No. 17-1113

In the Supreme Court of the United States

MARYTZA GOLDEN,

Petitioner,

v.

INDIANAPOLIS HOUSING AGENCY,

Respondent.

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

BRIEF IN OPPOSITION

KATHLEEN A. DELANEY
Counsel of Record
ANNAVIEVE C. CONKLIN
DELANEY &
DELANEY LLC
3646 Washington Blvd.
Indianapolis, IN 46205
(317) 920-0400
kathleen@delaneylaw.net

Counsel for Respondent Indianapolis Housing Agency

QUESTION PRESENTED

Whether an employee who uses all 12 weeks of leave guaranteed by the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq*., followed by four additional weeks of leave provided by her employer, and who then seeks a further six months of leave without medical evidence that she could perform the essential functions of her job even after that additional six months, is a "qualified individual" under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

INTRODUCTION

Petitioner asks this Court to grant review to decide whether an employee is a "qualified individual" under the Rehabilitation Act when she cannot perform the essential functions of her job for multiple months. The same question under the Americans with Disabilities Act (ADA) is presented by the co-pending petition in *Severson v. Heartland Woodcraft, Inc.*, No. 17-1001 (filed Jan. 18, 2018). In both cases, the Seventh Circuit correctly answered the question in the negative based on the plain text of the statutes, their underlying purpose, and the existence of a separate statute specifically focused on medical leaves and enacted close in time. Those decisions do not create or solidify any circuit conflict that would warrant this Court's review. Any disagreement among the circuits is new, underdeveloped, and lacking in practical significance in all but the rare case. And this is not the rare case. Petitioner's employer had already granted 16 weeks of medical leave; petitioner provided her employer no medical evidence that she would have been able to return to work even after the additional *six* months requested; and, in fact, she was not. The facts of petitioner's case (and others like hers) are undeniably tragic, but they fall outside the scope of the Rehabilitation Act and do not warrant the Court's review at this time.

STATEMENT OF THE CASE

1. a. The Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, forbids discrimination on the basis of disability by certain federally funded programs. Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or

his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 794(a). Section 504 further provides that the standard for assessing whether a violation has occurred in the context of employment discrimination is the same standard applied under Title I of the ADA. *Id.* § 794(d).

b. Title I of the ADA, 42 U.S.C. § 12111 *et seq.*, prohibits covered employers from discriminating "against a qualified individual on the basis of disability." *Id.* § 12112(a). Discrimination on the basis of disability includes the failure to provide "reasonable accommodations" to the known limitations of an "otherwise qualified individual with a disability," unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business." *Id.* § 12112(b)(5)(A). The ADA applies to employers with as few as 15 employees. *Id.* § 12111(5)(a).

A threshold question is whether the employee claiming discrimination is a "qualified individual." The ADA defines "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." *Id.* § 12111(8). If an employee cannot "perform the essential functions" of the job without a reasonable accommodation, then she could be a "qualified individual" only if a reasonable accommodation would allow her to perform those essential functions. *Id.*

The ADA does not define "reasonable accommodation," but provides that 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 examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." *Id.* § 12111(9).

The plaintiff has the burden of showing that she is a "qualified individual" and, relatedly, that a proposed accommodation is reasonable. *See, e.g.*, *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147 (1st Cir. 2006). If an employee makes these showings, the employer then has the opportunity to demonstrate that providing a given accommodation "would impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A). If an employer establishes that an otherwise reasonable accommodation would create an undue hardship, the denial of that accommodation does not constitute discrimination under the ADA. *See id.*

c. Separate from both the Rehabilitation Act and the ADA, the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, "entitle[s] employees to take reasonable leave for medical reasons." *Id.* § 2601(b)(2). Under the FMLA, "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" because of, among other things, "a serious health condition that makes the employee unable to perform the functions of the position of such employee." *Id.* § 2612(a)(1)(D); *see also id.* § 2611(2)(A) (defining "eligible employee"); *id.*

§ 2611(11) (defining "serious health condition"). The FMLA applies only to entities with 50 or more employees, and only to an employee who has worked for that employer for 12 months. *Id.* § 2611(2)(A)(i), (4)(A)(i).

2. a. Respondent Indianapolis Housing Agency (IHA) is a federally funded government agency that provides public housing in Indianapolis. As part of its mission, IHA maintains a police force. The "main functions" of IHA police officers "include responding to calls for service, investigating crimes, protecting the public, protecting IHA assets, responding to 911 calls, providing emergency aid, and protecting and serving the public." Pet. App. 2a (citation omitted). IHA hired petitioner as one of its police officers in June 1999. *Id.*

In November 2014, petitioner was diagnosed with breast cancer. *Id.* In early December, she requested and IHA granted her leave under the FMLA, and she soon underwent a mastectomy. *Id.* On December 19, petitioner's doctor characterized her condition as "ongoing" and said that she would be incapacitated "until released." *Id.*

Recognizing that she would not be able to return to work when her 12 weeks of FMLA leave ended on March 16, 2015, petitioner applied for long-term disability benefits. *Id.* at 3a, 11a. As part of that application, petitioner represented that she could not "perform [her] job descriptions safely" and "needed hands-on help to safely perform the activities of daily living." *Id.* at 3a (alteration in original) (citation omitted). Petitioner's direct supervisor at IHA certified on the employer portion of the application that petitioner's job could not be modified to accommodate her disability.

Id. Petitioner submitted the application on March 11, 2015. *Id.* at 12a.

Two days later, a member of IHA's human resources department sent petitioner a letter explaining that her FMLA leave would soon expire. *Id.* at 3a. The letter stated that, per IHA custom, petitioner could take an additional four weeks of medical leave, up to April 14, 2015. *Id.* The letter also requested that petitioner provide an updated certification from her doctor and invited her to contact the human resources department with any questions. *Id.* at 12a. On March 31, petitioner's doctor provided an updated certification, which again characterized her condition as "ongoing" and her period of incapacity as "until release." *Id.* at 3a.

On April 13, the day before her leave was scheduled to end, petitioner stopped by IHA's human resources department and had an unscheduled meeting with the director and a staff member. *Id.* The three discussed the fact that petitioner's employment would end the next day, as well as her retirement and long-term disability benefits. *Id.* at 3a, 13a. At that meeting, petitioner "didn't ask for additional leave or any other accommodations." *Id.* at 3a.

That night, however, petitioner sent a two-sentence email to the human resources department in which she "request[ed] an unpaid leave of absence per city policy." *Id.* at 13a. The "city policy" petitioner was referring to was IHA's General Leave of Absence policy, which states in relevant part:

> The Director of Human Resources in conjunction with the Department Director may ap-

> prove a leave without pay for a specified period of time (not to exceed six (6) months) when it is determined that no other leave form is appropriate. All such leaves are approved only after consideration of the effect of the leave on the department's operations and receipt of the appropriate supporting documentation. . . . Except in emergencies, the employe[e] is required to make his/her request at least two (2) weeks in advance of the anticipated leave.

Id. at 13a-14a. Although petitioner's email did not expressly identify the amount of leave she was requesting, she has since maintained that she was asking for a full six months. *See, e.g.*, Pet. 22. Petitioner failed to provide the required two weeks' notice and provided no supporting documentation from her doctor indicating that she would be able to return to work after the additional six months or anytime thereafter. *See* Pet. App. 4a. IHA denied this request, and petitioner's employment ended on April 14, 2015. *Id.*

After her employment with IHA ended, petitioner continued to have a severely limited ability to work. Her doctor cleared her to perform light duty work on July 6, 2015, restricting her to a maximum shift of eight hours and no more than 20 hours total per week, with a lifting restriction of no more than 15 pounds. *Id.* at 15a. On August 19, 2015, petitioner underwent a second mastectomy. *Id.* This surgery left her unable to work until September 8, 2015, and even then only with greater restrictions: a maximum of 10 hours per week and a lifting restriction of no more than 10 pounds. *Id.* Petitioner faced additional surgeries in

November and December 2015. *Id.* She was not released to work again until late February 2016, and only with continuing restrictions on her maximum hours and tasks. *Id.* In light of her medical restrictions, petitioner did not apply to any jobs between April 2015 and December 2015. Golden Dep. 35:9-12 (S.D. Ind.), ECF No. 49. Instead, based on her certification that she was unable to work, petitioner received long-term disability benefits amounting to roughly 60% of her salary starting on April 21, 2015, and running through March 18, 2016. *See* Pet. App. 15a.

b. On May 13, 2015, petitioner sued IHA in the United States District Court for the Southern District of Indiana. Petitioner claimed that IHA violated Section 504 of the Rehabilitation Act when it refused her request for six months of additional leave and terminated her employment. *See id.* at 10a.[1]

The district court granted summary judgment to IHA. *Id.* The court found it "undisputed" that, "[a]t the time of her termination, [petitioner] could not perform the essential functions of her job without an accommodation." *Id.* at 20a. The court then concluded that her requested accommodation of an additional six months of leave was not reasonable for two, independent reasons. *See id.* at 21a-28a.

First, the district court relied on Seventh Circuit decisions, including *Byrne v. Avon Products, Inc.*, 328

---

[1] Petitioner also alleged racial discrimination, but voluntarily dismissed that claim after IHA warned her that it was frivolous, *see* Fed. R. Civ. P. 11(c)(2), and discovery revealed that IHA had never granted any employee (of any race) leave under the policy petitioner invoked, *see* Walden Dep. 65:5-16 (S.D. Ind.), ECF No. 47-32. Pet. App. 10a n.1.

F.3d 379 (7th Cir.), *cert. denied*, 540 U.S. 881 (2003), to hold that the length of leave requested—"six months of leave *in addition to* the sixteen weeks she had already received"—was unreasonable "as a matter of law." Pet. App. 21a-24a. Second, the district court found that, at the time of petitioner's termination, there was no medical evidence that the requested accommodation would have enabled her to return to work. *See id.* at 24a-28a. Although petitioner testified that she had informed IHA that she planned to return to work in August 2015, her leave request came "with no medical evidence reflecting that she would have been able to perform the essential functions of her position as a Public Safety Officer on a regular basis at the end of her requested leave." *Id.* at 26a-27a. (And hindsight confirmed that in fact she could not. *See id.*) For that reason too, the district court held that the requested accommodation was not reasonable. *Id.* at 27a.

3. a. The court of appeals affirmed in a short per curiam, unpublished order. Pet. App. 1a-5a. The court explained that, "[a]fter [petitioner] took sixteen weeks of unpaid medical leave, her doctor still could not say when she would be able to return to work." *Id.* at 2a. Then, relying on its recent decision in *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017) (Sykes, J., joined by Wood, C.J. & Easterbrook, J.), *petition for cert. filed*, No. 17-1001 (distributed for Mar. 16, 2018 conference), the court held that petitioner was not a "qualified individual" because her request for "six months of medical leave in addition to the twelve weeks required by the FMLA" was not reasonable. Pet. App. 5a.

In *Severson*, the Seventh Circuit held that a "long-term," "multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA." 872 F.3d at 479, 481. That is so, the court explained, because "[a] 'reasonable accommodation' is one that allows the disabled employee to 'perform the essential functions of the employment position.'" *Id.* at 481 (quoting 42 U.S.C. § 12111(8)). The examples of reasonable accommodations identified in the statute "are all measures that facilitate work." *Id.* By contrast, the court continued, "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." *Id.* The court acknowledged that shorter leaves of absence, which could be analogous to a part-time or modified schedule (two potential accommodations identified by the ADA), might be reasonable. *Id.* But the court distinguished "a medical leave spanning multiple months," which "does not permit the employee to perform the essential functions of his job." *Id.*

The *Severson* court also focused on the relationship between the ADA and the FMLA. The court explained that "[l]ong-term medical leave is the domain of the FMLA," which is specifically designed to apply when employees are "*unable* to perform their job duties due to a serious health condition." *Id.* The ADA, by contrast, "applies only to those who can do the job." *Id.* (quoting *Byrne*, 328 F.3d at 381). If an employee could demand a multimonth leave as a reasonable accommodation, the court explained, "the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA." *Id.* at 482. The court found this to be an "untenable" interpretation of the ADA. *Id.*

b. Judge Rovner concurred in the judgment below, "question[ing] the holding[]" of *Severson*. Pet. App. 6a. She recognized, however, that "[t]he indefinite and lengthy nature of [petitioner's] request for leave indeed may have been an undue hardship for [IHA]." *Id.* at 8a.

4. Petitioner filed a timely petition for rehearing en banc. No response was requested and, on November 9, 2017, the court of appeals denied rehearing. *Id.* at 31a-32a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant review to consider whether a multimonth leave of absence can ever be a reasonable accommodation under the Rehabilitation Act. Contrary to petitioner's contention, there is no "intractabl[e]" or "entrenched" circuit split on that question warranting the Court's review at this time. No court of appeals has acknowledged this asserted conflict; no circuit has rejected the Seventh Circuit's reasoning; and the more recent cases have embraced the same logic. Any disagreement is also of little practical significance as the outcome would remain the same in all but the rare case. Moreover, the decision below is correct: an extended multimonth medical leave falls outside the text and purpose of the Rehabilitation Act, and is more specifically addressed by the FMLA. In any event, this case is a poor vehicle to resolve the question presented because petitioner would not prevail even under her preferred approach. Accordingly, this Court's review is not warranted.

I. There Is No Circuit Conflict Warranting This Court's Review

Petitioner asserts that there is an "intractabl[e]" and "entrenched" circuit split over whether a multimonth leave of absence can qualify as a reasonable accommodation. Pet. i, 1. Yet, no court of appeals has acknowledged the asserted split. *Severson* did not purport to disagree with any decision of any other court of appeals. And no decision of any other court of appeals purports to disagree with the Seventh Circuit. Petitioner relies most heavily on decades-old cases that do not address the key arguments that undergird *Severson*. More recent decisions appear to recognize that a multimonth leave of absence may fall outside the scope of the ADA. And, in any event, the purportedly different rules have produced different outcomes in very few cases. Unless and until a genuine split of consequence arises after further percolation, this Court's review is not warranted.

A. The Alleged Circuit Split Is Overstated

Petitioner contends that the Seventh Circuit decisions below and in *Severson* squarely conflict with the decisions of four other courts of appeals and cannot be reconciled with two others. Pet. 13-16. The purported split is significantly overstated.

1. As an initial matter, *Severson* did not hold that any medical leave "longer than one month" is necessarily unreasonable. *Id.* at 2. *Severson* refers to "multimonth" leaves and leaves "spanning multiple months" (872 F.3d at 479, 481), and the actual facts of *Severson* concerned a request for *three* months of leave (*id.* at 478). *Severson* thus does not foreclose the possibility that a leave of fewer than two months (*i.e.*, not

a *multi*month leave) may be reasonable in some circumstances. Any ambiguity on the precise "rule" petitioner seeks to challenge counsels against further review. *Compare, e.g.*, Pet. 21 ("more than one month"), *id.* at 26 ("longer than one month"), *and id.* at 29 ("exceeds one month"), *with id.* at 8 ("two months or more").

2. Whatever the outer limits of *Severson*, there is no meaningful division of authority warranting the Court's review.

a. Contrary to petitioner's contention (Pet. 15-16), there is no conflict with the Tenth Circuit. In *Hwang v. Kansas State University*, 753 F.3d 1159 (2014), a decision authored by then-Judge Gorsuch, the Tenth Circuit held that an employee diagnosed with cancer who asked her employer for additional time off after exhausting her six months of sick leave was *not* a qualified individual.

"It perhaps goes without saying," Judge Gorsuch wrote, "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.* at 1161. The reason why, the court explained, is that reasonable accommodations "are all about enabling employees to work, not to not work." *Id.* at 1161-62. The court found it "difficult to conceive how an employee's absence for six months . . . could be consistent with discharging the essential functions of most any job in the national economy today," and concluded that, "[e]ven if it were, it is [still] difficult to conceive when requiring so much latitude from an employer might qualify

as a *reasonable* accommodation." *Id.* at 1162. The court further distinguished such an extended leave from "brief absence[s]" from work that would allow the employee to "still discharge the essential functions of her job." *Id.* And the court noted that the Rehabilitation Act was not designed "to turn employers into safety net providers for those who cannot work." *Id.* Far from establishing a conflict, the Tenth Circuit's reasoning closely mirrors that of the Seventh Circuit.

The 20-year-old decision in *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998) (cited at Pet. 15-16), does not suggest otherwise. Indeed, *Rascon* did not squarely confront whether a multimonth leave of absence could be a reasonable accommodation. Although the employee had initially requested a four-month leave, the employer had granted four, sequential 30-day leaves for the employee to attend a treatment program. *See id.* at 1328-29. The dispute arose when the employer refused to provide the additional *weeks* necessary to complete that program. *See id.* at 1329. That such an "allowance of time for medical care or treatment may constitute a reasonable accommodation" (*id.* at 1333-34) or, in the words of *Hwang*, that a "*brief* absence may sometimes amount to a (legally required) reasonable accommodation" (753 F.3d at 1162 (emphasis added)), creates no division of authority. The Seventh Circuit agrees. *Severson*, 872 F.3d at 481 (acknowledging that a leave of "a couple of days or even a couple of weeks" may be a reasonable accommodation).

b. There is no square conflict with the Sixth Circuit either. The only published decision petitioner cites (Pet. 14) is also two-decades old and may no

longer be good law in that circuit. In *Cehrs v. Northeast Ohio Alzheimer's Research Center*, the employee had requested an additional one-month leave of absence after having already been granted eight weeks. 155 F.3d 775, 778 (6th Cir. 1998). In expressing uncertainty as to whether there should be a "*per se* rule that an unpaid leave of indefinite duration (or a very lengthy period such as one year) could never constitute a 'reasonable accommodation,'" the court rejected a "presumption that uninterrupted attendance is an essential job requirement." *Id.* at 782 (citation omitted); *see also id.* at 783.

But in 2015, the en banc Sixth Circuit embraced the "common sense" presumption *Cehrs* rejected, concluding that "[r]egular, in-person attendance *is* an essential function—and a prerequisite to essential functions—of most jobs." *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762-63 (6th Cir. 2015) (emphasis added). The continuing vitality of *Cehrs* is thus very much in doubt. *See Maat v. Cty. of Ottawa*, 657 F. App'x 404, 412 (6th Cir. 2016) (questioning whether *Cehrs* "survive[s] our more recent en banc decision in *EEOC v. Ford Motor Co.*"). And, since *Ford Motor Co.*, no Sixth Circuit case has found that a multimonth leave might be required as a reasonable accommodation.[2]

c. The alleged split with the First Circuit is also far from clear. Petitioner relies (Pet. 13) on *Garcia-*

---

[2] *Cleveland v. Federal Express Corp.*, 83 F. App'x 74, 78-79 (6th Cir. 2003) (cited at Pet. 14), is an unpublished decision that relies on *Cehrs* and that predates the en banc decision in *Ford Motor Co.* And in *Terre v. Hopson*, 708 F. App'x 221, 228-29 (6th Cir. 2017), another unpublished decision, the employer voluntarily *granted* the employee leave but then eliminated his position.

Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000). In that case, the court of appeals rejected the district court's view "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. But it also recognized that "there may be requested leaves so lengthy or open-ended as to be an unreasonable accommodation *in any situation*." *Id.* at 648 (emphasis added). And the leave requested in *Garcia-Ayala* "was for less than two months." *Id.* at 647.

Most critically, petitioner ignores a more recent decision indicating that the First Circuit does not in fact disagree with the Seventh Circuit's approach. In *Echevarria v. AstraZeneca Pharmaceutical LP*, 856 F.3d 119 (1st Cir. 2017), the court rejected as unreasonable an employee's request for a multimonth leave. In doing so, the First Circuit emphasized that a number of courts confronted with requests for longer, multimonth leaves have found them "facially" unreasonable, *including* the Seventh Circuit's decision in *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003). 856 F.3d at 130. The court also quoted at length from Judge Gorsuch's analysis in *Hwang*, including the point 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.* (quoting *Hwang*, 753 F.3d at 1162). The court then expressly distinguished *Garcia-Ayala* as involving only a "two month" leave. *Id.*

at 131 & n.16.[3] And the court left open the possibility that "lengthy" periods of leave *could* be an "unreasonable accommodation in every case." *Id.* at 132. Any declaration of a conflict is thus (at best) premature, and certainly not "entrenched" (Pet. 20).

d. The same goes for the Ninth Circuit. Petitioner relies on another nearly 20-year-old decision, and a more recent, unpublished decision in a case brought under state law. *See* Pet. at 14-15 (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999), and *Villalobos v. TWC Administration LLC*, No. 16-55288, 2017 WL 6569587 (9th Cir. Dec. 26, 2017)). Like *Rascon*, *Nunes* did not squarely present the question of a multimonth leave; the employee needed less than two months of additional leave. *Nunes*, 164 F.3d at 1245-46. Nor did the court engage in any real analysis of whether or when a multimonth leave might be reasonable—let alone grapple with the reasoning of *Severson*. Until the Ninth Circuit actually considers and rejects that analysis, the asserted conflict cannot fairly be described as "intractable."

3. The purported "conflict[]" with the Second and D.C. Circuits is weaker still. Pet. 17-18 (citing *Solomon v. Vilsack*, 763 F.3d 1 (D.C. Cir. 2014), and *McMillan v. City of New York*, 711 F.3d 120 (2d Cir. 2013)).

As petitioner concedes (Pet. 16), neither *Solomon* nor *McMillan* actually addressed the question of mul-

---

[3] The court made clear that *Garcia-Ayala*'s discussion of a "five months of unpaid leave" was mere "dictum." *Echevarria*, 856 F.3d at 131 n.16.

timonth leaves of absence. Instead, they both concerned employees' requests for flexible work schedules. McMillan, for example, simply wanted to arrive at work between 10 a.m. and 11 a.m. and to stay commensurately late, while "still work[ing] 35 hours per week." 711 F.3d at 124. Solomon wanted a "maxiflex" schedule, under which she would still work an average of 40 hours per week but could "vary the number of hours worked on a given workday or the number of hours each week." 763 F.3d at 10 (citation omitted). The fact that the Second and D.C. Circuits held that these could be reasonable accommodations in no way conflicts with the decision below or in *Severson*. *See Severson*, 872 F.3d at 481 (recognizing that a "modified work schedule" can be a reasonable accommodation).

Petitioner suggests (Pet. 16-18) that *Solomon* and *McMillan* held that no potential accommodation can be deemed categorically unreasonable. That too is wrong. *Solomon* says only that "[d]etermining whether a particular type of accommodation is reasonable is *commonly* a contextual and fact-specific inquiry," and that "it is *rare* that any particular type of accommodation will be categorically unreasonable." 763 F.3d at 9, 10 (emphases added). And *McMillan* does not even say that much; indeed, it distinguishes between "tardiness" and "complete absence[s]." 711 F.3d at 126-27 n.3; *see also infra* at 26 (discussing other generally recognized categorical rules).

4. Petitioner effectively concedes that there is no conflict with the other circuits. Pet. 18-19. Rightly so. *Epps v. City of Pine Lawn* (cited at Pet. 20) addressed

the question of leave in a footnote and summarily concluded that a request for six months of leave was *not* reasonable. 353 F.3d 588, 593 n.5 (8th Cir. 2003) ("Epps . . . failed to show that a reasonable accommodation existed."). Decisions from the other courts of appeals note that a leave of absence must be "limited" to be reasonable. *See, e.g.*, *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 419 (5th Cir. 2017); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 n.7 (4th Cir. 2013). And others emphasize that, to qualify as a reasonable accommodation, a leave must allow the employee "to return to work 'in the present or in the immediate future.'" *Billups v. Emerald Coast Utils. Auth.*, No. 17-10391, 2017 WL 4857430, at *4 (11th Cir. Oct. 26, 2017) (quoting *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir.), *cert. denied*, 540 U.S. 982 (2003)); *see also Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) ("[R]easonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question."). Because a multimonth leave is not "limited" and does not allow an employee to work "in the immediate future," the decision below and in *Severson* do not depart from the decisions of these circuits.

B. Any Disagreement Is Of Little Practical Significance

Review is particularly unwarranted because any disagreement among the courts of appeals appears to be of little practical significance. Petitioner (and Severson) have collectively identified *two cases* over the course of *two decades* where *any* court of appeals has

found a leave of two months or more to be even *potentially* reasonable. *See Dark v. Curry Cty.*, 451 F.3d 1078, 1090 (9th Cir. 2006), *cert. denied*, 549 U.S. 1205 (2007); *Cleveland v. Fed. Express Corp.*, 83 F. App'x 74, 78-79 (6th Cir. 2003).[4] Neither case decided whether the accommodation was in fact reasonable, or whether there would be undue hardship. *Dark*, 451 F.3d at 1090; *Cleveland*, 83 F. App'x at 78-81. And only one involved a leave request of over three months—and that decision was unpublished. *Cleveland*, 83 F. App'x at 78-79. Any difference in the governing approach is thus unlikely to impact the ultimate outcome in the vast majority of cases. (As discussed below, *see infra* Part III, the outcome in petitioner's case clearly would be the same in any circuit.) At the very least, the Court should await a more demonstrable practical impact before intervening in what would be—at best—a narrow and nascent conflict.

---

[4] As explained above (at 13-14), *Cehrs* and *Rascon* involved requests for one additional month and several additional weeks, respectively. *Garcia-Ayala* involved a request for "less than two months" of additional leave. 212 F.3d at 647. And the same is true of *Nunes*. *See* 164 F.3d at 1247. Of the new district court cases Severson cites in his reply, only two involved leaves of two months or more; neither resolved the reasonableness or undue hardship questions; and neither involved a leave of more than four months. *See Severson* Pet'r Reply 9 (Mar. 5, 2018) (citing *Casteel v. Charter Commc'ns. Inc.,* No. C13-5520 RJB, 2014 WL 5421258, at *2, *7 (W.D. Wash. Oct. 23, 2014), and *Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 720 F. Supp. 2d 694, 702-03 (E.D. Pa. 2010)).

II. The Seventh Circuit's Decision Is Correct

The Seventh Circuit correctly held that the "[i]nability to work for a multi-month period removes a person from the class protected by the ADA" and the Rehabilitation Act. *Severson*, 872 F.3d at 481 (alteration in original) (quoting *Byrne*, 328 F.3d at 381); Pet. App. 4a-5a.

A. An Employee Who Cannot Work For An Extended Period Of Time Is Not A "Qualified Individual"

1. The ADA prohibits discrimination against a "qualified individual." 42 U.S.C. § 12112(a). A "qualified individual" is someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). The meaning of "qualified individual" is thus directly tied to the employee's ability to "perform the essential functions" of the job—with an accommodation or without one.

As several courts of appeals have noted, the definition of "qualified individual" is "formulated entirely in the present tense, framing the precise issue as whether an individual 'can' (not 'will be able to') perform the job with reasonable accommodation." *Myers*, 50 F.3d at 283; *accord Wood*, 323 F.3d at 1313; *see also Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir. 2000) ("A 'qualified individual' is someone who '*can perform*.' That definition uses the present tense."). Thus, as a matter of plain text, a reasonable accommodation is "most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question." *Myers*, 50 F.3d at 283.

That understanding is confirmed by the statutory illustrations of what may constitute a reasonable accommodation. *See* 42 U.S.C. § 12111(9). Each of those examples—including "job restructuring, part-time or modified work schedules, [or] reassignment to a vacant position"—is designed to allow an employee to start or to continue performing her essential job functions now or in the near future. They are, as *Severson* explained, "all measures that facilitate work." 872 F.3d at 481. Or as then-Judge Gorsuch put it, "reasonable accommodations . . . are all about enabling employees to work, not to not work." *Hwang*, 753 F.3d at 1162.

A long-term, multimonth leave of absence is different in kind. The purpose of such a leave is to allow an employee to *not* work for a lengthy period, such that she will *not* perform the essential functions of the job during the extended leave. "Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." *Severson*, 872 F.3d at 481.

2. Those suffering from cancer and other serious illnesses that render them unable to work for extended periods of time are unquestionably deserving of society's deepest sympathy and care. But, as other courts have recognized, the ADA and the Rehabilitation Act are simply not designed to "remedy every misfortune." *Wilson*, 717 F.3d at 344; *see Hwang*, 753 F.3d at 1162 ("Ms. Hwang's is a terrible problem, . . . but it's a problem *other forms of social security* aim to address." (emphasis added)). As the Seventh Circuit explained, the ADA "is an anti-discrimination statute, not a medical-

leave entitlement." *Severson*, 872 F.3d at 479. An employee's inability to work for an extended period of time poses unique challenges for employees and employers alike. Aware of those challenges, Congress separately and specifically addressed an employee's need for extended medical leave in the FMLA.[5]

A textual comparison of the ADA and the FMLA demonstrates why the ADA does not cover multi-month leaves. The FMLA permits covered employees to take up to 12 weeks 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) (emphasis added). The ADA, in contrast, defines a "qualified individual" as someone who "***can perform*** *the essential functions of the employment position*"—with or without a reasonable accommodation. 42 U.S.C. § 12111(8) (emphasis added). An employee who needs an extended leave of absence is "unable" to perform her job functions or, in the words of the ADA, "can[*not*]" presently perform the essential functions of her job. *Cf. Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 791-92 (5th Cir. 2017) ("[A]n employee seeking FMLA leave is by nature arguing that he *cannot* perform the functions of the job, while an employee requesting a reasonable accommodation communicates that he *can* perform the essential functions of the job.").

---

[5] Relatedly, Congress separately addressed an employee's need for continued health insurance coverage after termination in the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, Title X, 100 Stat. 82, 222-37 (1986), which generally provides 18 months of additional coverage. *Geissal v. Moore Med. Corp.*, 524 U.S. 74, 80 (1998).

There are also important limitations on the leave afforded by the FMLA. The FMLA applies only to employers with 50 or more employees, provides leave only to those employees who have worked a qualifying amount of time for that employer, and is limited to 12 weeks for every 12-month period. *See* 29 U.S.C. § 2611(2), (4). These limitations—the product of legislative compromise—reflect Congress's considered judgment on how to strike the right balance between the needs of employees and employers. *Cf. Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed . . . is the very essence of legislative choice . . . .").

Interpreting the ADA to authorize multimonth leaves of absence upends that careful balance. The ADA applies to many more employers than the FMLA, including small businesses that would have the greatest difficulty coping with extended leaves of absence. *See* 42 U.S.C. § 12111(5)(a) (ADA covers entities employing 15 or more workers). And it applies to *all* of their employees, not just those who would meet the tenure requirement of the FMLA. It is wholly implausible that Congress would have bothered to define the limits of the FMLA's coverage and benefits so precisely in 1993 if it had enacted a far more free-ranging medical leave statute, in the form of the ADA, just a few years earlier. *See United States v. Fausto*, 484 U.S. 439, 453 (1988) (It is a "classic judicial task [to] reconcil[e] many laws enacted over time, and get[] them to 'make sense' in combination," and that task "necessarily assumes that the implications of a statute may be altered by the implications of a later statute."). And

applying such an implausible reading to Spending Clause legislation like the Rehabilitation Act would raise additional issues. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). The Seventh Circuit correctly rejected petitioner's effort to transform the ADA (and the Rehabilitation Act) into "an open-ended extension of the FMLA." *Severson*, 872 F.3d at 482.

B. Petitioner's Counterarguments Are Unpersuasive

1. Petitioner primarily challenges the "per se" nature of the Seventh Circuit decisions. According to petitioner, the ADA (and, in turn, the Rehabilitation Act) requires an "individualized inquiry" in all circumstances and rejects any and all bright-line rules. That is incorrect.

a. Contrary to petitioner's contention (Pet. 25), this Court's closely divided decision in *US Airways v. Barnett*, 535 U.S. 391 (2002), does not reject "per se" rules as a class. Nor does the Seventh Circuit's approach here "directly conflict[]" (Pet. 25) with that decision.

US Airways addressed whether the ADA could require reassignment of a disabled employee to a position that a different employee was otherwise entitled to hold under an established seniority system. 535 U.S. at 395-96. The Court held that, ordinarily, reassignment in conflict with a seniority system would not be a reasonable accommodation, but left open the possibility that a plaintiff could show "special circumstances" illustrating that this kind of reassignment

would be reasonable "on the particular facts" of the case. *Id.* at 402-05. Petitioner seems to think that because "[t]he Court declined to give a one-size-fits-all answer to *that* question" (Pet. 24 (emphasis added)), *no* question about the ADA can ever give rise to a categorical answer. That does not follow.

No one disputes that reassignment is otherwise within the class of workplace alterations that can qualify as a reasonable accommodation. *See* 42 U.S.C. § 12111(9) (including "reassignment to a vacant position" among the illustrative reasonable accommodations). Like the other statutory examples, reassignment is an alteration that enables an individual to start or continue working. It is therefore perfectly logical that whether a *particular* reassignment qualifies as a reasonable accommodation is not susceptible to a categorical rule. In contrast, as explained above, a multimonth leave of absence fails to qualify as a reasonable accommodation as a threshold matter. It is a workplace alteration intended to facilitate *not* working. It is needed precisely when an employee "can[*not*] perform the essential functions of the employment position." *Id.* § 12111(8). Nothing in *US Airways* is to the contrary.

b. Even less persuasive is petitioner's reliance (Pet. 26-27) on *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). *Arline* noted that determining whether an employee is a qualified individual will entail an "individualized inquiry" "in *most* cases." *Id.* at 287 (emphasis added). *Arline* did not hold that there can be no categorical rules. And it recognized that reasonable accommodations are measures de-

signed to "enable" an employee "to perform" the essential functions of a job, *id.* at 287 n.17—not to excuse their nonperformance.

c. Indeed, even petitioner acknowledges that the courts of appeals have adopted some categorical rules. Most notably, courts generally agree that "indefinite leave" is *never* a reasonable accommodation. Pet. 18; *see, e.g.*, *Echeverria*, 856 F.3d at 127; *Peyton v. Fred's Stores of Arkansas, Inc.*, 561 F.3d 900, 903 (8th Cir.), *cert. denied*, 558 U.S. 876 (2009); *Fogleman v. Greater Hazleton Health All.*, 122 F. App'x 581, 586 (3d Cir. 2004); *cf.* Order 3-4, *McMahon v. Metro. Gov't of Nashville & Davidson Cty.*, No. 16-6498 (6th Cir. June 27, 2017), ECF No. 31-2 (affirming liability where employer failed to offer finite, available leave after employee made non-specific leave request), *petition for cert. filed,* No. 17-1124 (Feb. 7, 2018). Other courts have held that paid leave, a promotion, or a new supervisor—just to name a few examples—are not reasonable accommodations either. *See Myers*, 50 F.3d at 283 (paid leave); *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 98 (2d Cir. 2009) (promotion); *Roberts v. Permanente Med. Grp., Inc.*, 690 F. App'x 535, 536 (9th Cir. 2017) (new supervisor). Petitioner's categorical assertion that the ADA does not countenance any bright-line rules is thus overstated and unsupported.

2. Neither the 2008 Amendments to the ADA nor the EEOC's implementing regulations support petitioner either. *See* Pet. 27, 30. The 2008 Amendments did nothing to alter the substantive meaning of "qualified individual" or "reasonable accommodation." The EEOC regulations, for their part, provide only that

"other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment." 29 C.F.R. pt. 1630 app. § 1630.2(*o*). No one disputes that short periods of leave—"a couple of days or even a couple of weeks," *Severson*, 872 F.3d at 481—can be a reasonable accommodation. The EEOC regulations are consistent with *that* principle; they do not address whether an extended, multimonth leave could also qualify as a reasonable accommodation.[6]

3. Finally, petitioner asserts (Pet. 28) that the Seventh Circuit has drawn an arbitrary distinction between "six months of part-time work and two months of no work." Far from arbitrary, that difference is at the heart of the definition of a "qualified individual." An individual who can only work part-time may be able to "perform" the essential functions of the job during those six months—with a part-time accommodation. An individual who is unable to work at all for two months cannot. The ADA covers only the former.

---

[6] Outside of notice-and-comment rulemaking, the EEOC has taken the position that a multimonth leave of absence could be a reasonable accommodation in some cases. And the EEOC filed a Statement of Interest in the district court restating that position. ECF No. 65. The EEOC did not, however, take any position on whether petitioner could prevail even under its stated approach. *See id.* at 14 n.3, 17. Nor did the EEOC file an amicus brief in petitioner's Seventh Circuit appeal. Notably, petitioner barely mentions the EEOC's position and does not suggest that deference was warranted.

III. This Case Is A Poor Vehicle For The Court's Review

The facts of petitioner's case are a prime example of why the question presented lacks practical significance in most cases, and make this case a particularly unsuitable vehicle for deciding whether a multimonth leave of absence could be a reasonable accommodation. Petitioner could not prevail, even under her preferred test, for two, independent reasons.

First, the district court decided this case on alternative grounds. Separate and apart from the rejection of a six-month additional leave "as a matter of law," the district court held that petitioner's request was unreasonable because she failed to provide any "medical evidence reflecting that she would have been able to perform the essential functions of her position as a Public Safety Officer on a regular basis at the end of her requested leave." Pet. App. 27a; *see also id.* at 2a (noting that petitioner's doctor "could not say when she would be able to return to work"); *id.* at 4a (at the time of her termination, petitioner's "doctor still had not provided an expected return to work date").

The courts of appeals agree that an accommodation is not reasonable unless it is likely to succeed in allowing the individual to perform the essential functions of the job. *See, e.g.*, *Basden v. Prof'l Transp., Inc.,* 714 F.3d 1034, 1038 (7th Cir. 2013); *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 90-91 (1st Cir. 2012); *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010), *cert. denied*, 564 U.S. 1039 (2011). And "[t]he facts relevant to a determination of whether a medical leave is a reasonable accommodation are the facts available to the decision-maker at the time of the

employment decision." *Echevarria*, 856 F.3d at 128 (alteration in original) (citation omitted).

When IHA denied petitioner's leave request, she had provided no medical documentation of any kind to demonstrate that she would be able to return to work at the end of her requested leave. The most recent certification from her doctor, provided just two weeks before her leave request, described her condition as "ongoing," stated that petitioner "was unable to perform her job functions," and gave no estimate of when she might be able to return to work. Pet. App. 12a-13a. Moreover, petitioner applied for long-term disability benefits at the same time—which required her to certify her inability to work (which she did), and which she received starting one week after her employment with IHA ended and continued receiving for nearly a year thereafter. *Id.* at 11a-12a, 15a. These undisputed facts foreclose any basis to conclude, in April 2015, that petitioner was likely to be able to return to work at the end of her requested leave. Leave was therefore not a reasonable accommodation, and the district court correctly granted summary judgment on this independent ground.[7]

---

[7] Petitioner contends that the district court erred "by discounting [her] undisputed testimony that she informed IHA at the time of her request that she planned to return to work by August [2015]." Pet. 9 n.3. But the district court merely recognized, correctly, that petitioner's bare assertion in April 2015 that she planned to return on a given date was insufficient to prove that such a return was medically likely. *See* Pet. App. 26a. And hindsight confirmed that commonsense conclusion. *See id.* at 15a, 26a-27a. Petitioner's condition remained severe throughout 2015—so severe that she admitted in December 2015 that there had "not been a single day since December 17, 2014 when

Second, petitioner's request for six months of additional leave—on top of the 16 weeks already granted—was unreasonable even under petitioner's preferred test. Indeed, "[i]t perhaps goes without saying . . . that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation." *Hwang*, 753 F.3d at 1161 (addressing six-month leave). The EEOC agrees. In a 2002 guidance document, the EEOC stated that an employer would not need to retain a disabled employee unable to perform her current job for six months while waiting for a different position to become vacant. That is so "because six months is beyond a 'reasonable amount of time.'" *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002, 2002 WL 31994335, at *21 (E.E.O.C. Oct. 17, 2002); *see also Minter v. District of Columbia*, 809 F.3d 66, 70 (D.C. Cir. 2015) (relying on EEOC's guidance that six months is unreasonable).

Petitioner's case presents no "special circumstances" (Pet. 23). The only "special circumstance" petitioner points to is the IHA leave policy she purports to have invoked. *See* Pet. 23.[8] But, contrary to petitioner's repeated intimation (Pet. 2, 7, 23, 26), IHA did *not* have a policy of regularly allowing employees six

---

[she] would [have been] able to meet the physical demands of the public safety officer job." Golden Dep. 109:18-22, ECF No. 59-5.

[8] Although that policy requires two weeks' advance notice, petitioner did not request the additional leave until after business hours the evening before the requested start date. Pet. App. 4a & n.1; *id.* at 20a n.2 (district court recognizing but excusing the late request).

months of unpaid leave. IHA's policy did not guarantee an employee any amount of leave, much less six months; six months was simply the maximum an employee could request. Pet. App. 14a. More fundamentally, the policy did not apply to petitioner at all. It applied only when "no other leave form is appropriate" (*id.*)—not when, as here, the employee qualified for and took 12 weeks of FMLA leave (and four weeks of additional medical leave). *See* Pet. App. 20a-21a. And the uncontradicted testimony of IHA's human resources director was that IHA had in fact *never* granted any employee leave under this policy. Walden Dep. 65:5-16, ECF No. 47-32. This never-used policy of non-guaranteed leave for reasons inapplicable here is not a special circumstance that could make petitioner's facially unreasonable request reasonable.

Because petitioner's requested additional six months of leave was unreasonable regardless, the question presented is not at all "dispositive" (Pet. 22). Instead, as in most cases involving multimonth leaves, this Court's intervention would have no impact on the outcome.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

KATHLEEN A. DELANEY
Counsel of Record
ANNAVIEVE C. CONKLIN
DELANEY &
DELANEY LLC
3646 Washington Blvd.
Indianapolis, IN 46205
(317) 920-0400
kathleen@delaneylaw.net

Counsel for Respondent Indianapolis Housing Agency

March 9, 2018