No. 23-997

IN THE

Supreme Court of the United States

KARYN D. STANLEY,

Petitioner,

v.

CITY OF SANFORD, FLORIDA,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF RESPONDENT

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The Center for Workplace Compliance respectfully submits this brief *amicus curiae*. The brief supports the Respondent and urges that the decision below be affirmed.[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Center for Workplace Compliance (CWC), formerly known as the Equal Employment Advisory Council (EEAC), is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 200 major U.S. employers, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of workplace rules and regulations. CWC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of CWC's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117, as well as other equal employment statutes and regulations. CWC's members offer a variety of fringe benefits to employees and certain former employees, such as subsidized health care premiums and long-term disability benefits. Accordingly, as employers, and as potential respondents to ADA charges, CWC's members have a substantial interest in the extent to which the actual content of benefit plans—not merely access to the plans—can be challenged under the ADA.

CWC participated as *amicus curiae* before this Court in *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997) (holding the nonretaliation provision of Title VII of the Civil Rights Act of 1964 provides a cause of action for former employees), a decision inappropriately relied on by a minority of U.S. Circuit Courts of Appeals in

interpreting the question at issue in this case. CWC also participated as *amicus curiae* in several key appellate cases involving the question presented here. *See, e.g., Ford v. Schering-Plough Corp.,* 145 F.3d 601 (3d Cir. 1998) (parity in long-term disability benefits for physical and mental conditions is not required); *Parker v. Metropolitan Life Ins. Co.,* 121 F.3d 1006 (6th Cir. 1997) (totally disabled individual is not a qualified individual; parity in long-term disability benefits for physical and mental conditions is not required); *EEOC v. CNA Ins. Cos.,* 96 F.3d 1039 (7th Cir. 1996) (parity in long-term disability benefits for physical and mental conditions is not required); *Gonzales v. Garner Food Serv., Inc.,* 89 F.3d 1523 (11th Cir. 1996) (former employees cannot bring claims under the Title I of the ADA because Congress intended Title I to apply only to current employees and job applicants).

Thus, CWC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of CWC's significant experience in these matters, CWC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Like many employers facing increasing benefits costs, in 2003 the City of Sanford, Florida, decided to modify the benefits offered to its retired employees. Jt. App. 3. Prior to this change, retirees without 25 years of service who elected disability retirement received a health care premium subsidy until they reached age 65. Jt. App. 3. Following the change, retirees who elected disability retirement without 25 years of ser-

vice received the subsidy for a maximum of two years. Jt. App. 3.

Karyn Stanley began working as a firefighter for the City in 1999. Jt. App. 2. She elected disability retirement in 2018, fifteen years after the City changed its retirement benefits. Jt. App. 2-3. Seven months later she filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) alleging the City's 2003 change to its retirement benefits discriminated against her on the basis of disability. Jt. App. 3.

Stanley filed this suit in 2020 alleging disability discrimination in violation of the Rehabilitation Act of 1973, the ADA, and the Florida Civil Rights Act. Jt. App. 3. She also sought a declaratory judgment that the City's change in retirement benefits violated a Florida law governing public sector retirement benefits. Jt. App. 3. Stanley's complaint did not include any allegation that the City engaged in compensation discrimination or retaliation. Jt. App. 3.

The district court granted the City's motion to dismiss with respect to the disability discrimination claims because Stanley could not show that she was a "qualified individual" protected by the ADA's employment nondiscrimination provisions. Jt. App. 3. On appeal, the Eleventh Circuit affirmed. Jt. App. 19.

As to Stanley's claims that the City's policy change violated state law, the district court granted the City's motion for summary judgment finding no violation. Jt. App. 3-4.

SUMMARY OF ARGUMENT

The decision below, which holds that under Title I of the ADA, a plaintiff must hold or desire an employment position with the defendant at the time of the defendant's alleged unlawful act, should be affirmed.

Title I's employment nondiscrimination provisions apply only to a "qualified individual." 42 U.S.C. § 12112(a). As defined under the ADA, a "qualified individual" is "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). Consequently, individuals who have resigned or retired due to their disability and can no longer perform the essential functions of the job in question are not qualified individuals and may not bring an employment nondiscrimination suit under the ADA. This stands in contrast with the ADA's anti-retaliation provision, 42 U.S.C. § 12203, that was drafted to permit causes of action by individuals regardless of their job qualifications.

While most U.S. Circuit Courts of Appeals to consider this question have agreed, there are two circuits that have adopted a contrary view. In their view, it makes more sense that Congress intended to create a comprehensive scheme to prevent employment discrimination, even among those former employees who are no longer qualified to perform a job. They wrongly read ambiguity into the ADA's employment nondiscrimination provisions and are influenced, in part, by a misplaced reliance on this Court's opinion in *Robinson v. Shell Oil*, 519 U.S. 337 (1997) involving coverage of former employees under Title VII's anti-retaliation provision. However, *Robinson* has no bearing on Title I of the ADA and the policy

goals embraced by these opinions cannot overcome Title I's clear language.

The ADA was not adopted on a blank slate. When Congress enacted the ADA, an analogous provision of regulations implementing section 504 of the Rehabilitation Act had already been interpreted as not allowing claims by former employees no longer qualified to perform their jobs. If Congress was concerned with this interpretation, it could have chosen to address it in the ADA, but it did not. Instead, it adopted a scheme based on the section 504 regulations.

Petitioner and her *Amici* argue that intervening legislation, the Lilly Ledbetter Fair Pay Act (Fair Pay Act), Pub. L. No. 111-2, 123 Stat. 5 (2009), "clarifies" that former employees may bring claims even if they are no longer qualified. However, this misconstrues the Fair Pay Act. The Fair Pay Act effectively extends the period in which charges of discrimination may be filed with the EEOC. However, it does not create any new causes of action under Title I of the ADA. Put simply, if no "discriminatory compensation or other practice" under Title I of the ADA has occurred, then the Fair Pay Act's rules about the timing of charges are irrelevant.

Further, the Fair Pay Act only applies to alleged acts of compensation discrimination. If the Fair Pay Act were extended to cases such as this, the filing periods under the ADA, Title VII, and other employment nondiscrimination laws would only be further eroded contrary to a statutory scheme that encourages relatively swift investigation, conciliation, and resolution of employment disputes.

It is important to note that former employees alleging that benefit plans have been unlawfully modified have other legal recourse outside of the ADA. For public sector workers, state law provides a variety of protections. Although states vary widely in the approaches they have taken, most states have robust protections for retiree benefits that have vested. For multi-state private sector workers, the Employee Retirement Income Security Act provides remedies. The failure of plaintiffs like Petitioner to succeed in their state law claims does not justify an expansive reading of the ADA to permit employment discrimination claims by former employees who are not qualified.

Finally, policy reasons also weigh in favor of affirming the decision below. Fewer and fewer employers are offering retiree health benefits. If former employees who are no longer qualified can bring employment discrimination claims challenging fringe benefits such as the health care subsidy offered in this case, the cost of offering post-employment benefits, especially those like healthcare subsidies or long-term disability insurance, will increase thus creating a further disincentive for employers to offer such programs.

The Eleventh Circuit's decision should be affirmed because it represents the most coherent and logical interpretation of Title I. It is also consistent with pre-ADA interpretations of analogous law, and properly recognizes that neither this Court's opinion in *Robinson* nor the enactment of the Fair Pay Act compels a different result. Policy considerations and the availability of other legal avenues to pursue claims of alleged unlawful benefit changes also suggest that the decision below is correct.

For these reasons, we respectfully request that this Court affirm the judgment below.

ARGUMENT

I. PETITIONER IS NOT A "QUALIFIED INDIVIDUAL" AS DEFINED BY THE ADA, CONSEQUENTLY SHE CANNOT BRING A CLAIM UNDER TITLE I

Title I of the ADA addresses employment discrimination. 42 U.S.C. §§ 12111- 12117. Specifically, section 102(a) prohibits discrimination in employment "against a *qualified individual* on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (emphasis added).[2] As Petitioner does not meet the definition of a "qualified individual" under the ADA, she cannot bring a claim under Title I.

A "qualified individual" is "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). "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). By limiting the ADA's coverage to a person who "can perform" the essential functions of a job that the individual "holds" or "desires," the ADA's coverage is, by definition, limited to employees or applicants.

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[2] The ADA prohibits employment discrimination against individuals who may not have a disability based on their relationship or association with an individual with a known disability. 42 U.S.C. § 12112(b)(4). The ADA's anti-retaliation provisions also extend to individuals who may not have a disability. 42 U.S.C. § 12203. Neither circumstance is presented here.

A majority of federal Courts of Appeals that have addressed this question agree. In *Gonzales v. Garner Food Servs.*, 89 F.3d 1523, 1526 (11th Cir. 1996), the Eleventh Circuit held that a participant in a health benefit plan only by virtue of his status as a former employee was not a qualified individual under Title I's definition. In that case, the plaintiff argued that "since the fruits of many fringe benefit programs are realized during the post-employment period, Congress must have intended former employees to be protected under the ADA as well." *Id.* However, the court rejected this approach noting that "interpreting the ADA to allow any disabled former employee to sue a former employer essentially renders the [qualified individual] requirement under the Act … meaningless." *Id.* at 1529.

Similarly, the Seventh Circuit has held that retirees and other former workers are not protected by the ADA's employment provisions. *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 457-58 (7th Cir. 2001). As the court asked, "How could they be? They cannot perform the essential functions of their job, and therefore they have no rights under [Title I]." *Id*. at 458. The Sixth and Ninth Circuits agree. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir 2000) ("Title I unambiguously excludes totally disabled persons."); *McKnight v. GMC*, 550 F.3d 519, 528 (6th Cir 2008) ("[W]e conclude that disabled former employees are not 'qualified individuals' with a disability under Title I of the ADA").

In this case, the Petitioner cannot show that she is a "qualified individual" under Title I because she neither "holds" nor "desires" the job and cannot perform the job's essential functions with, or without,

reasonable accommodations. Therefore, the plain text of Title I of the ADA bars Petitioner's claim.

II. THE MINORITY RULE ERRONEOUSLY RELIES ON *ROBINSON* AND INAPPROPRIATELY CREDITS POLICY GOALS INCONSISTENT WITH THE PLAIN TEXT OF THE ADA

The Second and Third Circuits recognize a minority rule, permitting Title I claims by former employees who no longer perform a job's essential functions with or without reasonable accommodation. *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), respectively. In each of these cases, the courts permitted Title I claims by former employees to survive motions to dismiss, only to lose on summary judgment.

In each case, the appeals courts concluded that because Title I prohibits discrimination in fringe benefits and that many fringe benefits are provided to former employees, Congress must have intended to create a recourse and remedy for benefits discrimination against former employees. *Castellano*, 142 F.3d at 69; *Ford* 145 F.3d at 608. Each court relied on this Court's rationale in *Robinson v. Shell Oil Co.*, 519 U.S. 317 (1997) interpreting the anti-relation provisions of Title VII. 142 F.3d at 68-69; *Ford* 145 F.3d at 606-07.

However, as described below, *Robinson* is not relevant to the ADA's employment nondiscrimination provisions. Further, the Second and Third Circuit's desire to "fully effectuate" the rights guaranteed by Title I, *Ford*, 145 F.3d at 606, is misplaced and inconsistent with the plain language of Title I.

A. *Robinson* Has No Relevance to Title I of the ADA

In *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997), this Court ruled that former employees are protected against retaliation under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.,* which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Section 704(a) of Title VII provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). The Court observed in *Robinson* that "the term 'employees,' as used in § 704(a) of Title VII, is ambiguous as to whether it includes former employees," and that, "being more consistent with the broader context of Title VII and the primary purpose of § 704(a), we hold that former employees are included within § 704(a)'s coverage." 519 U.S. at 346. The Court attributed the ambiguity to the lack of a "temporal qualifier in the statute such as would make plain that § 704(a) protects only persons still employed at the time of the retaliation." *Id.* at 341.

The Court's decision in *Robinson* has no relevance to Title I because *Robinson* interprets different statutory language in a different context. This is true for three separate reasons.

First, *Robinson* deals explicitly and exclusively with the use of the word "employees" in section 704(a) of Title VII, not "qualified individual" in Title I of the ADA. In *Robinson* this Court referred to, and specifically distinguished, its own prior decision interpreting the same word—employees—used in a different section of Title VII, section 701(b). 519 U.S. at 341. The Court observed that the section in question in its decision in *Walters v. Metropolitan Educ. Enters., Inc.,* 519 U.S. 202 (1997),[3] "has two significant temporal qualifiers [that] specify the time-frame in which the employment relationship must exist, and thus the specific context of that section did not present the particular ambiguity at issue in the present case." 519 U.S. at 341 n.2.

Second, the differences between the Title VII language under scrutiny in *Robinson* and Title I of the ADA are significant. Whether or not someone is a "qualified individual" protected by Title I does not depend at all on whether he or she was an "employee" or a "former employee," nor does it need to because the discrimination provision itself limits coverage of Title I to discrimination in employment. 42 U.S.C. § 12112(a). Unlike Title VII, Title I of the ADA contains a threshold requirement that a plaintiff currently be able to perform the essential functions of the job he or she holds or desires. 42 U.S.C. §§ 12111(8), 12112.

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[3] *Walters* interpreted the term "employees" as used in § 701(b) of Title VII, which defines the term "employer" as a person ... "'who *has* fifteen or more employees *for each working day* in each of twenty or more calendar weeks in the current or preceding calendar year.'" *Robinson,* 519 U.S. at 341 n.2 (quoting 42 U.S.C. § 2000e(b)) (emphasis added).

Moreover, the ADA's definition of "qualified individual" lacks the ambiguity that the Court in *Robinson* found to exist in section 704(a) of Title VII. Unlike section 704(a), the ADA's definition of "qualified individual" *does* contain temporal qualifiers. The words "holds" and "desires" appear unequivocally in the present tense, signifying a requirement that the individual be "qualified" at the time of the action being challenged. As the Ninth Circuit has concluded, this difference makes *Robinson* inapposite. *Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104, 1112 (9th Cir. 2000).

Third, even if the ADA definition of "qualified individual" were ambiguous, the contextual evidence the Court found to be determinative in *Robinson* would not suggest a contrary interpretation here. As *Robinson* dealt exclusively with section 704(a), the Court's evaluation of the context and purpose of section 704(a) is specific to Title VII retaliation protection. *See Robinson,* 519 U.S. at 345-46.

In *Robinson*, this Court observed that Title VII prohibits discriminatory discharge, and that "a charge under [Title VII] alleging unlawful discharge would necessarily be brought by a former employee, [so that] it is far more consistent to include former employees within the scope of 'employees' protected by § 704(a)." *Id.* at 345. Likewise, the Court pointed out that:

> exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse

> incentive for employers to fire employees who might bring Title VII claims.

Id. at 346 (citation omitted).

Well before *Robinson* was decided, the Eleventh Circuit addressed, and rejected, an attempt to bootstrap a Title VII retaliation analogy into the ADA. In *Bailey v. USX Corp.,* 850 F.2d 1506, 1509 (11th Cir. 1988), the Eleventh Circuit concluded that Title VII's antiretaliation provision protected former employees. When the plaintiff in *Gonzales* sought to expand *Bailey* to create a general rule that former employee status confers the right to sue under the ADA, the panel found the two concepts "easily distinguishable." 89 F.3d at 1528. The panel explained:

> As this Court in *Bailey* recognized, the expansion of the term "employee" to confer standing to sue upon former employees claiming retaliation is necessary to provide meaning to anti-retaliation statutory provisions and effectuate congressional intent. There are, however, no allegations of retaliation in this case, and excluding former employees from protection under the Act is not inconsistent with the policies underlying the statute. To the contrary, interpreting the ADA to allow any disabled former employee to sue a former employer essentially renders the [qualified individual] requirement under the Act, that an individual with a disability *hold or desire* a position the essential functions of which he or she can perform, meaningless.

Id. at 1529 (citation omitted).

As in *Bailey*, the Petitioner in this case has not alleged that the City engaged in unlawful retaliation

under the ADA. Accordingly, the Supreme Court's decision in *Robinson,* interpreting different language in another section of a different statute, is inapposite to the question of the ADA's employment nondiscrimination provision.

B. The Minority Rule Inappropriately Favors Policy Preferences Over Statutory Language Enacted by Congress

The Third Circuit characterized the "explicit rights created by Title I of the ADA" and the "ostensible eligibility standards for filing suit" as ambiguous. *Ford*, 145 F.3d at 606. As the Third Circuit reasoned, the "locus of the ambiguity is whether the ADA contains a temporal qualifier of the term 'qualified individual with a disability[.]'" *Id*. Consequently, after considering *Robinson* and the ADA's policy rational "to provide clear, strong, *enforceable* standards addressing" discrimination against individuals with disabilities, *id.* at 607 (quoting 42 U.S.C. § 12101(b)(2)), the Third Circuit chose to "resolve this ambiguity by interpreting Title I to allow disabled former employees to sue their former employers regarding their disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA." *Id*.

But this logic fails if we consider the specific language used by Congress in enacting the ADA. Some parts of the ADA were drafted to permit causes of action by individuals regardless of their job qualifications. These include the law's anti-retaliation provision, 42 U.S.C. § 12203, and Title III's prohibition against discrimination in places of public accommodation, 42 U.S.C. § 12182. But that was not the choice made in Title I, where Congress did use temporal modifiers to identify the individuals who could bring a claim. Consequently, the minority rule as expressed by

the Third Circuit elevates broad ADA policy goals—effectuating a full panoply of rights—above the qualifying words in the statute with the effect of "overturning the nuanced compromise in the legislation[.]" *Weyer*, 198 F.3d at 1113. Allowing a former employee to bring a Title I claim thus contradicts Congress's intent in requiring specific job and temporal qualifications.

III. SECTION 504 OF THE REHABILITATION ACT, ON WHICH THE ADA WAS MODELED, WAS INTERPRETED TO DENY CLAIMS BY FORMER EMPLOYEES BEFORE ENACTMENT OF THE ADA

As enacted, the ADA's general employment nondiscrimination provision included in Title I read: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employment compensation, job training, and other terms and conditions of employment." Pub. Law No. 101-336, 104 Stat. 327, 331-32 (1990).

This provision and its definition of "qualified individual with a disability" were based on regulations implementing section 504 of the Rehabilitation Act of 1973. *See, e.g.*, H.R. Rep. 485 pt. 2 (1990) at 54-55 ("This definition is comparable to the definition used in the regulations implementing section 501 and section 504 of the Rehabilitation Act of 1973").

At the time, section 504's employment nondiscrimination regulation stated: "No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies." 42 Fed. Reg.

22,677, 22,680 (May 4, 1977). The section 504 regulations defined "qualified handicapped person," with respect to employment, as "a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the job in question." *Id*. at 22,678.

In *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), the Eighth Circuit interpreted the original section 504 regulations and held that the Rehabilitation Act does not protect a plaintiff who is not qualified for the job against discrimination in the provision of employment-related fringe benefits. The court concluded that the Rehabilitation Act was designed to prohibit discrimination in employment only where the individual potentially can perform the essential functions of the job. Noting that the statutory language provides coverage "only to '*otherwise qualified handicapped individuals*,'" *Id.* at 771 (quoting 29 U.S.C. § 504), the Eighth Circuit concluded:

> [B]oth the language of the statute and its interpretation by the Supreme Court indicate that section 504 was designed to prohibit discrimination *within the ambit of an employment relationship in which the employee is potentially able to do the job in question*. Though it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, this sort of discrimination is simply not within the protection of section 504.

Id. (emphasis added).

If Congress disagreed with the Eighth Circuit's interpretation, it certainly could have addressed it when enacting the ADA. To the contrary, however,

Congress modeled Title I after the section 504 regulations. [4]

IV. THE FAIR PAY ACT HAS NO APPLICATION TO THIS CASE

A. The Fair Pay Act Extends the Filing Period for Compensation Discrimination Claims, But Creates No New Cause of Action

Petitioner and her *amici* assert that amendments made by the Fair Pay Act allow former employees to "bring suit under the ADA when they are 'affected by application of' discriminatory benefit plans 'adopted' while they were working." Petitioner's brief at 14. (citing 42 U.S.C. § 2000e-5(e)(3)(A)). Consequently, they argue, the amendments "allow a plaintiff to challenge a decision to adopt a discriminatory benefits policy each time that she is adversely affected, even after her employment ends." *Id.*

While the Fair Pay Act did amend Title VII's (and the ADA's) rules governing the timeliness of filing, it did not amend the substantive provisions of the ADA

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[4] Petitioner also argues that the revisions made by the ADA Amendments Act (ADAAA) to section 102 of the ADA support the proposition that an individual need not be disabled to be subject to unlawful discrimination under Title I. Pet. Br. 25. The ADAAA changed section 102 from prohibiting discrimination "against a qualified individual with a disability because of the disability of such individual" to prohibiting discrimination "against a qualified individual on the basis of disability." ADA Amendments Act of 2008 § 5, 122 Stat. 3557. But rather than broadening the scope of section 102, this change only serves to make section 102's coverage more like that used in the original section 504 regulations prohibiting discrimination "on the basis of handicap."

governing prohibited conduct. Section 3 of the Fair Pay Act amended Title VII to specify that:

> an unlawful employment practice occurs, with respect to discrimination in compensation … when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by the application of a discriminatory compensation decision or other practice ….”

Pub. L. No. 111-02, 123 Stat. 5, 5-6 (2009) (codified at 42 U.S.C. § 2000e-5(e)). Section 5 of the Fair Pay Act applies the provision to claims of “discrimination in compensation” under Title I of the ADA. Pub. L. No. 111-02, 123 Stat. 5, 6 (2009) (codified at 42 U.S.C. § 2000e-5 note).

These amendments effectively changed the period in which an employee could timely file a charge with the EEOC after an alleged unlawful practice. However, they did not create any new substantive causes of action. By its terms, the Fair Pay Act establishes that “an unlawful employment practice” occurs at three times, all of which depend on a “discriminatory compensation decision or other practice” having taken place. If no discriminatory compensation decision or other practice has occurred, the Fair Pay Act does not come into play.

Under Title I of the ADA, no discriminatory practice (whether compensation-related or otherwise) has occurred when the individual in question is not qualified for the position in question. Petitioner is thus barred from bringing the claim under Title I.

B. Petitioner's Case Does Not Concern the Type of Compensation Claim Addressed by the Fair Pay Act

Petitioner argues that her claim is the sort of compensation claim that the Fair Pay Act was enacted to address. Pet. Br. 21-27. But Petitioner's complaint does not allege compensation discrimination. Consequently, the Fair Pay Act does not apply.

The Fair Pay Act was enacted to supersede this Court's interpretation of Title VII's rules governing charge filing as articulated in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). However, the Fair Pay Act by its terms is limited to the timing of unlawful employment practices with respect to "discrimination in compensation." It does not encompass other types of discrimination claims.

Courts of Appeals have confirmed this in numerous cases analyzing the amendments the Fair Pay Act made to Title VII, the Age Discrimination in Employment Act (ADEA), and the ADA. For example, in an age discrimination case where the plaintiffs argued the Fair Pay Act should apply with respect to allegedly discriminatory demotions, the Tenth Circuit held:

> [I]t isn't enough for an employee to show that a discriminatory practice somehow affected his or her pay. Instead, the employee must show a discriminatory *pay disparity* between himself or herself and similarly situated but younger employees. … In other words, "discrimination in compensation" requires not just *any* effect on pay, but one of a particular kind: unequal pay for equal work.

Almond v. Unified Sch. Dist. #501, 665 F.3d 1174, 1181 (10th Cir. 2011) (citations omitted).

Similarly, the Second Circuit has held that the Fair Pay Act:

> does not encompass a claim of a discriminatory demotion decision that results in lower wages where, as here, the plaintiff has not offered any proof that the compensation itself was set in a discriminatory manner. A plaintiff must plead and prove the elements of a pay-discrimination claim to benefit from the [Fair Pay Act's] accrual provisions.

Davis v. Bombardier Transp. Holdings (USA), Inc., 794 F.3d 266, 269 (2d Cir. 2015).

Other circuits agree. *See, e.g., Noel v. Boeing Co.,* 622 F.3d 266, 274 (3d Cir. 2010) ("the plain language of the [Fair Pay Act] covers compensation decisions and not other discrete employment decisions."); *Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 375 (D.C. Cir. 2010) ("we conclude the decision whether to promote an employee to a higher paying position is not a 'compensation decision or other practice' within the meaning of that phrase in the [Fair Pay Act] and the [plaintiff's] failure-to-promote claim is not a claim of 'discrimination in compensation.'").

In this case, the Petitioner did not plead and cannot prove the elements of a pay discrimination claim. The Complaint does not allege unequal pay for equal work and does not identify similarly situated comparators who are paid more as a result of the City's actions. Consequently, the Fair Pay Act has no application to this case.

C. Application of the Fair Pay Act in This Case Would Undermine Congress' Policy Choices in Establishing Filing Periods in Title VII and the ADA

The ADA adopts the regime established by Title VII for the filing and investigation of charges of discrimination. 42 U.S.C. § 12117. This regime requires an individual alleging discrimination to file a charge within 180 days, or 300 days, of an alleged discriminatory act depending on interaction with state law. 42 U.S.C. § 2000e-5(e)(1).

The filing period serves several important policy goals. When Congress enacted Title VII "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" the elimination of discriminatory practices. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Although the law has since been amended to permit individuals as well as the EEOC to pursue discrimination claims in federal court, Title VII creates a procedure that provides "an opportunity to settle disputes through conference, conciliation, and persuasion" prior to litigation. *Id.* Title VII's filing period assists in achieving voluntary resolution of disputes by requiring allegations of discrimination to be raised relatively quickly, when there is a better chance of reaching voluntary resolution of claims.

It also provides important protections to employers. When employers are informed in a timely manner of alleged wrongdoing, they can promptly investigate. When evidence and recollections are fresh, their investigations are more likely to reveal information that will help resolve the dispute. Likewise, the filing periods "while guaranteeing the civil rights laws to those who promptly assert their rights, also protect

employers from the burden of defending claims of employment decisions that are long past." *Del. State College v. Ricks,* 449 U.S. 250, 256-57 (1980).

The Fair Pay Act created an exception to these filing rules under Title VII, and the ADA, for claims related to compensation discrimination in large part because employees may not have sufficient information to assess their pay in relation to that of co-workers. H.R. Rep. No. 110-237, at 7-8 (2007). However, the bill was limited to compensation claims only, not "'discrete personnel decisions like promotions and discharges.'" *Almond*, 665 F.3d at 1183 (quoting the bill's Senate Sponsor, Sen. Mikulski, 155 Cong. Rec. S757 (daily ed. Jan. 22, 2009)).

The alleged discriminatory act in this case, a change to retirement benefits, was not a compensation decision. Rather, it was a discrete act adopted in a public forum and published in the employer's handbook, which was readily available to Petitioner. If the Fair Pay Act is interpreted to reach discrete acts such as this, then the filing periods under employment discrimination laws will be significantly eroded. This will not only make it harder for employers to investigate and defend stale claims of discrimination but will also make it more unlikely that a voluntary resolution of a dispute will be possible.

V. OTHER LEGAL REGIMES OFFER MORE APPROPRIATE AVENUES TO CHALLENGE MODIFICATIONS TO RETIREE BENEFIT PLANS

Affirming the decision below will not leave individuals without recourse to challenge an employer's modifications to retirement benefit plans. The regulation of retirement benefits is complex and varies

depending on the type of post-employment benefit offered (for example, pension benefits versus health or welfare benefits) and the jurisdictions involved.

Notably, for large private sector, multi-state employers like most of CWC's members, benefit plans are governed by the Employee Retirement Insurance Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq*., which provides numerous avenues to challenge unlawful changes to benefits plans. While ERISA provides flexibility for employers to modify welfare benefits, those benefits "may vest … when employers elect to enter into a private contract with employees as set forth in benefit plan documents." *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 783 (7th Cir. 2005).

For former public sector workers like Petitioner, state laws control. Historically, retirement benefits for public sector workers were viewed as gratuities. Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 Iowa L. Rev. 1029, 1035 (2012). "In the early to mid-twentieth century, however, nearly every state moved away from this view of public pensions." *Id.* (footnote omitted). With respect to pensions, most states adopted a contract-based regime while others adopted a regime based on property rights. *Id.*

States also differ in their treatment of retiree health benefits with most states basing benefits "on achieving a specific status—such as a minimum number of years of service and a minimum age …." Pew Charitable Trusts, *Legal Protections for State Pensions and Retiree Health Benefits*, 9 (2019).[5] Still, many states

[5] *Available at* https://www.pewtrusts.org/-/media/assets/2019/05/prs_legal_protections_for_state_and_local_pension_and_retiree_medical_benefits_brief_final.pdf (last accessed November 18, 2024).

protect retiree health benefits "through the common-law contractual approach" while others provide protection through explicit language in state constitutions or statutes. *Id*. at 10.

Florida provides strong protection for retirees. However, Florida's public sector employers may make prospective changes to retirement benefit plans. *See, e.g., Fla. Sheriffs Ass'n v. Dep't of Admin*., 408 So. 2d 1033, 1036-37 (Fla. 1981).

An early case considering the question at issue here also addressed the applicability of contract law to address claims by former employees. In *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), the Eighth Circuit rejected coverage for former employees under section 504 of the Rehabilitation Act. The court sympathized with plaintiffs, referring to discrimination in the provision of fringe benefits to "handicapped employees unable to perform the essential functions of their jobs" as "undesirable." 831 F.2d at 772. While the court concluded that protection under section 504 was unavailable, it noted this was not the end of the matter as a parallel action based on a contract claim was pending in state court. *Id.* Ultimately, in state court the plaintiff won a jury verdict for expenses related to certain medical bills that her employer's health plan would have paid had she remained covered. *Beauford v. Father Flanagan's Boys' Home,* 486 N.W.2d 854, 857 (Neb. 1992).

The Petitioner in this case also pursued other legal avenues, including a claim under state law regulating insurance for certain public sector retirees. However, she lost those claims on summary judgment. Jt. App.

32-46. The failure of the Petitioner to prove her state law claim does not justify expanding Title I of the ADA to permit claims by former employees. Indeed, it simply reflects the fact that the City's 2003 decision to modify its retirement benefits was not unlawful.

VI. A RULING FOR THE PETITIONER COULD CAUSE EMPLOYERS TO REDUCE OR FURTHER ELIMINATE POST-EMPLOYMENT BENEFITS

Policy reasons also caution against interpreting Title I of the ADA to permit claims like Petitioner's as such a result could lead to a significant decrease in employer offered retirement benefits. Employers are not required to provide any post-employment disability benefits. While traditionally many large employers have offered retiree health benefits, the trend is undeniable: each year fewer and fewer employers find retiree health benefits worth offering. Tricia Neuman and Anthony Damico, Kaiser Family Foundation (KFF), *Retiree Health Benefits: Going, Going, Nearly Gone?* (Apr. 12, 2024).[6] According to KFF, which has conducted annual surveys on trends in employer-sponsored coverage, the share of large employers offering retiree health coverage dropped from 66% in 1998 to 21% in 2023. According to KFF:

> Retiree health benefits appear to be heading toward extinction for a number of reasons. The rise in health care costs has put pressure on employers to make tradeoffs between providing benefits to active workers versus

[6] *Available at* https://www.kff.org/medicare/issue-brief/retiree-health-benefits-going-going-nearly-gone/#:~:text=For%20the%20past%2025%20years,down%20from%2066%25%20in%201988. (last accessed Nov. 18, 2024).

> retirees, accelerating this trend. Union membership has steadily declined over the past few decades, easing the pressure on employers to provide retiree benefits. And the demand for retiree benefits may be less intense than it once was because Medicare benefits have improved somewhat over the years, with the prescription drug benefit that was added in 2006 and the offer of some extra benefits for beneficiaries who choose to enroll in a Medicare Advantage plan.

Id.

This Court and others have long recognized that rigid rules limiting employers' ability to modify welfare or other retirement benefit plans will create a disincentive for employers to offer generous benefits. In the ERISA context, this Court has observed:

> The flexibility an employer enjoys to amend or limit its welfare plan is not an accident; Congress recognized that "requiring the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans." Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into plans they initially offered, "they would err on the side of omission."

Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry., 520 U.S. 510, 515 (1997) (citations omitted).

Florida's Supreme Court has expressed similar concerns with respect to public sector retirement benefits, noting that its law:

> Was not intended to bind future legislatures from prospectively altering benefits which accrue for future state service. To hold otherwise would mean that no future legislature could in any way alter future benefits of active employees for future services, except in a manner favorable to the employee. This view would, in effect, impose on the state the permanent responsibility for maintaining a retirement plan which could never be amended or repealed irrespective of the fiscal condition of this state. Such a decision could lead to fiscal irresponsibility.

Fla. Sheriffs Ass'n., 408 So. 2d at 1037.

In the context of the issues raised in this case, the Seventh Circuit has said "[a]llowing former employees to complain about postemployment discrimination that does not involve retaliation would actually hurt them … it would create perverse incentives." *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 458 (7th Cir. 2001). As the court further explained:

> Since there is no legal requirement that employers offer disability benefits as part of their menus of fringe benefits, compelling employers who do to maintain them in lockstep with other benefits would deter their provision. The employer would tell its employees to buy their own disability insurance or to rely on social security disability benefits should they become disabled. Since workers with a disability are more likely than

> other workers to become totally disabled and have to retire early, an interpretation of the Act that discouraged employers from offering disability benefits would make the workplace less attractive to such workers.

Id.

Many employers still provide some types of retiree health benefits and related benefits such as the premium subsidy at issue in this case. However, if the Petitioner is successful, it will create a chilling effect on employers doing so in the future. Simply put, employers may find ADA compliance easiest to achieve by eliminating or further curtailing post-employment disability benefits.

CONCLUSION

Accordingly, the decision below should be affirmed.

Respectfully submitted,

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