No. 20-1357

IN THE

Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS, WELD COUNTY, COLORADO,

Petitioner,

v.

LAURIE EXBY-STOLLEY,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

Jason Wesoky
Counsel of Record
DARLING MILLIGAN, PC
1331 17th Street, Suite 800
Denver, CO 80202
(303) 623-9129
jwesoky@darlingmilligan.com

Counsel for Respondent

QUESTION PRESENTED

The question presented by petitioner Weld County improperly assumes the validity of a doctrine that has never been considered, let alone upheld, by this Court. In litigation under various federal laws outlawing employment discrimination, the lower federal courts often have required a plaintiff alleging disparate treatment to prove that she suffered a so-called "adverse employment action." This doctrine generally limits these laws' disparate-treatment coverage to claims alleging monetizable harm, such as job loss or demotion, and excludes a wide range of discriminatory employer conduct, such as employee transfers or shift changes that do not result in immediate monetary loss. An "adverse employment action" requirement appears nowhere in the text of these federal statutes (including in the Americans with Disabilities Act), which ban discrimination, without exception, in all "terms, conditions, and privileges" of employment.

If this Court were to overlook this antecedent issue and indulge the petition's assumption that the adverse-employment-action doctrine is valid, the question presented in this case would be:

Whether an "adverse employment action" is an element of a plaintiff's failure-to-accommodate claim under the Americans with Disabilities Act, which prohibits discrimination "in regard to" a disabled employee's "terms, conditions, and privileges of employment," 42 U.S.C. § 12112(a), and requires an employer to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual," *id.* § 12112(b)(5)(A).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTRODUCTION AND SUMMARY

Petitioner Weld County asks this Court to "clarify the elements" of a failure-to-accommodate claim under the Americans with Disabilities Act (ADA). Pet. 3. But, in reality, the County asks the Court to add a new requirement to the claim—that a plaintiff prove she suffered an "adverse employment action"—even though neither those words nor the meaning they have acquired in other employment-discrimination contexts appear anywhere in the ADA's text. The Court should decline that invitation because the County's petition meets none of the traditional criteria for review.

First, the County's question presented is not properly reviewable because it presupposes an affirmative answer to a crucial, logically antecedent question: whether the adverse-employment-action doctrine is valid. If the answer to that question is no—and it likely is—then the question presented would be meaningless. That the petition artificially separates the contrived question presented here from the antecedent question renders it unworthy of review. Moreover, as explained below, this Court is likely to soon address the antecedent question. It would be highly irregular to grant review on a question that depends on a doctrine that may soon be nullified.

Second, this case is a poor vehicle for review because the Tenth Circuit's remand authorizes the district court to reconsider respondent Laurie Exby-Stolley's constructive-discharge claim. Pet. App. 7a n.1. If Exby-Stolley proves constructive discharge on remand, the question presented would be moot because a constructive discharge is an "adverse

employment action" as defined by lower courts, making Exby-Stolley's failure-to-accommodate claim indisputably actionable. That serious impediment to review underscores a broader barrier: the non-finality of the Tenth Circuit's decision, which renders review of this case premature.

Third, despite the County's contrary assertion, no genuine split exists in the courts of appeals. No circuit has expressly confronted the question presented and then held that an "adverse employment action" is an element of an ADA failure-to-accommodate claim, the position advanced here by the County. If there were such a decision, the County surely would have directed this Court's attention to it—and the County has not.

Fourth, ADA failure-to-accommodate claims that do not also involve claims of job loss or demotion are rare. Therefore, the vast majority of failure-to-accommodate cases involve what the County itself views as an adverse employment action, so answering the question presented would affect only a small number of cases, making the question presented unworthy of review.

Finally, the Tenth Circuit's decision is correct. The ADA imposes on employers an affirmative duty to make reasonable workplace accommodations when an employee with a disability requests one unless accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). Any failure to fulfill that duty is an actionable violation. A reasonable accommodation concerning one's work is, by definition, an accommodation regarding the "terms, conditions, and privileges of employment," which is all that the statute requires. *See id.* § 12112(a). The

County's demand that the employee must suffer an additional "adverse employment action" has no foothold in the statutory text, and the Tenth Circuit properly rejected it.

Review should be denied.

STATEMENT OF THE CASE

I. Legal background

A. The Americans with Disabilities Act seeks to end discrimination against people with disabilities in all walks of life, including in employment. *See* 42 U.S.C. § 12101. It prohibits discrimination "against a qualified individual on the basis of disability in regard to" hiring, compensation, discharge, and "other terms, conditions, and privileges of employment." *Id.* § 12112(a). A disability is "a physical or mental impairment that substantially limits one or more of [an individual's] major life activities." *Id.* § 12102(1)(A). An individual is "qualified" if she can perform the "essential functions" of the job with or without "reasonable accommodation[s]," *id.* § 12111(8), including making workspaces more accessible, restructuring schedules, or providing different equipment, *id.* § 12111(9)(A)-(B); 29 C.F.R. § 1630.2(o)(2)(i)-(ii).

When an employee seeks a workplace accommodation, the employee and the employer are expected to work together in an "interactive process" to find a suitable accommodation. 29 C.F.R. § 1630.2(o)(3). An employer's failure to make "reasonable accommodations" for a person with a disability violates the ADA unless the accommodation "would impose an undue hardship" on the employer. 42 U.S.C. § 12112(b)(5)(A).

B. The phrase "terms, conditions, and privileges of employment" in the ADA mirrors nearly identical language in the ban on employment discrimination in Title VII of the Civil Rights Act of 1964. Pet. 5; *see* 42 U.S.C. § 2000e-2(a)(1). In "disparate treatment" suits under Title VII, the lower federal courts have often held that, to state a claim for relief, an employee must suffer what they call an "adverse employment action." As discussed below (at 14-15), this adverse-employment-action doctrine allows a significant amount of discriminatory conduct to escape redress and defies the statutory text, which simply prohibits "discriminat[ing] against an individual with respect to his … terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (Title VII); *see* 42 U.S.C. § 12112(a) (ADA).

Regardless of the validity of the adverse-employment-action doctrine in the disparate-treatment context, no circuit has squarely held that an ADA failure-to-accommodate plaintiff must prove an adverse employment action. *See infra* at 20-32.

II. Factual background

Respondent Laurie Exby-Stolley was a dedicated employee of petitioner Weld County for the better part of two decades. Tenth Circuit Appendix (CA10App.) 879, 882-83. As a health inspector, she put her master's degree in environmental policy to good use, inspecting restaurants, bars, and other institutions to ensure their safety. Pet. App. 141a; CA10App. 879. She tested safety practices, interviewed workers, and reported her results. Pet. App. 141a. She enjoyed her work, and she was good at it. CA10App. 23, 888.

Exby-Stolley fell at work while helping at a vaccine clinic in 2009, suffering serious injuries to her dominant right arm, wrist, and elbow. Pet. App. 141a; CA10App. 890. At first, her injuries were not properly diagnosed or treated. CA10App. 890-93. She continued to work with some restrictions, but her injury and a later reinjury restricted her movement and caused her constant pain. *Id.* at 891-93. Two surgeries did not alleviate the pain or restore full hand and arm function. Pet. App. 141a; CA10App. 893. She developed workarounds—what she called "[her] own … accommodations"—so she could complete her work with as little pain as possible, like assembling a fanny pack with jar openers and levers. CA10App. 894-96. Because she was learning to work with her non-dominant hand, she worked at a slower pace, and, because her work took longer, she could not complete the number of inspections generally expected of health inspectors. Pet. App. 141a; CA10App. 889.

While Exby-Stolley was undergoing treatment, the County temporarily changed her duties to follow her workers' compensation physician's restrictions. Pet. App. 141a-142a. Despite clarifying to her supervisors that she "ha[d] never said any of these tasks were impossible for [her] to carry out," CA10App. 479, Exby-Stolley was assigned part-time desk work that involved paperwork, phoning food vendors, and reviewing plans for body art parlors, food retail shops, and swimming pools instead of conducting inspections in the community. *Id.* at 482, 914. She was unhappy with her changed role. *Id.* at 915; Pet. App. 142a. She believed she "still could do

the job," CA10App. 888, and she "was hoping to continue" doing it. *Id.* at 911.

Exby-Stolley was eventually evaluated for permanent restrictions, and her physician found that she had a "43% impairment of the right upper extremity." Def.'s Mot. Summ. J., Ex. A. at 0579. She asked the County for workplace accommodations, explaining that she could perform all but the rarest of tasks with her fanny pack of tools if she were only given more time to perform them, CA10App. 897, 909-10, 928, and help on the rare occasion that she had to lift something heavy, *id.* at 887, 933; Pet. App. 142a. But her supervisors rejected her suggested accommodations, such as providing her with tools to lift objects, assigning her to projects that she could complete with her disability, or just some extra time, *see* CA10App. 23-24, 928, 909-10, and they did not offer alternatives, Pet App. 142a. One supervisor even suggested that she leave work and accept full-time disability. *Id.*

Finally, Exby-Stolley's second-level supervisor asked if she wanted him to write her letter of resignation or if she would do it herself. Pet. App. 142a; CA10App. 929. She was incredulous: "I give my right arm to Weld County, and this is what I get." CA10App. 928. Given this ultimatum, she resigned, in what Exby-Stolley maintains was a constructive discharge. Pet. App. 143a; *see infra* at 7-8.[1]

---

[1] We recognize that the County maintains that Exby-Stolley was not constructively discharged. *See* Pet. App. 144a-145a. The jury was barred from considering Exby-Stolley's constructive-discharge claim, but under the Tenth Circuit's en

III. Procedural background

A.1. Exby-Stolley sued, alleging that Weld County had violated the ADA by failing to accommodate her disability or engage in the interactive process and then terminating her when she could not perform all her job duties. Pet. App. 145a-146a.

Exby-Stolley sought reinstatement with reasonable accommodations, front and back pay, and compensatory damages, including for emotional distress and mental anguish. CA10App. 24-25; *see* Pet. App. 195a. She maintained that she had proposed—but the County did not provide—various reasonable accommodations so that she could continue to work. CA10App. 23-24. Exby-Stolley emphasized that she could not find new employment and was suffering anxiety after losing her job. *Id.* at 24.

Exby-Stolley further alleged that "the County fired her on the sole basis that her restrictions did not meet the listed physical requirements of her health inspector position." CA10App. 23. She maintained in the pretrial order that, despite her repeated requests, "[n]o accommodation was offered as an alternative" to resignation and that the County's actions were "tantamount to her termination." *Id.* at 317. The County's own records listed the reason for her separation as a termination

---

banc decision, the district court is authorized to consider it anew on remand, Pet. App. 7a n.1, which presents a serious barrier to this Court's review, *see infra* at 16-18.

for health reasons. Pl.'s Response to Summ. J., Ex. 23. Nonetheless, before trial, the district court refused to allow Exby-Stolley to pursue her constructive-discharge claim on the ground that she had not sufficiently alleged it. CA10 App. 705, 749.

2. The case went to trial. After the close of evidence, the district court instructed the jury on what it viewed as the elements of an ADA failure-to-accommodate claim, including that the plaintiff prove by a preponderance of the evidence that she (1) had a "disability," (2) was a "qualified individual," and (3) was "discharged from employment or suffered another adverse employment action." Pet. App. 146a. The jury was also instructed concerning causation, the undue-hardship defense, and damages. *Id.* at 146a n.1.

The jury instructions defined an "adverse employment action" as "a significant change in employment status, such [as] a hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Pet. App. 206a-207a.

The jury found Exby-Stolley had proved that she had a disability and was a qualified individual. Pet. App. 194a. The jury did not find, however, that she had "suffered another adverse employment action," *id.*, and so did not answer the remaining interrogatories, *id.* at 195a. Judgment was entered for the County. *Id.* at 196a.

B. Exby-Stolley appealed to the Tenth Circuit, arguing that an "adverse employment action" is not an element of an ADA failure-to-accommodate claim. Pet. App. 140a. She also argued that the district

court should have allowed her to submit her constructive-discharge claim to the jury and erred in not clearly placing the burden of proof for the undue-hardship defense on the County. *Id.*; *see* CA10App. 448.

A divided panel of the Tenth Circuit affirmed, holding that a plaintiff must not only establish a failure to accommodate but must also prove an "adverse employment action." Pet. App. 140a. Though the panel majority acknowledged that "adverse employment action" does not appear in the ADA's text, *id.* at 148a, it reasoned that the phrase is appropriate shorthand for an employment decision that affects the "terms, conditions, and privileges" of one's employment, *id.* at 153a. It observed that, generally, to prove an adverse employment action, an employee must be terminated or have her pay or benefits reduced. *See id.* at 173a-174a (providing examples). Therefore, Exby-Stolley's claim failed. *Id.* at 175a.

The panel majority also held that Exby-Stolley could not pursue her constructive-discharge claim. Pet. App. 176a. Because her amended complaint alleged only that the County's ADA violations "culminated" in her termination, the panel held that she had not properly alleged constructive discharge. *Id.* at 176a, 177a.

Judge Holmes dissented, rejecting the majority's view that an ADA failure-to-accommodate claim includes an adverse-employment-action element. Pet. App. 178a.

C. The Tenth Circuit granted Exby-Stolley's petition for rehearing en banc and reversed.

The en banc majority explained that 42 U.S.C. § 12112(a), which provides the ADA's general ban on employment discrimination "in regard to" an employee's "terms, conditions, and privileges" of employment, and 42 U.S.C. § 12112(b), which lists examples of discrimination, are "inextricably intertwined." Pet. App. 57a. Claims authorized by Section 12112(b), including a failure-to-accommodate claim, therefore "necessarily implicate" Section 12112(a)'s "terms, conditions, and privileges of employment." *Id.* at 58a. For that reason, the majority held, a failure-to-accommodate plaintiff need not make an additional showing that she suffered a so-called adverse employment action. *Id.* at 60a. Holding otherwise "would effectively involve adding language to the relevant statutory text that has no footing there." *Id.* at 62a. The majority also emphasized that no other circuit regularly demands that a failure-to-accommodate plaintiff prove an adverse employment action. *Id.* at 37a.

The majority stressed that an employer's duty to reasonably accommodate an employee with a disability is an affirmative obligation on employers, Pet. App. 17a, so it is "hard to imagine" that an employer breaches that obligation only when the employee shows that the employer took additional action that affected the employee's pay or benefits or led to some other monetizable injury, *id.* at 18a. If that were required, qualified individuals with disabilities could not, as the ADA envisions, access the same employment opportunities as individuals without disabilities. *Id.* at 27a.

Because the jury had based its verdict on a faulty instruction demanding proof of an adverse

employment action, the en banc court reversed and remanded for a new trial. Pet. App. 73a. In addition, because the question of undue hardship would likely recur in the new trial, the court clarified that undue hardship is an affirmative defense for which the County has the burden of proof. *Id.* at 76a. The majority decided not to address whether the district court erred in refusing to instruct the jury on constructive discharge or to allow Exby-Stolley to discuss constructive discharge in closing argument because "[t]he district court could address those matters on remand." *Id.* at 7a n.1.

Judge McHugh dissented on behalf of herself and five others. Pet. App. 76a. She reasoned that an employer violates 42 U.S.C. § 12112(a) when it discriminates against a qualified individual on the basis of disability and when the discrimination is "in regard to" the "terms, conditions, and privileges of employment." Pet. App. 78a. For that reason, she maintained, a plaintiff must also show "employment-related consequences" from the employer's failure to accommodate, such as disciplinary action or termination. *See id.* at 119a, 121a-122a.

The dissenters nonetheless questioned the validity of the adverse-employment-action doctrine itself. Judge McHugh noted that the doctrine has become "divorced" from the statutory text in both the Title VII and ADA contexts, Pet. App. 118a, but maintained that the error did not prejudice Exby-Stolley, *id.* at 124a. In a separate dissent, Judge Hartz expressed the same concern: that caselaw may have "too narrowly circumscribed what constitutes an adverse employment action." *Id.* at 128a. Because the issue was not raised before the panel, however,

he believed the en banc court should not opine on it. *Id.*

D. On remand in the district court, the case was assigned to a new judge, who set a new trial date, but that date was vacated pending resolution of this petition. Dist. Ct. Dkt. 253, 257, 259.

REASONS FOR DENYING THE WRIT

The petition should be denied because it improperly assumes an answer to a question that the petition does not pose and because it satisfies none of the traditional criteria for review.

I. Review should be denied because the petition improperly assumes an answer to a critical predicate question that the petition does not present.

This Court should not grant review before answering the predicate question whether the atextual adverse-employment-action doctrine is valid in a case, unlike this one, that properly poses that question. If the doctrine is *invalid*—and it likely is—then the question presented here need never be answered.

A. The question presented is whether an ADA reasonable-accommodation plaintiff must prove what the lower courts have called an "adverse employment action." This doctrine has arisen under statutes that ban disparate-treatment discrimination in hiring, firing, compensation, and other "terms, conditions, or privileges" of employment. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (Title VII); 29 U.S.C. § 623(a)(1) (Age Discrimination in Employment Act); 42 U.S.C. § 12112(a) (ADA).

Beyond hiring, firing, and compensation, the statutory phrase "terms, conditions, or privileges" refers to all other attributes of the employer-employee relationship with respect to which an employer may not discriminate. "Terms" are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third Dictionary 2358 (1961). A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third Dictionary 473 (1961). "Privilege" means to enjoy "a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third Dictionary 1805 (1961).[2]

Each of these words is defined broadly, together referring to "the entire spectrum of disparate treatment"—the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation omitted).

These anti-discrimination statutes, then, are not limited to injuries that employers or courts view as particularly harmful. Rather, the statutes establish no minimum level of actionable harm. "[T]erms, conditions, or privileges" of employment are all those workplace attributes that "affect employment or

---

[2] This brief cites to Webster's Third because it was published contemporaneously with enactment of Title VII, from which the adverse-employment-action doctrine arose.

alter the conditions of the workplace." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006). Thus, an employer who denies an employee's request for an ADA workplace accommodation has, by definition, denied an accommodation "in regard to" hiring, discharge, compensation, or "other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). This is true (of course) of Exby-Stolley, for whom the County denied work-related accommodations, such as modifying her job's physical requirements and providing tools so she could meet them. *See* CA10App. 23-24.

B. Yet, many lower federal courts have engrafted onto the Nation's antidiscrimination statutes an "adverse employment action" requirement wholly divorced from the statutory text. For example, the Third Circuit asks whether the discrimination is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004) (quotation marks omitted). "[L]ateral transfers" that involve changes to "title, office, reporting relationship and responsibilities" are "generally insufficient" to alter terms, conditions, or privileges of employment and so may not be remedied. *Langley v. Merck & Co.*, 186 F. App'x 258, 260 (3d Cir. 2006). In the Fifth Circuit, an "adverse employment action" is only an "ultimate employment decision"—a refusal to hire, a firing, a demotion, or the like. *McCoy v. City of Shreveport*, 492 F.3d 551, 559, 560 (5th Cir. 2007). And in the Tenth Circuit, there must be "a significant change in employment status, such [as] a hiring, firing, failing to promote, reassignment with significantly different

responsibilities, or a decision causing a significant change in benefits." Pet. App. 206a-207a (jury instruction below); *see Piercy v. Maketa*, 480 F.3d 1192, 1203-04 (10th Cir. 2007).

C. This Court has never addressed, let alone blessed, this atextual doctrine. *See Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (Easterbrook, J.) ("[H]undreds if not thousands of decisions" have reflexively held "that an 'adverse employment action' is essential to the plaintiff's prima facie case," even though this Court "has never adopted it as a legal requirement."). Yet the petition assumes its validity. The County's question presented thus accepts the adverse-employment-action doctrine as a proper interpretation of the simple statutory phrase "terms, conditions, and privileges" *outside of* the ADA reasonable-accommodation context and then blithely asks whether that doctrine applies in ADA reasonable-accommodation cases. *See* Pet. i.

D. The impropriety of reviewing the question presented without answering the predicate question is underscored by the fact that the adverse-employment-action doctrine is almost certainly invalid. The doctrine has drawn considerable criticism because, as indicated, it is at odds with the text of the laws it purports to interpret. *See Minor*, 457 F.3d at 634; *see also, e.g.*, *Chambers v. District of Columbia*, 988 F.3d 497, 503 (D.C. Cir. 2021) (per curiam) (Tatel & Ginsburg, J.J., concurring), *reh'g en banc granted* (May 5, 2021). Indeed, even the *dissenters* below seriously questioned the doctrine. *See* Pet. App. 118a, 128a.

This Court was recently asked to overturn the doctrine in *Peterson v. Linear Controls, Inc.*, No. 18-1401, and called for the views of the United States, 140 S. Ct. 387 (2019) (Mem.). The Solicitor General explained that interpreting "terms, conditions, or privileges" to cover only "'significant and material' employment actions" is "atextual and mistaken" and recommended a grant of certiorari. Br. for United States as Amicus Curiae at 6, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451 (Mar. 20, 2020). Though *Peterson* apparently settled, *see* Jt. Mot. to Defer Consideration of Pet. for a Writ of Cert., No. 18-1401 (May 28, 2020), and the petition was dismissed, *Peterson v. Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (Mem.), it is likely that this Court will soon have the opportunity to decide whether the adverse-employment-action doctrine is valid. Meanwhile, the Court should not grant review of a petition that improperly assumes its validity.

II. The petition presents a poor vehicle for review.

This case presents a poor vehicle for review for two related reasons. First, the key fact on which the question presented depends—that Exby-Stolley did not properly plead constructive discharge and thus cannot have suffered an adverse employment action—is subject to further review and possible revision under the express terms of the Tenth Circuit's remand. Second, the case's lack of finality renders this Court's review premature.

A. Exby-Stolley maintains that, after the County failed to accommodate her disability, she left her job after being told that she would be fired if she did not resign. As noted above (at 8), the district court did

not allow this constructive-discharge claim to go to the jury on the ground that it had not been adequately developed. Exby-Stolley disagreed, maintaining that she forthrightly pleaded and vigorously pursued that claim, *see supra* at 7-8, and that the County was well aware of the claim throughout the pre-trial proceedings. She sought reversal of the trial court's ruling at both stages of Tenth Circuit review. *See* Exby-Stolley CA10 En Banc Opening Supp. Br. 19-22; Exby-Stolley CA10 Panel Opening Br. 36-43.

After holding that an ADA failure-to-accommodate plaintiff need not prove an adverse employment action, the en banc Tenth Circuit remanded for a new trial, at which the jury instructions would be revised to comport with the court's rulings. Pet. App. 73a, 76a. The court expressly noted that it would not address "whether the district court erred in refusing to either allow her to instruct the jury on a claim of constructive discharge or to argue constructive discharge in closing argument. *The district court may address those matters on remand*." Pet. App. 7a n.1 (emphasis added). The petition stresses the district court's initial treatment of the constructive-discharge claim, Pet. 31, but ignores the terms of the Tenth Circuit's remand on that claim.

But that passage is critical. If, on remand, the district court allows Exby-Stolley's constructive-discharge claim to proceed, or simply allows her to argue to the jury that her constructive-discharge flowed from the County's failure to accommodate, the question presented would likely fall out of the case because the County agrees, as it must, that

discharge is an "adverse employment action." *See* Pet. 31. Thus, if the Tenth Circuit's remand is allowed to run its course, this Court's intervention would likely be unnecessary even if the County's view that a failure-to-accommodate plaintiff must prove an "adverse employment action" were indulged. This case is therefore a particularly poor candidate for review, and the petition should be denied for this reason alone.

B. That the district court may revive Exby-Stolley's constructive-discharge claim on remand underscores a broader impediment to review: the non-finality of the Tenth Circuit's judgment. Although this Court sometimes grants review of petitions from interlocutory court of appeals rulings, "[o]rdinarily, this Court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.I.18, at 282 (10th ed. 2013) (quotation marks omitted) (citing cases); *see also Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (*VMI*) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

The posture of this case is anything but extraordinary, and the decision below is the antithesis of final. The court of appeals sent the case back to the district court to conduct a new trial that has yet to begin. At that trial, the County will maintain all its defenses, including that its

accommodations (if any) were reasonable and that the accommodations sought by Exby-Stolley would have imposed an undue burden. *See* Pet. App. 202a-204a, 206a.

The Tenth Circuit's ruling is thus a less appropriate vehicle for immediate review than was the *VMI* case, where this Court denied review from an interlocutory court of appeals' ruling. There, the Fourth Circuit had issued a final decision holding that Virginia's sponsorship of a military college for men only was unconstitutional, but the district court had not yet ruled on the appropriate remedy. This Court denied certiorari, apparently on the ground that the decision was not sufficiently final because the remedy phase was ongoing. *See VMI*, 508 U.S. at 946 (opinion of Scalia, J., respecting the denial of certiorari). The Court recognized that there would be time to review the decision, if necessary, after a remedy was issued, *see id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, by contrast, there is no decision regarding the County's liability, let alone the appropriate remedy.

Exby-Stolley believes she will prevail on remand, and, if she does, the County may appeal from the final decision and ultimately petition this Court on the nonfinal question on which it now seeks premature review (and on any other properly preserved federal issue). *See VMI*, 508 U.S. at 946 (opinion of Scalia, J., respecting the denial of certiorari) (citing cases). And if the County prevails on remand, it will have achieved its goal in the litigation without this Court's intervention.

Moreover, unlike *VMI*, which was idiosyncratic, if the County is correct here that the issue presented is likely to recur, Pet. 23-24, any number of appropriate future vehicles would allow this Court to resolve the issue. *But see infra* at 32-33 (explaining that the question presented rarely arises). In the meantime, the Court should stay its hand and allow the litigation to run its course.

III. The claimed circuit split does not exist.

The majority of circuits have made clear that an ADA failure-to-accommodate plaintiff need not prove an "adverse employment action," and, as the en banc majority correctly observed, "*none* of our sister circuits has regularly incorporated an adverse-employment-action requirement into an ADA failure to accommodate claim," Pet. App. 37a.

Critically, all six circuits that have issued model jury instructions for an ADA failure-to-accommodate claim list its elements and do not include an adverse-employment-action element.[3] *See* Pet. App. 41a-42a

---

[3] *See Model Civil Jury Instructions for the Dist. Courts of the Third Circuit* § 9.1.3, at 18 (Comm. on Model Civil Jury Instructions within the Third Circuit, updated 2019); *Pattern Jury Instructions (Civil Cases) for the Fifth Circuit* § 11.10, at 200-01 (Comm. on Civil Pattern Jury Instructions Fifth Circuit District Judges Ass'n 2020); *Fed. Civil Jury Instructions of the Seventh Circuit* § 4.03, at 89 (Comm. on Pattern Civil Jury Instructions of the Seventh Circuit, rev. 2017); *Manual of Model Civil Jury Instructions for the Dist. Courts of the Eighth Circuit* § 9.42, at 9-28 (Comm. on Model Jury Instructions for the Dist. Courts of the Eighth Circuit 2020); *Manual of Model Civil Jury Instructions for the Dist. Courts of the Ninth Circuit* § 12.7, at 292-93 (Ninth Circuit Jury Instructions Comm.,

nn.10 & 11, 43a-44a, 46a-47a, 50a. The County asserts that these instructions do not necessarily establish circuit precedent, Pet. 20, 22, but that misses the point. These model instructions show that, in the real world, juries considering ADA failure-to-accommodate cases are not told that they must find an "adverse employment action," and, tellingly, absent the decision below, the County has not pointed to a single case in which a jury was instructed that it was required to do so.

We now review each circuit's case law, respond to the County's claim of a circuit split, and show that no split exists.

---

updated 2021); *Eleventh Circuit Pattern Jury Instructions* (Civil Cases) § 4.12, at 1 (Comm. on Pattern Jury Instructions of the Eleventh Circuit Judicial Council, rev. 2020).

Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits. As the County acknowledges, Pet. 13-16, the Fourth,[4] Fifth,[5] Sixth,[6] Seventh,[7] Tenth,[8] and Eleventh[9] Circuits do not require a failure-to-accommodate plaintiff to prove an adverse employment action. Similarly, as the County recognizes, Pet. 16, the Third Circuit equates any failure to accommodate with an adverse employment action.[10]

---

[4] *See Adams v. Anne Arundel Cnty. Pub. Schs.*, 789 F.3d 422, 432 (4th Cir. 2015); *Rhoads v. FDIC*, 257 F.3d 373, 387 n.11 (4th Cir. 2001).

[5] *See Dillard v. City of Austin*, 837 F.3d 557, 562 (5th Cir. 2016); *EEOC v. LHC Group, Inc.*, 773 F.3d 688, 703 n.6 (5th Cir. 2014); *Feist v. Louisiana, Dep't of Just., Off. of the Att'y Gen.*, 730 F.3d 450, 452 (5th Cir. 2013).

[6] *See Brumley v. United Parcel Serv., Inc.*, 909 F.3d 834, 839 (6th Cir. 2018); *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 n.2 (6th Cir. 2007); *Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997).

[7] *See Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 224 (7th Cir. 2015); *EEOC v. AutoZone, Inc.*, 630 F.3d 635, 638 n.1 (7th Cir. 2010); *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1283 (7th Cir. 1996).

[8] *See* Pet. App. 10a.

[9] *See Batson v. Salvation Army*, 897 F.3d 1320, 1326 (11th Cir. 2018); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1225-1226 (11th Cir. 2005); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001).

[10] *See Colwell v. Rite Aid Corp.*, 602 F.3d 495, 504 (3d Cir. 2010); *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 761 (3d Cir. 2004); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d. Cir. 1999).

First Circuit. Contrary to the petition's assertion (at 17-18, 25), the First Circuit, also does not require a failure-to-accommodate plaintiff to prove an adverse employment action. In *Carroll v. Xerox Corp.*, 294 F.3d 231, 237-38 (1st Cir. 2002), the court explained that, in contrast to a disparate-treatment claim, a reasonable-accommodation claim does not require an adverse employment action.

As its model jury instructions indicate, *see supra* note 3, the First Circuit has set out the prima facie case with no mention of an adverse-employment-action element, explaining that a failure-to-accommodate plaintiff must show only that "(a) she is disabled within the ADA's definition; that (b) she could perform the job's essential functions either with or without a reasonable accommodation; and that (c) the employer knew of her disability, yet failed to reasonably accommodate it." *Lang v. Wal-Mart Stores E., L.P.*, 813 F.3d 447, 454 (1st Cir. 2016) (citing *Rocafort v. IBM Corp.*, 334 F.3d 115, 119 (1st Cir. 2003)).

And in *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999), the First Circuit explained that "an employer who knows of a disability yet fails to make reasonable accommodations violates the statute, no matter what its intent, unless it can show that the proposed accommodations would create undue hardship for its business." Though it went on to note that a plaintiff must show that the failure to accommodate "affected the terms, conditions, or privileges" of employment, *id.*, the court neither equated that phrase with an "adverse employment action" nor discussed the need

for one in its failure-to-accommodate analysis, *see id.* at 264-65.

The County's reliance (at 18) on a decade-old dictum in *Colón-Fontánez v. Municipality of San Juan*, 660 F.3d 17 (1st Cir. 2011), is misplaced. There, the First Circuit appears to have conflated in passing the elements of a failure-to-accommodate claim and a disparate-treatment claim, but the court did not discuss the adverse-employment-action element because the plaintiff failed to establish that she was a "qualified individual" with a disability. *Id.* at 32. That the First Circuit does *not* require proof of an adverse employment action is underscored by a raft of its failure-to-accommodate decisions making no mention of an adverse-employment-action element.[11]

Second Circuit. The Second Circuit also does not require proof of an adverse employment action in failure-to-accommodate claims. *See, e.g.*, *Woolf v. Strada*, 949 F.3d 89, 93 (2d Cir. 2020); *McBride v. BIC Consumer Prod. Mfg. Co., Inc.*, 583 F.3d 92, 96-97 (2d Cir. 2009).

The County asserts that the Second Circuit "has repeatedly held" that an ADA failure-to-

---

[11] *See, e.g.*, *Sepúlveda-Vargas v. Caribbean Rests., LLC*, 888 F.3d 549, 553 (1st Cir. 2018); *EEOC v. Kohl's Dep't Stores, Inc.*, 774 F.3d 127, 131-32 (1st Cir. 2014); *see also Enica v. Principi*, 544 F.3d 328, 338 (1st Cir. 2008) (not requiring an adverse employment action in a failure-to-accommodate claim under the Rehabilitation Act, which has the same standards as the ADA); *Calero-Cerezo v. DOJ*, 355 F.3d 6, 19, 20 (1st Cir. 2004) (same).

accommodate claim requires an "adverse employment action." Pet. 18. But the two cases cited by the County do nothing of the sort. Neither decision addressed whether the plaintiff had properly stated a failure-to-accommodate claim; rather, both suits failed because the plaintiff had not shown that the alleged failure to accommodate *caused* the plaintiff's injury—injuries (discharge and demotion) that no one could dispute are "adverse employment actions." *See Parker v. Sony Pictures Ent., Inc.*, 260 F.3d 100, 108 (2d Cir. 2001) (no causation shown for alleged discriminatory discharge); *Natofsky v. City of New York*, 921 F.3d 337, 352-53 (2d Cir. 2019) (no causation shown between failure to accommodate, plaintiff's negative performance reviews, and his allegedly discriminatory demotion). Indeed, when *Natofsky* set out the elements of what it called the "*prima facie* case of discrimination based on an employer's failure to accommodate a disability," it nowhere mentioned an adverse-employment-action element. *Id.* at 352.

Not surprisingly, when actually analyzing failure-to-accommodate claims, the Second Circuit has not referred to an adverse-employment-action requirement. *See e.g.*, *Noll v. Int'l Bus. Machines Corp.*, 787 F.3d 89, 94 (2d Cir. 2015); *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 184 (2d Cir. 2006); *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999).

The County suggests that the Second Circuit has omitted mention of a supposed adverse-employment-action requirement only when "it was obviously satisfied." Pet. 19. That is not accurate. For instance, in *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127 (2d

Cir. 2008), the harm to the plaintiff was transfer to a more menial position, *id.* at 134, yet the Court discussed the adverse-employment-action element only in its discrimination analysis, not in its failure-to-accommodate analysis, *id.* at 134-36. And, in *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1515, 1517 (2d Cir. 1995), the court held that the plaintiff—a current employee with physical impairments seeking a parking space near her office—had stated a failure-to-accommodate claim, without any discussion of whether the plaintiff had suffered an adverse employment action. *See also id.* at 1515 (setting out the elements of the claim, with no mention of adverse-employment-action element).

Eighth Circuit. The Eighth Circuit has not regularly incorporated an adverse-employment-action element into a failure-to-accommodate claim. *See, e.g.*, *Nahal v. Allina Health Sys.*, 842 Fed. App'x 9, 10 (8th Cir. 2021).

Consistent with its model jury instructions, *see supra* note 3, that court recently set out the prima facie failure-to-accommodate case without mentioning an adverse-employment-action element. *See Garrison v. Dolgencorp, LLC,* 939 F.3d 937, 942 (8th Cir. 2019). In contrast, the plaintiff in that case could not prevail on her retaliation claims because "[f]or these claims, [she] would need to prove that [the defendant] took an adverse employment action against her." *Id.* at 942.

The petition asserts (at 18-19) that the Eighth Circuit has "consistently" required an adverse employment action, but none of the decisions it cites turned on that issue, let alone expressly ruled that an adverse employment action is a necessary

component of a failure-to-accommodate claim. One plaintiff could not show he was a qualified individual with a disability so "his claim fail[ed] on that basis," *Gardea v. JBS USA, LLC*, 915 F.3d 537, 543 (8th Cir. 2019), and another survived summary judgment on whether he satisfied the adverse-employment-action element, so the court did not need to address if the element itself was required, *see Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 717-18 (8th Cir. 2003). Another decision specifically noted that it was treating the plaintiff's disability-discrimination claim and her failure-to-accommodate claim as a single claim because both the district court and the plaintiff had treated them that way. *See Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 631 n.4 (8th Cir. 2016). And the County's last case, *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004), is doubly inapposite because it arose under state law, *id.* at 781 n.1, and the plaintiff was fired, *id.* at 788, making the claim actionable whether an adverse-employment-action element was required or not.

The County tellingly acknowledges (at 20-21) that recent Eighth Circuit decisions describe the prima facie failure-to-accommodate case without an adverse-employment-action element but asserts that earlier decisions mentioning the element trump under the "prior panel rule." That argument fails on its own terms, however, because other decisions pre-dating those cited by the County do not mention an adverse-employment-action requirement in their reasonable-accommodation analyses and in describing the prima facie case. *See Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002)

(Rehabilitation Act case); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136-37 (8th Cir. 1999).

Ninth Circuit. The Ninth Circuit also has not regularly viewed an "adverse employment action" as an element of a failure-to-accommodate claim. *See, e.g.*, *Snapp v. United Transp. Union*, 889 F.3d 1088, 1095 (9th Cir. 2018); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1133, 1139 (9th Cir. 2001).

The County is simply wrong that *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010), suggests that an "adverse employment action" is required. *See* Pet. 21. The court there explained that the "benefits and privileges" of employment encompass everything other employees enjoy, such as "understanding and participating in mandatory departmental meetings," 620 F.3d at 1111, or job trainings, *id.* at 1113. A failure-to-accommodate analysis, then, "focuses on whether, in regard to the privileges of [the employee's] employment, [the employer] provided reasonable accommodations to [the employee's] known physical limitations." *Id.* at 1110. The plaintiff there was still employed, and, ultimately, the Court allowed the failure-to-accommodate claim to proceed past summary judgment with no discussion of an adverse-employment-action element. *Id.* at 1114.

Though some Ninth Circuit opinions do mention that element in failure-to-accommodate cases, the court has explained that a failure-to-accommodate analysis is often similar to the analysis for other ADA claims because "the consequence of the failure to accommodate is … frequently unlawful termination." *Humphrey*, 239 F.3d at 1139. The petition lists Ninth Circuit decisions that simply

mention an adverse-employment-action element in the prima facie case, but in all of them, the plaintiff suffered an obvious adverse action, and in all but one, the plaintiff's claim also failed on other grounds. The issue was therefore not directly presented or outcome-determinative in any of the cases.[12]

When the Ninth Circuit has addressed head-on what the ADA's accommodation requirement means, it has been clear that the duty exists in *all* cases. Employers must "provide modifications that enable an employee to enjoy equal benefits and privileges of employment as other employees." *EEOC*, 620 F.3d at 1111 (quotation marks omitted). This understanding dovetails with that court's model jury instructions, which do not include an adverse-employment-action element. *See supra* note 3.

D.C. Circuit. The D.C. Circuit does not require a failure-to-accommodate plaintiff to show an adverse employment action. *See Aka v. Washington*

---

[12] *See Braunling v. Countrywide Home Loans Inc.*, 220 F.3d 1154, 1156, 1157 (9th Cir. 2000) (plaintiff was fired but could not show that she was qualified); *Allen v. Pacific Bell*, 348 F.3d 1113, 1115 (9th Cir. 2003) (plaintiff was fired but could not show that his former employer had failed to engage in the interactive process); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1236, 1237 (9th Cir. 2012) (plaintiff was fired but could not prove that she was able to perform the essential functions of the position). In *Mickaelson v. Cummins, Inc.*, 792 F. App'x 438, 440 (9th Cir. 2019), the court devoted just one sentence to the reasonable-accommodation analysis, suggesting a need for an "adverse employment action" but rejecting the plaintiff's claim because his firing was not causally related to his disability.

Hosp. Ctr., 156 F.3d 1284, 1300 (D.C. Cir. 1998) (en banc); *Hill v. Assocs. for Renewal in Educ., Inc.*, 897 F.3d 232, 237 (D.C. Cir. 2018). That court has explained simply that "it is discriminatory for a covered employer to decline to take reasonable steps to accommodate an employee's disability, unless the steps in question 'would impose an undue hardship on the operation of the business' of the employer." *Aka*, 156 F.3d at 1300 (quoting 42 U.S.C. § 12112(b)(5)(A)).

The County (at 16) mischaracterizes D.C. Circuit precedent by building its argument around a decision predating that court's en banc ruling in *Aka*, 156 F.3d 1284. Though *Marshall v. Federal Express Corp.*, 130 F.3d 1095 (D.C. Cir. 1997), explained that a failure-to-accommodate claim must be "in regard to some adverse personnel decision or other term or condition of employment," it also made clear that "if working conditions inflict pain or hardship on a disabled employee, the employer fails to modify the conditions upon the employee's demand, and the employee simply bears the conditions, this could amount to a denial of reasonable accommodation, despite there being no … adverse personnel action." *Id.* at 1099. The D.C. Circuit recently elaborated on *Marshall*, explaining that a "reasonable jury could conclude that forcing [the plaintiff] to work with pain when pain could be alleviated by his requested accommodation violates the ADA." *Hill*, 897 F.3d at 239.

Further, *Marshall* did not purport to set out the prima facie case for ADA failure-to-accommodate claims, and, in other decisions, the D.C. Circuit has done so without mentioning an adverse-employment-

action element. *See Hill*, 897 F.3d at 237. And the circuit's recent decisions under the Rehabilitation Act, the elements of which track the ADA's, also do not mention an adverse-employment-action element when describing the prima facie case. *See Reagan-Diaz v. Whitaker*, 748 F. App'x 353, 354 (D.C. Cir. 2019); *Solomon v. Vilsack*, 763 F.3d 1, 5, 9 (D.C. Cir. 2014).

The County's description of *Duncan v. Washington Metropolitan Transit Authority*, 240 F.3d 1110, 1114 (D.C. Cir. 2001) (en banc), is misleading. *See* Pet. 16-17. The plaintiff there alleged two separate claims: that his employer violated the ADA by not accommodating his disability *and* by firing him. *Id.* at 1113. The court did not distinguish between the two claims, stating only that "an ADA plaintiff must prove that" he was disabled, qualified and that he suffered an adverse action. *Id.* at 1114. Moreover, the plaintiff's claim failed because he had not shown he had a disability, so the passing reference to an adverse-employment-action element was not outcome-determinative. *Id.*

Federal Circuit. The petition's last cited case (at 23) merely notes without analysis that a "plaintiff claiming a violation of the ADA" must show four elements, including an "adverse employment action." *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633, 639 (Fed. Cir. 2004). But other decisions explain that a "qualified individual with a disability is thus entitled to a reasonable accommodation, absent any statutory qualification that may limit the employer's duty to provide such an accommodation." *Office of Senate Sergeant at Arms v. Office of Senate Fair Emp. Practices*, 95 F.3d

1102, 1107 (Fed. Cir. 1996) (interpreting the Government Employee Rights Act, which incorporates relevant ADA provisions); *Thibeault v. Merit Sys. Prot. Bd.*, 611 F. App'x 975, 977 (Fed. Cir. 2015) (same under the Rehabilitation Act).

* * *

As shown, no genuine circuit split exists. A canvas of the case law shows that, at most, there is a smattering of arguable *intra*-circuit differences expressed in sporadic dicta or in seemingly inadvertent, passing references to the components of a prima facie case. When expressly determining the elements of a failure-to-accommodate claim, consistent with the circuits' model jury instructions, no circuit has held that an adverse employment action is required.

IV. A failure-to-accommodate claim divorced from job loss or demotion is rare, rendering the question presented unworthy of review.

As just shown, only a small number of decisions in the three decades since the ADA's enactment have squarely considered and resolved the question whether an "adverse employment action" is an element of a failure-to-accommodate claim. The vast majority of the time, those bringing failure-to-accommodate claims have also been demoted, fired, or constructively discharged—which all courts would agree is an "adverse employment action"—so the question presented does not arise. The Tenth Circuit panel majority made exactly this point. *See* Pet. App. 173a n.10. Indeed, but for the district court's refusal to allow Exby-Stolley's constructive-discharge claim

to go to the jury—a refusal now subject to revision on remand, *see supra* at 16-18—the issue probably would not have arisen here either.

The dearth of relevant cases shows that the ADA's accommodation mandate generally works—most employees do not need to sue for a reasonable accommodation because their employers know that they must provide one and may not fire an employee to avoid doing so. Put differently, employers already "know what acts will expose [them] to liability" when employees ask for accommodations. Pet. 24.

The County asserts that ADA cases, like all "[c]ivil-rights cases[,] are a mainstay of federal-question jurisdiction." Pet. 23. It gestures toward the "[t]housands of ADA employment claims" filed in federal court. *Id.* at 24. In this, the County is correct, but its lens is far too wide, overlooking that the question presented implicates only a tiny sliver of all ADA cases. *See* Pet. App. 173a n.10.

Review should be denied for this reason as well.

V. The Tenth Circuit's ruling is correct.

A. The Tenth Circuit correctly determined that an "adverse employment action" is not an element of an ADA failure-to-accommodate claim. Its decision reflects straightforward analysis of the ADA's text, which mandates that employers may not "discriminate against a qualified individual on the basis of disability in regard to … terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Subsection (b) then goes on to "particularize[] and make[] concrete [subsection (a)'s] rule" with "examples of the kinds of disability discrimination that" are "in regard to … terms, conditions, and

privileges of employment." Pet. App. 9a. One example is "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). An employer who fails to provide accommodations, then, has discriminated on the basis of disability, violating the ADA. *See id.* § 12112(a).

1. The County asserts that this language requires that an employer's failure to accommodate result in a "material impact on the 'conditions' or 'privileges' of employment," Pet. 27, or, as the district court's jury instructions mandated, "a significant change in employment status, such [as] a hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," Pet. App. 206a-207a. But, as just explained, the statute requires only that a failure to accommodate be "in regard to" an employee's "terms, conditions, and privileges of employment." *See* 42 U.S.C. § 12112(a).

When an accommodation "is reasonable and enables an employee to perform the essential functions of the job," it "necessarily pertains to her terms, conditions, and privileges of employment." CA10 U.S. Br. 21. When "an adjustment or modification is job-related, *e.g.,* specifically assists the individual in performing the duties of a particular job" in any way, it can be a "reasonable accommodation." 29 C.F.R. pt. 1630 app. § 1630.9. As the Tenth Circuit put it, a failure to accommodate thus "necessarily—indeed, as a matter of logic and common sense—must involve (*i.e.*, be 'in regard to')

that qualified person's 'terms, conditions, and privileges of employment.'" Pet. App. 52a.

2. As discussed above (at 13-14), the statutory phrase "terms, conditions, and privileges of employment" embraces all attributes of the employer-employee relationship. "In regard to" also "generally has a broadening effect," indicating that the text should be understood "expansively." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018). Showing a "direct relation to or impact on" something, no matter how small, is enough to be "in regard to" it. *Id.*

The ADA's accommodation mandate is capacious by design. Diluting that mandate by adding an "adverse employment action" element—as that element has been defined in disparate-treatment doctrine by the lower courts—would impermissibly shrink its reach and engraft onto the ADA a requirement that "does not expressly appear in [its] plain terms." Pet. App. 10a. The County's position thus would "rewrite the statute that Congress has enacted," *see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018) (quotation marks omitted), allowing prohibited discrimination to go unremedied.

B. Requiring a failure-to-accommodate plaintiff to prove an "adverse employment action" would severely weaken the ADA's affirmative obligation on employers to accommodate employees with disabilities. Section 12112(b)(5)(A) creates a duty to accommodate known limitations. *See* Pet. App. 20a-21a. A failure to fulfill that duty is actionable because the ADA "requires preferences in the form of 'reasonable accommodations" that allow people with disabilities "to obtain the *same* workplace

opportunities" as other employees. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002). A scheme requiring the further harm demanded by the adverse-employment-action doctrine to trigger the accommodation duty would make no sense because it would require employees to suffer the very harms—job loss or demotion—that the duty seeks to prevent in the first place. *See* Pet. App. 27a-28a.

An example illustrates the point. Consider a sales associate at the local big-box store. He suffers from chronic pain, which is exacerbated by prolonged standing. Though he can complete a normal shift standing at the register like other employees, the pain exhausts him so much that he cannot cook dinner for his family, give his children baths, walk the family dog, or participate in local community groups. He is disabled under the ADA because he suffers from a physical impairment "that substantially limits one or more [of his] major life activities." 42 U.S.C. § 12102(1)(A).

He asks his manager to provide a tall, orthopedic chair that would allow him to sit while at the register with less pain and to have a more normal life outside of work. The chair is not cheap, but its purchase would not pose an undue hardship on the employer. Because the employee loves his job and needs his paycheck, he will stay whether his employer provides the chair or not. Wanting to save the company money, his manager refuses the accommodation. The employee remains in constant pain, and, though many employees would quit under these circumstances, he soldiers on.

According to the County, this refusal to accommodate is perfectly lawful because the

employee has not suffered an "adverse employment action." In light of the text and purpose of the ADA's accommodation mandate, that position cannot be right, and the Tenth Circuit properly rejected it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jason Wesoky
Counsel of Record
DARLING MILLIGAN, PC
1331 17th Street, Suite 800
Denver, CO 80202
(303) 623-9129
jwesoky@darlingmilligan.com

May 26, 2021