No. 08-1113

In the Supreme Court of the United States

LEROY MCKNIGHT, ET AL.,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Title I ("Employment") of the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12112(a) (2008), bars "discriminat[ion] 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."

The ADA defines "qualified individual" to "mean[] 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 Questions Presented are:

(1) Whether retirees who become totally disabled and receive Social Security Disability Insurance ("SSDI") benefits are "qualified individual[s]" entitled to seek relief under § 12112(a) when they have no current interest in holding an employment position, but rather complain about the calculation of their retirement benefits.

(2) Whether it violates § 12112(a) for a retirement plan to provide that former employees' supplemental early retirement benefits will be reduced if they receive SSDI benefits.

RULE 29.6 DISCLOSURE STATEMENT

Respondent General Motors Corporation states that it is a publicly-traded corporation incorporated under the laws of Delaware. Respondent has no parent corporation and no publicly-traded corporation owns ten percent or more of its stock.

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Respondent General Motors Corporation respectfully submits this Brief in Opposition.

STATEMENT

A. Statutory background.

The Americans with Disabilities Act's basic prohibition against discrimination in employment is codified at 42 U.S.C. 12112(a). As applicable to this case (it has since been amended in immaterial respects, *see* Pet. App. 46a-47a), it provides:

> (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.

The term of art "qualified individual" thus is incorporated into § 12112(a) and defines the class of individuals protected by the Act's basic prohibition against employment discrimination. That term is defined by 42 U.S.C. 12111(8):

> 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. * * *

Subsection (b) of § 12112, entitled "Construction," provides that the word "discriminate" in subsection (a) "includes" various employment practices set out in seven paragraphs. The paragraph relied upon by petitioners is § 12112(b)(2), which states that subsection (a) covers:

> 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 title (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)

Although Title I's basic prohibition against discrimination protects only "qualified individual[s]," the ADA's anti-retaliation provision, 42 U.S.C. 12203, is not so limited. Subsection 12203(a) provides:

> (a) Retaliation. -- No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

The Petition Appendix contains many of the relevant provisions of the ADA. It omits, however, § 12203, the anti-retaliation provision, and § 12201(c), the safe harbor provision for bona fide benefit plans (*see infra* at 20-21 n.9). For the Court's convenience, respondent reproduces the most significant provisions of the ADA, including §§ 12203 and 12201(c), in the Appendix hereto ("App.").

B. Statement of the Case.

1. Petitioners are three retired former employees of respondent who now receive Social Security Disability Insurance ("SSDI") benefits based on a determination that they are totally disabled. Petitioners took early retirement under plans applicable to salaried and hourly workers with 30 years of service.[1] Under the plans, petitioners were eligible for supplemental early retirement benefits until age 62 and one month. Then, as now, respondent's early retirement plans provided for "benefit integration" between the supplemental early retirement benefits and Social Security benefits. When Social Security Old Age benefits become available, the supplemental early retirement benefits expire (while the basic pension benefits continue). Pet. App. 30a-31a. And the supplemental early retirement benefits are likewise reduced if a retiree becomes eligible for SSDI benefits before reaching the age of 62 and one month. As the court below explained, "[b]enefit integration permits a

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[1] Respondent's plans for salaried workers and hourly workers are separate, but the plans are identical in all respects relevant here. Pet. App. 3a, 5a.

higher level of income to all retired/disabled employees by allowing benefits under such plans to take credit for other income streams that a participant many be entitled to receive." Pet. App. 5a (internal quotations omitted). Early retirees are also required to refund any overpayments of supplemental early retirement benefits if SSDI benefits are awarded retroactively. Pet. App. 6a.

After retiring and beginning to receive early retirement benefits under respondent's plans, petitioners sought and were awarded SSDI benefits. Accordingly, petitioners' supplemental early retirement benefits were reduced under the plans' "benefit integration" provisions. The reduction is smaller than the amount of SSDI benefits, so petitioners receive more in total benefits than if they had not sought and received SSDI benefits. *See* Pet. 5-6 & n.5. In accordance with the plans, respondent also sought repayment of supplemental early retirement benefits as a result of retroactive SSDI benefits received by petitioners.

2. Petitioners filed this suit contending that the benefit-integration provisions in respondent's plans discriminate on the basis of disability in violation of § 12112(a) because supplemental early retirement benefits are reduced on account of SSDI benefits but not on account of income received from other sources after retirement. For example, a retiree who later works (with or without reasonable accommodation of a disability) for another employer, or who returns to respondent as a contract employee, continues to receive the full amount of supplemental early retirement benefits (until age 62 and one month). Petitioners also alleged that the benefit-

integration provisions violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 *et seq.*, and a Michigan statute.

With respect to petitioners' ADA claim, no petitioner alleges that respondent forced him to take early retirement because of disability discrimination. Nor does any petitioner allege that respondent discriminated against him because of disability during his employment. Indeed, petitioners do not allege that they had a disability during their employment. And at the time that petitioners' supplemental early retirement benefits were reduced and this suit was filed, no petitioner "h[e]ld[] or desire[d]" a job with respondent (or elsewhere, for that matter), consistent with the findings that petitioners were totally disabled and entitled to SSDI benefits. *See* 42 U.S.C. 423(d)(1)(A) (SSDI eligibility requires "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months").[2]

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[2] In their amended complaint, two petitioners alleged that they "could continue to work with reasonable accommodation," Am. Compl. ¶¶ 19, 29, despite their receipt of SSDI benefits, but did not allege that they "desire[d]" an "employment position" with respondent. One petitioner conceded that he was "totally disabled." *Id.* ¶ 13. The former two petitioners abandoned their reasonable accommodation contention in the court below, *see* Pet. App. 22a, and the petition does not suggest that any petitioner could or would return to work at respondent or elsewhere, even with accommodation. Given that petitioners have satisfied the standard for SSDI benefits, it is not

Respondent moved for summary judgment on the ground that petitioners, as retirees who neither held nor desired a job and who could not work even with reasonable accommodation, were not "qualified individual[s]" protected by § 12112(a). Respondent also sought summary judgment on the ground that its plans did not "discriminate . . . on the basis of disability," *id.*, even if the omitted words -- "against a qualified individual" -- were not fatal to petitioners' claims.

3. The district court agreed with respondent on both issues. It held, first, that petitioners' claims failed because they were not "qualified individual[s]" covered by § 12112(a). Petitioners argued that they were "qualified individual[s]" because they were "qualified individual[s]" at the time they retired. Pet. App. 35a. The court disagreed, explaining that the "plain language" of § 12111(8) requires measuring a plaintiff's claim to be a "qualified individual" in the present. Pet. App. 39a (§ 12111(8) requires that plaintiff "'can perform' the essential functions of the employment position that the individual 'holds or desires'").

In the alternative, the district court held that petitioners' claims failed on the merits because all of

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surprising that the case thus comes to this Court with petitioners concededly totally disabled. *Cf. Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). Indeed, there is a degree of "protection integration," to mirror the plans' benefit integration, in that the ADA protects those interested and able to work and SSDI provides benefits to individuals suffering total disabilities that preclude them from working. *See id.* at 801 ("The Social Security Act and the ADA both help individuals with disabilities, but in different ways.").

respondent's employees had "equal access" to its plans. Pet. App. 42a. When petitioners elected early retirement, they knew that their supplemental early retirement benefits would be reduced if they later became eligible for SSDI. All employees were offered the same benefits integration terms, without regard to whether they were disabled. That only some early retirees would become "the future disabled" did not mean that the plans discriminated on the basis of disability. *See id.*[3]

4. The Sixth Circuit affirmed on both grounds. That court had held in *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181, 183 (6th Cir. 1996), that § 12112(a) does not apply to former employees who are not "qualified individual[s]." Petitioners urged the court below to reconsider *Parker* in light of this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), which held that the word "employees" as used in Title VII's anti-retaliation provision, 42 U.S.C. 2000e-3(a), extended to former employees.[4] *Robinson* did not address

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[3] The district court also dismissed petitioners' ERISA claims. The court noted that Congress and this Court had approved benefits integration under ERISA, *see Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), and that every court to consider the question even after the enactment of the ADA has held that benefits integration is permitted by ERISA. Pet. App. 42a-44a. The court then declined to exercise supplemental jurisdiction over petitioners' state-law claims. Pet. App. 44a-45a. Petitioners did not appeal the dismissal of their ERISA and state-law claims. Pet. App. 7a.

[4] Even apart from the intervening *Robinson* decision, the precedential status of the *Parker* panel opinion was open to debate. *Parker* was vacated by the Sixth Circuit upon rehearing *en banc*, but rehearing was not sought as to the

§ 12111(8)'s "qualified individual" definition or the ADA at all, but the Second and Third Circuits held in the wake of *Robinson* that former employees are covered by § 12111(8). *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 607 (3d Cir. 1998); *Castellano v. City of New York*, 142 F.3d 58, 69 (2d Cir. 1998); *but cf. Ford*, 145 F.3d at 615 (Alito, J., concurring in judgment) (declining to reach this issue).

The court below held that *Robinson* did not alter its analysis in *Parker*. *Robinson* emphasized the lack of a "temporal qualifier" in the provision at issue, which created ambiguity concerning its application to former employees. 519 U.S. at 341-42. Section 12111(8), in contrast, contains clear "temporal qualifiers" -- the requirement that the plaintiff "can perform" the essential duties of an employment position that he or she "holds or desires," all expressed in the present tense. *See* Pet. App. 17a-20a. Because the Second and Third Circuits disregarded these express "temporal qualifiers," their finding of ambiguity in § 12111(8) "is tenuous at best." Pet. App. 20a. The Sixth Circuit thus joined the Seventh and Ninth Circuits in holding, after *Robinson*, that former employees who neither "hold[]" nor "desire[]" an "employment position," and who "can[not] perform" the essential functions of their former or any other job because they are totally disabled, fall outside the scope of

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"qualified individual" issue, and the *en banc* court did not consider that issue. *See Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1009 (6th Cir. 1997) (*en banc*); Pet. App. 12a-13a In all events, the decision below now embodies the Sixth Circuit's precedent on the issue.

§§ 12111(8) and 12112(a). *See Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 457-58 (7th Cir. 2001); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000).[5]

The court of appeals also held that respondent's plans do not violate § 12112(a). The plans were available to all employees regardless of "contemporary or future disability status." Pet. App. 24a (quoting *Ford*, 145 F.3d at 806). Respondent thus provided "equal access to the same benefit plan" to petitioners and all others with the requisite years of service, and did not discriminate against petitioners on the basis of disability in offering the plans to them. *Id.*

REASONS FOR DENYING THE WRIT

The circuit split touted by the petition is of negligible practical consequence and does not merit this Court's review. The question on which courts have disagreed -- whether a totally disabled former employee is a "qualified individual" entitled to bring an ADA claim under §§ 12111(8) and 12112(a) -- is academic, because even those courts that have answered that question in the affirmative have proceeded to reject claims like those at issue here. In 1998, then-Judge Alito explained that the "ease" with which similar claims could be rejected on other grounds made it unnecessary to consider the

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[5] The courts below on occasion couched their rulings in the language of "standing." *See, e.g.*, Pet. App. 2a. Despite this imprecise usage, it is clear that the courts did not intend to question whether petitioners had a basis under Article III to bring their claims. *See* Pet. 6 n.9.

principal question on which certiorari is sought here. *Ford*, 145 F.3d at 615 (Alito, J., concurring in judgment). Events since that time have confirmed the correctness of that observation. As in *Ford* itself, the question that Judge Alito declined to reach has made no difference to the outcome in other ADA cases brought by former employees challenging benefits received post-employment. There is no need for this Court to settle a dispute over what amounts to dictum or over whether petitioners' claims should be rejected in one versus two steps.

This case exemplifies how the first question in the petition lacks practical significance. Both courts below held that petitioners' claims failed regardless of whether petitioners are "qualified individual[s]," because respondent's plans did not discriminate on the basis of disability. That holding is correct, and -- despite including it as a second question presented -- the petition makes no serious attempt to argue that it independently merits this Court's review. Accordingly, even if the Court otherwise might be inclined to consider question one, this case is not an appropriate vehicle because whether petitioners are "qualified individuals" makes no difference to the outcome.

Moreover, the Sixth Circuit's resolution of the first question presented is correct. Section 12111(8) contains precisely the "temporal qualifiers" whose absence was critical to this Court's decision in *Robinson, supra*. By limiting the term "qualified individual" to a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," Congress made it

crystal clear that retirees who neither hold nor desire any employment position and who are totally disabled are not covered. Nor is there any basis for concern that adhering to the plain language of §§ 12111(8) and 12112(a) will risk inadequate protection against retaliation. Unlike in *Robinson*, where the potentially underinclusive term "employees" was used in Title VII's anti-retaliation provision, the ADA's anti-retaliation provision is not linked to the "qualified individual" definition at issue here. The ADA's anti-retaliation provision deliberately reaches far more broadly, protecting "any individual" rather than only "qualified individual[s]" as defined in § 12111(8).

I. CERTIORARI IS NOT WARRANTED BECAUSE THE APPARENT CIRCUIT SPLIT LACKS PRACTICAL CONSEQUENCE.

A. The Apparent Circuit Split is Academic.

Although the lower courts have disagreed on the preliminary question whether totally disabled former employees who neither hold nor desire any employment position are "qualified individual[s]" entitled to bring suit under § 12112(a), the most salient characteristic of that disagreement is its lack of practical relevance to the outcome in cases challenging post-employment benefits. That question therefore does not merit this Court's review. The circuit courts that have addressed the first question presented by the petition have generally done so in two types of cases: (1) when a former employee challenges a disparity in benefits under a long-term disability plan, *e.g.*, a disparity

between coverage for mental and physical disabilities, *see, e.g., Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); or (2) when a retiree alleges that a pension plan provides reduced benefits on account of disability, *see, e.g., Morgan v. Joint Admin. Bd.*, 268 F.3d 456 (7th Cir. 2001); *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998). Both types of claims have been consistently rejected regardless of the resolution of the principal question on which certiorari is sought.

1. In *Ford*, the plaintiff challenged her former employer's long-term disability benefits plan because it limited benefits for mental disability to two years but did not similarly limit benefits for physical disability. 145 F.3d at 603. The case thus presented the "purely legal question of whether a disparity between disability benefits for mental and physical disabilities violates the [ADA]." *Id.* The majority's negative answer to that question ended the case, but the majority nonetheless volunteered its analysis of the "preliminary issue [of] whether Ford is even eligible to sue under the ADA." *Id.* at 604. Then-Judge Alito did not join that analysis and concurred only in the judgment. Judge Alito observed that "[i]n light of the ease with which Ford's claims can be resolved" on other grounds, there was no need to reach the question "whether a former employee who can no longer work can meet Title I's 'qualified individual with a disability' requirement." *Id.* at 615. The first question on which certiorari is sought was likewise irrelevant to the outcome in *Weyer*. After determining that as a former employee the

plaintiff was *not* covered by Title I, the Ninth Circuit went on to hold that the disparity between mental and physical disability benefits in the former employer's plan did not violate Title I in any event. *Weyer*, 198 F.3d at 1116-17.[6]

2. Former employees who, like petitioners, have alleged post-employment discrimination in pension or retirement benefits have also lost on the merits, regardless of whether they have been treated as "qualified individual[s]" entitled to bring such a claim. In *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998), former police officers and firefighters who retired with disability pensions argued that the ADA entitled them to the additional benefits that New York City gave to officers who retired after 20 years of service with "for service" rather than disability pensions. Some plaintiffs had served less than 20 years and thus were eligible only for disability pensions. Other plaintiffs had served for 20 years, but chose disability pensions rather than "for service" pensions. *See id.* at 64-65. The court considered at great length whether the plaintiffs (who, unlike petitioners, were disabled at the time of separation) could be deemed "qualified individual[s]" entitled to sue under § 12112(a),

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[6] The only exception to the courts of appeals' unanimous rejection of such mental-physical disability benefits disparity claims was a decision by a divided panel of the Eleventh Circuit that was vacated upon grant of rehearing en banc. *See Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001); *id.* at 1070 (vacatur order). The panel decision remains vacated, and rehearing remains stayed, pending the outcome of the defendant's bankruptcy. *See Johnson v. K Mart Corp.*, 281 F.3d 1368 (11th Cir. 2002) (*en banc*).

ultimately answering that question in the affirmative. *See id.* at 66-69. But the court then made short work of the claims on the merits, holding that the City did not discriminate based on disability in reserving "for service" pensions to officers who served the requisite 20 years or in declining to permit 20-year veterans who freely chose disability pensions to receive "for service" pensions as well. *Id.* at 70-71. Just as the Sixth Circuit concluded in the present case, the latter retirees had equal access to the benefits they complained had been denied them, and nothing in the ADA required the City to give disabled retirees more benefits than similarly-situated non-disabled retirees. *Id.* As to the vast majority of plaintiffs in *Castellano*, the court's "qualified individual" discussion was thus unnecessary.

One plaintiff (Velardi) made a different allegation. Velardi alleged that he served 20 years and should have been free to choose either a "for service" or a disability pension, but that, because of his disability, the City "forced" him to retire with a disability pension. *Id.* at 72. The Second Circuit held that this allegation stated a valid claim of disability discrimination. *Id.* Although the court appeared to believe that its conclusion that former employees can be "qualified individual[s]" despite not "desir[ing]" a job was necessary to uphold Velardi's claim, *see id.*, it was not. Velardi's claim was that the City had discriminated against him while he was still an employee, in forcing him to retire with a disability pension instead of giving him the choice between a disability pension and a for-service pension. Velardi "h[e]ld[]" a job and thus

plainly was covered by Title I at the time of the alleged discrimination. Just as a covered employee who alleges that he was fired in violation of the ADA can sue under § 12112(a) despite being a "former" employee at the time the suit is brought, Velardi could sue for discrimination in the "terms, conditions, and privileges of [his] employment," *id.*, that occurred while he was an employee. The *Castellano* court therefore did not need to consider whether § 12111(8)'s "qualified individual" definition can be extended to cover a former employee who alleges discrimination occurring after his employment has ended and at a time when he no longer "desires" a job (or "can perform the essential functions" of a job) with his former employer. And, in all events, an individual like Velardi who is disabled while still an employee poses a different question from individuals like petitioners who become disabled only after ending the employment relationship.

For these reasons, despite some methodological disagreement as to whether there are one or two (or more) fatal defects in claims brought by retirees, there is no circuit split over whether retirees have a valid claim under the ADA. Claims of post-employment discrimination affecting former employees who are no longer "qualified individual[s]" at the time of the alleged discrimination have been uniformly rejected. Although some judges have chosen to address the subsidiary issue of whether such plaintiffs can sue under § 12112(a) before holding that such claims in any event fail to state a violation of that provision, any disagreement on that subsidiary issue is an academic exercise. Review of

this issue can await the day, if it ever comes, on which a court of appeals finds retirees to be "qualified individual[s]" *and* awards them some relief. Then-Judge Alito was correct that there was no need for the Third Circuit to reach the "qualified individual" issue in *Ford*, and there is even less reason for this Court to devote its scarce resources to it in the absence of a conflict that matters to the outcome of actual cases.

B. This Case Is Not An Appropriate Vehicle to Resolve the Apparent Split.

This case exemplifies why the disagreement concerning whether retirees who are totally disabled and do not "desire[]" a job are "qualified individual[s]" does not merit this Court's intervention. As in the cases discussed above, petitioners failed to allege a valid § 12112(a) claim, even aside from petitioners' failure to come within the "qualified individual[s]" entitled to bring suit. Even if the Court might be inclined to consider the first question presented in a case where the question was outcome-determinative, this is not such a case. Petitioners make a half-hearted effort to seek this Court's review on the Sixth Circuit's second basis for dismissing their claims, but there plainly is no need for this Court to consider that question.

1. The Sixth Circuit concluded that because petitioners had equal access to respondent's plans, there was no violation of § 12112(a). Pet. App. 24a. That conclusion is correct, as well as fully consistent with other circuits' treatment of similar claims.

The Sixth Circuit reasoned that because petitioners and all other employees had the same

opportunity to elect early retirement under the same plans with the same terms, respondent did not discriminate on the basis of disability in offering the plans. Pet. App. 24a. Unlike in *Castellano*, respondent did not "force" any petitioner to enroll in a less-advantageous plan than other employees were offered; indeed, respondent offered only a single, unitary plan for salaried employees and a single, unitary plan for hourly employees. As in *Leheny v. City of Pittsburgh*, 183 F.3d 220, 230 (3d Cir. 1998), and *Ford, supra*, all employees "had the opportunity to join the same plan with the same schedule of coverage, meaning that every [GM] employee received equal treatment." Pet. App. 24a (quoting *Ford*, 145 F.3d at 806). Petitioners do not allege that they were disabled at the time they elected to take early retirement, let alone that respondent somehow discriminated against them on the basis of disability by offering them less favorable terms than non-disabled employees received.

To the contrary, all of respondent's employees who were eligible for early retirement had the opportunity to elect early retirement under the same terms, without regard to whether they were then disabled or would in the future become disabled. All of respondent's employees who elected early retirement knew that, if they were to become totally disabled and receive SSDI benefits before attaining age 62 and one month, their supplemental early retirement benefits would be reduced. *See* Pet. App. 24a ("So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred . . .") (quoting *Ford*, 145 F.3d at 806); *see*

also Leheny, 183 F.3d at 230 (holding that equal entitlement under the pension plan, even if reduced in proportion to worker's compensation benefits during the time retiree receives benefits, does not violate ADA). This Court made a similar point in the context of the Age Discrimination in Employment Act in *Kentucky Retirement Sys. v. EEOC*, 128 S. Ct. 2361, 2367 (2008) ("the specific benefit at issue here is offered to all hazardous position workers on the same nondiscriminatory terms ex ante").

In addition to the Third Circuit authority on which the court below expressly relied, the decision below is fully consistent with decisions of the Second, Seventh, and Ninth Circuits. In *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144 (2d Cir. 2000), the court held that it did not violate the ADA for the employer to offer different long-term benefits for mental and physical disabilities. As in the present case, the court emphasized that, whatever the levels or details of coverage in the plan, the plaintiffs "were given access to the same fringe benefit plan as their coworkers and, in that sense, enjoyed equal 'compensation, . . . terms, conditions, and privileges of employment.'" *Id.* at 149 (ellipsis in original). "Viewed through this lens," the court explained, "they were not discriminated against at all." *Id.*[7]

In *EEOC v. CNS Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996) (D. Wood, J.), the court similarly made

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[7] The Second Circuit noted that given its holding that the employer had not discriminated based on disability in violation of § 12112(a), it did not need to consider whether the plaintiffs were "qualified individual[s]." *Id.* at 147 n.3.

clear that the key inquiry is whether the employer discriminated based on disability in providing access to its plan or plans. The court recognized that a pension plan may be a term or condition of employment covered by § 12112(a), but it emphasized that

> there is no claim here that CNA discriminated on the basis of disability in offering its pension plan to anyone. It did not charge higher prices to disabled people, on the theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled.

Id. at 1044. The court explained that the plaintiff's claim in reality was that the plan discriminated against "employees who *in the future* will become disabled due to mental conditions," because those employees' "present dollars (unbeknownst to them) are buying only 24 months of benefits . . . ." *Id.* (emphasis in original). Because all employees had equal access to the plan, the court concluded that this claim was "more grist for the ERISA mill or the national health care debate than for the ADA." *Id.*; *see also Weyer*, 198 F.3d at 1116 ("Fox did not treat Weyer any differently because of her disability. It simply gave her the same opportunity that it gave all the rest of its employees . . . .").

2. Petitioners argue briefly (Pet. 32-33) that the decision below is contrary to this Court's decision in *Olmstead v. Zimring*, 527 U.S. 581 (1999). This contention cannot bear scrutiny. *Olmstead* did not

involve Title I of the ADA and did not present any question relating in any way to retirement benefits. To the contrary, *Olmstead* involved Title II of the ADA (which governs public services furnished by governmental entities) and presented "the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions." *Id.* at 587. Regulations required services to be provided "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Id.* at 592 (quoting 28 C.F.R. 35.130(d) (1998)).[8] The Court held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability," *id.* at 597, but also held that a state's resource constraints could limit its obligations, *see id.* at 607. None of these issues has any bearing on, or counterpart in, the present case, and there is nothing in *Olmstead* that remotely strengthens the case for granting certiorari here.

In short, the Sixth Circuit's holding that respondent's plans do not violate § 12112(a) simply does not merit the Court's review. Because petitioners' claims would fail even if the Court were to find them to be "qualified individual[s]," this is not an appropriate case for the Court to consider the first question presented by the petition.[9]

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[8] Unlike in the present case, it was undisputed that the plaintiffs were "qualified individuals with disabilities." *See id.* at 602-03.

[9] Although not raised below, another potential independent ground to affirm the decision below may exist. In § 12201(c)(3),

II. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S DECISION IN *ROBINSON*.

Petitioners suggest that certiorari is warranted because the decision below is inconsistent with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Petitioners also suggest

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the ADA provides a safe harbor for "a bona fide benefit plan that is not subject to State laws that regulate insurance." This provision exempts a "bona fide benefit plan" that is subject to ERISA (and correspondingly not subject to state laws governing insurance) from Title I's prohibitions and restrictions. *See Fitts v. Federal Nat'l Mortg. Ass'n*, 236 F.3d 1, 4 (D.C. Cir. 2001). The safe harbor does not apply if a plan is used as a "subterfuge to evade the purposes" of Title I, 42 U.S.C. 12201(c), but there is no allegation here of any such "specific intent." *See Ford*, 145 F.3d at 615 (Alito, J., concurring in judgment) (no need to reach other issues "[i]n light of the ease with which Ford's claims can be resolved under section [12201(c)]"). As this Court recognized in the context of the ADEA just last Term, the interaction between the anti-discrimination statutes and pension plans is much more complex than the application of those statutes to individual employment decisions. *See Kentucky Retirement Sys.*, 128 S. Ct. at 2367. Before this Court wades into that issue, it would want not only a split, which is currently lacking because no court of appeals has awarded relief to a retiree under the ADA in a non-vacated opinion, but also a decision that addressed the safe harbor provision as well as the questions raised in the petition. The interaction with ERISA is particularly important to address in light of this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), which observed that ERISA "expressly preserved the option of pension fund integration with benefits available under . . . the Social Security Act," *id.* at 514 (citing 29 U.S.C. 1054(b)(1)(B)(iv), 1054(b)(1)(C), and 1054(b)(1)(G)), and held that integration with workers' compensation benefits is authorized as well, *see id.* at 526.

that the Sixth Circuit's decision is incorrect because the ADA's prohibition on discrimination with respect to "fringe benefits" cannot be given effect unless former employees like petitioners are entitled to sue and because the decision below leaves a "remedial gap," Pet. 28. None of these arguments is persuasive. The decision below is entirely consistent with *Robinson* and correctly interprets the plain language of §§ 12111(8) and 12112(a).

A. The Sixth Circuit's Decision is Fully Consistent with *Robinson*.

1. The question in *Robinson* was whether the word "employees" in the anti-retaliation provision of Title VII included former employees. Section 704(a) makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have utilized the protections of Title VII or assisted others in so doing. 42 U.S.C. 2000e-3(a). The *Robinson* Court acknowledged that "[a]t first blush," the term "employee" in § 704(a) "would seem to refer to those having an existing employment relationship with the employer in question." 519 U.S. at 341. But the Court explained that certain features of § 704(a) made it ambiguous and militated in favor of holding it to include former employees.

First, the Court emphasized that "there is no temporal qualifier" in § 704(a) itself or in surrounding provisions to make clear whether § 704(a) applies only to persons who are still "employees" at the time of the retaliation. *Id.* at 341-42. On this critical "temporal qualifier" point, the Court distinguished its decision just one month

earlier in *Walters v. Metro. Educational Enters.*, 519 U.S. 202 (1997). The Court had held unanimously in *Walters* that "employees" as used in § 701(b), 42 U.S.C. 2000e(b), relating to the 15-employee threshold for coverage by Title VII, unambiguously referred to current employees only. As the Court explained in *Robinson*, § 701(b) was clear in that regard because it "has two significant temporal qualifiers." 519 U.S. at 341 n.2. Section 701(b) provides that Title VII applies to an employer "who has fifteen or more employees for each working day . . . ." The "temporal qualifiers" in § 701(b) are the present-tense word "has," used in relation to "each working day," which together "specify the time frame in which the employment relationship must exist." *Robinson*, 519 U.S. at 341 n.2. Second, the *Robinson* Court relied on the fact that the word "employee" clearly included former employees as used in at least some provisions of Title VII. *See id.* at 342-43 (provision authorizing "reinstatement" necessarily applies to former employees).

For those reasons, the Court concluded that § 704(a) was ambiguous with respect to the question of "in what time frame must the employment relationship exist." *Id.* at 344. Having found § 704(a) ambiguous, the Court considered what interpretation would be most consistent with that section's purpose. In doing so, the 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. If employers could retaliate with impunity against Title VII complainants after separation -- *e.g.*, by giving negative references -- that "would undermine

the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining . . . ." *Id.* at 346.

2. *Robinson* did not mention §§ 12111(8) or 12112(a) of the ADA, and its analysis was closely tied to the text and context of the particular Title VII provisions at issue. *Robinson's* failure to mention the ADA is hardly surprising, because the basic dynamic that drove the analysis in *Robinson* -- the potential underinclusiveness of Title VII's anti-retaliation provision -- does not arise in the ADA, which contains an anti-retaliation provision clearly drawn in broader terms than the ADA's anti-discrimination provisions at issue here. *See infra* at 26-27. The court below, like the Seventh and Ninth Circuits, engaged in a careful review of §§ 12111(8) and 12112(a) in the light of *Robinson* and correctly concluded that these ADA provisions unambiguously do not cover totally disabled retirees who neither hold nor desire a job. *See* Pet. App. 13a-21a.

a. First, these courts have observed that "Title I, unlike the section of Title VII at issue in *Robinson*, has a 'temporal qualifier.'" *Weyer*, 198 F.3d at 1112. Section 12111(8) defines "qualified individual" as "someone who '*can perform*.' That definition uses the present tense. Thus, one must be able to perform the essential functions of employment at the time that one is discriminated against." *Id.* (emphasis in original). Section 12111(8)'s other temporal qualifiers reinforce this conclusion. In addition to requiring a present ability to perform the essential functions of a job, that provision refers in the present tense to "the employment position that such individual holds or

desires." *Id.* The ADA, therefore, has more in common with the provision that the Court limited to current employees in *Walters* than to the anti-retaliation provision distinguished in *Robinson*.

Moreover, § 12112(a) explicitly incorporates the defined term "qualified individual" in its prohibition of "discriminat[ion] against a qualified individual." 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 text and structure. The detailed and clear definition of "qualified individual," and its incorporation into the substantive prohibition, stand in stark contrast to the unilluminating definition of "employee" ("an individual employed by an employer") and the bare use of the word "employees" in § 704(a) at issue in *Robinson*. *See* 519 U.S. at 342. 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.

Second, the contextual and policy concerns that impelled the *Robinson* Court to a broad construction of Title VII's anti-retaliation provision are not present here, because §§ 12111(8) and 12112(a) have nothing to do with retaliation and the ADA's anti-retaliation provision is expressly drawn to cover "any individual," not just the narrower subset of "qualified individual[s]" covered by Title I's anti-discrimination provisions. *See Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 458 (7th Cir. 2001) (Posner, J.) ("The difference is stark."). If the ADA's anti-retaliation provision were similar to Title VII's,

perhaps *Robinson's* logic would transfer to that provision (though that still would be beside the point given that the provisions at issue here do not relate to retaliation). In reality, however, the ADA's anti-retaliation provision is quite different, and that difference further confirms that §§ 12111(8) and 12112(a) have the limited scope imparted by their plain and precise language.

The ADA's anti-retaliation provision is in Title V, not Title I, and it is drafted to extend protection to a far broader universe of individuals than those protected by Title I. The ADA's anti-retaliation provision makes it unlawful to

> discriminate against *any individual* because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. 12203(a) (emphasis added). As Judge Posner explained, Title I's "statutory protections against discrimination are protections of '[otherwise] qualified individual[s] with a disability,' 42 U.S.C. 12112(a), but the retaliation provision protects individuals, period." *Morgan*, 268 F.3d at 458. The difference between the precisely defined term "qualified individual" and the broad inclusion of "any individual" further supports the common-sense conclusion that Congress meant what it said in §§ 12111(8) and 12112(a).

b. In *Castellano* and *Ford*, the Second and Third Circuits concluded that *Robinson's* finding of ambiguity in the word "employees" in § 704(a) served to create ambiguity in a *different* term ("qualified individual"), in a *different* type of provision (*i.e.*, one having nothing to do with retaliation), in a *different* statute. Those courts seriously misread both *Robinson* and §§ 12111(8) and 12112(a).

Both courts tracked *Robinson's* path toward a finding of ambiguity by declaring that these ADA provisions, like § 704(a), lack a temporal qualifier. The Third Circuit, for example, stated that "the ADA contains an ambiguity concerning the definition of 'qualified individual with a disability' because there is no temporal qualifier for that definition." *Ford*, 145 F.3d at 606; *see also Castellano*, 142 F.3d at 67. This statement is mystifying -- there is a temporal qualifier (indeed, multiple, mutually-reinforcing temporal qualifiers) *in* that definition *itself*. Just as in *Walters*, the repeated use of the present tense "specif[ies] the time-frame" in which the plaintiff must satisfy the definition, *i.e.*, at the time of the alleged discrimination. *See Robinson*, 519 U.S. at 342 n.2. As the court below correctly pointed out, "[t]he *Ford* court appears to have disregarded the plain language of the statute -- which does, in fact, contain temporal qualifiers . . . -- and instead manufactured ambiguity where none existed." Pet. App. 20a.

B. The Sixth Circuit's Decision Is Correct.

The courts that have departed from the plain language of §§ 12111(8) and 12112(a) have done so because they have had difficulty reconciling the

definition of "qualified individual" with the ADA's reference to discrimination with respect to "fringe benefits." 42 U.S.C. 12112(b)(2). The court below correctly rejected the contention that such an inconsistency exists or justifies disregarding the plain language of §§ 12111(8) and 12112(a).

1. There is no inconsistency between the "fringe benefits" language in § 12112(b)(2) and the "qualified individual" definition. Subsection (a) of § 12112 makes it unlawful to "discriminate against a qualified individual on the basis of disability," and subsection (b), entitled "Construction," provides that that quoted language "includes" activities set out in seven paragraphs. *See* App. 2a-4a. It is § 12111(8) that defines "qualified individual"; § 12112(a) incorporates that defined term by explicit reference; and nothing in § 12112(b), a gloss on § 12112(a), purports to vary that definition. Given this statutory structure, it would be passing strange for an isolated, and indeed parenthetical, reference to "fringe benefits" in § 12112(b) to defeat the plain language of § 12111(8).

Paragraph (2) of § 12112(b) is the provision that refers to "fringe benefits." It does not even address fringe benefits directly, but rather includes a reference to "providing fringe benefits" in a parenthetical listing of exemplary "relationships" that preclude an employer from "contracting out" discrimination prohibited by Title I. Paragraph (2) provides that § 12112(a) includes

> participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered

> entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs).

42 U.S.C. 12112(b)(2).

The Second and Third Circuits focused on types of "fringe benefits" that are received after employment has ended, such as pension benefits, and concluded that it would conflict with the prohibition on discrimination with respect to fringe benefits to interpret the "qualified individual" definition according to its plain language to exclude retirees. *See Ford*, 145 F.3d at 605 (stating that there is a "disjunction between the ADA's definition of 'qualified individual with a disability' and the rights that the ADA confers"); *see also Castellano*, 142 F.3d at 66-67.

The Second and Third Circuits set up a false choice between the central "qualified individual" language on the one hand and the very peripheral (for present purposes) protections against discrimination by organizations "providing fringe benefits" on the other. First, focusing on the inclusion of "fringe benefits" in paragraph (b)(2) risks losing sight of the import of the provision as a whole. As quoted in full above, it is clear that the chief purpose of this paragraph governing

"participat[ion] in a contractual or other arrangement or relationship" is to ensure that an employer cannot evade the ADA by outsourcing its hiring, training, and benefits programs. That purpose is far afield from the supposed conflict identified by those courts. If the import of paragraph (2) were a listing of potential types of prohibited discrimination, all of which applied exclusively to retirees, it might have relevance. Instead, paragraph (2) is clearly an anti-circumvention provision, not a provision designed to shed light on the meaning of "qualified individual." Moreover, the very fact that the reference to fringe benefits occurs in a parenthetical elaborating on examples of relationships covered by the anti-circumvention rationale of paragraph (2) strongly cautions against the conclusion that paragraph (2) holds the key to the question whether "qualified individual" includes retirees. The answer to that question must be found instead in the precise place the statute promises to provide the answer, namely, in the definition of "qualified individual" and its multiple temporal qualifiers.

In all events, the central error that the *Castellano* and *Ford* courts made is in incorrectly assuming that fringe benefits apply exclusively to retirees and thus that § 12112(b)(2)'s reference to fringe benefits would be meaningless if former employees are not eligible to sue under § 12112(a). *See Castellano*, 142 F.3d at 69. That argument critically depends on the proposition that only former employees receive fringe benefits, but that proposition is manifestly incorrect. In a broad range of contexts, this Court has recognized that "fringe

benefits" include many benefits that are received or utilized during employment. "Fringe benefits" thus can include health insurance, vacation pay, overtime pay, sick leave, and meals.[10] While retirement benefits might be among the items that make up the universe of fringe benefits, they are hardly the exclusive or even the most important fringe benefit.[11] Because employees who satisfy the plain language of the "qualified individual" definition receive multiple types of fringe benefits, the inclusion of "fringe benefits" in § 12112(b)(2) can be given effect without rewriting § 12111(8).

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[10] *See, e.g., Howard Delivery Serv. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 654 (2006) ("pension plans, and group health, life, and disability insurance"); *Gilbert v. Homar*, 520 U.S. 924, 932 (1997) ("health and life insurance"); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 133 (1992) (Stevens, J., dissenting) ("vacation pay and health insurance"); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 689 (1983) ("health and disability insurance programs"); *Morrison-Knudsen Constr. Co. v. Dir.*, 461 U.S. 624, 646 n.7 (1983) (Marshall, J., dissenting) ("overtime, vacation pay, meals furnished employees, and such exotic items as automobile parts"); *Fed. Mar. Comm'n v. Pac. Mar. Ass'n*, 435 U.S. 40, 47 n.7 (1978) ("bargained-for plans for vacation pay, pay guarantees, pensions, welfare, and holidays"); *Amell v. United States*, 384 U.S. 158, 160 (1966) ("sick leave and vacation pay, and for death, health, medical and pension programs").

[11] And even with respect to retirement benefits, an organization that provides fringe benefits could discriminate against *current* employees. For example, an organization that allows current employees to check the balance in their retirement plan over the telephone, but that fails to accommodate employees with hearing disabilities, would seem to come within the ambit of § 12112(b)(2).

2. To be sure, adhering to the "qualified individual" definition means that fewer claims can be brought with respect to fringe benefits received after employment has ended. But that just means that Congress could have gone further than it did in Title I. "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; Pet. App. 18a. The Third Circuit clearly erred when it concluded (albeit in what amounts to dictum) that the "qualified individual" definition should give way "[i]n order for the rights guaranteed by Title I to be fully effectuated." *Ford*, 145 F.3d at 606. At best, that reasoning is circular. The definition of "qualified individual" itself limits the rights guaranteed by Title I. Full effectuation of the rights guaranteed does not justify expanding the universe of the rights guaranteed. At worst, that reasoning ignores the compromises that produced the ADA, like most legislation. As the court below noted (agreeing with the Ninth Circuit's analysis of this issue), insisting on "fully effectuating" one provision of a complex statute "has the potential to subvert the intent of Congress." Pet. App. 19a. That is because major legislation like the ADA

> often results from a delicate compromise among competing interests and concerns. 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.

Pet. App. 19a (quoting *Weyer*, 198 F.3d at 1113); *see also Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law") (emphasis in original).

3. For similar reasons, petitioners' contention (Pet. 28) that the decision below leaves a "gap" in protection cannot alter the plain language of §§ 12111(8) and 12112(a). But, in all events, what petitioners term a "gap" is just the result of Congress' decision in the ADA to address the rights of workers and leave the difficult issues raised by the totally disabled and their pension rights primarily to other statutes. Title I was clearly -- and reasonably -- intended to "draw workers with a disability into the workforce." *Morgan*, 268 F.3d at 458. Congress simply did not undertake in the ADA to regulate benefits for people who are totally disabled and unable to work. That is principally the role of the Social Security Act's provision for SSDI benefits, which pre-existed the ADA. Just because the ADA does not cover a matter does not mean that an "arbitrary gap" (Pet. 28) exists, for the matter may be covered by other laws, such as the Social Security Act and ERISA.

Indeed, although petitioners abandoned their ERISA claim, that should not obscure the fact that

ERISA, and not the ADA, is the federal statute that most directly and comprehensively "addresses fringe benefits for people unable to perform the functions of a job even with reasonable accommodations." *Weyer*, 198 F.3d at 1112; *see also* Pet. App. 21a. Congress expressly authorized the kind of "benefit integration" with SSDI benefits at issue in this case when it enacted ERISA. *See Alessi*, 451 U.S. at 514 (citing 29 U.S.C. 1054(b)(1)(B)(iv), 1054(b)(1)(C), and 1054(b)(1)(G)). And in *Alessi*, this Court spoke approvingly of benefit integration, *see id.*, and held that ERISA permitted integration with workers' compensation benefits as well, *id.* at 526. It is thus not surprising that, far from prohibiting benefit integration when it enacted the ADA, Congress took pains to create a safe harbor delimiting the respective domains of Title I and ERISA. *See supra* at 20-21 n.9. Certainly, this kind of statutory safe harbor is not the kind of "arbitrary gap" that would strengthen the case for the Court's review.[12]

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[12] It also is far from clear that interpreting §§ 12111(8) and 12112(a) as petitioners advocate would help people who are totally disabled. Judge Posner, in *Morgan*, explained that "[a]llowing former employees to complain about postemployment discrimination that does not involve retaliation would actually hurt them [by creating] perverse incentives" for employers to stop offering disability benefits. 268 F.3d at 458. That would hurt all employees, but especially disabled employees. *See id.* Nor is it clear that petitioners' view would advance the interests of individuals with disabilities as a group. Benefit integration seeks to benefit all retirees by taking into account offsetting SSDI benefits, just as respondent's plans take into account Social Security Old Age benefits by terminating the supplemental early retirement benefits at age 62 and one month. This approach allows for

CONCLUSION

The petition should be denied.

Respectfully submitted,

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greater benefits for all retirees -- including those with non-total disabilities who do not qualify for SSDI benefits.