No. 12-707

In the Supreme Court of the United States

UNITED AIRLINES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*) requires an employer to provide an "otherwise qualified individual" with a disability "reasonable accommodations" unless the employer can demonstrate that doing so "would impose an undue hardship on the operation of [its] business." 42 U.S.C. 12112(a) (Supp. V 2011); 42 U.S.C. 12112(b)(5)(A). The statute further provides that a "'reasonable accommodation' may include * * * reassignment to a vacant position." 42 U.S.C. 12111(9)(B). The question presented is whether the ADA requires an employer to reassign an individual with a disability who can no longer perform his current job to a vacant equivalent position for which he is qualified, where doing so would not cause the employer undue hardship.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 693 F.3d 760. The previous opinion of the court of appeals (Pet. App. 12-20) is reported at 673 F.3d 543. The minute order of the district court (Pet. App. 21) is unreported.

JURISDICTION

The original judgment of the court of appeals was entered on March 7, 2012. A revised judgment of the court of appeals on rehearing was entered on September 7, 2012. The petition for a writ of certiorari was filed on December 6, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. 12101 *et seq.*), prohibits a covered employer from "discriminat[ing] against a qualified

individual on the basis of disability." 42 U.S.C. 12112(a) (Supp. V 2011). The ADA provides that such prohibited discrimination means, among other things, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified [disabled employee] unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." 42 U.S.C. 12112(b)(5)(A).

The ADA includes "reassignment to a vacant position" in the non-exclusive list of possible "reasonable accommodation[s]" that employers may be required to provide to employees with disabilities. 42 U.S.C. 12111(9). The Equal Employment Opportunity Commission (EEOC) has explained that reassignment is a reasonable accommodation of last resort, to be used only when reasonable accommodations intended to keep the employee in her current job are not possible. See 29 C.F.R. App. 1630.2(*o*).

2. In 2003, petitioner adopted Reasonable Accommodation Guidelines that address, among other things, accommodating disabled employees who can no longer do the essential functions of their current jobs even with a reasonable accommodation. Pet. App. 3. Those guidelines recognize that reassignment, or "transfer," to "an equivalent or lower-level vacant position" may be a reasonable accommodation. *Ibid.* The guidelines specify, however, that because "reassignment through [petitioner's] transfer process" is "competitive," an "employee will [not] be automatically placed into a vacant position." *United Airlines Reasonable Accommodation Process Guidelines for Managers* 8 (June 23, 2003), 2d Amended Compl., Ex. A *(United Guidelines*).

Under the guidelines, employees who can no longer perform their jobs due to disability can "submit an unlimited number of transfer applications"; are "guaranteed an interview (when the selection process so requires) for all positions for which the employee is minimally qualified"; and for "competitive vacancies," should receive "priority consideration for placement when two or more employees are substantially equal when considering all of the evaluation criteria for the hiring decision." *United Guidelines* 8. Aside from those measures, however, a disabled employee who will lose his or her job absent reassignment must compete for a vacant position on the same competitive terms as all other employees.

2. After the *United Guidelines* went into effect, the EEOC began receiving charges in several of its offices, including San Francisco and Chicago, complaining that petitioner refused to provide reassignment as a reasonable accommodation. On June 3, 2009, the EEOC filed suit in the Northern District of California (where petitioner has a hub airport), alleging that petitioner's transfer policy violates the ADA. Pet. App. 3. The district court granted petitioner's motion to transfer the suit to the Northern District of Illinois. *Ibid.*

On February 3, 2011, the district court granted petitioner's motion to dismiss. Pet. App. 21. The court explained that in *EEOC* v. *Humiston-Keeling, Inc.*, 227 F.3d 1024 (2000), the "Seventh Circuit rejected a claim by the EEOC that [was] identical to the one in this case, namely that the reassignment provision of the ADA requires that a disabled employee receive a position over a more qualified nondisabled employee as long as the disabled employee is capable of per-

forming the work required for the position." Pet. App. 24. The district court noted that this Court in *US Airways* v. *Barnett*, 535 U.S. 391 (2002), had subsequently "rejected [an employer's] argument that the ADA never requires an employer to grant an accommodation to a disabled employee if [the] accommodation would violate a disability neutral rule." Pet. App. 25. But the district court stated that *Barnett* did not involve "the precise issue presented here" and that it was thus "bound" to follow *Humiston-Keeling* and subsequent circuit cases applying it. *Id.* at 25, 26.

3. a. The court of appeals initially affirmed, explaining that *Humiston-Keeling* had "already held" that the ADA does not "require[] employers to reassign employees, who will lose their current positions due to disability, to a vacant position for which they are qualified." Pet. App. 12-13; see *id.* at 17-19. The panel stated that the "EEOC's [contrary] interpretation may in fact be a more supportable interpretation of the ADA, and here we think that this is likely." *Id.* at 15. But the court explained that principles of *stare decisis* required it to adhere to *Humiston-Keeling*. *Id.* at 15-20.

The court of appeals nonetheless "strongly recommend[ed] *en banc* consideration" because "the logic of EEOC's position on the merits, although insufficient to justify departure by th[e] panel from the principles of *stare decisis*, is persuasive with or without consideration of *Barnett*." Pet. App. 19-20; see also *id.* at 13 (suggesting that the en banc court "might reconsider the impact of *Barnett* on *Humiston-Keeling*").

b. Respondent petitioned for rehearing en banc, and petitioner filed a response. Pet. App. 1. Thereafter, "every member of the court in active service ap-

proved overruling *Humiston-Keeling*" without the "usual formal en banc procedure." *Id.* at 1-2. The panel therefore vacated its original decision and circulated a new draft decision to the full court under Seventh Circuit Rule 40(e). When no member of the court asked for rehearing en banc, the panel issued a new decision, reversing the district court's judgment and remanding the case to the district court for further consideration. *Id.* at 2, 11.

In its new opinion, the court of appeals explained that "*Humiston-Keeling* did not survive *Barnett*." Pet. App. 2-3. The court held that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer." *Id.* at 3.

The court of appeals explained that this Court in *Barnett* had concluded that "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'" Pet. App. 5 (brackets in original) (quoting *Barnett*, 535 U.S. at 398). "Instead, the Court outlined a two-step, case-specific approach." *Id.* at 5-6. First, the plaintiffs must demonstrate that "'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Id.* at 6 (quoting *Barnett*, 535 U.S. at 401). (Even if the plaintiff cannot make that showing, the court of appeals explained that, under *Barnett*, plaintiff "can still prevail by showing that special circumstances warrant a finding that the accommodation is reasonable under the par-

ticular circumstances of the case." *Id.* at 6 n.1 (quoting *Shapiro* v. *Township of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002)).) Second, if the plaintiff shows that reassignment is reasonable in the run of cases, "the burden shifts to the defendant/employer to 'show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.'" *Id.* at 6 (quoting *Barnett*, 535 U.S. at 402). When this Court in *Barnett* applied that framework to the case before it, it held that reassignment that would conflict with an employer's seniority system "would not be reasonable in the run of cases." *Ibid.* (quoting *Barnett*, 535 U.S. at 403).

The court of appeals explained that petitioner's argument in this case was foreclosed by *Barnett*, which held that "[m]erely following a 'neutral rule' did not allow [the employer] to claim an 'automatic exemption' from the accommodation requirement of the [ADA]." Pet. App. 7 (quoting *Barnett*, 535 U.S. at 398). "Instead, [the employer in *Barnett*] prevailed because its situation satisfied a much narrower, fact-specific exception based on the hardship that could be imposed on an employer utilizing a seniority system." *Ibid.* The court of appeals explained that a "best-qualified selection policy" was not equivalent to a seniority system like the one at issue in *Barnett* because the former "does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy." *Id.* at 9.

The court of appeals noted petitioner's argument that it should not "abandon *Humiston-Keeling*, in part because the Eighth Circuit explicitly adopted" that decision's reasoning in *Huber* v. *Wal-Mart Stores, Inc.*, 486 F.3d 480, 483-484 (2007), cert. dismissed, 552

U.S. 1136 (2008). Pet. App. 10. The court explained, however, that "the Eighth Circuit's wholesale adoption of *Humiston-Keeling* has little import" because that court adopted *Humiston-Keeling* "without analysis, much less an analysis of *Humiston-Keeling* in the context of *Barnett*." *Ibid.* The court of appeals also explained that two other circuits "have already determined that the ADA requires employers to appoint disabled employees to vacant positions, provided that such accommodations would not create an undue hardship (or run afoul of a collective bargaining agreement)." *Id.* at 10-11 (citing *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc), and *Aka* v. *Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc)).

The court of appeals did not apply the two-step *Barnett* framework itself to this case, but instead directed the district court to do so on remand. Pet. App. 9. In particular, the court of appeals directed the district court to "first consider (under *Barnett* step one) if mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation." *Ibid.* The court of appeals stated that it thought this test would likely be satisfied in this case, given that reassignment "is the very accommodation analyzed in *Barnett*" and that there is no seniority system at issue. *Id.* at 9 n.3. But the court recognized that "it is possible there is some comparable circumstance of which we are unaware." *Id.* at 10 n.3. In addition, the court of appeals "note[d] for completeness that if mandatory reassignment is not ordinarily a reasonable accommodation, the EEOC can still prevail if it shows that special factors make mandatory reassignment reasonable in this case." *Ibid.*

"Assuming that the district court finds that mandatory reassignment is ordinarily reasonable," the court of appeals explained, "the district [court] must then determine (under *Barnett* step two) if there are fact-specific considerations particular to [petitioner's] employment system that would create an undue hardship and render mandatory reassignment unreasonable." Pet. App. 9-10.

ARGUMENT

Petitioner renews its contention that its "best-qualified" personnel policy categorically trumps the ADA's reassignment obligation. The court of appeals correctly rejected that argument in light of this Court's decision in *US Airways, Inc.* v. *Barnett*, 535 U.S. 391 (2002). While the Eighth Circuit alone has reached a different result, that court based its analysis almost exclusively on a pre-*Barnett* decision of the Seventh Circuit that the Seventh Circuit unanimously overruled below in this case. Review by this Court would be premature until the Eighth Circuit has an opportunity to revisit the question presented in light of the elimination of the intellectual foundation of its precedent in this area. Moreover, the question presented arises infrequently, and the interlocutory posture of the decision below also counsel against review at this time.

1. Petitioner urges review to resolve what it characterizes as a "longstanding split" over the question presented. Pet. 10. Although there is currently a shallow conflict in the courts of appeals on this question, review is not warranted on this basis.

a. As the court of appeals explained, even before *Barnett,* the Tenth and District of Columbia Circuits both concluded "that the ADA requires employers to

appoint disabled employees to vacant positions, provided that such accommodations would not create an undue hardship (or run afoul of a collective bargaining agreement)." Pet. App. 10-11 (citing *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1164-1170 (10th Cir. 1999) (en banc); *Aka* v. *Washington Hosp. Ctr.*, 156 F.3d 1284, 1304-1305 (D.C. Cir. 1998) (en banc)). The court of appeals' holding in this case is consistent with those decisions.

Only the Eighth Circuit has reached a contrary conclusion. See *Huber* v. *Wal-Mart Stores, Inc.*, 486 F.3d 480 (2007), cert. dismissed, 552 U.S. 1136 (2008). But, as the court of appeals explained below, the Eighth Circuit in *Huber* merely "adopt[ed]" the Seventh Circuit's now-overruled decision in *EEOC* v. *Humiston-Keeling, Inc.*, 227 F.3d 1024 (2000), "without analysis, much less an analysis of *Humiston-Keeling* in the context of *Barnett*." Pet. App. 10; see *Huber*, 486 F.3d at 483 (quoting *Humiston-Keeling*, 227 F.3d at 1027-1028); see also Pet. App. 19.

Given that the Eighth Circuit supported its holding principally through wholesale adoption of *Humiston-Keeling* and that the Seventh Circuit has now unanimously overruled that decision as inconsistent with this Court's subsequent decision in *Barnett*, it is possible that the Eighth Circuit will revisit the question in a future case that squarely presents it. Review by this Court before the Eighth Circuit has an opportunity to undertake that exercise (and possibly change its status as the sole outlier court of appeals on this question) would be premature. The Seventh Circuit's overruling of *Humiston-Keeling* (and the possibility that the Eighth Circuit would thus reconsider *Huber* and eliminate the split) also render the present cir-

cumstances markedly different from those governing at the time this Court granted certiorari in *Huber*.

b. The question presented in this case does not arise frequently, and certiorari is unwarranted for that reason as well. As petitioner acknowledges (Pet. 10-15), only four courts of appeals have squarely addressed the issue, and it took many years (since the D.C. Circuit's 1998 decision in *Aka*) to reach even that low tally. (Petitioner's separate discussion (Pet. 16-19) of opinions predating or not citing *Barnett* and containing generic references to "affirmative action" do not present the question addressed by the court of appeals in this case.)

The infrequency with which the question presented here arises (and the narrowness of the reassignment obligation) are explained by the place of reassignment in the overall statutory scheme. First, unlike some other ADA reasonable-accommodation requirements, reassignment is not available to applicants; it is instead available only to existing employees at risk of losing their jobs because of disability. See 29 C.F.R. App. 1630.2(*o*); S. Rep. No. 116, 101st Cong., 1st Sess. 31-32 (1989) (Senate Report). Second, the reassignment obligation is triggered only where the employee cannot be reasonably accommodated in his current position, which is the preferred mechanism for accommodating disabilities. See 29 C.F.R. App. 1630.2(*o*); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 63 (1990) (House Report); *Smith*, 180 F.3d at 1170-1171. Reassignment is thus "the reasonable accommodation of last resort." *EEOC No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities*

Act, EEOC Compl. Man. (BNA) 902.0164 (Oct. 17, 2002) (*Guidance*).

Third, there must be a vacant position for reassignment to even be a possibility. The employer is not obligated to bump another employee or create a new position to allow for reassignment. See House Report 63; *Guidance* 902.0164; *Smith*, 180 F.3d at 1170, 1174-1175. Fourth, the reassignment obligation applies only to positions at the disabled employee's grade level (or below if no such equivalent positions are vacant); an employer is not required to promote the employee as part of a reassignment. See *Guidance* 902.0164; 29 C.F.R. App. 1630.2(*o*); see 29 C.F.R. App. 1630.2(*o*) (employer may reduce salary of employee reassigned to lower graded position, assuming that it would do the same for "reassigned employees who are not disabled"); *Smith*, 180 F.3d at 1170, 1176-1177. And "the employer has the authority to pick and choose which appropriate vacant job is to be offered to the otherwise qualified disabled employee." *Id.* at 1170; see *id.* at 1177-1178.

Fifth, the employee "must be qualified for, and able to perform the essential functions of, the position sought with or without reasonable accommodation," 29 C.F.R. App. 1630.2(*o*), and "[t]here is no obligation for the employer to assist the individual to become qualified." *Guidance* 902.0163. The employer alone establishes the minimum qualifications for a position, and when evaluating whether an employee meets them, the ADA requires that "consideration * * * be given to the employer's judgment as to what functions of a job are essential." 42 U.S.C. 12111(8). Finally, an employee need not be reassigned where the employer

demonstrates that the specific reassignment would result in undue hardship. 42 U.S.C. 12112(b)(5)(A).

c. The interlocutory posture of this petition makes it a poor vehicle for review of the question presented. The court of appeals remanded to the district court to determine whether "mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation." Pet. App. 9. While the court of appeals stated that it "d[id] not believe this step will cause the district court any great difficulty," it recognized that there could be a "circumstance" regarding petitioner's operations "of which [the court was] unaware," and that such circumstance could render reassignment unreasonable. *Id.* at 9-10 n.3. Petitioner therefore still has an opportunity to show that reassignment is not a reasonable accommodation for purposes of this case.

Even if the district court found reassignment reasonable in the run of cases, petitioner would still have the opportunity to demonstrate "fact-specific considerations particular to [its] employment system that would create an undue hardship and render mandatory reassignment unreasonable." Pet. App. 10. Petitioner may prevail on one of these bases on remand, thus obviating the need for this Court's review. Even if it does not, the record developed during the remand proceedings would provide critical context for this Court's consideration of the question presented.

This pre-remand petition arises from a dismissal granted under Federal Rule of Civil Procedure 12(b)(6). Other than a copy of petitioner's Reasonable Accommodation Guidelines, the record is thus entirely bereft of information about petitioner's employment practices, including its day-to-day reassignment procedures, the nature of its "best-qualified" policy, and

how it applies that policy. Instead, the decisions below were based only on the allegations in respondent's 12-paragraph complaint. By contrast, *Barnett* came to this Court on summary judgment, see 535 U.S. at 395, as did *Huber*, see 486 F.3d at 481. For these reasons as well, review is not warranted at this time.

2. The court of appeals' decision was correct.

The ADA prohibits employers from discriminating against a "qualified individual on the basis of disability." 42 U.S.C. 12112(a) (Supp. V 2011). An individual is "qualified" if he satisfies the requisite job-related requirements of the position he holds or desires and can perform the essential functions of that position, with or without reasonable accommodation. 42 U.S.C. 12111(8); 29 C.F.R. App. 1630.2(m). The ADA defines the phrase "discriminate against a qualified individual on the basis of disability" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operations of the business." 42 U.S.C. 12112(b)(5)(A) (2006 & Supp. V 2011). And the statute expressly identifies "reassignment to a vacant position" as a possible "reasonable accommodation." 42 U.S.C. 12111(9)(B).

a. In *Barnett*, this Court interpreted the ADA reassignment obligation in a case where an employee's request for reassignment conflicted with "the interests of other workers with superior rights to bid for the job under an employer's seniority system." 535 U.S. at 393-394. The plaintiff, a cargo handler who injured his back at work, bid successfully for a position in the mail room, a less physically demanding position.

Id. at 394. He then requested as a reasonable accommodation that he be permitted to remain in that position. *Ibid.* Another employee with more seniority obtained the position, however, and the plaintiff lost his job and brought an ADA claim. *Ibid.*

The Court observed that the employer in that case argued that the ADA does not "require an employer to grant preferential treatment" and thus "does not require the employer to grant a request that, in violating a disability-neutral rule, would provide a preference." *Barnett*, 535 U.S. at 397. The Court rejected the premise of that argument. The Court explained that "preferences will sometimes prove necessary to achieve the [ADA's] basic equal opportunity goal" and that "the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the [ADA's] potential reach." *Ibid.*; see *id.* at 398 ("The simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'").

The Court in *Barnett* explained that, in order to defeat an employer's motion for summary judgment, an employee must show that his requested accommodation "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." 535 U.S. at 401. "Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402.

The Court assumed that a request for reassignment would "normally" be a reasonable one in a case

like the one before it, "were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system." *Barnett*, 535 U.S. at 403. In that "one circumstance," the Court explained, "it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system." *Ibid.* The Court based that conclusion on factors related to the "importance of seniority to employee-management relations." *Ibid.* In particular, "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." *Id.* at 404. Indeed, as the Court observed, seniority systems "include 'an element of due process,' limiting 'unfairness in personnel decisions.'" *Ibid.* (citation omitted). The Court concluded that to require a "case-specific 'accommodation' decision made by management" any time reassignment conflicted with the "uniform, impersonal operation of seniority rules" would "undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend." *Ibid.*

The *Barnett* Court emphasized, however, that the employee before it "remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts." 535 U.S. at 405. For example, the employee might show that the employer frequently changed the seniority system, "reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference." *Ibid.*

Similarly, the employee might show that the system is already subject to many exceptions, such that "one further exception is unlikely to matter." *Ibid.*

b. In an opinion supported by every active member of the Seventh Circuit (Pet. App. 1-2), the court of appeals in this case correctly applied this precedent to conclude that an employer's asserted policy of assigning employees based solely on who is best qualified cannot, by itself, defeat the ADA's express recognition of reassignment as a reasonable accommodation. As the court of appeals explained, *Barnett* also established that "[m]erely following a 'neutral rule' [does] not allow [an employer] to claim an 'automatic exemption' from the accommodation requirement of the [ADA]." *Id.* at 7. Although *Barnett* established a special rule for seniority systems, the court of appeals explained that "a best-qualified selection policy" is fundamentally different from a seniority system. *Id.* at 9. In particular, "the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy." *Ibid.*

The court of appeals further explained that petitioner has several options on remand. Pet. App. 9 & n.3. It is free to argue that the particular circumstances of its workplace would make reassignment unreasonable. See *ibid.* In addition, petitioner can attempt to demonstrate "fact-specific considerations particular to [its] employment system," including, as may be relevant, those related to application of its best-qualified policy, that "would create an undue hardship." *Id.* at 10.

The court of appeals' approach is true to the statutory text and properly balances the remedial goals of

the ADA with the legitimate interests of employers in those limited situations (see pp. 10-12, *supra*) where the statute's reassignment obligation is triggered. The statute provides that "reassignment," not merely the opportunity to apply for it, is a reasonable accommodation. 42 U.S.C. 12111(9)(B). Petitioner's contrary interpretation, under which the reassignment obligation would seemingly be defeated whenever an employer has a "best-qualified" placement policy, would essentially read the reassignment obligation out of the statute. If all that provision accomplished was to allow disabled employees to obtain reassignments they could obtain competitively even without the ADA, the reassignment provision would accomplish nothing at all. See *Smith*, 180 F.3d at 1164-1167; *Aka*, 156 F.3d at 1304.

The court of appeals' analysis is also supported by the express enumeration of the reassignment obligation among other enumerated obligations that constitute "reasonable accommodation[s]," *i.e.*, "making existing facilities used by employees readily accessible to and usable by individuals with disabilities," "job restructuring, part-time or modified work schedules, * * * acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters." 42 U.S.C. 12111(9)(A) and (B). It is likely that many of these reasonable accommodations will require deviation from neutral policies of general applicability. See generally *Barnett*, 535 U.S. at 397-398. For example, a qualified individual with a disability may require more time to complete an examination than other employees are provided, may need special office equip-

ment that would be unavailable to non-disabled employees who requested it, or require a ground-floor office that would otherwise go to a more senior employee. Absent a demonstration by the employer that such accommodations would cause undue hardship, however, the employer would be required by the ADA to provide them. The reassignment obligation should be treated no differently.

The court of appeals' conclusion is also supported by the longstanding position of the EEOC, the agency Congress entrusted to administer the ADA. See *Guidance* 902.0166 (Q/A 29) ("Does reassignment mean that the employee is permitted to compete for a vacant position? No. Reassignment means that the employee gets the vacant position *if s/he is qualified for it*."); *Guidance* 902.0163 ("The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment."). The EEOC's "policy statements, embodied in its compliance manual and internal directives * * * reflect 'a body of experience and informed judgment.'" *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (citations omitted). As such, they warrant a measure of respect and deference. See *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335-1336 (2011) (giving weight to EEOC's consistent position set forth in compliance manual); *Federal Express*, 552 U.S. at 399 (deferring to EEOC guidance that had "been binding on EEOC staff for at least five years").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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