire to ensure ADA coverage of individuals with disabilities by refocusing the inquiry to whether discrimination occurred, rather than whether the individual bringing a claim had standing).

Congress also made clear that the Act's standing provisions—providing "who" could bring an ADA claim—would have sufficient breadth to accommodate this broadened anti-discrimination mandate in section 12111. Just as section 12111 prohibits discriminating against a qualified individual "*on the basis of disability*," (*see* 42 U.S.C. §§ 12111(8), 12112(a) (emphasis added)), section 12117, titled "Enforcement," now permits "any person alleging discrimination *on the basis of disability* in violation of" Title I to sue for the full range of remedies provided in Title VII. 42 U.S.C § 12117(a).

"Any person alleging discrimination on the basis of disability" obviously includes a *retiree* alleging such discrimination. A single discriminatory benefits check can serve as the basis for an ADA claim. And Congress broadly stated its intention that ADA plaintiffs should not be required to prove anything more to obtain statutory standing.

Accordingly, the amendments to the ADA in the Fair Pay Act and the 2008 Act confirm that Title VII and the ADA should be read in harmony, and like Title VII, the Act should be interpreted to protect former employees' right to sue for discrimination in the provision of post-employment benefits.

C. Nothing in the ADA's text requires interpreting the Act to provide narrower protections to people with disabilities than those protected under Title VII.

By contrast, there is absolutely nothing in the ADA's standing or anti-discrimination provisions to indicate that the Act's protections are restricted only to current workers or those seeking employment—or that only current and future workers could sue for discrimination.

The court below concluded otherwise only by focusing on a single provision in the Act that has nothing to do with standing: the provision in subsection 12111(8) defining a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court of appeals concluded that, because only a "qualified individual" can sue for discrimination under the ADA, only an individual who "holds or desires" a job can sue for discrimination under the ADA. *See* Pet. Br. 3.

1. But subsection 12111(8) does nothing to narrow the class of persons who have statutory standing to sue under the ADA. The role of this definition, and the placement within the Act of the term it defines, is simply to "reaffirm" that Title I "does not undermine an employer's ability to choose and maintain qualified workers." H.R. Rep. No. 101-485, pt. 2, at 55 (1990).

Such reaffirmation is necessary because the one thing that sets the substantive anti-discrimination protections of the ADA apart from those of Title VII is that the ADA sometimes demands *more* than equal treatment to covered individuals—it sometimes requires "preferential[]"

treatment for disabled workers to "achieve [the Act's] basic equal opportunity goal." *Barnett*, 535 U.S. at 397. This preferential-treatment mandate may require an employer to make significant changes to disabled workers' job duties or modify the working environment to accommodate their disability, including "job restructuring," "modified work schedules," "reassignment," the modification of equipment and "facilities" to make them "readily accessible to and usable by individuals with disabilities," and "other similar accommodations." 42 U.S.C. § 12111(9).

Subsection 12111(8) tempers the burdens imposed on employers as the result of this preferential-treatment mandate by clarifying that an individual with a disability is entitled to reasonable accommodation only when the individual can "perform the essential functions of the employment position that such individual holds or desires." This ensures that the ADA does not "demand action beyond the realm of the reasonable." *Barnett*, 535 U.S. at 401.

Accordingly, the ADA's requirement in subsection 12111(8) that a person with a disability be able to perform the essential functions of the position that the worker "holds or desires" has nothing to do with who has standing to sue—but rather who an employer must accommodate. And thus, subsection 12111(8) answers the substantive question of whether an employer who fails to accommodate the employee has committed actionable discrimination in violation of the ADA. This has nothing to do with whether a former or retired employee is entitled to sue under the ADA.

2. Yet if the court below was correct that subsection 12111(8) imposes limits on the class of persons entitled to bring suit under the ADA, retirees fall comfortably within

those limits. It is entirely natural to read the statute as providing retirees who have ceased actively working for an employer the same right to sue as those who currently "hold" a position with the employer and those who "desire" such a position.

a. This is so because subsection 12111(8) only tests "if you can do a job, not if you have one" (Pet. Br. 15)—imposing a condition that applies only to those actively working for or seeking work from the employer, and requiring only those persons to possess the qualifications for the jobs they hold or seek. Those conditions simply do not apply to retirees, who do not have any "qualifications" to meet—beyond those they had to satisfy during their employment to earn post-employment retirement benefits.

Supporters of the result below question this interpretation, pointing out that subsection 12111(8) lacks any language making clear that the requirements for those who "hold" or "desire" a position do not apply to retirees. *See Gonzalez* v. *Garner Food Servs., Inc.*, 89 F.3d 1523, 1528 (11th Cir. 1996). But there was no need for Congress to make clear that retirees need not meet the qualifications for the position they held before retirement in order to sue for discrimination in post-employment benefits. The provisions in the ADA that *actually* define statutory standing already make clear that "any person alleging discrimination on the basis of disability" is entitled to invoke "the powers, remedies, and procedures" available under the ADA. 42 U.S.C. § 12117(a). Indeed, given the clarity and breadth of this standing provision, Congress would have to clarify that retirees were *not* included in the class of persons entitled to sue under the act, and were *denied*

standing in order to exclude them from the Act's protections. The lower court's supporters are therefore looking for qualifying language in the wrong place.

In fact, the absence of such qualifying language in the ADA's standing provisions provides even more compelling reason to limit subsection 12111(8) to what it actually says—and nothing more. In no event should that provision be interpreted to smuggle in a disguised limitation on standing under the ADA.

b. Yet if retirees must possess "qualifications" required for the "employment position" they "hold," then they readily do so, because the position they hold *is that of retiree*. An "employment position," as used in section 101's definition of "a qualified individual with a disability," 42 U.S.C. § 12111(8), is not necessarily the same thing as a job. "Employment," like "employee," does not inherently refer to current employment. *See Robinson*, 519 U.S. at 340–44. And "position" refers only to "the place where a person" is "in relation to others"—their "situation." *Webster's New World Dictionary, Third College Edition* 1053 (1994).

For someone who has retired, their "relation[ship]" to their "employment" and their employment "situation" could best be described as "retiree." *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.* v. *Facet Enterprises*, 601 F. Supp. 292, 298 (E.D. Mich. 1984) (referring to the "position of retirees" in connection with a controversy over employer's post-employment benefits); *Sch. Dist. of Pittsburgh* v. *Loc. Union 297, Pittsburgh Area Sch. Emp., A.F.S.C.M.E. AFL-CIO*, 46 Pa. Cmwlth. 192, 194 (1979) (distinguishing between "employees" and "the position of retirees" in connection with coverage under an employer's life insurance plan).

Interpreting the definition that way resolves any textual tension: The "employment position" Ms. Stanley "holds" is retiree; the position has no "essential functions" she "can perform." *See* Amicus Br. of the United States 1, *Stanley* v. *City of Sanford*, No. 2210002 (11th Cir. Apr. 13, 2022) (arguing that a former employee suing under the ADA for discrimination in post-employment benefits is properly regarded as holding the employment position of "post-employment benefits-recipient").

Regardless of whether retirees are best understood as *being excused* from the requirements for "qualified individuals" in subsection 12111(8) or *having satisfied* those requirements, retirees must be granted standing to vindicate Congress's deliberate prohibition of discrimination in the provision of post-employment benefits. *See* 42 U.S.C. § 12112(b) (prohibiting "discriminat[ion]" in "fringe benefits"). By contrast, any contrary interpretation would nullify this statutory protection. It would also undermine Congress's de-emphasis on statutory standing in the ADA. And it would undermine the harmony between Title VII and the ADA that Congress deliberately and intentionally sought to foster. For all these reasons, that interpretation should be rejected.

D. There are also important practical reasons for allowing disabled retirees to sue over discrimination in post-employment benefits.

Beyond these textual reasons for rejecting the decision of the court below and the artificial conditions on ADA standing it seeks to impose, there are important practical considerations that counsel in favor of allowing retirees to sue over discrimination in post-employment benefits.

1. First, denying disabled retirees the right to sue will leave employers free to subject disabled retirees to whatever discriminatory treatment they like—reducing, if not eliminating, the benefits of disabled workers entirely while retaining them for their able-bodied counterparts. That means the ADA's protections against discrimination will mean the least when they are needed the most—especially when a worker is forced to retire from one job because of a disability, which will often leave them unable to perform the functions required for another one.

That result would eviscerate the ADA's basic purpose—converting the ADA's mandate to bring individuals into the economic and social mainstream of American life," H.R. Rep. No. 101-485, pt. 2, at 50 (1990), into an allowance to cast them out instead.

Many disabled workers experience real-world hardship as the result of such discriminatory treatment. Typically, Social Security retirement benefits amount to only about 40 percent of pre-retirement income; therefore, post-employment benefits are particularly important for retirees, who frequently depend on employer-provided retirement plans to survive financially as they age. *See* Seth D. Harris, *Increasing Employment for Older Workers with Effective Protections Against Employment Discrimination*, 30 Cornell J. L. & Pub. Pol'y 199, 201 (2020).

Indeed, many retirees from jobs in state and local government are ineligible for Social Security retirement benefits,[2] making employer-provided pension and healthcare

[2] *State and Local Government Employees Social Security and Medicare Coverage*, Internal Revenue Serv. (Mar. 27, 2024), https://bit.ly/3XRjQl7.

benefits even more critical. And, as in so many areas, the burden of enduring discriminatory treatment in these benefits will fall most heavily on low-income individuals, who already face struggles in financing long-term care. That imposes a double burden on low-income individuals with disabilities.

Interpreting the ADA to permit such hardship would be particularly perverse for the nation's first responders and rescue workers—who risk all, putting their lives on the line for others, and face higher rates of career-ending disability than other workers as a result. Firefighters have one of the "highest rates of injuries and illnesses of all occupations." Bureau of Lab. Stats., *Occupational Outlook Handbook*, *Firefighters*, https://perma.cc/F8CP-UJL8. These heroes deserve to have their benefits protected at all costs—and on no account should their employers be allowed to use the disabling wounds they suffer in the line of duty as grounds to discriminate against them after they are forced to retire because of those wounds.

2. The court of appeals' interpretation would also convert the ADA into a statutory blunderbuss—heedlessly and arbitrarily denying protections to workers in a manner that makes no sense and Congress did not intend. This case amply demonstrates the problem. Many employers—like Ms. Stanley's—adopt discriminatory policies during their workers' employment that will impact those workers only after retirement. This is precisely why the ADA expressly permits disabled workers to sue every time they are "affected" by their employers' discrimination, "including each time wages, benefits, or other compensation is paid." 42 U.S.C. § 2000e-5(e)(3)(A). The interpretation adopted by the court of appeals renders this provision en-

tirely toothless and will mean that by the time many workers discover they have been discriminated against, they will have lost the right to sue to challenge that discrimination.

This problem will also result in arbitrary distinctions between similarly situated workers who are subjected to the same policy that discriminates on the basis of a disability. The worker who becomes subjected to the policy while disabled but still employed will be able to sue to challenge it, while the worker who suffers a more severe disability and is forced to leave employment before discovering the policy would not. There is no way Congress would countenance these perverse results that would occur if the court of appeals' decision is left standing.

By contrast, employers have not been able to identify any legitimate harm they will suffer if that decision is overturned. For instance, some local government groups complain that they need to maintain the "flexibility" to discriminate against retired employees so they can make "cost-saving" measures. Rachel Mackey, Nat'l Ass'n of Counties, *NACO Legal Advocacy: Stanley* v. *City of Sanford* (Aug. 6, 2024), https://bit.ly/3XrwQN1. But these concerns are unfounded.

Congress already provides employers all the flexibility they need to make cost-driven decisions about rationing benefits with the ADA's Section 501(c) "safe harbor." Sections 501(c)(2) and (3) protect employers from liability for conduct that would otherwise violate the ADA if that conduct is undertaken pursuant to an insured or self-insured benefit plan and the plan is not "a subterfuge to evade the purposes of the ADA." And there is a high bar for proving "subterfuge" necessary to circumvent this immunity from ADA liability.

"[W]hen an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relationship." *Ohio Pub. Ret. Sys.* v. *Betts*, 492 U.S. 158, 181 (1989).

Under this reading of "subterfuge," a worker cannot prove that a benefit plan provision is a subterfuge to leave the safe harbor "unless she could show that it was intended to serve the purpose of discriminating in some non-insurance-benefit aspect of her relationship with the defendants." *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 615 (3d Cir. 1998) (Alito, J., concurring). This high bar cannot be satisfied when employers are forced to cut benefits for non-discriminatory, cost-driven reasons.

Furthermore, despite what employers and their supporters have said, if the ADA permits employers to discriminate against retirees in the provision of their post-employment benefits, there is no legal protection that will step in to fill this gap in disabled workers' legal protections. Employers insist that a worker with a disability whose benefits are reduced or denied on a discriminatory basis will be able to sue for the breach of the "promise" of benefits—under breach of contract or tort theories. But employers and benefit providers routinely reserve for themselves the right to change their benefit plans, thereby granting themselves the right to amend the essential terms of the contract and undermining any potential for justifiable reliance on the initial promise of benefits.

The need to interpret the ADA to provide protection to retirees also cannot be rendered unnecessary by "other

legislation, such as ERISA." *Weyer* v. *Twentieth Century Fox*, 198 F.3d 1104, 1112 (9th Cir. 2000). While ERISA "addresses fringe benefits for people unable to perform the functions of a job even with reasonable accommodations," that statute is still unlikely to aid retirees who are subjected to discriminatory treatment in the provision of benefits on the basis of their disability. As the Court held in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 508, 511 (1981), while ERISA "prohibits forfeitures of vested pension rights," ERISA "leaves [the question]" to the private parties creating the pension plan the determination of the "content" or "amount" or "level" of "benefit that, once vested, cannot be forfeited." (citing 29 U.S.C. §§ 1054(b)(1)(B)(iv), 1054(b)(1)(C), 1054(b)(1)(G)). So employers can create room for themselves to escape liability under ERISA simply by liberally defining those benefits that are not subject to "vesting." And employers have successfully used such methods to defeat claims that they discriminated against disabled employees in the past. S*ee* Brief in Opposition, *McKnight* v. *Gen. Motors Corp.*, No. 08-1113 (U.S. May 29, 2009).

Accordingly, there is simply no substitute for the protections that the ADA provides. It is therefore essential that the Court overturn the court of appeals' interpretation of the Act to deny those protections to retirees.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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