No. 08-_____ 081113 MAR 3 - 2009

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Do the anti-discrimination protections of the Americans With Disabilities Act and its implementing regulations apply to disabled former employees?

(2) Under the Americans With Disabilities Act and its implementing regulations, may an employer, which does not reduce the retirement benefits of non-disabled workers who have post-retirement earnings, reduce the retirement benefits of disabled workers solely because they receive federal disability benefits?

PARTIES

The petitioners are Leroy McKnight, Nicholas Klayo, and Robert Griffin. The respondent is the General Motors Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Petitioners Leroy McKnight, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on December 4, 2008.

OPINIONS BELOW

The December 4, 2008 opinion of the court of appeals, which is reported at 550 F.3d 519 (6th Cir. 2008), is set out at pp. 1a-24a of the Appendix. The March 20, 2007 decision of the district court, which is *unofficially reported at* 2007 WL 851633 (E.D.Mich. 2007), is set out at pp. 25a-45a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on December 4, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix.

STATEMENT OF THE CASE

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court held that Title VII applies to former employees. In the wake of *Robinson*, the courts of appeals have repeatedly disagreed as to whether the anti-discrimination provisions of the Americans With Disabilities Act (ADA) apply to disabled former employees. In the instant case the Sixth Circuit held that the ADA does not protect such former employees, expressly rejecting the contrary holdings in the Second and Third Circuits. (15a-20a).

This case concerns the early retirement benefits available to General Motors employees. After thirty years of employment, General Motors hourly and salaried workers[1] may retire even though they have not yet reached the normal retirement age. An employee who opts for early retirement initially receives two benefits, monthly retirement payments (which continue as long as the worker lives) and an early retirement supplement. The early retirement supplement lasts until the worker reaches the age of 62 and one month, at which point he or she is eligible for Social Security Old Age benefits.

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[1] The terms of the early retirement benefit programs for hourly and salaried employees are largely similar. (3a-5a).

Petitioner McKnight was an hourly worker prior to his retirement. Petitioners Klayo and Griffin were salaried employees.

Under both the monthly retirement and the early retirement supplement a retiree is free, without any reduction in benefits, to return to the workforce and work full time or part time. Retirees may, without any effect on their benefits, resume work for General Motors as contract employees, and a significant number of retirees do just that.

This case concerns the circumstance in which the pension plan[2] reduces a worker's benefits. If a retiree receives, or "could become eligible for," Social Security Disability Insurance benefits (SSDI), the retiree's monthly early retirement supplement is substantially reduced.[3] Social Security Disability Insurance provides

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[2] Under some circumstances certain types of Workers' Compensation payments received by a retiree may result in a reduction, of equal size, of retirement benefits. Motion for Summary Judgment Submitted by Defendant General Motors, Exhibit A, Supplemental Agreement Covering Pension Plan, Article IV, *sec.* 2. *No deductions are permitted, for example, for* "fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member."

In the proceedings below, respondent offered no assertions or evidence as to whether such reductions have actually occurred, or how frequently, with regard to workers who had taken early retirement. Counsel for the employer acknowledged that (like SSDI) Workers' Compensation benefits "will probably be paid to somebody who is contending they are disabled." (Transcript of Motion for Summary Judgment, p. 13).

Neither court below referred to or relied on this provision.

[3] The early retirement supplement is reduced by the amount of the "temporary benefit" to which the retiree would have been entitled had he or she qualified for the Temporary Benefit. The Temporary Benefit is a separate benefit paid by

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benefits to individuals who are no longer able to work and who previously made Social Security contributions for the requisite number of quarters. See *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). Under the General Motors retirement plans, if the Social Security Administration (because of the delay between application for and approval of monthly SSDI benefits) provides a retiree with a retroactive award of SSDI benefits, General Motors insists on repayment of a substantial sum for early retirement supplemental payments made by the company during the period for which SSDI benefits were later retroactively awarded.[4] Non-disabled workers are not subject to having their retirement

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General Motors to certain individuals who, because of disability, are permanently and totally prevented from regular employment at the General Motors plant where they have seniority. The eligibility standards and benefit levels of the Temporary Benefit are somewhat different than the standards for SSDI. The Temporary Benefit is not available to a disabled worker who is able to obtain SSDI or who is over 62 and one month and thus able to obtain Social Security Old Age benefits.

The court of appeals at one point suggested that the reduction is equal to the amount of the SSDI payment. (5a n.1). That is not correct. Elsewhere the court of appeals described the reduction as "apparently about equal to the...SSDIB." (5a). For all three of the plaintiffs the reduction in their early retirement supplement was smaller than the amount of the SSDI which they received.

[4] The reduction is equal to the total Temporary Benefit payments that would have been made to the worker, had he been eligible for them, during the period for which the retroactive SSDI benefits were paid. See n.3, *supra*.

benefits reduced or reclaimed in this manner because of post-retirement earnings.

Petitioner McKnight retired in February 2000; in November 2000, McKnight began receiving SSDI benefits. Because of the SSDI benefits, General Motors reduced McKnight's monthly retirement benefits by $1,165.50 per month,[5] from $2,730.00 to $1,564.50. (26a). The employer also claimed entitlement to repayment of $10,489.50 for retirement benefits previously paid to McKnight. (6a). In 2000 General Motors notified McKnight that it would suspend payment of even the reduced retirement benefits to McKnight "until the full amount of any overpayment has been recovered."[6]

Petitioner Griffin retired from General Motors in December 1998, and was awarded SSDI benefits in 2002. Because of the SSDI benefits, General Motors reduced Griffin's monthly retirement benefits by $951.45, to $1,182.04 per month. The employer claimed entitlement to repayment of $30,446.40 for retirement benefits previously paid to Griffin, to cover the period for which Griffin received retroactive SSDI benefits from the Social Security Administration. (6a, 32a). General Motors notified Griffin it

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[5] The reduction was less than the $1592.20 SSDI benefit which McKnight received. (26a).

[6] Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibit H, Letter to Leroy McKnight, November 22, 2000.

would suspend payment of any retirement benefit until that $30,446.40 had been recovered.[7]

Petitioner Klayo retired in January, 1999, and was awarded SSDI in 2003. Because of the SSDI benefits, General Motors reduced Klayo's retirement benefits by $976.86 per month, and claimed entitlement to repayment of $35,166.96 for earlier retirement benefits previously paid to Klayo. The employer notified Klayo that it would suspend payment of any retirement benefits until that $35,166.96 had been recovered.[8]

Plaintiffs brought this action in 2005, alleging inter alia that the reduction in their monthly retirement benefits, as well as the required repayment, violated the Americans With Disabilities Act. The underlying facts were largely undisputed. The district court granted summary judgment to the defendants.

The district court concluded that disputed reductions in the retirement benefits of disabled workers are permitted by the ADA.[9] First, the district court

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[7] 6a; Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibits C, D and I.

[8] 6a, 31a; Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibits D, F and I.

[9] The courts below characterized this issue as one of whether the plaintiffs "have standing under...the ADA to pursue their claims." (2a; see 7a, 8a, 10a, 25a). This is a confusing, if not incorrect, use of the term "standing." The plaintiffs certainly have

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held that the ADA simply does not protect disabled former employees from discrimination on the basis of disability. (32a-40a). The district judge acknowledged that the Second and Third Circuits had both held that disabled former employees are protected by the ADA. (36a-37a). He noted, however, that several other circuits – particularly the Sixth and Ninth Circuits – had reached the opposite conclusion, and decided to interpret the ADA, as had "a majority of circuits," to exclude disabled former employees from the protections of the Act. (39a). Second, the district court reasoned that the ADA permits an employer to reduce the benefits of disabled, but not non-disabled workers, because of outside sources of income. (40a-42a).

The Sixth Circuit affirmed. The court of appeals noted that "[w]hether disabled former employees are 'qualified individuals' under Title I [of the ADA] is an issue that has divided the circuits." (9a). The Sixth Circuit acknowledged that the Second and Third Circuits had held that disabled former employees are protected by the ADA (9a), but rejected the reasoning of those circuits as "tenuous at best." (20a). The Third

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standing in the constitutional sense; they were injured by the practice complained of, and would benefit from an order restoring the amount of their original retirement benefits or awarding improperly withheld past benefits. See *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 604-05 (3d Cir. 1998); *Conners v. Maine Medical Center*, 42 F.Supp.2d 34, 40 (D.Me. 1999).

Although the language utilized by the courts below may be of no substantive significance, for clarity we avoid this idiosyncratic use of the term "standing."

Circuit decision,[10] the court of appeals objected, "disregarded the plain language of the statute." (20a). The Sixth Circuit decided instead to follow the rule in "the majority" of circuit courts, which had concluded that disabled former employees are not protected from discrimination. (17a). The ADA, "by its plain language, ... does not apply to former employees who are unable to perform the essential functions of their jobs." (21a). That limitation, the Sixth Circuit held, applied to retired workers despite the fact that those workers – by definition – have no job functions to perform.

The court of appeals also held that the ADA, even if applicable to disabled former employees, permitted the employer to reduce the benefits of the disabled retirees, but not non-disabled retirees, on the basis of outside income. The ADA, it reasoned, only required General Motors to accord disabled workers "equal access to the benefit programs." (24a).

[10] The reference is to *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEPLY ENTRENCHED INTER-CIRCUIT CONFLICT REGARDING WHETHER THE ANTI-DISCRIMINATION PROTECTIONS OF THE ADA APPLY TO DISABLED FORMER EMPLOYEES

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court held that Title VII applies to former employees. In the wake of *Robinson*, the courts of appeals have sharply disagreed as to whether the anti-discrimination provisions of the Americans With Disabilities Act apply to disabled former employees. Six circuits have now addressed this issue, openly disagreeing with one another as the proper construction of the ADA. In *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), then Judge Alito noted that

> the difficult issue[ ] of...whether a former employee who can no longer work can meet Title I's "qualified individual with a disability requirement"...ha[s] divided the circuits.

145 F.3d at 615. "[T]he different positions staked out by the circuit courts are intractable and create an affirmative inter-circuit split." *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 34 (2007).

The conflict grows out of the awkward way in which the ADA is written. Section 12112(a) forbids an employer to "discriminate against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a). Sections 12112(b) and 12112(d)

specify several types of discriminatory actions that are forbidden by section 101(a); although some of the provisions in sections 102(a) and 102(d) are limited to "qualified" employees or applicants,[11] many of those provisions contain no such restriction.[12] 42 U.S.C. §§ 12112(b), 12112(d). Section 12112(b), moreover, expressly forbids discrimination with regard to fringe benefits, certain types of which (such as retirement benefits) are only provided to former employees. Section 12111(8), on the other hand, defines "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position that such individual holds or desires." 42 U.S.C. § 12111(8). Former employees, of course, usually neither hold nor desire any position with the employer that is providing them with fringe benefits. These divergent provisions have led to widespread disagreement among the lower courts as to whether the section 12112(a) prohibition against discrimination applies only to individuals who hold or desire, and are qualified for, a particular job, a restriction which would exclude disabled former employees.

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[11] 42 U.S.C. §§ 12112(b)(2) ("qualified applicant"), 12112(b)(4) ("qualified individual"), 12112(b)(5) ("qualified individual").

[12] 42 U.S.C. §§ 12112(b)(1) ("applicant or employee"), 12112(b)(3) ("discrimination on the basis of disability"), 12112(b)(6) ("individual with a disability"), 12112(b)(7) ("applicant or employee who has a disability"), 12112(d) ("applicant" and "employee").

Since 1997 this inter-circuit conflict has turned on a disagreement about the significance of this Court's decision in *Robinson*. The question in *Robinson* was whether section 704(a) of Title VII, which forbids retaliation against "employees" for certain protected activities, applies to former employees. The Court acknowledged that "[a]t first blush, the term 'employees' would seem to refer to those having an existing employment relationship with the employer in question." 519 U.S. at 341. But the meaning and possible ambiguity of statutory language, *Robinson* held, had to be evaluated in "the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* Read in those contexts, the Court held, "employees" could mean either current employees or former employees. *Robinson* noted in particular that there was "no temporal qualifier in the statute such as would make plain that § 704(a) protects only persons still employed at the time of the retaliation." *Id.* Since the statutory language was unclear, the Court interpreted "employees" to include former employees because that construction was "more consistent with the broader context of Title VII and the primary purpose of § 704(a)." 519 U.S. at 346.

In *Castellano v. City of New York*, 142 F.3d 58 (2nd Cir. 1998), the Second Circuit concluded that the decision in *Robinson* supported the conclusion that the ADA does apply to disabled former employees. *Robinson*, the Second Circuit noted, had held that

> the language of section 704(a) of Title VII is ambiguous and then interpreted the statutory language in light of the purposes of section 704(a) and Title VII.... This reasoning applies with equal force to the instant case.

142 F.3d at 69. The Second Circuit reasoned that in the case of the ADA there is "textual ambiguity surrounding the time at which a plaintiff must have been a 'qualified individual.'" *Id.*[13]

> An interpretation excluding from the ADA former employees or employees who can no longer perform the essential functions of their former employment would undermine the purpose of preventing disability discrimination in the provision of fringe benefits.

142 F.3d at 69. If the protections of the ADA did not apply to former employees at all,

> an employer could terminate an employee in violation of the ADA and then deny him fringe benefits, yet the employee could bring no ADA claim for the latter violation because

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[13] Section 12111(8) defines a "qualified individual with a disability" as an individual "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."...It fails to specify *when* a potential plaintiff must have been a "qualified individual with a disability" in the context of a claim that the provision of retirement or fringe benefits is discriminatory.

142 F.3d at 67 (emphasis in original).

> at the time of the discriminatory denial of fringe benefits he was a former employee who did not "hold" an "employment position."

142 F.3d at 67. If the protections of the ADA, although applicable to some former employees, were limited to those who were still able to perform their old jobs, the law

> would permit irrational discrimination as between disabled persons, some of whom (for whatever reason) could still perform the essential functions of their former employment and others of whom could not.

Id. The Second Circuit noted that the EEOC, which is primarily responsible for enforcing the employment provisions of the ADA, had concluded that the protections of the ADA apply to all former employees, including those who can no longer perform the essential functions of their old jobs. 142 F.3d at 69. The Second Circuit thus concluded that

> [b]ecause fringe benefits are earned for actual service in employment, it is irrelevant whether former employees, otherwise eligible for fringe benefits, could *also* perform such essential functions at or after termination of their employment.

142 F.3d at 68 (emphasis in original). The court of appeals expressly refused to adopt the contrary rule in the Sixth, Seventh and Eleventh Circuits. 142 F.3d at 68.

In *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), the Third Circuit also relied on this Court's decision in *Robinson* in holding that "Title I of the ADA does permit disabled individuals to sue their former employers." 145 F.3d at 608. "Our impetus for this conclusion...comes from the Supreme Court's *Robinson* decision allowing former employees to sue under Title VII." 145 F.3d at 608. The Third Circuit agreed with the Second Circuit that the ADA was ambiguous, because it did not make clear whether a covered employee must be "qualified" at the time he earns a fringe benefit or at the time he seeks that benefit.[14] The Third Circuit also reasoned that the ADA was ambiguous because there was "an internal contradiction in the ADA itself." 145 F.3d at 605. Section 12112(b)(2) expressly forbids discrimination with regard to fringe benefits, some of which (as in the instant case) are provided only to former employees, while section 12111(8) defines "qualified individual" in a manner that seems to refer to current employees or applicants.

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[14] The locus of the ambiguity is whether the ADA contains a temporal qualifier of the term "qualified individual with a disability[.]" If the putative plaintiff must, at the time of the suit, be employable with or without a reasonable accommodation, then a disabled former employee loses his ability to sue to challenge discriminatory disability benefits. Alternatively, the term "qualified individual with a disability" may include former employees who were once employed with or without reasonable accommodations yet who, at the time of suit, are completely disabled.

145 F.3d at 606.

> This disjunction between the explicit rights created by Title I of the ADA and the ostensible standards for filing suit under Title I causes us to view the contents of those requirements as ambiguous.

145 F.3d at 606.

The interpretation of Title VII in *Robinson*, the Third Circuit reasoned, supported a similar construction of the ADA.

> The Supreme Court's recent decision in *Robinson*, which concerned the scope of Title VII..., contributes to this ambiguity by lending support for interpreting Title I of the ADA to permit suits by disabled individuals against their former employers.... Cases interpreting Title VII are relevant to our analysis of the ADA because the ADA is essentially a sibling statute of Title VII.... Our decision is...in keeping with the Supreme Court's *Robinson* decision, which found that the temporal reach of Title VII encompasses former employees....

145 F.3d at 606-07. The Third Circuit emphatically rejected the decisions of several other circuits which had held that the ADA does not protect former employees.

> By adopting this interpretation, we part ways with the Seventh and Eleventh Circuits, both of which tendered decisions prior to *Robinson*. In *EEOC v. CNA Ins. Companies*,

> 96 F.3d 1039 (7th Cir. 1996),...the Seventh Circuit's brief analysis conflates two issues, the first being whether the individual could sue regarding fringe benefits while completely disabled, and the second being whether the individual's suit had merit.... [W]e do not find the Seventh Circuit's reasoning persuasive....
>
> We also disagree with the Eleventh Circuit's ruling in *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996).... The Eleventh Circuit...failed to address the possibility that the disparity between the rights created by the ADA and the apparent legal remedy fashioned by the ADA creates an ambiguity in the eligibility requirements for obtaining a remedy.... [W]e respectfully disagree with the...sister courts of appeals.

145 F.3d at 607-08.

In *Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001), the Eleventh Circuit divided sharply about the significance of *Robinson*. Prior to *Robinson* the Eleventh Circuit had ruled that the ADA does not protect a disabled former employee. *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996). In *Johnson* a panel of the Eleventh Circuit concluded that *Gonzales* was bad law after *Robinson*, and held that "a former employee...is entitled to bring a claim against his former employer under § 12112(a) of Title I of the ADA." 273 F.3d at 1048. A majority of the panel reasoned that *Robinson* had fatally undermined the rationale of *Gonzales*.

> [T]he part of *Gonzales* wherein we decided that the meaning of the term "employees" in § 12111(4) plainly excluded former employees has been undermined by *Robinson*.... *Robinson* also undermines this court's previous finding that the term "discriminate," as defined in § 12112(b), plainly excludes former employees.... In light of the Court's emphasis in *Robinson* on the importance of temporal qualifiers, we must now acknowledge that it is hard to argue that §§ 12112(b)(1)-(b)(3) unambiguously contemplate discrimination encountered solely by job applicants and/or current employees.... [O]ur reliance in *Gonzales* on the legislative history of the ADA does not withstand the analysis in *Robinson*.

273 F.3d at 1044-48. The court expressly disagreed with the Ninth Circuit's refusal to apply *Robinson* to the ADA. 273 F.3d 1047.[15] A concurring opinion emphasized that "*Robinson*...clearly abrogates *Gonzales*." 273 F.3d at 1060 (Barkett, J., concurring).

> *Robinson* explicitly invalidates several of the propositions that informed...*Gonzales*.... [T]he *Robinson* Court, analyzed the same terms we examined in *Gonzales* and found these terms to be ambiguous.... [T]here is no doubt that the *Robinson* Court's decision

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[15] "Based on our reading of *Robinson*, we are convinced that...the Ninth Circuit in *Weyer* [*v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000)]...found more clarity in the language of § 12111(8) than is justified."

> invalidates *Gonzales*.... *Robinson* clearly invalidates our analysis in *Gonzales*.

273 F.3d at 1060-65. One member of the panel dissented, arguing that *Robinson* did not warrant the majority's decision to disregard the earlier Eleventh Circuit precedent in *Gonzales*. Although *Robinson* might have "weakened" the rationale of *Gonzales* and could "provide a springboard for the en banc court to reconsider settled circuit law," it had not "overruled" *Gonzales*. 273 F.3d at 1067-70 (Carnes, J., dissenting).[16] The Eleventh Circuit subsequently voted to rehear *Johnson* en banc. 273 F.3d at 1070. That rehearing has been stayed pending resolution of the bankruptcy proceedings regarding the defendant employer. *Johnson v. K Mart Corp.*, 281 F.3d 1368 (11th Cir. 2002).

Since this Court's decision in *Robinson*, on the other hand, the Sixth, Seventh and Ninth Circuits have taken the opposite position, holding that the ADA does not protect disabled former employees.[17]

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[16] The dissenting judge "express[ed] no view on how I would vote to decide the ADA coverage issue if we were reconsidering it en banc." 273 F.3d at 1070.

[17] The Eighth Circuit has held that disabled former employees are not protected from discrimination by the Rehabilitation Act of 1973. *Beaufort v. Father Flanagan's Boys' Home*, 831 F.3d at 768 (8th Cir. 1987). That circuit has not addressed this issue under the ADA, and has not considered the implications for either statute of this Court's decision in *Robinson*.

In the instant case the Sixth Circuit refused to apply the reasoning of *Robinson* to claims under the ADA, instead adhering to the Sixth Circuit's pre-*Robinson* decision in *Parker v. Metro. Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996) (*"Parker I"*).

> Plaintiffs urge this court to reconsider *Parker I*'s conclusion in light of *Robinson*.... We decline to do so.... [T]he Ninth Circuit [in *Weyer*] reaffirmed the view held...prior to *Robinson*: the plain, unambiguous language of Title I does not permit disabled former employees to bring suit under the act.... The Seventh Circuit has also joined the Ninth Circuit in adopting the majority position post-*Robinson*.... [W]e do not think that *Robinson* requires a decision contrary to *Parker I*.

(15a-21a). If a retired worker was sufficiently disabled to qualify for SSDI, the court below reasoned, the worker would not be a "qualified individual with a disability." (9a). "[The ADA] does not apply to former employees who are unable to perform the essential functions of their jobs." (21a). The requirement that disabled individuals be able to perform "the essential functions of their jobs" applied to retired workers, the Sixth Circuit insisted, even though those individuals by definition have no job functions to perform. The court below insisted that this paradoxical requirement was mandated by the "unambiguous...plain language of the ADA." (21a). Because of the asserted clarity of the ADA, the court of appeals held that this

Court's decision in *Robinson* was inapplicable to the ADA. (21a).

The Sixth Circuit expressly rejected the contrary holdings of the Second and Third Circuits in *Castellano* and *Ford*, dismissing the analysis of those circuits as "tenuous at best" (20a), and objecting that "[t]he circularity of this reasoning is apparent." (20a n.5, quoting *Parker I*, 99 F.3d at 186 (6th Cir. 1996)). The court of appeals below criticized the Third Circuit decision in *Ford* because it "appears to have disregarded the plain language of the statute." (20a).

In *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), the Ninth Circuit also rejected the argument that under the standard established by *Robinson* former employees are protected by the ADA. *Robinson* is inapplicable to the ADA, the court of appeals reasoned, because the plain language of the ADA does not cover former employees.

> Title I...unambiguously excludes former employees. A "qualified individual" is one who "can perform the essential functions of the employment position that such individual *holds* or *desires*." "Holds," in the present tense, refers to current employees. Likewise, "desires," in the present tense, refers to people who presently want jobs as opposed to...those no longer able to work....

198 F.3d at 1112 (emphasis in original). The Ninth Circuit thus concluded that the ADA was enacted solely "to enable disabled people who can work with

reasonable accommodation to get and keep jobs," not to "equalize post-employment fringe benefits for people who cannot work." 198 F.3d at 1112. The court of appeals expressly disagreed with the decisions of the Second and Third Circuits in *Castellano* and *Ford*.

> The Second and Third Circuits have...held...that former employees must be included [within the protections of the ADA.]... We reject this view.... We cannot accept the Third Circuit's view, that we should construe Title I contrary to what it says....

198 F.3d at 1111-12.

In *Morgan v. Joint Administration Board*, 268 F.3d 456 (7th Cir. 2001), the Seventh Circuit rejected the argument that *Robinson* required that circuit to reconsider its pre-*Robinson* decision holding that the ADA does not protect disabled former employees. See *EEOC v. CNA Ins. Companies*, 96 F.3d 1039 (7th Cir. 1996). Writing for the panel, Judge Posner concluded that disabled former employees would be *worse off* if they were protected by the ADA, because that would create an economic incentive for employers to refuse to establish any retirement benefit programs for disabled former employees.[18] The Seventh Circuit insisted that

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[18] Allowing former employees to complain about postemployment discrimination...would actually hurt them.... [I]t would create perverse incentives. Since there is no legal requirement that employers offer disability benefits as part of their menu of fringe benefits,...[t]he employer

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its earlier decision had already "anticipated" and rejected the rationale of *Robinson*, and refused to follow the decisions in the Second and Third Circuits that in light of *Robinson* "retired employees are protected by the ADA after all." 268 F.3d at 458.

The existence of this well-established inter-circuit conflict is widely recognized. The Sixth Circuit below candidly acknowledged that whether the ADA protects disabled former employees

> is an issue that has divided the circuits. The Second and Third Circuits take the minority position – that former employees who are totally disabled can be considered "qualified individuals" with standing to bring suit under [the ADA].... The majority position – that former disabled employees cannot be considered "qualified individuals" – has been explicitly adopted by the Ninth and Seventh Circuits.

(9a; see 15a (panel "decline[d]" to "join the Second and Third Circuits")). In *Ford* then Judge Alito noted that the courts of appeals were "divided" on this issue. 145 F.3d at 615. In *Johnson* the panel recognized that

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> would tell its employees to buy their own disability insurance.... Since workers with a disability are more likely than other workers to become totally disabled and have to retire early, an interpretation of the Act that discouraged employers from offering disability benefits would make the workplace less attractive to such workers.

268 F.3d at 458.

there is a "fractured series of decisions rendered by the court of appeals," 273 F.3d at 1068, noting that the Second and Third Circuits had held the ADA protects disabled former employees, while the Seventh and Ninth Circuits had taken the opposite position. 273 F.3d at 1068 n.4. In his dissenting opinion in *Johnson*, Judge Carnes argued that

> Judge Barkett obviously disagrees with the conclusions of Judges Flaum, Posner, and Williams of the Seventh Circuit in *Morgan* and of Judges Beezer, Wiggins, and Kleinfeld of the Ninth Circuit in *Weyer*, but the fact that there is a disagreement, and a two-to-two split of the other circuits that have addressed the issue since *Robinson* was released proves that there is substantial doubt about whether *Robinson* overruled or undermined to the point of abrogation the *Gonzales* decision.

273 F.3d at 1070 (Carnes, J., dissenting).[19] In *Weyer* the Ninth Circuit explained that "[w]e cannot avoid an inter-circuit conflict, because the Second and Third Circuits have held contrary to the Seventh and Eleventh Circuits." 198 F.3d at 1112.

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[19] See 273 F.3d at 1069 (dissenting opinion):

> A couple of other circuits in post-*Robinson* decisions have reached conclusions on the coverage issue that are different from the Ninth Circuit's in *Weyer* and the Seventh Circuit's in *Morgan*.... *Ford v. Schering-Plough Corp*.... *Castellano v. City of New York*....

Nine district court decisions have noted the existence of this inter-circuit conflict. *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 27 (D.R.I. 2007) ("[the] Courts of Appeal that have rendered decisions are unambiguously split on this issue"); *Hatch v. Pitney Bowes, Inc.*, 2005 WL 5394399 at *15 (D.R.I. 2005) ("the issue has produced a split among the circuits which have addressed it"); *Fletcher v. Tufts University*, 367 F.Supp.2d 99, 105 (D.Mass. 2005) (noting "the split of authority on this issue," contrasting decisions in the Seventh and Ninth Circuits with decisions in the Second and Third Circuits); *Iwata v. Intel Corporation*, 349 F.Supp.2d 135, 146-47 (D.Mass. 2004) (contrasting decisions in the Second and Third Circuits with contrary decisions in the Sixth, Seventh, Eighth and Ninth Circuits); *Heston v. Underwriters Laboratories, Inc.*, 297 F.Supp.2d 840, 843 (M.D.N.C. 2003) (noting "the split in case law" between the rule in the Seventh and Eleventh Circuits and the contrary rule in the Second and Third Circuits); *EEOC v. Group Health Plan*, 212 F.Supp.2d 1094, 1098 (E.D.Mo. 2002) ("[t]he Circuit Courts of Appeal are split on the issue of what effect *Robinson* has on the question of whether former employees are covered under the ADA"); *Fitts v. Federal National Mortgage Ass'n*, 44 F.Supp.2d 317, 321 (D.D.C. 1999) ("a split exists among the circuits"); *Conners v. Maine Medical Center*, 42 F.Supp.2d 34, 45 (D.Me. 1999) ("this Court declines to follow the Seventh and Eleventh Circuits and concurs with the decisions tendered by the Second and Third Circuits"); *Fennell v. Aetna Life Insurance Co.*, 37 F.Supp.2d 40, 42 (D.D.C. 1999)

("a split exists among the circuits as to whether a totally disabled former employee can bring a Title I [of the ADA] challenge").[20]

The EEOC, which is responsible for enforcing the employment discrimination provisions contained in Title I of the ADA, has consistently construed section 12112(a) to forbid discrimination against disabled former employees. The Commission has filed amicus briefs in five courts of appeals emphatically advancing that interpretation of the ADA.[21] The EEOC's Compliance Manual states that

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[20] In addition, the Massachusetts Commission Against Discrimination had noted the existence of this conflict in federal law.

> Courts across the country have split on the issue of whether an employee who brings a claim alleging discrimination in the provision of [employer-provided long-term disability] benefits must first demonstrate that he or she is qualified to perform the essential functions of his or her job. Compare...*Ford v. Schering-Plough Corp.*... *Castellano v. City of New York*...with *Parker v. Metropolitan Life Ins. Co.*....

Samartin v. Metropolitan Life Ins. Co., 2005 WL 2993469 at *3 (2005).

[21] Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of the Plaintiffs-Appellants, *Weyer v. Twentieth Century Fox Film Corp.*, 1998 WL 34082429 (9th Cir.); Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of the Appellant, *Ford v. Schering-Plough Corporation*, 1997 WL 33551474 (3d Cir.); Brief of the Equal Employment Opportunity Commission as Amicus Curiae, *Castellano v. The City of New York*, No. 96-7920 (2d Cir.); Brief of the Equal Employment Opportunity Commission as Amicus

(Continued on following page)

> [w]here an employer establishes either [a disability retirement or service retirement] plan[ ],...it may not discriminate against employees with disabilities.... As long as all employees may participate in the service retirement plan on the same terms, regardless of the existence of the disability, the employer will not violate the ADA....

(Compliance Manual, section 3, "ADA Issues" part V).[22] The Manual contains a section devoted exclusively to the non-discrimination requirements which the EEOC maintains are applicable to disability and service retirement plans. *Id.* ("Disability and Service Retirement Plans"). The Commission has filed suit under the ADA against private employers to prevent discrimination against disabled former employees[23] and has gone to court to enforce its subpoena power to investigate discrimination against such former employees.[24]

Curiae, *Gonzales v. Garner Fast Foods, Inc.*, 1995 WL 17057641 (11th Cir.); Brief of the Equal Employment Opportunity Commission, as Amicus Curiae, *Parker v. Metropolitan Life Ins. Co.*, 1995 WL 17809733 (6th Cir.).

[22] Available at http://www.eeoc.gov/policy/docs/benefits.html (visited Feb. 3, 2009).

[23] *EEOC v. CNA Insurance Companies*, 96 F.3d 1039 (7th Cir. 1996); *EEOC v. Deloitte & Touche, LLP*, 2000 WL 1024700 (S.D.N.Y. 2000).

[24] *EEOC v. Group Health Plan*, 212 F.Supp.2d 1094 (E.D.Mo. 2002).

In its brief in *Castellano*, the EEOC cogently explained the importance of this recurring issue. The district court in that case, like the Sixth Circuit in the instant case, had

> held that individuals may not challenge discrimination in the provision of post-employment benefits if they can no longer perform their former jobs. If upheld on this ground, the court's decision would insulate blatantly discriminatory benefit programs from challenge under Title I of the ADA whenever the discrimination is directed at former employees. Such a result, in our view, would subvert Congress' intent to prohibit disability discrimination in the provision of benefits.

Brief of the Equal Employment Opportunity Commission as Amicus Curiae, *Castellano v. The City of New York*, No. 96-7920 (2d Cir.) at 1-2.

> The language of the ADA indicates that Congress clearly intended to prohibit disability-based discrimination in the provision of employment-related benefits.... [M]any of the most essential fringe benefits that employers provide to their employees are, by definition, unavailable until the employee has stopped working. Not only pension benefits, but also long-term disability benefits, retiree health benefits, health insurance continued under COBRA, and deferred compensation plans,

> for example, are only available after an employee has retired or ceased working.

Id. at 8-9.

In its amicus brief in *Ford*, the EEOC pointed out that excluding disabled former employees from the protections of the ADA "would leave a substantial, arbitrary gap in coverage for benefit discrimination." Brief of the EEOC as Amicus Curiae, 1997 WL 33551474 at *7. The lower courts have repeatedly recognized the inequity of the gap created by the rule applied in this case, which withholds the protections of the ADA from disabled retired workers at the very point when they are most dependent on their fringe benefits.[25] That is precisely the type of unwarranted loophole in a major federal employment law which the United States suggested warranted a grant of certiorari in *Crawford v. Metropolitan Government of Nashville and Davidson County*, ___ U.S. ___ (2009). Brief of the United States as Amicus Curiae, No. 06-1595, at 18 ("The decision below creates an inexplicable gap in Title VII's anti-retaliation provision.")

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[25] *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 32 (D.R.I. 2007) (excluding former employees from the protections of the ADA would "create a remedial gap in Title I's statutory scheme, because Title I guarantees the right to be free from discrimination in the provision of fringe benefits"); *Lewis v. Aetna Life Ins. Co.*, 982 F.Supp. 1158, 1163 (E.D.Va. 1997) (excluding disabled former employees from protections of the ADA would create an "enormous...gap in the protection afforded by Title I [that] would be clearly at odds with the expressed purpose of the ADA").

This issue is ripe for resolution by this Court. The conflict has existed for more than a decade, since *Castellano* and *Ford* were decided shortly after this Court's decision in *Robinson*. In *Castellano* and *Ford* the Second and Third Circuits expressly considered and rejected the holding and reasoning of the contrary decisions in the Sixth, Seventh and Eleventh Circuits. In the instant case, *Morgan*, and *Weyer*, the Sixth, Seventh and Ninth Circuits expressly considered and rejected the holding and reasoning of the contrary decisions in the Second and Third Circuits. This issue has arisen in a variety of different circumstances, thus informing this Court's understanding of the implications and ramifications of these conflicting interpretations of the ADA. The circuit court decisions, although reaching sharply inconsistent results, have aired in a thorough and thoughtful manner the range of considerations bearing on the proper interpretation of the ADA. No purpose would be served by deferring action by this Court to definitively resolve this recurring and important question.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT

The retirement plans at issue in this case do not reduce the early retirement benefits of non-disabled retirees who have jobs, no matter how much they earn or for whom they work. The plans do, however, greatly reduce the retirement benefits of disabled retirees solely because they receive federal SSDI

benefits. The SSDI benefits which trigger that loss of retirement benefits would often be substantially less than what a non-disabled retiree – without any reduction in retirement benefits – would earn in a full time job. The Sixth Circuit held that the ADA permits such discrimination so long as disabled workers have "access" to the retirement plan. That crabbed interpretation of the ADA is in square conflict with this Court's consistent interpretation of the ADA and of the Rehabilitation Act on which it was based.

The distinction made by General Motors between disabled and non-disabled workers is clear. The income of non-disabled retirees is not subject to reduction based on their post-retirement earnings. They may earn as much as they can from whomever they please – General Motors, a competing automobile company, the Social Security Administration – without forfeiting a penny of their retirement benefits. If a retiree who took such a job and was later laid off receives unemployment compensation, his or her benefits are not reduced. If a retiree who took such a job was fired for some unlawful reason and subsequently wins an award of back pay, his or her benefits are not reduced. A benefit reduction is imposed, however, if a disabled retiree receives SSDI benefits.

This distinction is permitted by the ADA, the Sixth Circuit insisted, because the ADA requires only that disabled and non-disabled workers have "equal access to the same benefit plan." (24a). The Sixth Circuit's "equal access" standard was an exceptionally undemanding one. The ADA, on the Sixth Circuit's

view, required only that disabled workers be given "the option of rejecting" SSDI benefits in order to obtain the full retirement benefits, even though non-disabled workers are not required, as a condition of receiving the same benefits, to reject wages from post-retirement employment. (23a). On the Sixth Circuit's interpretation of the ADA, General Motors could adopt a policy of permitting most retirees to have post-retirement earnings, but cancelling the retirement benefits for any blind retiree who took a job; that would be "equal access" under the ADA because the blind retirees would have "the option of rejecting" any job offers, and could thereby continue to receive the same retirement benefits as gainfully employed sighted retirees.

The Sixth Circuit "equal access" rule reads into the ADA a severe restriction that is manifestly inconsistent with the decisions of this Court regarding ADA and the Rehabilitation Act from which the ADA derived. The Court has never imposed any such limitation on the federal prohibition against disability-based discrimination. The core requirement of that anti-discrimination principle, this Court has repeatedly held, is that "handicapped individuals receive 'even-handed treatment' in relation to nonhandicapped individuals." *Traynor v. Turnage*, 485 U.S. 535, 548 (1988).[26] The requirement of "evenhanded treatment" is not limited to evenhandedness in *what* benefits are

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[26] *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) ("evenhanded treatment").

available; it is equally applicable to the *conditions* which disabled and non-disabled individuals must meet to obtain the same benefit. Where, as here, only disabled retirees must forsake outside income to obtain the full General Motors retirement benefits, the program "treat[s] handicapped persons less favorably than nonhandicapped persons." *Traynor*, 485 U.S. at 548. The ADA, like the Rehabilitation Act, is "concerned...with discrimination in the *relative* treatment of handicapped and non-handicapped persons." *Bowen v. American Hospital Association*, 476 U.S. 610, 641 (1986) (quoting Brief for the United States) (emphasis in original).

In *Olmstead v. Zimring*, 527 U.S. 581 (1999), this Court rejected a proposed construction of Title II of the ADA that is indistinguishable from the interpretation of Title I adopted by the Sixth Circuit in the instant case. The plaintiffs in *Olmstead* were mentally disabled patients complaining that they, unlike non-disabled patients, could only obtain medical treatment if they agreed to live in a state institution. The defendants in *Olmstead* suggested that this treatment of the disabled plaintiffs did not constitute discrimination within the meaning of the ADA because the plaintiffs could obtain access to needed medical treatment by agreeing to reside in such an institution. This Court rejected that argument, holding that the defendant's practice was discriminatory because it imposed on disabled individuals seeking medical treatment a burden not imposed on non-disabled individuals.

> [C]onfinement in an institution severely diminishes the everyday life activities of individuals, including...work options.... In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

527 U.S. at 601. Like the practice held unlawful in *Olmstead*, the General Motors plan discriminates against disabled retires by requiring them – as a condition of receiving full early retirement benefits – to "relinquish [substantial outside income], while persons without...disabilities can receive [full early retirement benefits] without similar sacrifice."

In *Olmstead* the United States correctly pointed out that the practice at issue in that case "imposes a substantial burden on persons with disabilities that the State does not impose on persons without disabilities." (Brief for the United States as Amicus Curiae Supporting Respondents, No. 98-536, at 17, 1999 WL 149653). The practice at issue in the instant case discriminates in precisely that manner. The EEOC Compliance Manual provides that under the ADA retirement plans must permit "all employees [to] participate in the service retirement plan on the same terms, regardless of the existence of a disability." See text at n.22, *supra*. The General Motors plan, which makes forfeiture of outside income a "term" imposed

on disabled workers receiving SSDI, but not imposed on non-disabled workers with outside earnings, clearly violates that standard.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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