No. 23-997

In the

# Supreme Court of the United States

KARYN D. STANLEY,

*Petitioner*,

v.

CITY OF SANFORD, FLORIDA,

*Respondent*.

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Title I of the Americans with Disabilities Act prohibits discrimination on the basis of disability against "qualified individuals." 42 U.S.C. § 12112(a). Title I defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The question presented is whether a totally disabled, former employee—who did not earn a benefit during her employment and who concedes she could not perform the essential functions of her former job when she was denied that benefit—is a "qualified individual" entitled to sue under the ADA.

## TABLE OF CONTENTS

QUESTION PRESENTED .......... i

TABLE OF CONTENTS .......... ii

TABLE OF AUTHORITIES .......... iv

INTRODUCTION .......... 1

STATEMENT .......... 3

A. Statutory Background .......... 3

B. Factual Background .......... 4

C. Procedural Background .......... 6

REASONS FOR DENYING THE PETITION .......... 9

I. The record and decisions below do not present the question raised by Petitioner because she did not earn the benefits she seeks and the City did not discriminate on the basis of disability .......... 9

II. Resolution of the question presented will not change the outcome of this case and it lacks practical consequence for other cases .......... 16

III. This Court has already found the question presented uncertworthy three times before .......... 21

IV. Petitioner and amici overstate the importance of the "qualified individual" disagreement, which has not resulted in rampant disability discrimination or forum shopping. .......... 23

V. The decision below is correct .......................... 25

A. The decision below is consistent with the plain language, structure, and purpose of Title I .................................. 25

B. Petitioner's argument that the amendments to the ADA expanded the definition of a "qualified individual" is unpreserved, meritless, and further percolation on this issue is warranted......................... 29

C. Petitioner is not a "qualified individual" ............................................ 33

CONCLUSION ......................................................... 33

## TABLE OF AUTHORITIES

***Cases***

*Bass v. City of Orlando,*
57 F. Supp. 2d 1318 (M.D. Fla. 1999) .................. 20

*Bass v. City of Orlando,*
203 F.3d 841 (11th Cir. 1999) .............................. 20

*Castellano v. City of New York*,
142 F.3d 58 (2d Cir. 1998). 10, 11, 17, 23, 27, 28, 29

*Castellano v. City of New York*,
525 U.S. 820 (1998) .................................. 10, 22, 23

*City of Hollywood v. Bien*,
209 So. 3d 1 (Fla. Dist. Ct. App. 2016) ........... 15, 24

*Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*,
447 U.S. 102 (1980) .................................. 25, 26, 28

*E.E.O.C. v. Group Health Plan*,
212 F. Supp. 2d 1094 (E.D. Mo. 2002) ................. 21

*Florida Sheriffs Ass'n v. Dep't of Admin., Div. of Ret.*,
408 So. 2d 1033 (Fla. 1981) .................................. 15

*Ford v. Schering-Plough Corp.*,
145 F.3d 601 (3d Cir. 1998)............................ 18, 20

*Gonzales v. Garner Food Services, Inc.*,
89 F.3d 1523 (11th Cir. 1996) ............. 7, 21, 22, 23

*Johnson v. K Mart Corp.*,
273 F.3d 1035 (11th Cir. 2001) .............................. 7

*McKnight v. Gen. Motors Corp.*,
550 F.3d 519 (6th Cir. 2008) .............. 18, 21, 23, 26

*McKnight v. Gen. Motors Corp.*,
557 U.S. 935 (2009) .......................................... 19, 22

*McNair v. D.C.*,
213 F. Supp. 3d 81 (D.D.C. 2016) ......................... 31

*Morgan v. Joint Admin. Bd., Retirement Plan*,
268 F.3d 456 (7th Cir. 2001) ........................... 19, 21

*Ostrowski v. Lake Cnty.*,
33 F.4th 960 (7th Cir. 2022)...................... 24, 25, 31

*Robinson v. Shell Oil Co.*,
519 U.S. 337 (1997) .................................. 21, 22, 26

*Smith v. Town of Ramapo*,
2018 WL 279758 (S.D.N.Y. Jan. 3, 2018)............ 27

*Smith v. Town of Ramapo*,
745 Fed. Appx. 424 (2d Cir. 2018) ...... 24, 25, 27, 31

*Stevens v. Rite Aid Corp.*,
851 F.3d 224 (2d Cir. 2017).................................. 29

*Tarmas v. Sec'y of Navy*,
433 Fed. Appx. 754 (11th Cir. 2011)..................... 31

*Weyer v. Twentieth Century Fox Film Corp.*,
198 F.3d 1104 (9th Cir. 2000) ....... 19, 20, 21, 26, 29

*Wood v. Garner Food Services, Inc.*,
520 U.S. 1229 (1997) ................................ 21, 22, 23

***Statutes***

42 U.S.C. § 12111 ..................................................3, 32

42 U.S.C. § 12112 ........................................... 3, 22, 26

42 U.S.C. § 12117 ...................................................... 28

42 U.S.C. § 2000e-3 ................................................... 22

42 U.S.C. § 2000e-5 .............................................. 4, 26

Americans with Disabilities Act of 1990,
Pub. L. No. 101-336, 104 Stat. 327 ....................... 32

ADA Amendments Act of 2008 ("ADAAA"),
Pub. L. No. 110-325, 122 Stat. 3553 ....... 3, 4, 29, 32

Lilly Ledbetter Fair Pay Act of 2009,
Pub. L. No. 111-2, 123 Stat. 5 ......... 4, 26, 29, 30, 31

***Regulations***

EEOC ADA Regulations,
29 C.F.R. § 1630.1 (2011) ..................................... 32

***Legislative History***

H.R. Rep. No. 101–485(III) (1990) ........................ 3, 28

***Other Authorities***

EEOC Interpretive Guidelines,
Notice No. 915.002, "*Questions and Answers About Disability and Service Retirement Plans Under the ADA*," May 11, 1995 ............................ 17

EEOC Interpretive Guidelines, OLC Control No. EEOC-CVG-2001-1, *Section 3 Employee Benefits, ADA Issues, Section V. Disability Retirement and Service Retirement Plans*, October 3, 2000 ...................................................... 17

Petition for a Writ of Certiorari, *Wood v. Garner Food Services, Inc.*, No. 96-1478, 1997 WL 33557145 (March 12, 1997) .................................. 22

## INTRODUCTION

The undisputed facts found by the district court below contradict the core factual predicate of the question presented by Petitioner—that she was denied a post-employment benefit allegedly earned during employment. Petitioner neither earned the benefit nor suffered any discrimination on the basis of her disability. She simply failed to satisfy the City's service-based criteria for earning the subsidy to age 65. Had she served 25 years, she would have received it regardless of her disability. Thus, the district court found that the City's requirements for earning the subsidy drew "neutral lines that are rationally related to meet its legitimate goal..." Doc. 45 at 12.

Petitioner retired early with only 20 years of service. Although her reason for retiring early is indeed tragic, it did not render the denial of the subsidy to age 65 unlawful or even unfair. Non-disabled retirees with only 20 years of service also did not receive the subsidy to age 65, no matter how unfortunate their reasons for retiring early. In fact, Petitioner was treated better than non-disabled retirees with the same amount of service because while they received no subsidy at all, Petitioner received the subsidy for 24 months out of compassion for her disability.

Accordingly, even assuming that Petitioner was a "qualified individual" at the time the City ceased payment of the subsidy, her ADA claim would still fail because cessation of that payment was not on the basis of disability. The circuit courts and the EEOC agree that employers may lawfully pay retirees different benefits for different years of service. To do so is not a

violation of the ADA. Indeed, although the United States supported Petitioner's "qualified individual" argument below, it expressly declined to join her argument that the City discriminated on the basis of disability. This Court should deny certiorari because a resolution of the question presented in Petitioner's favor will not change the outcome of this case. If remanded, the district court will still enter judgment for the City because it has already found that the City did not unlawfully discriminate against Petitioner.

Moreover, the hypothetical facts asserted in the question presented by Petitioner are unlikely to arise in any other case. In the two decades since the "qualified individual" disagreement arose, none of the circuits, on either side of the split, have found an employer wrongfully denied an earned benefit to a disabled retiree. Thus, Petitioner overstates the importance of the "qualified individual" question, resolution of which has proven to be an academic exercise with no actual impact on the outcome of cases. Indeed, this Court has found the precise "qualified individual" question at issue here uncertworthy three times before. This issue remains equally unimportant and uncertworthy today.

Further, Petitioner failed to raise in the district court her argument that the 2008 and 2009 amendments to the ADA expanded the definition of a "qualified individual." The Eleventh Circuit properly found this argument was unpreserved and meritless. Moreover, percolation on this issue in the lower courts is warranted because the Eleventh Circuit is the only circuit to ever resolve it. This Court should deny the Petition.

## STATEMENT

### A. Statutory Background

**1.** Title I of the Americans with Disabilities Act states, "No covered entity shall discriminate against a qualified individual on the basis of disability..." 42 U.S.C. § 12112(a). Section 12111(8) defines a "qualified individual" as "an individual who, with or without reasonable accommodation, *can* perform the essential functions of the employment position that such individual *holds* or *desires*." 42 U.S.C. § 12111(8) (emphasis added). By use of the present tense ("can perform," "holds," and "desires"), § 12111(8) contains a temporal qualifier demonstrating that "[t]he determination of whether a person is qualified should be made *at the time* of the employment action..." H.R. Rep. No. 101–485(III), at 34 (1990) (emphasis added). Thus, if a person is not a "qualified individual," *i.e.,* able to perform the job that such person holds or desires, at the time of the discriminatory act, there is no actionable discrimination pursuant to § 12112(a).

**2.** The ADA Amendments Act of 2008 ("ADAAA") did not expand the definition of a "qualified individual" to include totally disabled, former employees. *See* Pub. L. No. 110-325, § 5(c), 122 Stat. 3553, 3557 (2008) (striking "with a disability" but otherwise leaving § 12111(8) as originally enacted). Section 12111(8) still defines a "qualified individual" as someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Congress left the "qualified individual" definition in the present tense. *Id.* Congress' stated purpose for the

ADAAA was to broaden the definition of a "disability"—not a "qualified individual." Pub. L. No. 110-325, § 2(a)(3)-(8), 122 Stat. 3553.

**3.** The Lilly Ledbetter Fair Pay Act of 2009, which amended § 2000e-5(e) of Title VII of the Civil Rights Act, also did not change the definition of a "qualified individual." *See* Pub. L. No. 111-2, 123 Stat. 5 (2009). The Ledbetter Act merely amended Title VII to extend the statute of limitations for filing an EEOC charge. *See* 42 U.S.C. § 2000e-5(e)(3)(A). The Ledbetter Act had no effect on the meaning of a "qualified individual" under Title I of the ADA.

### B. Factual Background

The facts stated in Petitioner's question presented—that Petitioner "earned" benefits during her employment that were later denied—are contradicted by the record and findings below. Pet. i. At the time that Petitioner was hired in 1999, the City paid a post-employment health insurance subsidy to age 65 (the "subsidy") for all non-disabled *and* disabled retirees who served the City for 25 years. Doc. 45 at 2; Doc. 38-6 at 2, ¶ 2.45(C), (G). It also paid the subsidy to age 65 for employees retiring early for disability reasons, even though they did not complete 25 years of service. Doc. 45 at 2; Doc. 38-6 at 2, ¶ 2.45(F), (G). Non-disabled retirees with less than 25 years' service, received no subsidy at all. Doc. 45 at 2, 12; Doc. 38-6 at 2, ¶ 2.45(C), (G).

The subsidy was a costly benefit that was paid for solely out of the City's general fund with no contribution from employees. *See* Petitioner's Principal Br. below at 48. The City paid over a

thousand dollars a month for Petitioner's health insurance. Doc. 38-13; Doc. 38-14 at 3. Thus, for just one employee like Petitioner retiring early at the age of 47, payment of the subsidy to age 65 would have cost the City over $216,000.00.

Four (4) years into Petitioner's employment, the City was forced to cut costs. Doc. 45 at 2; Doc. 38-10 at 2. Therefore, in 2003—over a decade *before* Petitioner became disabled and retired—the City passed an ordinance that would conserve funds by treating employees who retired early for disability reasons the same as, rather than better than, all other retirees with an equivalent amount of service. Doc. 45 at 2-3, 12; Doc. 38-10 at 4, ¶ 2.45(C), (F), (G). Under the new policy, a disability retiree with only 20 years' service would now be *ineligible* for the subsidy to age 65, just like all other retirees with only 20 years' service. Doc. 45 at 2-3, 12; Doc. 38-10 at 4, ¶ 2.45(C), (F), (G).

Notwithstanding Petitioner's early retirement short of the 25-year mark, the 2003 ordinance, out of compassion, provided employees retiring early for disability reasons, the subsidy for 24 months after their retirement—a $24,000 benefit in Petitioner's case. Doc. 38 at 21-22; Doc. 45 at 3, 7. On the other hand, similarly situated, *non-disabled* retirees with only 20 years' service received no subsidy at all. Doc. 38-10 at 4, ¶ 2.45(C); Doc. 45 at 2-3, 12. Thus, far from treating Petitioner worse because of her disability than her non-disabled co-workers with an equivalent amount of service, she was treated better than them *because* of her total disability.

Contrary to Petitioner's claim (at 10) that the City's Director of Human Resources and Risk

Management, Fred Fosson, could not explain why the City changed the subsidy policy, Mr. Fosson testified that the reason was set forth in the ordinance itself and other public records provided to Petitioner. Doc. 39-4 at 10, 80; Doc. 45 at 2, n. 1. Mr. Fosson was deposed nearly twenty years after the ordinance was passed and thus his knowledge of it was limited to what could be discerned from the public records. Doc. 39-4 at 1. Those records repeatedly stated that the purpose of the ordinance was to save costs. Doc. 38-7; Doc. 38-9; Doc. 38-10 at 2.

Despite its irrelevance, the City must correct Petitioner's statement (at 10) that the subsidy policy change was made "quietly." The passage of a new law during a public meeting conducted by the City Commission can hardly be characterized as a "quiet" change. Docs. 38-8; 38-9; 38-10. Not only did the City pass a new law, but it also revised its Human Resources Manual to clearly reflect the change. Doc. 38-11 at ¶ 2.45(C). Moreover, Petitioner's lack of awareness of the ordinance during her employment is irrelevant. She conceded that the ordinance did not affect her during her employment and thus she could not have sued at that time even if she had become aware of the ordinance. Pet. App. 18a.

### C. Procedural Background

**1.** The district court dismissed Petitioner's ADA claim because her allegations failed to show that she was a "qualified individual" under Title I of the ADA. Pet. App. 26a. Instead, Petitioner alleged that when the City ceased subsidizing the cost of her health insurance 24 months after she retired, she was not able to perform the essential functions of a job she held

or desired. *Id.* Because the "qualified individual" issue was dispositive of her ADA claim, the veracity of her allegation of disability discrimination was irrelevant.

However, later on summary judgment of Petitioner's Equal Protection claim, the City produced undisputed evidence proving that eligibility for the subsidy to age 65 was based on years of service—not disability. Doc. 45 at 2-3, 12; Doc. 38-10 at 4, ¶ 2.45(C), (G). The district court found that the City's service-based classifications "demarcated neutral lines that are rationally related to meet its legitimate goal—i.e., to contain future costs." Doc. 45 at 12. Indeed, had Petitioner served 25 years, she would have received the subsidy to age 65 despite her disability. *See* Doc. 38-10 at 4, ¶ 2.45(C), (G).

**2.** The Eleventh Circuit agreed with the district court that the City's subsidy policy did not violate the Equal Protection Clause. Pet. App. 19a. It also agreed that Petitioner was not a "qualified individual" entitled to sue under the ADA as established by its precedent in *Gonzales v. Garner Food Services, Inc.* 89 F.3d 1523 (11th Cir. 1996). Pet. App. 18a. However, its decision was not solely out of deference to precedent. The Eleventh Circuit also held that *Gonzales* was correctly decided and the court's short-lived departure from *Gonzales* in its vacated decision in *Johnson v. K Mart Corp.,* 273 F.3d 1035 (11th Cir. 2001), was not. Pet. App. 10a-13a. Indeed, *Johnson* contained a vigorous dissent against the majority's reasoning, which was so flawed that the Eleventh Circuit granted the extraordinary remedy of rehearing *en banc*. *See Johnson,* 273 F.3d at 1067–68 (Carnes, J., dissenting), *reh'g en banc granted, opinion vacated* (Dec. 19, 2001).

Having determined below that the plain language of Title I contains a temporal qualifier, the Eleventh Circuit asked, "whether Stanley was a disabled employee or job applicant capable of performing the job at the time of the alleged discrimination." Pet. App. 16a. "Because Stanley cannot establish that the City committed any discriminatory acts against her while she could perform the essential functions of a job that she held or desired to hold, her Title I claim fails." Pet. App. 18a.

The Eleventh Circuit further held that Petitioner waived any argument that she suffered discrimination *during* her employment as a disabled employee still capable of performing the essential functions of her job. Pet. App. 17a-18a. The Eleventh Circuit noted that "[t]he first time this argument appeared was in the United States' brief as amicus curiae in this Court." Pet. App. 18a. "We will not consider arguments raised only by amici." *Id.*

Tellingly, while the United States supported Petitioner's "qualified individual" argument, it expressly declined to join her argument that the City's policy discriminated on the basis of disability. *See* Amicus Br. of the United States at 3, n. 2 ("The United States takes no position on whether Stanley adequately alleges that the City's post-employment health-benefits policy discriminates on the basis of disability.").

## REASONS FOR DENYING THE PETITION

### I. The record and decisions below do not present the question raised by Petitioner because she did not earn the benefits she seeks and the City did not discriminate on the basis of disability.

Petitioner's claim that "this case cleanly tees the issue up for this Court's resolution as a pure question of law with no relevant factual disputes" is incorrect. Pet. 3. The City heavily disputes and the decisions below contradict the core factual predicate of her question presented—that she was denied a post-employment benefit allegedly "earned" during employment, on the basis of disability. Pet. i. Accordingly, Petitioner's statement that "no one disputes that the fringe benefits at issue were earned for actual service in employment," is incorrect. Pet. 26 (cleaned up).

Although the district court dismissed Petitioner's ADA claim at the pleadings stage because she failed to plead that she was a "qualified individual," the undisputed evidence presented later on summary judgment to defeat Petitioner's Equal Protection claim demonstrated that eligibility for the subsidy to age 65 was based on years of service—not disability. Doc. 45 at 2-3, 12; Doc. 38-10 at 4, ¶ 2.45(C), (G). Indeed, the district court has already found that the City's service-based classifications for earning the subsidy "demarcated *neutral* lines that are rationally related to meet its legitimate goal—i.e., to contain future costs." Doc. 45 at 12 (emphasis added). Thus, the City did not unlawfully discriminate on the basis of disability. Petitioner simply failed to satisfy the

"neutral" service-based criteria applicable to *all* employees for earning the subsidy to age 65. Doc. 45 at 12.

The amicus curiae's contention that this Court "could overturn the judgment below without deciding the merits of the alleged discrimination" fails to recognize that the merits of the alleged discrimination have already been decided below and the Petition does not challenge that portion of the decisions. Amicus Br. of National Employment Lawyers Association, *et al.,* at 18. The Petition does not even mention the district court's order (Doc. 45) finding the City's policy drew "neutral lines" that did not unlawfully discriminate against the Petitioner. Nor is this order included in the Appendix.

Moreover, the merits of the alleged discrimination are not implicated by the circuit split on the "qualified individual" question. Instead, all circuit courts, on both sides of the "qualified individual" disagreement, unanimously agree that policies like the City's do not violate the ADA regardless of whether a former employee is a "qualified individual" otherwise entitled to sue. For instance, in *Castellano v. City of New York,* although the Second Circuit found that disabled former police officers were "qualified individuals," it resolved the appeal in favor of the city because its retirement plan did not violate the ADA. 142 F.3d 58 (2d Cir. 1998), *cert. denied*, 525 U.S. 820 (1998).

There, only "for service" retirees (retirees who served for twenty years) were eligible to receive a so-called VSF benefit. *Id.* at 63-64. The plaintiffs, like the Petitioner here, argued that a disabled employee who

"retires after ten, or even two, years" was entitled "to receive the same pension as a twenty-year retiree." *Id.* at 70. The Second Circuit rejected this argument holding the plaintiffs were "similarly situated *not* with twenty-year 'for service' retirees, but with non-disabled retirees who retire after an equivalent period of service." *Id.* (emphasis added). "Because the latter group is not entitled to VSF benefits, there is no unlawful discrimination." *Id.* "Titles I and II of the ADA…prohibit discrimination only on the basis of disability." *Id.*

Here, at the time that Petitioner was hired in 1999, the City paid the subsidy to age 65 for all non-disabled *and* disabled retirees who served the City for 25 years. Doc. 45 at 2; Doc. 38-6 at 2, ¶ 2.45(C), (G). It also paid the subsidy to age 65 for employees retiring early for disability reasons, even though they did not complete 25 years of service. Doc. 45 at 2; Doc. 38-6 at 2, ¶ 2.45(F), (G). All other retirees with less than 25 years' service received no subsidy at all. Doc. 45 at 2; Doc. 38-6 at 2, ¶ 2.45(C), (G). The subsidy was a costly benefit that was paid for solely out of the City's general fund with no contribution from employees. *See* Petitioner's Principal Br. below at 48.

Four (4) years into the Petitioner's employment, the City was forced to cut costs. Doc. 38-10 at 2; Doc. 45 at 2. Thus, in 2003—over a decade *before* Petitioner became disabled and retired—the City passed an ordinance that would conserve funds by treating employees who retired early due to disability the same as, rather than better than, all other retirees with an equivalent period of service. Doc. 38-10 at 2-5. Under the new policy, a "disability retiree" with only 20

years' service would be ineligible for the subsidy to age 65 just like non-disabled retirees with only 20 years' service. Doc. 45 at 2-3; Doc. 38-10 at 4, ¶ 2.45(C), (F), (G). However, a disabled retiree who served for 25 years remained eligible for the subsidy to age 65 just like non-disabled retirees with 25 years' service. Doc. 45 at 2-3; Doc. 38-10 at 4, ¶ 2.45(C), (G).

It is important to note the distinction between a disabled retiree and a "disability retiree." The latter is a disabled retiree who qualifies for and accepts a "disability retirement." Doc. 39-17 at 29. Only those disabled retirees who are "totally and permanently" disabled are eligible for a "disability retirement." Doc. 39-17 at 29. A disabled retiree is also eligible for all of the same retirements as a non-disabled retiree, including a "normal retirement" or an "early retirement," so long as she meets each retirement's criteria. Doc. 39-17 at 27-29. If a disabled retiree qualifies for and accepts a "normal retirement," she is a "normal retiree." Under the City's pension plan, a "normal retirement" could be taken after only ten (10) years of service but could also be taken after 25 years of service. Doc. 39-17 at 27; Doc. 45 at 3, n. 2.

Therefore, Petitioner's statement (at 10) that only "normal retirees" remained eligible for the health insurance subsidy to age 65,[1] without any reference to their years of service or to the fact that a disabled retiree could also be a "normal retiree," is inaccurate

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[1] Petitioner cites to Doc. 39-16 for this proposition but omits key language from that document which shows that the policy was based solely on years of service and not on whether a retiree was a "normal retiree." Pet. 10. Also, this document was not in any Appendix filed in the circuit court below.

and misleading. A “normal retiree” (disabled or non-disabled) with only ten or twenty years of service is *not* eligible to receive the health insurance subsidy to age 65 because the criteria is 25 years of service—not a “normal retirement.” Doc. 38-10 at 4, ¶ 2.45(C), (G).

In fact, the phrase “normal retiree” appears nowhere in the ordinance because the ordinance is entirely service-based. *See* Doc. 38-10 at 2-5. The ordinance states “[a]n employee, if hired before October 1, 2002, will have met the criteria for eligibility for continuation of City-Paid health insurance at the time of retirement upon completion of twenty-five (25) years' service to the City.” Doc. 38-10 at 4, ¶ 2.45(C). There is no distinction between disabled and “normal retirees” or non-disabled retirees. All are eligible for the subsidy to age 65 so long as they complete 25 years of service. Thus, Petitioner's statement that the City “changed its subsidy policy to distinguish between ‘disabled’ and ‘normal’ retirees,” is incorrect. Pet. 10.

The record and decisions below clearly contradict Petitioner's claim that she earned the subsidy to age 65 and that the City discriminated on the basis of disability. Pet. 10. Petitioner simply failed to meet the neutral, service-based criteria to receive the subsidy to age 65. Instead, in 2018, she requested and was awarded a “disability retirement” with only 20 years of service. Doc. 38-5.[2] Notwithstanding a “disability retiree's” failure to serve 25 years, the new ordinance, out of compassion, provided payment of the

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[2] Contrary to the speculation of Petitioner and amici that Petitioner's disease was in the line of duty, the record shows it was not. Doc. 38-5.

subsidy for 24 months after their retirement. Doc. 38 at 21-22; Doc. 38-10 at 4, ¶ 2.45(F); Doc. 45 at 7, 12. On the other hand, non-disabled retirees with less than 25 years of service would receive no subsidy at all. Doc. 38-10 at 4, ¶ 2.45(C). Thus, far from treating Petitioner worse on the basis of her disability than her similarly situated, non-disabled co-workers with an equivalent period of service, she was treated better than them *because* of her total disability. Therefore, the question presented by Petitioner—whether a former employee, who "earned" post-employment benefits while employed, loses the right to sue over discrimination—poses a hypothetical question divorced from the facts of this case.

Petitioner's diagnosis with Parkinson's disease is undeniably tragic. And her inability to continue serving the City for 25 years was clearly beyond her control. However, non-disabled retirees who served less than 25 years *also* did not receive the subsidy to age 65. In fact, they received no subsidy at all, no matter how unfortunate or beyond their control the reasons for their early retirement. Thus, the district court found that "while the Court sympathizes with the fact that Plaintiff was forced to retire just short of her twenty-five years due to Parkinson's disease, the City has demonstrated that it demarcated neutral lines that are rationally related" to containing costs. Doc. 45 at 12.

Although prior to the 2003 ordinance, the City had the resources to pay the subsidy to age 65 for both 25-year retirees and "disability retirees" with less than 25 years, the City was permitted to change that policy before Petitioner's retirement to balance its

budget. *See Florida Sheriffs Ass'n v. Dep't of Admin., Div. of Ret.,* 408 So. 2d 1033, 1036-37 (Fla. 1981) ("[T]he legislature can alter retirement benefits of active employees…To hold otherwise would mean that no future legislature could in any way alter future benefits…This view would…impose on the state the permanent responsibility for maintaining a retirement plan which could never be amended...irrespective of the fiscal condition of this state.").

Had Petitioner taken a disability retirement *before* the policy changed in 2003, perhaps she could have claimed a "vested right" to the subsidy under the pre-2003 policy. Under Florida law, "once a participating member reaches retirement status, the benefits under the terms of the act *in effect at the time* of the employee's retirement vest." *City of Hollywood v. Bien*, 209 So. 3d 1, 3 (Fla. Dist. Ct. App. 2016) (emphasis added). "The contractual relationship may not thereafter be affected or adversely altered by subsequent statutory enactments." *Id.* Therefore, Petitioner was only entitled to the benefits under the policy "in effect at the time" of her retirement, which was the 2003 subsidy policy requiring her to serve 25 years to earn the subsidy to age 65. Additionally, the ordinance expressly states that it does not deny any "vested right." Doc. 38-10 at 5, ¶ 2.45(I). To be sure, Petitioner did not sue the City for breach of contract. *See* Doc. 1. Thus, Petitioner's statement that the City breached its "benefits bargain that it had struck with her when she was hired" by changing its policy in 2003, is factually and legally unsupported. Pet. 11.

This Court should deny the Petition because the question presented by Petitioner is not based on the facts of this case or findings below. Petitioner did not "earn" the subsidy to age 65 because she failed to serve for 25 years. Denial of that benefit was not unlawful discrimination on the basis of disability. Therefore, Petitioner has raised a hypothetical question, the resolution of which would be an impermissible advisory opinion.

## II. Resolution of the question presented will not change the outcome of this case and it lacks practical consequence for other cases.

**A.** Even if this Court were inclined to resolve the "qualified individual" question as the Second and Third Circuits have to find that former employees can sue for denial of post-employment benefits, it would not change the outcome of this case. As demonstrated above, because Petitioner did not serve for 25 years, she did not earn the subsidy to age 65. Her ADA claim will fail regardless of her status as a "qualified individual" because the City's subsidy policy did not discriminate on the basis of disability.

The district court, in disposing of Petitioner's Equal Protection claim, has already determined that the City's service-based policy "demarcated *neutral* lines that are rationally related to meet its legitimate goal…to contain future costs." Doc. 45 at 12 (emphasis added). This finding, affirmed by the Eleventh Circuit and unchallenged by the Petition, is now the "law of the case" which will be applied to Petitioner's ADA claim if reinstated by this Court. Accordingly, even if this Court resolves the "qualified individual" question

in Petitioner's favor, the district court will still enter judgment for the City on the ADA claim based on the district court's prior finding that there is no unlawful discrimination here.

**B.** For the same reason, the circuit split lacks practical consequence for any other case. Petitioner ignores the fact that even in the Second and Third Circuits, her ADA claim would fail. Those circuits agree with the Sixth, Seventh, Ninth and Eleventh Circuits that employers may pay different levels of benefits for different types of retirements without violating the ADA regardless of the "qualified individual" status of a plaintiff, as follows.

**1. Second Circuit.** In *Castellano,* the Second Circuit found disabled former police officers were "qualified individuals," but still found in favor of the employer because there was no unlawful disability discrimination as demonstrated by the EEOC's Interpretive Guidelines. 142 F.3d at 70. The Second Circuit held "[n]or, as noted by the EEOC, does the ADA 'require that service retirement plans and disability retirement plans provide the same level of benefits, because they are two separate benefits which serve different purposes.' " *Id.* (quoting EEOC Notice No. 915.002, *"Questions and Answers About Disability and Service Retirement Plans Under the ADA,"* May 11, 1995, at 2).[3] "The ADA requires only that persons with disabilities have the opportunity to receive the

[3] *See also* EEOC Guidelines, OLC Control No. EEOC-CVG-2001-1, *Section 3 Employee Benefits, ADA Issues, Section V. Disability Retirement and Service Retirement Plans*, October 3, 2000, https://www.eeoc.gov/laws/guidance/section-3-employee-benefits.

same benefits as non-disabled officers who have given an equivalent amount of service." *Id.*

This ruling and the EEOC guidelines explain why the United States below expressly declined to support Petitioner's argument that the City discriminated on the basis of disability. *See* Amicus Br. of the United States at 3, n. 2.

**2. Third Circuit.** After deciding the "qualified individual" question in *Ford v. Schering-Plough Corp.* in favor of the plaintiff, the Third Circuit nonetheless affirmed the dismissal of the ADA claim. 145 F.3d 601, 608 (3d Cir. 1998). It held "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities." *Id.* "The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA." *Id.*

**3. Sixth Circuit.** The Sixth Circuit has also held, under facts similar to the instant matter, that the plaintiffs' ADA claims failed on the merits regardless of the "qualified individual" question. *McKnight v. Gen. Motors Corp.,* 550 F.3d 519, 528 (6th Cir. 2008), *cert. denied,* 557 U.S. 935 (2009). "[E]ach plaintiff had equal access to the same benefit plan; thus, they too received equal treatment from GM." *Id.* at 529. Thus, "even if plaintiffs had standing, the benefit plans in question do not violate the ADA." *Id.* at 528.

**4. Seventh Circuit**. In *Morgan v. Joint Admin. Bd., Retirement Plan,* after resolving the "qualified individual" question, the Seventh Circuit found that not only was there no disability discrimination, the employer's plan, like the one in the instant case, may have treated disability retirees *better* than normal retirees:

> On the one hand, a normal retiree will get a larger pension than a disability retiree because he has more years of service. On the other hand, a worker who becomes totally disabled can obtain benefits with only nine and a half years of service. He gets a smaller pension, but gets it sooner, maybe much, much sooner, in which event he may—despite the absence, of which the plaintiffs complain, of a cost of living increase—be treated *better* than a normal retiree.

268 F.3d 456, 459 (7th Cir. 2001) (emphasis added). In the subject case, Petitioner was treated better than non-disabled retirees with an equivalent amount of service because while they received no subsidy at all, Petitioner received the subsidy for 24 months simply because she was totally disabled and they were not.

**5. Ninth Circuit**. In *Weyer v. Twentieth Century Fox Film Corp.,* the Ninth Circuit decided both the "qualified individual" question and the merits of the ADA claim. 198 F.3d 1104, 1116 (9th Cir. 2000). It held there was "no discrimination under the Act where disabled individuals are given the same opportunity as everyone else..." *Id.* "Fox did not treat Weyer any differently because of her disability." *Id.*

Thus, "qualified individual" status would not have saved Weyer's claim.

**6. Eleventh Circuit.** In *Bass v. City of Orlando,* the Eleventh Circuit affirmed the district court's judgment in favor of the employer because, regardless of "qualified individual" status, there was no disability discrimination. 57 F. Supp. 2d 1318, 1324-26 (M.D. Fla. 1999), *aff'd,* 203 F.3d 841 (11th Cir. 1999) (citing EEOC Guidelines, in part, to find that disabled former police officers were "not treated differently from similarly situated officers" who were "non-disabled officers who retired with the same length of service as Plaintiffs").

Just like every case cited above, resolution of the "qualified individual" question will make no difference to the outcome of Petitioner's case. "Qualified individual" or not, the City did not discriminate against Petitioner on the basis of disability. "Disability retirees" are simply not entitled to the same benefits as other disabled and non-disabled retirees with more years of service. On that point, all circuits agree.

In *Ford*, then-Judge Alito stated that because the case was easily resolved on other grounds showing there was no actionable discrimination under the ADA, he would not have reached the "qualified individual" question. 145 F.3d at 615 (Alito, J., concurring). This Court should likewise reserve judgment on the "qualified individual" question to avoid issuing an advisory opinion with no impact on the outcome of this case. Certiorari would be better exercised, if at all, in a case where a former employee is denied, on the basis of disability, a post-employment

benefit actually earned during employment because then a ruling on the "qualified individual" question could make a difference. Those are not the facts of this case which makes it a very poor vehicle for resolution of the question presented.

### III. This Court has already found the question presented uncertworthy three times before.

Petitioner argues that because the issue in *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997), a Title VII case, was important enough to warrant certiorari, this Court should also grant certiorari here. Pet. 33. This argument fails because, as the majority of circuit courts have found, the Title VII issue in *Robinson* is not analogous to the "qualified individual" issue under the ADA. *See Weyer,* 198 F.3d at 1111 (holding "the statutes are not analogous"); *Morgan,* 268 F.3d at 458 ("We anticipated and discussed the difference between that situation [in *Robinson*] and the one here...The difference is stark."); *McKnight,* 550 F.3d at 527 (same). "The *Robinson* opinion did not address the ADA, and the language of Title I of the ADA is significantly different than the section of Title VII at issue in *Robinson*." *E.E.O.C. v. Group Health Plan*, 212 F. Supp. 2d 1094, 1099 (E.D. Mo. 2002). Indeed, "Title VII does not contain the language of 'qualified individual'…" *Id.*

This Court has already indicated its agreement with the majority position that the issue in *Robinson* is not analogous to the "qualified individual" issue. *See Gonzales v. Garner Food Services,* 89 F.3d 1523 (11th Cir. 1996), *cert. denied, Wood v. Garner Food Services, Inc.,* 520 U.S. 1229 (1997). In *Gonzales,* the Eleventh

Circuit determined that a former employee was not a "qualified individual." 89 F.3d at 1530-31. On petition to this Court, the new administrator of the decedent's estate, Mr. Wood, argued the Eleventh Circuit's "qualified individual" decision conflicted with this Court's decision in *Robinson.* Petition for Writ of Certiorari at 6, *Wood v. Garner Food Services, Inc.,* No. 96-1478, 1997 WL 33557145 (March 12, 1997).

However, because the law and facts of *Gonzales/Wood* and *Robinson* are not analogous, there was no conflict between the decisions and this Court denied certiorari. *Wood,* 520 U.S. 1229. Indeed, Title VII's anti-retaliation provision at issue in *Robinson* applies to "employees," 42 U.S.C. § 2000e-3(a), whereas Title I of the ADA limits its protections to "qualified individuals." 42 U.S.C. § 12112. Unlike Title I's definition of a "qualified individual," Title VII's definition of "employees" does not contain any "temporal qualifier." *See Robinson*, 519 U.S. at 341–42. "And unlike Title VII's varied use of 'employees,' Title I consistently uses the term 'qualified individual' to refer to active employees or current applicants." Pet. App. 11a-12a. Therefore, this Court properly rejected the previous attempt in *Wood* to analogize the "qualified individual" issue to the issue in *Robinson*. *Wood,* 520 U.S. 1229.

After *Gonzales/Wood,* petitions raising the "qualified individual" question came before this Court two more times before the instant Petition, and each time this Court denied certiorari. *See Castellano*, 525 U.S. 820 (1998) ("Petition for writ of certiorari to…the Second Circuit denied."); *McKnight,* 557 U.S. 935 (2009) ("Petition for writ of certiorari to…the Sixth

Circuit denied."). The subject case should be treated no differently especially when, just as in *Castellano* and *McKnight,* resolution of the "qualified individual" question will not affect the outcome of this case because there was no unlawful discrimination in the first place. This Court properly found the "qualified individual" question presented in *Gonzales/Wood, Castellano* and *McKnight* uncertworthy. That precise question is at issue here and remains uncertworthy today. Nothing has changed.

## IV. Petitioner and amici overstate the importance of the "qualified individual" disagreement, which has not resulted in rampant disability discrimination or forum shopping.

Petitioner and amici attempt to paint a grim picture of millions of disabled Americans allegedly at risk for rampant discrimination by virtue of their location within the circuits on the majority side of the "qualified individual" disagreement. However, that portrayal is belied by the fact that, despite the passage of over two decades since the split arose, none of the circuits, on either side of the split, have found an employer committed disability discrimination by paying disability retirees different benefits than retirees with more years of service. Instead, all circuits have agreed that, regardless of "qualified individual" status, employers do not violate the ADA by offering different levels of benefits for different types of retirements. *See, supra,* at 17-20. Thus, far from revealing rampant employer misconduct, the caselaw reflects a pattern of misguided litigation by

retirees with less years of service demanding the same benefits as retirees with more years of service.

Likewise, the alleged threat of forum shopping is meritless. If, unlike the facts of this case, an employer actually denied a disabled retiree a benefit duly earned during employment, the employer would risk significant potential liability for breach of contract and ERISA claims, and also (as to governmental employers) due process, equal protection, and takings claims. *See, e.g., Bien*, 209 So. 3d at 3. An employer would hardly risk such exposure simply because it might escape liability from one of many different causes of action that an employee could successfully prosecute on such facts. Here, Petitioner did not earn the subsidy to age 65 under the service-based criteria of the policy in effect at the time of her retirement and thus she had no contractual, constitutional, statutory, or any other right to that benefit, even if she resided within the boundaries of the Second or Third Circuits.

Petitioner points to two fairly recent cases from the Second and Seventh Circuits as evidence of the persistence and importance of the "qualified individual" question. Pet. 21 (citing *Smith v. Town of Ramapo*, 745 Fed. Appx. 424 (2d Cir. 2018) and *Ostrowski v. Lake Cnty.,* 33 F.4th 960 (7th Cir. 2022)). Despite being on opposite sides of the "qualified individual" disagreement, neither circuit found any disability discrimination against the police officers in those cases. *See Ostrowski,* 33 F.4th at 966 ("[A] retirement plan [does] not violate the employment provisions of the ADA by extending a cost-of-living increase to non-disabled retirees but not those who

retire early because of disability."); *Smith*, 745 Fed. Appx. at 426 ("Nor does Smith allege that he was ultimately deprive[d] of the value of any previously accrued benefit, such as a payout for his accumulated vacation days."). Thus, instead of reflecting a purported persistent attack on post-employment benefits for disabled first responders, *Smith* and *Ostrowski* reveal more misguided litigation by retirees seeking unearned benefits.

Accordingly, the hyperbolic alarm sounded by Petitioner and amici regarding the alleged impact of the "qualified individual" disagreement is not supported by the caselaw from any circuit. No matter how each circuit resolves that question, they all find there is no ADA violation by paying different benefits for different types of retirements. Resolution of the "qualified individual" question has proven to be an academic exercise lacking practical consequence for any case. The importance of the question presented is patently overstated.

## V. The decision below is correct.

### A. The decision below is consistent with the plain language, structure, and purpose of Title I.

The Eleventh Circuit below properly gave effect to the plain language of Title I. The cardinal rule of "statutory construction [is] that the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as

conclusive." *Id.* Petitioner all but ignores this most familiar canon as she must to prevail. Because the plain language of the substantive provisions of Title I so clearly contradicts Petitioner's interpretation of a "qualified individual," she focuses on the enforcement provisions of Title I, particularly the amendments to 42 U.S.C. § 2000e-5(e) created by the Ledbetter Act. Pet. 23-24. She incorrectly argues only the enforcement provisions "say who can sue and when." Pet. 23.

To the contrary, because the substantive provisions of Title I prohibit discrimination only against a "qualified individual," those provisions clearly demonstrate that only a "qualified individual" can sue for disability discrimination. 42 U.S.C. § 12112(a). And the Eleventh Circuit correctly held, along with the majority of circuit courts, that "[t]here is a clear temporal qualifier in Title I" demonstrating *when* an individual must be qualified. Pet. App. 11a; *see also Weyer,* 198 F.3d at 1112 ("Title I, unlike the section of Title VII at issue in *Robinson,* has a 'temporal qualifier.'...A 'qualified individual' is someone who '*can perform*.' That definition uses the present tense."); *McKnight,* 550 F.3d at 527 ("[T]he plain language of the statute…does, in fact, contain temporal qualifiers..."). "So, to be a victim of unlawful disability discrimination, the plaintiff must desire or already have a job with the defendant at the time the defendant commits the discriminatory act." Pet. App. 11a.

Petitioner argues that Title I says "nothing about *timing*." Pet. 24 (emphasis in original). Petitioner gives short shrift to Title I's use of the

present tense suggesting this Court should just ignore it. Pet. 24. However, even the Second Circuit, one of the two circuits on the minority side of the "qualified individual" disagreement, has walked back from this position in recent years. *See Smith,* 745 Fed. Appx. at 426. The Second Circuit acknowledged the temporal qualifier in Title I and conceded that "[i]n general, the determination of whether a person is 'qualified' should be made *at the time of the discriminatory employment action*." *Id.* (emphasis added).

The Second Circuit further acknowledged that previously, in *Castellano,* it departed from this "general rule." *Id.* It explained that *Castellano* "created a *narrow exception* to the rule for post-employment benefits intended to be used by retirees." *Id.* (emphasis added); *see also Smith v. Town of Ramapo*, 2018 WL 279758, at *3 (S.D.N.Y. Jan. 3, 2018), *aff'd,* 745 Fed. Appx. 424 (2d Cir. 2018) ("*Castellano* created an exception to the general rule, *articulated by Congress*, that 'a determination of whether a person is qualified should be made at the time of the [discriminatory] employment action…' ") (cleaned up) (emphasis added).

As such, the Second Circuit has acknowledged, albeit in an unpublished opinion, two crucial points: (1) that Title I does, in fact, contain a temporal qualifier; and (2) the Second Circuit's "narrow exception" to the "general rule" is a judicially-created legal fiction rewriting the plain language of Title I. Should this Court grant certiorari, it should decline Petitioner's invitation to rewrite Title I as the Second and Third Circuits have.

Next, Petitioner argues that the enforcement provisions, 42 U.S.C. § 12117(a), apply "to *any person* alleging discrimination on the basis of disability." Pet. 24. (emphasis added). However, she omits the crucial remaining portion of that provision. Section 12117(a) actually applies "to any person alleging discrimination on the basis of disability *in violation of any provision of this chapter*"—the chapter being the ADA. 42 U.S.C. § 12117(a) (emphasis added). Thus, again, the question of *who* can sue entirely depends upon whether a person can allege a violation of the substantive provisions of Title I. And, as demonstrated above, those provisions clearly reserve their protections for those who are "qualified individuals" at the time of the discriminatory act.

The only way this Court could ignore the plain language of those provisions is if faced with "clearly expressed legislative intention to the contrary." *Consumer Prod. Safety Comm'n,* 447 U.S. at 108. However, even the legislative history affirms the plain language of the statute. The Second Circuit has acknowledged that "[t]he House committee report accompanying the ADA adds that a 'determination of whether a person is qualified should be made at the time of the [discriminatory] employment action…' " *Castellano,* 142 F.3d at 67 (quoting H.R.Rep. No. 101–485(III), at 34 (1990)). Notwithstanding this clear legislative history in lock step with the text of the ADA, the Second Circuit rejected it because it was unsatisfied with the outcome of a "literal reading" of the committee report. *Id.*

Although courts should avoid a literal interpretation of a statute when such an approach

would frustrate the statute's central purpose, the majority's interpretation does no such thing. Title I's central purpose is to prohibit employers from discriminating "against people with disabilities that do not prevent job performance, but when a disability renders a person unable to perform the essential functions of the job, that disability renders him or her unqualified." *Stevens v. Rite Aid Corp.,* 851 F.3d 224, 229 (2d Cir. 2017). Title I's "language [is] well designed to help people get and keep jobs, not to help those no longer able to work get disability pay." *Weyer,* 198 F.3d at 1112. "Congress has the authority to improve the circumstances of disabled people in some respects even if it does not improve them in all respects." *Id.*

Further, "[l]egislation often results from a delicate compromise among competing interests and concerns." *Id.* at 1113. "If we were to 'fully effectuate' what we take to be the underlying policy of the legislation, without careful attention to the qualifying words in the statute, then we would be overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed." *Id.*

### B. Petitioner's argument that the amendments to the ADA expanded the definition of a "qualified individual" is unpreserved, meritless, and further percolation on this issue is warranted.

Petitioner's heavy and incorrect reliance on the ADAAA's and Ledbetter Act's purported expansion of the meaning of a "qualified individual," is

unpreserved. Pet. 7-8, 27. Petitioner never argued the alleged impact of these amendments in the district court. *See* Doc. 17; Pet. App. 18a. This issue was injected into the case for the very first time by the United States in its amicus brief below. Amicus Br. of the United States at 5. The United States made the novel argument that the Ledbetter Act allowed Petitioner to sue during her employment when she allegedly became "subject to" the new ordinance as a disabled employee still able to perform her job. *Id.* However, in her Principal Brief below (at 22), Petitioner expressly denied any ability to sue during her employment.

Accordingly, the Eleventh Circuit correctly found that Petitioner "waited too long to make" the argument that she "suffered discrimination as a disabled employee at some unknown point *before* she retired but *after* she was diagnosed with Parkinson's." Pet. App. 17a (emphasis in original). The United States incorrectly argued below that the district court "overlooked" these arguments. Amicus Br. of the United States at 5. The Eleventh Circuit rejected this argument holding "[t]he first time this argument appeared was in the United States' brief as amicus curiae in this Court. We will not consider arguments raised only by amici." Pet. App. 18a. It further found Petitioner "did not make an argument to the district court and specifically disclaimed the argument in its own brief." *Id.* Therefore, Petitioner's argument that the amendments to the ADA redefined a "qualified individual" is unpreserved for review in this Court.

In addition to finding Petitioner's arguments unpreserved, the Eleventh Circuit properly rejected

them on the merits. Pet. App. 15a. However, no other circuit court has considered the "qualified individual" issue in light of the Ledbetter Act. As the United States noted below in its brief (at 5) "all other circuit-level decisions that have addressed this issue—predate the [Ledbetter] Fair Pay Act." Although, *Smith* and *Ostrowski* were decided after the Ledbetter Act, neither the Second nor Seventh Circuit discussed its purported impact. This Court would benefit from further percolation in the lower courts on whether the Ledbetter Act changed the meaning of a "qualified individual." As there is currently no split on that issue, this Court's intervention is unwarranted.

Moreover, the Eleventh Circuit correctly found that the Ledbetter Act is irrelevant to the "qualified individual" analysis. Pet. App. 15a. The Act merely provides "that the statute of limitations for filing an EEOC charge alleging pay discrimination resets with each paycheck affected by a discriminatory decision." *Tarmas v. Sec'y of Navy*, 433 Fed. Appx. 754, 760 (11th Cir. 2011). If a plaintiff is not a "qualified individual" under Title I, the Ledbetter Act does not give rise to a cause of action where none exists. *See, e.g., McNair v. D.C.,* 213 F. Supp. 3d 81, 88 (D.D.C. 2016) ("The Lilly Ledbetter Fair Pay Act…does not grant plaintiffs a stand-alone cause of action…The Act essentially functions to extend the statute of limitations for discriminatory compensation claims..."). Thus, the Eleventh Circuit correctly found the Ledbetter Act's "relaxed statute of limitations helps a plaintiff only if that plaintiff otherwise has a claim for discrimination…nothing in the Fair Pay Act changes Title I's substantive requirements…" Pet. App. 15a.

Likewise, it correctly found that the ADAAA did not expand the definition of a "qualified individual" to include totally disabled, former employees. Pet. App. 13a-14a. The definition of a "qualified individual"—someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"—was materially unchanged by the ADAAA. *Compare* ADA of 1990, Pub. L. No. 101-336, § 101(8), 104 Stat. 327, 331 (1990) *with* 42 U.S.C. § 12111(8); *see also* ADAAA, Pub. L. No. 110-325, § 5(c), 122 Stat. 3553, 3557 (2008) (striking "with a disability" but otherwise leaving § 12111(8) as originally enacted). Congress left the "qualified individual" definition in the present tense demonstrating its agreement with the majority's interpretation of the temporal qualifier. 42 U.S.C. § 12111(8).

Petitioner's argument that Congress' removal of "with a disability" from § 12111(8) was allegedly meant to clarify the definition of a "qualified individual," is easily disproved by examining Congress' actual stated purpose, which was to broaden the definition of a "disability." *See* Pub. L. No. 110-325, § 2(a)(3)-(8). The EEOC has also stated that the purpose of the ADAAA was to broaden the definition of a "disability." *See* 29 C.F.R. § 1630.1(c)(4) (2011) ("Consistent with the Amendments Act's purpose…the definition of 'disability' in this part shall be construed broadly…").

### C. Petitioner is not a "qualified individual."

Because Petitioner was unable to perform the essential functions of a job she held or desired at the time the City ceased the subsidy payment, the courts below correctly found she was not a "qualified individual" entitled to sue under Title I. Moreover, Petitioner failed to earn the subsidy to age 65 because she did not serve for 25 years. Thus, resolution of the "qualified individual" question in Petitioner's favor will not change the outcome of this case. The Petition does not seek review of the lower courts' finding that the City's service-based subsidy policy did not unlawfully discriminate against Petitioner. Indeed, on that point, the circuit courts uniformly agree.

## CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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