No. 23-997

IN THE
Supreme Court of the United States

KARYN D. STANLEY,
Petitioner,

v.

CITY OF SANFORD, FLORIDA,
Respondent.

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 60 national and international labor organizations with a total membership of over 12.5 million working men and women.[1] The AFL-CIO and its affiliated unions have negotiated benefits on behalf of millions of workers that accrue upon their retirement, including the continued provisions of health insurance post-retirement. In addition, the AFL-CIO has advocated for statutory protection of workers with disabilities, including those contained in the Americans with Disabilities Act (ADA). The AFL-CIO thus has a strong interest in the protections of the ADA extending to all forms of deferred compensation earned by workers with disabilities during their employment and relied on during their retirement.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred for two separate reasons.

First, the discrimination occurred while Stanley was an employee and thus indisputably a "qualified individual" protected from discrimination under 42 U.S.C. § 12112(a) and her claim was timely under the Lilly Ledbetter amendments.

While Stanley was still working and thus indisputably a "qualified individual," her employer discriminated against her "on the basis of disability in regard to" both "employee compensation" and "other terms, conditions, and privileges of employment" by shorten-

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

ing the period during which she would be entitled to retiree health insurance upon her retirement if she retired due to a disability.

The plain meaning of the word "compensation" as well as the phrase "other terms, conditions, and privileges of employment" includes deferred compensation such as retiree health insurance. Moreover, when Congress included those words in the ADA in 1990, it did so against the background of long and consistent construction of the same words in parallel statutes to encompass deferred compensation. See *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1079 (1983) (Marshall, J., joined by Brennan, White, Stevens, and O'Connor, JJ.); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983); *Hishon v. King & Spaulding*, 467 U.S. 69, 77 (1984). And the legislative history of the ADA makes clear that Congress intended to prohibit discrimination in regard to "fringe benefits available *by virtue of employment*" not simply wages and fringe benefits paid *during* employment. H.R. Rep. No. 101-485, pt. 2, at 55 (1990) (emphasis added).

In addition, the ADA prohibits "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3)(A). And while Stanley was an employee, her employer changed its retiree health insurance policy to provide for a shorter period of coverage for employees who retire due to disability and thus "utilize[ed a] standard[and a] criteri[on] . . . that ha[d] the effect of discrimination on the basis of disability." *Id.*

The employer thus violated the ADA even though Stanley was not disabled at the time of the discrimination. The ADA prohibits "discriminat[ion] against a qualified individual *on the basis of disability*." 42 U.S.C. § 12112(a) (emphasis added). An employer's adoption of a policy that discriminates "on the basis of disability" in the provision of retiree healthcare does not fall outside the prohibition merely because a particular employee is not disabled at the time the policy is adopted and is therefore not affected by the discrimination until after she develops "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Congress amended by ADA in 2008 precisely to avoid that result, changing the original language prohibiting "discriminat[ion] against a qualified individual *with a disability because of the disability of such individual*," 42 U.S.C. § 12112(a) (2006) (emphasis added), to the current language prohibiting "discriminat[ion] against a qualified individual *on the basis of disability*." 42 U.S.C. § 12112(a) (emphasis added).

A contrary reading would lead to incongruous results clearly not intended by Congress. Because Stanley was not yet disabled at the time of the discriminatory policy change, she would be barred from seeking redress when the policy was applied to her upon retirement. But a coworker doing the same job and suffering from the same disability, even one hired after Stanley, who started suffering from the disability earlier than Stanley and before the policy change, would state a cause of action even if the change had exactly the same adverse effect on the two employees due to their disabilities after they retired.

While Stanley did not pursue her claim immediately after the retiree health benefit was unlawfully

changed during her employment, her claims was still timely after she retired under the amendment adopted by the Lilly Ledbetter Fair Pay Act. 42 U.S.C. § 2000e-5(e)(3)(A). She filed a timely charge after she "bec[ame] subject to [the] discriminatory compensation decision or other practice," *i.e.*, after she retired and began to utilize the retiree health insurance benefit that would terminate sooner because of her disability. *Id.*

Second, the ADA protects former employees.

A contrary construction permitting discrimination against retirees would be starkly inconsistent with Congress' express purpose "to provide a clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (emphasis added). Congress made explicit that it intended to bar discrimination in "fringe benefits," 42 U.S.C. § 12112(b)(2), and certainly understood in 1990 that many employees relied on such benefits, earned during their employment, after they retired. After all, just 16 years earlier, Congress adopted the Employee Retirement Income Security Act (ERISA) in recognition of the fact that that "the continued well-being and security of millions of employees and their dependents are directly affected by these [retirement benefit] plans." 29 U.S.C. § 1001(a).

Imagining the possible consequences of affirming the Court of Appeals' construction in this case clearly illustrates that Congress could not possibly have intended such a result. Under the Court of Appeals' construction, a new employer that did not wish to bear the expense and inconvenience of providing reasonable accommodations to qualified individuals with a disability could easily, instead of simply refusing to do

so, announce to all prospective employees that individuals with a disability would not be eligible for retiree health insurance or any other post-employment benefits. If any such employees sued after being denied benefits post-retirement, the employer could simply argue the former employees were no longer "qualified individuals" and could not state a claim. The employer could thus deter qualified individuals with a disability from even applying to work for the employer while staying within the letter of the law as construed by the Court of Appeals.

Construing the definition of "qualified individual" in isolation as the Court of Appeals did here, would also lead to anomalous results. Imagine two employees working for the City of Sanford. Both are individuals with disabilities but both continue to work with reasonable accommodations. While they are working, the City changes its retiree health insurance benefit as in this case. Both then retire. After their health insurance terminates pursuant to the changed policy, both sue. However, one former employee seeks to return to work because she needs health insurance (but is not rehired) and the other does not. The employee who no longer "desires" to return to work cannot state a claim but the employee who does can because she is "an individual who, with . . . reasonable accommodation, can perform the essential function of the employment position that [she] . . . desires." 42 U.S.C. § 12111(8). Because the alleged discrimination does not relate to hiring, the different treatment of the two employees under the law is entirely arbitrary and could not have been intended by Congress.

While adopting the Court of Appeals' construction would be starkly inconsistent with Congress' intent, construing the ADA to protect retired employees

would in no way be inconsistent with the express purpose of the definition of "qualified individual," which was simply "to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, *i.e.*, the non-marginal functions of the job in question." H.R. Rep. No. 101-485, pt. 2, at 55 (1990). It would be perverse to use the definition of "qualified individual," which was intended to protect employers' ability to ensure employees can do the job, to permit discrimination against an individual who adequately performed the job and is no longer seeking to do so.

Given the "broader context" and "primary purpose" of the ADA, this Court's holding in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), that the word "employee" in Title VII's prohibition of retaliation should be construed to include former employees, makes clear that the word "employee" in the ADA should likewise be construed to include former employees. Like the anti-retaliation provision of Title VII at issue in *Robinson*, both the "general rule" stated in 42 U.S.C. § 12112(a) and the "construction" of the rule in Section 12112(b) bar discrimination against an "employee." And the two statutes define the word "employee" in identical terms. *Compare* 42 U.S.C. § 2000e(f) *with* 42 U.S.C. § 12111(4). Moreover, key elements of *Robinson's* reasoning apply equally under the ADA. For example, the *Robinson* Court observes that "a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees,'" 519 U.S. at 342, such as Section 706(g)(1), 42 U.S.C. § 2000e-5(g)(1) (providing that after a finding of unlawful discrimination, a court can order "reinstatement or hiring of employees"), which is expressly incorporated into the ADA by 42 U.S.C. § 12117(a).

Indeed, granting persons with disabilities less protection than accorded those covered by Title VII would itself be contrary to express congressional intent. The House Report on the ADA explained that "the purpose of the ADA" was "to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women." H.R. Rep. No. 101-485, pt. 3 at 48 (1990). And, prior to the adoption of the ADA, this Court had made clear that Title VII barred discrimination in the payment of retirement benefits. *See, e.g., Ariz. Governing Comm.*, 463 U.S. at 1080.

Finally, this Court's observation in *Allied Chem. Workers* that the word "employee" in the exception to the prohibition on employer payments to unions in the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), for payments into benefit funds had been properly construed to include retired employees further supports a parallel construction of the ADA. 404 U.S. at 169-70. There is "no anomaly," this Court found, "in the conclusion that retired workers are 'employees' . . . entitled to the benefits negotiated while they were active employees." *Id.* at 170.

As under Title VII in *Robinson* and the LMRA in *Allied Chem. Workers*, context and statutory purpose make clear that Congress intended the term employee in the ADA to include retired employees.

ARGUMENT

I. The Discrimination Occurred While Stanley Was an Employee and Thus Indisputably a Qualified Individual and Her Claim Was Timely Under the Lilly Ledbetter Act

A. The Discrimination Occurred While Stanley Was an Employee

For two separate reasons, the discrimination occurred while Stanley was an employee and thus indisputably a "qualified individual."

First, the ADA expressly states, "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . compensation . . . or other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). While Stanley was still working and thus a "qualified individual," her employer discriminated against her "on the basis of disability" in regard to both "employee compensation" and "other terms, conditions, and privileges of employment" by shortening the period during which she would be entitled to retiree health insurance upon her retirement if she retired due to a disability.

The plain meaning of the word "compensation" encompasses both (1) current compensation, *i.e.*, wages or salary paid while employees are working, and (2) deferred compensation, *i.e.*, pensions and retiree health insurance benefits paid after employees retire but owing to their prior employment. The common meaning of the word "compensation" in 1990, when the ADA was enacted, included all forms of compensation paid in return for services. *See, e.g.*, *Compensation*, Merriam-Webster Dictionary 268 (9th ed. 1990) ("Compensation: Something that constitutes . . . recompense."); *Compensation*, Black's Law Dictionary 283 (6th ed. 1990) "Com-

pensation . . . Remuneration for services rendered . . . *See also* Deferred compensation.") Moreover, when Congress adopted that language in 1990, it did so against the background of a long and consistent construction of the word "compensation" to encompass both current and deferred compensation in the form of retirement benefits. In 1971, this Court observed, "future retirement benefits of active workers are part and parcel of their overall compensation." *Allied Chem. Workers*, 404 U.S. at 180. And again in 1983, this Court stated, "There is no question that . . . retirement benefits constitute a form of 'compensation.'" *Ariz. Governing Comm.*, 463 U.S. at 1079. As early as 1948, the National Labor Relations Board explained that the term "wages," surely one form of compensation, includes deferred compensation:

> The term 'wages' as used in [the National Labor Relations Act] must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. There is indeed an inseparable nexus between an employee's current compensation and his future pension benefits. Regardless of the particular economic considerations that may motivate the establishment of a pension system, the fact remains that the employer's financial contribution thereto, in whole or in part, on behalf of the employees provides a desirable form of insurance annuity . . . In substance, therefore, the respondent's monetary contribution to the pension plan constitutes an economic enhancement of the employee's money wages. Their *actual total current compensation is reflected by both types of items*.

Inland Steel Co., 77 NLRB 1, 4-5 (1948) (emphasis added). The Board continued, "in all fields of law deal-

ing with Congressional legislation for the protection of public rights, the term 'wages' has consistently been construed to include increments, such as retirement benefits . . . , which flow to employees because of their longevity." *Id.* at 5. Congress intended the term "compensation" in the ADA, in accordance with this long-standing, preexisting construction, to include deferred compensation such as retiree healthcare.[2]

Thus, Stanley was discriminated against while she was still employed when her employer altered the deferred compensation she was entitled to receive "on the basis of disability."

Moreover, even if the word "compensation" did not include deferred compensation, the words "other terms, conditions, and privileges of employment" are a catch-all that encompass retiree health insurance. The plain meaning of the phrase, "terms . . . and privileges of employment," encompasses deferred compensation like retiree health care. In addition, as with the word "compensation," when Congress adopted the ADA in 1990, it did so against the background of a long and consistent construction of the phrase "terms . . . and privileges of employment" to encompass both health insurance and other fringe benefits, even if they are received post-employment. Indeed, this Court expressly so held in the decade prior to the adoption of the ADA. First, in *Newport News Shipbuilding*, 462 U.S. at 682, this

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[2] For this reason, the Courts of Appeals that are aligned with the Eleventh Circuit on this issue and that have distinguished *Robinson* on the grounds that "in [the Title VII case] the protected interest of the former employee arose during the period of employment, [while] it did not here," are wrong. *See, e.g., Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1111 (9th Cir. 2000) (citing *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, 1045 (7th Cir. 1996)).

Court stated, "[h]ealth insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'" under Title VII. And a year later in *Hishon*, 467 U.S. at 77, this Court added:

> A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship. Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates.

See also Ariz. Governing Comm, 463 U.S. at 1079 ("There is no question that the opportunity to participate in a deferred compensation plan constitutes a 'conditio[n] or privileg[e] of employment.'")

The legislative history of the ADA also makes clear that Congress intended to bar discrimination in receipt of fringe benefits earned during employment even if they are not enjoyed until after retirement. The House Report on the bill that became the ADA states that "decisions covered" by the bill "include . . . fringe benefits available *by virtue of employment*." H.R. Rep. No. 101-485, pt. 2, at 55 (1990) (emphasis added). The choice of the words "by virtue of employment" rather than "during employment" is telling. It makes clear the Congress intended to bar discrimination in the provision of deferred compensation, including retiree health insurance.

For that reason alone, the discrimination occurred while Stanley was an employee and thus indisputably a "qualified individual."

A second reason why the discrimination occurred while Stanley was an employee and thus a "qualified individual" is that the ADA expressly prohibits "utilizing standards, criteria, or methods of administration

. . . that have the effect of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3)(A). That is exactly what happened here. While Stanley was an employee, her employer changed its retiree health insurance policy to provide for a shorter period of coverage for employees who retire due to disability and thus "utiliz[ed a] standard[and a] criteri[on] . . . that ha[d] the effect of discrimination on the basis of disability."

For each of those reasons, the Court below erred.

The foregoing is correct regardless of whether Stanley had a disability at the time the retiree health insurance policy was changed. The ADA prohibits "discriminat[ion] against a qualified individual *on the basis of disability*." 42 U.S.C. 12112(a) (emphasis added). An employer's adoption of a policy that discriminates "on the basis of disability" in the provision of retiree healthcare does not fall outside the prohibition merely because a particular employee is not disabled at the time the policy is adopted and is therefore not affected by the discrimination until after she develops "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A).

That reading of the text of the prohibition is supported by its legislative history. As originally enacted, the ADA prohibited "discriminat[ion] against a qualified individual *with a disability because of the disability of such individual*," 42 U.S.C. § 12112(a) (2006) (emphasis added), and defined the term "qualified individual with a disability" as "an individual *with a disability* who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," 42 U.S.C. § 12111(8) (2006) (emphasis added). The ADA Amendments Act of 2008 (ADAAA), Pub. L.

No. 110-325, 122 Stat. 3553, modified Section 12112(a) to prohibit "discriminat[ion] against a qualified individual *on the basis of disability*," and struck the words "with a disability" from the heading and text of Section 12111(8). *See* 42 U.S.C. §§ 12111(8) and 12112(a) (emphasis added). Those amendments were intended to broaden the prohibited discrimination to reach discrimination against a qualified individual "on the basis of disability" even when the discrimination was not, at least at the time it occurred, "against a qualified individual with a disability because of the disability of such individual."[3]

A contrary reading would lead to incongruous results clearly not intended by Congress. Because Stanley was not yet disabled at the time of the discriminatory policy change, she would be barred from seeking redress when the policy was applied to her after her retirement. But a coworker doing the same job and suffering from the same disability, even one hired after Stanley, who started suffering from the disability earlier than Stanley and before the policy change, would state a cause of action even if the change had exactly the same adverse effect on the two employees due to their disabilities after they retired. That result makes no sense and was not intended by Congress.[4]

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[3] We note that all of the Court of Appeals' decisions in accord with the Eleventh Circuit's decision in this case preceded these amendments to the ADA.

[4] Moreover, Stanley had a disability as of 2016 when she was diagnosed with Parkinson's and continued to work until 2018. Thus, she was indisputably a "qualified individual" during that two-year period and was also, at that time, discriminated against on the basis of disability because the retiree health insurance plan then in effect provided her with a shorter period of coverage based on her disability. As we explain in the next subsection, she was, at that time, "subject to a discriminatory compensation de-

The discrimination occurred while Stanley was still employed and thus indisputably a "qualified individual."[5]

B. The Claim Was Timely Under the Lilly Ledbetter Act

While Stanley did not pursue her claim at the time the retiree health benefit was unlawfully changed, her claims was still timely under the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

In the Lilly Ledbetter Act, Congress amended Title VII and other civil rights statutes to specifically address situations where an employee is not subject to or actually affected by an act of discrimination until after the statute of limitations would otherwise have run under this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Title VII now provides:

> For purposes of this section [establishing the "time for filing charges"], an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, result-

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cision," even if she had not yet been "affected by" its application. *See* 42 U.S.C. § 2000e-5(e)(3)(A).

[5] The Court below simply ignored this argument on the grounds that it had been waived by Stanley, a suggestion that is persuasively rebutted in Stanley's brief. Pet. Br. at 24-25.

ing in whole or in part from such a decision or other practice.

42 U.S.C. § 2000e-5(e)(3)(A). The fact that Congress intended discrimination in fringe benefits to be included in this provision is made clear by the express inclusion of payment of "benefits" in the amendment. And the ADA expressly incorporates the "powers, remedies and procedures set forth in Title VII." 42 U.S.C. § 12117(a). Thus, Congress specifically noted that the amendment "shall apply to claims of discrimination in compensation brought under title I" of the ADA. 42 U.S.C. § 2000e-5 note.

Under the Ledbetter amendments, even if Stanley did not pursue her claim in a timely manner after "the discriminatory compensation decision or other practice [was] adopted," she did so in a timely manner after she "bec[ame] subject to [the] discriminatory compensation decision or other practice," *i.e.*, after she retired and began to utilize the retiree health insurance benefit that would terminate early because of her disability.[6] 42 U.S.C. § 2000e-5(e)(3)(A). Stanley's claim was thus timely.[7]

For these reasons, the discrimination occurred while Stanley was a "qualified individual" and her claim was timely.

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[6] Stanley's health insurance terminated two years after her retirement, while, if she had retired for reasons other than disability, it would not have terminated until she reached age 65, giving her another 16 years of coverage, as she retired at age 47. *See* Pet. App. 3a.

[7] We note that all the Court of Appeals' decisions in accord with the Eleventh Circuit's decision in this case predate the Ledbetter amendments.

II. The ADA Protects Former Employees Even After They Are No Longer Able to Work

A. A Contrary Construction Would Seriously Undermine the Clear Purpose of the ADA

Congress intended the ADA to protect disabled persons from *all* forms of employment discrimination. Congress stated that the purpose of the Act was to "to provide a clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (emphasis added). This Court has recognized the Act's "broad mandate" and "sweeping purpose." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001). The express purpose to create a "comprehensive" prohibition of discrimination would be seriously undermined by permitting discrimination against employees once they retire.

Specifically, Congress intended to bar discrimination in "employee compensation" and in "other terms and conditions of employment." 42 U.S.C. § 12112(a). Both terms clearly encompass fringe benefits as explained above. Moreover, Congress specifically identified discrimination in the provisions of "fringe benefits" as among the forms of "discrimination prohibited by [the ADA]" when it provided that "the term 'discriminate against a qualified individual on the basis of disability' includes—. . . participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with . . . an organization providing fringe benefits to an employee of the covered entity . . .)." 42 U.S.C. § 12112(b)(2). *See also* H.R. Rep. No. 101-485, pt. 3, at 38 (1990) ("[E]mployers may not deny health insurance coverage completely to an individual based

on the person's . . . disability."); S. Rep. No. 101-116, at 27 (1989) ("All people with disabilities must have equal access to health insurance coverage that is provided by the employer to all employees."); H.R. Rep. No. 101-485, pt. 2, at 55 (1990) (the Act covers decisions concerning "fringe benefits available by virtue of employment").

And central among all fringe benefits, now and in 1990 when the ADA was adopted, are retirement income and retiree health insurance. Sixty-six percent of employers provided retiree health benefits in 1988, two years before Congress enacted the ADA. The State of Retiree Health Benefits: Historical Trends and Future Uncertainties, p. 10, Ex. 4, Testimony of Patricia Neuman, Henry J. Kaiser Family Foundation, before the Special Committee on Aging, United States Senate (May 17, 2004), https://www.kff.org/wp-content/uploads/2013/01/the-state-of-retiree-health-benefits-historical-trends-and-future-uncertainties.pdf. In 1990, when the ADA was adopted, employees received $172 billion annually in post-retirement fringe benefits, not even including retiree health care, amounting to approximately five per cent of total employee compensation.[8] In 1974, just 16 years before it enacted the

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[8] Figures derived from Bureau of Economic Analysis, U.S. Dept. of Commerce, National Data, National Income and Product Accounts, Table 1.10 Gross Domestic Income by Type of Income, https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey&_gl=1*17i59tq*_ga*Mzc0OTE5MjQ2LjE3MjMxNDA5NTg.*_ga_J4698JNNFT*MTcyNjc1Mjk3Mi4yMi4xLjE3MjY3NTMwMjkuMy4wLjA.#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDMsM10sImRhdGEiOltbImNhdGVnb3JpZXMiLCJTdXJ2ZXkiXSxbIk5JUEFfVGFibGVfTGlzdCIsIjUxIl0sWyJGaXJzdF9ZZWFyIiwiMTk5MCJdLFsiTGFzdF9ZZWFyIiwiMjAyNCJdLFsiU2NhbGUiLCItOSJdLFsiU2VyaWVzIiwiUSJdXX0=, and Table 7.8 Supplement to Wages and Salaries by Type, https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey&_gl=1*17i59tq*_ga*Mzc0OTE5MjQ2LjE3Mj

ADA, Congress adopted the Employee Retirement Income Security Act (ERISA), recognizing that "the continued well-being and security of millions of employees and their dependents are directly affected by these [benefit] plans." 29 U.S.C. § 1001(a).[9] Surely, Congress did not intend to leave employees with a disability exposed to discrimination in regard to this valuable, indeed often life-sustaining, form of compensation.

The lower federal courts have persuasively made this point. The Second Circuit observed, "[m]any fringe benefits are paid out to those who no longer work and who are no longer able to work, and some fringe benefits are paid out to individuals precisely because they can no longer work." *Castellano v. City of New York*,

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MxNDA5NTg.*_ga_J4698JNNFT*MTcyNjc1Mjk3Mi4yMi4xLjE3MjY3NTMwMjkuMy4wLjA.#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDMsM10sImRhdGEiOltbImNhdGVnb3JpZXMiLCJTdXJ2ZXkiXSxbIk5JUEFfVGFibGVfTGlzdCIsIjI4NSJdLFsiRmlyc3RfWWVhciIsIjE5OTAiXSxbIkxhc3RfWWVhciIsIjIwMjIiXSxbIlNjYWxlIiwiLTkiXSxbIlNlcmllcyIsIkEiXV19.

[9] Contrary to the suggestion of some lower federal courts that agree with the Eleventh Circuit, *see McKnight v. Gen. Motors Corp.*, 550 F.3d 519, 528 (6th Cir. 2008); *Weyer*, 198 F.3d at 1112, while the passage of ERISA evidences Congress' awareness of the importance of post-retirement fringe benefits to the well-being of U.S. workers, ERISA in no way substitutes for the anti-discrimination provisions of the ADA. As this Court expressly held prior to adoption of the ADA, "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). In fact, the legislative history of ERISA makes clear that an amendment that would have prohibited discrimination in benefit plans was not even introduced based on the express understanding that nondiscrimination in [such benefit plans] is fully required under [Title VII]." *Id*. at 104 (quoting Senator Mondale who had raised the possibility of such an amendment). *See also id*. (referencing similar colloquy in the House).

142 F.3d 58, 68 (2d Cir. 1998). "Under [the employer's] reading," the Court continued, "none of these individuals would be protected by the ADA." *Id*. As Judge Anderson stated in his dissent in *Gonzales v. Garner Food Servs, Inc.*, 89 F.3d 1523 (11th Cir. 1996), "It would be counter-intuitive, and quite surprising, to suppose . . . that Congress intended to protect current employees' fringe benefits, but intended to then abruptly terminate that protection upon retirement or termination, at precisely the time that those benefits are designed to materialize." *Id*. at 1532 (Anderson, J., dissenting). "So enormous a gap in the protection afforded by Title I would be clearly at odds with the expressed purpose of the ADA." *Lewis v. Aetna Life Ins. Co.*, 982 F.Supp. 1158, 1163 (E.D. Va. 1997). "[I]t is inconceivable," the Second Circuit observed, "that Congress would in the same breath expressly prohibit discrimination in fringe benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be 'qualified' at or after their retirement, although they had earned those fringe benefits through years of service in which they performed the essential functions of their employment." *Castellano*, 142 F.3d at 69.

Imagining the possible consequences of affirming the Court of Appeals' construction in this case clearly illustrates that Congress could not possibly have intended such a result. Under the Court of Appeals' construction, an employer starting a business who did not wish to bear the expense and inconvenience of providing reasonable accommodations to qualified individuals with a disability could easily, instead of simply refusing to do so, announce to all prospective employees that individuals with a disability would not be eligible for retiree health insurance or any other post-employment benefits. If any such employees

sued after being denied benefits post-retirement, the employer could simply argue the former employees were no longer "qualified individuals" and could not state a claim. The employer could thus deter qualified individuals with a disability from even applying to work for the employer while staying within the letter of the law as construed by the Court of Appeals. As the Eleventh Circuit explained in *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1048 (11th Cir. 2001), *vacated pending reh'g en banc*, 273 F.3d 1035, 1070 (11th Cir. 2001), "reading [the prohibition] narrowly to exclude coverage of former employees . . . [would] create a 'perverse incentive' for employers to interfere with the post-employment benefits of former employees." Congress could not have intended and did not intend to permit such a result.

Finally, construing the definition of "qualified individual" in isolation, as the Court of Appeals did here, would lead to anomalous results. Imagine two employees working for the City of Sanford. Both are individuals with disabilities but both continue to work with reasonable accommodations. While they are working, the City changes its retiree health insurance benefit as in this case. Both then retire. After their health insurance terminates pursuant to the changed policy, both sue. However, one former employee seeks to return to work because she needs health insurance (but is not rehired) and the other does not. The employee who no longer "desires" to return to work cannot state a claim but the employee who does can because she is "an individual who, with . . . reasonable accommodation, can perform the essential function of the employment position that [she] . . . desires." 42 U.S.C. § 12111(8). Because the alleged discrimination does not relate to hiring, the different treatment of the two employees under the

law is entirely arbitrary and could not have been intended by Congress.[10]

B. Stanley's Construction is Consistent with the Purpose of the Definition of "Qualified Individual"

Not only is the Court of Appeals' construction of the ADA starkly inconsistent with clear congressional intent, Stanley's proposed construction[11] is fully consistent with the purpose of the limiting language relied on by the Court below.

Congress adopted the definition of "qualified individual" in order to set limits on whom the Act requires employers to hire and retain, *not* to limit the protections of retired employees. Congress wanted to make clear that employers had no obligation to hire or retain individuals who could not do the job, even with a reasonable accommodation. Stanley's construction of the

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[10] Even courts that agree with the Eleventh Circuit acknowledge this anomaly (but simply choose to ignore it). *See McKnight*, 550 F.3d at 528 ("We acknowledge the plain language of Title I suggests that disabled former employees who still 'desire' their former employment positions might, in fact, have standing.") This example also illustrates why the Courts of Appeals that have suggested a narrow reading of "qualified individual" is supported by a coherent congressional intent to protect against discrimination only in hiring and during employment are wrong—because a narrow reading does, under some circumstances, protect employees post-retirement. *See, e.g., Weyer*, 198 F.3d at 1112-13.

[11] Stanley persuasively argues that the words of limitation in the definition of "qualified individual" in 42 U.S.C. § 12111(8)—"who can perform the essential functions of the employment position"—apply only to current employees and applicants and not to retired employees. Pet. Br. at 34-42. We do not reiterate Stanley's argument here but rather demonstrate how it is bolstered by the use of the word "employee" in the prohibition of discrimination read as instructed in *Robinson*.

Act would in no way undermine that purpose. Indeed, it would be perverse to use the definition of "qualified individual," which was intended to protect employers' ability to ensure employees can do the job, to permit discrimination against an individual who adequately performed the job and is no longer seeking to do so.

The legislative history confirms the limited intent behind the definition. The House Report on the ADA makes clear that Section 12111(8) was "intend[ed] to reaffirm that [the] legislation does not undermine an employer's ability to choose and maintain qualified workers." H.R. Rep. No. 101-485, pt. 2 at 55 (1990). The purpose was "to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, *i.e.*, the non-marginal functions of the job in question." *Id*. Congress adopted the definition in order to ensure that employers were not required to hire, promote, or retain unqualified employees simply because they are disabled.

The Second Circuit clearly explained why that congressional purpose is not undermined by the protection of the post-employment benefits of retired employees who performed their job duties fully despite their disabilities:

> Where the alleged discrimination relates to the provision of post-employment benefits, rather than to hiring, promotion, or firing, Congress's expressed concern about qualifications is no longer implicated. Because retired employees who receive fringe benefits no longer work or seek to work for their former employers, they plainly need not perform the essential functions, or indeed *any* functions, of their former employment. Provided that retired employees were qualified (i.e., performed the 'essential functions' of

> their jobs) while employed and on that basis became entitled to post-employment benefits, the purpose of the 'essential functions' requirement has been met.

Castellano, 142 F.3d at 68. Stanley's construction is thus entirely consistent with the purpose of the definition of "qualified individuals."

C. *Robinson* is Highly Persuasive

In *Robinson*, this Court addressed a question that is precisely parallel to the question raised by this case. The Court's rationale for holding in *Robinson* that the term "employee" in Title VII includes former employees is highly persuasive here.

Title VII makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment . . . 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 [the law]." 42 U.S.C. § 2000e-3(a). Just as in this case, the employer in *Robinson* argued that the term "employee" in that prohibition did not include former employees, thus leaving the plaintiff unable to state a claim based on his former employer's retaliatory action (giving him a negative reference). The Supreme Court unanimously rejected the argument.

As in Title VII, the prohibition of discrimination in the ADA uses the term "employee." While the "general rule" stated in Section 12112(a) uses the term "qualified individual," it also provides that the prohibition of discrimination against a "qualified individual" may be "in regard to . . . *employee* compensation . . . and other terms, conditions, and privileges of employment." 42

U.S.C. § 12112(a). Moreover, the "construction" in Section 12112(b) makes clear that "discriminate against a qualified individual on the basis of disability" "includes—. . . limiting, segregating, or classifying a job applicant or *employee* in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or *employee*." 42 U.S.C. § 12112(b)(1) (emphasis added).[12] Thus, the two statutes use the same word, "employee," which should be construed in the same manner for the following reasons.

This Court began its analysis in *Robinson* by observing that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." 519 U.S. at 341. Here, the Court of Appeals focused on the language in isolation. But as in *Robinson*, the context in which the language is used and the broader statutory context suggest ambiguity where the Court below saw clarity.

Key elements of the *Robinson* Court's reasoning apply equally here. There, as here, the employer relied on the present tense form of the relevant definition. Title VII defines an employee to be "an individual *employed* by an employer." 42 U.S.C. § 2000e(f) (empha-

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[12] Proscribed discrimination also includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or *employee* with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an *employee* of the covered entity, or an organization providing training and apprenticeship programs)." 42 U.S.C. § 12112(b)(2) (emphasis added).

sis added). The ADA defines employee in precisely the same manner. 42 U.S.C. § 12111(4). The Court held in *Robinson* that "the word 'employed' . . . could . . . be read to mean '*was* employed.'" 519 U.S. at 342. The same is true under the ADA.

In *Robinson*, "there [was] no temporal qualifier in the statue such as would make plain" that it does not protect former employees. *Id*. at 341. The same is true under the ADA. Like Section 2000e(f) of Title VII, Section 12111 of the ADA does not read "*currently* employed by an employer" and Section 12111(8) does not read "can *currently* perform" or "*currently* holds or desires."

The *Robinson* Court also observed that "a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.'" 519 U.S. at 342. And among the provisions of Title VII cited by the Court is Section 706(g)(1), 42 U.S.C. § 2000e-5(g)(1), which is expressly incorporated into the ADA by 42 U.S.C. § 12117(a). That section provides that after a finding of unlawful discrimination, a court can order "reinstatement or hiring of employees." 42 U.S.C. § 2000e-5(g)(1). The *Robinson* Court explained, "because one does not 'reinstat[e]' current employees, that language necessarily refers to former employees. Likewise, one may hire individuals *to be* employees, but one does not typically hire persons who already *are* employees." 519 U.S. at 342. That logic applies directly here because the remedial provision is incorporated by reference into the ADA.[13]

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[13] In addition, as Stanley points out, the Eleventh Circuit's reading of Section 12111(8) would render the qualifying language in Section 12112(b)(5)(A) mere surplusage as all "qualified individuals" would be either applicants or employees. Pet. Br. at 32-33.

Based on that reasoning, the Court held in *Robinson* "that the term 'employees,' as used in § 704(a) of Title VII, is ambiguous as to whether it includes former employees." 519 U.S. at 346. The Court therefore proceeded to consider context and purpose and concluded, "[i]t being more consistent with the broader context of Title VII and the primary purpose of § 704(a), we hold that former employees are included within § 704(a)'s coverage." *Id.* The "broader context" of the ADA and the "primary purpose" of Section 12111(8) lead to the same conclusion here as explained in subsection A and B above.[14]

Indeed, granting persons with disabilities less protection than accorded those covered by Title VII would itself be contrary to express congressional intent. The enforcement provisions of the ADA expressly incorporate those of Title VII. *See* 42 U.S.C. § 12117(a). The House Report on the ADA explained that "the purpose of the ADA" was "to provide civil rights protections for persons with disabilities that are parallel to those avail-

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[14] The suggestion by the Court below that *Robinson* is distinguishable because the purpose of the anti-retaliation provision in Title VII would be uniquely frustrated if it were construed not to protect former employees, Pet. App. 8a, is plainly wrong. The facts in *Robinson*, involving retaliation in the form of refusal to provide a reference to a former employee, were actually very unusual. Many, if not most, cases of retaliation involve current employees who are passed over for promotion, disciplined, or otherwise treated worse because they invoked the protections of Title VII. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58-59 (2006) (retaliation charge by current employee based on adverse change in job responsibilities and disciplinary suspension). Thus, the Court of Appeals' suggestion that *Robinson* is distinguishable because its "construction was 'necessary to provide meaning to anti-retaliation statutory provisions and effectuate congressional intent'" is simply wrong. Pet. App. 8a (quoting *Gonzales*, 89 F.3d at 1529).

able to minorities and women." H.R. Rep. No. 101-485, pt. 3, at 48 (1990). And, prior to the adoption of the ADA, this Court had made clear that Title VII barred discrimination in the payment of retirement benefits. *See, e.g., Ariz. Governing Comm.*, 463 U.S. at 1080 ("We have no hesitation in holding . . . that the classification of employees on the basis of sex is . . . [impermissible] at the pay-out stage of a retirement plan.").

Moreover, the holding in *Robinson* is consistent with this Court's earlier holding in *Allied Chem. Workers,* which made clear that the word "employee" can be read to encompass retired employees depending on the specific statutory context. In analyzing the purpose of employers' duty to bargain "with a representative of [their] employees" imposed by the National Labor Relations Act, 29 U.S.C. § 158(a)(5), the *Allied Chem. Workers* Court held that the duty did not extend to retired employees.[15] But, before reaching that conclusion, the Court distinguished a separate provision of the Labor-Management Relations Act ("LMRA") authorizing employers to make payments to union-managed trust funds established "for the sole and exclusive benefit of the *employees* of such employer." 404

[15] In reaching this conclusion, despite several categorical statements about the "plain meaning" of the word "employees," *see, e.g.*, *Allied Chem. Workers*, 404 U.S. at 166, statements later contradicted by *Robinson*, the Court relied heavily on the fact that the NLRA's primary purpose was to prevent industrial unrest in the form of strikes, reasoning that Congress did not intend retired employees who cannot strike and thus cannot cause such unrest to be covered by the Act. *Id.* ("The Act, after all, as s 1 makes clear, is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of 'workers'—not those who have retired from the work force.")

U.S. at 169-70 (citing 29 U.S.C. § 186(c)(5)).[16] As to the latter provision—relating to funds that are generally used to provide fringe benefits such as health insurance and retirement income—the Supreme Court cited with approval a lower court's conclusion that the word "employee" should *include* both "current employees" and "persons who were . . . current employees but are now retired.'" *Id.* at 169 (citing *Blassie v. Kroger Co.*, 345 F.2d 58, 70 (8th Cir. 1965)).

Like here, this Court explained that the issue was whether retired employees remain protected by statutory provisions securing fringe benefits. *See id.* at 169-70 ("The question . . . was simply whether . . . retirees remain eligible for benefits of trust funds established during their active employment."). Given the different congressional purposes of the bargaining duty and the authorization of payments into benefit funds, the Court found that there was "no anomaly in the conclusion that retired workers are 'employees' . . . entitled to the benefits negotiated while they were active employees, but are not 'employees' whose ongoing benefits are embraced by the bargaining obligation of [the NLRA]." *Id.* at 170. Differing interpretations of an identical term were dictated by statutory context and purpose.

In other words, the word "employee" can mean different things in different statutory contexts and here, in the ADA, as in Title VII, for the reasons explained in *Robinson*, and in the exception for employer payments into benefit funds in the LMRA, for the reasons explained in *Allied Chem. Workers*, the context and

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[16] This provision operates as an exception to the LMRA's general prohibition making it unlawful for an employer to provide "any money or other thing of value" to a labor organization. 29 U.S.C. § 186(a)(2).

statutory purpose make clear that Congress intended the term "employee" to include retired employees.

CONCLUSION

For the above-stated reasons, the decision below should be reversed.

Respectfully submitted,

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