No. 20-

IN THE
Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS,
WELD COUNTY, COLORADO,
Petitioner,

v.

LAURIE EXBY-STOLLEY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

SEAN MAROTTA
Counsel of Record
REEDY C. SWANSON
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
sean.marotta@hoganlovells.com

Counsel for Petitioner

QUESTION PRESENTED

Whether a plaintiff asserting a failure-to-accommodate claim under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a), must show that the employer's failure to make the requested accommodation affected the "terms, conditions, [or] privileges of employment," *id.*—that is, whether the employee must show that the failure to accommodate amounted to an adverse employment action.

PARTIES TO THE PROCEEDING

The Board of County Commissioners, Weld County, Colorado, petitioner on review, was the defendant-appellee below.

Laurie Exby-Stolley, respondent on review, was the plaintiff-appellant below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit:

Exby-Stolley v. *Board of County Commissioners, Weld County, Colo.*, No. 16-1412 (10th Cir. Oct. 28, 2020) (en banc) (reported at 979 F.3d 784)

Exby-Stolley v. *Board of County Commissioners, Weld County, Colo.*, No. 16-1412 (10th Cir. Oct. 11, 2018) (reported at 906 F.3d 900) (panel opinion vacated by order granting rehearing)

U.S. District Court for the District of Colorado:

Exby-Stolley v. *Board of County Commissioners, Weld County, Colo.*, No. 1:13-cv-01395-WYD-NYW) (D. Colo. Oct. 12, 2016) (unreported)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

IN THE
Supreme Court of the United States

No. 20-

BOARD OF COUNTY COMMISSIONERS, WELD COUNTY, COLORADO,

Petitioner,

v.

LAURIE EXBY-STOLLEY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

The Board of County Commissioners of Weld County, Colorado, respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's en banc opinion is reported at 979 F.3d 784. Pet. App. 1a-136a. The Tenth Circuit panel's vacated opinion is reported at 906 F.3d 900. Pet. App. 139a-192a. The district court's jury instructions, verdict form, and final judgment are unreported. Pet. App. 193a-196a, 202a-207a.

JURISDICTION

The en banc Tenth Circuit entered judgment on October 28, 2020. Pet. App. 137a-138a. On March 19, 2020, this Court extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112, provides in pertinent part:

> (a) General Rule
>
> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) Construction
>
> As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—
>
> * * *
>
> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity * * * .

INTRODUCTION

This case asks the Court to clarify the elements of one of the most common federal-court causes of action: a failure-to-accommodate claim under the Americans with Disabilities Act of 1990 (ADA). All agree that a plaintiff must show that she is a covered employee and that her covered employer has refused her request for a reasonable accommodation. The courts of appeals disagree, however, whether the plaintiff must *also* show that the employer's refusal was "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Or, to employ the usual judicial shorthand for this lengthy statutory phrase, must the refusal amount to an "adverse employment action"? A sharply divided en banc Tenth Circuit below aligned itself with six other circuits, which have held that such a showing is unnecessary. But six circuits have reached the opposite conclusion.

The majority approach cannot be reconciled with the ADA's plain text. The ADA provides that failure to make a reasonable accommodation constitutes "discriminat[ion] against a qualified individual on the basis of disability," *id.* § 12112(b), but it does not excuse an employee from also showing that *any* actionable discrimination—including a failure to accommodate—was "in regard to" the "terms, conditions, and privileges of employment," *id.* § 12112(a).

Review is warranted to reconcile the court of appeals' divergent approaches and realign the elements of a failure-to-accommodate claim with the text Congress enacted.

This case is an appropriate vehicle for the Court to do so because the question presented was outcome dispositive. The jury found that Respondent Laurie Exby-Stolley is disabled and was refused an accommodation, but determined that—in light of her voluntary resignation—she had not suffered an adverse employment action. The District Court entered judgment for the County on the basis of that finding. If the Tenth Circuit and six other circuits are right, a new trial is necessary because the jury should not have been instructed on an adverse-employment-action element. But in six other circuits, that instruction—and the District Court's judgment—would have been affirmed as correct.

This Court should settle this fundamental question of federal law. The petition should be granted.

STATEMENT

A. Statutory Background

The core prohibition on employment discrimination in Title I of the ADA is codified at 42 U.S.C. § 12112. Subsection (a) states what conduct is prohibited, 42 U.S.C. § 12112(a), and therefore actionable, *id.* §§ 12117(a), 2000e-5(f). A "covered entity" cannot "discriminate against a qualified individual on the basis of disability" when the discrimination is "in regard to" a wide range of employment-related activities: "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, [or] privileges of employment." 42 U.S.C. § 12112(a).

Subsection (b), titled "Construction," lists actions that qualify as "discriminat[ion] against a qualified individual on the basis of disability." *Id.* § 12112(b).

One of them—the one relevant to this case—is "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless * * * the accommodation would impose an undue hardship." *Id.* § 12112(b)(5)(A). Subsection (b) does not address the in-regard-to clause in subsection (a).

The in-regard-to clause mirrors, and builds upon, similar language in Title VII of the Civil Rights Act of 1964, which prohibits discrimination "with respect to" an employee's "compensation, terms, conditions, or privileges of employment." *Compare id.* § 2000e-2(a)(1), *with id.* § 12112(a). Because these in-regard-to and with-respect-to clauses are cumbersome, courts have regularly abbreviated both by asking whether an employee has experienced an "adverse employment action." Pet. App. 148a-150a ("This terminology * * * is well established in judicial opinions."); *see, e.g.*, *Brown* v. *Cox*, 286 F.3d 1040, 1045 (8th Cir. 2002) ("An adverse employment action is one that causes a material change in the terms or conditions of employment."); *Power* v. *Summers*, 226 F.3d 815, 820 (7th Cir. 2000) ("[T]he federal statutes * * * that forbid invidious discrimination in employment[ ] limit their protection to victims of 'adverse employment action,' which is judicial shorthand * * * for the fact that these statutes require the plaintiff to prove that the employer's action * * * altered the terms or conditions of his employment.").

B. Procedural Background

1. Respondent Laurie Exby-Stolley worked as a health inspector for Petitioner Weld County, Colorado. Pet. App. 141a. Exby-Stolley broke her right

arm on the job in 2009, and her injury made it harder for her to conduct inspections. *Id.* That meant inspections took longer "and she could not complete the number of inspections required of those in her position." *Id.*

The parties differed as to what happened next. According to the County, Exby-Stolley requested accommodation in the form of "a new position [to] be created for her by piecing together" tasks from her existing job and those of "other positions * * * that she could perform." *Id.* at 144a. Told that this arrangement would not be fair to the employees already performing those tasks, Exby-Stolley "indicated that she was resigning," which took County officials by surprise. *Id.* at 144a-145a. In Exby-Stolley's account, when negotiations regarding a potential accommodation reached an impasse, a supervisor for the County made a comment that left her convinced "that she was being told to resign." *Id.* at 142a.

The parties agree that Exby-Stolley in fact resigned. She "sent an email to all her colleagues informing them that she would no longer be working for the County." *Id.* at 143a. Her email concluded: "After a final evaluation with the physician and meeting with management it is apparent that I am no longer able to perform the duties required in [my] job description." *Id.* (alteration in original, internal quotation marks omitted).

2. Exby-Stolley sued the County, alleging that it had failed to accommodate her broken arm under the ADA. *Id.* at 145a-146a. She claimed that the County's failure to accommodate her injury led to her being "terminated" from employment. *Id.* at 176a.

The District Court tried the case to a jury. *Id.* at 146a. The court instructed the jury to find in Exby-Stolley's favor if she established, in pertinent part, that (1) she "had a 'disability' "; (2) she "was a 'qualified individual' "; and (3) she "was discharged from employment or suffered another adverse employment action by" the County. *Id.* at 203a-204a.

The jury found for Exby-Stolley on the first two elements, but—crediting the County's version of events—determined that she was not terminated or otherwise subjected to an adverse employment action by the County. *Id.* at 194a; *see also Patrick* v. *Burget*, 486 U.S. 94, 98 n.3 (1988) (evidence must be viewed "in the light most favorable" to jury-verdict winner). The District Court accordingly entered judgment in the County's favor. Pet. App. 195a-196a.

3. Exby-Stolley appealed, arguing that the District Court wrongly gave an adverse-employment-action instruction. *Id.* at 147a. A divided Tenth Circuit panel disagreed and affirmed. *Id.*

The panel explained that it "is clear from the language of § 12112" that "it is not enough to establish * * * discrimination," including discrimination through a failure to accommodate. *Id.* at 148a, 151a (internal quotation marks omitted). A plaintiff must also show that the failure is " 'in regard to' certain features of employment." *Id.* at 148a. The "adverse employment action" language the District Court used is "well established in judicial opinions" as "shorthand" for the in-regard-to clause. *Id.* at 148a, 153a. The panel observed that "several other circuits have explicitly required an adverse employment action in failure-to-accommodate cases," but recognized that at least two other circuits had "explicitly" disagreed. *Id.*

at 166a-167a. The panel likewise rejected Exby-Stolley's argument that *any* failure to accommodate would automatically satisfy the in-regard-to clause. *Id.* at 172a-173a. "[A] mere inconvenience," for example, would not amount to a changed "term, condition, or privilege of employment." *Id.* at 173a-174a (internal quotation marks omitted).

The panel concluded that the District Court's instructions adequately informed the jury that Exby-Stolley's alleged termination would qualify as an adverse employment action. Although Exby-Stolley claimed she was also entitled to an instruction on *constructive* discharge, the panel held that she had not preserved that theory of an adverse employment action because she had not asserted it in her complaint or before the final pretrial order designed to "clarify the nature of the disputes at issue." *Id.* at 176a-177a.

Judge Holmes dissented. *Id.* at 178a. He contended that the panel's analysis conflicted with prior Tenth Circuit cases that did not require a showing of an adverse employment action in ADA failure-to-accommodate cases. *See id.* at 188a-189a (Holmes, J., dissenting).

4.a. The full Tenth Circuit granted rehearing en banc and ordered that the parties "address specifically * * * [w]hether an adverse employment action is a requisite element of a failure-to-accommodate claim under the" ADA. *Id.* at 198a. In a 7-6 decision, the full court concluded it was not. *Id.* at 2a, 76a.

The en banc majority held that "once plaintiffs have established that their employers[ ] fail[ ] to reasonably accommodate their disability," they have adequately proved an ADA claim "and need not go further." *Id.* at 19a. The majority rested its conclusion

predominantly on the ADA's purposes. *See id.* at 19a-34a. The majority thought "it would make little sense to require the showing of an adverse employment *action* as part of a failure-to-accommodate claim," which asserts "that the employer *failed to act*." *Id.* at 22a. The majority also believed that an adverse-action requirement "would significantly frustrate the ADA's remedial purposes" of "promoting full participation and equal opportunity." *Id.* at 24a, 26a.

The en banc majority was also unpersuaded by the panel's textual analysis. The majority believed that subsection (b)'s examples of discrimination act as "particularized, concrete expression[s]" of the "terms-conditions-and-privileges-of-employment language" contained in subsection (a). *Id.* at 52a. The majority therefore held that a jury in an ADA failure-to-accommodate case "need not expressly" be told that a plaintiff must show that the employer's failure was "in regard to the * * * terms, conditions, or privileges of employment." *Id.* at 62a-61a & n.20. The majority therefore reversed for a new trial without that instruction. *Id.* at 72a-73a.

Judge McHugh dissented, joined by Chief Judge Tymkovich and Judges Kelly, Eid, Carson, and Hartz. *Id.* at 76a-127a. Beginning "with the language of the statute," *id.* at 77a (internal quotation marks omitted), Judge McHugh explained that, "[b]y its plain terms," the reasonable-accommodation requirement in "§ 12112(b) speaks directly to satisfaction of the discrimination clause but is silent as to the twenty-five words Congress included in the in-regard-to clause." *Id.* at 80a. The majority's failure to account for those 25 words "violates the surplusage canon of statutory

construction" by "read[ing] that language out of the statute." *Id.* at 81a.

Judge McHugh also addressed the majority's reliance on the ADA's purposes. *Id.* at 89a-91a. She explained that "the 'in regard to' language strikes the appropriate balance between protection of disabled employees and deference to the business decisions of employers." *Id.* at 91a. Nor would it be especially onerous for plaintiffs to make the necessary showing, as "the terms, conditions, and privileges of employment include not only benefits that are part of an employment contract, but also those benefits that comprise the incidents of employment or that form an aspect of the relationship between the employer and employees." *Id.* at 118a (internal quotation marks, citation, and alterations omitted). So, for instance, a claim by an employee "who is forced to work in significant pain" could go forward, even if the employee was not demoted or docked pay. *Id.* at 122a-123a.

Judge McHugh allowed that the District Court may have taken an overly restrictive approach by limiting its definition of an adverse employment action to "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 124a (internal quotation marks omitted). Judge McHugh recognized, however, that any error was harmless because Exby-Stolley's *only* claim of an adverse employment action was her supposed termination. *Id.* at 124a, 126a. The District Court's instructions, which included termination as a potential adverse employment action, "adequately covered this theory." *Id.* at 125a.

Judge Hartz dissented separately, raising questions about Judge McHugh's analysis of the "terms, conditions, and privileges" criterion. *Id.* at 127a. But he agreed with Judge McHugh that this case did not require "opining on that issue" given Exby-Stolley's exclusive reliance on termination. *Id.* at 128a.

b. The en banc majority and dissents also disagreed on the state of the law in other circuits. Although the majority asserted that "*none* of [its] sister circuits has regularly incorporated an adverse-employment-action requirement into an ADA failure-to-accommodate claim," it recognized that "the decisions in [several] circuits [were] not entirely uniform" and "do not all point in the same direction." *Id.* at 37a-38a.

Judge McHugh explained that, for the majority to count zero circuits against its position, it had to disregard "the general rule that" when there are "inconsistent intracircuit decisions * * * the earlier panel opinion controls." *Id.* at 95a-96a (McHugh, J., dissenting). The majority had also failed to adequately consider whether the "perceived conflict" within some circuits was "real." *Id.* at 100a (internal quotation marks omitted). Correcting for those omissions, multiple courts of appeals "correctly ground themselves in § 12112(a)'s text" and "require some showing that a failure-to-accommodate plaintiff suffered either an adverse employment action or some other detrimental alteration in the terms, conditions, or privileges of employment." *Id.* at 101a.

Judge Hartz, meanwhile, believed the state of circuit law was cloudier than both the majority and Judge McHugh had made it out to be. But he agreed that it "could be very helpful to the lower courts" if

this Court "decides to review this case." *Id.* at 132a (Hartz, J., dissenting).

c. The Tenth Circuit agreed to withhold its mandate pending the County's "efforts to seek certiorari review in the Supreme Court." *Id.* at 201a. This petition follows.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision deepens the pervasive confusion among the lower courts about the elements of an ADA failure-to-accommodate claim. Every federal circuit has confronted the issue, and they are nearly evenly divided. The question recurs frequently, as ADA suits form part of the bread-and-butter of federal litigation. Parties need clarity as to the fundamental elements of this common cause of action. And the majority rule, followed by seven circuits and adopted by the Tenth Circuit below, cannot be reconciled with the ADA's text.

The time is therefore ripe for this Court to intervene. It should grant certiorari and reverse the Tenth Circuit's decision, which "ignore[s] twenty-five words Congress placed in the Americans with Disabilities Act." Pet. App. 76a (McHugh, J., dissenting).

I. THE DECISION BELOW DEEPENS AN ENTRENCHED CONFLICT REGARDING THE ELEMENTS OF AN ADA FAILURE-TO-ACCOMMODATE CLAIM, AN IMPORTANT AND RECURRING FEDERAL QUESTION.

A. The Circuits Are Divided.

There is substantial disagreement among the lower courts regarding the elements of an ADA failure-to-accommodate claim. A complete canvass of the

circuits, taking full account of the standard rules for harmonizing intracircuit precedents, reveals a near-even split. This Court's review is urgently needed to bring clarity to the elements of this common federal cause of action.

1. The Tenth Circuit joins six other circuits that do not require any showing beyond a covered employer's refusal to accommodate a qualifying employee's disability. These circuits hold that a failure to accommodate violates the ADA regardless of any impact on the employee's terms, conditions, or privileges of employment.

Start with the Fourth Circuit. That court has repeatedly confronted ADA suits raising both disparate-treatment and failure-to-accommodate claims. For the disparate-treatment claims, it requires "discharge," *Rhoads* v. *FDIC*, 257 F.3d 373, 387 n.11 (4th Cir. 2001), or some other "adverse employment action," *Adams* v. *Anne Arundel Cty. Pub. Schs.*, 789 F.3d 422, 430 (4th Cir. 2015). But it does not require a similar showing for a plaintiff to succeed on a failure-to-accommodate claim. *See id.* at 432 ("An employer that fails to make 'reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability' has engaged in impermissible discrimination * * * ." (quoting 42 U.S.C. § 12112(b)(5)(A))); *see also Rhoads*, 257 F.3d at 387 n.11 (similar).

The Fifth Circuit likewise does not consider an adverse employment action to be an element of a failure-to-accommodate claim. The court has held that a plaintiff may "prevail" on a failure-to-accommodate claim if "(1) he is a qualified individual with a disability; (2) the disability and its consequential limitations

were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations." *Clark* v. *Champion Nat'l Sec., Inc.*, 952 F.3d 570, 587 (5th Cir. 2020) (internal quotation marks and alterations omitted). This formulation, the court has explained, means that "[a] failure-to-accommodate claim provides a mechanism to combat workplace discrimination even when the employee in question *has not* suffered adverse employment action." *EEOC* v. *LHC Grp., Inc.*, 773 F.3d 688, 703 n.6 (5th Cir. 2014).

In the Sixth Circuit, "to succeed" on a failure-to-accommodate claim, a "plaintiff must prove that (1) he has a disability; (2) that he is 'otherwise qualified' for the job; and (3) that defendants * * * refused to make a reasonable accommodation for his disability." *Smith* v. *Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997). Once again, the court contrasts failure-to-accommodate claims with disparate-treatment claims, which require proof the employer "made an adverse employment decision regarding [the plaintiff] * * * because of his disability." *Id.*; *see also Brumley* v. *United Parcel Serv., Inc.*, 909 F.3d 834, 839 (6th Cir. 2018) (requiring plaintiff to show "she requested an accommodation" and the defendant "failed to provide the necessary accommodation").

The Seventh Circuit, too, has held that a plaintiff can "directly establish a violation of the ADA" by showing only that "he was a qualified individual with a disability, and that [the employer] did not reasonably accommodate him." *Bultemeyer* v. *Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1283 (7th Cir. 1996). Thus, the court holds that "[n]o adverse employment action is required to prove a failure to accommodate."

EEOC v. *AutoZone, Inc.*, 630 F.3d 635, 638 n.1 (7th Cir. 2010); *see also Curtis* v. *Costco Wholesale Corp.*, 807 F.3d 215, 224 (7th Cir. 2015) (listing elements of failure-to-accommodate claim with no adverse-employment-action requirement); *Hoffman* v. *Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001) (same).[1]

In the Eleventh Circuit, "an employer's failure to reasonably accommodate a disabled individual *itself* constitutes discrimination under the ADA, so long as that individual is 'otherwise qualified,' and unless the employer can show undue hardship." *Holly* v. *Clairson Indus., L.L.C.*, 492 F.3d 1247, 1262 (11th Cir. 2007). The court has thus held that a qualified employee has stated a claim for "unlawful[ ] discriminat[ion]" when she alleges that "the employer fail[ed] to provide 'reasonable accommodations' for the disability—unless doing so would impose undue hardship on the employer." *Lucas* v. *W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001) (quoting 42 U.S.C.

---

[1] Judge McHugh's dissent placed the Seventh Circuit on the other side of the split based on a belief that the court's "earliest relevant panel decision" was *Foster* v. *Arthur Andersen LLP*, 168 F.3d 1029 (7th Cir. 1999), *abrogation recognized on other grounds*, *Serwatka* v. *Rockwell Automation, Inc.*, 591 F.3d 957, 962-963 (7th Cir. 2010). *See* Pet. App. 98a-99a. But that overlooks *Bultemeyer*, which predates *Foster*. *Bultemeyer*'s formulation, requiring no adverse employment action, aligns with the Seventh Circuit's consistent practice since *Foster*—even in cases that have cited *Foster*. *See Curtis*, 807 F.3d at 224 (no adverse-employment-action requirement); *AutoZone*, 630 F.3d at 638 n.1 (expressly disavowing adverse-employment-action requirement); *Hoffman*, 256 F.3d at 572 (citing *Foster*, but requiring no adverse employment action); *Stevens* v. *Illinois Dep't of Transp.*, 210 F.3d 732, 736 (7th Cir. 2000) (similar). In contrast, no published Seventh Circuit decision since *Foster* has required an adverse employment action in a failure-to-accommodate case.

§ 12112(b)(5)(A)); *see also D'Angelo* v. *ConAgra Foods, Inc.*, 422 F.3d 1220, 1225-26 (11th Cir. 2005) (stating elements of a reasonable-accommodation claim without including an adverse-employment-action element).

For all practical purposes, the Third Circuit falls into the same category. Although it ostensibly requires an adverse employment action in failure-to-accommodate cases, it has held that "[a]dverse employment decisions in this context include refusing to make reasonable accommodations for a plaintiff's disabilities." *Williams* v. *Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 761 (3d Cir. 2004). Thus, in the Third Circuit, an ADA plaintiff need not make any showing beyond a failure to accede to a reasonable request for accommodation.

2. Six circuits disagree and require an ADA failure-to-accommodate plaintiff to demonstrate an adverse employment action, fulfilling the Act's requirement that any discrimination must be "in regard to" the "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

The D.C. Circuit exemplifies this group. In *Marshall* v. *Federal Express Corp.*, the court carefully examined Section 12112(a)'s text and held that it "makes clear" that "for discrimination (including denial of reasonable accommodation) to be actionable, it must occur *in regard to* some adverse personnel decision or other term or condition of employment." 130 F.3d 1095, 1099 (D.C. Cir. 1997). The en banc court reiterated the point in *Duncan* v. *Washington Metropolitan Area Transit Authority*, which involved both a failure-to-accommodate and a disparate-treatment claim. 240 F.3d 1110, 1114 (D.C. Cir. 2001) (en banc).

In listing the elements for *both* causes of action, the court required the plaintiff to have suffered "an adverse employment action because of his disability." *Id.* (quoting *Swanks* v. *Washington Metro. Area Transit Auth.*, 179 F.3d 929, 934 (D.C. Cir. 1999)).

The Tenth Circuit en banc majority attempted to minimize *Marshall* by pointing out that the D.C. Circuit was willing to assume that working conditions that "inflict pain or hardship" might affect the terms or conditions of employment despite the absence of "job loss, pay loss, transfer, demotion, denial of advancement, or other adverse personnel action." Pet. App. 42a n.12 (quoting *Marshall*, 130 F.3d at 1099) (emphasis omitted). But that assumption does not eliminate the conflict: It goes, at most, to the precise contours of the adverse-employment-action requirement. But the en banc majority did not dispute that *Marshall* requires a showing of a nexus to working conditions that its decision does not. *See id.*

Nor does the D.C. Circuit's opinion in *Hill* v. *Associates for Renewal in Education, Inc.*, 897 F.3d 232, 237 (D.C. Cir. 2018), also cited by the en banc majority, Pet. App. 41a-42a, suggest that the D.C. Circuit has changed its approach. Although *Hill* did not mention the adverse-employment-action requirement, the case involved a plaintiff who was allegedly fired for requesting an accommodation. *See Hill*, 897 F.3d at 235. It is therefore unsurprising that the court did not mention the superfluous adverse-employment-action requirement.

The First Circuit is similar. That court has long recognized that, to succeed "on a failure-to-accommodate claim" under the ADA, "a plaintiff ordinarily must" prove a disability, a covered employer, a failure to

"reasonably accommodate," and "that the employer's failure to do so affected the terms, conditions, or privileges of the plaintiff's employment." *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). And in later cases, the court has abbreviated the in-regard-to element to an "adverse employment action." *See, e.g.*, *Colón-Fontánez* v. *Municipality of San Juan*, 660 F.3d 17, 32 (1st Cir. 2011).

To be sure, as the Tenth Circuit en banc majority pointed out, not every First Circuit failure-to-accommodate opinion expressly refers to this element. *See* Pet. App. 39a-40a & n.9. But the First Circuit has explained the occasional omission, stating that the "element[ ] * * * that [the] plaintiff suffered in the terms and conditions of her employment" is only "sometimes noted," and other times "require[s] no discussion." *Calero-Cerezo* v. *U.S. Dep't of Justice*, 355 F.3d 6, 20 n.3 (1st Cir. 2004).[2] The cases omitting the adverse-employment-action element therefore do not call into doubt whether the First Circuit applies it consistently.

The Second Circuit's cases resemble the First Circuit's. The court has repeatedly held that an ADA failure-to-accommodate claim requires an adverse employment action. *See, e.g.*, *Natofsky* v. *City of New York*, 921 F.3d 337, 352 (2d Cir. 2019); *Parker* v. *Sony Pictures Ent., Inc.*, 260 F.3d 100, 108 (2d Cir. 2001). The Tenth Circuit en banc majority claimed that the Second Circuit's decisions were "not entirely uniform" because of other cases that do not mention the

[2] *Calero-Cerezo* is a Rehabilitation Act case, but the court explained that it considers that "the case law construing the ADA generally pertains equally to claims under the Rehabilitation Act." 355 F.3d at 19.

requirement. *See* Pet. App. 46a. But as the D.C. and First Circuits make clear, there is no inconsistency: In some cases, including all of the Second Circuit failure-to-accommodate cases cited by the en banc majority, there was no need to mention the adverse-employment-action requirement because it was obviously satisfied. *See McMillan* v. *City of New York*, 711 F.3d 120, 124 (2d Cir. 2013) (30-day suspension without pay)*; Graves* v. *Finch Pruyn & Co.*, 457 F.3d 181, 184 (2d Cir. 2006) (involuntarily placed on disability leave); *Rodal* v. *Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 117 (2d Cir. 2004) (plaintiff forced to take disability leave); *Mitchell* v. *Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 4 (2d Cir. 1999) (termination). All of these cases are therefore consistent with the Second Circuit's requirement of an adverse employment action in failure-to-accommodate cases.

The Eighth Circuit has likewise long required "a party" who "makes a reasonable accommodation claim" to "first make a facial showing that he has an ADA disability and that he has suffered adverse employment action." *Fenney* v. *Dakota, Minnesota & E. R.R. Co.*, 327 F.3d 707, 712 (8th Cir. 2003). In *Fenney* itself, for instance, the court considered whether the summary-judgment record contained evidence to support the plaintiff's claim of "constructive demotion," and remanded for trial on a failure-to-accommodate claim in part on the strength of that showing. *See id.* at 717.

Fenney is far from "unrepresentative" of the Eighth Circuit's law, as the Tenth Circuit en banc majority seemed to think. Pet. App. 44a n.13. On the contrary, the Eighth Circuit has consistently and repeatedly required an adverse employment action in failure-to-

accommodate cases. *See, e.g.*, *Gardea* v. *JBS USA, LLC*, 915 F.3d 537, 541 (8th Cir. 2019); *Kelleher* v. *Wal-Mart Stores, Inc.*, 817 F.3d 624, 631 (8th Cir. 2016); *Kammueller* v. *Loomis, Fargo & Co.*, 383 F.3d 779, 788 (8th Cir. 2004).

Citing *Dick* v. *Dickinson State University*, 826 F.3d 1054 (8th Cir. 2016), the en banc majority posited that the Eighth Circuit is more like the Third Circuit, where a failure to grant a reasonable accommodation satisfies the adverse-employment-action element in all cases. Pet. App. 43a. Not so. All *Dick* recognizes is that if an employee actually "in need of assistance" requests an accommodation and is denied, the ADA makes the employer liable. 826 F.3d at 1060. That is a far cry from holding that *every* denied accommodation necessarily gives rise to liability, regardless of "need." *Id.*[3]

Nor does *Garrison* v. *Dolgencorp, LLC*, 939 F.3d 937 (8th Cir. 2019), undermine *Fenney* and its progeny. In *Garrison,* the Eighth Circuit allowed an ADA failure-to-accommodate claim to proceed despite the absence of "an adverse employment action * * * that was causally connected to [the plaintiff's accommodation] request." *Id.* at 942 n.1. The majority's terse reasoning does not engage with the *Fenney* line of cases or reconcile the apparent conflict with *Fenney*'s holding. To the extent there is a conflict, however, the Eighth

[3] The Eighth Circuit model jury instructions, which the en banc majority also invoked, Pet. App. 43a-44a, are not illuminating. The manual is prepared by a committee of practitioners, magistrate judges, and district judges, not the Eighth Circuit itself. *See Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit* iii-xvii (2020). The committee recognizes its work should not be treated as authoritative. *Id.* at xviii.

Circuit follows the "prior panel rule," meaning that *Fenney*'s "earlie[r] opinion must be followed." *Mader* v. *United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc).

The Ninth Circuit, too, requires an adverse employment action in failure-to-accommodate cases. *See Samper* v. *Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012); *Allen* v. *Pacific Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003) (per curiam); *Braunling* v. *Countrywide Home Loans Inc.*, 220 F.3d 1154, 1156 (9th Cir. 2000); *see also Mickealson* v. *Cummins, Inc.*, 792 F. App'x 438, 440 (9th Cir. 2019) ("Because Mickealson cannot show that he suffered an adverse employment action because of his disability, his reasonable accommodation claim also fails."). This element reflects the court's understanding that the statute requires action taken "in regard to * * * job training[ ] and other terms, conditions, and privileges of employment." *EEOC* v. *UPS Supply Chain Sols.*, 620 F.3d 1103, 1110 (9th Cir. 2010) (quoting 42 U.S.C. § 12112(a)).

The Tenth Circuit en banc majority attempted to unsettle the Ninth Circuit's consistent body of precedent. *See* Pet. App. 49a-50a. But the cases it cited are fully consistent with the Ninth Circuit recognizing an adverse-employment-action requirement. In *Snapp* v. *United Transportation Union*, the court explained that the "ADA treats the failure to provide a reasonable accommodation as an act of *discrimination* if the employee is a 'qualified individual,' the employer receives adequate notice, and a reasonable accommodation is available that would not place an undue hardship on the operation of the employer's business." 889 F.3d 1088, 1095 (9th Cir. 2018) (emphasis added)

(quoting 42 U.S.C. § 12112(b)(5)(A)). The quotation merely reflects a point on which all parties are agreed: Under Section 12112(b), a failure to accommodate counts as "discrimination" for ADA purposes. But *Snapp* had no reason to dwell on the adverse-employment-action element because the plaintiff had been terminated, an undisputed adverse employment action. *See id.* at 1093.[4]

Nor was the adverse-employment-action element at issue in *Dunlap* v. *Liberty Natural Products, Inc.*, another case involving a terminated plaintiff. 878 F.3d 794, 797 (9th Cir. 2017). The Tenth Circuit en banc majority highlighted language from *Dunlap* observing that "a failure-to-accommodate claim 'is analytically distinct from a claim of disparate treatment or impact under the ADA.' " *Id.* at 798 (quoting *Johnson* v. *Board of Trs. of Boundary Cty. Sch. Dist.*, 666 F.3d 561, 567 (9th Cir. 2011)). But absent from the en banc majority's discussion is any mention of *why* the two claims differ. In *Dunlap*, it was the *employer* who argued that the jury instructions were deficient for failing to inform the jury of an element necessary to trigger a duty to accommodate that would be not be necessary for a disparate-treatment claim—namely, the need for an employer to be "aware of or ha[ve] reason to be aware of" the employee's "desire for a reasonable accommodation." *Id.* And the quoted language traces

---

[4] The Ninth Circuit's model jury instructions, which cite *Snapp* as the leading source for reasonable-accommodation claims, warn that the Ninth Circuit "does not adopt these instructions as definitive" and that "the correctness or incorrectness of a given instruction may be the subject of a Ninth Circuit opinion." Ninth Cir. Jury Instructions Comm., *Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit*, "Caveat" & 294-295 (last updated Dec. 2020).

back to a case filed under Title II of the ADA explaining that a reasonable-accommodation plaintiff does not need to establish that the defendant treated a nondisabled person more favorably. *See Johnson*, 666 F.3d at 567 (citing *McGary* v. *City of Portland*, 386 F.3d 1259, 1266-1267 (9th Cir. 2004)). That distinction is irrelevant to the question here.

Last but not least, the Federal Circuit, citing Eighth Circuit precedent, has required a plaintiff bringing a failure-to-accommodate claim to demonstrate "she has suffered an adverse employment decision." *Office of the Architect of the Capitol* v. *Office of Compliance*, 361 F.3d 633, 639 (Fed. Cir. 2004) (citing *Cravens* v. *Blue Cross & Blue Shield*, 214 F.3d 1011, 1016 (8th Cir. 2000)).

B. The Question Presented Is Important And The Split Will Not Resolve On Its Own.

1. To summarize: After the decision below, seven circuits do not require failure-to-accommodate plaintiffs to show that their claims are "in regard to" the "terms, conditions, and privileges" of their employment. 42 U.S.C. § 12112(a). Six take the opposite tack, requiring a showing of an adverse employment action in failure-to-accommodate cases.

This deep division among the lower courts calls out for this Court's attention. *See* Sup. Ct. R. 10(a). Civil-rights cases are a mainstay of federal-question jurisdiction. ADA cases are no exception. The EEOC receives tens of thousands of ADA complaints every year. *See Americans with Disabilities Act of 1990 (ADA) Charges (Charges filed with EEOC) (includes concurrent charges with Title VII, ADEA, EPA, and*

GINA) FY 1997-FY2020, EEOC.[5] Thousands of ADA employment claims are filed in federal court each year. *Just the Facts: Americans with Disabilities Act*, Admin. Office of U.S. Courts (July 12, 2018).[6] And the sheer number of cases in the split is a testament to the frequency with which these cases are filed. *Supra* pp. 13-23.

The question presented is foundational to the "balance" Congress struck in the ADA "between protection of disabled employees and deference to the business decisions of employers." Pet. App. 91a (McHugh, J., dissenting). An employer developing a compliance program must know what acts will expose it to liability. An employee, too, must know what she will need to prove if she seeks to vindicate those rights before the Equal Employment Opportunity Commission or in court. Given the current state of the law, however, employers and employees alike face substantial difficulty in drawing those lines. The situation is particularly difficult for larger employers, who must take into account the disparate regimes in the various circuits.

2. Judge Hartz's separate dissent worried that a number of the decisions cited by the en banc majority did not thoroughly discuss their positions on the question presented. *See id.* at 133a (Hartz, J., dissenting). But the fault lines are clear. On the one side are courts, exemplified by the Tenth and Fifth Circuits, that view the failure-to-accommodate language in

---

[5] *Available at* https://www.eeoc.gov/statistics/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent (last visited Mar. 24, 2021).

[6] *Available at* https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act.

Section 12112(b)(5)(A) as sufficient to state a claim under the ADA, the in-regard-to clause notwithstanding. *See* Pet. App. 52a-61a; *Dillard* v. *City of Austin*, 837 F.3d 557, 562 (5th Cir. 2016). On the other side are the courts, like the D.C., First, and Ninth Circuits, which have concluded based on the ADA's text that the in-regard-to clause must still be satisfied in failure-to-accommodate cases by showing an adverse employment action. *Marshall*, 130 F.3d at 1099; *Higgins*, 194 F.3d at 264*; UPS Supply Chain*, 620 F.3d at 1110. And even Judge Hartz recognized that it "could be very helpful to the lower courts" if this Court "decides to review this case." Pet. App. 132a (Hartz, J., dissenting).

That decisions within several circuits may not be "entirely uniform" is no cause for this Court to defer review. *Id.* at 38a. The en banc majority overstated the disuniformity in an effort to add more circuits to its side. *Supra* pp. 11, 16-23. But even if there is some doubt at the margin as to the rule in one or two circuits, the split is still real. And the published decisions addressing the question presented in every circuit makes reconciliation unlikely. It's improbable that even one circuit will go en banc to reconsider its position; it's nearly inconceivable that six or more will. There is no need to wait for that unlikely outcome. *Cf. Mullins Coal Co. of Va.* v. *Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 484 U.S. 135, 159 n.34 (1987) (certiorari granted where there was "intracircuit confusion" among "the Sixth and Seventh Circuits" and the "Tenth Circuit" had taken a position on the question presented "without discussing the issue"). The split is entrenched, the question important, and the topic ripe for this Court's consideration.

II. THE TENTH CIRCUIT'S DECISION IS WRONG.

In interpreting a statute, this Court "begin[s] where all such inquiries must begin: with the language of the statute itself." *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1056 (2019) (internal quotation marks omitted). The ADA's text makes clear that even when an employer refuses a disabled employee's reasonable request for an accommodation, that refusal is not actionable unless it was "in regard to" the "terms, conditions, [or] privileges of employment." 42 U.S.C. § 12112(a).

1. Section 12112(a) requires *both* (1) discrimination "against a qualified individual on the basis of disability" that is (2) "in regard to" the "terms, conditions, [or] privileges of employment." Subsection (b) provides examples of conduct that satisfies one—and only one—of those two requirements: "discriminat[ion] against a qualified individual on the basis of disability." *Id.* § 12112(b). One of those examples is failing to accommodate a request that can be implemented without undue hardship to the employer. *Id.* § 12112(b)(5)(A).

Thus, "[b]y its plain terms," an employer's failure to accommodate under Section 12112(b) "speaks directly to the satisfaction of the discrimination clause but is silent as to the twenty-five words Congress included in the in-regard-to clause." Pet. App. 80a (McHugh, J., dissenting). The "in-regard-to clause" requires "something more than an employer's failure to accommodate." *Id.*; *see also Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (noting the "cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute" (internal quotation marks omitted)).

This additional requirement performs an important function, ensuring that employers are not held liable for failures to accommodate that do not have a material impact on the "conditions" or "privileges" of employment. Thus, the Act does not compel employers to offer accommodations that a disabled employee requests for "any amenity or convenience * * * that is not provided to employees without disabilities." 29 C.F.R. pt. 1630 app. § 1630.9. Instead, an employer's obligations center "on the needs of a particular individual *in relation to problems in performance of a particular job*" because of a disability. S. Rep. No. 101-116, at 34 (1989) (emphasis added); *see also* H.R. Rep. No. 101-485(II), at 64-65 (1990) (same). In other words, the denial of an accommodation must adversely affect the employee's conditions and privileges of employment, not just withhold something the employee would prefer to have.

2. The en banc majority's contrary conclusion flouts the basic rules of statutory interpretation. The majority's conclusion only follows if subsection (b) "particularizes and makes concrete" the *entire* "[g]eneral rule" in subsection (a)—"what it means to discriminate against qualified individuals" *and* that such discrimination is "in regard to . . . terms, conditions, and privileges of employment." Pet. App. 54a-55a, 57a (internal quotation marks omitted). But that is not what subsection (b) does: As the majority recognizes, subsection (b) substitutes "specifically" for "the second component" of subsection (a)'s discrimination clause. *Id.* at 57a.

If the text left any doubt, the statutory history confirms that Congress carefully delineated which parts of subsection (a) would be satisfied by the examples in

subsection (b). As originally enacted, subsection (b)'s list delineated employment practices that satisfied the term "discriminate." 42 U.S.C. § 12112(b) (2006). In 2008, Congress amended subsection (b) by substituting "discriminate against a qualified individual on the basis of disability" for "discriminate." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a)(2), 122 Stat. 3553, 3557. This expanded the portion of subsection (a) satisfied by the employment practices listed in subsection (b). So if Congress intended for subsection (b)'s list of offending employment practices to "particularize and make concrete" the entire general rule in subsection (a), it could have said so. But it did not. *See* Pet. App. 80a-81a (McHugh, J., dissenting).

The en banc majority attempted to patch the textual hole in its analysis by asserting, repeatedly, that subsection (b) is "inextricably intertwined" with subsection (a). Pet. App. 9a, 55a, 57a, 58a, 61a n.19. But that impressionistic perception of the statute cannot substitute for the text Congress enacted. And that text directs courts to treat the examples in subsection (b) as satisfying the discrimination clause but not the distinct in-regard-to clause. *Id.* at 79a-80a (McHugh, J., dissenting).

Perhaps sensing the weakness of its textual case, the majority primarily attacked a straw man, emphasizing that the phrase "adverse employment action" does not appear in the ADA. *See id.* at 10a. And the majority suggested it would be "illogical" to require an adverse employment "action" in cases that peg liability to an employer's omission. *Id.* at 22a. These arguments are beside the point: The phrase "adverse employment action" has long been employed as judicial

shorthand to refer to the in-regard-to clause and the similar with-respect-to clause in Title VII. *See supra* p. 5. And the majority did not dispute the longstanding equivalence. *See* Pet. App. 68a; *see also Sanchez* v. *Denver Pub. Schs.*, 164 F.3d 527, 533 (10th Cir. 1998) (linking "adverse employment action" to change in "terms, conditions, or privileges of employment" (internal quotation marks omitted)).

3. The remaining justifications the Tenth Circuit offered for its result do not rehabilitate its rewrite of Congress's text.

The majority's primary redoubt was the ADA's "remedial purposes." *See* Pet. App. 24a. The court believed that an adverse-employment-action requirement would "significantly frustrate" that purpose. *Id.* Yet, looking to a statute's purpose to interpret the text "gets the inquiry backward." *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 769 (2019). "The best evidence of [statutory] purpose," after all, "is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991).

The text here unambiguously requires ADA plaintiffs to show that a requested accommodation was "in regard to" the "terms, conditions, [or] privileges of employment." 42 U.S.C. § 12112(a). As Judge McHugh explained, that text *is* critical to Congress's purpose, because it "strikes the appropriate balance between protection of disabled employees and deference to the business decision of employers." Pet. App. 91a (McHugh, J., dissenting); *see* S. Rep. No. 101-116, at 34; H.R. Rep. No. 101-485(II), at 64-65. The majority's rule, by contrast, invites federal courts to sit as a " 'super' human resources department to dictate employer

conduct irrespective of its impact"—a function that goes well beyond Congress's desire to provide "a remedy for actual harm incurred in employment." Pet. App. 88a (McHugh, J., dissenting).

The en banc majority also pointed to EEOC guidance as confirmation of its conclusion on the elements of the claim. *See id.* at 34a-37a. But the cited regulation does not support the majority's position. The provision, titled "Not making reasonable accommodation," does not purport to set out all the elements of a failure-to-accommodate claim. *See* 29 C.F.R. § 1630.9; *see also* Pet. App. 92a (McHugh, J., dissenting). Indeed, elsewhere in the same regulations, the EEOC takes account of the in-regard-to clause, explaining that the "obligation to make reasonable accommodation" is limited to a requested "adjustment or modification" that "is job-related." 29 C.F.R. pt. 1630 app. § 1630.9; *see also id.* § 1630.4(a). Furthermore, the United States below filed an *amicus* brief explaining that "to prevail on a failure-to-accommodate claim * * * , a qualified individual must show that a denied accommodation pertains to her terms, conditions, or privileges of employment." U.S. C.A. Br. 14. On the question presented, the United States agrees with the County, not the en banc majority.

III. THIS CASE IS A SUITABLE VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case cleanly presents the threshold elements of an ADA failure-to-accommodate claim. The jury found in favor of the County based on its conclusion that Exby-Stolley did not suffer any "adverse employment action." Pet. App. 194a. The Tenth Circuit, in turn, reversed *only* because it believed that the jury should not have been asked to find whether there was

an adverse employment action at all. *See id.* at 72a-73a.

To be sure, "adverse employment action" may not perfectly capture the full scope of the phrase "terms, conditions, and privileges of employment." *See id.* at 116a-117a (McHugh, J., dissenting). But this case does not require the Court to mark out the metes and bounds of that phrase, because Exby-Stolley has preserved one and only one theory of an adverse employment action: termination. *See id.* at 125a-126a. Thus, as long as the District Court was right to require *some* impact on the terms of Exby-Stolley's employment, its judgment should be affirmed. *See id.*

Exby-Stolley claimed on appeal that the jury should also have been instructed that she could satisfy the adverse-employment element by showing *constructive* discharge. *Id.* But the panel majority and en banc dissenters both found—without contradiction from the en banc majority or panel dissent—that Exby-Stolley did not preserve that theory in the District Court. *See* Pet. App. 125a-126a, 176a-177a. There is no cause for this Court to set aside that finding, which is well supported by the record. *See id.*

In short, the correctness of the District Court judgment turns solely on whether the in-regard-to clause requires *some* showing beyond a covered employer declining to assent to a qualified employee's request for an accommodation. The courts of appeals are deeply split on that issue. This Court should grant certiorari to furnish a definitive answer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SEAN MAROTTA
Counsel of Record
REEDY C. SWANSON
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
sean.marotta@hoganlovells.com

Counsel for Petitioner

MARCH 2021