No. 23-362

IN THE

Supreme Court of the United States

PERRY HOPMAN,

Petitioner,

v.

UNION PACIFIC RAILROAD CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Americans with Disabilities Act requires employers to "mak[e] reasonable accommodations" for qualified individuals with a disability. 42 U.S.C. § 12112(b)(5)(A). Federal regulations define "reasonable accommodation[s]" to include modifications necessary to enable an employee with a disability to perform essential work functions, 29 C.F.R. § 1630.2(o)(1)(ii), and "to enjoy equal benefits and privileges of employment" available to similarly situated employees without disabilities, *id.* § 1630.2(o)(1)(iii).

Petitioner Perry Hopman, a Union Pacific freight train engineer, requested to bring his service dog with him in the cab of the locomotive. Because it is undisputed that petitioner can perform the essential functions of his job without an accommodation, petitioner did not make a claim under § 1630.2(o)(1)(ii). Instead, he argued that the dog eased his psychological pain and that a right to work without psychological pain is a "benefi[t] and privileg[e] of employment" under § 1630.2(o)(1)(iii).

The question presented is:

Whether the Eighth Circuit correctly held that the "benefits and privileges of employment" under 29 C.F.R. § 1630.2(o)(1)(iii) refers to employer-provided programs and services offered to employees regardless of their disability status, and does not include a right to freedom from psychological pain.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that respondent Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation, a publicly traded company. No publicly traded corporation is known to own 10% of the stock of Union Pacific Corporation.

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BRIEF IN OPPOSITION

Respondent Union Pacific Railroad Company (Union Pacific) respectfully submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

This case concerns the meaning of an uncommonly invoked regulation implementing the Americans with Disabilities Act (ADA).

The ADA prohibits discrimination "on the basis of disability." Under the statute, an employer's failure to provide "reasonable accommodations" to an employee with a disability can be prohibited discrimination. 42 U.S.C. § 12112(a)-(b). Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) provide that employers may be required to offer an accommodation to an employee with a disability to enable him "to perform the essential functions" of his position, 29 C.F.R. § 1630.2(o)(1)(ii), or "to enjoy equal benefits and privileges of employment as are enjoyed" by "similarly situated" employees without disabilities, *id.* § 1630.2(o)(1)(iii). "[M]ost failure-to-accommodate cases" are essential-functions cases under § 1630.2(o)(1)(ii). Pet. App. 4a.

This case, however, involves a standalone claim under § 1630.2(o)(1)(iii). Petitioner Perry Hopman, a Union Pacific freight train engineer, does not dispute that he can perform the essential functions of his job without an accommodation. Invoking only the "equal benefits and privileges" provision, petitioner contended that the law entitled him to bring his service dog into the cab of moving freight trains to ease the negative effects of post-traumatic stress

disorder and migraine headaches. After careful review by its legal team and safety department, Union Pacific denied petitioner's request because allowing a dog in the cab of a freight train would threaten the health and safety of railroad employees and would violate federal safety regulations. The district court rejected petitioner's claim that he was entitled to this accommodation under 29 C.F.R. § 1630.2(o)(1)(iii), and the Eighth Circuit affirmed.

There is no reason for this Court to grant review.

The Eighth Circuit held that petitioner had not properly preserved the issue whether a right to be free from psychological pain is among the "equal benefits and privileges of employment" an employer must provide under 29 C.F.R. § 1630.2(o)(1)(iii). *See* Pet. App. 15a (citing Fed. R. App. P. 28(a)(5), and concluding that petitioner's failure to "stat[e] this is an issue presented . . . will not do"). Because this Court ordinarily does not review issues not preserved below, the petition should be denied on that ground alone.

The Eighth Circuit also correctly rejected petitioner's claim on the merits. The plain text of § 1630.2(o)(1)(iii), the court of appeals reasoned, shows that the "equal benefits and privileges of employment" refer only to programs and services provided or sponsored by the employer and offered to employees regardless of whether they have a disability. Section 1630.2(o)(1)(iii) does not create a general right to a workplace free of psychological pain. *See* Pet. App. 12a-13a.

Petitioner's claim of a circuit split is baseless. The Eighth Circuit did not announce a position that, as petitioner contends, puts that court in open conflict

with eight other federal courts of appeals and one state supreme court. Petitioner's attempt to manufacture a circuit split rests on a hodgepodge of dicta, unpublished decisions, and cases interpreting a different statute. It also rests on the false premise that this case raises a broader question about the meaning of the phrase "terms, conditions, and privileges of employment" under the ADA. *See* Pet. i, 9. That issue is not before the Court. Petitioner did not raise these statutory interpretation arguments below, and he presented his case as seeking only to vindicate the "equal benefits and privileges of employment" under 29 C.F.R. § 1630.2(o)(1)(iii). *See, e.g.*, D. Ct. Dkt. 4, ¶ 12. Certainly that is how both the district court and the Eighth Circuit understood his claim. And as the Eighth Circuit explained, petitioner "cites no case . . . where an employee's failure-to-accommodate claim was based entirely on the benefits and privileges of employment duty in 29 C.F.R. § 1630.2(o)(1)(iii), and the court held that the duty was not limited to employer provided or sponsored services and programs." Pet. App. 14a. In short, courts are not divided on the actual question presented in this case.

There is no other reason to grant review. Cases under § 1630.2(o)(1)(iii) do not arise frequently, so interpretive questions about its meaning are not significant enough to warrant this Court's review. And even if there were questions about the regulation's meaning, the EEOC itself can clarify. There is no need for this Court's intervention.

Finally, this case is a poor vehicle for addressing the question presented. No matter what this Court might decide on the question petitioner raises, the outcome of this case will be the same because

alternative grounds independently support the Eighth Circuit's holding. This Court should not expend its limited resources on a case where its ruling will not affect the outcome.

The Court should deny the petition.

STATEMENT

1. The Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327, codified at 42 U.S.C. § 12101 *et seq.*, prohibits an employer from discriminating against qualified individuals based on disability. 42 U.S.C. § 12112(a)-(b). This statutory prohibition carries with it the duty to provide "reasonable accommodations" to individuals with a disability, unless the accommodation would pose an undue hardship to the employer. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 395 (2002). The statute lists specific examples of "reasonable accommodation[s]," including "making existing facilities used by employees readily accessible to and usable by individuals with disabilities," and "job restructuring," "the provision of qualified readers or interpreters, and other similar accommodations." 42 U.S.C. § 12111(9).

By regulation, the EEOC has provided additional guidance on the meaning of "reasonable accommodation." The regulatory definition of "reasonable accommodation" has three distinct provisions, and ADA plaintiffs often opt to litigate failure-to-accommodate claims under one or another of these provisions. These regulations have "controlling weight unless they are . . . contrary to the statute," *United States v. Morton*, 467 U.S. 822, 834 (1984), and are "assume[d]" to be "valid" unless challenged, *Keith v. Cnty. of Oakland*, 703 F.3d 918, 925 (6th Cir. 2013).

- Section 1630.2(o)(1)(i) addresses job applicants, defining "reasonable accommodation" to include adjustments that enable a qualified applicant with a disability to "be considered for the position such qualified applicant desires."
- Section 1630.2(o)(1)(ii) applies to modifications or adjustments "that enable an individual with a disability who is qualified to perform the essential functions" of the job. "[M]ost" ADA failure-to-accommodate claims fall under this essential-functions rubric. Pet. App. 4a.
- Section 1630.2(o)(1)(iii) is less commonly invoked than the other two subsections. It provides that "reasonable accommodation" includes modifications or adjustments that enable an employee with a disability "to enjoy equal benefits and privileges of employment as are enjoyed by . . . similarly situated employees without disabilities." Section 1630.2(o)(1)(iii) is the sole provision at issue in this case. *See* D. Ct. Dkt. 59, at 15 (plaintiff's opposition to summary judgment) ("[t]he first two prongs [of the regulations] are not at issue in this lawsuit").

2. Petitioner Perry Hopman experiences post-traumatic stress disorder and related symptoms arising from his two military tours of duty as a flight medic.

Petitioner began working for Union Pacific as a train conductor in 2008 and returned to the job in 2015 after his second tour of duty. Pet. App. 67a-69a. Although petitioner passed Union Pacific's fitness re-entrance exam, he suffered flashbacks and migraine

headaches on the job. *Id.* at 7a. To ease his symptoms, petitioner obtained a service dog. *Id.*

In 2016, about a year after he returned to work, petitioner requested that Union Pacific authorize him to bring his service dog to work as a reasonable accommodation for his post-traumatic stress disorder. Pet. App. 70a. Petitioner represented that his service dog would "allow him to be more comfortable at work, make working easier, and help him both mentally and physically." *Id.*; *see* D. Ct. Dkt. 54-6, at 2; D. Ct. Dkt. 55, ¶ 13. Union Pacific reviewed and denied petitioner's request because (among other reasons) permitting a dog in the cab of a moving freight train would present a safety risk. Pet. App. 70a; D. Ct. Dkt. 54-7, at 2; D. Ct. Dkt. 55, ¶ 14.

Petitioner renewed his request for an accommodation in April 2017. Pet. App. 71a. After further review, Union Pacific again denied the request because the accommodation would present a safety risk and violate federal safety regulations. *Id.* at 76a.

Union Pacific offered petitioner an alternative accommodation—a position working in a railroad yard (with no material change in pay) that would enable him to avoid nights away from home without his service dog. Pet. App. 77a. Petitioner initially declined the job, but he later reconsidered and eventually pursued and accepted a rail-yard position. *Id.* at 79a. After some time in that role, however, petitioner decided to return to his previous job working as a conductor. *Id.* at 79a-80a.

Petitioner then filed a charge with the EEOC, alleging that Union Pacific failed to accommodate his request to bring his dog into the locomotive cab. Pet. App. 80a. Petitioner's charge admitted that he could

perform the essential functions of his job without the accommodation, but he maintained that his requested accommodation was necessary so that he could enjoy the equal benefits and privileges of employment. *Id*.

While petitioner's charge was pending, Union Pacific promoted him from conductor to freight train engineer.

3. After the EEOC issued a Notice of Right to Sue, petitioner sued in the United States District Court for the Eastern District of Arkansas. Pet. App. 80a. His complaint alleged that Union Pacific's refusal to allow him to bring his dog into the cab of Union Pacific freight trains denied him the "equal benefits and privileges of employment as are enjoyed by his co-workers without disabilities." D. Ct. Dkt. 4, ¶ 12 (amended complaint). Petitioner has maintained that his suit concerns only the third definition of "reasonable accommodation" under the EEOC's regulations, 29 C.F.R. § 1630.2(o)(1)(iii), and that he is able to perform his job's essential functions with or without his dog. *See* D. Ct. Dkt. 4, ¶¶ 12, 19; D. Ct. Dkt. 55, ¶¶ 18, 31; D. Ct. Dkt. 59, at 15 (plaintiff's opposition to summary judgment) ("[t]he first two prongs [of the regulations] are not at issue in this lawsuit").

At trial, petitioner testified that he could perform the essential functions of the job without accommodation. D. Ct. Dkt. 190, at 179-180; D. Ct. Dkt. 191, at 9, 27, 32. Accordingly, the jury was instructed only on a § 1630.2(o)(1)(iii) theory:

> Fourth, allowing Mr. Hopman his requested accommodation was (1) reasonable and (2) a modification or adjustment *to enable Mr. Hopman with a disability to enjoy equal*

> *benefits and privileges of employment* as are enjoyed by Union Pacific Railroad's other similarly situated employees without disabilities.

Pet. App. 8a-9a (emphasis added).

Petitioner, however, put on no evidence of any "benefits" or "privileges" of employment Union Pacific may have denied him. The only reference to those terms during trial came at the end of petitioner's rebuttal during closing arguments, when his counsel touted the "benefit o[r] privilege" of working "without the pain and suffering" and "allow[ing petitioner] to really flourish." Pet. App. 9a.

The jury returned a verdict in petitioner's favor, but the district court granted Union Pacific's motion for judgment as a matter of law. Pet. App. 19a-49a. The court held that freedom from psychological pain is not among the "benefit[s] or privilege[s] of employment that [Congress] envisioned employers being required to offer employees." *Id.* at 26a. Under 29 C.F.R. § 1630.2(o)(1)(iii), the court reasoned, the obligation to provide "equal benefits and privileges of employment" refers "to *employer sponsored* placement or counseling services, and to *employer provided* cafeterias, lounges, gymnasiums, auditoriums, transportation and the like." Pet. App. 28a. And "[t]here was no evidence presented at trial that Union Pacific offers service animals to its non-disabled employees as a benefit and privilege of employment." *Id.* at 31a. The court further explained that petitioner had pointed to no "authority where a court has articulated a right to work without mental or psychological pain" as a "benefit or privilege of employment." *Id.* at 41a. And many courts held otherwise. *See id.* at 41a-43a (collecting cases). The

court therefore concluded that petitioner had not claimed "a cognizable benefit or privilege of employment that he is entitled to as a reasonable accommodation." *Id.* at 49a.

4. The Eighth Circuit affirmed. The court began by noting that petitioner "did not claim denial of a job performance accommodation under 29 C.F.R. § 1630.2(o)(1)(ii)," but invoked only "the employer obligation in 29 C.F.R. § 1630.2(o)(1)(iii) to make reasonable accommodation relating to benefits and privileges of employment." Pet. App. 9a. "[I]n the district court he explicitly limited his failure-to-accommodate claim to" that subsection. *Id.* at 11a. And on that sole claim, the Eighth Circuit "agree[d]" with the district court that the "'benefits and privileges of employment'" under the regulation "(1) refers only to employer-provided services; (2) must be offered to non-disabled individuals in addition to disabled ones; and (3) does not include freedom from mental or psychological pain." *Id.*

The Eighth Circuit focused on the "plain text" of the regulation, which is "controlling" absent any contention that the regulation is "contrary to . . . the statute it is interpreting." Pet. App. 12a-13a. The court reasoned that the plain meaning of the phrase "equal benefits and privileges of employment" refers to a mandate of "equal access" to "*employer-provided or sponsored* services such as health programs, transportation, and social events." *Id.* at 14a (quoting EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 3.3 (1992)). The court underscored that the EEOC had also construed the "obligation to make reasonable accommodation" as a "non-discrimination" mandate—not as imposing

duties to provide greater benefits to employees with disabilities that are not available to employees without disabilities. *Id.* at 13a (quoting 29 C.F.R. Part 1630 App., § 1630.9).

The court then turned to petitioner's contention that "the ability to work with reduced pain is a benefit or privilege of employment." Pet. App. 15a. As an initial matter, the court concluded that petitioner had not preserved this argument on appeal because he did not "stat[e] this is an issue presented" in his opening brief. *Id.* (citing Fed. R. App. P. 28(a)(5)). And "[o]n the merits," "mitigating pain is not an employer sponsored program or service." *Id.*

"[E]ven putting that formidable obstacle aside," the Eighth Circuit continued, an alternative ground disposed of petitioner's claim: "The obligation to make reasonable accommodation . . . does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability." Pet. App. 15a (quoting 29 C.F.R. Part 1630 App., § 1630.9). Because petitioner's dog assisted him "throughout his . . . daily activities, on and off the job," his dog is "a personal item"—akin to a wheelchair or eyeglasses—not a "type of reasonable accommodation" an employer is required to provide. *Id.* Accordingly, "[p]roviding a service dog at work so that an employee with a disability has the same assistance the service dog provides away from work is not a cognizable benefit or privilege of employment." *Id.* at 16a.

The court of appeals did not reach Union Pacific's additional alternative ground that provision of a service dog would pose a safety threat and violate federal safety regulations. Pet. App. 10a n.2.

REASONS FOR DENYING THE PETITION

This case presents the narrow question whether a right to be free from psychological pain is among the "equal benefits and privileges of employment" an employer must provide under 29 C.F.R. § 1630.2(o)(1)(iii). The Eighth Circuit found petitioner failed to properly preserve this question, and it does not merit this Court's review in any event. There is no circuit split. The court of appeals noted that petitioner "cite[d] no case" going the other way. Pet. App. 14a. Moreover, the question is not especially significant, and regardless of how this Court might resolve it, it would make no difference to the outcome here because alternative grounds independently support the decision below.

The Court should deny the petition.

I. THE EIGHTH CIRCUIT FOUND THAT PETITIONER DID NOT PROPERLY PRESERVE THE QUESTION PRESENTED.

A threshold ground suffices to dispose of the petition: The court of appeals found that petitioner had not properly preserved his argument that a right to be free from psychological pain is a cognizable benefit or privilege of employment under § 1630.2(o)(1)(iii). *See* Pet. App. 15a (petitioner's failure to "stat[e] this is an issue presented . . . will not do" (citing Fed. R. App. P. 28(a)(5))). Petitioner has not challenged that determination in this Court.

Although the Court *may* consider petitioner's argument (because the court of appeals nonetheless considered its "merits," Pet. App. 15a), petitioner's failure properly to raise the argument below is a strong "prudential" consideration against certiorari.

City of Springfield v. Kibbe, 480 U.S. 257, 259 (1987) (per curiam). This Court "ordinarily will not decide questions not raised or litigated in the lower courts," even if "passed on by the Court of Appeals." *Id.*; *see Wood v. Milyard*, 566 U.S. 463, 473 (2012) (courts ordinarily "abstain from entertaining issues that have not been raised and preserved"). "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958). This is not such a case.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT AND IS CONSISTENT WITH THE VIEWS OF THE EEOC.

Petitioner seeks to portray the Eighth Circuit's decision as inconsistent with the decisions of other circuits and the views of the EEOC. Neither portrayal is accurate.

A. The Eighth Circuit's decision does not create a conflict.

Contrary to petitioner's odd assertion, the Eighth Circuit did not "frankly" "acknowledg[e]" that it was creating a lopsided conflict and standing in opposition to nine other appellate courts. Pet. 19-20. The Eighth Circuit *denied* the existence of any such conflict: Petitioner "cites no case . . . where an employee's failure-to-accommodate claim was based entirely on the benefits and privileges of employment duty in 29 C.F.R. § 1630.2(o)(1)(iii), and the court held that the duty was not limited to employer provided or sponsored services and programs." Pet. App. 14a. Because "ADA failure-to-accommodate cases are fact- and context-specific," any "apparent circuit conflicts"

here can be "reconcile[d]" by the "distinguishing facts and contexts in the various cases." *Id.* at 17a.

The Eighth Circuit is correct: There is no conflict.

1. Petitioner's purported split starts with a citation to a footnote in a nearly three-decades-old First Circuit opinion. *See* Pet. 20 (citing *Jacques v. Clean-Up Grp., Inc.*, 96 F.3d 506, 515 n.9 (1st Cir. 1996)). That footnote is dicta, and in any event, does not conflict with the decision below. In *Jacques*, the court upheld a jury's determination that an employer did not violate the ADA because the jury could reasonably have concluded that the employee was "simply unwilling to fulfill the essential function" of the job. 96 F.3d at 514. In a footnote, the First Circuit added that an employer may well have a duty to accommodate if necessary to allow for the "equal enjoyment of employment privileges and benefits." *Id.* at 515 n.9. But the court summarily concluded that this additional ground did not help the plaintiff, who had "presented no evidence" to satisfy that separate, non-essential-functions ground. *Id.* *Jacques* said nothing to suggest that "employment privileges and benefits" under § 1630.2(o)(1)(iii) include a right to be free from psychological pain.

Petitioner's other First Circuit decisions are even less relevant. In *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 253, 263 (1st Cir. 1999), the court held only that a lack of a "disability-related animus" does not automatically "block [a] failure-to-accommodate claim." Petitioner notes (at 20) that *Higgins* quoted the ADA's prohibition against discrimination regarding the "terms, conditions, and privileges of employment" and described the plaintiff's claim as "relating to a hearing impairment that impeded his ability to work comfortably in the

factory." 194 F.3d at 256, 264 (quoting 42 U.S.C. § 12112(a)). But the court did not pass on the merits of that claim, much less "h[o]ld" that such a claim was "actionable," Pet. 20.

Nor is *Bell v. O'Reilly Auto Enterprises, LLC*, 972 F.3d 21 (1st Cir. 2020), on point. That case held that the district court erred in instructing the jury "that an employee must demonstrate that he needed an accommodation to perform the essential functions of his job." *Id.* at 24 (emphasis omitted). That holding accords with the Eighth Circuit's decision below, which assumes that a plaintiff may request an accommodation under § 1630.2(o)(1)(iii) even when the accommodation is unnecessary for an essential function of the job. *See* Pet. App. 11a. *Bell* simply did not address—and had no occasion to address—whether accommodations under § 1630.2(o)(1)(iii) are limited to "existing employer-provided program[s]," Pet. 20. Its *silence* on that issue does not entail a conflict with the Eighth Circuit.

2. The decision below does not conflict with the Third Circuit's decision in *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010). *See* Pet. 21-22. *Colwell* held that the ADA may require employers "to make reasonable shift changes in order to accommodate a disabled employee's disability-related difficulties in getting to work." 602 F.3d at 506.

Petitioner makes no effort to explain how that modest holding conflicts with the decision below. It does not. *Colwell* was an essential-functions case: Its holding turned on "whether an employer is obligated to accommodate a disability-related problem outside of the workplace that influences an employee's ability *to perform the essential functions of her job while at work*." *Colwell*, 602 F.3d at 505 n.8 (emphasis added).

In analyzing that issue, the Third Circuit consulted the ADA's statutory definition of "reasonable accommodation," which includes "modified work schedules." *Id.* at 505 (quoting 42 U.S.C. § 12111(9)(B)). But *Colwell* did not construe the phrase "benefits and privileges of employment" in § 1630.2(o)(1)(iii), which does not pertain to essential-functions claims.

3. The Fifth and Sixth Circuit cases cited by petitioner cannot be part of any circuit conflict. *Stokes v. Nielsen*, 751 F. App'x 451 (5th Cir. 2018) (per curiam), and *Gleed v. AT&T Mobility Services, LLC*, 613 F. App'x 535 (6th Cir. 2015), are unreported, and therefore are "not precedent." *Stokes*, 751 F. App'x at 452 n.*.

In any event, neither *Stokes* nor *Gleed* conflict with the decision below. *Stokes* concerned a partially blind plaintiff's request for "meeting materials she is able to read." 751 F. App'x at 453. The Fifth Circuit held that her employer's refusal to accommodate that request denied the plaintiff a privilege of employment—readable meeting materials—"enjoyed by . . . similarly situated employees without disabilities." *Id.* at 454. That unremarkable result does not contravene the principle that the "benefits and privileges of employment" "refers only to employer-provided services" offered equally to employees with and without disabilities, Pet. App. 11a: An employer may not provide readable materials to visually unimpaired employees while refusing to provide readable materials to its visually impaired employees.

The Sixth Circuit's decision in *Gleed* is also inapposite. That case concerned an employee's request for a chair while working on his employer's

sales floor. The record revealed that the employer *did* provide chairs to other employees who needed them. *See* 613 F. App'x at 538 (employer "allowed Gleed's pregnant coworker to have a chair"). The employer's failure to provide the plaintiff a chair therefore denied him an employer-provided benefit available to employees without disabilities. *See* Pet. App. 34a-35a. *Gleed* did not purport to construe § 1630.2(o)(1)(iii) differently than the Eighth Circuit did here.

The only published Sixth Circuit case cited by petitioner is even further afield. In *EEOC v. Dolgencorp, LLC*, 899 F.3d 428 (6th Cir. 2018), the court refused to disturb a jury verdict finding an employer liable under the ADA for failing to accommodate a diabetic cashier's request to keep orange juice at her cash register. But the employer in *Dolgencorp* did not contend that the requested accommodation was not a cognizable benefit or privilege of employment under § 1630.2(o)(1)(iii). Its only defense was that it had reasonably accommodated the cashier because she was permitted to treat her "hypoglycemia in other ways." *Id.* at 434. The Sixth Circuit's rejection of that defense has no bearing on this case.

4. The D.C. Circuit's decision in *Hill v. Associates for Renewal in Education, Inc.*, 897 F.3d 232 (D.C. Cir. 2018), resembles the Sixth Circuit's decision in *Gleed*. In *Hill*, the court held that the plaintiff, a teacher, could survive summary judgment on his claim that his employer, an afterschool program, had failed to reasonably accommodate his request for a classroom aide. The plaintiff "was the *only* teacher in his program who was not assigned a classroom aide." *Id.* at 235 (emphasis added). Consistent with the Eighth Circuit's conclusion here, the teacher's requested

accommodation in *Hill* was thus an employer-provided benefit available to similarly situated employees without disabilities. Moreover, the court's analysis turned on the statutory definition of "reasonable accommodation," which authorizes accommodations "similar" to the employer's provision of "qualified readers or interpreters," *id.* at 237 (quoting 42 U.S.C. § 12111(9)). *Hill* did not construe the phrase "benefits and privileges of employment" in 29 C.F.R. § 1630.2(o)(1)(iii).

5. Implicitly conceding that the Tenth Circuit has not confronted an on-point ADA case, petitioner attempts to craft a conflict with two Tenth Circuit cases addressing a different statute—the Rehabilitation Act, which forbids handicap-based discrimination by federal government employers. *See* Pet. 26 (citing *Sanchez v. Vilsack*, 695 F.3d 1174 (10th Cir. 2012); *Brown v. Austin*, 13 F.4th 1079 (10th Cir. 2021)). Even assuming these Rehabilitation Act cases could be relevant, petitioner's cases miss the mark.[1]

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[1] Petitioner highlights that *Sanchez*, 695 F.3d at 1178 n.2, said in a footnote that the same liability standards govern the ADA and § 501 of the Rehabilitation Act. But that footnote is dicta, and *Sanchez* would not bind the Tenth Circuit in a future ADA case. Petitioner's other cited Tenth Circuit case proves the point: *Brown* underscored the "*heightened* accommodation duties" applicable to federal employers under the Rehabilitation Act. 13 F.4th at 1088 (emphasis added); *see also Woodman v. Runyon*, 132 F.3d 1330, 1343 (10th Cir. 1997) ("federal employers have greater duties to accommodate disabled workers under section 501 than . . . those owed by employers under the ADA").

Decisions from other courts also undercut petitioner's assumption that case law under the two statutes is interchangeable. In the Seventh Circuit, for example, the ADA does not require an employer to "accommodate a disability that is irrelevant to an employee's ability to perform the essential

Sanchez construed the Rehabilitation Act to hold only that "a transfer accommodation for medical care or treatment is not per se unreasonable, even if an employee is able to perform the essential functions of her job without it." 695 F.3d at 1182. Nothing in the Tenth Circuit's rejection of that *per se* rule conflicts with the Eighth Circuit's decision here. The Eighth Circuit did not address job transfers for medical care. And nothing in the decision below remotely implies that "a transfer accommodation for medical care" can never be a "reasonable accommodation." *Id.* If an employer were to offer job transfers to similarly situated employees without disabilities, for instance, the employer may also be required to offer them to employees with disabilities under the Eighth Circuit's interpretation of § 1630.2(o)(1)(iii). *Cf. Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999) ("Reassignment to a vacant position is a possible accommodation under the ADA.").

Brown, 13 F.4th 1079, confirms that there is no daylight between the Eighth and Tenth Circuit's approaches. In *Brown*, an employee contended that he was entitled to a job reassignment that supposedly would have helped him "to live a 'normal life'" and to "minimiz[e] stress." *Id.* at 1089-90. The Tenth Circuit

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functions of her job." *Brumfield v. City of Chicago*, 735 F.3d 619, 632 (7th Cir. 2013). But the Rehabilitation Act may require an accommodation if necessary to "(1) perform the essential functions of the job in question, (2) pursue therapy or treatment for their handicap, or (3) enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees." *Fedro v. Reno*, 21 F.3d 1391, 1395-96 (7th Cir. 1994) (citations omitted); *id.* at 1398 (Rovner, J., concurring in part and dissenting in part) (referring to the "greater burden that section 501 imposes on federal employers").

disagreed, explaining that employers have no general duty to help their employees live a "normal life." *Id.* at 1089 (noting that *Sanchez* is limited to the "narrow circumstances" where an employee requests a transfer for necessary medical care). Even in the Rehabilitation Act context, then, *Brown* squarely aligns with the Eighth Circuit's view.

6. Petitioner fares no better in looking to the Ninth Circuit. Like the Tenth Circuit in *Sanchez*, the Ninth Circuit in *Buckingham v. United States*, 998 F.2d 735, 739 (9th Cir. 1993), merely rejected the argument that "there is a per se rule that job transfers are not reasonable accommodations under [the Rehabilitation Act]." Again, the decision below did not concern a job transfer, and nothing in the Eighth Circuit's reasoning would foreclose a job transfer if such transfers were offered to similarly situated employees without a disability, or if the transfer were pursued under an essential-functions theory. And the *Buckingham* court strongly signaled that the plaintiff would be better off pursuing the latter theory on remand, by contending that "the accommodation he seeks is necessary to enable him to perform the essential functions of [the] job." *Id.* at 742-43.

7. The Seventh Circuit is not part of any split. The Seventh Circuit has not settled on an approach for when, if ever, accommodations may be required in a non-essential-functions case. As petitioner notes, the Seventh Circuit held in *Brumfield*, 735 F.3d at 631-32, that the ADA does not "enable a plaintiff to state a failure-to-accommodate claim against her employer" if she is able to perform the "essential functions of her job" without an accommodation. *See also Swain v. Wormuth*, 41 F.4th 892, 898 (7th Cir. 2022) ("An employer *may* make an accommodation

untethered to an essential function, but it is not *required* to do so." (emphases added)). In dicta, a different panel of the Seventh Circuit recently attempted to limit *Brumfield* by recasting it as a ticket good for one ride only. *See EEOC v. Charter Commc'ns, LLC*, 75 F.4th 729, 739 (7th Cir. 2023) (describing *Brumfield*'s facts as "remarkabl[e]," its analysis as "rather abstract," and its holding as correct only "as applied" to its facts). *Charter*, however, was an essential-functions case, and the Seventh Circuit there held only that a modified work schedule may be required as an accommodation if it is necessary to enable the employee to "safely" perform an essential function of his job. *Id.*

Whichever approach the Seventh Circuit ultimately adopts on the antecedent question raised in *Brumfield*, that circuit is not part of any split on the question presented here. The decision below assumed that non-essential-functions claims are cognizable under § 1630.2(o)(1)(iii), and construing that provision, the Eighth Circuit held that the "equal benefits and privileges of employment" refer only to employer-provided services made available to employees regardless of disability status. Pet. App. 11a. The Seventh Circuit has not addressed that interpretive question.

8. Finally, the Montana Supreme Court's decision in *McDonald v. Department of Environmental Quality*, 214 P.3d 749 (Mont. 2009), does not conflict with the Eighth Circuit's decision. *McDonald* concerned an employee's request for changes to her employer's facilities that would permit her to "use her service animal effectively in the workplace" to manage her disabilities. *Id*. at 762. Construing the Montana Human Rights Act and the ADA, the Montana

Supreme Court held that an employer may be required to make such an accommodation.

While *McDonald* and this case both concern a service dog, that is where the similarities end. The key allegation in *McDonald* was that the employee had "difficulty walking" around the facilities and faced "the risk of falling without [her service dog's] assistance to get up." *Id*. at 760. Given those facts, the court zeroed in on the employer's duty to make existing facilities readily accessible to an employee with a disability, *id.* at 764—part of the statutory definition of "reasonable accommodation," 42 U.S.C. § 12111(9)(A). This case, in contrast, does not implicate that duty. *See* Pet. App. 41a (explaining that petitioner *could* "access his employer's facilities without his service animal"). *McDonald*'s reasoning also relied heavily on an analogy to regulations addressing a public accommodation's duty to make modifications to "permit the use of a service animal by an individual with a disability." 214 P.3d at 762-63 (acknowledging that these regulations are not "on point" because they do not apply to "employers" under Title I of the ADA, but treating them as instructive nonetheless). Here, petitioner raised no argument under those regulations.

In any event, any conflict between *McDonald* and the decision below would be academic. *McDonald* construed not only the ADA, but also the Montana Human Rights Act, a state "omnibus anti-discrimination statute." *Hathaway v. Zoot Enters., Inc.*, 498 P.3d 204, 209 (Mont. 2021). State courts are free to construe their own anti-discrimination laws differently—and more broadly—than the federal ADA. *See id.*

* * *

Petitioner comes close to admitting that his hodgepodge of cases creates no real conflict with the Eighth Circuit. Petitioner asserted *only* a § 1630.2(o)(1)(iii) claim, and he concedes that many of his cited cases "have not" construed that regulatory provision. Pet. 9. Given the way petitioner litigated this case below—and the claim he chose to bring—this case presents no broader statutory interpretation issue under the ADA, and there is no conflict for this Court to resolve.

B. The Eighth Circuit's decision aligns with the EEOC's views.

With no divide among appellate courts, petitioner argues that certiorari is warranted because the decision below is purportedly "contrary" to the views of the EEOC. Pet. 29 (collecting administrative decisions and amicus briefs). As an initial matter, courts of appeals routinely disagree with the government; such disagreement is hardly a "compelling reaso[n]" to grant certiorari. Sup. Ct. R. 10. In any event, there is no disagreement. As the Eighth Circuit noted, its ruling accords with the EEOC's views.

1. Petitioner does not even try to refute the EEOC guidance cited by the Eighth Circuit in support of its decision. As the Eighth Circuit explained, Pet. App. 13a, the EEOC's interpretive guidance on Title I of the ADA provides that the obligation to make reasonable accommodations applies to "non-work facilities *provided or maintained by an employer*," "*employer sponsored* placement or counseling services," and "*employer provided* cafeterias, lounges, gymnasiums, auditoriums, transportation and the like." 29 C.F.R.

Part 1630 App., § 1630.9 (emphases added). And an EEOC "Technical Assistance Manual" addresses the issue of "Accommodations to Ensure Equal Benefits of Employment," by providing that "[e]mployees with disabilities must have *equal access* to lunchrooms, employee lounges, rest rooms, meeting rooms, and *other employer-provided or sponsored* services such as health programs, transportation, and social events." Pet. App. 14a (emphasis altered) (quoting EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 3.3 (1992)). Petitioner offers no response to the EEOC's on-point and unambiguous guidance.

2. Petitioner pivots to the government's litigating positions in two amicus briefs. Pet. 29-30. Neither brief helps petitioner.

The EEOC's brief in *Gleed* argued that an employer may obtain a reasonable accommodation even if he is able to perform "the essential job functions without it." Pet. 29-30 (quoting EEOC Amicus Br. 10, *Gleed v. AT&T Mobility Servs., Inc.*, No. 14-2088 (6th Cir. Nov. 12, 2014)). That premise does not help petitioner because the Eighth Circuit's decision accepts it. And in a passage petitioner does not quote, the EEOC's *Gleed* brief confirms that "working without pain or the risk of exacerbating a medical condition is *not* precisely a 'privilege' or 'benefit' of employment," "as those terms normally connote something additional that an employer provides to its employees." EEOC Amicus Br. 16, *Gleed* (emphasis added).

The EEOC's amicus brief in *Beasley v. O'Reilly Auto Parts* is similarly unhelpful to petitioner. Pet. 30 (citing EEOC Amicus Br., *Beasley v. O'Reilly Auto Parts*, No. 21-13083 (11th Cir. Nov. 8, 2021)). There,

the Commission urged that an employer may be required to provide an "interpreter" to a hearing-impaired employee if necessary to enjoy the benefits and privileges of "understanding and participating in workplace meetings, training, or social events." EEOC Amicus Br. 25, *Beasley*. But those are employer-provided benefits or programs that are available to employees without disabilities, so that statement accords with the Eighth Circuit's holding here.

3. The EEOC's adjudications in *Helena E. v. Kijakazi*, 2022 WL 3715444 (E.E.O.C. Aug. 3, 2022), and *Reina D. v. Berryhill*, 2017 WL 6422230 (E.E.O.C. Nov. 29, 2017), add nothing. Pet. 30-31. Those cases merely cite the Ninth Circuit's decision in *Buckingham* and the Tenth Circuit's decision in *Sanchez*. As explained above, neither *Buckingham* nor *Sanchez* conflicts with the Eighth Circuit's decision, and *Helena E.* and *Reina D.* are inapposite for the same reasons.

4. Finally, petitioner cites a ream of disability-specific EEOC guidance that, according to petitioner, focuses on "whether the employee needs an accommodation to avoid disability-related harm, and whether the requested accommodation would impose undue hardship on the employer." Pet. 31-34. But that does little more than recite the generic ADA requirements that a plaintiff must proffer a reasonable accommodation and that a defendant may respond by showing undue hardship—the basic ADA framework applicable in every circuit. *See, e.g.*, *Peebles v. Potter*, 354 F.3d 761, 768 (8th Cir. 2004). The guidance documents have nothing illuminating to say on the issue presented in this case—whether a general right to be free from psychological pain is a

"benefit" or "privilege of employment" under § 1630.2(o)(1)(iii).

Petitioner also highlights the EEOC's guidance on accommodations for diabetes. Pet. 33-34. But petitioner's discussion only confirms that guidance's irrelevance. Petitioner correctly quotes the guidance as saying that an employer may "have to accommodate an employee who is unable to work" while managing her diabetes. *Id.* But an employee who is unable to work at all without accommodation is, by definition, unable to perform the essential functions of her job—and the Eighth Circuit's decision does not address essential-functions claims.

Even if petitioner had succeeded in showing that the EEOC has taken inconsistent positions over the years, it is up to the Commission to resolve its own inconsistencies. And if the Eighth Circuit has misinterpreted the EEOC's regulations, the Commission can amend its regulations or issue new guidance. None of this provides any reason for this Court to grant review.

III. THERE IS NO OTHER REASON TO GRANT REVIEW.

This Court need not grant review to consider a question that was not properly presented in the court of appeals and as to which there is no circuit split. And there are three other reasons why review is unwarranted: The Eighth Circuit's decision is correct; the question is not particularly significant; and this case is a poor vehicle for deciding it because independent alternative grounds support the Eighth Circuit's decision, and the Court's decision on the question petitioner raises would not change the outcome of this case.

A. The decision below is correct.

Petitioner has never questioned the validity of § 1630.2(o)(1)(iii) as an interpretation of the ADA. As the Eighth Circuit correctly concluded, therefore, his claim rises or falls based on the proper reading of that regulation. Pet. App. 12a-13a; *see Morton*, 467 U.S. at 834. But petitioner does not even attempt to offer a plausible alternative construction of § 1630.2(o)(1)(iii)'s text. For good reason: The decision below is plainly correct.

Section 1630.2(o)(1)(iii) provides that an employer may be required to provide accommodations that enable employees with disabilities to enjoy "equal benefits and privileges of employment" that are enjoyed by "similarly situated employees without disabilities." Two textual clues compel the Eighth Circuit's interpretation. First, the text refers to benefits "of employment." As the EEOC acknowledged in its amicus brief in *Gleed*, that phrasing is most naturally understood to refer to benefits of the job itself—*i.e.*, those provided by one's employer. Second, the provision is framed as a non-discrimination principle, benchmarking the required "benefits and privileges of employment" to those received by "similarly situated" employees. Nothing in that text imposes a duty on employers to provide employees with disabilities *greater* privileges—such as a right to be free from psychological pain—than they provide to their employees without disabilities.

The Eighth Circuit's reading of § 1630.2(o)(1)(iii) also tracks the ADA's text and purpose. The ADA's definition of "reasonable accommodation[s]," which the EEOC's regulations supplement, offers examples only of employer-provided or employer-sponsored benefits. *See* 42 U.S.C. § 12111(9); Pet. App. 25a. The

statutory definition includes "making existing facilities" accessible to employees with a disability, as well as job restructuring, reassignment, provision of training materials, "and other similar accommodations." 42 U.S.C. § 12111(9). In contrast to those examples, a right to be free from psychological pain under § 1630.2(o)(1)(iii) would frustrate the congressional "desire to keep" the ADA "within manageable bounds." *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (describing objectives of Rehabilitation Act); *Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 728 (8th Cir. 1999) (holding that employers have no duty to "provid[e] an aggravation-free environment"); *see also* Pet. App. 26a-27a (describing how "legislative history also makes clear that reasonable accommodation does not extend to adjustments or modifications for the personal benefits of the individual with a disability").

Any remaining doubt is laid to rest by the EEOC's interpretive guidance. *See* 29 C.F.R. Pt. 1630, App. § 1630.9. All of the EEOC's "examples of what may constitute benefits and privileges of employment" relate to employer-sponsored programs offered to employees generally. Pet. App. 28a. Again, petitioner disputes none of this.

The Eighth Circuit properly construed § 1630.2(o)(1)(iii), and there is no error for this Court to correct.

B. The question presented is not significant enough to merit review.

This case concerns the meaning of a single, narrow provision in the EEOC's implementing regulations of the ADA. Notwithstanding petitioner's effort to raise a broader question, Pet. i, the district

court and the Eighth Circuit both correctly recognized that petitioner consistently and repeatedly disavowed reliance on any other provision of the EEOC's implementing regulations or the ADA itself. *See* Pet. App. 11a, 27a-28a.

Interpretive issues about the meaning of 29 C.F.R. § 1630.2(o)(1)(iii) rarely arise. As the Eighth Circuit explained, "[m]ost" ADA failure-to-accommodate claims concern a request for accommodations necessary to perform the essential functions of the job. Pet. App. 4a; *see also Allen v. City of Raleigh*, 140 F. Supp. 3d 470, 482 (E.D.N.C. 2015) ("Central *to most* ADA failure-to-accommodate claims is whether, with a reasonable accommodation, an employee with a disability can perform the essential functions of a given job." (emphasis added)). Petitioner's elaborate efforts to manufacture a circuit split underscore how infrequently the issue arises. None of the cases in the supposed split involved a case in which a court considered a standalone § 1630.2(o)(1)(iii) claim.

Petitioner opines that "different legal standards" will apply in different circuits and that "[t]he circuit split [will] impos[e] significant burdens" on EEOC district offices and recipients of federal funds. Pet. 35-36. As explained above, however, no such split exists. And because this case concerns the meaning of a regulation, the EEOC itself can easily resolve any confusion or ameliorate any "significant burdens" through guidance or a new regulation. There is no need for this Court to exercise its certiorari jurisdiction to address a narrow issue of regulatory interpretation that the EEOC itself can address.

Nor will the Eighth Circuit's decision somehow strip employees of the ADA's core protections. *Contra* Pet. 37-38 (collecting cases where employees would

purportedly be denied life-saving accommodations for "hypoglycemic episode," "high-risk pregnancy," and "severe breathing difficulties" under the Eighth Circuit's approach). In many cases, a plaintiff unable to claim a cognizable "benefit" or "privilege" under § 1630.2(o)(1)(iii) may be able to show that the accommodation is necessary to perform an essential function of the job under § 1630.2(o)(1)(ii). *See, e.g.*, *Buckingham*, 998 F.2d at 742-43 (opining that plaintiff had likely adduced sufficient evidence to satisfy essential-functions theory); *Charter Commc'ns*, 75 F.4th at 739 (recasting the plaintiff's claim as one where an accommodation was necessary to "safely" perform the job's essential functions). Tellingly, none of petitioner's cases even *cites* § 1630.2(o)(1)(iii). *See* Pet. 37. Each is better understood as an essential-functions case.

C. This case is a poor vehicle.

Even if the proper interpretation of § 1630.2(o)(1)(iii) were otherwise worthy of this Court's attention, this case is a poor vehicle for addressing it. No matter what the Court might hold on the question presented, it would make no difference to the outcome of petitioner's case because alternative grounds support the Eighth Circuit's decision.

1. The court of appeals explained that "even putting . . . aside" the question whether the "benefits and privileges of employment" are limited to employer-provided or -sponsored programs and services, petitioner's claim has a foundational defect: A service dog is primarily for the personal benefit of the individual, and therefore is not a "type of reasonable accommodation" as a matter of law. Pet. App. 15a.

Petitioner asserts that the question presented provided "[t]he sole basis on which Hopman's claim was rejected." Pet. 38-39. That is demonstrably wrong, and petitioner elsewhere acknowledges as much. *See* Pet. 17 n.4 (noting that "[e]ven if" Union Pacific had provided service dogs to all employees, "the court of appeals insisted that Hopman could not insist that he was entitled to that type of accommodation, because actually providing a service dog would be like providing a worker with eyeglasses, a personal item not a job-related accommodation"). Petitioner may disagree with the Eighth Circuit's conclusion, *id.*, but that ground is not encompassed within the question petitioner has presented—and it provides a fully sufficient basis for the Eighth Circuit's decision. So the question presented is academic.

2. The question presented would make no difference to the outcome of petitioner's case for another reason: Federal regulations prohibit petitioner's requested accommodation.

"When Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 573 (1999). Accordingly, "[a]n accommodation is not reasonable within the meaning of the ADA if it is specifically prohibited by a binding safety regulation." *Bey v. City of New York*, 999 F.3d 157, 168 (2d Cir. 2021); *see also* 29 C.F.R. § 1630.15(e) (explaining that it is a defense to liability under the ADA "that another [f]ederal law or regulation prohibits an action (including the provision of a particular reasonable accommodation)"). Compliance with federal safety regulations, therefore, is a complete defense to petitioner's claim.

Federal railroad safety regulations prohibit petitioner from bringing his dog into the cab of a freight train locomotive. *See, e.g.*, 49 C.F.R. § 229.119(c) (prohibiting "obstruction[s]" that could jeopardize safe operations). For this reason too, remand would simply result in judgment once again being entered for Union Pacific. This Court should reserve review for those cases in which its intervention is both necessary and determinative. Here, it is neither.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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