No. 22-1881

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PERRY HOPMAN,
Plaintiff-Appellant,

vs.

UNION PACIFIC RAILROAD,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Arkansas Western Division, No. 4:18-cv-00074-KGB.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that the Chamber of Commerce of the United States of America ("Chamber") is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: November 7, 2022

/s/ Michael H. McGinley
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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

As major employers, Chamber members are firmly committed to nondiscrimination and to providing equal opportunities in their workplaces for Americans with disabilities. Under Title I of the Americans with Disabilities Act ("ADA"), members regularly make reasonable accommodations that allow qualified employees with disabilities to perform their jobs. But Congress carefully defined the bounds of Title I's accommodation provision to balance the legitimate interests of both disabled persons and employers nationwide. The quite sympathetic facts of this case should not lead this Court to expand the text in a way that will require

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for both parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

employers to grant unnecessary accommodations or reconfigure their business operations. The ADA's text, purpose, and history do not support that view, which would impose obligations on employers that were never envisioned by Congress. The Chamber has a strong interest in preventing this result.

SUMMARY OF ARGUMENT

The ADA requires employers to make reasonable accommodations that allow otherwise qualified employees with disabilities to perform the essential functions of their jobs. But that accommodation provision does not impose an additional obligation on employers to make exceptions to their generally applicable policies to mitigate disability-related symptoms. Adopting a more capacious view of the ADA would upend the careful balance that Congress struck and impose an untenable accommodations regime on American business.

Indeed, both the ADA's text and this Court's precedent foreclose that view. Congress deliberately chose to extend the ADA's accommodation provision only to "*otherwise* qualified individual[s]." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). An individual is "qualified" if he "can perform the essential functions of the employment position." *Id.* § 12111(8). Thus, an "otherwise qualified" individual is one who will *become* qualified—that is, able to perform the essential functions of the job—by virtue of the accommodation. Congress made clear, however, that the duty to accommodate is triggered only in this situation. Nothing in the ADA requires employers to provide accommodations for those who are already fully qualified for the job. This Court and others have applied that clear statutory text to hold that ADA plaintiffs are not entitled "to any accommodation" if they are "capable of performing the essential functions of the [job]." *Lowery v. Hazelwood Sch. Dist.*, 244 F.3d 654,

660 (8th Cir. 2001); *accord Brumfield v. City of Chicago*, 735 F.3d 619, 631–34 (7th Cir. 2013).

To the extent the EEOC's implementing regulations conflict with this plain reading of the ADA, they are not entitled to deference. But even assuming deference is appropriate, the district court rightly rejected the view that the phrase "benefits and privileges *of employment*" requires employers to make individualized arrangements that might mitigate symptoms stemming from a personal condition. 29 C.F.R. § 1630.2(o)(1)(iii) (emphasis added). Such arrangements are, after all, for the employee's *personal* benefit; they are not employment-related benefits afforded to "similarly situated employees without disabilities." *Id.* Accordingly, whether this Court resolves this case under the plain terms of the ADA's statutory text or based on the EEOC's implementing regulations, it should affirm.

ARGUMENT

I. The ADA Requires Only Those Reasonable Accommodations That Enable An Employee To Perform Essential Job Functions.

"The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (citation omitted). As written, the ADA does not require employers to provide accommodations that might "mitigate the symptoms of a disability." Appellant's Br. at 45. Rather, "an employer's accommodation duty is triggered only in situations where an individual

who is qualified on paper requires an accommodation in order to be able to perform the essential functions of the job." *Brumfield*, 735 F.3d at 632.

That is because the ADA's text requires reasonable accommodations only for "the known physical or mental limitations of an *otherwise qualified individual*." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). The ADA does not specifically define that italicized phrase. But it provides that the term "qualified individual" means "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position." *Id.* § 12111(8). As a result, the key to whether an individual is "qualified" is whether he "can perform the essential functions" of the job. *Id.*

Reading those provisions together, it is clear that the ADA distinguishes between "two categories of paper-qualified individuals with disabilities: those who are able to perform the essential functions of the job even without reasonable accommodation, and those who could do so if the employer were to make an accommodation for their physical or mental limitations." *Brumfield*, 735 F.3d at 632. Individuals in the first category are "qualified for the position in every relevant respect," because they can perform the essential job functions without modification. *Id.* And individuals in the latter category are "*otherwise* qualified" because they can perform the essential functions *only* "in [the] different circumstances" where a reasonable accommodation has been provided. Webster's Ninth New Collegiate

Dictionary 835 (1986) (defining "otherwise"); *see also Brumfield*, 735 F.3d at 632–33. In other words, a "reasonable accommodation is one which *enables* a[n] individual with a disability to perform the essential functions of the position." *Hatchett v. Philander Smith Coll.*, 251 F.3d 670, 675 (8th Cir. 2001) (emphasis added) (citing 29 C.F.R. § 1630.2(o)(1)(i)). It makes the individual "qualified." But one who is already "fully qualified for the job without accommodation" is "not entitled to an accommodation in the first place." *Brumfield*, 735 F.3d at 632.

Other canons of construction confirm this plain-text reading of the statute. Consider the material-change canon: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) (citation omitted). Here, Title I's general antidiscrimination provision protects *all* "qualified individual[s]." 42 U.S.C. § 12112(a); *see also id.* § 12132 (Title II). And so too does its provision barring discrimination against those who are related to or associated with a disabled person. *Id.* § 12112(b)(4). But Congress did not opt for that broad formulation in Title I's accommodation provision. It instead chose to require accommodations only for "*otherwise* qualified individuals." *Id.* § 12112(b)(5)(A) (emphasis added). This Court "must give effect to, not nullify, Congress' choice to include limiting language in [this] provision[] but not others."

Gallardo v. Marstiller, 142 S. Ct. 1751, 1759 (2022). And there is no explanation for that disparate choice in language other than the obvious one: An accommodation is required only where it "will allow [a disabled individual] to perform the essential functions of the job." *See Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 546 (8th Cir. 2018) (citation omitted).

A contrary reading would similarly run afoul of the canon against surplusage. That "cardinal principle of statutory construction" instructs courts to construe statutes so that "no . . . word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted). In this case, Congress deliberately restricted the scope of the accommodation provision's protection to "otherwise" qualified individuals. That word "cannot be meaningless, else [it] would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). The only sensible way to give meaning to the word "otherwise" is to limit an employer's duty to accommodate to those requests that will enable a disabled individual to *become* "qualified"—that is, able to "perform the essential functions of the employment position." 42 U.S.C. § 12111(8).

Additionally, "[t]he legislative history (for those who consider it) confirms, with unusual clarity, all [that has been] said so far." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1085 (2019). It clarifies that Congress' purpose in enacting the ADA's accommodation provision was to enable persons with disabilities to "attain the same

level of performance as is available to nondisabled employees having similar skills and abilities." H.R. Rep. No. 101-485, pt. 2, at 66 (1990); S. Rep. No. 101-116, at 35 (1989). To achieve that specific end, Congress carefully chose the "otherwise qualified" language to "clearly describe a person with a disability who meets all of an employer's job-related selection criteria except those criteria that he or she cannot meet because of a disability, but which could be met with a reasonable accommodation." H.R. Rep. No. 101-485, pt. 2, at 64; S. Rep. No. 101-116, at 33. Such an accommodation would "then make[]" the "otherwise qualified" person a "qualified individual with a disability" by allowing the employee to perform her essential job functions. H.R. Rep. No. 101-485, pt. 2, at 64–65.

Put differently, the "accommodation process focuses on the needs of a particular individual *in relation to problems in performance of a particular job* because of a physical or mental impairment." *Id.* at 65 (emphasis added); S. Rep. No. 101-116, at 34. But nothing in the statutory text, the structure of the provisions, or the legislative history suggests a broader intent. Instead, Congress struck a sensible balance: Accommodations are required only where they would enable an "otherwise qualified individual with a disability" to "perform the essential functions" of his job. 42 U.S.C. §§ 12111(8), 12112(b)(5)(A).

Consistent with the plain text, structure, and history of the statutory text, binding precedent from this Court dictates the same result. In *Lowery v. Hazelwood*

School District, a disabled security officer argued that a school district denied him a reasonable accommodation by "fail[ing] to move him to the custodial department on his request." 244 F.3d at 660. This Court rejected that claim, explaining that once a plaintiff admits that he is "capable of performing the essential functions of the [job]," as here, "he cannot argue that he [is] entitled to any accommodation" under the ADA. *Id.*[2] The Seventh Circuit has adopted the same reading of the statute. *See Brumfield*, 735 F.3d at 631–34. And to the extent that other courts have reached a contrary result, they have done so based on the EEOC's implementing regulations, not the statute's text. *See infra* Section II; Appellee's Br. at 40–41.

To be clear, none of this is to suggest that disabled persons who can perform their essential job duties without accommodation are left unprotected by the ADA. Quite the opposite. Those individuals are still "qualified for the job, and the ADA prevents the employer from discriminating against [them] on the basis of [their] irrelevant disabilit[ies]." *Brumfield*, 735 F.3d at 633; *see* 42 U.S.C. § 12112(a). But where an employee's limitations do not affect her ability to perform any essential

[2] *Lowery* alternatively held that the plaintiff had failed to adequately request an accommodation. *See* 244 F.3d at 660. So the plaintiff's ability to perform the essential job functions without accommodation was not the only basis for rejecting his ADA claim. But that does not make the latter holding any less binding. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*," *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949), and "each represents a valid holding of the court," *Sutton v. Addressorgraph-Multigraph Corp.*, 627 F.2d 115, 117 n.2. (8th Cir. 1980) (per curiam).

job functions, the employer's duty to accommodate is simply "not implicated." *Brumfield*, 735 F.3d at 633. Nor does the statute prohibit employers from providing accommodations that are not compelled by the statute. While an "employer may make an accommodation untethered to an essential function," it "is not required to do so." *Swain v. Wormuth*, 41 F.4th 892, 898 (7th Cir. 2022).

* * *

In sum, the ADA's accommodation provision was adopted "to remove barriers that would prevent employees with disabilities from properly performing their duties." *Brumfield*, 735 F.3d at 633 (quoting John Parry, *Disability Discrimination Law, Evidence and Testimony* 172 (2008)). But it does not obligate employers to provide accommodations to employees who are already "capable of performing the essential functions" of their jobs. *Lowery*, 244 F.3d at 660. Thus, where an employee does not allege that his disability-related condition "prevent[s] [him] from performing an essential function of [his] job, rendering [him] disabled but 'otherwise qualified,'" he cannot state a failure-to-accommodate claim. *Brumfield*, 735 F.3d at 634.

II. The EEOC's Implementing Regulations Do Not Require Employers To Alleviate All Disability-Related Symptoms.

The EEOC's implementing regulations cannot—and do not—alter the careful balance that Congress struck in Title I's accommodation provision. Those regulations define "reasonable accommodation" to include those that would allow a

disabled employee "to enjoy equal benefits and privileges of employment as are enjoyed by . . . other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(1)(iii).

At the outset, that regulatory provision cannot override or enlarge the plain text of the congressionally enacted statute. "Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). As explained above, the ADA unambiguously requires that, "to be entitled to an accommodation, a disabled employee must have a physical or mental limitation that prevents her from performing an essential function of the particular job at issue." *Brumfield*, 735 F.3d at 633. Then—and only then—does the accommodation provision kick in. To the extent 29 C.F.R. § 1630.2(o)(1)(iii) ventures beyond that statutory command, it is "invalid." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 333 (2014); *see Smithville R-II Sch. Dist. v. Riley*, 28 F.3d 55, 58 (8th Cir. 1994).

Nor are the EEOC's implementing regulations entitled to *Chevron* deference on this question. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). The Supreme Court has emphasized that *Chevron* "deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity" in the statute. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612,

1630 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9). Here, the ADA's plain text—along with the material-change canon and the anti-surplusage canon—are "more than up to the job of solving today's interpretive puzzle." *Id.* Because those traditional tools of construction "supply an answer, '*Chevron* leaves the stage.'" *Id.* (quoting *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 417 (6th Cir. 2017) (Sutton, J., dissenting)); *see also Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) (refusing to defer to EEOC's regulation); *cf.* Br. for *Amicus Curiae* The Chamber of Commerce of the United States in Support of Neither Party at 4–13, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114), https://bit.ly/3FI5UBs.

But even if this Court were to defer to the EEOC's regulation, that would not support imposing a broad obligation on employers to provide accommodations that might alleviate the symptoms of a disability, unrelated to performing an essential function of the particular job at issue. As with statutory interpretation, courts must "begin [their] interpretation of [a] regulation with its text." *Green v. Brennan*, 578 U.S. 547, 553 (2016). Unless otherwise defined, words are to "be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). And to help "discern that ordinary meaning, those words must be read and interpreted in their context, not in isolation." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) (quotation marks omitted).

Nothing in § 1630.2(o)(1)(iii)'s text forces employers to modify workplace practices to provide "relief from pain" that is caused by a personal condition. Appellant's Br. at 49. Rather, that text requires only that employers provide accommodations that allow disabled employees "to enjoy equal *benefits and privileges of employment* as are enjoyed by . . . other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(1)(iii) (emphasis added). A "benefit" is "[t]he advantage or privilege something gives." Black's Law Dictionary 188 (10th ed. 2014); *see also* New Oxford American Dictionary 155 (3d ed. 2010) ("an advantage or profit gained from something"). And a "privilege" is similarly defined as "[a] special legal right, exemption, or immunity granted to a person or class of persons." Black's Law Dictionary 1390; *see also* New Oxford American Dictionary 1390 ("a special right, advantage, or immunity granted or available only to a particular person or group of people").

At bottom, then, a "benefit" or "privilege" is an advantage that is given or granted by something. In turn, the regulation makes clear that the "something" that *gives* the advantage must be "employment." 29 C.F.R. § 1630.2(o)(1)(iii). And those employment-given advantages must be provided by employers to disabled and non-disabled employees alike. *See id.* Accordingly, the regulation does not require any accommodation unless it would provide access to a benefit or privilege that the employer gives to the rest of its employees—that is, unless the employer sponsors,

makes available, or provides the benefit or privilege to its employees generally. The district court was correct in so holding. *See* Add. 6–7; R. Doc. 214, at 6–7.

Precedent from other circuits does not "contradict[] the district court's ruling." Appellant's Br. at 47 (capitalization altered). Consider, first, *Sanchez v. Vilsack*, 695 F.3d 1174 (10th Cir. 2012). *Sanchez* addressed a claim brought under the Rehabilitation Act by a disabled federal employee who sought a hardship transfer to accommodate her condition. *Id.* at 1176–77. The U.S. Forest Service argued that the Rehabilitation Act did not require accommodations unless "an employee cannot perform the essential functions of her job." *Id.* at 1182. And the Tenth Circuit disagreed.[3] But even though it rejected the Forest Service's argument on this specific point, it had no occasion to—and did not purport to—define the "scope of benefits and privileges of employment," Appellant's Br. at 48–49, let alone for the EEOC regulation at issue. That matter was never in dispute.

The Sixth Circuit's unpublished decision in *Gleed v. AT&T Mobility Services, LLC*, 613 F. App'x 535 (6th Cir. 2015), is even further afield. In *Gleed*, the employer denied a disabled employee's request for a chair, even though it gave one to a

[3] *Sanchez* did not engage in a textual analysis—much less one for the ADA's accommodation provision—because the parties did not present one. Nor was the court asked to decide whether the EEOC regulation at issue is entitled to deference. Thus, the decision in no way undermines the conclusion that, at least for purposes of the ADA, an employer need only provide reasonable accommodations that are necessary to enable an employee to perform the essential functions of his job. *See Lowery*, 244 F.3d at 660; *Brumfield*, 735 F.3d at 632–34.

pregnant coworker. *Id.* at 537–38. That fell squarely within the regulation's prohibition: The employer gave an "employee[] without disabilities" a "benefit" while denying the same to "an employee with a disability." 29 C.F.R. § 1630.2(o)(1)(iii). The same cannot be said here.[4]

Likewise, the D.C. Circuit's decision in *Hill v. Associates for Renewal in Education, Inc.*, 897 F.3d 232 (D.C. Cir. 2018), is simply off-point. There, the employer provided a classroom aide for the plaintiff's colleagues but refused to do the same for him. *See id.* at 235 ("Hill was the only teacher in his program who was not assigned a classroom aide[.]"); *see also id. at* 238, 240. As in *Gleed*, then, the employer selectively conferred a benefit to non-disabled employees. And, as in *Sanchez*, the parties did not dispute what is meant by the phrase "benefits and privileges of employment."

Nor is Appellant correct that "the term 'benefits and privileges of employment' [is] entitled to a broad construction" in favor of employees.

[4] It is also worth noting that *Gleed*'s recognition of the benefits-and-privileges theory for accommodations is inconsistent with other Sixth Circuit precedent. In an earlier decision, the court rejected the view that "the ADA requires an employer to provide accommodations even for employees who, although disabled, are able to perform the essential functions of the job without accommodation." *Black v. Wayne Ctr.*, 2000 U.S. App. LEXIS 17567, at *9 (6th Cir. July 17, 2000); *see also Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993) (affirming decision holding, in context of the Rehabilitation Act, that "there is no need for [a] defendant to make any accommodations" where a disabled employee is "able to perform the duties of the job, in spite of handicap").

Appellant's Br. at 47. That argument "relies on the flawed premise that the [ADA and its implementing regulations] 'pursue[]' [their] remedial purpose 'at all costs.'" *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013)). And it ignores the "powerful . . . countervailing consideration[]"—surely recognized by Congress and the EEOC—that the disability laws must be kept "within manageable bounds" to limit obligations imposed on employers too. *See Loye v. County of Dakota*, 625 F.3d 494, 499 (8th Cir. 2010) (quoting *Alexander v. Choate*, 469 U.S. 287, 299 (1985)); *see also Cannice v. Norwest Bank Iowa, N.A.*, 189 F.3d 723, 728 (8th Cir. 1999) ("We do not believe . . . that the obligation to make reasonable accommodation extends to providing an aggravation-free environment.").

* * *

As with the statute itself, nothing in the text of the EEOC's regulation requires employers to modify disability-neutral workplace practices to "mitigate the pain and other harmful symptoms of [a] disabilit[y]" unrelated to performing an essential function of the particular job at issue. Appellant's Br. at 43. And so even if this Court defers to the regulation, the accommodation claim at issue fails.

III. Expanding The ADA's Accommodations Requirement Would Impose An Untenable Regime On American Businesses.

Adopting a more expansive requirement that employers modify workplace practices to alleviate symptoms of disabilities would cause serious practical

difficulties and economic harms that Congress sought to avoid when it carefully calibrated the ADA's accommodation provision. It would inundate employers with accommodation requests, impede otherwise qualified individuals with disabilities from receiving essential accommodations, and generate unworkable results. Rather than invite that problematic regime, this Court should follow the plain statutory text and apply existing Eighth Circuit precedent.

For starters, such an expansive theory of the duty to accommodate would unleash a flood of accommodation requests that are not required to enable employees to perform their essential job functions. Under the current statutory regime, employers process about 3 accommodation requests per 100 employees.[5] Spread across the national workforce, that amounts to many millions of requests per year. Adopting the limitless accommodation requirement that Appellant requests would increase that number exponentially. The sheer variety of potential difficulties caused by disabilities opens the door to a panoply of accommodation requests—many of which have no bearing on an employee's ability to do the job. While Congress has made the rational policy choice to require accommodations that are necessary for an employee to perform the essential functions of the job, the overall value of any expansion of that policy choice "depends crucially on how effectively it promotes

[5] *Empowering Disabled Employees in the Workforce*, Reliance Standard (Feb. 2022), https://bit.ly/3UyLwa5.

the employment of workers with observable disabilities." J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. Rev. 903, 931 (2003). Because any accommodation "implicitly imposes a tax" on employers, *id.*, Congress did not (and could not have intended to) require employers to provide all forms of accommodations that would potentially mitigate every conceivable symptom of a disability. On the contrary, this Court has explained that "[t]he duty to accommodate does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability." *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 471 (8th Cir. 2007) (citation omitted). It extends more narrowly to only those accommodations that enable "otherwise qualified" individuals with disabilities to perform essential job functions. 42 U.S.C. § 12112(b)(5)(A); *see Lowery*, 244 F.3d at 660.

A more expansive, contrary reading would transform the ADA from a statute that protects necessary disability accommodations[6] into one that forces employers to remedy every mere discomfort. But there is no indication Congress chose to subject employers to the massive potential for litigation that would arise if courts expanded

[6] To be certain, otherwise qualified individuals still lack equal opportunity in the labor market, and thus require an employer's full consideration. "Despite ADA protections, federal tax incentives, and private sector opportunity programs, millions of individuals with disabilities looking for work remain unemployed." Stephanie Ferguson & Isabella Lucy, *Data Deep Dive: Supporting and Hiring Individuals with Disabilities and Neurodivergence*, U.S. Chamber of Commerce (Aug. 25, 2022), https://bit.ly/3DO7CP9.

the statute to include accommodation requests that are *not* required to perform essential job functions and expanded the EEOC's regulation to include "benefits and privileges of employment" *not* provided by an employer.[7] Rather, if Congress wished to enact legislation to that effect, or amend the ADA to treat any discomfort as a benefit or privilege protected under the ADA, it would do so. *Cf. United States v. Flute*, 929 F.3d 584, 589 (8th Cir. 2019) ("Had Congress intended [this] exception . . . to apply more broadly, it would have expressly stated so."); *Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation.").

Indeed, by making ADA compliance so unsustainable, Appellant's theory would interfere with employers' ability to provide those reasonable accommodations that *are* required by the statutory text. Should this Court accept that capacious reading, the overwhelming number of new accommodation requests would divert the finite time, attention, and resources of employers nationwide.[8] That surge of

[7] Employees filed 22,843 ADA charges with the EEOC against employers in 2021. After investigation, the EEOC found only 21.1 percent of these charges presented meritorious claims. The EEOC resolved most of those administratively, resulting in $122.2 million in settlements. *Americans with Disabilities Act of 1990 (ADA) Charges FY 1997 - FY 2021*, U.S. Equal Emp't Opp. Comm'n, https://bit.ly/3Uv9Uta.

[8] One study indicates that the median one-time expenditure as reported by the employer was $500 per accommodation. *Costs and Benefits of Accommodation*, Job Accommodation Network (Oct. 21, 2020), https://bit.ly/3DJZQpm.

accommodation requests could overload the approval process and prevent employers from focusing on accommodation requests that are *required* for disabled employees to perform their job.[9] That would harm employers and employees alike, *see* Verkerke, *supra*, at 907 (noting that "the conventional economic analysis of mandated benefits concludes that the costs of any mandate are normally shifted to workers in the form of reduced wages or employment levels, or both"), and it would upend the careful "balance [that] has been struck" by the ADA's specific statutory text, H.R. Rep. 101-485, pt. 2, at 50; S. Rep. 101-116, at 21. Again, while employers certainly may choose to grant accommodations not required to perform essential job functions, the ADA does not require them to do so. *See Swain*, 41 F.4th at 898.

Likewise, extending the EEOC's regulation to non-employer-sponsored "benefits and privileges" would open the floodgates to an unstainable amount of accommodation requests. Nothing in the statute or the regulation remotely suggests that employees are entitled to any accommodation that in any way reduces any symptom of any disability as a benefit or privilege of employment. And endorsing such a sweeping view here would yield unworkable results that would impose an

[9] Due to the informal nature of many accommodation requests, the potential number of requests an employer can face is immeasurable. For instance, merely making an employer aware of a scheduling conflict related to a medical condition is enough to trigger a duty to accommodate under the law. *See Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA – Requesting Reasonable Accommodation*, U.S. Equal Emp't Opp. Comm'n (Oct. 17, 2002), https://bit.ly/3NLbjJZ.

untenable obligation on employers. To take just one example, consider specialized-eating requirements from severe food allergies[10] or diabetes.[11] While an employer who provides lunch might be required to offer options for those with severe allergies, an employee may believe that they cannot take advantage of the "benefit" or "privilege" of convenient food options near the office unless the employer pays for food delivery or provides another dining option not offered to other employees.

Moreover, Appellant's expansive theory would necessarily lead to irreconcilable conflicts between various employees' requested accommodations. The statute solves this problem by limiting required accommodations to those necessary for the employee to perform the essential functions of the job. But Appellant's position would produce an untenable matrix of conflicting accommodation requests that are *not* required for employees to perform their essential job functions. That could in turn harm many employees with disabilities.

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[10] An estimated one in ten Americans suffer from food allergies. Ruchi S. Gupta et al., *Prevalence and Severity of Food Allergies Among US Adults*, Jama Network Open, Jan. 4, 2019, *available at* https://bit.ly/3NLFRex.

[11] Courts have found diabetes and food allergies could be covered under the ADA depending on their severity. *Compare J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 671 (4th Cir. 2019) (holding there was a genuine dispute of material fact as to whether plaintiff's gluten sensitivity was a disability within the meaning of the ADA), *with Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 222–24 (5th Cir. 2011) (finding no disability for diabetes under the ADA when only modest adjustments to an individual's diet are necessary, such as portion control and a once-daily insulin shot).

And that is to say nothing about the externalities that such accommodations would impose on other, non-disabled employees. *See* Verkerke, *supra*, at 933. "The ADA does not require employers to penalize employees free from disability in order to vindicate the rights of disabled workers." *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001); *see US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002).

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court affirm the district court's judgment.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Michael H. McGinley, counsel for *amicus curiae*, certify that I am a member in good standing of the Bar of this Court. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,147 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-pt font. This brief also complies with Local Rule 28(h)(2), because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2022, I caused the foregoing *amicus curiae* brief to be filed with the Clerk for the United States Court of Appeals for the Eighth Circuit. The Court's CM/ECF system was used to file the brief. All attorneys in this case are registered CM/ECF users and service will therefore be accomplished by the CM/ECF system.

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