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 RESPONDENT

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November 12, 2024

QUESTION PRESENTED

Title I of the Americans with Disabilities Act prohibits discrimination on the basis of disability against "qualified individuals." 42 U.S.C. § 12112(a). Title I defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The question presented is whether a totally disabled, former employee—who did not earn a benefit during her employment and who concedes she could not perform the essential functions of her former job when she was denied that benefit—is a "qualified individual" entitled to sue under the ADA.

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INTRODUCTION

This Court should only decide the issue splitting the circuit courts upon which this Court granted certiorari. That issue is whether discrimination occurring entirely *post-employment* against totally disabled former employees, is actionable under Title I of the ADA. The Eleventh Circuit, joining the majority of courts, correctly held that Title I unambiguously prohibits discrimination solely against an individual who "can perform" the job she presently "holds or desires." Thus, it concluded that because Petitioner could not establish that the City committed any discriminatory acts against her while she could perform the essential functions of a job that she held or desired to hold, her Title I claim failed.

In Part I of her brief, Petitioner raises an argument that she not only failed to press below, but that she expressly disclaimed. She untimely argues she was discriminated against *during* her employment when she was a "qualified individual." However, she conceded in her initial brief below that she could not have brought these claims while she was still employed and able to do her job because she would have lacked standing. The Eleventh Circuit properly declined to decide her opposite position untimely raised for the first time in her reply brief.

This Court "does not '[o]rdinarily...decide in the first instance issues not decided below.'" *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC,* 596 U.S. 61, 76 (2022). Therefore, Petitioner's contention that this Court "need not reach" the circuit-split question and should reverse on the issue she disclaimed, should be rejected. This Court should only

consider the circuit-split question. But to the extent this Court reviews the question not pressed or passed upon, it should find that Petitioner's unpreserved claims of discrimination during employment are unpled and time-barred. The Ledbetter Act has no place here to save her waived claims allegedly accruing two decades ago.

Petitioner incorrectly claims that the Eleventh Circuit held that a disabled retired firefighter may be subjected to discrimination with impunity. It said nothing of the sort. And "[i]t seems more than uncharitable to say," *Kincaid v. Williams*, 143 S. Ct. 2414, 2418 (2023) (Alito, J., dissenting), that the court of appeal's finding of an unambiguous limitation on Title I's prohibitions is the same as finding that a retiree "may be subjected to discrimination with impunity."

The Eleventh Circuit also did not hold that former employees can never sue under Title I regarding post-employment benefits. It held that discrimination occurring during employment against a "qualified individual" is actionable under the ADA. And for alleged discrimination post-employment, there are numerous remedies under other federal and state laws. Thus, Petitioner's claims failed, not for lack of remedy or an incorrect interpretation of the ADA, but because of her allegations and litigation strategy. This Court should affirm.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. In enacting the Americans with Disabilities Act, Congress found, in part, that "society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). Congress enacted Title I of the ADA to provide legal remedies for discrimination against disabled workers that did not previously exist. *See* 42 U.S.C. § 12101(a)(4). At the time, several other federal statutes existed for the protection of employee retirement benefits such as ERISA and the Social Security Act. The Equal Protection Clause provided an additional remedy for public employees. *See Tennessee v. Lane*, 541 U.S. 509, 522 (2004) ("emphasiz[ing] that the House and Senate Committee Reports on the ADA focused on '[d]iscrimination [in]...*employment in the private sector,*' and made no mention of discrimination in public employment.") (emphasis added by the Court).

This Court has also "identified Title I's purpose as enforcement of the Fourteenth Amendment's [equal protection] command that 'all persons similarly situated should be treated alike.'" *Id.* Thus, except as to the ADA's requirement that employers provide "reasonable accommodations" for the disabled, 42 U.S.C. § 12112(b)(5)(A), the essence of the ADA is equal—not preferential—treatment for the disabled. *See Williams v. United Ins. Co. of Am.,* 253 F.3d 280, 282 (7th Cir. 2001) (an "employer is not required to give the disabled employee preferential treatment."). "The ADA requires only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have given an equivalent

amount of service." *Castellano v. City of New York,* 142 F.3d 58, 70 (2d Cir. 1998).

2. The ADA's prohibition against discrimination in employment is codified in Title I:

> **(a) General rule.** No covered entity shall discriminate against a *qualified individual* on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (emphasis added). The term of art "qualified individual" is incorporated into the general rule and defines the class of individuals protected by its prohibition against discrimination:

> The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8). "The determination of whether a person is qualified should be made at the time of the employment action, e.g. hiring or promotion..." H.R. Rep. No. 101–485(III), at 34 (1990).

3. While Title I "borrows much of its procedural framework from [T]itle VII," it "borrows much of its

substantive framework from Section 504 of the Rehabilitation Act of 1973." *Id.* at 31. The "concept" of a "qualified individual" comes from "the regulations implementing...the Rehabilitation Act"—not from Title VII. *Id.* at 33; *see also Alexander v. Choate*, 469 U.S. 287, 309 (1985) (no unlawful discrimination found under the Rehabilitation Act because the state's policy was "neutral on its face" and it "made the same benefit...equally accessible to both handicapped and nonhandicapped persons…").

B. Factual Background

1. Because Petitioner argues that the Eleventh Circuit erred in affirming the dismissal of her ADA claim at the pleading stage, the facts should be taken from her complaint only. Petitioner's statement of the facts, however, largely draws from the evidence developed at the summary judgment stage on her Equal Protection Clause claim. The pertinent factual allegations from her complaint are as follows.

Petitioner alleged that when she was hired in 1999, the City "paid for health insurance for its employees who retired after 25 years of service and its employees who retired on account of disability" until "the age of 65." Doc. 1, ¶¶ 13, 19. In 2018, she accepted a disability retirement because she was completely unable to perform her duties as a firefighter due to an unidentified "physical disability." *Id.* ¶ 16.

Fifteen years before she retired, the City changed its policy in 2003 to require all retirees to complete 25 years' service to earn the subsidy to age 65. *See id.* ¶¶ 19, 24. But the change still treated disability retirees better than similarly situated non-disabled retirees

with less than 25 years because while the latter received nothing, the former received the subsidy for 24 months or until their receipt of Medicare benefits, whichever came first. *Id.* ¶ 24.

Petitioner, however, did not sue the City for breach of an employment contract or bring an unconstitutional takings claim based on the change. Thus, Petitioner's statement that the City "promised" her the benefits under the defunct policy from 15 years before she retired, is factually and legally unsupported. Pet. Br. 11. Petitioner only had a vested right to benefits under a policy "in effect at the time" of her retirement. *City of Hollywood v. Bien*, 209 So. 3d 1, 3 (Fla. Dist. Ct. App. 2016).

While Petitioner claims the policy change was made "quietly," Pet. Br. 10, her complaint actually alleges a public announcement of the policy because it was "codified in City Policy Section 2.45(c)" of its ordinances, and in its "official personnel policies." Doc. 1, ¶ 24; *see also* Doc. 38-10 at 2-5; Doc. 38-11 at 4. Her complaint does not allege that she was unaware of the personnel policy or the ordinance at the time of its passage or when she retired.

Because she was totally disabled and unable to work, Petitioner retired early with only 20 years' service instead of the 25 required to earn the subsidy to age 65. Doc. 1, ¶ 16. Her complaint did not allege when she became disabled or that she continued to work thereafter as a "qualified individual" with a disability before she retired. Petitioner only alleged that because of a "physical disability" she took a disability retirement in November 2018 and as a result, the City's subsidy policy would be applied to

her, and she would lose the subsidy in November of 2020—24 months after her retirement date. Doc. 1, ¶¶ 16, 26.

2. Petitioner erroneously claims that the City's subsidy policy distinguished between "normal retirees" and disabled retirees. Pet. Br. 11.[1] However, the phrase "normal retiree" appears nowhere in the ordinance. *See* Doc. 38-10 at 2-5. Rather, the ordinance shows that *any* retiree, disabled or non-disabled, with 25 years of service is eligible for the subsidy to age 65. Doc. 38-10 at 4, ¶ 2.45(C), (G). The ordinance did not condition the subsidy to age 65 on a "normal retirement" because under the City's pension plan, a "normal retirement" could be taken after only ten (10) years of service. Doc. 39-17 at 27; J.A. 35, n. 2.

Petitioner, like everyone else, was eligible to receive the full subsidy so long as she served 25 years. However, in 2018, she requested and was awarded a "disability retirement" with only 20 years of service. Doc. 38-5.[2] But even though she failed to fulfill the service-based criteria, the City, out of compassion, provided 24 months of the subsidy to its totally disabled retirees who retired early short of 25 years. Doc. 38-10 at 4, ¶ 2.45(C), (F), (G); J.A. 34-35, 40; Doc. 38 at 21-22. Uncoincidentally, 24 months is exactly how long it takes before a totally disabled retiree like Petitioner is eligible to receive Medicare benefits. *See* Medicare Act, 42 U.S.C. §§ 426(b)(2)(A), 1395o(a)(1).

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[1] Petitioner cites to Doc. 39-16 for this proposition but omits key language from that document which shows that the policy was based solely on years of service and not a "normal" retirement.

[2] Petitioner insinuates that she was disabled "in the line of duty." Pet. Br. 1, 11. The record shows she was not. Doc. 38-5.

Similarly situated, *non-disabled* retirees with only 20 years' service received no subsidy at all and they are not Medicare eligible because they are not disabled. Doc. 38-10 at 4, ¶ 2.45(C); J.A. 34-35, 44. Thus, far from treating Petitioner worse because of her disability than her non-disabled co-workers with the same amount of service, she was treated better than them *because* of her total disability.

Although the City would have liked to continue paying disability retirees with less than 25 years the same subsidy as 25-year retirees, it was forced to cut costs and start treating disability retirees the same as, rather than better than, everyone else with less than 25 years of service. Doc. 38-10 at 2; J.A. 34 n. 1, 40. Prior to the 2003 ordinance, the City had the resources to pay the subsidy to age 65 for both 25-year retirees and "disability retirees" with less than 25 years. However, the City was permitted to change that policy *before* Petitioner's rights vested at retirement. *Florida Sheriffs Ass'n v. Dep't of Admin., Div. of Ret.,* 408 So. 2d 1033, 1036-37 (Fla. 1981).

Petitioner claims (at 11) that the City's HR Director could not explain why the City changed the subsidy policy. He was deposed nearly twenty years after the ordinance was passed and thus his knowledge of it was limited to what could be discerned from the public records. Doc. 39-4 at 1, 10, 80. The district court found that the purpose was clearly set forth in the ordinance itself and the City articulated its legitimate reasons for its service-based policy to reward long-term employment, contain costs, and provide compassion for employees who retire early due to disability. J.A. 34 n. 1, 40, 45. The City's policy

provided disabled employees access to the same benefits available to all. Doc. 38-10 at 4, ¶ 2.45(C).

C. Procedural Background

1. The City moved to dismiss Petitioner's ADA claim because she only alleged post-employment discrimination when she was no longer a "qualified individual." Doc. 14 at 4-5. Petitioner did not dispute the City's characterization of her allegations or argue that her complaint actually alleged discrimination *during* her employment. *See* Doc. 17. Petitioner also did not move for leave to amend to add allegations of discrimination during employment.

Therefore, the district court dismissed Petitioner's ADA claim because she alleged the "discrimination did not occur until Plaintiff was no longer able to perform the essential functions of her job" when she was no longer a "qualified individual." Pet. App. 26a. After dismissal, Petitioner did not move for reconsideration arguing the court misapprehended any allegations of discrimination during employment.

On her Equal Protection Clause Claim, the district court found the policy drew "neutral" lines based on service requiring *all* retirees to serve 25 years to earn the subsidy to age 65. J.A. 44-45.

2. Petitioner's initial brief in the Eleventh Circuit confirmed that her complaint only alleged post-employment discrimination because she argued she "could not have brought these claims while she was still employed" because "she would have lacked standing." Pet. C.A. Br. 22. The Eleventh Circuit therefore refused to pass upon this issue expressly

disclaimed in her initial brief and untimely contradicted in her reply brief. Pet. App. 17a.

Next, the Eleventh Circuit analyzed whether the City's post-employment application of the subsidy policy was, in its own right, a fresh violation of Title I, rather than an alleged extension of past discrimination. Pet. App. 16a. In doing so, it found that nothing in the Ledbetter Act "changes Title I's substantive requirements," including the requirement that one be a "qualified individual" at the time of the discriminatory act. Pet. App. 15a. It held the Ledbetter Act's "relaxed statute of limitations helps a plaintiff only if that plaintiff otherwise has a claim for discrimination." *Id.*

Therefore, it adhered to its precedent holding that Title I is unambiguous and contains a "clear temporal qualifier" stating "[o]nly someone 'who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual *holds* or *desires*" is protected from disability discrimination. Pet. App. 11a (emphasis in original). It concluded that "[b]ecause Stanley cannot establish that the City committed any discriminatory acts against her while she could perform the essential functions of a job that she held or desired to hold, her Title I claim fails." Pet. App. 18a.

SUMMARY OF ARGUMENT

I. Part I of Petitioner's brief is unrelated to the circuit-split question upon which this Court granted certiorari regarding whether discrimination occurring entirely post-employment is actionable under the ADA. Instead, Part I seeks review of a different question regarding whether Petitioner sufficiently alleged discrimination *during* her employment as a "qualified individual." Petitioner argues her ADA claim allegedly accrued in 2003 when the City passed its subsidy policy. She admits she was not disabled at that time but argues Title I did not require her to have a disability to sue for disability discrimination. She heavily relies on the minimal standing requirements in the enforcement provisions of Title I and Title VII. But Title I's enforcement provision only applies to "any person alleging discrimination on the basis of disability in *violation of any provision of this chapter*." 42 U.S.C. § 12117(a) (emphasis added). This is a "cross-reference…directing us to a class of claims with a settled and statutorily precise meaning." *Almond v. Unified Sch. Dist. No. 501,* 665 F.3d 1174, 1181 (10th Cir. 2011).

The ADA's "class of claims" are found in its substantive anti-discrimination provision, § 12112(a), which has a settled meaning requiring Petitioner to show: "(1) that she was disabled under the ADA; (2) that she was a qualified individual with a disability; and (3) that she was discriminated against by her employer because of that disability." *Dunlap v. Liberty Nat. Prod., Inc.,* 878 F.3d 794, 798–99 (9th Cir. 2017). Because Petitioner conceded that she did not have a disability in 2003 and further conceded that she

"lacked standing" to sue for anything occurring "while she was still employed," Pet. C.A. Br. 22, the Eleventh Circuit correctly declined to pass upon whether her allegations sufficiently alleged she was discriminated against as a "qualified individual" at any time before she retired. Pet. App. 17a.

The Eleventh Circuit also correctly held that the Ledbetter Act did not change Title I's substantive requirement that she be a "qualified individual" with a disability at the time of the alleged discrimination. *Id.* 15a. Because she only alleged discrimination occurring entirely post-employment when she could no longer perform the essential functions of her job, she was not a "qualified individual" entitled to sue.

II. The Eleventh Circuit correctly held that Title I's use of the present tense unambiguously prohibits discrimination solely against an individual who "can perform" the job she presently "holds or desires." *Id.* 11a-12a. This reading is consistent with the ADA's statutory scheme which uses the term "individuals" to broadly include former employees, but "qualified individuals" to refer only to current employees. And it gives effect to every word in the definition and the general rule where it appears.

Petitioner's interpretation requires this Court to rewrite Title I to include an exception to the "can perform" clause for retirees. It is based on a policy preference to avoid what she perceives as an "absurd" consequence of the express line drawn by Congress. However, "Congress could reasonably decide to enable disabled people who can work with reasonable accommodation to get and keep jobs, without also deciding to equalize post-employment fringe benefits

for people who cannot work." *Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104, 1112 (9th Cir. 2000). The Eleventh Circuit correctly refused to allow policy preference or purpose—even purpose as most narrowly defined—to negate the plain language of the statute.

ARGUMENT

The question presented, as inaccurately framed by Petitioner, asks under the ADA, "does a former employee—who was qualified to perform her job and who earned post-employment benefits while employed—lose her right to sue over discrimination with respect to those benefits solely because she no longer holds her job?" Pet. Br. i. A former employee who has a "right to sue" cannot "lose" that right "solely" because she no longer holds her job. If so, there could be no ADA claim for a discriminatory termination—a claim the Eleventh Circuit has permitted former employees to bring. *See Taylor v. Food World, Inc.*, 133 F.3d 1419 (11th Cir. 1998).

The Eleventh Circuit held that to "fall within Title I's anti-discrimination provision, a plaintiff's claim must depend on an act committed by the defendant while the plaintiff was either working for the defendant or seeking to work for the defendant." Pet. App. 8a-9a. This holding clearly makes room for former employees to sue if they were discriminated against *during* their employment. Because the Eleventh Circuit did not hold that former employees are categorically barred from suing under the ADA, Petitioner is not entitled to a reversal based on a ruling that was never made.

The circuit-split question is whether discrimination occurring entirely *post-employment* against totally disabled former employees, is actionable under Title I. The Eleventh Circuit, siding with the majority, held that "[b]ecause Stanley cannot establish that the City committed any discriminatory acts against her while she could perform the essential functions of a job that she held or desired to hold, her Title I claim fails." Pet. App. 18a.

Therefore, Part I of Petitioner's brief framing the issue as whether "[t]he ADA permits former employees to bring suit with respect to post-employment benefits," attacks a strawman. Pet. Br. 17. As the Eleventh Circuit never categorically barred such suits, Petitioner reveals the real alleged errors for this Court's review deep into Part I(C)(2). *Id.* 24-27. In doing so, she has "smuggl[ed] additional questions into" the case "after [this Court] grant[ed] certiorari." *Irvine v. People of California,* 347 U.S. 128, 129 (1954).

Completely unrelated to the circuit-split question regarding whether post-employment discrimination against former employees is actionable under Title I, Petitioner argues the Eleventh Circuit erred by: (1) finding that she disclaimed standing to sue for discrimination occurring *during* her employment, Pet. Br. 24, 27; (2) misapplying Title I's "disability" element to the facts of this case*, Id.* 25; and (3) not applying the Ledbetter Act to find her time-barred claims allegedly accruing during employment "re-accrued in 2020," *Id.* 24.

None of these questions are "subsidiary question[s] fairly included" in the circuit-split

question. *Yee v. City of Escondido, Cal.,* 503 U.S. 519, 535 (1992). Instead, Petitioner has relegated the circuit-split question to her secondary argument for reversal. Pet. Br., Part II, 27. Remarkably, she argues that this Court "need not even reach" the circuit-split question and should reverse based solely on the above three alleged misapplications of law to fact. Pet. Br. 17. This is backwards. This Court should ignore Part I and proceed solely to resolving the circuit-split question in Part II. But to the extent this Court reviews Part I, it should find that she waived these arguments, and any claim of discrimination during employment is unpled and time-barred.

I. The Non-Circuit-Split Questions Regarding Discrimination During Employment

In support of her argument of discrimination during employment when she was a "qualified individual," Petitioner provides a truncated version of Title I's enforcement and substantive provisions omitting crucial elements under § 12112(a). Pet. Br. 17-23. She argues merely pleading that she was "aggrieved" regarding her post-employment benefits, with the aid of the Ledbetter Act, brings her "claim across the finish line." Pet. Br. 21.

Her claim, however, never got off the starting blocks because she expressly disclaimed standing to sue for anything occurring during her employment. Pet. C.A. Br. 22. To be sure, her initial brief in the Eleventh Circuit argued:

> Ms. Stanley could not have brought these claims *while she was still employed* and able to do her job because she had not yet learned

> of the discrimination and become a disability retiree impacted by the discrimination *so she would have lacked standing*.

Id. (emphasis added). Even in the absence of this disclaimer, her complaint failed to demonstrate that a Title I claim accrued during her employment or that any such claim was timely. Determining the timeliness of Petitioner's 2019 EEOC charge required her "to identify precisely the 'unlawful employment practice' of which" she complains. *Delaware State Coll. v. Ricks,* 449 U.S. 250, 257 (1980).

Petitioner argues her claims accrued during her employment: (1) in 2003 when the City adopted its subsidy policy; (2) when she became disabled during employment; and (3) at some unspecified time when it became "inevitable" that she would need to take a disability retirement prior to her retirement on November 1, 2018. Pet. Br. 24-26. These arguments cannot be squared with the allegations of the complaint. And Petitioner has waived them.

A. Petitioner disclaimed and her complaint failed to demonstrate any claim accrued in 2003 when the City adopted its subsidy policy.

1. The Eleventh Circuit found Petitioner "concedes, and we agree, that her claim cannot turn on the 2003 amendment to the benefits plan because she was not yet disabled at that time." Pet. App. 16a. Petitioner admitted in her initial brief that the City adopted its subsidy policy "in 2003, when Ms. Stanley was a non-disabled employee." Pet. C.A. Br. 22 n. 5. She then conceded she "lacked standing" to bring

"these claims *while she was still employed* and able to do her job" because she was not yet a "disability retiree impacted by the discrimination." Pet. C.A. Br. 22 (emphasis added). Although Petitioner purported to incorporate the United States' contrary arguments into her initial brief, Pet. C.A. Br. 20, the Eleventh Circuit was not required to scour the amicus brief for better arguments to save Petitioner's case. The Eleventh Circuit properly relied on *her* arguments in *her* brief expressly disclaiming standing to sue for anything during her employment.

Petitioner and the United States attempt to explain away her concessions by arguing she only meant to disclaim any *financial* impact during her employment. Pet. Br. 27; U.S. Am. Br. 27-28. This argument cannot be squared with her clear concession that she "lacked standing" to sue "while she was still employed." Pet. C.A. Br. 22. Indeed, financial impact is not necessary for standing, but an injury is. Her way of describing "injury" was by using the word "impact" because otherwise she would not have disclaimed standing simply because she suffered no *financial* impact during employment.

It is true that this Court's "practice 'permit[s] review of an issue not pressed [below] so long as it has been passed upon.'" *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 330 (2010). To the extent that the Eleventh Circuit passed upon this issue by "agree[ing]" with Petitioner's concession that "her claim cannot turn on the 2003" adoption of the policy, Pet. App. 16a, prudential concerns weigh in favor of this Court declining to review this matter. A mere failure to "press" an argument is markedly different

than an express disclaimer of an argument because the latter invites the complained-of error. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (rejecting argument "that we need not concern ourselves about Springfield's failure to preserve this issue, because it was passed on by the Court of Appeals" because "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested.").

Further, while an appellant can raise on appeal any new "argument" in support of a "claim," U.S. Amicus Br. 28 n. 6, it cannot wait until its reply brief to flip-flop on a position in true ambush fashion as Petitioner did here. *Compare* Pet. C.A. Br. 22 *with* Pet. C.A. Reply Br. 5. This Court should hold that because Petitioner "raised this issue for the first time in [her] reply brief," she "has waived this claim." *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999).

2. Even if Petitioner hadn't expressly disclaimed the argument below, her allegations were still insufficient to demonstrate that a claim accrued in 2003. Although she concedes she was not disabled then, she incorrectly argues she was not required to have a disability at that time to bring suit. Pet. Br. 25.

Title I's enforcement provision, § 12117(a), incorporates Title VII's remedial framework which states any "person claiming to be aggrieved" can bring "a civil action." 42 U.S.C. § 2000e-5(f)(1). This Court has held that "aggrieved" in Title VII "enabl[es] suit by any plaintiff with an interest arguably [sought] to be protected by the statute...while excluding plaintiffs

who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." *Thompson v. N. Am. Stainless, LP,* 562 U.S. 170, 178 (2011) (internal quotation marks and citation omitted). Put differently, the requirement that the plaintiff be "aggrieved" is a requirement that the plaintiff have "statutory" standing to sue. *Id.* at 177-78.

But, here, Petitioner failed to allege Article III or statutory standing to sue in 2003. Her claim is based on "*her* disability." Doc. 1, ¶ 26. And yet, she was not disabled in 2003 and therefore not injured by a policy that allegedly discriminated only against the disabled. *See Bostock v. Clayton Cnty., Georgia,* 590 U.S. 644, 681 (2020) ("Discriminate against" means "distinctions or differences in treatment that injure protected individuals.").

Her claim was not based on the disability of someone else with whom she associated under § 12112(b)(4), nor was it based on a claim that she was merely "regarded as" disabled under § 12102(1)(C). *See Murray v. Warren Pumps, LLC*, 821 F.3d 77, 83 (1st Cir. 2016) (a plaintiff must prove her "particular theory of disability discrimination alleged."). Based on Petitioner's particular theory in her complaint, she was required to show that she was discriminated against because of *her* disability "which requires that the disability exist at the time of the discrimination." *Weyer,* 198 F.3d at 1112.

Petitioner argues that the ADAAA of 2008 repealed any requirement that she have a disability to sue for a claim allegedly accruing in 2003. Pet. Br. 25. The ADAAA amended § 12112(a) to prohibit

discrimination "against a qualified individual *on the basis of disability*" rather than "against a qualified individual *with a disability because of the disability*." Pub. L. No. 110-325, § 5(a)(1), 122 Stat. 3557 (2008) (emphasis added). However, the Eleventh Circuit and its "sister circuits...hold that the switch from 'because of' to 'on the basis of' in the 2008 amendment to the ADA did not change or affect its but-for causation standard." *Akridge v. Alfa Ins. Companies,* 93 F.4th 1181, 1192 (11th Cir. 2024).

This amendment removed the redundant language, "*with a disability because of the disability*" from § 12112(a) because those words were already repeated several times in the "construction" provision, § 12112(b). Section 12112(b)(1), for example, still prohibits "classifying a job applicant or employee...*because of the disability* of such applicant or employee." 42 U.S.C. § 12112(b)(1) (emphasis added).

The express purpose of the ADAAA was to "reject" decisions of this Court, which Congress found interpreted the definition of a "disability" too narrowly. Pub. L. No. 110-325, § 2(b). Congress stated the amendment's purpose was to clarify "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* at § 2(b)(5). Therefore, the changes removed the prior emphasis on whether an individual's impairment met the definition of a "disability." Congress did not remove the requirement that an individual have a disability all together.

3. Even if the ADAAA did dispense with the "disability" element, the United States acknowledges

that the "ADAAA's amendments...apply to claims that arose after" January 1, 2009. U.S. Amicus Br. 24 n. 4. Therefore, any claim allegedly accruing in 2003 would be governed by the ADA, before the ADAAA allegedly disposed of the disability element.

4. Petitioner makes a last-ditch effort to root her claim in 2003 when she was a "qualified individual" by arguing this Court may "conceive of this claim as encompassing two moments of time that complete the whole: when the facially discriminatory policy was adopted in 2003, and when Lt. Stanley became disabled." Pet. Br. 26. However, this Court has recognized that Title VII claims can encompass different events at different points in time only in two narrow circumstances: hostile work environment claims and constructive discharge claims. *Green v. Brennan*, 578 U.S. 547, 556-57 (2016). Moreover, Petitioner has expressly waived any argument of discrimination at any time during her employment. Pet. C.A. Br. 22.

B. Petitioner disclaimed and her complaint failed to demonstrate a claim accrued at any time between her diagnosis and retirement.

1. The Eleventh Circuit expressly declined to pass upon Petitioner's untimely argument raised in her reply brief that a claim accrued "at some unknown point before she retired but after she was diagnosed with Parkinson's." Pet. App. 17a. This Court should decline to "decide in the first instance issues not decided below." *Reagan Nat'l Advert. of Austin, LLC,* 596 U.S. at 76.

2. But if this Court proceeds, it must determine whether the complaint alleged that Petitioner was a "qualified individual" with a disability during her employment. She must allege that she became disabled "during the course of [her] employment but nevertheless continued to perform the essential requirements of [her] job with or without a reasonable accommodation, until [she] became completely and totally disabled." *Bass v. City of Orlando,* 57 F. Supp. 2d 1318, 1323 (M.D. Fla. 1999), *aff'd,* 203 F.3d 841 (11th Cir. 1999). Contrary to the United States' claims, Petitioner's complaint does not allege when or how she became disabled, let alone that she continued to work thereafter. U.S. Amicus Br. 26. Petitioner only alleged that because of a "physical disability" she took a disability retirement in 2018 and as a result would lose the subsidy in 2020. Doc. 1, ¶¶ 16, 26.

Although we now have the benefit of the summary judgment record on her Equal Protection claim, in testing the sufficiency of a complaint, a district court does not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated...laws in ways that have not been alleged." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526 (1983); *see also Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242, 1248 (11th Cir. 2005) (a plaintiff must "allege sufficient facts to warrant [a particular] inference").

Petitioner led the district court to its conclusion when she failed to dispute the City's argument for dismissal that she only alleged post-employment discrimination when she was no longer a "qualified

individual." Doc. 14 at 4-5; Doc. 17. Instead, she merely argued that the district court should refuse to follow Eleventh Circuit precedent in *Gonzales* (a case involving only post-employment discrimination). Doc. 17 at 5-6. As the Eleventh Circuit noted, she did not attempt to distinguish the facts of *Gonzales* from her case by arguing that she alleged discrimination during employment. Pet. App. 18a. The district court, thus, properly dismissed her ADA claim because her complaint "alleged [the] discrimination did not occur until Plaintiff was no longer able to perform the essential functions of her job." Doc. 27 at 7.

Further, the district court was "not required to grant…plaintiff leave to amend [her] complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.,* 314 F.3d 541, 542 (11th Cir. 2002). After dismissal, Petitioner did not move for reconsideration arguing the court misapprehended her complaint allegedly pleading discrimination during employment. Perhaps fearing her claims would be time-barred, she never argued they arose during her employment, years before she filed her 2019 EEOC charge. Indeed, she never mentioned the generous accrual provisions of the Ledbetter Act in the district court. Doc. 1, ¶ 6.

Petitioner's initial brief in the Eleventh Circuit confirmed that her complaint only alleged post-employment discrimination because she argued she "could not have brought these claims while she was still employed" because "she would have lacked standing." Pet. C.A. Br. 22. The Eleventh Circuit

therefore properly refused to pass upon this issue expressly disclaimed in her initial brief and untimely contradicted in her reply brief. Pet. App. 17a. This Court should decline to decide this unpreserved issue in the first instance, and as demonstrated above, it is unsupported by her allegations.

C. The Ledbetter Act's generous accrual provisions do not create a claim where none exists.

It is clear that *if* a claim accrued in 2003, it expired long before Petitioner filed her EEOC charge in 2019. Doc. 1, ¶ 6. Petitioner argues that under the Ledbetter Act, 42 U.S.C. § 2000e5(e)(3)(A), her 2003 claim "re-accrued in 2020" when she "was 'affected' when her subsidy ended." Pet. Br. 24, 26 n. 1. The Ledbetter Act has no place here.

"Ordinarily, a limitations period commences when the plaintiff has a complete and present cause of action." *Green v. Brennan,* 578 U.S. 547, 554 (2016) (cleaned up). "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Id.* (cleaned up). Petitioner failed to demonstrate she had a "complete and present" claim during her employment.

Indeed, any claim of disability-based discrimination in 2003 when she was not disabled would have been dismissed for lack of standing, as she conceded below but refuses to admit now. Pet. Br. C.A. 22. If no claim accrued in 2003, it could not "re-accrue" post-employment. "A plaintiff must plead and prove the elements of a pay-discrimination claim to benefit from the Ledbetter Act's accrual provisions." *Davis v.*

Bombardier Transp. Holdings (USA) Inc., 794 F.3d 266, 269 (2d Cir. 2015); *see also AT & T Corp. v. Hulteen,* 556 U.S. 701, 716 (2009) (Ledbetter Act did not save the plaintiff's untimely claim because the original employment practice "was not discriminatory"). The Ledbetter Act "is an accrual rule; it does not affect the substance of the claim." *McReynolds v. Merrill Lynch & Co., Inc.,* 694 F.3d 873, 888 (7th Cir. 2012). Therefore, the Eleventh Circuit correctly held the Ledbetter Act's "relaxed statute of limitations helps a plaintiff only if that plaintiff otherwise has a claim for discrimination." Pet. App. 15a.

The Eleventh Circuit did not pass upon whether the Ledbetter Act *should* apply to allow a Title I claim to "re-accrue" when an individual is "affected" post-employment when she is no longer qualified. This Court should decline to decide this issue in the first instance. This is especially so where Petitioner has not shown that the facts of *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007), which prompted the Ledbetter Act, are sufficiently similar to the subject facts to warrant extension of the Act here. Unlike the secret decisions creating an unknown pay disparity for Ms. Ledbetter, the City's subsidy policy was a publicly announced act codified in its ordinances and "official personnel policies." Doc. 1, ¶ 24; *see also* Doc. 38-10 at 2-5; Doc. 38-11 at 4. Such fully communicated acts can be vindicated "without the need for the Ledbetter Act's generous accrual provisions because the employee had notice of the pay reduction." *Davis,* 794 F.3d at 271.

Petitioner's later testimony claiming ignorance of the ordinance is irrelevant. *See Taylor v. Michael*, 724

F.3d 806, 811 (7th Cir.2013) ("Lack of familiarity with the law...is not a circumstance that justifies equitable tolling."). Therefore, the City's policy is akin to the employment practice at issue in *Ricks,* not *Ledbetter.* In *Ricks*, "the only alleged discrimination occurred–and the filing limitations periods therefore commenced–at the time the tenure decision was made and communicated to Ricks." 449 U.S. at 258. "That is so even though one of the *effects* of the denial of tenure–the eventual loss of a teaching position–did not occur until later." *Id.* For such acts, "the clock starts running when the plaintiff first knew or should have known of his injury, whether or not he realized the cause of his injury was unlawful." *Almond,* 665 F.3d at 1176.

To extend the Ledbetter Act under the facts of this case would open the floodgates to stale claims over known, written personnel policies and publicly announced ordinances. And it would allow plaintiffs to delay suit indefinitely, despite knowing exactly when a benefit will end, by arguing that the claim "re-accrues" every month that the plaintiff does not receive the benefit. *See, e.g., Lohrasbi v. Bd. of Trustees of the Univ. of Illinois,* 147 F. Supp. 3d 746, 755 (C.D. Ill. 2015) ("[T]he 300-day time-limit does not restart each day that Plaintiff is deprived of Professor Emiritus status."). The Ledbetter Act has no place here and any claims that allegedly accrued during Petitioner's employment have long-since expired and been waived.

II. The Circuit Split Question Regarding Discrimination Post-Employment

This Court should only resolve the question splitting the circuit courts: whether totally disabled retirees are "qualified individuals" entitled to seek relief under Title I for discrimination occurring entirely post-employment. The Eleventh Circuit below (at Pet. App. 11a-12a) and "the majority of courts have held, Title I is unambiguous; by its plain language, it does not" prohibit discrimination against "former employees who are unable to perform the essential functions of their jobs." *McKnight v. Gen. Motors Corp.*, 550 F.3d 519, 528 (6th Cir. 2008); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 458–59 (7th Cir. 2001); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir. 2000).

Only two circuits have disagreed and held that Title I is ambiguous because it allegedly fails to "specify *when* a potential plaintiff must have been a 'qualified individual'..." *Castellano v. City of New York,* 142 F.3d 58, 67 (2d Cir. 1998) (emphasis in original); *Ford v. Schering-Plough Corp.,* 145 F.3d 601, 606 (3d Cir. 1998). The Third Circuit also found an ambiguity, not in the text, but in the "disjunction between the ADA's definition of 'qualified individual with a disability' and the rights that the ADA confers." *Ford,* 145 F.3d at 605.

As the Eleventh Circuit explained below "[n]either court established that the text of Title I's anti-discrimination provision is ambiguous." Pet. App. 12a. "Instead, the Second and the Third Circuit expressed something between discomfort and disagreement with the policy choice underlying the

line, drawn by the text of the ADA, between disabled individuals who hold or desire to hold a job and those who do not." Pet. App. 12a. "But not 'even the most formidable policy arguments' empower a court to ignore unambiguous text." *Id.* (citation omitted). And that text plainly prohibits discrimination solely against individuals who "can perform the essential functions" of the job "that such individual holds or desires." 42 U.S.C. §§ 12111(8), 12112(a).

A. Title I requires an individual to hold or desire a job at the time of the discriminatory act to be a "qualified individual."

The first step "in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "The 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." *Id.* at 341.

1. The text uses the present tense as a temporal qualifier to prohibit discrimination solely against an individual who "can perform" the job she presently "holds or desires."

a. Title I's anti-discrimination provision (the "general rule") and its incorporated definition of a "qualified individual" are unambiguous. 42 U.S.C. §§ 12112(a), 12111(8). The "general rule" makes it unlawful for an employer to "discriminate against a

qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a).

Section 12111(8) defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). Because the general rule expressly incorporates the definition of a "qualified individual," an "ADA plaintiff bears the burden of proving that she is...a person 'who, with or without reasonable accommodation, *can perform* the essential functions' of *her* job," *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 806 (1999), at the time of the prohibited discrimination. (emphasis added).

"Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson,* 503 U.S. 329, 333 (1992). For example, the ADA's use of "the present indicative verb form" requires "that a person be *presently*…substantially limited in order to demonstrate a disability." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), *superseded, in part, on other grounds,* ADAAA of 2008, Pub. L. No. 110-325, § 2(b)(3) (emphasis added); Dictionary Act, 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise...words used in the present tense include the future as well as the present"—not the past).

Section 12112(a) does not prohibit discrimination against an individual who *performed* the job that such

individual *held* or *desired*. *See* 42 U.S.C. §§ 12112(a), 12111(8). The present tense is used to require that an individual be able to perform her job at the time of the discrimination.

This is not to say that a former employee can never sue under Title I. The Eleventh Circuit held she may sue if her claim is based "on an act committed by the defendant while the plaintiff was either working for the defendant or seeking to work for the defendant." Pet. App. 8a-9a. This is because the general rule does not require a former employee to be a "qualified individual" at the time of the lawsuit. *See id.* § 12112(a). Its focus is on the individual's qualifications at the time of the discriminatory act because it speaks only in terms of the prohibited discrimination—not when suit is filed. *Id.* Any mischaracterization of the Eleventh Circuit's holding to categorically exclude retirees from suing under Title I, must be rejected. It correctly held that "[b]ecause Stanley cannot establish that the City committed any discriminatory acts against her while she could perform the essential functions of a job that she held or desired to hold, her Title I claim fails." Pet. App. 18a.

b. This Court's decision in *Robinson* reinforces the significance of present tense verbs as "temporal qualifiers" to limit the scope of a statute's protection to current employees. 519 U.S. at 341-42 & n. 2. The question in *Robinson* was whether the word "employees" in Title VII's anti-retaliation provision, § 704(a), includes former employees. *Id.* at 339. Section 704(a) makes it unlawful "for an employer to discriminate against any of his employees or

applicants for employment" who have availed themselves of Title VII's protections or assisted others in so doing. *Id.* Section 701(f) defines "employee" as "an individual *employed* by an employer." *Id. a*t 342 (emphasis added).

This Court explained that certain features of § 704(a) made it ambiguous and militated in favor of reading it to include former employees. *Id.* at 341. First, this Court emphasized that "there is no temporal qualifier" in § 704(a). *Id.* Second, the definition of "employees" in § 701(f) was consistent with either current or past employment because the word "employed" used therein could mean "*is* employed" or "*was* employed." *Id.* at 342 (emphasis in original). Thus, this Court concluded that like § 704(a), the definition of "employees" in § 701(f) "lacks any temporal qualifier." *Id.*

On this critical "temporal qualifier" point, this Court distinguished its decision just one month earlier in *Walters v. Metro. Educational Enters.,* 519 U.S. 202 (1997). *Id.* at 341 n. 2. In *Walters,* this Court unanimously held that "employees" as used in § 701(b) relating to the 15-employee threshold for coverage by Title VII, unambiguously referred to current employees only. 519 U.S. at 341, n.2. This was because § 701(b) clearly included "two significant temporal qualifiers." *Id.* This Court noted § 701(b)'s language stating that Title VII "applies to any employer 'who *has* fifteen or more employees *for each working day*…'" *Id.* (emphasis in original). "The emphasized words specify the time frame in which the employment relationship must exist, and thus the specific context of that section did not present the particular

ambiguity at issue in the present case." *Id.* Indeed, § 701(b)'s use of the present-tense as a temporal qualifier was critical in distinguishing the facts of *Robinson*.

The majority of courts have thus correctly concluded that "Title I, unlike the section of Title VII at issue in *Robinson*, has a 'temporal qualifier.'" *Weyer,* 198 F.3d at 1112. Because § 12111(8) "uses the present tense...one must be able to perform the essential functions of employment at the time that one is discriminated against." *Id.* Section 12111(8)'s other temporal qualifiers reinforce this conclusion. It also refers in the present tense to "the employment position that such individual *holds* or *desires*." 42 U.S.C. § 12111(8) (emphasis added). The ADA, therefore, has more in common with the provision that this Court limited to current employees in *Walters* than to the anti-retaliation provision distinguished in *Robinson*.

2. The specific context in which "qualified individual" is used within the anti-discrimination provision shows that it prohibits discrimination solely against those who presently hold or desire jobs.

After examining the language itself, we next look to the "specific context in which that language is used" to discern its meaning. *Robinson,* 519 U.S. at 341. The "qualified individual" definition is used within the anti-discrimination provision. 42 U.S.C. §§ 12112(a), 12111(8). Petitioner's incorrect interpretation of Title I derives from her narrow focus on the "qualified individual" definition completely out of context from

the general rule where the definition appears. A "qualified individual" means an individual who "can perform the essential functions" of the job she "holds or desires." 42 U.S.C. § 12111(8). Petitioner argues that the "primary purpose" of the "qualified individual" definition is to protect employers from being compelled to hire or retain unqualified individuals by "testing" an employee's capabilities. Pet. Br. 34. And so, she argues if an individual has no job, an employer has no interest in the individual's ability to perform and thus the "can perform" clause can be ignored. *Id.* 24, 34-35.

This argument barely holds water when the "qualified individual" definition is read in a vacuum. It completely fails when the definition is read within the general rule where it appears. Indeed, "[t]he question isn't just what [qualified individual] mean[s], but what [Title I] says about it." *Bostock,* 590 U.S. at 656. Read in context, the general rule prohibits discrimination solely against an individual who can perform the job she holds or desires. 42 U.S.C. § 12111(8), 12112(a).

And so, the primary purpose of this *anti-discrimination* rule is not to protect the hiring prerogatives of employers, but to protect *certain* disabled individuals from discrimination: those who presently work, want to work and can work despite their disabilities. *See Tyndall v. Nat'l Educ. Centers, Inc. of California*, 31 F.3d 209, 215 (4th Cir. 1994) ("[T]he primary purpose of the ADA...[is] to encourage employers to take on qualified individuals, regardless of their disability."). Title I was intended to "draw *workers* with a disability into the workforce." *Morgan*,

268 F.3d at 458 (emphasis added). Its "language [is] well designed to help people get and keep jobs, not to help those no longer able to work get disability pay." *Weyer,* 198 F.3d at 1112; *see also* Pet. App. 8a (the ADA's "central purpose" is "protecting disabled people who can nevertheless perform the essential functions of a job"). Indeed, drawing the disabled into the workforce would save "the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(8) (emphasis added).

Thus, the primary purpose of the anti-discrimination rule is to prohibit employers from discriminating against current employees and applicants who can work despite their disabilities—not to impose a "test" on employees that they either "pass," "fail," or in the case of retirees, are allegedly exempt from taking. *See* Pet. Br. 34. By interpreting the definition of a "qualified individual" in a vacuum, Petitioner commits the same error as the Second Circuit did in *Castellano*. There, despite acknowledging that it must consider "the specific context in which that language is used," the court skipped that step, isolated the definition, and concluded that it failed "to specify *when* a potential plaintiff must have been a 'qualified individual with a disability'..." 142 F.3d at 67 (emphasis in original). It then "manufactured ambiguity where none existed." *McKnight,* 550 F.3d at 527.

Had the *Castellano* court read the definition in context as used in the general rule, it would have realized that the statute says exactly when an individual must be qualified. A violation only arises if

an employer discriminates against a "qualified individual" and thus if one is not qualified at the time of the discrimination there is no violation and no claim. 42 U.S.C. § 12112(a). By focusing on those who "can perform" jobs they "hold or desire" Congress limited the statute's protections to current employees and applicants.

Even considering the "primary purpose" of the "qualified individual" definition as narrowly defined by Petitioner to protect employers from being forced to hire or retain unqualified individuals, Petitioner's argument fails. "[E]xcept in the rare case of an obvious scrivener's error, purpose—even purpose as most narrowly defined—cannot be used to contradict text or to supplement it." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 57 (2012) ("Scalia & Garner"). Petitioner's argument that the purpose of the "can perform" clause should be deemed "satisfied" in the case of retirees is nothing more than a request for this Court to rewrite the text to include an exception to the "can perform" clause for retirees.

And regardless of whether an employer is concerned with a retiree's ability to perform, Congress was concerned solely with protecting those who "can perform." If an individual is totally disabled or no longer holds or desires their position, the statute is silent as to discrimination against that individual. Petitioner presumes, based on nothing, that the statute *must* say something about retirees who do not hold or desire their jobs. But a "judge should not presume that every statute answers every question, the answers to be discovered through interpretation." Scalia & Garner, 93.

"[T]he limitations of a text—what a text chooses *not* to do—are as much a part of its 'purposes' as its affirmative dispositions." *Id.* at 57 (emphasis in original). These "limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose." *Id.* at 57-58. Title I expressly limits its protections to those who can perform the jobs they hold or desire. There are no exceptions, and this Court should not alter the plain language to make any to appease Petitioner's policy preferences.

3. Title I's distinction between "qualified individuals" and "individuals" is consistent throughout the statutory scheme.

The ADA's "statutory scheme is coherent and consistent." *Robinson*, 519 U.S. at 340. The ADA's use of "qualified individual" does not vary in different provisions. In *Robinson*, on the other hand, this Court found that the word "employee" included former employees in at least some provisions of Title VII. *Id.* at 342-43. Having found § 704(a) ambiguous, this Court considered what interpretation would be most consistent with that section's purpose. In doing so, this Court emphasized that § 704(a) was an anti-retaliation provision that by its nature would be "effectively vitiate[d]" if it were confined to current employees. *Id.* at 345. However, the ambiguities and policy concerns that drove this Court's analysis of Title VII's anti-retaliation provision do not exist under Title I of the ADA.

Title I does not protect against retaliation. The ADA prohibits retaliation under Title V. *See* 42 U.S.C.

§ 12203(a) (it is unlawful for any employer "to discriminate against *any individual* because such individual has opposed any act or practice made unlawful by this chapter...") (emphasis added). Thus, the concerns that impelled this Court to a broad construction of Title VII's anti-retaliation provision are not present here, because the ADA's anti-retaliation provision is expressly drawn to cover "any individual," not just the narrower subset of "qualified individuals" covered by Title I. *See Morgan,* 268 F.3d at 458 ("The difference is stark."). Thus, when Congress wanted to prohibit discrimination against disabled former employees, "it did so clearly and explicitly," *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 455 (2002), by referring to "individuals"—not "qualified individuals."

B. Petitioner's contrary arguments lack merit.

As described above, the Second and Third Circuits are the only circuits to side with Petitioner's argument. *See supra Castellano* and *Ford.* Recently, however, the Second Circuit acknowledged that "[i]n general, the determination of whether a person is 'qualified' should be made at the time of the discriminatory employment action," but in *Castellano,* the court "created a *narrow exception* to the rule for post-employment benefits intended to be used by retirees." *Smith v. Town of Ramapo*, 745 Fed. Appx. 424, 426 (2d Cir. 2018) (emphasis added). Thus, even the Second Circuit, albeit in an unpublished opinion, admits that *Castellano* judicially-created a "narrow exception" to the plain text of the rule articulated by Congress. *Id.*

Petitioner now rejects the Second and Third Circuit's finding of ambiguity in the "qualified individual" definition. She argues their judgments are dictated by the plain text of Title I, which she claims imposes only a "conditional" mandate that one be able to perform their job only *if* they hold or desire one. Pet. Br. 28. Despite this recasting of the argument, Petitioner is still guilty of the same cardinal sin of statutory construction committed by the Second and Third Circuits. She too rewrites Title I by creating a "narrow exception" to the "can perform" clause just for retirees.

1. Petitioner's interpretation of the performance requirement of the "qualified individual" definition as a "conditional mandate," adds an unwritten exception to that requirement for retirees.

a. The alleged "conditional" nature of the performance requirement of the "qualified individual" definition cannot be divined from any part of the statutory text. In support of this theory, Petitioner resorts to strained and unnatural constructions such as retirees are "not unable to perform the essential functions of a job that they hold or desire." Pet. Br. 34. She admits "testing the job capabilities of someone who is no longer working may seem logically awkward." *Id.* That is putting it mildly. But purported logic aside, the text simply does not contain any language conditioning the ability to perform on whether a person holds or desires a job.

Title I makes no exceptions to the "can perform" clause. Courts should not "elaborate unprovided-for

exceptions to a text…'[I]f the Congress [had] intended to provide...exceptions, it would have done so in clear language.'" Scalia & Garner, 93. Petitioner improperly argues for a "tacit exception," *Bostock*. 590 U.S. at 669, to Title I's "can perform" clause. But "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Id.*

The correct reading of Title I to only prohibit discrimination against an individual who presently holds or desires a job that she can perform gives effect to all of the words in §§ 12112(a) and 12111(8). Petitioner's interpretation, on the other hand, requires the addition *and* subtraction of language from Title I. It does not, however, prohibit discrimination against an individual who can perform the essential functions of the job only *if* she holds or desires one.

Even if Congress wanted to imply that the performance requirement was conditioned upon an individual having or wanting a job, Congress would not have referred to "*the* employment position" that such individual holds or desires. *Id.* § 12111(8) (emphasis added). By referring to "*the* employment position" the text clearly indicates that the job currently exists. Petitioner's reading replaces "the" with "an" to read the definition as only requiring the ability to perform *if* the individual has *an* employment position. This addition and subtraction of text cannot be countenanced by this Court.

Petitioner argues Congress did not include "an" instead of "the" because that would have made the statute too confusing. Pet. Br. 44. As already discussed, Congress knew exactly how to expand the

ADA's protections to other individuals besides current employees and applicants. *See supra* 36-37. It also would have been a very simple matter for Congress to do what the Second and Third Circuits did to Title I by inserting a "narrow exception" to the "qualified individual" definition for retirees. *Smith,* 745 Fed. Appx. at 426. Congress did none of these things and Petitioner's arguments fail.

b. Petitioner's "conditional mandate" interpretation opens the door to a host of new "qualified individuals" none of whom Congress intended to protect. It will create bizarre incentives for employees to simply deny desiring a job or promotion to circumvent the requirement that they be able to perform it. An employee totally incapable of performing a certain position could sue if she is not given the position because of her disability. So long as she doesn't apply for the promotion or otherwise indicate that she "desires" it, she can sue if a non-disabled employee is given the position over her despite her inability to perform the position because of her disability. Petitioner's "conditional mandate" test is unworkable and should be rejected.

c. While Petitioner argues that retirees are "qualified individuals" who need not satisfy the "can perform" clause, the United States takes a different approach that also fails. U.S. Amicus Br. 30. It argues post-employment discrimination against a retiree "retroactively" changes the terms of employment and so "it is naturally described as discrimination against a qualified individual...even if the plaintiff is no longer employed." *Id.* What the United States characterizes as a "retroactive change" to the terms of employment

is actually just a breach of contract. No court would ever describe such a breach as a "retroactive change" to a contract. If it did, then all a breaching party would have to do to "retroactively change" the terms of a contract would be to breach it. This, of course, is absurd.

And whether the changed term of employment is a contractual term or just a privilege, is irrelevant. There is no time machine that an employer travels in to alter the terms or privileges that existed during employment. Those terms and privileges remain the same regardless of any later refusal to honor them. Therefore, it is legally unsound to say that a present breach is a past harm to a plaintiff when she was a "qualified individual." A post-employment change only affects someone who is unqualified. Moreover, the change happened *during* Petitioner's employment in 2003, but she waived any such claim. So the United States' argument is purely hypothetical.

The United States primarily argues for reversal on the grounds Petitioner disclaimed. Its arguments fail for all the same reasons described above in Part I. Its focus on the alleged discrimination occurring during employment confirms Title I's purpose to prohibit such acts during, not after, employment.

2. Petitioner's interpretation of the "qualified individual" definition solely as a screen to protect employers renders §§ 12112(b)(5)(A), (b)(6), (b)(7), and (d)(2) superfluous.

Petitioner argues that §§ 12112(b)(5)(A), (b)(6), (b)(7), and (d)(2) allegedly all do the same work as the "qualified individual" definition by allowing employers to take actions against disabled employees that "are justified in relation to the operation of their business." Pet. Br. 31. But if these subsections of § 12112 perform this function, then the same function allegedly performed by § 12111(8) is rendered superfluous. Instead, § 12111(8) as used in the general rule, tells employers who they may not discriminate against—those who hold or want jobs they can perform—but then §§ 12112(b) and (d)(2) provide exceptions to that general prohibition for the protection of the business.

Accordingly, Petitioner's reliance on these subsections undermines her argument and proves the City's point that the general rule sets forth its limited protection of current employees and applicants who can perform despite their disabilities, but then §§ 12112(b) and (d) include exceptions to that general prohibition to allow an employer to discriminate against these "qualified individuals" where it is necessary to protect the business.

3. The Eleventh Circuit's interpretation does not render § 12112(b)(5)(A) superfluous.

Petitioner argues that if the "qualified individual" definition excludes those who do not hold or desire a job, then § 12112(b)(5)(A)'s reference to an "otherwise qualified individual with a disability who is an *applicant or employee*" is surplusage. Pet. Br. 32-33. She is incorrect.

Section 12112(b) is the "construction" provision explaining that the term "discriminate against a qualified individual on the basis of disability," includes several forms of discrimination. Section 12112(b) is replete with references to "a job applicant or employee," sometimes repeating that phrase multiple times within one subsection. *See, e.g.,* § 12112(b)(1). Section 12112(b)(2) also repeats the reference to a "*qualified* applicant or employee" even though it is defining what is included in the term "discriminate against a *qualified* individual." *Id.* § 12112(b)(2). Likewise, § 12112(b)(5)(B) refers to a "job applicant or employee who is an otherwise qualified individual with a disability." *Id.* § 12112(b)(5)(B).

The repetition of these phrases serves only to emphasize how important it was to Congress that a plaintiff have an actual, present relationship with an employer, as an employee or job applicant, to sue. While a "qualified individual" may be someone who merely "desires" a job under § 12111(8), § 12112(b) clarifies that the individual must actually apply for a job to establish a sufficient relationship to the employer to justify imposing obligations on the employer under the ADA. There is no surplusage

caused by the Eleventh Circuit's correct reading of Title I.

But even assuming that the Eleventh Circuit's interpretation renders the phrase "applicants and employees" in § 12112(b)(5)(A) somehow superfluous, that should not alter the conclusion. "The canon against surplusage is not an absolute rule." *Marx v. General Revenue Corp.,* 568 U.S. 371, 385 (2013).

4. Petitioner's arguments regarding common usage, grammar and logic rely on false analogies.

By focusing on the definition of a "qualified individual" in isolation, Petitioner concocts several false analogies in support of her strained interpretation. When the definition is read out of context, it is stripped of its meaning and malleable to Petitioner's many unhelpful hypotheticals. She posits a movie theater rule: "You can't watch the movie unless you silence your cell phone." Pet. Br. 35. She states if you don't have a phone surely you don't violate the rule. *Id.* This rule is not analogous at all to Title I.

This rule imposes a prohibition on the patron—not the movie theater. And the prohibition against the patron is imposed by the movie theater—not a regulator of the movie theater and so the intent behind the rule is not analogous to Title I. When the theater is the one imposing the restriction, its intent is to protect other patrons from disruption by noisy cell phones. But if a patron does not hold a cell phone, then the theater's concern is not implicated. So, of course, the theater will let you in if you don't have a cell

phone. After all, its motivation is to sell as many tickets as possible so long as the ticket holders are not disturbing others.

But a proper analogy to Title I would require a hypothetical rule that says, "no movie theater shall refuse entry to an individual who can silence the cell phone that such individual holds." If a patron doesn't hold a cell phone, then under this properly analogous rule, the theater can grant the patron entry if it wants, but nothing in the rule *prohibits* the movie theater from refusing that patron entry. This is because the only thing that is prohibited by the regulator is refusal of entry to people who hold cells phones that can be silenced. The focus, from the regulator's perspective, is clearly on protecting people with cell phones.

At first blush, it may seem strange that this fictional regulator did not prohibit discrimination against people *without* cell phones, but not once we realize that the regulator enacted the rule with the protection of people with cell phones in mind. Perhaps the regulator was concerned with making sure people with cell phones can still attend movies and did not want theaters to reject them solely because their cell phones could disturb others. So long as the cell phone can be silenced, the regulator prohibits movie theaters from refusing entry to people with cell phones.

Similarly, under Title I, when we realize that Congress was concerned only with protecting those who work or want to work, we can see the clear purpose of the "qualified individual" definition within the anti-discrimination rule to prohibit discrimination solely against those individuals as long as they can perform despite their disabilities. It was not concerned

with anyone else in this one statute. It doesn't mean that employers have a license to discriminate against retirees. There are several other laws that would prohibit such misconduct. Disabled retirees may face challenges, but Title I "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Florida Bar,* 575 U.S. 433, 449 (2015).

Petitioner provides other purported analogies all suffering from the same flaw as her movie theater hypothetical. Their structure does not mimic Title I's structure and are thus useless to this Court. For example, her "command" analogy fails because Congress did not make a command to an employee. Pet. Br. 39. She argues "When a command is conditional, its condition may be either overt or explicit." *Id.* The command, "Drive carefully!" is conditioned on the subject of that command to be in the act of driving. But Congress did not command an employee to "Perform your job!" If it did, then perhaps we could say that an employee must perform only if she has a job. The "qualified individual" definition, however, does not appear within a command directed at an *employee*. It appears within the anti-discrimination provision commanding *employers* not to discriminate against individuals who can perform their jobs.

No matter how many expedient hypotheticals Petitioner poses, there is only one way this Court can reach her desired outcome—by creating an exception, just for retirees, to the plain language prohibiting discrimination solely against those who can perform their jobs.

5. Petitioner's argument that her interpretation is consistent with Title VII and avoids surplusage and absurd consequences, fails.

a. The Eleventh Circuit's interpretation does not render the "compensation" clause of § 12112(a) superfluous. Simply because Title I protects "compensation," including retirement benefits, does not mean that Title I was designed to "protect retirees" from post-employment discrimination. Pet. Br. 46. The purpose of the "compensation" clause cannot be pursued at the expense of negating Title I's plain text, especially when there are numerous circumstances where the reference to "compensation" can be given effect without nullifying the "qualified individual" limitations.

Because litigants can sue employers who adopt discriminatory fringe benefits policies during their employment when they are "qualified individuals," effect can be given to the "compensation" clause without negating the "qualified individual" requirements. "Compensation" and "fringe benefits" can include a variety of benefits received during employment such as health insurance, vacation pay, overtime pay, and sick leave. While retirement benefits might be among the items that make up the universe of compensation or benefits, they are not the exclusive or the most important benefit. Because employees who satisfy the plain language of the "qualified individual" definition receive multiple types of "compensation" and "benefits," the inclusion of

those terms in Title I can be given effect without rewriting § 12111(8).

The fact that retirees cannot sue regarding discriminatory benefits and compensation in every scenario does not render Title I's references to "compensation" superfluous. "No text pursues its purposes at all costs." Scalia & Garner, 57; *Clifford F. MacEvoy Co. v. U.S. for Use & Benefit of Calvin Tomkins Co.,* 322 U.S. 102, 107 (1944) (even a "highly remedial" statute "entitled to a liberal construction…does not justify ignoring plain words of limitation."). This "Court cannot construe a statute in a way that negates its plain text, and here, Congress expressly limited," *Honeycutt v. United States*, 581 U.S. 443, 454 n. 2 (2017), Title I's protections to those who can perform the jobs they hold or desire.

b. In the context of a "qualified individual," Title I and Title VII are not analogous. Petitioner argues that her interpretation of Title I would maintain "congruity between the ADA and Title VII, the statute on which much of title I was 'modeled.'" Pet. Br. 46. While Title I "borrows much of its *procedural* framework from [T]itle VII...by incorporating title VII's enforcement provisions," Title I "borrows much of its *substantive* framework from Section 504 of the Rehabilitation Act of 1973." H.R.Rep. No. 101–485(III), at 31 (1990) (emphasis added). The "concept" of a "qualified individual" who must be able to perform the "essential functions" of her job comes from "the regulations implementing...the Rehabilitation Act"—not Title VII. *Id.* at 33.

There is no counterpart to the "qualified individual" definition in Title VII, so loose references

to Title VII and the ADA as "sibling statutes," *Ford,* 145 F.3d at 606, obscure these important differences in the text. Although Title VII and the ADA may be closely related in other respects, on the issue here "the statutes are not analogous." *Weyer,* 198 F.3d at 1111.

c. Petitioner's reliance on the absurd results test fails. Petitioner argues there is no plausible explanation for the "qualified individual" definition to exclude retirees and she invokes the "absurd results" test. Pet. Br. 46-47. This "Court rarely invokes such a test to override unambiguous legislation." *Barnhart,* 534 U.S. at 459. This test is stringent and states "the absurdity must consist of a disposition that no reasonable person could intend." Scalia & Garner, 237.

Here, there are "several explanations for why Congress would have purposefully exempted" retirees from the statute's coverage. *Barnhart,* 534 U.S. at 459. "Congress could reasonably decide to enable disabled people who can work with reasonable accommodation to get and keep jobs, without also deciding to equalize post-employment fringe benefits for people who cannot work." *Weyer*, 198 F.3d at 1112. "Congress has the authority to improve the circumstances of disabled people in some respects even if it does not improve them in all respects." *Id.* "Legislation often results from a delicate compromise among competing interests and concerns." *Id.* at 1113; *Barnhart,* 534 U.S. at 461 (any "dissatisfaction" with the consequences of plain text is "often the cost of legislative compromise."). "If we were to 'fully effectuate' what we take to be the underlying policy of the legislation, without careful attention to the

qualifying words in the statute, then we would be overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed." *Weyer*, 198 F.3d at 1113.

Title I, thus, reasonably prohibits employers from discriminating solely "against people with disabilities that do not prevent job performance, but when a disability renders a person unable to perform the essential functions of the job, that disability renders him or her unqualified." *Stevens v. Rite Aid Corp.,* 851 F.3d 224, 229 (2d Cir. 2017). When the perceived gap in Title I for the protection of retirees is understood for what it really is—important compromise that facilitates action on the more pressing problems of the day—the consequences of Title I's plain language are not at all "surprising" or "absurd." Pet. Br. 27, 47.

Congress enacted Title I to provide a legal remedy for disabled workers that did not previously exist. *See* 42 U.S.C. § 12101(a)(4). At the time, several other federal statutes existed for the protection of employee retirement benefits such as ERISA, the Social Security Act, and the Medicare Act. The Equal Protection Clause provided an additional remedy for public employees. *See Tennessee v. Lane*, 541 U.S. 509, 522 (2004) ("emphasiz[ing] that the House and Senate Committee Reports on the ADA focused on '[d]iscrimination [in]...*employment in the private sector,*' and made no mention of discrimination in public employment.") (emphasis added by the Court). Additionally, numerous common law claims such as breach of contract, promissory estoppel, or fraud in the inducement along with state statutory and

unconstitutional takings claims could be brought to obtain promised benefits.

Thus, before the ADA, a disabled employee could not sue her private employer for discrimination, breach of contract, or any of the other above remedies if she accepted a job knowing that her contract included a lesser pension than a similarly situated non-disabled employee. And even if she didn't know about a secret discriminatory decision applied to her during her employment but later discovered it, there was no law that prohibited such discrimination. The ADA stepped in to prohibit such discriminatory policies from being applied to current employees and applicants. Such policies could dissuade a disabled job applicant from accepting that job or force a disabled employee to search elsewhere for a fair pension. And in the absence of the ADA, that employee would be forced to do so without remedy. Title I's "language [is] well designed to help people get and keep jobs…"*Weyer,* 198 F.3d at 1112.

But an employer who does not discriminate until post-employment does not deter employment. If the employer has a facially neutral pension policy that promises a pension to all retirees, but the employer withholds the pension from a disabled retiree, then that retiree has a clear breach of a contract claim along with all of the other remedies mentioned above under ERISA, the Social Security Act, etc. Under Florida law, "once a participating member reaches retirement status, the benefits under the terms of the act in effect at the time of the employee's retirement vest." *Bien*, 209 So. 3d at 3. "The contractual relationship may not thereafter be affected or

adversely altered by subsequent statutory enactments." *Id.*

Thus, the Eleventh Circuit's interpretation does not "allow employers to freely discriminate against their former employees." Pet. Br. 47. Employers risk significant liability for allowing their animus against the disabled to lead them to breach their contracts or violate other laws post-employment. The remedies for violating these laws are not always the same as the ADA's remedies. But the fact that these remedies pre-dated the ADA demonstrates the reasonableness of Congress' decision to focus on the more pressing issue of the day for which there was no remedy at all—discriminatory policies that excluded capable individuals from the workforce simply because they were disabled. Because there are several plausible explanations for the line drawn by the plain text of Title I, Petitioner's arguments fail the absurd results test. The Eleventh Circuit correctly held that Petitioner could not state a claim for disability discrimination under the ADA.

CONCLUSION

For these reasons, this Court should affirm.

Respectfully submitted,

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November 12, 2024

Statutory Appendix

STATUTORY APPENDIX
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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12111(8) provides:

> **(8) Qualified individual**
>
> The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12112(a) provides:

> **Discrimination**
>
> **(a) General rule**
>
> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(b) provides:

> **(b) Construction**
>
> As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—
>
> **(1)** 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;
>
> **(2)** 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);
>
> **(3)** utilizing standards, criteria, or methods of administration—
>
> > **(A)** that have the effect of discrimination on the basis of disability; or
> >
> > **(B)** that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be

job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. § 12117(a) provides:

Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 2000e-5(e)(3)(A) provides:

> 3(A) For purposes of this section, 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, resulting in whole or in part from such a decision or other practice.