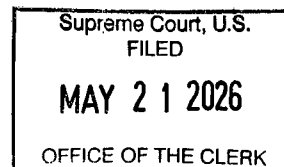


No. 26-317



In the Supreme Court of the United States

NICHOL ROYSTON,

Petitioner,

v.

CITY OF SCOTTSDALE, _____

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

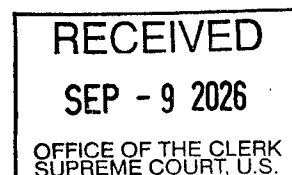
PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Petitioner, and plaintiff-appellant below is Nichol Royston.

Respondents, and defendants-appellees are the City of Scottsdale

RELATED PROCEEDINGS

United States District Court (D. Ariz.):

Nichol Royston v. City of Scottsdale, et al.,
No. 2:22-cv-00542-SMB (Sep. 24, 2024)
(summary judgment for Respondents)

United States Court of Appeals (CA9):

Nichol Royston v. City of Scottsdale, et al.,
No. 24-6530 (Nov. 6, 2025) (district
court affirmed)

Nichol Royston v. City of Scottsdale, et al.,
No. 24-6530 (Dec. 23, 2025) (rehearing
denied)

Supreme Court of the United States:

Nichol Royston v. City of Scottsdale, et al.,
No. 25A1002 (Mar. 12, 2026) (time to pe-
tition for certiorari extended to May 22,
2026)

QUESTIONS PRESENTED

In *Muldrow v. City of St. Louis*, this Court held that to allege an adverse employment action—such as an adverse transfer—the Petitioner “does not have to show . . . that the harm incurred was significant[] [o]r serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar.” 601 U. S. 346, 355 (2024) (internal quotation marks and citation omitted). Instead, the text of Title VII requires only that a transferee show “some harm respecting an identifiable term or condition of employment.” *Ibid.*

1. Does the Ninth Circuit decision, which relied on pre-*Muldrow* opinions, conflict with *Muldrow* and post *Muldrow* decisions in other Circuits by finding no actionable employment harm in an involuntary transfer, solely because the employee retained her title, rank, and pay, despite evidence of materially adverse changes to her employment terms and conditions?

2. Whether the Americans with Disabilities Act and the Family and Medical Leave Act of 1993 allow employers to use past protected leave or speculative future leave related to a disability, including cancer, as a legitimate reason for adverse actions without following the ADA’s interactive process or showing undue hardship.

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Appendix A

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OPINIONS BELOW

The Ninth Circuit's memorandum is reproduced in the Appendix at App. 1–4. The District of Arizona's order is reproduced in the Appendix at App. 5–29.

JURISDICTION

The Ninth Circuit's decision was entered on November 6, 2025. The Ninth Circuit denied rehearing on December 23, 2025. Justice Kagan extended the time to petition for writ of certiorari to May 22, 2026. This Court has jurisdiction under 28 U. S. C. § 1254.

STATUTORY PROVISIONS INVOLVED

29 U. S. C. § 2612(a)(1)(D) provides in relevant part: “[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.”

29 U.S.C. § 2615(a)(2) provides in relevant part: “It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter”

29 U.S.C. 2615(b):

Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

42 U.S.C. § 2000e-3(a):

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment 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. § 12112(a): "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

29 C. F. R. § 825.215: "An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."

INTRODUCTION

The Americans with Disabilities Act (ADA), 42 U. S. C. § 12101 *et seq.*; the Rehabilitation Act of 1973, 29 U. S. C. § 701 *et seq.*; the Family and Medical Leave Act (FMLA), 29 U. S. C. § 2601 *et seq.*; and related federal anti-retaliation protections prohibit employers from discriminating or retaliating against employees because of disability, the need for reasonable accommodation, or the use of federally protected medical leave and requires employers to conduct individualized assessments, engage in a good-faith interactive process, and establish undue hardship before excluding or disadvantaging an employee because of disability-related limitations. 42 U. S. C. §§ 12111(8), 12112(b)(5)(A).

Collectively, these statutes embody a central doctrinal principle: employers may not convert protected medical conditions, protected leave, or anticipated future limitations into a basis for exclusion absent an individualized analysis and without establishing the

operational hardship Congress required. Yet, Petitioner maintains Respondents did just that.

Petitioner, a new mother diagnosed with cancer months after returning from maternity leave, was denied a transfer to an office position and involuntarily transferred to a more physically demanding position after taking federally protected time for maternity leave and cancer surgery. The justification for the adverse action was information derived from a process decisionmakers referred to as the "rumor mill" and concerns Petitioner would require "extensive" time off in the future due to her disability.

To bolster the decision, Respondents reviewed and relied upon Petitioner's prior year of absences, mainly federally protected leave and used those protected absences as support for the adverse action. Petitioner then engaged in the protected activity of reporting the discrimination and was retaliated against which resulted in a medical emergency requiring hospitalization.

All of Petitioner's claims were dismissed on summary judgment and affirmed on appeal to the Ninth Circuit.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Nichol Royston was employed with the Scottsdale Police Department from 2005-2023. App. 5

In Jan. 2020, Petitioner had a baby and utilized twelve weeks of FMLA-protected maternity leave. App. 6. Six months after returning from maternity leave, Petitioner was diagnosed with stage three neuroendocrine cancer requiring major surgery. App. 6.

Since Petitioner exhausted her FMLA allotment with maternity leave, her request for surgery leave fell within the framework of the ADA as a request for reasonable accommodation.

In December 2020, Petitioner underwent major surgery to remove multiple organs and reconstruct her GI tract. App. 7. In February 2021, Petitioner returned from leave and asked permission to attend follow-up medical appointments due to her disability and offered to move them to her days off if it interfered with operations. Supervisor, Alexander Ristuccia granted the accommodation, but later this time was used against her. CA9.4-SER-942. Petitioner's work partner then retired and she asked for help from cross trained employees, as she was ill from surgery recovery, but was denied. App. 7.

On February 16, 2021, Petitioner passed an interview and administrative review for a transfer and was placed on a transfer list. App. 7. Petitioner then missed a day for cancer surgery recovery and expressed apprehension regarding her absence from work and explained she did not expect to continue to be absent. Mr. Ristuccia reassured her and told her "[t]ake the time you need." CA9.4-SER-1042. Petitioner then missed an additional day and a half and her Lieutenant, Christopher DiPiazza called for a meeting to rescind her job transfer and involuntarily transfer her to the most physically demanding position available to her without an ADA interactive process. App. 8. At no time did City personnel convey any apprehension regarding her use of leave or suggest that her position or transfer were in jeopardy.

In March 2021, a meeting was held to discuss Petitioner's medical absences, but Petitioner was not asked to participate. App. 9.

In accordance with Mr. Ristuccia's account: "Chief (Slavin) walked in." and "Uh, we're just having a discussion about (Nicole). And if she's going to be removed and what's going on." And I remember very vividly where he kind of put his hand down and said, "Oh, no, she's removed, she's out of the unit." CA9. 2-SER-457.

Mr. Ristuccia expressed his surprise, as he had anticipated that the meeting would entail a discussion of options. Nevertheless, no worthwhile alternatives were taken into account. Mr. Ristuccia said in the meeting, "[t]here was a concern that based on her medical issues, that, uh, could she fulfill the duties of a Patrol Police Aid" (CA9. 2-SER-459) and he was concerned she'd think, "Oh, my God, I'm having all these medical issues and I'm back on the road in a bullet-proof vest in a car, in the heat directing traffic accidents. CA9. 2-SER-473. Human Resources Senior Analyst Don Tellis also said in the meeting they "had the discussion that, um, the Department foresees that there will be some more extensive absences in the future." CA9. 2-SER-497. Commander Evans provided Petitioner's absence statistics from the past year and stated, "granted, it's - it's a combination of vacation, sick, FMLA, short-term disability, what-have-you." CA9. 2-SER-556. Mr. Ristuccia provided an attendance document showing management was tracking her time off since her return from cancer leave and need for future leave (CA9. 2-SER-368) and Lt. DiPiazza said, Petitioner was going "into these

FMLA leaves and short term disability and we just weren't staffed for that." CA9. 2-SER-534.

Petitioner was then informed by her chain of command that her transfer was denied, and she was being transferred because they heard through the "rumor mill" (CA9. 4-SER-1066) she might need more surgery, could take FMLA and they "expect her to be even - absent even more, um, due to her condition." (CA9. 2-SER-504. She was subsequently informed that she was being reassigned to patrol. App. 9. While her job title, rank and pay remained the same it changed her job wholesale.

Petitioner was never afforded an ADA interactive process or chance to explain her absences had been temporary, time-bounded medical incidents that would not recur as she was merely recovering from a major surgery and attending medical appointments she was told was told not to move to her days off. The position Petitioner was denied transfer then sat vacant for a year as Respondents admitted in their motion for summary judgment, "Once a transfer list is posted, it remains in effect for one year and the assignment cannot be reposted or filled by another PA." (DSOF ¶¶69-81.) Petitioner filed a grievance with the Chief's office and the very day she engaged in the protected activity, Lt. DiPiazza instructed Mr. Ristuccia to cease providing assistance to Petitioner while they knew she was working alone and recovering from a serious surgery. App. 10. The order to withhold help lasted 19 days, during which time Petitioner had a medical emergency on duty and was transported to the hospital and hospitalized and later diagnosed with "acute stress disorder." D. Ariz. ECF No. 487 at 2.

Mr. Ristuccia submitted an email to himself that served as a record of the instructions. He also documented Lt. DiPiazza's instruction to not allow anyone to cover Petitioner's work while she was hospitalized and what appeared to be a plan to interfere with her grievance process as he and Lt. DiPiazza "mutually realized she could not come in for the meeting if she was on FMLA. LT told Commander about this." Petitioner was then put on continuous FMLA, told she could not return to work without being cleared by a doctor and her grievance meeting was cancelled. (D. Ariz. ECF No. 60-1 at 2)

Petitioner's Oncologist later sent Respondent's an intermittent FMLA packet indicating she had medical limitations related to her disability. The request was for certification only and she did not request actual leave. App. 10. While the request was pending, in May 2021, Petitioner met with Chief Jeff Walther and Assistant Chief Richard Slavin to discuss the transfer and clarify that her cancer and associated symptoms prevented her from working patrol and was asked why she just didn't go on disability. CA9. 1-SER-40, App. 11.

Petitioner was unable to fulfill the duties of patrol which left her with no other choice than to enroll in the City's light-duty program which precluded her from working overtime. App. 11 Shortly thereafter, petitioner was approved for intermittent FMLA certification and Human Resources emailed the ADA Coordinator asking if they could accommodate her, but the ADA Coordinator never responded or initiated an ADA interactive process. D. Ariz. ECF No. 48-3 at 1.

An Internal Affairs investigation was initiated into Petitioner's claims, but it was overseen by the

defendants (top decision makers) who then signed off on petitioner's claims being "not sustained" and "unfounded." CA9. 3-SER-764-67. Petitioner was later transferred to patrol and filed suit thereafter. Petitioner was later medically separated. CA9. 2-SER-331. An EEOC charge was timely filed. App. 12.

II. Procedural Background

Petitioner commenced this action in the District of Arizona asserting claims under the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), Title VII of the Civil Rights Act of 1964, and related federal statutes arising from the rescission of her approved transfer and subsequent reassignment following cancer treatment and protected medical leave.

Respondent moved for summary judgment. The district court granted summary judgment in favor of Respondent and dismissed Petitioner's claims in their entirety. The district court concluded, inter alia, that Petitioner had not suffered an actionable adverse employment action because she retained her title, rank, and salary following the involuntary transfer. The retaliation claim was disposed of by accepting Respondent's reasoning that Lt. DiPiazza instructed Mr. Ristuccia to cease helping Petitioner – the same day she reported discrimination – merely due to operational purposes.

Petitioner timely appealed to the Ninth Circuit. On November 6, 2025, the Ninth Circuit affirmed in an unpublished disposition. The Ninth Circuit similarly concluded that Petitioner's transfer did not constitute actionable employment harm notwithstanding

evidence that the reassignment materially altered the terms and conditions of her employment.

Petitioner timely sought rehearing and rehearing en banc, both of which were denied on December 23, 2025.

Justice Kagan thereafter granted Petitioner an extension of time to file this Petition through May 22, 2026. This Petition follows.

REASONS FOR GRANTING THE PETITION

I. The Decision Conflicts with this Court's Precedent in *Muldrow v. City of St. Louis*

This case presents substantial questions concerning the reach of this Court's decision in *Muldrow v. City of St. Louis*, 601 U. S. 346 (2024). The Ninth Circuit relied upon pre-*Muldrow* decisions:

- *Samper v. Providence St. Vincent Med. Ctr.*, 675 F. 3d 1233, 1237 (CA9 2012) (explicitly rejected by *Exby-Stolley v. Bd. of Cnty. Commissioners*, 979 F. 3d 784, 810 (CA10 2020) as “an outlier”);
- *Murray v. Mayo Clinic*, 934 F. 3d 1101, 1105 (CA9 2019) (holding “but-for” causation standard applies to ADA discrimination claims under Title I).

It cited out of context dicta from *Muldrow* to conclude the Petitioner did not suffer an “injury respecting her employment terms or conditions.”¹ App. 3.

¹ “[T]he fact that the Court of Appeals’ order under challenge here is unpublished carries no weight in our decision to review the case[; . . .] regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.” *Commissioner v. McCoy*, 484 U. S. 3, 7 (1987)

This is a misreading of *Muldrow* which has been properly rejected by other courts. Indeed, *Muldrow* closely parallels the facts presented here.

In *Muldrow*, a female police officer alleged sex discrimination in violation of Title VII after her employer (the city) transferred her to a lesser position and replaced her with a male officer. While *Muldrow's* rank and pay remained unchanged with her new position, her responsibilities, perks, and schedule did not. The defendant had argued, among other things, that the Court should apply the "materially adverse" standard used in the retaliation context, such that the provision would apply only when the action was "materially adverse," meaning that it caused "significant" harm.

The Court disagreed, explaining that the test in the retaliation context sought "to capture those (and only those) employer actions serious enough to 'dissuade [] a reasonable worker from making or supporting a charge of discrimination.'" Thus, no such extra-textual reasoning is applicable to the discrimination bar, because the anti-discrimination provision simply "seeks a workplace where individuals are not discriminated against" because of traits like race and sex. Instead, the anti-discrimination provision "flatly 'prevent[s] injury to individuals based on' status, without distinguishing between significant and less significant harms."

Based on the statutory text, this Court held that "to make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment," but a plaintiff need not show that the harm incurred was "significant," "serious," "substantial," or otherwise exceeded some heightened bar. The plaintiff must show that the

transfer "brought about some "disadvantageous" change in an employment term or condition."²

This Court explained that "it does not matter ... that her rank and pay remained the same, or that she still could advance to other jobs." Instead, Muldrow need show only some injury respecting her employment terms or conditions. The transfer must have left her worse off, but need not have left her significantly so. And Muldrow's allegations, if properly preserved and supported, meet that test. Specifically, she was moved from a plainclothes job in a prestigious specialized division giving her substantial responsibility over priority investigations and frequent opportunity to work with police commanders. She was moved to a uniformed job supervising one district's patrol officers, in which she was less involved in high-visibility matters and primarily performed administrative work. Her schedule became less regular, often requiring her to work weekends; and she lost her take-home car.

Similarly in this case, Petitioner was removed from a "specialty assignment" in a two-person unit where she worked exclusively indoors, wore business casual clothing, and did administrative work and denied her transfer to a three-person unit where she would also work exclusively indoors, have a similar schedule, wear business casual clothing and do administrative work with the added benefit of work from home opportunities and a flexible schedule. App. 5. Petitioner

² In concurrence, Justice Kavanaugh stressed that the only question "is whether the relevant employment action changes the compensation, terms, conditions, or privileges of employment. A transfer does so." According to Justice Thomas, the perceived harm or injury must be "more than trifling," even if it does not rise to the level of "significant" or "material" harm.

was then transferred to a one-person position at a hybrid desk/patrol position that required indoor and outdoor work (in a patrol vehicle), had a different schedule, did not offer work from home opportunities or a flexible schedule and she had to wear a full police uniform with Kevlar vest, had investigative duties and carried a case load.

Under *Muldrow*, those allegations readily constitute "some harm respecting an identifiable term or condition of employment." The decision below nevertheless treated the absence of diminished title, rank, or pay as effectively dispositive. That approach cannot be reconciled with *Muldrow's* rejection of heightened harm requirements for discriminatory transfers.

The FMLA's restoration regulation confirms the same point: an equivalent position must be "virtually identical" to the employee's former position in terms of pay, benefits, working conditions, privileges, perquisites, and status, and must involve the same or substantially similar duties, responsibilities, skill, effort, responsibility, and authority. 29 C. F. R. § 825.215(a). Petitioner's reassignment was not virtually identical under that standard; it materially changed her duties, working conditions, physical demands, schedule flexibility, work location, and employment circumstances. Just because her title remained the same does not mean the reassignment complies with the statute or satisfies the regulatory definition of an equivalent position.

II. Lower Courts are Divided in Applying *Muldrow*

Post *Muldrow*, courts have held: (1) *Muldrow* applies to Title VII discrimination cases not involving

transfers (See *Arnold v. United Airlines, Inc.*, 142 F. 4th 460, 470 (CA7 2025); also *Peifer v. Bd. of Prob. & Parole*, 106 F. 4th 270, 277 (CA3 2024); and *Cole v. Grp. Health Plan, Inc.*, 105 F.4th 1110, 1114 (CA8 2024)); (2) Muldrow applies to discrimination claims under the ADEA (see *Milczak v. Gen. Motors, LLC*, 102 F. 4th 772, 787 (CA6 2024); also see *Mitchell v. Planned Parenthood of Greater N.Y., Inc.*, 745 F. Supp. 3d 68, 90–91 (SDNY 2024)); (3) Muldrow applies to ADA discrimination claims (See *Rios v. Centerra Grp. LLC*, 106 F.4th 101, 112 n.4 (CA1 2024); also see *Ver-saggi v. KLS Martin, L.P.*, 2024 WL 2290653, at *2 (CA5 May 21, 2024) and *Ananth v. Turner*, 2025 WL 973470 *10 (DDC Mar. 31, 2025)), illustrating the deviation from *Muldrow* that the Ninth Circuit took in this case. In *Ananth*, plaintiff repeatedly alleged that her work schedule directly affected her health, the court held that “Not being able to work one’s preferred schedule can ‘meet the standard of ‘some harm’ to the terms and conditions of her employment ... [if] they represent changes that negatively impact her work environment.” (quoting *Mitchell v. Garland*, 2024 WL 3251217, at *4 (DDC. July 1, 2024) (quoting *Muldrow*, 601 U. S. at 350))).

Alao v. District of Columbia is similar. 2025 WL 885202, *6–7 (DDC Mar. 21, 2025). The United States District Court for the District of Columbia found that the thrust of plaintiff’s ADA discrimination claim plausibly alleged the required adverse action “by alleging that her reassignment changed her employment conditions and made her worse off,” where plaintiff alleged that reassigning her “exacerbated” her “health condition” in several ways. *Ibid.*

In short, as these cases demonstrate, Petitioner more than meets the standards of *Muldrow*. The rescission of Petitioner's transfer and the subsequent transfer to patrol constituted adverse employment actions. Both actions constitute adverse employment actions regardless of whether she retained the identical job title, lost no pay, lost no rank, was not deprived of benefits, and had no effect upon her career.

The Ninth Circuit found that the City had non-discriminatory business reasons for taking the actions that it did. App. 3. It accepted the City's discretion why it needed to move Petitioner out of her original position but fails to provide a discriminatory justification for rescinding the transfer and, instead, transferred Petitioner to patrol.

Finally, the decision of the Ninth Circuit conflicts with those of other Circuits as to whether the adverse employment action was based upon a record of past absences or upon "an unfounded assumption" regarding her need for future absences. *Tyndall v. Nat'l Educ. Centers, Inc. of California*, 31 F. 3d 209, 214 (CA4 1994); see also *Overley v. Covenant Transport, Inc.*, 178 Fed. Appx. 488, 493 (CA6 2006) ("Courts have surmised that an employee would be protected under the statute if ... the employer's decision was based solely on an unsubstantiated belief that the employee would have to miss work because of the association."); *Deka v. Countryside Ass'n for People With Disabilities, Inc.*, 140 F. Supp. 3d 698, 707 (NDIL 2015) (plaintiff's multiple sclerosis caused her to seek FMLA medical leave).

III. The Courts of Appeals are Divided on Whether Employers May Rely On Protected Leave or Speculative Future Absences without Conducting the ADA's Required Individualized Analysis

At the center of this case is whether employers may treat prior use of federally protected leave and projected future absences as evidence of employee unreliability without conducting the individualized inquiry federal law requires. The decision below effectively permits employers to convert protected leave into a basis for adverse action.

This case does not present a challenge to attendance as an essential job function. Petitioner does not contend that regular attendance was nonessential, nor did she seek exemption from performing the core duties of her position. While the petition references details of Petitioner's own experience, those facts are not presented to focus solely upon an individual case, but to illustrate the broader struggles faced by countless Americans confronting cancer, serious illness, disability-related treatment, and federally protected leave while attempting to remain productive members of the workforce.

The ADA requires employers to conduct individualized inquiry, engage in a good-faith interactive process, and establish undue hardship before excluding or disadvantaging an employee because of disability-related limitations.

Respondents did not do so here.

Instead:

- Petitioner was removed based upon concerns regarding anticipated future absences;

- Prior protected leave was used against her; and
- No meaningful ADA interactive process occurred.
- The evidence offered to justify undue hardship was largely hearsay

Petitioner explained that her absences were finite, associated with recovery from major cancer surgery, and not expected to continue indefinitely. Nevertheless, Respondents relied upon predictive assumptions regarding future disability-related limitations.

This Court has not addressed whether employers may rely upon protected leave and speculative future absences to justify adverse action without conducting the individualized assessment required by the ADA. Lower courts are developing materially different approaches to this recurring issue.

The Equal Employment Opportunity Commission has emphasized that disability-related leave and attendance limitations must be evaluated through the ADA's interactive process and undue-hardship framework on a case-by-case basis. See EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (2016).

Several circuits recognize that finite medical leave, temporary limitations, and intermittent absences frequently require individualized analysis and often present factual disputes inappropriate for summary judgment:

Courts requiring individualized analysis / interactive process:

- First Circuit: Recognizes that medical leave may constitute a reasonable accommodation requiring individualized assessment rather than

categorical attendance assumptions. *Criado v. IBM Corp.*, 145 F. 3d 437 (CA1 1998);

- Sixth Circuit: Attendance and leave-related accommodation issues ordinarily require individualized inquiry. *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F. 3d 775 (CA6, 1998);⁸
- Ninth Circuit: Finite medical leave may constitute a reasonable accommodation where factual disputes exist regarding ability to return to work. *Nunes v. Wal-Mart Stores, Inc.*, 164 F. 3d 1243 (CA9 1999)
- Sixth Circuit (en banc): Accommodation determinations require a fact-specific inquiry focused upon actual job requirements and accommodation feasibility. *EEOC v. Ford Motor Co.*, 782 F. 3d 753 (CA6 2015)
- Tenth Circuit: Rejected rigid approaches inconsistent with the ADA's text and individualized-assessment framework. *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F. 3d 784 (CA10, 2020)

Courts allowing broader employer discretion/predictive leave:

- Seventh Circuit: Rejected extended leave as a reasonable accommodation where the employee was unable to work and not a "qualified individual" under the ADA. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017)
- Fourth Circuit: Recognized broader limits on accommodation theories tied to future work limitations and modified work structures. *Perdue v. Sanofi-Aventis U.S., LLC*, 999 F. 3d 954 (CA4 2021)

- Ninth Circuit (current case): The panel allowed reliance on prior protected leave and predictive absences without individualized inquiry, effectively broadening employer discretion.

The resulting divergence permits materially similar claims to receive different treatment depending upon jurisdiction.

Review is warranted to clarify that the ADA's individualized-assessment requirement cannot be displaced by predictive assumptions concerning future attendance at the summary-judgment stage.

IV. The Case Presents Important Institutional and National Consequences

The decision below carries sweeping consequences extending far beyond Petitioner's individual case. The questions presented are exceptionally important nationally because they arise at the intersection of three major federal statutory frameworks governing modern employment relationships: Title VII, the ADA, and the FMLA.

Millions of Americans rely upon federally protected leave and disability protections each year while recovering from childbirth, cancer treatment, major surgery, chronic illness, caring for loved ones with serious medical conditions, and other significant health-related circumstances. The ability of employees to utilize federally protected leave without fear that those absences will later be used against them is central to Congress's framework safeguarding equal employment opportunity and continued workforce participation for individuals facing serious medical conditions and disabilities.

The institutional stakes are substantial. Congress enacted the ADA specifically to replace decisions based upon stereotypes, assumptions, and generalized fears regarding disability with individualized assessment and objective analysis. The decision below also threatens the uniform administration of federal employment law nationwide. Since *Muldrow*, lower courts have struggled to determine what constitutes actionable employment harm and whether preexisting heightened-injury standards remain viable.

V. The Ninth Circuit's Decision is Wrong

Federal law prohibits employers from using protected leave as a basis for adverse action. Yet the Ninth Circuit allowed Respondents to rely on Petitioner's medical leave and anticipated absences to justify her removal.

Retaliation Mischaracterized: The Ninth Circuit deemed Petitioner's retaliation claim "moot" because assistance was allegedly withheld one day. In fact, help was withheld from April 16 to May 4, 2021—a period of *nineteen days*. App. 29.

Contested Evidence: Petitioner also identified *factual inaccuracies in documents submitted by supervisors*, which were nevertheless relied upon in the lower courts:

- *Absence statistics misrepresented the timeframe.* Commander Evans reviewed March 2020–March 2021, but Respondents submitted February 2021–February 2022 to the court. (Doc. 48-10 at 70)
- *Factual inaccuracies.* The record contains significant, outcome-determinative factual inaccuracies and disputed material facts that warrant

review by a jury. For example, Respondents asserted that no employees were cross-trained, yet dozens of internal investigation statements confirmed the opposite, and the job descriptions Respondents submitted expressly required backup coverage responsibilities. Respondents also stated, Petitioner "said that she did not want to go back to Patrol" (DSOF 209 Doc 46 at 12) but the record reflects she "indicated that there was ongoing health concerns. And - and, um, and - and some of the limitations she might have in working a Road assignment due to her health concerns." (2-SER-583-84)

- One of the evidence documents compared Petitioner to an employee in a completely different unit rather than to her work partner. In contrast, when compared to her partner, he *missed more time than her in two out of four years*. (D. Ariz. ECF No. 48-2 at 6)
- Petitioner corrected these inaccuracies during deposition, but the lower courts still relied on flawed and disputed documents in granting summary judgment. CA9. 1-SER-27-28.

Failure to Accommodate: The Ninth Circuit ruled there was no failure to accommodate. Petitioner, however, was removed due to absences tied to a known *cancer-related disability*. Respondents cannot plausibly claim ignorance of her need for accommodation. The ruling permits employers to penalize employees for the consequences of a known disability while avoiding the ADA's *interactive process*. App. 2.

The Core Employment Action. The lower courts focused on Petitioner's removal from her original

assignment, but the central issue is the rescission of her approved transfer.

Reasonable Jury Could Find Pretext: Viewed in the light most favorable to Petitioner, the record permits a reasonable jury to find Respondents' explanations inconsistent, unworthy of credence, and *pretextual*. This case illustrates the importance of the jury's role in assessing credibility, weighing conflicting evidence, and determining whether Respondents' stated reasons were legitimate or merely pretext for discrimination."

VI. This Case is an Excellent Vehicle

This case presents clean, recurring legal questions of broad national importance that are not dependent upon case-specific factual disputes.

There was no completed ADA interactive process, no undue-hardship determination, and no dispute that Petitioner utilized federally protected leave.

Rather, the questions presented concern whether employers may rely upon protected leave and projected future attendance concerns to justify adverse action and whether lower courts may continue imposing heightened injury standards after *Muldrow*.

The decision below rests upon legal conclusions regarding the scope of actionable employment harm and the permissibility of predictive attendance-based reasoning under the ADA and FMLA.

Because those questions were resolved at summary judgment and were dispositive below, this case presents an excellent vehicle for resolving recurring issues of substantial national importance.

CONCLUSION

This Court should grant certiorari.

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