Case No. 16-1412

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LAURIE EXBY-STOLLEY,
Plaintiff – Appellant,

v.

BOARD OF COUNTY COMMISSIONERS,
WELD COUNTY, COLORADO,
Defendant – Appellee.

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC* AND REVERSAL

Appeal from the United States District Court District of Colorado

The Honorable Wiley Y. Daniel

Originating Case No. 13-cv-01395-WYD-NYW

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DISCLOSURE STATEMENT

No *amici curiae* have parent corporations or are publicly held corporations.

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STATEMENT OF AMICI CURIAE

The Colorado Plaintiff Employment Lawyers Association (PELA) is Colorado's largest professional organization comprised of lawyers who represent employees in cases involving employment law violations. PELA, founded in 1985, is a nonprofit organization created to increase awareness of the rights of employees and workplace fairness. PELA is dedicated to preserving laws protecting workers from unfair employment practices. PELA is committed to protecting workers from historically disadvantaged groups and enforcing laws protecting these individuals from discrimination.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the

Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

Authority to File.

Amici Curiae have authority to file this brief if the Court grants the Motion for Leave to File *Amici Curiae* Brief in Support of Appellant's Petition for Rehearing *En Banc*.

29(a)(4)(E) Statement.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or person other than *amici* and their members contributed money towards the preparation or filing of this brief.

ARGUMENT

A. The Majority Opinion Contravenes Other Circuit Authority and the ADA's Plain Language and Structure.

The majority opinion in *Exby* requires proof of a disparate-treatment style "adverse action" even in failure-to-accommodate claims. Maj. Op. p. 13, 31. This holding is inconsistent with other circuits and creates a circuit split. It is also inconsistent with the plain language and structure of the Americans with Disabilities Act and its implementing regulations.

Circuit courts agree that a *disparate-treatment claim* under the ADA requires proof of an adverse employment action. But in *accommodation claims*, which are analytically distinct, other circuits generally do not require the additional showing of a disparate-treatment style adverse action that the panel insists on here.

At least two Circuits hold that the failure to accommodate *is itself* sufficient adverse action. *Dick v. Dickinson State Univ.*, 826 F.3d 1054, 1060 (8th Cir. 2016) ("An employer is also liable for committing an adverse employment action if the employee in need of assistance actually requested but was denied a reasonable accommodation." (quotes, brackets, and citations omitted)); *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 504 (3d Cir. 2010) ("Adverse employment decisions . . . include refusing to make reasonable accommodations for a plaintiff's disabilities." (quotes omitted)).

Several other Circuits do not require an adverse action on a failure-to-accommodate claim. *E.E.O.C. v. LHC Grp., Inc*., 773 F.3d 688, 703 n.6 (5th Cir. 2014) ("A failure-to-accommodate claim provides a mechanism to combat workplace discrimination even when the employee in question has not suffered adverse employment action.");[1] *McMillan v. City of New York*, 711 F.3d 120, 125–26 (2d Cir. 2013) (adverse action and failure to accommodate are distinct claims, and listing the elements of each); *E.E.O.C. v. AutoZone, Inc*., 630 F.3d 635, 638 n.1 (7th Cir. 2010) ("The court strayed from the reasonable accommodation test it had identified by requiring that the EEOC demonstrate an adverse employment action against Shepherd. No adverse employment action is required to prove a failure to accommodate."); *Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997) (For ADA claim to succeed, "plaintiff must prove that (1) he has a disability; (2) that he is 'otherwise qualified' for the job; and (3) that defendants either refused to make a reasonable accommodation for his disability or made an adverse employment decision regarding him solely because of his disability."). *See*

[1] The majority criticized the language in *LHC* as dicta, but the Fifth Circuit took pains to state that the District Court must follow it on remand, 773 F.3d at 703 n.6, and the Fifth Circuit continues to follow this language. *See, e.g., Dillard v. City of Austin, Texas*, 837 F.3d 557, 562 (5th Cir. 2016) ("Apart from any claim that an adverse employment action was motivated by the employee's disability, an employer's failure to reasonably accommodate a disabled employee may constitute a distinct violation of the Act.").

also Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 868 and n.2 (6th Cir. 2007) ("Accordingly, claims premised upon an employer's failure to offer a reasonable accommodation necessarily involve direct evidence (the failure to accommodate) of discrimination. . . . This, of course, is not necessarily true of claims premised upon an adverse employment decision such as a failure to hire, failure to promote, or discharge.").

The majority argues that the claims in 42 U.S.C. § 12112(b) are missing an element (adverse action), which must be imported from 42 U.S.C. § 12112(a). That is incorrect. The claims in § 12112(b) are complete and stand on their own. The statutory language and structure clarifies that the specific provisions in 42 U.S.C. § 12112(b) set out the ADA's "adverse action" rules rather than requiring reference back to § 12112(a). Subparagraph (b)(1) prohibits "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status." This provision expressly sets out the adverse action required. It would be redundant to import an additional requirement, particularly one that may be inconsistent with the plain language. Similarly, subparagraphs (b)(2) and (b)(4) list the adverse actions prohibited by those provisions. That contradicts the argument that § 12112(b) is missing language about actionable harm that must be imported from disparate-treatment case law.

Any adverse action required by the ADA is set out in the provisions of § 12112(b); Congress did not require any judicial action adding further terms.

Of course, a plaintiff must show harm flowing from the failure to accommodate. In many cases, the plaintiff's claim is that the failure to accommodate led to the loss of a job. Under those facts, the plaintiff must show that the failure to accommodate caused the job loss. But nothing in the ADA limits accommodation claims to those involving job or monetary loss.

This Court already held that accommodations are not only to ensure the ability to do the job. In *Sanchez v. Vilsack*, 695 F.3d 1174, 1181 (10th Cir. 2012), the Court adopted the more-expansive view in "our sibling circuits' interpretation," and held that the plaintiff stated an accommodation claim when the employer failed to transfer him to a location closer to his medical providers. Other Circuits agree, as noted in *Vilsack*.

Because of this breadth, several Circuits have recognized that an accommodation claim is actionable even without the type of job or monetary loss that the panel majority would require in this case. *Feist v. Louisiana, Dep't of Justice, Office of the Atty. Gen*., 730 F.3d 450, 453 (5th Cir. 2013) (holding that accommodations are required to ensure equal benefits and privileges, and thus the failure to allow use of a close-in parking lot was actionable, given that the plaintiff suffered pain from walking); *Hill v.*

Assocs. for Renewal in Educ., Inc., 897 F.3d 232, 239 (D.C. Cir. 2018) ("A reasonable jury could conclude that forcing Hill to work with pain when that pain could be alleviated by his requested accommodation violates the ADA."); *see also E.E.O.C. v. Federal Express Corp*., 513 F.3d 360 (4th Cir. 2008) (affirming judgment for plaintiff, who could not access safety training regarding the then-active anthrax threat, and thus sustained mental anguish, but not job loss), *cert. denied*, 555 U.S. 814 (2008); *see also See* Megan I. Brennan, *Need I Prove More: Why an Adverse Employment Action Prong Has No Place in A Failure to Accommodate Disability Claim*, 36 HAMLINE L. REV. 497, 509 (2013) ("[T]he vast majority of courts correctly appreciate that the failure to accommodate is itself an act of discrimination that violates the ADA.").

The implementing regulations are consistent with other Circuits, and inconsistent with the majority opinion here. They explain that reasonable accommodation includes changes to enable an employee with a disability "to enjoy equal benefits and privileges of employment." 29 C.F.R. § 1630.2(o)(1)(iii). Such changes will rarely involve a disparate-treatment style adverse action, but are still actionable. For instance, a person with a condition affecting bladder control—who soils herself because the employer refuses to grant her a workstation near the restroom—has not suffered

disparate-treatment style adverse action, but still has suffered actionable harm. A veteran with PTSD may need an emotional support animal to deal with anxiety and panic attacks. If the employer rejects this request, the veteran will have to endure anxiety and panic attacks throughout the workday, and may have an actionable claim.

By denying a disabled employee a reasonable accommodation, the employer prevents that employee from receiving benefits and privileges of employment equal to those enjoyed by similarly situated employees without disabilities. Failure to accommodate is a deprivation of the terms and conditions of employment that a disabled employee is otherwise entitled to.

B. The Cases Cited by the Majority Do Not Support Its Position.

The majority claims support from other Circuit decisions but upon inspection, such support disappears. The majority cites *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 32 (1st Cir. 2011), but the cited language is distinguishable because the court and parties focused exclusively on a different issue. *Id*., and n.14. More importantly, the authorities cited by *Colon-Fernandez* actually clarify that adverse action is not an element of an accommodation claim. *Carroll v. Xerox Corp.*, 294 F.3d 231, 237–38 (1st Cir. 2002) ("With respect to his disparate treatment claim, … Carroll must show (1) that he suffers from a disability or handicap, as defined by the

ADA … that (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation, and finally that (3) Xerox took an adverse employment action against him because of, in whole or in part, his protected disability. As to his reasonable accommodation claim, Carroll needs to show, in addition to the first two prongs set forth above, that Xerox, despite knowing of his alleged disability, did not reasonably accommodate it."); *Rios-Jimenez v. Principi*, 520 F.3d 31, 41 (1st Cir. 2008) (substantially similar).

Most of the other cases the panel cites are distinguishable. *Parker*,[2] *Foster*,[3] and *Samper*[4] are cases in which the plaintiff alleged that the failure to accommodate caused job loss. In that context, adverse action is required—the plaintiff has to show that connection. *Fenney*[5] is similar; the plaintiff alleged (and therefore had to prove) that the failure to accommodate caused a constructive demotion.

Finally, the panel claims support in *Marshall v. Fed. Exp. Corp.*, but the case is distinguishable because the plaintiff had no evidence of an

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[2] *Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 108 (2d Cir. 2001).
[3] *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999), *abrogation recognized by Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962–63 (7th Cir. 2010) (ADA not interpreted in lockstep with Title VII).
[4] *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012).
[5] *Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 711 (8th Cir. 2003).

accommodation claim. 130 F.3d 1095, 1099 (D.C. Cir. 1997) ("Here, the only adverse action before us is denial of the chance to apply for the Operations Agent job. In regard to that . . . Marshall required no accommodation at all: she was as capable of performing the job as anyone."). Moreover, the panel failed to cite the language two paragraphs below, which aligns with *Exby*'s and Amici's argument. *Id.* ("We assume without deciding 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 job loss . . . or other adverse personnel action.").

C. The Majority's Adverse Action Requirement Was Inappropriate Under the Facts in this Case.

The majority recognizes that "there could be a failure to accommodate that does not result in termination and is not otherwise connected to an adverse employment action." Maj. Op. p. 31. It gives no examples (although several are cited above), but notes that the failure to move an employee who uses a wheelchair "a few feet closer to the entrance" may not be an adverse action. But the facts matter. If the distance is longer, and the travel painful or damaging, it might be actionable. *Feist, supra*; *Hill, supra*. But even if the distance is small, and the person gets around well using a wheelchair, there

is no need to import the adverse action analysis from disparate-treatment law. Instead, the employer can deny the relocation without liability because it is unnecessary and there is no pain or mental anguish to remedy.

In this case, the trial court eliminated the discharge claim and the harm flowing from it. But, contrary to the majority's view, Ms. Exby sought mental anguish from the failure to accommodate itself. Aplt. App. Vol. IV pp. 914-916, 919, 934-935 (testimony of Ms. Exby regarding emotional impact of failure to accommodate; "you go from being an active member of a part of a team to, more or less, this invisible person."). That claim was actionable without having to show a separate adverse action. In effect, the instructions required proof that the failure to accommodate led to the termination.[6] That was one of Ms. Exby's claims, but not the only one, and not the claim the lower court allowed to go to the jury. In this context, the instructions were error.

[6] The court instructed the jury that "[a]n adverse employment action constitutes a significant change in employment status, such a hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Aplt. App. Vol. II, p. 449.

CONCLUSION

On rehearing, this Court should clarify that the ADA does not require any additional showing of adverse action in failure-to-accommodate claims. This clarification ensures employers are liable for failing to provide a reasonable accommodation, whether it results in a termination or not.

RULE 32(G)(1) CERTIFICATE OF COMPLIANCE.

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,572 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Counsel relied on our word-processing system, Microsoft Word, for the word count.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

CERTIFICATE OF SERVICE & DIGITAL SUBMISSION.

I hereby certify that on this 1st day of November 2018, the foregoing **AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC AND REVERSAL** was provided electronically through the Court's ECF System after all required privacy redactions were made and the submission was scanned for and confirmed to be free of viruses using Security Manager AV Defender version: 6.6.2.49, Engines version: 7.78067 (11802475), last updated November 1, 2018 at 14:11, and the hard copies of any pleading required to be submitted to the clerk's office are exact copies of the ECF filing, and this pleading complies with applicable type volume limits pursuant to 10th Circuit Court of Appeals CM/ECF User's Manual § II.J. to:

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I also certify that on this same day, *amici curiae* provided Expert Doxument Solutions, Inc. with an electronic version of the foregoing **AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC AND REVERSAL** for copying and delivery of seven exact hard copies of the ECF filing within 2 business days, pursuant to

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