No. 17-1001

IN THE

Supreme Court of the United States

RAYMOND SEVERSON

Petitioner,

v.

HEARTLAND WOODCRAFT, INC.

Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID A. MCCLURG
Counsel of Record
PETRIE & PETTIT, S.C.
250 EAST WISCONSIN AVENUE, SUITE 1000
MILWAUKEE, WI 53202
(414) 276-2850
DMcClurg@petriepettit.com

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QUESTION PRESENTED

Whether an employee seeking a multi-month leave of absence following three months of FMLA leave is a "qualified individual" under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, given that such leave of absence does not enable the employee to "perform the essential functions of the employment position," 42 U.S.C. § 12111(8), during the period of leave.

CORPORATE DISCLOSURE STATEMENT

Respondent Heartland Woodcraft, Inc. has no corporate parent and no publicly held company owns 10% or more of the company's stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 872 F.3d 476. The order of the district court (Pet. App. 12a-45a) is not published in the Federal Supplement but is available at 2015 WL 7113390.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2017. On December 11, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 18, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. a. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, prohibits covered employers from discriminating "against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Discrimination on the basis of a disability includes the failure to make "reasonable accommodations" for known disabilities, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A).

The threshold question in an ADA case is whether an employee claiming discrimination is a "qualified individual" who falls within the class of persons protected by the ADA. *See, e.g.*, *EEOC v. Amego, Inc.*, 110 F.3d 135, 141 (1st Cir. 1997). "The term 'qualified individual' means 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). In other words, if the employee cannot "perform the essential functions" of the job without a reasonable accommodation, then he is a "qualified individual" only if the proposed accommodation would enable him to perform those functions. *Id.*

If the employee establishes eligibility for ADA protection, he has the burden of showing that the employer refused to provide a "reasonable accommodation[]" for a known disability. 42 U.S.C. § 12112(b)(5)(A); *see US Airways, Inc. v. Barnett*, 535 U.S. 391, 400-02 (2002). The ADA does not define the term "reasonable accommodation," but it does offer several examples of what the term "may include": "making existing facilities used by employees readily accessible to and usable by individuals with

disabilities[,] . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of . . . training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 42 U.S.C. § 12111(9)(A)-(B). The reasonableness of a particular accommodation is evaluated by asking whether the accommodation is "reasonable on its face, *i.e.*, ordinarily or in the run of cases." *US Airways, Inc.*, 535 U.S. at 401-02.

If an employee can overcome those hurdles, the employer has the opportunity to show that provision of a proposed accommodation "would impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A); *see* 42 U.S.C. § 12111(10) (defining "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of" various factors such as the cost of the accommodation and the financial resources of the facility involved in the provision of the accommodation); *US Airways, Inc.*, 535 U.S. at 400-02; Pet. App. 6a n.1. When such an undue hardship is established, the denial of an accommodation—even a reasonable one—does not constitute discrimination under the ADA. 42 U.S.C. § 12112(b)(5)(A) (discrimination includes "not making reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship").

b. In 1993, Congress enacted a separate statutory regime "to entitle employees to take reasonable leave for medical reasons." 29 U.S.C. § 2601(b)(2). Under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, "an eligible employee shall be

entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D); *see* 29 U.S.C. § 2611(2)(A)(i) (defining eligible employees); 29 U.S.C. § 2611(11) (defining "serious health condition"). The FMLA requires employees to give their employers advance notice of foreseeable leave, 29 U.S.C. § 2612(e), and it allows employers to require medical certification when leave is sought for a serious health condition, 29 U.S.C. § 2613. An employer may comply with its obligations under the FMLA by providing unpaid leave. 29 U.S.C. § 2612(c). The FMLA covers entities employing 50 or more employees, while the ADA covers smaller employers with as few as 15 employees. *Compare* 29 U.S.C. § 2611(4)(A)(i) (defining covered employers under FMLA), with 42 U.S.C. § 12111(5)(a) (defining covered employers under ADA).

2. Respondent Heartland Woodcraft, Inc. (Heartland), a small, family-owned company in West Bend, Wisconsin, manufactures shelves, tables, and cabinets used by retail stores to display merchandise. Pet. App. 13a. Petitioner began working at Heartland in 2006 as a supervisor. Resp. C.A. Br. 2. In 2010, he was promoted to operations manager. Pet. App. at 13a.

In the middle of 2013, Heartland determined that petitioner was performing poorly in his operations-manager position. Pet. App. 13a. On June 5, 2013, Heartland's president and general manager met with petitioner to relieve him of the position due to his performance deficiencies. *Id.* Heartland offered petitioner a different position: second-shift lead,

which represented a demotion from petitioner's operations-manager role. *Id.*; *see id.* at 19a (noting that "the second-shift lead is generally required to lift heavy items"); *id.* at 20a-27a (discussing various job responsibilities of second-shift lead).

Heartland was eager to find a new second-shift lead at that time. Pet. App. 13a. The person temporarily in that position, Curtis Strnad, was not meeting expectations—and that poor performance was particularly concerning because Heartland was expanding its second-shift operations. *Id.* Heartland believed that Strnad's insufficient supervision of employees was resulting in increased labor costs, decreased productivity, and diminished morale. Resp. C.A. Br. 9.

When Heartland offered petitioner the second-shift lead job, petitioner did not immediately respond. Instead, he informed Heartland's president and general manager that earlier in the day he had begun experiencing severe back pain. Pet. App. 13a; *see id.* (noting that the pain "was not caused by a workplace injury"); Resp. C.A. Br. 3; *see also* Pet. App. 3a (noting that in 2010 petitioner had been diagnosed with a condition called back myelopathy that occasionally flared up and prevented him from bending, lifting, and standing). On the president's suggestion, petitioner went home for the day. Pet. App. 13a.

Petitioner never returned to work. On June 9, 2013, while still at home, he notified Heartland that he would accept the second-shift lead position. Pet. App. 14a. The following day, petitioner began submitting doctor's notes to Heartland indicating that he would be unable to return to work due to back pain. *Id.* By early July 2013, petitioner

exercised his right to take a 12-week leave of absence under the FMLA, which began—at his request—retroactively on June 5, 2013. *Id.* By the end of July, Heartland received a doctor's note stating that petitioner was "unable to return to work until further notice." Resp. C.A. Br. 8.

In mid-August 2013, petitioner informed Heartland that he was scheduled to undergo back surgery on August 27, 2013, the same day on which his FMLA leave expired. Pet. App. 14a. He asked Heartland to provide him an additional two months of medical leave to recuperate from his surgery. *Id.* He also indicated that he might need a subsequent surgery, requiring a third month of medical leave. *Id.*

Heartland considered the request, but decided that it was unable to hold open petitioner's job as second-shift lead for that lengthy period. Pet. App. 14a-15a. Because of Strnad's performance issues, Heartland could not afford to have Strnad remain in the second-shift lead position during petitioner's requested leave, and needed to find a permanent replacement as quickly as possible. *Id.*

Accordingly, on August 26, 2013, Heartland notified petitioner that he would be terminated on August 28, after his FMLA leave expired. Pet. App. 15a. At the same time, Heartland invited petitioner to reapply for a job at the company when his doctor released him to resume work. *Id.* Petitioner never did so, although his doctor cleared him to return to work, more than three months later, on December 5, 2013. *Id.*; *see id.* at 2a, 5a.

3. a. On September 17, 2014, petitioner filed suit in the Eastern District of Wisconsin, alleging that Heartland had discriminated against him on the

basis of a disability in violation of the ADA by denying his request for a multi-month leave of absence to follow his 12 weeks of FMLA leave. Pet. App. 15a; *see id.* at 12a; Pet. C.A. Br. 15.

Heartland moved for summary judgment, and the district court granted that motion. Pet. C.A. Br. 15. As relevant here, the court reasoned that a person is a "qualified individual" under the ADA only if he is able to perform the essential functions of the job with the proposed accommodation. Pet. App. 27a. The court concluded that "at the time Heartland terminated [petitioner's] employment, he had been unable to perform any of the essential functions of the second-shift lead position for three months, and he would remain unable to perform some of the essential functions of the position for an additional two or three months. Thus, at the time of his termination, which is the time that matters, . . . [petitioner] was not a qualified individual." Pet. App. 27a-28a (citing, *inter alia*, *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 380-81 (7th Cir. 2003) (Easterbrook, J.), which held that "[i]nability to work for a multi-month period removes a person from the class protected by the ADA"). The court rejected petitioner's contention that it was sufficient that an extended medical leave might enable him "eventually" to perform the job's essential functions. *Id.*; *see id.* at 27a-28a n.5 (stating that in light of its ruling on whether petitioner was a "qualified individual" the court would not reach the issue of undue hardship).

b. The court of appeals affirmed. *See* Pet. App. 1a-11a (opinion by Judge Sykes, joined by Chief Judge Wood and Judge Easterbrook).

The court of appeals began with the definition of "qualified individual." The court explained that "the baseline requirement found in" that definition "is concrete: A 'reasonable accommodation' is one that allows the disabled employee to 'perform the essential functions of the employment position.' If the proposed accommodation does not make it possible for the employee to perform his job, then the employee is not a 'qualified individual' as that term is defined in the ADA." Pet. App. 7a-8a (citations omitted); *see id.* at 8a (noting that the "illustrative examples" of reasonable accommodations in 29 U.S.C. § 12111(9) "are all measures that facilitate work"); *id.* at 2a (stating that a reasonable accommodation is a "measure[] that will enable the employee to work").

Accordingly, the court of appeals concluded, "a long-term leave of absence cannot be a reasonable accommodation." Pet. App. 8a; *see id.* at 2a, 6a. Such an "extended" leave "does not give a disabled individual the means to work; it excuses his not working." *Id.* at 8a. And "[a]n inability to do the job's essential tasks means that one is not 'qualified.'" *Id.* (quoting *Byrne*, 328 F.3d at 381); *see Waggoner v. Olin Corp.*, 169 F.3d 481, 482 (7th Cir. 1999) ("The rather common-sense idea is that if one is not able to be at work, one cannot be a qualified individual."), *quoted in* Pet. App. 8a.

The court of appeals rejected the argument that "the duration of the leave is irrelevant as long as it is likely to enable the employee to do his job when he returns." Pet. App. 9a. The court reasoned that such a reading of the statute would "equate[] 'reasonable accommodation' with 'effective accommodation,' an interpretation" that this Court "rejected" in *US*

Airways, Inc. v. Barnett, 535 U.S. 391 (2002). Pet. App. 9a-10a.

Finally, the court of appeals noted that "[t]he ADA is an antidiscrimination statute, not a medical leave entitlement." Pet. App. 2a. A "[l]ong-term medical leave is the domain of the FMLA, which entitles covered employees" to a 12-week medical leave for a serious health condition. *Id.* at 9a (citing 29 U.S.C. § 2612(a)(1)(D)). An interpretation of the ADA that requires employers to provide extended medical leave would, the court explained, convert the anti-discrimination charter of the ADA into "an open-ended extension of the FMLA." *Id.* at 10a.

ARGUMENT

The court of appeals correctly decided that petitioner was not a "qualified individual" within the meaning of the ADA because he was not able to perform the essential functions of his job even with his requested accommodation: a lengthy leave of absence. Contrary to petitioner's contention (Pet. 14-24), no conflict between that decision and the decision of any other court of appeals merits this Court's review. Moreover, a decision in petitioner's favor on the question presented would not change the outcome in this case—and, because that would be true in most ADA cases involving similarly long leaves of absence, the question is of limited practical significance. Accordingly, the petition should be denied.

A. The Court of Appeals' Decision Is Correct

1. As the court of appeals correctly explained, petitioner is not within the class of persons protected by the ADA. Pet. App. 8a-10a.

The ADA protects "qualified individual[s]." 42 U.S.C. § 12112(a); *see id.* ("No covered entity shall discriminate against a qualified individual on the basis of disability"). The term "qualified individual" means "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 meaning of "qualified individual" is thus tied to the employee's ability to "perform the essential functions" of the job—either with the accommodation or without it. There is no dispute here that petitioner could not perform the essential functions of the job without the requested accommodation, so the only question is whether petitioner could meet the job's obligations *with* the accommodation. The answer is no.

A long-term leave of absence involves an extended absence from work—but an employee cannot "perform the essential functions" of his job while he is not in fact doing any part of his job for a lengthy period of time. Pet. App. 7a-9a; *see, e.g.*, *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181, 185 n.5 (2d Cir. 2006) (explaining that "the idea of unpaid leave of absence as a reasonable accommodation" involves an "oxymoronic anomaly . . . —the idea that allowing a disabled employee to leave a job allows him to perform that job's functions") (citation and internal quotation marks omitted). In contrast, each of the statutory examples of a "reasonable accommodation[]"—including, as most relevant here, "job restructuring, part-time or modified work schedules, [or] reassignment to a vacant position," 42 U.S.C. § 12111(9)(A)-(B)—is designed to facilitate the performance of a job's essential functions. None of them operates as a statutory entitlement not to

perform any work at all for an extended period of time.

To be sure, a long-term leave of absence could enable an employee to perform the job's essential functions *after* the leave has expired. But that is not how Congress wrote the statute. The definition of "qualified individual" speaks in the present tense—it asks whether the employee "can" do the job that he "holds or desires" if the proposed accommodation is given. 42 U.S.C. § 12111(8); *see Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 655 (1st Cir. 2000) (O'Toole, J., dissenting). That present-tense language indicates that an employee's ability to do the job with the help of the proposed accommodation must be measured at the time the adverse employment decision is made, not after an extended leave of absence has terminated months later.

Any other reading of the ADA would be contrary to its purpose and would be difficult to reconcile with the FMLA, a later-enacted statute. Pet. App. 10a. The purpose of the ADA is to combat discrimination against disabled persons. 42 U.S.C. § 12101(b). One purpose of the FMLA is to guarantee covered employees a 12-week period of leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). The EEOC has recognized, by regulation, that "[a]n employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position *during the absence for treatment*." 29 C.F.R. § 825.123 (emphasis added); *see* 29 U.S.C. § 2612(a)(1)(D). If the ADA were

interpreted to deem an extended absence from work a *means* of performing the essential functions of an employee's position, then employees could secure through the ADA what Congress did not give them through the FMLA—a protected period of medical leave that is longer than 12 weeks. Pet. App. 10a (rejecting argument that ADA should be read as an "open-ended extension of the FMLA"). And such an interpretation of the ADA would impose this unwarranted leave requirement on much smaller employers than are covered by the FMLA. *Compare* 42 U.S.C. § 12111(5)(A) (ADA covers all employees of an entity employing 15 or more employees), *with* 29 C.F.R. § 825.110(a) (FMLA covers "eligible employees" who have completed at least 1250 hours of service for an employer in the prior 12-month period at a worksite where 50 or more employees of that employer work at facilities within a 75-mile radius).[1]

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[1] The FMLA was introduced and defeated in every session of Congress from 1985 to 1990, and was signed into law in 1993 only after its leave provisions were severely curtailed. The first version of the FMLA provided for 26 weeks of unpaid medical leave and would have applied to employers with as few as five employees. *See* D.R. Lenhoff & L. Bell, *Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study*, at 15-20, available at http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf. By the time the statute was enacted, the length of job-protected leave was reduced to 12 weeks and coverage was limited to larger employers with 50 or more employees. Given that backdrop, it is unlikely that, in passing the ADA just a few years earlier, Congress intended to require employers with as few as 15 employees to provide lengthy leaves for medical reasons.

Because the FMLA addresses so specifically how long a period of medical leave employers are required to offer, the better reading of the ADA, adopted by the court below, harmonizes the two statutes rather than placing them into conflict. *See generally, e.g.*, *Branch v. Smith*, 538 U.S. 254, 281 (2003); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

2. Petitioner's contrary arguments, under which an employee could be deemed qualified to perform the essential functions of his position no matter how lengthy a period of leave he demanded, *see* Pet. App. 9a-10a, lack merit. As the court of appeals explained, petitioner's "reading of the statute equates 'reasonable accommodation' with 'effective accommodation,' an interpretation" that this Court "has rejected." Pet. App. 9a. There is no reason for the Court to revisit that issue in this case.

First, petitioner contends (Pet. 27) that the Seventh Circuit's decision runs afoul of what he characterizes as a general principle that "lower courts" must always "conduct individualized inquiries when evaluating disability cases." But no such principle exists. Some aspects of the inquiry into whether a violation of the ADA has occurred will call for a case-specific analysis, as the Seventh Circuit's decision here illustrates. Pet. App. at 10a-11a (analyzing the reasonableness of proposed accommodations other than a lengthy leave of absence).[2] A court of appeals is not forbidden,

[2] Here, to the extent that petitioner contends (Pet. 28) that even if extended leave cannot be considered reasonable "in the run of cases" he should be considered a qualified individual with a disability based on the "special circumstances" in this case, that argument is incorrect. This Court's decision in *US Airways, Inc.*

however, from providing guidance to lower courts by indicating that certain types of cases fall outside the scope of the ADA's language. *See, e.g.*, *Regan v. Faurecia Auto. Seating, Inc.*, 679 F.3d 475, 480 (6th Cir. 2012) ("[T]he inquiry into reasonableness requires . . . a factual determination untethered to the defendant employer's particularized situation.") (citation and internal quotation marks omitted); *see also US Airways, Inc.*, 535 U.S. at 401-02 (setting forth an objective test that assesses the reasonableness of an accommodation without regard to the particular facts of a case).[3]

Here, the Seventh Circuit has simply interpreted the language of the relevant statutory provisions and determined that a person who requires a long-term leave of absence from his job cannot be a "'qualified individual' as that term is defined in the ADA." Pet. App. 7a-8a. Nothing in the statutory scheme or the decisions of this Court conflicts with that interpretation, which has the signal virtue of

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v. Barnett, 535 U.S. 391 (2002), indicates that such a "special circumstances" analysis should be limited to reassignment cases. *See id.* at 401-06.

[3] Indeed, the courts frequently have deemed various classes of accommodations to be categorically outside the scope of what the ADA requires, regardless of the particular facts of the case at hand. *See, e.g.*, *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1257 (11th Cir. 2001) ("The ADA does not mandate that employers promote disabled employees in order to accommodate them."); *Smith v. Midland Brake, Inc.,* 180 F.3d 1154, 1170 (10th Cir. 1999) ("[E]mployers need not create a new job or even modify an essential function of a vacant job in order to make it suitable for the disabled employee, because such a reconfigured job is not considered an existing vacant position.").

ensuring that "like cases" are "decided alike" in the district courts. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005); *cf. Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 760-61 (1989) (stating that courts may properly develop "categorical rules" even when interpreting a statutory "grant of discretion").

Second, petitioner analogizes (Pet. 29-30) an extended leave of absence to the period when an accommodation like a wheelchair ramp is being "acquired and installed." The analogy does not advance petitioner's position. The accommodation represented by a wheelchair ramp, which has no temporal aspect, does not exist until the ramp is in place at a worksite. In contrast, a leave of absence is an accommodation that is continuously in place over a period of time—that is, beginning when the employee goes out on leave, and continuing throughout the period when the employee is not working. During the period of the accommodation, then, a wheelchair ramp enables an individual to "perform the essential functions" of the job, whereas a multi-month leave of absence precludes the disabled person from doing so.

Third, petitioner argues that the court of appeals' ruling irrationally distinguishes between an extended leave of absence and a shorter-term or intermittent absence. As the decision below acknowledges (Pet. App. 8a-9a), the Seventh Circuit has agreed that periods of intermittent or shorter-term leave do not categorically remove an employee from the class of ADA-protected persons. *See Amadio v. Ford Motor Co.*, 238 F.3d 919, 928 (7th Cir. 2001) ("Undoubtedly, a short, one-week medical leave constitutes a reasonable accommodation in many circumstances.");

Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 601 (7th Cir. 1998) (2-4 weeks requested leave); *see also Byrne*, 328 F.3d at 381. But, as the court explained in this case, *see* Pet. App. 8a-9a, no inconsistency exists. Intermittent or shorter-term leave can preserve the employee's ability to "perform the essential functions" of the job—after all, it is not unusual for employees to take short periods off of work, so long as the essential functions of the job do not go neglected for extended periods of time. *See Hwang v. Kansas State Univ.*, 753 F.3d 1159, 1162 (10th Cir. 2014) ("few jobs require an employee to be on watch 24 hours a day, 7 days a week"); *Haschmann*, 151 F.3d at 602; 42 U.S.C. § 12111(9)(B) (noting possibility of "part-time or modified work schedules"). A single extended period of absence from work—when no duties are performed, much less the essential ones, for months on end—is fundamentally different.

B. There Is No Conflict Among The Circuits Meriting This Court's Review

Petitioner claims that the courts of appeals are split over whether "a finite leave of absence of more than one month in duration is categorically exempted from the ADA's reasonable accommodation requirements." Pet. 14; *see id.* at 14-25 (citing decisions from the Tenth, Sixth, Ninth, and First Circuits). That claim is overblown—as demonstrated by the fact that the leave at issue in this case was for several months, not simply "more than one month." *Id.* No disagreement among the circuits relating to treatment of a lengthy leave of absence under the ADA warrants this Court's review.

1. Petitioner's assertion (Pet. 20-21) that the Tenth Circuit takes an approach different from that taken by the court below is flatly incorrect.

In *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014) (cited in Pet. 20-21), in an opinion by then-Judge Gorsuch, the Tenth Circuit rendered a decision that is on all fours with the decision in this case.[4] The plaintiff in *Hwang* was a teacher who would not be able to work at all during a proposed six-month leave that she claimed was a reasonable accommodation. The court ruled that she could not "satisfy[] her elemental obligations" under the statute, because there was "no question she wasn't able to perform the essential functions of her job even with a reasonable accommodation," thus removing her from the scope of the ADA's definition of "qualified individual." *Id.* at 1161. "By her own admission," the court explained, "she couldn't work at any point or in any manner for a period spanning more than six months. It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions—and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation." *Id.* The court noted that "reasonable accommodations—typically things like adding ramps or allowing more flexible working hours—are all about enabling employees to work, not to not work." *Id.* at 1161-62.

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[4] As the petition points out (Pet. 21), *Hwang* involved the Rehabilitation Act rather than the ADA, but the Rehabilitation Act incorporates ADA standards, including the ADA provisions relevant in this case. *See* 29 U.S.C. § 794(d).

That is exactly the same reasoning that led the court of appeals in this case to reach the conclusion that petitioner was not a "qualified individual" under the ADA. Pet. App. 8a-10a. Petitioner suggests (Pet. 21) that *Hwang* framed the relevant inquiry as a more fact-specific one than the Seventh Circuit did, but that is a serious over-reading of the decision. *Hwang* simply noted—just like the court below—that "an employee who needs a brief absence from work for medical care can often still discharge the essential functions of her job," 753 F.3d at 1162; *see* Pet. App. 8a, and that the circumstances of a case could bear on the distinction between a permissible "brief absence" and an impermissible "lengthy absence," 753 F.3d at 1162. The court also explained that it was "difficult to conceive how an employee's absence for six months . . . could be consistent with discharging the essential functions of most any job," *id.*, and gave no indication that it would find an absence of two or three months any more "consistent" with the requirements of the statute.[5]

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[5] Petitioner also cites two earlier decisions from the Tenth Circuit, but those have been superseded by *Hwang*, and in any event are both distinguishable. In *Rascon v. US W. Commc'ns, Inc.*, 143 F.3d 1324 (10th Cir. 1998), *overruled on other grounds*, *New Hampshire v. Maine*, 532 U.S. 742 (2001), the court did not meaningfully analyze the question of whether an employee who seeks a lengthy leave of absence can nevertheless be a "qualified individual" under the ADA, and the leave requested by the employee was within the leave period provided for by the employer's own internal policies. *See* 143 F.3d at 1333-35. And in *Boykin v. ATC/VanCom of Colo., L.P.*, 247 F.3d 1061 (10th Cir. 2001), the court addressed a distinct issue not presented here: reassignment of an employee to a vacant position. *See id.* at 1064-65.

Consistent with *Hwang* and the decision below, most circuits have held that a reasonable accommodation is one that "presently, or in the near future, enable[s] the employee to perform the essential functions of his job." *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996) (citing *Myers*, 50 F.3d at 283); *Duckett v. Dunlop Tire Corp*, 120 F.3d 1222, 1226 (11th Cir. 1997) (same); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 760 (5th Cir. 1996) (same); *Wood v. Green*, 323 F.3d 1309, 1311-12 (11th Cir. 2003) (same); *see, e.g.*, *Robert v. Board of Cty. Comm'rs of Brown Cty., Kan.*, 691 F.3d 1211, 1217-18 (10th Cir. 2012) ("A leave request must assure an employer that an employee can perform the essential functions of her position in the 'near future.'").

2. Contrary to petitioner's contention, the Sixth Circuit has also taken an approach similar to that taken by the court below. For example, in *Boileau v. Capital Bank Financial Corp.*, 646 F. App'x 436, 441 (6th Cir. 2016), the court found that an employee was not a "qualified individual" under the ADA because she could not meet the basic attendance requirements of the job. The court relied on the Seventh Circuit's decision in *Byrne v. Avon Products*, 328 F.3d 379 (7th Cir. 2003)—on which the court below also relied, *see* Pet. App. 3a ("*Byrne* is sound and we reaffirm it"); *id.* at 8a-10a—for the proposition that "[i]nability to work for a multi-month period removes a person from the class protected by the ADA." *Byrne*, 328 F.3d at 380; *see, e.g.*, *Gamble v. JP Morgan Chase & Co.*, 689 F. App'x 397, 402-03 (6th Cir. 2017) ("our caselaw further establishes that an employee who has not been medically released to return to work, and therefore cannot perform the essential function of regularly

attending his or her job, is not a qualified individual for purposes of the ADA"); *Melange v. City of Ctr. Line*, 482 F. App'x 81, 84–85 (6th Cir. 2012) (same).[6] That is precisely what the court of appeals ruled in this case.

That reasoning is consistent with the Sixth Circuit's recent en banc decision in *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015). In that case, the court of appeals decided that an "up-to-four-days telecommuting proposal" would not allow an employee to perform the essential functions of her job and that she was therefore "not a 'qualified individual' as a matter of law." *Id.* at 762-63. Citing the Seventh Circuit's decision in *Waggoner v. Olin Corp.*, 169 F.3d 481 (7th Cir. 1999), which (like *Byrne*) formed part of the basis for the decision below, *see* Pet. App. 8a, the Sixth Circuit emphasized that "[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs," 782 F.3d at 762-63.

Petitioner relies on several Sixth Circuit decisions that pre-date that 2015 en banc decision. *See* Pet. 17-19 (citing *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998),

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[6] *See also, e.g.*, *Anderson v. Inland Paperboard & Packaging, Inc.*, 11 F. App'x 432, 438 (6th Cir. 2001) (citing *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) ("[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA") (citation omitted)); *Monette v. Electronic Data Sys., Corp*., 90 F.3d 1173, 1183 n.10, 1184, 1187 (6th Cir. 1996) (ruling that that leave of more than the 37 days voluntarily provided by the employer was not a "reasonable accommodation"), *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp.,* 681 F.3d 312, 315-16 (6th Cir. 2012)).

Cleveland v. Federal Express Corp., 83 F. App'x 74, 78, 81 (6th Cir. 2003), and *Walsh v. United Parcel Serv.*, 201 F.3d 718, 727 (6th Cir. 2000)).[7] But the Sixth Circuit has recently expressed doubt about whether the very decisions cited by petitioner "survive our more recent en banc decision in *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (en banc)." *Maat v. County of Ottawa, Mich.*, 657 F. App'x 404, 412 (6th Cir. 2016) (citing *Cehrs* and *Cleveland*); *compare, e.g.*, *Ford Motor Co.*, 782 F.3d at 762-63, and *Melange*, 482 F. Appx. at 84 ("An employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."), *with Cehrs*, 155 F.3d at 782 (rejecting proposition that "regular and predictable attendance is a job requirement").[8]

Under those circumstances, it is apparent that no current conflict exists between the approach taken by the Sixth Circuit and the approach taken by the court of appeals in this case. When the Sixth Circuit next has the opportunity squarely to address the issue, it may well decide that the decisions on which

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[7] *Walsh* notes that "the *Cehrs* Court was confronted with a situation where a request for a definite *and relatively short leave*" of one month "was made." 201 F.3d at 726 (emphasis added).

[8] Although *Maat* does not specifically mention the decision in *Walsh*, that decision is plainly distinguishable from the decision below. The holding in *Walsh* is that "when, as here, an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation." 201 F.3d at 727. That holding does not suggest approval of a lengthy leave like the one at issue in this case.

petitioner relies did not survive the en banc decision in *Ford Motor Co.*, and may once again endorse the approach taken in *Byrne*, *Waggoner*, and the decision below.

3. The Ninth Circuit, too, is likely to revisit its approach, in light of more recent developments, to the issue of whether a person whose proposed accommodation is a lengthy absence from the job can be a "qualified individual" under the ADA.

In asserting a circuit split with respect to the Ninth Circuit, petitioner primarily relies (Pet. 19) on *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999), an almost twenty-year-old decision with limited reasoning. In *Nunes*, the court of appeals stated, without elaboration, that "[i]f [plaintiff's] medical leave was a reasonable accommodation, then her inability to work during the leave period would not automatically render her unqualified." *Id.* at 1247.[9] But *Nunes* predates this Court's decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). While *US Airways* does not directly address the medical-leave issue, that decision does significantly explicate the relevant provisions of the ADA—and the decision below relied on it in rejecting the view that "a long-term medical leave of absence should qualify as a reasonable accommodation when the leave is . . . of a definite, time-limited duration" and is "likely to enable the employee to perform the

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[9] *Nunes* relied on dicta in *Norris v. Allied-Sysco Food Servs., Inc.,* 948 F. Supp. 1418 (N.D. Cal. 1996), to support that pronouncement, even though the *Norris* court cited two cases holding that for leave to be a reasonable accommodation it must allow the employee to return to work in the immediate or near future. *Norris,* 948 F. Supp. at 1439 (citing *Hudson*, 87 F.3d at 1169, and *Myers*, 50 F.3d at 280, 283).

essential job functions when he returns." Pet. App. 9a; *see id.* at 9a-10a (explaining that this "reading of the statute equates 'reasonable accommodation' with 'effective accommodation,' an interpretation . . . rejected" in *US Airways*).

In addition, some Ninth Circuit decisions other than *Nunes* suggest a view of the meaning of the pertinent statutory provisions more akin to the Seventh Circuit's. For instance, in *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), the court denied ADA protection—outside the medical-leave context—because the employee was not a "qualified individual." *Id.* at 1112. The court explained that "[a] 'qualified individual' is someone who 'can perform.' That definition *uses the present tense.* Thus, one must be able to perform the essential functions of employment *at the time that one is discriminated against* in order to bring suit." *Id.* (emphasis added). In other words, under *Weyer*, the ability to do the job at some later date, even months after the employment decision, is not the relevant inquiry under the ADA's definition of "qualified individual." What matters is whether the employee can perform the job's essential functions, with or without the accommodation, at the time of termination. *See id.*[10] That is consistent with the reasoning of the Seventh Circuit's decision below.

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[10] *See also, e.g.*, *Johnson v. Board of Trs. of Boundary Cty. Sch. Dist. No. 101*, 666 F.3d 561, 564 (9th Cir. 2011) ("Moreover, she must show that she was 'qualified' at the time of the alleged discrimination." (citing *Weyer*, 198 F.3d at 1112)); *Walraven v. Geithner*, 363 F. App'x 513, 514 (9th Cir. 2010); *cf. Larson v. United Nat. Foods W. Inc.*, 518 F. App'x 589, 591 (9th Cir. 2013) ("And an indefinite, but at least six-month long, leave of absence to permit him to fulfill the . . . treatment recommendations so that he might eventually be physically qualified under the DOT

Under those circumstances, if the Ninth Circuit were to confront a case like petitioner's in the future, it could well take a different view from that expressed in *Nunes*. The court would have to take *US Airways* into account, and would also have the benefit of recent, thoroughly reasoned decisions like the Tenth Circuit's decision in *Hwang* and the Seventh Circuit's decision below.

4. The state of affairs in the First Circuit is similar. As petitioner explains, in *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000), the First Circuit rejected the argument that "an employee's request for an extended medical leave will necessarily mean . . . that the employee is unable to perform the essential functions of her job." *Id.* at 647-48 (citing *Criado v. IBM Corp.*, 145 F.3d 437, 443-44 (1st Cir. 1998)); *see id.* at 647 (citing *Haschmann*, 151 F.3d at 601). Like the Ninth Circuit's decision in *Nunes*, however, *García-Ayala* predates this Court's decision in *US Airways* and could be revisited in light of that decision.

Moreover, subsequent to *García-Ayala* the First Circuit has been more receptive to the idea that a person seeking a lengthy leave of absence from work is not a "qualified individual." *García-Ayala* specifically acknowledged that "there may be requested leaves so lengthy or open-ended as to be an unreasonable accommodation in any situation," 212 F.3d at 648; *see id.* at 649—that is, that there may be firm rules, cutting across cases, that district courts

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regulations is not a reasonable accommodation."); *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1135 n.11 (9th Cir. 2001) (noting that, for many jobs, "regular and predictable attendance is an essential function of the position").

can apply to certain categories of circumstances. Recently, in *Echevarría v. AstraZeneca Pharm. LP*, 856 F.3d 119 (1st Cir. 2017) (cited in Pet. 17), the First Circuit ruled that the lengthy leave sought by the employee in that case was not a reasonable accommodation under the ADA. In doing so, the First Circuit cited the Tenth Circuit's decision in *Hwang* approvingly, quoted its key passages at some length, and noted the "dilemma that lengthy leave requests pose." *Id.* at 130-31; *see id.* at 132 ("Our holding in *García-Ayala* was driven by the particular facts of that case."); *see also, e.g.*, *Colón–Fontánez v. Municipality of San Juan*, 660 F.3d 17, 33 (1st Cir. 2011) ("This Court—as well as the majority of circuit courts—has recognized that attendance is an essential function of any job.") (internal quotes and citation omitted).[11]

With the benefit of *Hwang*'s reasoning, and in light of other developments in the law since *García-Ayala*, the First Circuit's approach seems to be evolving, and may well continue to do so. In any event, even under *García-Ayala*, *see* 212 F.3d at 648 ("there may be requested leaves so lengthy or open-ended as to be an unreasonable accommodation in any situation"), many cases will have the same outcome in the First Circuit as they do in the Seventh Circuit. This Court's review is not warranted.

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[11] Another recent First Circuit case cited by petitioner, *McDonald v. Town of Brookline*, 863 F.3d 57, 66 (1st Cir. 2017) (cited in Pet. 17), is inapposite. In relevant part, *McDonald* held merely that a district court did not commit plain error by failing to instruct a jury that a "reasonable accommodation may include, inter alia, leave of absence and leave extension; [and] additional leave beyond that allowed in leave policy." *Id.* at 65.

C. Resolution of the Question Presented Would Lack Practical Significance

Finally, this case does not merit this Court's review because of the nature of the question presented. The question whether an employee who seeks a lengthy leave is a "qualified individual" is just the first step in the analysis of an ADA discrimination claim, and petitioner would not be able to overcome the additional statutory hurdles to establish a successful claim of discrimination. Moreover, that difficulty is likely to be common in cases involving long-term leaves of absence from work, which means that any disagreement among the circuits on the "qualified individual" issue is ultimately of little practical significance.

1. This case is a poor vehicle for addressing the question presented because even a disposition of that question in petitioner's favor would not change the result.

Even if petitioner were able to establish that he is a "qualified individual" within the meaning of the ADA, he would still have to show that his proposed accommodation was "reasonable on its face, *i.e.*, ordinarily or in the run of cases." *US Airways, Inc.*, 535 U.S. at 401-02. But his proposed accommodation is not a reasonable one under that objective standard. It is not ordinarily reasonable to ask an employer to provide a lengthy period of leave, in addition to the full 12 weeks of FMLA leave, to an employee who is unable to perform any of the functions of his job during that period. Here, the *total* leave to which petitioner says he was entitled would have extended over six months. That amount of time away from the job, which is far beyond what most employers

(especially smaller employers covered by the ADA) would approve, is so long as to be objectively unreasonable "in the run of cases." As then-Judge Gorsuch explained in *Hwang*, "it's difficult to conceive how an employee's absence for six months—an absence in which she could not work . . . in any way in any place—could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a *reasonable* accommodation." *Hwang*, 753 F.3d at 1162; *see id.* at 1161; *Stallings v. Detroit Pub. Schs.*, 658 F. App'x. 221, 226-27 (6th Cir. 2016) (four months of leave was not a reasonable accommodation); *compare, e.g.*, *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002) ("Because Smith had requested and taken no more leave than the FMLA already required that she be given, we cannot conclude that the length of time was unreasonable or that the leave unduly burdened [the employer]."). [12] That conclusion is cemented by the fact that

[12] The EEOC's Enforcement Guidance acknowledges that an initial FMLA absence is relevant and may be considered in evaluating the reasonableness of a request for extended medical leave following exhaustion of available FMLA leave. *See* EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* ¶ 21 (Oct. 2002), available at https://www.eeoc.gov/policy/docs/accommodation.html. Because a decision on the merits in this case may well draw a line between employees seeking leave who (like petitioner) have already taken 12 weeks of weeks of FMLA leave and those who have not taken or were not eligible for FMLA leave, as the decisions cited in the text suggest could be appropriate, this case would not provide guidance as to the latter category, and could therefore leave open significant questions for future decision.

petitioner has not pointed to any decision definitively approving such a lengthy multi-month period of leave—not otherwise offered by an employer as a matter of its own internal policies—as a reasonable accommodation under the ADA. *See, e.g.*, Pet. 20 (citing *Rascon*, 143 F.3d at 1333-35).

In addition, even were the accommodation an objectively reasonable one in the run of cases, petitioner's case would nevertheless falter at the "undue hardship" inquiry. An "undue hardship" is "an action requiring significant difficulty or expense, when considered in light of" factors such as the "nature and cost of the accommodation," the "overall financial resources" and "size" of the employer, and "the composition, structure, and functions of the workforce of such entity." 42 U.S.C. § 12111(10)(A)-(B). At summary judgment in the district court, respondent presented substantial evidence that granting petitioner the additional leave he requested would have represented an undue hardship to Heartland, a small company with a small number of workers and limited financial resources. *See* Resp. Dist. Ct. Br. 15-20, Sept. 11, 2015, 14-cv-01141-LA No. 44 (E.D. Wis.). Although the district court did not reach the issue in light of its "qualified individual" ruling, *see* Pet. App. 28a n.5, that evidence established that the accommodation would have caused Heartland significant difficulty and expense by delaying the company's ability to find a permanent and qualified employee to fill the position of second-shift lead. Strnad was the temporary second-shift lead at the time, but his performance deficiencies were causing decreased productivity, increased labor costs, and diminished productivity and morale—and doing so at a time when the importance of the second shift was increasing.

Heartland thus needed to replace him as soon as possible with a permanent and qualified candidate, and did not believe that it would be feasible to find and hire a temporary qualified candidate as a placeholder while waiting for petitioner's eventual return. *See* Resp. Dist. Ct. Br. 16-20, Sept. 11, 2015, 14-cv-01141-LA No. 44 (E.D. Wis.). Heartland's difficulty, despite its best efforts, in quickly finding a permanent replacement for Strnad confirmed Heartland's conclusion that a permanent replacement was necessary, because it was difficult to find any person with the necessary skills who was willing to accept the job, much less one who would be willing to accept the position on a temporary basis. That fact does not diminish the difficulty and expense involved in holding petitioner's position open for him, particularly in light of the fact that there appears to have been at least some uncertainty surrounding the possible date of petitioner's return to work. *See, e.g.*, Pet. App. 14a; Koness Aff. 9, July 16, 2015, 14-cv-01141-LA No. 25 (E.D. Wis.).

2. As evidenced by the objective nature of the inquiry into whether a proposed accommodation is "reasonable" within the meaning of the ADA, claims involving the kind of extended leave at issue in this case will almost always run into the same difficulties—entirely independent of the "qualified individual" inquiry—that petitioner faces here. A lengthy leave of absence is unlikely to be reasonable on its face, and it is likely to represent an undue hardship to the employer (especially the smaller employers covered by the ADA). Accordingly, regardless of how a court analyzes the question whether a person who seeks a lengthy leave can be a "qualified individual" under 42 U.S.C. § 12111(8),

such claims are unlikely to succeed. *See, e.g.*, *Hwang*, 753 F.3d at 1161-62.

In light of that fact, this Court's review of the question presented is not warranted. The answer to that question simply will not have a sufficient practical effect on the actual resolution of ADA disability claims to merit this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID A. MCCLURG
Counsel of Record
PETRIE & PETTIT, S.C.
250 EAST WISCONSIN
AVENUE, SUITE 1000
MILWAUKEE, WI 53202
(414) 276-2850
DMcClurg@petriepettit.com