No. 17-1124

In the Supreme Court of the United States

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Petitioner,

v.

BEVERLY MCMAHON,
Respondent.

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

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF PETITIONER

CHARLES W. THOMPSON, JR.
AMANDA KELLAR KARRAS
Counsel of Record
CAITLIN CUTCHIN
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
51 Monroe St., Suite 404
Rockville, MD 20850
(202) 466-5424
akellar@imla.org

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICI CURIAE*

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935.[1] Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy. IMLA provides the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The International Public Management Association for Human Resources (IPMA-HR) has over 8,000 members who are public sector human resource directors, managers, and professionals. IPMA-HR promotes public sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National Public Employer Labor Relations Association (NPELRA), a not-for-profit corporation established in 1970, represents public sector and not-for-profit entities and practitioners of labor and employee relations employed therein. NPELRA and its

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amici curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici curiae* states that counsel for all parties received notice and consented to the filing of this brief.

members function as fiduciaries to the interests of the citizens, in part, by advocating the development of sound local, state and national policy relative to hiring, compensation, benefits, and employee/labor management relations.

Amici support laws, policies, and practices that eliminate discrimination in the workplace and which require employers to make reasonable accommodations so that people can participate equally in all aspects of their community and employment regardless of their disabilities or any other protected characteristics. However, the decision of the Sixth Circuit creates a circuit split and diverges from the majority rule that recognizes that an employee who has requested an indefinite medical leave of absence cannot maintain a discrimination action under the Americans with Disabilities Act ("ADA") against his or her employer, because by its very nature such a request demonstrates that the employee is incapable of presently or in the near future performing the essential functions of the job, with or without a reasonable accommodation. The Sixth Circuit's allowance of claims under the ADA involving requests for indefinite leave, and the confusion among the circuits is untenable and requires immediate review. Accordingly, this Court should grant certiorari to harmonize the law and establish a clear and workable standard.

SUMMARY OF THE ARGUMENT

Every circuit to address the issue of requests for indefinite medical leave under the ADA apart from the Sixth and the Ninth Circuits has concluded that such requests either render an individual not "qualified" under the ADA or are facially unreasonable. This lopsided circuit split causes significant challenges for public employers in the Sixth and Ninth Circuits and no doubt creates confusion for multi-state employers. Employers bear significant direct and indirect costs related to employee absenteeism, including lost productivity and low employee morale, and these costs are exacerbated by requests for indefinite leave, which create unreasonable burdens on employers and their employees. Further, litigation costs associated with the ADA are expensive and affect local governments' resources and their ability to provide services to their residents.

As more of its sister circuits join the majority rule and articulate a clear and workable standard for employers, the Sixth Circuit has remained in the minority. Rather than allow confusion in the circuits to persist, this Court should grant the Petition and adopt a manageable, bright-line rule, indicating that requests for indefinite leave render an individual not "qualified" under the ADA or at least that a request for indefinite leave is not reasonable under the ADA.

ARGUMENT

I. THE SPLIT IN THE CIRCUITS ON THIS IMPORTANT QUESTION OF FEDERAL LAW CAUSES SERIOUS HARM TO LOCAL GOVERNMENTS

The Sixth Circuit's decision diverges sharply from the majority of circuits and makes it extremely difficult for public employers to manage their workforces in that jurisdiction. As demonstrated in the Petition, the Sixth Circuit's decision splits from the majority view that an employee's request for indefinite medical leave renders the employee not "qualified" under the ADA.

Even more troubling, the Sixth Circuit's decision exacerbates the confusion by rejecting the majority view that a request for indefinite medical leave is per se an unreasonable accommodation and instead joining the minority view of the Ninth Circuit to the contrary. Because the Sixth Circuit's decision perpetuates ambiguity in the law for both public and private employers, this Court should grant the Petition.

A. The Federal Courts of Appeals are Irreconcilably Split on Whether an Individual Requesting Indefinite Medical Leave Can be Considered "Qualified" Under the ADA

A "qualified" individual under the ADA includes "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of" the relevant "employment position." 42 U.S.C. § 12111(8); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 395 (2002). As described in the Petition, the majority of circuits to consider the issue of a request for

an indefinite medical leave have concluded that such a request makes it impossible for the employee to establish that he or she could "perform the essential functions" of his or her job. *See* Petition at 8-11. These courts reason that being unable to perform the essential functions of the job, i.e., through attendance at the present or in the near future, by definition, causes the person to be not "qualified" for the job. *Id.*

In addition to the circuits identified in the Petition, the D.C. and Seventh Circuits have also held that an employee who requests indefinite medical leave is not "qualified" for the position under the ADA. *See Minter v. District of Columbia,* 809 F.3d 66, 69-70 (D.C. Cir. 2015); *Nowak v. St. Rita High Sch.,* 142 F.3d 999, 1004 (7th Cir. 1998). Judge Garland recently opined for the D.C. Circuit that an employee was "indisputably not a 'qualified individual'" when the evidence demonstrated she had a physician's certificate stating she was "Totally Disabled" and further that the disability was "indefinite." *See Minter,* 809 F.3d at 69-70. It was not enough to save her ADA claim that the employee indicated she "hope[d]" to return in another three months." *Id.* at 70. Similarly, in *Nowak*, the Seventh Circuit concluded that an employee "failed to meet his burden of establishing he was a 'qualified individual with a disability' at the time of his termination" because the "ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence." 142 F.3d at 1004.

In contrast, the Sixth Circuit below dismissed the crucial fact that the Respondent's doctor had indicated her leave would be of an indefinite duration and

instead focused on the fact that the Respondent had "demonstrated she was qualified to perform her job, having successfully done so for four months before requesting leave." *See* Petition, at Appendix to Petition (App.) 4 (emphasis added). This reasoning extends the important protections under the ADA beyond any reasonable interpretation of that statute to include individuals who cannot perform the essential functions of their job even with an accommodation. Moreover, the decision makes it nearly impossible for employers to know how to handle requests for indefinite leave in the Sixth Circuit. Under the Sixth Circuit's view, any employee that has gone out on a medical leave and returned to work, even for a nominal amount of time, and then later requests an indefinite leave would be deemed "qualified" under the ADA. This reasoning is in stark contrast to the majority of circuits that have considered this issue. For example, the Eleventh Circuit rejected the employee's argument that prior accommodations providing leaves of absences made a requested future accommodation reasonable. *Wood v. Green,* 323 F.3d 1309, 1314 (11th Cir. 2003).

B. The Sixth Circuit's Decision Splits from the Majority of Circuits and the EEOC that Conclude that a Request for an Indefinite Leave is Per Se Unreasonable

1. The Federal Courts of Appeals are Irreconcilably Split on Whether a Request for Indefinite Leave Constitutes an Unreasonable Request Under the ADA as a Matter of Law

While some courts considering the issue of indefinite leave under the ADA have flatly stated that

such a request renders the person not "qualified," others review the issue through the lens of whether the request constitutes an unreasonable accommodation as a matter of law. The majority of circuits, including the Third, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits, to consider the question of whether a request for indefinite leave can constitute a reasonable accommodation have concluded that such a request is facially unreasonable. *See Delaval v. PTech Drilling Tubulars, LLC*, 824 F.3d 476, 481-82 (5th Cir. 2016) ("Time off, whether paid or unpaid, can be a reasonable accommodation, but an employer is not required to provide a disabled employee with indefinite leave."); *Roberts v. Bd. of Cnty. Comm'rs*, 691 F.3d 1211, 1217-19 (10th Cir. 2012) (providing that "at the time of her termination, the county did not have a reasonable estimate of when [the employee] would be able to resume all essential functions of her employment. As such, the only potential accommodation that would allow [the employee] to perform the essential functions of her position was an indefinite reprieve from those functions—an accommodation that is unreasonable as a matter of law"); *Peyton v. Fred's Stores of Ark., Inc.,* 561 F.3d 900, 903 (8th Cir. 2009) (noting that a request for an indefinite leave is not a reasonable accommodation under the ADA); *Fogleman v. Greater Hazleton Health Alliance,* 122 Fed. App'x 581, 586 (3d Cir. 2004) (concluding that there was "no evidence that permits any conclusion other than that the requested leave was for an indefinite and open-ended period of time," which "does not constitute a reasonable accommodation."); *Duckett v. Dunlop Tire Corp.,* 120 F.3d 1222, 1226 (11th Cir. 1997) ("Plaintiff's request that his employer accommodate any disability Plaintiff had by providing him with two more months leave

when he could not show he would likely be then able to labor is not 'reasonable' within the meaning of the ADA. . . ."); *Myers v. Hose*, 50 F.3d 278, 280-81 (4th Cir. 1995) (holding that a requirement that an employer grant an employee an indefinite medical leave would "contravene the meaning of the phrase 'reasonable accommodation'" under the ADA).

In contrast to the majority of circuits, the Sixth and Ninth Circuits have concluded that a request for an indefinite leave *may not* constitute a reasonable accommodation, but both circuits refused to establish a bright-line rule. *See Dark v. Curry Cnty.,* 451 F.3d 1078, 1090 (9th Cir. 2006); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.,* 155 F.3d 775, 782 (6th Cir. 1998). In this case, the Sixth Circuit rejected Nashville's argument that providing an indefinite amount of leave is simply not a reasonable accommodation. *See* App. 4. The court concluded that even though the Respondent's "medical providers did not estimate how long a leave period would be necessary, . . . Nashville also did not ask them to do so, instead denying [Respondent] any of the unpaid leave that she could have been provided." *Id.* (emphasis added). This reasoning flips the burden in ADA cases on its head and sharply contrasts with other circuit court decisions considering similar facts. For example, in *Fogleman,* the Third Circuit explained that the plaintiff had failed to meet her burden of identifying a reasonable accommodation where she presented no evidence specifying the duration of the requested leave and that the request was instead, open-ended and for an unknown period of time and therefore could not constitute a reasonable accommodation. 122 Fed. App'x at 585-86.

The Sixth Circuit's decision is not a novel result for that court. Two decades ago, the Sixth Circuit refused to adopt a *per se* rule that an unpaid leave of indefinite duration could never constitute a "reasonable accommodation" under the ADA. *See Cehrs* 155 F.3d at 782. In the intervening years, as demonstrated above, the majority of circuits to consider this issue have held the exact opposite. Despite the vast weight of authority, the Sixth Circuit resists recognizing a bright-line rule for ADA claims involving requests for indefinite leave. *See e.g., Cleveland v. Fed. Express Corp.,* 83 F. App'x 74, 78-79 (6th Cir. 2003) (indicating the circuit has "declined to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation" and citing to *Cehrs* with approval noting that there is no "per se rule that an unpaid leave of indefinite duration. . . could never constitute a reasonable accommodation"); *accord Tubbs v. Formica Corp.,* 107 F. App'x 485, 488 (6th Cir. 2004); *Austin v. Better Bus. Bureau of Middle Tenn., Inc.,* No. 3:10-cv-00084, 2011 U.S. Dist. LEXIS 28447, at *10 (M.D. Tenn. Mar. 18, 2011) (noting that "the refusal in the *Cleveland* opinion to find a bright-line rule for the duration of a leave that can constitute a reasonable accommodation continues to be the rule within this circuit."). While the Sixth Circuit might validly resist setting a bright-line durational limit for how long a period an employer must accommodate an employee with a *defined leave request* and allowing the employer and employee to undergo the interactive process to balance the need for the accommodation with the hardship on the employer in that situation, its conclusion that an employer may have to hold open a position for an *indeterminate period* possibly well into the future cannot meet any test of reason.

The Sixth Circuit is not alone in its view that an indefinite leave request can be a reasonable accommodation. Though somewhat unsettled, the Ninth Circuit appears to take the Sixth Circuit's minority view on this issue. Specifically, in *Dark v. Curry Cnty.,* the court held that "recovery time of unspecified duration may not be a reasonable accommodation . . ." but that there was a genuine dispute of fact as to whether the employee could have been reasonably accommodated if offered medical leave to adjust to new medication. 451 F.3d at 1088. Like the Sixth Circuit, this seems to imply that the burden would be on the employer to specify some amount of definite leave when faced with a request for indefinite leave. However, to further confound things, the Ninth Circuit more recently noted that an indefinite leave, but of at least six months in duration, to allow the employee to undergo a substance abuse program was not a reasonable accommodation. *Larson v. United Natural Foods W. Inc.*, 518 F. App'x 589, 591 (9th Cir. 2013). Although *Larson* seems in line with the majority rule, it cited to *Dark,* and the law in the Ninth Circuit is murky at best.

Without this Court's intervention, this lopsided split in the circuits will likely continue.

2. The Sixth Circuit's Decision is Contrary to EEOC Guidance

In addition to creating an irreconcilable circuit split, the Sixth Circuit's minority view also diverges from official EEOC enforcement guidance, further confusing employers and ignoring longstanding agency deference principles. Specifically, EEOC guidance on indefinite leave, acknowledged and followed by most circuits,

supports the proposition that requests for indefinite medical leave are per se unreasonable.[2]

The EEOC defines indefinite leave as a situation in which an employee "cannot say whether or when she will be able to return to work at all. . . ."[3] EEOC guidance recognizes the distinction between employees requesting leave with an approximate date of return versus employees requesting indefinite leave with no proximate date of return.[4] Indeed, the EEOC has expressly stated that "[a]lthough employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide

---

[2] *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, THE AMERICANS WITH DISABILITIES ACT: APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES, (Oct. 14, 2008), https://www.eeoc.gov/facts/performance-conduct.html [hereinafter PERFORMANCE & CONDUCT STANDARDS]; s*ee also Delaval v. Ptech Drilling Tubulars, LLC,* 824 F.3d 476, 481-82 (5th Cir. 2016); *Kalskett v. Larson Mfg. Co. of Iowa, Inc.*, 146 F. Supp. 2d 961, 981 (N.D. Iowa 2001); *Boykin v. ATC / VANCOM of Colo., L.P.*, 247 F.3d 1061 (10th Cir. 2001).

[3] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT, 10 (May 9, 2016), *available at* https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf [hereinafter EMPLOYER-PROVIDED LEAVE]. While the EEOC advises that such a request would constitute an undue hardship, the EEOC acknowledges that most courts consider the request as per se unreasonable. *See* Performance & Conduct Standards *supra* note 2, at footnote 76.

[4] *See id; see also*, PERFORMANCE & CONDUCT STANDARDS *supra* note 2. At question 21, example 38, the EEOC states that if an employee on leave "is unable to provide information on whether and when he could return to another job that he could perform," then "[t]he employer may terminate this worker because the ADA does not require the employer to provide indefinite leave." *Id.*

leave of indefinite duration."[5] In striking a balance between protecting disabled employees' needs for reasonable accommodation and accounting for an employers' practical challenges in accommodating unspecified amounts of time as a leave of absences, the EEOC has not wavered from its position that an employer does not need to consider indefinite leave as a reasonable accommodation.[6]

The Sixth Circuit's refusal to accept a bright-line rule for indefinite leave not only contravenes this guidance, but it also ignores longstanding principles of agency deference.[7] Because many federal agencies, including the EEOC, possess knowledge and expertise within a highly specialized area, courts have long deferred to their persuasive, interpretive guidance. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Sixth Circuit has not afforded the EEOC this same deference nor even explained why it chose to diverge

---

[5] PERFORMANCE & CONDUCT STANDARDS *supra* note 2 at Q & A 21.

[6] EEOC guidance has long interpreted the ADA's reasonable accommodation requirement to exclude any requirement to provide leave of an indefinite duration. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, PUB. NO. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (Oct. 17, 2002), *available at* https://www.eeoc.gov/policy/docs/accommodation.html #leave; *see also*, PERFORMANCE & CONDUCT STANDARDS *supra* note 2.

[7] It is well-established that judicial deference be given to reasonable agency interpretations of statutes. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Further, under *Auer v. Robbins*, courts must accept an agency's position unless it is "plainly erroneous or inconsistent with the regulation." 519 U.S. 452, 461 (1997).

from the agency's guidance. Indeed, it failed to even acknowledge its divergence from the agency's guidance. This disregard for agency guidance will further confound employers in the Sixth Circuit who may erroneously believe they can rely on the EEOC's published guidance.

Because employers need clarity and uniformity in this important area of the law, this Court should grant the Petition.

II. THE SIXTH CIRCUIT'S OPINION ALLOWING CLAIMS INVOLVING REQUESTS OF INDEFINITE LEAVE TO PROCEED UNDER THE ADA CAUSES SERIOUS PRACTICAL CONSEQUENCES FOR LOCAL GOVERNMENT EMPLOYERS IN TERMS OF COSTS AND MANAGING THEIR WORKFORCES

State and local governments, who are collectively the nation's largest employer, generally offer generous benefits encompassing leave of all types, including leaves of absences where the request is for a finite duration and where that leave is reasonable and would not pose an undue hardship.[8] Indefinite leaves of absence, however, exacerbate significant costs borne by employers and hamper their ability to effectively manage their workforces.

---

[8] As of December 2017, state and local governments employed more than 19.5 million people. *See* GOVERNING, *State and Local Government Employment: Monthly Data*, http://www.governing.com/gov-data/public-workforce-salaries/monthly-government-employment-changes-totals.html (last updated Jan. 11, 2018).

According to the Centers for Disease Control and Prevention, lost productivity due to worker's absenteeism for illness and injury costs U.S. employers $225.8 billion dollars per year.[9] Excessive absenteeism causes both direct and indirect costs for employers. Direct costs include wages and salaries, overtime costs, and replacement worker costs. For example, when an employee is absent, nearly half of employers use co-workers to cover that absence, and if those employees are nonexempt employees, the result is significant overtime costs.[10] In other cases, employers are forced to hire temporary replacement workers to cover prolonged absences, which also carry significant costs.[11] In a 2013 study of 733 U.S. businesses, these direct costs constituted 15.4% as a percentage of total payroll.[12]

---

[9] *See* Claire Stinson, CDC FOUNDATION, *Worker Illness and Injury Costs U.S. Employers $225.8 Billion Annually* (Jan. 28, 2015), https://www.cdcfoundation.org/pr/2015/worker-illness-and-injury-costs-us-employers-225-billion-annually.

[10] In a 2013 study of 733 US businesses, overtime was used to cover 47% of employee absences. *See* SOC'Y FOR HUMAN RES. MGMT., THE TOTAL FINANCIAL IMPACT OF EMPLOYEE ABSENCES SURVEY, 2 (Aug. 2014), https://blog.shrm.org/sites/default/files/reports/14-0531%20ExSummary_ImpactAbsence_Final.pdf?_ga=2.135268660.424005937.1518181908-1332709926.1516717461. Overtime costs for responding businesses were 5.7% as a percentage of payroll. *Id.* at 1.

[11] *Id.* In the same study, the cost of replacement workers, such as temporary employees, was 1.6% as a percentage of payroll. *Id*.

[12] *Id.* at 2.

While these direct costs are staggering, they do not scratch the surface when indirect and intangible costs of absenteeism are considered. These indirect and intangible costs include: loss of productivity, the need to train replacement employees, supervisory employees' time needed to deal with training and assimilating the temporary workers or managing a depleted workforce, low employee morale, and additional employee stress. And while some of these indirect costs are not quantifiable, one study noted the productivity loss alone for paid time off was 6.2% of payroll.[13]

These costs are exacerbated by an indefinite leave of absence. For example, while many employees are likely to be supportive while their co-worker recovers from an illness or injury, where there is a request for indefinite leave, these same co-workers are more likely to become disengaged and stressed as a result of not being able to see an end to their increased workloads, causing further challenges for employers in these situations.

Moreover, indefinite leaves of absence cause significant hardships for employers in terms of managing their operations. In the case of a request for leave of a finite duration, even a lengthy one, an employer will certainly bear costs, but it can help to mitigate those costs through careful budgeting and planning. For example, where an employer knows it has to backfill a specific job for two months while one of its employees is out on leave, that employer can calculate whether to pay overtime to current workers to cover the position or to hire a temporary worker.

---

[13] *Id.* at 3.

Conversely, in the case of a request for indefinite leave, an employer's choices become confused as the employer tries to evaluate if sustained overtime can be supported or whether when hiring a temporary replacement worker, it must engage in extensive training to fill a complex job for the long term, or simply train for the short term. The difference for the employer is substantial as it will either have to waste resources training an employee for a lengthier period than necessary or else risk the need to continually provide updated trainings to a temporary employee, while waiting for information about when the employee may return to work.

Further complicating matters, many employers have the added hurdle of navigating these problems in the context of collective bargaining agreements (CBAs). According to the Department of Labor, in 2017 public sector employees had a union membership of 34.4%, which was more than five times the rate of private-sector workers.[14] For that reason, the implications of indefinite leave press more heavily on state and local governments as they adjust to the requirements of their CBAs to try to accommodate these requests. The CBAs, which govern public employees, frequently limit how management can adjust for disruptions in the workforce, which complicates juggling employee absences, particularly of an indefinite duration.

---

[14] News Release, DEP. OF LABOR, BUREAU OF LABOR STATISTICS, PUB. NO. USDL 18-0080, Union Members – 2017, Table 3 (January 19, 2018), *available at* https://www.bls.gov/news.release/union2.nr0.htm.

A unique challenge for public employers in these situations can be gleaned from CBAs for firefighters and police officers, who often work long hours with set days off. For example, the CBA between the City of Middletown, Connecticut and its local firefighter union provides:

> **SECTION 1** The work week of all employees who do firefighting shall be an average of not more than forty-two (42) hours per week computed over a period of one (1) fiscal year, based on a schedule of one (1) twenty-four (24) hour tour which shall be considered to be a ten (10) hour day shift, 7:30 a.m. to 5:30 p.m., followed by a consecutive fourteen (14) hour night shift, 5:30 p.m. to 7:30 a.m., followed by three (3) days off.[15]

Addressing the terms of these requirements are difficult under any system, but where juggling these work schedules over extended leave periods without an end in sight for every employee who may be entitled to an accommodation becomes nigh impossible.

Moreover, temporarily replacing police officers or members of a fire service involves much more than making a phone call to a temporary employment service. Police officers, firefighters, and EMT's are people who must have significant training to do their jobs. Departments in large urban communities

---

[15] CITY OF MIDDLETOWN, AGREEMENT BETWEEN THE CITY OF MIDDLETOWN, CONNECTICUT AND LOCAL UNION #1073 – INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, JULY 1, 2016 -JUNE 30, 2019, Article VI, *available at* http://www.cityofmiddletown.com/filestorage/117/121/161/1875/AFSCME_Local_466_Contract.pdf.

generally overstaff sufficiently to cover statistically anticipated employee absences, but smaller and more rural communities face much more challenging solutions that can include mutual aid with another community or developing volunteer cadres who can fill a role. In each situation, urban or rural, large or small, the community's solutions are based on specific needs and anticipated, statistically reliable data that include the leave policies of the community. Unspecified, indeterminate demands therefore thwart a community's ability to find reasonable solutions to providing public safety for its residents, underscoring the problems associated with the Sixth Circuit's decision.

The lack of a clear, workable standard for requests for indefinite leave has yet another serious implication for employers. HR professionals and agency managers are adept at balancing leave balances, contractual obligations, and federal, state, and local laws with employer necessity. But in all those situations, leave is finite and therefore manageable, whereas under the Sixth Circuit's decision the accommodation of leave of an infinite duration is completely unmanageable. HR professionals and other supervisors who administer requests for leave are not medical professionals. However, in the Sixth Circuit, employers would need to be clairvoyant to second guess an employee's doctor by offering durational leave based on their estimates rather than a medical professional's judgment, thereby flipping the burden under the ADA on its head. The Eighth Circuit summarized the problem with this approach:

> Employers are not qualified to predict the degree of success of an employee's recovery from an illness or injury. To afford . . . protections of the ADA during the early stages of . . . recuperation from [illness or] surgery, . . . would be to burden [the employer] with the duty to see into the future. We do not believe that such was the intent of Congress in passing the ADA.

Peyton v. Fred's Stores of Ark., Inc., 561 F.3d 900, 903 (8th Cir. 2009) (quoting *Browning v. Liberty Mutual Insurance Co.,* 178 F.3d 1043, 1049 (8th Cir. 1999)). Employers operating in one of the jurisdictions outside of the circuits that have decided this issue face these same challenges in deciding how to handle these requests.[16]

In contrast, in the majority of circuits an unambiguous request from an employee for indefinite medical leave without more explanation as to the length of absence or illness could simply be denied. A bright-line rule that requires employees and their doctors to estimate a finite period of leave necessary to accommodate an employee's disability properly places the burden where it belongs. It allows the employer and employee to negotiate the terms of the accommodation to ensure it is reasonable. This practical bright-line rule makes it easier for employers to manage their workforces in an otherwise complex area of the law.

---

[16] The lack of a uniform standard presents additional difficulties for employers with multi-state operations. How a hypothetical employer with operations in the Sixth and Eighth Circuits, for instance, deals with requests for indefinite medical leave could well vary depending on where the request originates.

Finally, the lack of a unified bright-line rule among the circuits regarding requests for indefinite leave creates significant costs in terms of liability for public employers. In Fiscal Year 2017 (FY2017), employees brought nearly 27,000 ADA claims against their employers.[17] According to the EEOC, ADA claims in FY2017 provided over $135 million in monetary benefits for claimants, not including benefits obtained through litigation.[18] When factoring in litigation awards and settlements outside the EEOC, this figure is easily significantly higher. For example, a jury recently awarded a Baltimore County employee approximately $780,000 for violations of the ADA and over $500,000 in attorney's fees and costs.[19] In another recent suit, a jury returned a verdict awarding the plaintiff nearly $2.5 million, including $2 million in punitive damages on his ADA disability discrimination / failure to accommodate claims.[20]

---

[17] *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT & LITIGATION STATISTICS, *available at* https://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm; *see also* Press Release, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC RELEASES FISCAL YEAR 2016 ENFORCEMENT AND LITIGATION DATA (Jan. 18, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/1-18-17a.cfm. ADA claims were the third most common discrimination claim brought against employers after retaliation and race discrimination claims. *Id.*

[18] *Id.*

[19] *See Van Rossum v. Baltimore Cnty.,* No. 14-0115, 2017 U.S. Dist. LEXIS 157196, at *11 (D. Md. Sept. 26, 2017).

[20] Kirk Mitchell, *Denver Jury Awards $2.45 Million Verdict to SkyWest Airlines Employee*, DENV. POST, Sept. 27, 2017, *available at* https://www.denverpost.com/2017/09/27/skywest-airlines-employee-2-million-settlement/.

As the foregoing demonstrates, costs related to ADA lawsuits can quickly skyrocket for employers. The attorney's fees in these cases are often many times higher than the actual compensatory damages at stake and in and of themselves deter employers from taking these cases to a jury. And attorney's fees do not include the cost for the employer to retain its own attorney to litigate these cases or the internal costs associated with a local government's own employee time in addressing these actions. Further, costs associated with litigation are even more challenging for public employers that operate on fixed budgets and in some cases, are constitutionally prohibited from carrying a deficit.[21]

Amici understand the importance of anti-discrimination statutes and the associated costs of litigating these claims and providing reasonable accommodations for finite leave requests, but the gravity of these numbers should not be lost, particularly for local governments with cash-strapped budgets and limited resources. In a case like this one, where the Sixth Circuit's rule conflicts with the majority of circuits and makes planning and budgeting difficult at best, this Court should intervene and grant

---

[21] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, STATE BALANCED BUDGET REQUIREMENTS (1999), *available at* http://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx; *see also* Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS INST. (Dec. 31, 2012), https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/. Local governments also have to balance these litigation costs against the services they provide to their citizens, and as the former increases, it follows that the latter must decrease proportionally.

the Petition. Ultimately, the circuits must find a unified approach to this issue and this case provides an appropriate vehicle for the Court's intervention and settling the conflict and resolving the confusion.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge the Court to grant the Petition for Writ of Certiorari and reverse the Sixth Circuit Court of Appeals' judgment.

Respectfully submitted,

CHARLES W. THOMPSON, JR.
AMANDA KELLAR KARRAS
Counsel of Record
CAITLIN CUTCHIN
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
51 Monroe St., Suite 404
Rockville, MD 20850
(202) 466-5424
akellar@imla.org

Counsel for Amici Curiae