No. 00-1250

IN THE
SUPREME COURT OF THE UNITED STATES

US AIRWAYS, INC.,
Petitioner,

v.

ROBERT BARNETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT

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RESPONDENT'S QUESTION PRESENTED

Whether, as the Ninth Circuit held below, the ADA requires an employer to reassign a disabled employee to a vacant position as a reasonable accommodation where necessary to retain the employee, or whether, as the Petitioner asserts, an employer that has adopted a seniority policy is exempt from this requirement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. THIS IS NOT A CASE PRESENTING A CONFLICT BETWEEN THE ACCOMMODATION NEEDS OF A DISABLED EMPLOYEE AND A SENIORITY SYSTEM. 8

A. Barnett Did Not Request Reassignment; He Asked to Remain in the Mailroom Position, an Accommodation That Did Not Require Modification of the Petitioner's Seniority Policy 8

B. The Requested Accommodation Did Not Conflict with the Petitioner's Own Policies or With Any Seniority "Rights" or Expectations 9

C. At all Times, the Petitioner Retained the Discretion to Provide Other Effective Accommodations Without Granting Barnett Permission to Remain in the Mailroom Position. 12

II. PERMITTING BARNETT TO REMAIN IN THE MAILROOM POSITION WAS A "REASONABLE ACCOMMODATION" 12

A. The Petitioner's Proposed "Reasonableness" Defense is Contrary to the Statute's Plain Language and Structure..... 13

B. The Petioner's "Reasonableness" Defense is Inconsistent with Governing Regulations 18

C. The Petitioner Cannot Demonstrate that Barnett's Requested Accommodation Was "Unreasonable" As a Matter of Law..... 21

1. The Accommodation Requested by Barnett Cannot Be Rejected as a "Preference." 22

2. The Accommodation Requested by Barnett Cannot Be Rejected as Unrelated to His Disability 29

3. The Accommodation Requested by Barnett Cannot Be Rejected Because Its Evaluation Would Impose Administrative Burdens..... 30

III. THE ACCOMMODATION OF REASSIGNMENT MEANS REASSIGNMENT, NOT "CONSIDER FOR REASSIGNMENT." 32

A. The Petitioner's Reading of the "Reassignment" Clause is Inconsistent with the Plain Language of the Statute 34

B. The Petitioner's Reading of the "Reassignment" Clause is Inconsistent with the Goal of Effective Accommodations Enabling Disabled Employees to Retain Employment 36

C. There is No Basis for Substituting the Petitioner's Judgment for that of Congress 37

IV. THE PETITIONER FAILED TO DEMONSTRATE THAT IT WAS ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF "UNDUE HARDSHIP." 38

V. THE REASONING OF *HARDISON* DOES NOT PRECLUDE THE ACCOMMODATION REQUESTED BY BARNETT 42

VI. THE PETITIONER'S REMAINING STATUTORY ARGUMENTS ARE UNPERSUASIVE 45

A. Barnett Was Qualified for the Mailroom Position 45

B. The Mailroom Position Was "Vacant" 47

CONCLUSION 50

TABLE OF AUTHORITIES

FEDERAL CASES

Aka v. Washington Hospital Center,
156 F.3d 1284 (D.C. Cir. 1998)
(en banc) 10,23, 34, 35

Alderson v. Postmaster General of the United States,
598 F. Supp. 49 (W.D.Okla. 1984) 33

Alexander v. Choate,
469 U.S. 287 (1985) 22

Barnett v. U.S. Air,
228 F.3d 1105 (9th Cir. 2000).....2, 4, 12

Beck v. University of Wisconsin Board of Regents,
75 F.3d 1130 (7th Cir. 1996)..... 41

Black v. Frank,
730 F. Supp. 1087 (S.D. Ala. 1990)..... 33

Board of Trustees of Univ. of Ala. v. Garrett,
531 U.S. 356, 121 S. Ct. 955 (2001) 15, 42

Bouzianis v. U.S. Air, Inc.,
No. 84-3798-K, 1985 U.S. Dist. LEXIS
15470 (D. Mass. Sept. 30, 1985)..... 11

Bragdon v. Abbott,
524 U.S. 624 (1998) 20

*Buckhannon Board and Care Home v. West Virginia
Department of Health and Human Resources*,
__U.S.__, 121 S. Ct. 1835 (2001) 14, 46-48

Buckingham v. United States,
998 F.2d 735 (9th Cir. 1993)..... 10

California Brewers Association v. Bryant,
444 U.S. 598 (1980) 9, 49

Carty v. Carlin,
623 F. Supp. 1181 (D. Md. 1985) 33

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 20

Citicorp Industrial Credit, Inc. v. Brock,
483 U.S. 27 (1987) 25-26

Consolidated Rail Corporation v. Darrone,
465 U.S. 624 (1984) 21, 24

Cooper v. Federal Reserve Bank,
467 U.S. 867 (1984) 49

Cravens v. Blue Cross and Blue Shield,
214 F.3d 1011 (8th Cir. 2000)..... 41

Dancy v. Kline,
639 F. Supp. 1076 (N.D. Ill. 1986)..... 33

Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989) 15

Davis v. U.S. Postal Service,
675 F. Supp. 225 (M.D. Pa. 1987) 33

Davoll v. Webb,
194 F.3d 1116 (10th Cir. 1999)..... 41

E.E.O.C. v. Humiston-Keeling,
227 F.3d 1024 (7th Cir. 2000).....23, 25

Eckles v. Consolidated Rail Corp.,
1041 (7th Cir. 1996) 10-11

Fedro v. Reno,
21 F.3d 1391 (7th Cir. 1994)..... 41

Fields v. Lyng,
705 F. Supp. 1134 (D. Md. 1987) 33

Firefighters Local Union No. 1784 v. Stotts,
467 U.S. 561 (1984) 28, 49

Franks v. Bowman Transport Co.,
424 U.S. 747 (1976) 49

Garcia-Ayala v. Lederle Parenterals, Inc.,
212 F.3d 638 (1st Cir. 2000)..... 41

Gile v. United Airlines, Inc.,
213 F.3d 365 (7th Cir. 2000)..... 41

Hendricks-Robinson v. Excel Corp.,
154 F.3d 685 (7th Cir. 1998)..... 41

Holy Trinity Church v. United States,
143 U.S. 457 (1892) 25-26

Ignacio v. U.S. Postal Service,
Fed. Equal Opp. Rptr. ¶ 843159 (EEOC,
Sept. 4, 1984) 32

Ignacio v. U.S. Postal Service,
30 M.S.P.R. 471 (Special Panel No. 1, Feb. 27, 1986) 33

Johnson v. Transp. Agency,
480 U.S. 616 (1987) 49

Kralik v. Durbin,
130 F.3d 76 (3rd. Cir. 1997) 10

Olmstead v. L.C. by Zimring,
527 U.S. 581 (1999) 20, 24

PGA Tour v. Martin,
__U.S.__, 121 S. Ct. 1879 (2001) .....*passim*

Ratzlaf v. United States,
510 U.S. 135 (1994) 16

Reeves v. Sanderson Plumbing Products,
530 U.S. 133 (2000) 5, 38

Salanger v. U.S. Air,
611 F. Supp. 427 (N.D.N.Y. 1985) 11

School Board of Nassau County, Fla. v. Arline,
480 U.S. 273 (1987) 15-16, 22, 35

Smith v. Midland Brake,
180 F.3d 1154 (10th Cir. 1999).....34, 35

Steel Workers v. Weber,
443 U.S. 193 (1979) 28

Sutton v. United Air Lines, Inc.,
527 U.S. 471 (1999) 24

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 49

Trans World Airlines v. Hardison,
432 U.S. 63 (1977) 42-45

Traynor v. Turnage,
485 U.S. 535 (1988) 21

United States v. Mead Corp.,
__ U.S. __, 121 S. Ct. 2164 (2000) 20

Willis v. Pacific Maritime Association,
236 F.3d 1160 (9th Cir. 2001)..... 10

Wimbley v. Bolger,
642 F. Supp. 481 (W.D. Tenn. 1986) 33

Woodman v. Runyon,
132 F.3d 1330 (10th Cir. 1997)..... 10

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 28

STATUTES

29 U.S.C. § 206(1)(i) 43

29 U.S.C. § 623(f)(2)(A)..... 43

29 U.S.C. § 2931 (b)(3)(B)..... 48

29 U.S.C. § 790 *et seq.*..... 20

29 U.S.C. § 794..... 32

42 U.S.C. § 12101(a)(6) 24

42 U.S.C. § 12101(a)(8) 24

42 U.S.C. § 12101(a)(9) 24

42 U.S.C. § 12102(2) 30

42 U.S.C. § 12111(8) .....*passim*

42 U.S.C. § 12111(9) .....*passim*

42 U.S.C § 12111(10) .....*passim*

42 U.S.C. § 12112(a) 13, 35, 40

42 U.S.C. § 12112(b)(2)..... 43

42 U.S.C. § 12112(b)(5).....*passim*

42 U.S.C. § 12112(b)(5)(a).....*passim*

42 U.S.C § 12112(d)(4)(A) 17

42 U.S.C. § 12113.....15, 16

42 U.S.C. § 12113(b) 31, 39

42 U.S.C. § 12116..... 19

42 U.S.C. § 12117(a) 19

42 U.S.C. § 12111 (9) .....*passim*

42 U.S.C. § 12112(d)(4)(A) 17

42 U.S.C. § 12142(b) 17

42 U.S.C. § 12142(c)(1)(B)(a)(3).....17

42 U.S.C. § 12143(a) 17

42 U.S.C. § 12143(c)(4) 17

42 U.S.C. § 12144.....17

42 U.S.C. § 12145.....17

42 U.S.C. § 12147(a) 17

42 U.S.C. § 12147(b)(2)(B).....17

42 U.S.C. § 12148(b)(1) 17

42 U.S.C. § 12162(a)(1) 17

42 U.S.C. § 12162(a)(3)(A).....17

42 U.S.C. § 12162(a)(4)(A)(ii).....17

42 U.S.C. § 12162 (b)(1) 17

42 U.S.C. § 12162(c) 17

42 U.S.C. § 12162(d)(1) 17

42 U.S.C. § 12162(e)(2)(A)(ii).....17

42 U.S.C. § 12162(e)(2)(A)(ii)(II) 17

42 U.S.C. § 12162(e)(2)(B)(i) 17

42 U.S.C. § 12162(e)(2)(B)(ii) 17

42 U.S.C. § 12181(7)(C) 27

42 U.S.C § 12181(7)(L) 27

42 U.S.C. § 12181(9) 17

42 U.S.C. § 12182(b)(1)(A)(iii) 17

42 U.S.C. § 12182(b)(2)(A)(i) 17

42 U.S.C. § 12182(b)(2)(A)(ii) 16, 17

42 U.S.C. § 12182(b)(2)(A)(iv) 17

42 U.S.C. § 12182(b)(2)(C) 17

42 U.S.C. § 12182(b)(3) 17

42 U.S.C. § 12183(a)(1) 17

42 U.S.C. § 12184(b)(1) 17

42 U.S.C. § 12184(b)(3) 17

42 U.S.C. § 12184(b)(5) 17

42 U.S.C. § 12184(b)(7) 17

42 U.S.C. § 12187 18

42 U.S.C. § 12201(a) 20

42 U.S.C. § 12201(c) 17

42 U.S.C § 12205 14

42 U.S.C. § 12206(c) 30

42 U.S.C. § 12208 18

42 U.S.C. § 12210 18

42 U.S.C. § 12211(a) 18

42 U.S.C. § 12211(b) 18

42 U.S.C. § 1382c-(a)(3)(B) 49

42 U.S.C. § 1981(a)(3) 31

42 U.S.C. § 2000e-(2)(h) 9, 42

42 U.S.C. § 2000e-4(a) 49

42 U.S.C. § 211 48

42 U.S.C. § 3028(b)(3)(E) 48, 49

42 U.S.C. § 423(d)(2)(A) 49

42 U.S.C. § 603(a)(5)(I)(i)(I) 48

42 U.S.C. § 603(a)(5)(I)(i)(III)(bb) 48

42 U.S.C. § 607(f) 48

42 Fed. Reg. 22676 (1977) 46

45 Fed. Reg. 37622 (1980) 20, 21

45 Fed. Reg. 6670 (1980) 21

46 Fed. Reg. 1120 (1981) 21

Cal. Labor Code § 2922 11

REGULATIONS AND EXECUTIVE MATERIALS

28 C.F.R. § 35.130(b)(7) 17

29 C.F.R. § 1630.2(m) 47

29 C.F.R. § 1630.2(o) ..... *passim*

29 C.F.R. § 1630.2(p)(2)(v) 39

29 C.F.R. § 1630.6(a) 43

29 C.F.R. § 1630.6(b) 43

29 C.F.R. Part 1630, App., § 1630.15(d) 39, 40

29 C.F.R. Part 1630, App., § 1630.2(o) 37

29 C.F.R. Part 1630, App., § 1630.6 44

29 C.F.R. Part 1630, App., § 1630.9 12

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act No. 915.002, 21-25 (Mar. 1, 1999) 30, 37

LEGISLATIVE MATERIALS

HOUSE COMM. ON EDUCATION AND LABOR,
H.R. REP. NO. 485(II), 101st CONG.,
2d. SESS. (1990).....*passim*

HOUSE COMM. ON EDUCATION AND LABOR,
H.R. REP. NO. 485(III), 101st CONG.,
2d. SESS. (1990).....12, 43

HOUSE COMM. ON THE JUDICIARY,
H.R. REP. NO. 485(III), 101st CONG.,
2d. SESS. (1990).....12, 31, 43

SENATE COMM. ON LABOR AND HUMAN RESOURCES,
S. REP. NO. 116, 101st CONG.,
1st SESS. (1989).....*passim*

138 CONG. REC. S 16608-05 (Oct. 5, 1992)
(Statement of Harkin) 32

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (7th ed. 1999).....14, 15, 48

UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT, HANDBOOK ON REASONABLE
ACCOMMODATION, OPM Doc. 720-A (March
1980)..... 32

WEBSTER'S NEW COLLEGE DICTIONARY (1999) 19

INTRODUCTION

Robert Barnett sought reasonable accommodations under the Americans with Disabilities Act, including reassignment to a vacant position, to enable him to maintain his ten-year employment with the petitioner US Airways. US Airways refused to accommodate Mr. Barnett, and he was effectively terminated.

On summary judgment, US Airways failed to submit undisputed evidence demonstrating that on the facts accommodation was not possible, would have imposed undue burdens, or was otherwise outside the statute's provisions. Instead, the petitioner sought a non-statutory, *per se* exemption to the accommodation obligation for employers with seniority policies. Because the statute's language, structure, and purposes cannot support the petitioner's proposed exemption, the Ninth Circuit properly found a triable issue of fact on Mr. Barnett's failure to accommodate claim for purposes of summary judgment. This Court should affirm.

STATEMENT OF THE CASE

Robert Barnett worked for the petitioner US Airways and its predecessor for ten years. After becoming disabled in 1990 through an on-the-job injury, Mr. Barnett used US Airways internal policies to transfer into a mailroom position that effectively accommodated his disability. Two years later, Mr. Barnett learned that US Airways intended to open his position up for bid, and that another more senior employee planned to displace him pursuant to US Airways' internal seniority policy.

US Airways' seniority policy is part of its unilaterally adopted Personnel Policy Guide. According to its

introductory pages, "[t]he Agent Personnel Policy Guide is not intended to be a contract (express or implied) or otherwise to create legally enforceable obligations for continued employment on the part of either US Air or its employees. . . . USAir reserves the right to change any and all of the stated policies and procedures at any time, without advance notice." Respondent's Lodging at 2 (emphasis in original). The Guide further specifies that "[e]mployees may not grieve personnel actions that are taken in order to ensure that the Company is in compliance with federal, state and/or local law." Joint Appendix at 31. The seniority policy was unilaterally amended by US Airways on numerous occasions. Joint Appendix at 50-51; Supplemental Joint Appendix at 2-3, 6; Respondent's Lodging at 5. US Airways also had a written and widely circulated policy of complying with the Americans with Disabilities Act. Joint Appendix at 39-49.

Upon learning of his impending displacement, Mr. Barnett requested that his job *not* be put up for bid, and that he be permitted to remain in the mailroom position. "U.S. Air did not respond to Barnett for five months," and then only "informed Barnett that he would be removed from the mailroom." *Barnett v. U.S. Air*, 228 F.3d 1105, 1109 (9th Cir. 2000) (en banc). Mr. Barnett then requested accommodations – lifting equipment and job restructuring – that would have enabled him to perform another position, one in cargo that he could obtain under the seniority policy. "U.S. Air rejected all three of Barnett's proposed reasonable accommodations and offered no practical alternatives. . . . U.S. Air did not seek to have a dialogue with Barnett but instead rejected his proposed accommodations by letter." 228 F.3d at 1116-17.

The petitioner asserts that the decision to put Mr. Barnett's job up for bid was made "[i]n connection with

layoffs," Petitioner's Brief at 5 (citing the Ninth Circuit's original panel decision). The use of seniority is particularly important here, the petitioner states, because "the implementation of layoffs leaves employees vying for a diminished number of positions," and layoffs "by nature involve a zero-sum situation, in which an override of seniority rules can result in the loss of a job by a more senior employee despite his entitlement under an established seniority policy to remain with the company." *Id.* at 22, 32; *see also id.* at 44 (noting "special context of layoffs"). There is no basis in the record for these provocative assertions.

In the administrative proceeding before the Equal Employment Opportunity Commission, the petitioner filed the following response:

> Request 8. State the reasons why Mr. Barnett's swing shift mailroom position became open for bid to other employees in 1992.
>
> Response. Job duties are open for rebid at the San Francisco station three to four times per year based primarily on changes in the airline's schedule. As the schedule of flights changes, so do the needs for staffing the airport.

Respondent's Lodging at 7-8 (March 8, 1994 letter filed with EEOC). Other documents describing the petitioner's response to Mr. Barnett's accommodation requests do not mention layoffs.[1]

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[1] *See, e.g.*, Supplemental Declaration of Richard Davis, Exh. EE (June 1, 1993 U.S. Air memo) (bid occurred "because of personnel changes in his work area"); Feb. 28, 1996 Transcript of Oral Argument (statement of Raymond W. Thomas, counsel for Petitoner) ("[T]he stations are re-bid from time to time as a result of schedule changes and other operational reasons[.]"); Declaration of Robert Barnett, Exh. H (March 4, 1993 letter from U.S. Air to Robert Barnett) ("To the extent you can exercise your

The Ninth Circuit Court of Appeals, sitting *en banc*, held that an employer is not automatically entitled to summary judgment merely because the disabled employee sought – among other accommodations – a reassignment that required a modification of the employer's seniority policy. "[T]he seniority system without more should not bar reassignment." *Barnett v. U.S. Air,* 228 F.3d at 1119. "A per se bar conflicts with the basic premise of the ADA, which grounds accommodation in the individualized needs of the disabled employee and the specific burdens which such accommodation places on an employer." *Id.* at 1120. Instead, a case-by-case analysis is required to determine whether reassignment was required by the ADA. *Id.* Where the employer presented no specific evidence of hardship or disruption, summary judgment could not be granted. *Id.*

SUMMARY OF ARGUMENT

The record of this matter does not pose the question purportedly presented, that of how to resolve a conflict between the petitioner's seniority policy and the Respondent's need for accommodation under the Americans with Disabilities Act. The requested accommodation was merely to permit Robert Barnett to remain in a position he held for more than two years, and to refrain from declaring the position "vacant." Such an accommodation does not implicate the petitioner's seniority policy, nor does it require consideration of the reasonable accommodation of

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seniority to successfully bid and hold a duty function that would allow you to work within your restrictions, you are free to do so. I apologize for the delay in responding to your request."); Supplemental Declaration of Richard Davis, Exh. 6 (excerpt from deposition of Ollie Lawrence) ("the reason why that one [the accommodation of staying in the mailroom job] may not be specifically identified is because I probably ruled it out immediately as being an undue hardship"). These documents are reproduced in the Appellant's Excerpt of Record before the Ninth Circuit at pages 29, 35, 36, 207, 208 and 215.

"reassignment to a vacant position" under the ADA. Nor did Mr. Barnett request the "bumping" of a co-worker: the only person bumped was Mr. Barnett. The requested accommodation was entirely consistent with the petitioner's own policies, including the petitioner's written policy requiring "affirmative action in employment and advancement" for disabled employees. Further, at all times the company retained the discretion to provide reasonable accommodations to Mr. Barnett in other ways, such as through job restructuring or the purchase of lifting equipment.

Moreover, even if the modification requested by Mr. Barnett is labeled a "reassignment to a vacant position," there is no reason to exempt the petitioner from providing this critical accommodation as necessary. Where no accommodation can enable an employee to perform his current job, reassignment to a vacant position permits him to retain his employment alongside similarly situated non-disabled employees. Reviewing the facts of this case under the detailed statutory framework of the ADA, the petitioner has failed to demonstrate undisputed facts sufficient to meet their burden on summary judgment under *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 146-48 (2000). There are at best disputed facts as to the extent of any administrative or financial burden that would have been imposed by the requested accommodation.

Because the petitioner cannot demonstrate a defense as a matter of law on summary judgment, it instead asserts that all modifications to "neutral" employer policies – or at least all modifications that it regards as "preferences" – should be deemed by this Court inherently "unreasonable," and therefore unavailable to disabled employees as accommodations under the ADA, regardless of the facts of the particular situation. Alternatively, the petitioner asserts

that such modifications are inherently burdensome, such that the "undue burden" defense applies. These interpretations are contrary to the plain language of the statute, which expressly lists "modifications to . . . employer policies" and "reassignment to a vacant position" as possible accommodations. They are also contrary to the fact-based individualized inquiry required by the statute's terms and structure.

To buttress its proposed *per se* exemption, the petitioner asserts that the word "reasonable" in "reasonable accommodation" creates an independent basis for defeating accommodation claims on summary judgment. According to the petitioner, an ADA plaintiff must demonstrate that the accommodation requested was "reasonable" as defined by numerous dictionaries – *e.g.* fit, appropriate, not excessive, proper, proportionate, and so on. Such an expansive reading of the word "reasonable" would render superfluous significant portions of the statutory scheme, including the "undue hardship" and "direct threat" defenses. It is also contrary to longstanding judicial and regulatory interpretation of the phrase "reasonable accommodation," a legal term of art, which is simply a modification that enables a disabled employee to perform the job, and that does not impose an undue hardship. Moreover, even if the word "reasonable" has some substantive meaning independent of the phrase "reasonable accommodation," there is no factual basis here for asserting that the accommodation requested was excessive or improper.

The assertion that the modification would have given Mr. Barnett an unfair or unreasonable "preference" over nondisabled employees is, on this record, incorrect. Permitting Mr. Barnett to remain in his mailroom position was a modest measure that would have enabled him to remain gainfully employed alongside his similarly situated

colleagues with comparable seniority. Mr. Barnett had more than enough seniority to secure a job in the company; he was not otherwise vulnerable to layoff.

Contrary to the petitioner's strong suggestion, the impact on other employees of permitting Mr. Barnett to remain in the mailroom would *not* have been the layoff of a nondisabled person who otherwise would have remained employed. The only impact would have been the removal of one possible assignment (the mailroom position) from the list of options for employees with enough seniority to remain employed, and replacing that option with the assignment Mr. Barnett would have bid for but for his disability (the cargo position). Further, but for the petitioner's decision to declare Mr. Barnett's position "vacant," other employees would never even have considered the assignment as a possible option, much less formed a preference for the assignment. As a result of the petitioner's refusal to accommodate him, Mr. Barnett was effectively terminated, granting a windfall to a less senior, nondisabled employee.

Also wrong is the assertion that Mr. Barnett's request to remain in the mailroom sought to overcome a *seniority*-related obstacle, as opposed to a *disability*-related obstacle. But for the physical limitations of his disability, Mr. Barnett would have secured and performed the cargo position, an assignment for which he had sufficient seniority. Barnett sought permission to remain in a position he was able to perform despite his disability.

The petitioner's remaining statutory arguments are not persuasive. The term "qualified individual with a disability" is expressly defined as an individual who is able to perform the essential functions of the position, with or without accommodation. Mr. Barnett easily fits into this definition, as he successfully performed the mailroom

position for two years. Similarly, the ordinary definition of the term "vacant position" does not exclude empty jobs for which the employer has a selection policy.

ARGUMENT

I. THIS IS NOT A CASE PRESENTING A CONFLICT BETWEEN THE ACCOMMODATION NEEDS OF A DISABLED EMPLOYEE AND A SENIORITY SYSTEM.

This is not a case presenting a conflict between the accommodation needs of a disabled employee and a seniority system. Rather, under the specific circumstances of this case, Mr. Barnett's need for accommodation was consistent with the petitioner's seniority policy.

A. Barnett Did Not Request Reassignment; He Asked to Remain in the Mailroom Position, an Accommodation That Did Not Require Modification of the Petitioner's Seniority Policy.

Mr. Barnett did not request "reassignment to a vacant position" – he asked to remain in the mailroom position, a job he obtained using his seniority, and which he had been performing successfully for two years. He did not seek to "bump" anyone – the only person "bumped" was Mr. Barnett himself. Thus, the Court need not determine whether, and if so under what circumstances, the reasonable accommodation of "reassignment to a vacant position" is available under the ADA.

The petitioner's determination to remove Mr. Barnett from the mailroom consisted of two separate and distinct decisions: (1) the decision to declare his position vacant and subject to bidding; and (2) the decision to fill the position using

the seniority policy. While implementing the latter decision required the application of a seniority policy, the former decision did not. The petitioner's seniority policy includes no provisions explaining when a vacancy exists or when certain positions will be deemed vacant. Joint Appendix at 24-30; *see also* Respondent's Lodging at 9-27.

In *California Brewers Assn. v. Bryant*, 444 U.S. 598 (1980), this Court reviewed the types of employment practices that may be regarded as part of a seniority system and thus encompassed by the express Title VII exemption, 42 U.S.C. § 2000e-(2)(h). According to the Court, a seniority system includes rules for calculating seniority, when seniority may be forfeited, which types of seniority will count, and which types of employment decisions will be governed by seniority. 444 U.S. at 606-607, 609-610 (reviewing provisions of collective bargaining agreement). However, the provision does not exempt employer practices "simply because those rules are dubbed 'seniority' provisions or have some nexus to an arrangement that concededly operates on the basis of seniority." *Id.* at 608.

Here, the accommodation requested by Mr. Barnett, to refrain from declaring his position "vacant," did not require an application or modification of the petitioner's seniority policy.

B. The Requested Accommodation Did Not Conflict with the Petitioner's Own Policies or With Any Seniority "Rights" or Expectations.

Permitting Mr. Barnett to remain in the mailroom position was permissible under the petitioner's own policies. First, the petitioner's own policy was to comply with the ADA by accommodating persons with disabilities. Joint Appendix

at 39-49.[2] In fact, petitioner's own policy as a federal contractor mandates "affirmative action in employment and advancement" for disabled employees, including accommodations. *Id.* at 39. Second, the petitioner's own grievance policy specifies that actions taken in order to comply with federal law may not be challenged by other employees. Joint Appendix at 31.[3] In such circumstances, the Courts of Appeal have sought to reconcile seniority rules with an employer's statutory duty to accommodate, and have closely scrutinized seniority provisions to determine whether any provision permits the requested accommodation.[4] This

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[2] *See* SENATE COMM. ON LABOR AND HUMAN RESOURCES, S. REP. NO. 101-116, at 32 (1989) ("Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodations may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation."); HOUSE COMM. ON EDUCATION AND LABOR, H. R. REP. NO. 101-485(II), 2d. Sess., at 63 (1990) (same).

[3] Further, seniority is not always used by the petitioner to fill vacancies. Respondent's Lodging at 25 (best qualified to be selected).

[4] *See, e.g., Aka v. Washington Hosp. Center,* 156 F.3d at 1284, 1303 (D.C. Cir. 1998) ("an interpretation of [CBA] section 14.5 which allows WHC to implement its ADA obligations is distinctly preferred"); *Willis v. Pacific Maritime Association,* 236 F.3d at 1160, 1166 (9th Cir. 2001) (rule that reassignment in violation of CBA not required by ADA "is only applicable where there is a direct conflict between the proposed accommodation and the collectively-bargained seniority rights of other employees"); *Kralik v. Durbin,* 130 F.3d at 76, 81, 83 (3rd Cir. 1997) (being excused from forced overtime provision might be reasonable accommodation if union waives objection); *Woodman v. Runyon,* 132 F.3d 1330, 1347 (10th Cir. 1997) (reassignment is reasonable accommodation where not expressly prohibited by collective bargaining agreement); *Buckingham v. United States,* 998 F.2d 735, 741 (9th Cir. 1993) (transferring employee with AIDS would not violate union agreement which permitted exceptions for "unusual circumstances"); *See also Eckles v. Consolidated Rail Corp.,* 94 F.3d at 1041, 1052 (7th Cir. 1996) (limiting holding to collectively bargained seniority rights, and expressly declining to find that all provisions found in collective

Court should similarly conclude that the petitioner's policies encompass Mr. Barnett's request, at least for purposes of summary judgment.

Construing such an exception is particularly apt in this case, as the petitioner's policies and practices create no seniority "rights" or reasonable expectations in its employees. The personnel policy guide itself expressly states that its provisions create no express or implied contractual rights. Respondent's Lodging at 2; *see also* Cal. Labor Code § 2922 (California employees presumed "at will"); Respondent's Brief in Opposition to Certiorari, Appendix A at 26-29, 31-33, 40-41; *Bouzianis v. U.S. Air, Inc.*, No. 84-3798-K, 1985 U.S. Dist. LEXIS 15470, at *5-7 (D. Mass. Sept. 30, 1985) (U.S. Air successfully argued that "personnel policy guide" did not create enforceable contract); *Salanger v. U.S. Air,* 611 F. Supp. 427 (N.D.N.Y. 1985) (same); Respondent's Opposition Brief to Petition for Writ of Certiorari, Appendix A (oral argument transcript). Additionally, the petitioner significantly and unilaterally modified the seniority rules on several occasions, creating exceptions to the seniority policy for employees with catastrophic illnesses, and changing the basis of furlough decisions from "section" seniority to "company" seniority.[5] There is no evidence that employees affected by these changes filed grievances, lawsuits, or otherwise created administrative or financial burdens for the petitioner. In these circumstances, it is plain that the other employees who might prefer the mailroom position over the cargo position, and who had adequate seniority for either, held

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bargaining agreements take precedence over the ADA duty to reasonably accommodate.).

[5] Joint Appendix at 50-51 (reviewing change from classification seniority to company seniority for furlough); Supplemental Joint Appendix at 2-3, 6 ("N" and "D" notations in margin indicating changed seniority rules, from group to company seniority, for displacements, furloughs, and recalls, and changed seniority rules for transfers for "catastrophic illness"). Respondent's Lodging at 5 (chart defining "N," "C" and "D" codes).

no seniority "rights" or expectations sufficient to create any sort of conflict with Mr. Barnett's need for accommodation.[6]

C. At all Times, the Petitioner Retained the Discretion to Provide Other Effective Accommodations Without Granting Barnett Permission to Remain in the Mailroom Position.

An employer retains the discretion to select *any* effective accommodation. 29 C.F.R. 1630 App., § 1630.9 ("[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations . . . ."); HOUSE COMM. ON JUDICIARY, H. R. REP. NO. 101-485(III) at 40 (1990) ("In the event there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier[.]"). In this case, the Ninth Circuit found disputed issues of material fact as to whether two other proposed accommodations – job restructuring and/or lifting equipment in the cargo position – would have been effective. *Barnett v. U.S. Air*, 228 F.3d 1105, 1116-17 (9th Cir. 2000) (en banc). The petitioner could have provided either of these accommodations without granting Mr. Barnett permission to remain in the mailroom position.

II. PERMITTING BARNETT TO REMAIN IN THE MAILROOM POSITION WAS A "REASONABLE ACCOMMODATION."

The modification requested by Mr. Barnett – to remain on a particular shift in the mailroom position – falls squarely within the plain language of the statute. The statute

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[6] The Petitioner's Brief is less than straightforward on this point. *See, e.g.*, pp. 2 ("entitlement"), 4 ("rights"), 5 ("seniority rights"), 10 ("legitimate expectations and rights," "entitled to the position"), 18 ("entitled to position"), 40 (employment policies create contract rights).

prohibits discrimination against a "qualified individual with a disability," 42 U.S.C. § 12112(a), and expressly defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). The ADA specifies that "[t]he term reasonable accommodation may include . . . making existing facilities used by employees readily accessible to and usable by individuals with disabilities, . . . job restructuring, *part-time or modified work schedules, reassignment to a vacant position*, acquisition or modification of equipment or devices, appropriate adjustment or *modifications of examinations, training materials or policies, . . . and other similar accommodations* for individuals with disabilities." 42 U.S.C. § 12111(9) (emphasis added). [7] It is undisputed that the requested accommodation imposed no monetary costs, and would have enabled the respondent to retain employment.

A. The Petitioner's Proposed "Reasonableness" Defense is Contrary to the Statute's Plain Language and Structure.

The petitioner argues that Mr. Barnett's request was not a reasonable accommodation because it required a modification to its "neutral" seniority policy, and as such would not be "reasonable" in this case – or in any other case. According to the petitioner, a plaintiff seeking to show the

[7] *See also* H. R. REP. NO. 485(II) at 34; S. REP. NO. 116 at 32 ("the provision of all types of reasonable accommodations is essential to accomplishing the critical goal of this legislation – to allow individuals with disabilities to be part of the economic mainstream of our society," and most accommodations require little or no cost.).

existence of a "reasonable accommodation" must show that the accommodation was "reasonable" – "fair," "proper," "suitable under the circumstances," "fit and appropriate," "not extreme," "not excessive," "not demanding too much," "not extravagant" "proportionate," and so on. Petitioner's Brief at 16-17 (citing dictionaries). Further, this showing must be made not only for the particular employer, but for employers generally. Petitioner's Brief at 17. Under this expansive definition and application of the word "reasonable," petitioner argues, the requested policy modification was "unreasonable" in the respondent's case, and would be similarly "unreasonable" in any other case. Petitioner's Brief at 17.

The ADA's remarkably detailed statutory language and structure contradict the petitioner's proposed interpretation of the term "reasonable accommodation." First, the term "reasonable accommodation" is a legal term of art. *See Buckhannon Board and Care Home v. West Virginia Dep't of Health and Human Resources*, __U.S.__, 121 S. Ct. 1835, 1839 (2001) ("prevailing party" in 42 U.S.C. § 12205 is term of art, citing definition found in Black's Law Dictionary). "Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." 121 S. Ct. at 1846 (Scalia, J., concurring) (endorsing use of Black's Law Dictionary over Webster's and other nonlegal dictionaries).[8] According to Black's Law Dictionary, a "reasonable accommodation" is "[a]n action taken to adapt or adjust for a disabled person,

[8] Thus, in the phrase "prevailing party," the word "prevailing" may not be taken out of context to more broadly define the phrase. *Id.* ("It is undoubtedly true, as the dissent points out by quoting a nonlegal dictionary [citation omitted], that the word 'prevailing' can have other meanings in other contexts: 'prevailing winds' are the winds that predominate."); *see also* BLACK'S LAW DICTIONARY 1272 (7th ed. 1999) ("It is extremely difficult to state what lawyers mean when they speak of 'reasonableness.'") (quoting *Jurisprudence*).

done in a way that does not impose an undue hardship on the party taking the action." BLACK'S LAW DICTIONARY 1272 (7th ed. 1999).

The interpretation of a statutory provision must also take into account the other portions of the law of which it is a part. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The ADA creates a detailed structure of specific mandates and affirmative defenses. "Undue hardship" is defined to mean "an action requiring significant difficulty or expense, when considered in light of the [statutory] factors." 42 U.S.C. § 12111(10)(A).[9] The undue hardship language "makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 967 (2001).[10] The

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[9] The statutory factors are detailed, and include "the nature and cost of the accommodation," "the overall financial resources of the facility or facilities . . .; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility"; "the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities" and "the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce . . .; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity." 42 U.S.C. § 12111(10)(B).

[10] This Court's own rulings are inconsistent with the petitioner's reading. *See Garrett*, 531 U.S. 356, 121 S.Ct. 955, 967 (2001) ("The ADA does except employers from the 'reasonable accommodation' requirement where the employer 'can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." § 12112(b)(5)(A). However, even with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an "undue burden" upon the employer."); *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 288 n. 17 (1987) ("When a handicapped person is not able to perform the

statute provides several other detailed defenses. 42 U.S.C. § 12113.[11]

The petitioner's proposed interpretation of "reasonable" would completely eviscerate and render meaningless the detailed statutory system of explicit and carefully crafted defenses to a reasonable accommodation claim. Indeed, the petitioner's proposed definition of "reasonable" is so broad that reference to the express statutory defenses would be pointless. Facts sufficient to establish undue hardship would always meet the "unreasonable" standard constructed by the petitioner. Despite the statutory language, there would be nothing left to the undue hardship defense for which the employer bears the burden. Statutory interpretation which renders provisions meaningless must be avoided. *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994); *see also PGA Tour v. Martin*, __U.S.__, 121 S. Ct. 1879, 1897 (2001) (dissent's "reading of the statute renders the word 'fundamentally' largely superfluous").

Respecting the specificity of the "undue hardship" defense becomes even more important when viewed in the context of the ADA as a whole. For example, under Title III, discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when

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essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions. . . . Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee [citation omitted], or requires 'a fundamental alteration in the nature of [the] program.'").

[11] These include defenses for an employer's requirement that an employee "not pose a direct threat to the health or safety of other individuals in the workplace," for a religious entity's requirement that all employees "conform to the religious tenets of such organization," and for the refusal to assign an individual with an infectious disease to food handling. 42 U.S.C. § 12113.

such modifications are necessary to afford such . . . accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii); *see also* 28 C.F.R. § 35.130(b)(7) (comparable rule for Title II). Under the petitioner's reading, the "fundamental alteration" defense would never be considered where the requested modification was deemed improper, unfair or not proportionate. *Compare PGA Tour v. Martin*, 121 S. Ct. at 1893-97.

In numerous other provisions of the ADA, Congress spelled out specific standards delineating when the burdens imposed by an affirmative obligation would be of the type or magnitude that would relieve a covered entity of a particular statutory duty.[12] These widely divergent provisions, some

[12] 42 U.S.C.§ 12112(d)(4)(A) (medical inquiries prohibited "unless…job related and consistent with business necessity"); §§ 12142(b), 12145, 12162(c) ("good faith efforts"); §§ 12142(c)(1)(B)(a)(3), 12162(d)(1), 12162(e)(2)(B)(i), 12184(b)(7) ("to the maximum extent feasible"); § 12143(a) ("comparable, to the extent practicable"); § 12143(c)(4) (relief if obligation "would impose an undue financial burden on the public entity"); §§ 12144, 12182(b)(2)(C)(i), (ii), 12184(b)(3), (5) ("when viewed in its entirety" is "equivalent"); §§ 12147(a), 12162(e)(2)(B)(ii), 12183(a)(2) ("to the maximum extent feasible," and "not disproportionate to the overall alterations in terms of cost and scope"); §§ 12147(b)(2)(B), 12162(e)(2)(A)(ii)(II) (extension of time for "extraordinarily expensive structural changes"); §§ 12148(b)(1), 12162(a)(1), 12162(a)(3)(A)(i)(II), (ii)(II), 12162 (b)(1), 12162(e)(2)(A)(ii)(I), (II) ("as soon as practicable"); § 12162(a)(4)(A)(ii) ("[u]nless not practicable"); §§ 12181(9) ("readily achievable" with four factors); 12182(b)(2)(A)(iv) ("readily achievable"); §§ 12182(b)(1)(A)(iii), 12182(b)(2)(A)(i), 12184(b)(1) ("unless [such action or criteria] necessary"); § 12182(b)(3) ("direct threat to the health or safety of others"); § 12183(a)(1) ("except where an entity can demonstrate that it is structurally impracticable"); § 12201(c) (insurers may underwrite, classify, or administer risks "that are based on or not inconsistent with state law," so long as insurer's actions are not "a subterfuge to evade the purposes of titles I and III").

more and some less demanding than "undue hardship," make clear that in framing the different titles and sections of the ADA Congress made deliberate choices about the type and stringency of defense appropriate to each.[13] The entire statutory plan would be undermined if this Court were to read into the term "reasonable" a vague and open-ended exemption from the accommodation obligation.

B. The Petitioner's "Reasonableness" Defense is Inconsistent with Governing Regulations.

The Equal Employment Opportunity Commission has issued regulations defining "reasonable accommodation" as follows:

> [T]he term reasonable accommodation means: (i) [m]odifications or adjustments to a job application process *that enable* a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) [m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, *that enable* a

[13] Congress also made deliberate decisions about persons and entities outside of the statute's protections and obligations. 42 U.S.C. § 12187 (Title III of act "shall not apply to private clubs or establishments . . . or to religious organizations or entities controlled by religious organizations"); 42 U.S.C. § 12208 (term "disabled" does not apply to person "solely because that individual is a transvestite"); 42 U.S.C. § 12210 (term "individual with a disability" does not apply to "individual who is currently engaging in the illegal use of drugs"); 42 U.S.C. § 12211(a) ("homosexuality and bisexuality are not impairments and as such are not disabilities"); 42 U.S.C. § 12211(b) ("disability" does not include "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, . . . other sexual behavior disorders[,] compulsive gambling, kleptomania, . . . pyromania[,] or psychoactive substance use disorders resulting from current illegal use of drugs.").

> qualified individual with a disability to perform the essential functions of that position; or (iii) [m]odifications or adjustments *that enable* a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o) (emphasis added).[14] This definition centers on the function of a reasonable accommodation – to enable disabled persons to participate – and makes no reference to the open-ended "reasonableness" exemption urged by the petitioner.[15] The Commission's regulation, which

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[14] Title I directs the EEOC to issue regulations to carry out its provisions, 42 U.S.C. § 12116, an authority that Congress withheld from the Commission with regard to Title VII and other civil rights laws. Congress gave added force to the Title I regulations by providing that aggrieved persons may seek judicial redress not only for violations of "any provision of this Act," but also for violations of the "regulations promulgated." 42 U.S.C. § 12117(a).

[15] The Petitioner asserts that a "reasonable accommodation" cannot mean a modification that effectively accommodates an individual's disability, as the word "accommodation" already assumes effectiveness. Petitioner's Brief at 7. In common usage, the word "accommodate" means an adjustment; it does not necessarily mean an effective or successful adjustment. *See, e.g.*, WEBSTERS NEW COLLEGE DICTIONARY (1999) (accommodate: "1. To do a favor or service for: OBLIGE. 2. To supply with (e.g. lodging). 3. To have enough space for. 4. To acclimate or adjust <accommodated myself to the new neighborhood>. 5. To reconcile, as differences. 6. To allow for. – To become adjusted, as the eye to focusing on distant objects."). The petitioner also notes that several "effective" accommodations are not required because they are not considered "reasonable accommodations," such as reallocating essential functions, creating a new position, and providing personal prosthetic devices, and argues that these support the creation of another exception, one for employers with seniority policies. Petitioner's Brief at 16. However, Congress made particular and express distinctions supporting the exceptions listed by the petitioner. 42 U.S.C. § 12111(8), (9); S. REP. NO. 116 at 31 ("Barriers to performance may be eliminated by eliminating *nonessential* functions . . .."), 33 ("personal use items such as hearing aids and eyeglasses are not included"); H. R. REP. NO. 485(II) at 62, 64 (same). While

contradicts the petitioner's interpretation, is entitled to judicial deference. *See, e.g., United States v. Mead Corp.*, __ U.S. __, 121 S. Ct. 2164, 2172-73 (2000); *Olmstead v. L.C.*, 527 U.S. 581, 613 (1999) (Kennedy, J., concurring); *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998), *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[16]

Further, the ADA includes a unique "double floor" provision, directing that its provisions not be construed "to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). The regulations in place at the time the ADA was enacted are inconsistent with the petitioner's reading of the word "reasonable." According to the Department of Justice Regulations:

> A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate, based on the individual assessment of the applicant or employee, that the accommodation would impose an undue hardship on the operation of its program. . . . A reasonable accommodation may require a recipient to bear more than an insignificant economic cost in making allowance for the handicap of a qualified applicant or employee and to accept minor inconvenience which does not bear on the ability of

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articulating these exceptions, Congress declined to exempt transfers where the employer has a seniority policy. No such exemption appears in either the text of the statute or its legislative history.

[16] The Petitioner acknowledges that the EEOC's regulations, and 29 C.F.R. § 1630.2(o) in particular, are important tools for interpreting the ADA. Petitioner's Brief at 20.

> the handicapped individual to perform the essential duties of the job.

45 Fed. Reg. 37622 (1980) (adopting 28 C.F.R. § 42.511).[17] Similarly, according to the Department of Labor regulations:

> "Reasonable accommodation" means the changes and modifications which can be made in the structure of a job or employment and training program, or in the manner in which a job is performed or an employment and training program is conducted, unless it would impose an undue hardship on the operation of the recipient's program.

45 Fed. Reg. 6670 (1980) (adopting 29 C.F.R. § 32.3). These regulations contain no reference to cost, disruption, proportionality, or any other aspect of "reasonableness" other than the recitation of the "undue hardship" defense. [18]

C. <u>The Petitioner Cannot Demonstrate that Barnett's Requested Accommodation Was "Unreasonable" As a Matter of Law</u>.

Even if the word "reasonable" adds some additional requirement to the respondent's case, the petitioner has not presented any specific evidence demonstrating that accommodating Mr. Barnett's request to remain in the mailroom was somehow "excessive" or burdensome. Instead, the petitioner asserts that such an accommodation is *inherently* unreasonable, regardless of the evidence in a

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[17] The Department of Treasury regulations were in accord. 46 Fed. Reg. 1120 (1981) (adopting 31 C.F.R. § 51.55).

[18] These regulations have been recognized as an important source of guidance on the meaning of section 504, and were codified by the 1978 amendments to the Rehabilitation Act. *Traynor v. Turnage*, 485 U.S. 535, 550 n.10 (1988); *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 626 (1984).

particular case, citing three incorrect and non-statutory public policy arguments. This assertion is contrary to the plain language of 42 U.S.C. § 12111(9), which expressly lists modified schedules, policy modifications and reassignments as possible accommodations.

Moreover, the petitioner's position is contrary to the individualized, case-by-case analysis prescribed by the statutory scheme. *PGA Tour v. Martin*, 121 S. Ct. at 1896 ("Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. . . . To comply with [Title III], an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration."); *Arline*, 480 U.S. at 287 ("To answer this question [whether Arline is otherwise qualified] in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact."); S. REP. NO. 116 at 31 ("fact-specific case-by-case approach to providing reasonable accommodations is generally consistent with interpretations of this phrase under . . . the Rehabilitation Act of 1973"); H. R. REP. NO. 485(II) at 62 (same).

1. The Accommodation Requested by Barnett Cannot Be Rejected as a "Preference."

The petitioner characterizes the accommodation requested by Mr. Barnett as an unreasonable and unfair "preference." Of course, there is no statutory basis for excluding accommodations that are viewed by employers as "preferences": The statute expressly lists "modifications of . . . policies," "reassignment to a vacant position," and "other

similar accommodations" as reasonable accommodations. 42 U.S.C. § 12111 (9); *see also Alexander v. Choate*, 469 U.S. 287, 301 n.20 (1985). Rather, it is clear (as the petitioner concedes), that the "reasonable accommodation" mandate requires employers to provide some things to disabled employees that they may deny to non-disabled employees. *See* Petitioner's Brief at 19 (reviewing example of providing breaks).

It is true that in some cases (barring undue hardship or another defense), the ADA's provisions require that the disabled incumbent receives a reasonable accommodation transfer into a vacancy, while the nondisabled incumbent or outside applicant who might otherwise obtain the opportunity does not. The petitioner seeks to amend the plain language of the Act to eliminate such accommodation, citing general language in the Act's findings and in the legislative history referencing "equal employment opportunity." Petitioner's Brief at 7, 13-17; *see also E.E.O.C. v. Humiston-Keeling*, 227 F.3d 1024, 1028-29 (7th Cir. 2000).[19] This language is an insufficient basis for rejecting the unambiguous statutory language providing for reassignment.

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[19] The petitioner also argues that since employers need not prefer applicants with disabilities, nor provide such applicants with reassignments, then Congress could not have meant for employers to "prefer" disabled employees by providing them with reasonable accommodation transfers. Petitioner's Brief at 22; *see also* S. REP. NO. 116 at 26-27 ("no obligation under this legislation to prefer applicants with disabilities over other applicants"), 32 ("Reassignment as a reasonable accommodation is not available to applicants for employment."); H. R. Rep. No. 485(II) at 63. However, the legislature history makes clear distinctions between applicants and employees, especially in the context of reassignment. Further, "[h]ad Congress intended that disabled employees be treated exactly like other job applicants, there would have been no need for the report to go on to explain that 'bumping' another employee out of a position to create a vacancy is not required[.]" *Aka*, 156 F.3d at 1304.

Moreover, the legislative history reviews in detail the vocational goals of the Act, goals which are directly served by the "accommodation of last resort," that of reassignment to a vacant position:

> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.

S. REP. NO. 116 at 31-32; H. R. Rep. No. 485(II) at 63 (same); *see also Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 633-34 n.13 (1984) ("the primary goal of the [Rehabilitation] Act is to increase employment of the handicapped").[20] Under the facts here, reassignment would have kept Mr.

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[20] According to the Act's findings, "census data, national polls, and other studies have documented that persons with disabilities . . . are severely disadvantaged . . . vocationally . . .. [T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency . . .." 42 U.S.C. § 12101(a)(6), (8). The committee reports emphasize that "[i]ndividuals with disabilities experience staggering levels of unemployment and poverty. . . . Two-thirds of all disabled Americans between the age of 16 and 64 are not working at all. . . . [T]he majority of those individuals with disabilities not working and out of the labor force, must depend on insurance payments or government benefits for support." S. REP. NO. 116 at 9; H. R. REP. NO. 485(II) at 32-33; *see also* S. REP. NO. 116 at 16-18 ; H. R. REP. NO. 485(II) at 43-47 (describing costs to society of reliance of disabled on public support). Thus, discrimination "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9). As noted by the Petitioner, the ADA's express findings are relevant to its interpretation. Petitioner's Brief at 11-12 (citing *Sutton v. United Air Lines, Inc.* 527 U.S. 471, 487 (1999) and *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 613 (1999) (Kennedy, J., concurring)).

Barnett gainfully employed, alongside his nondisabled coworkers with comparable seniority.

Failing to acknowledge the ADA's plain language and its multiple purposes, the Seventh Circuit's analysis in *E.E.O.C. v. Humiston-Keeling, Inc.*, goes astray. Although the appellate court properly concludes that the term "reassignment to a vacant position" cannot mean *consider for* reassignment, it proceeds to create an extra-statutory exception to the reasonable accommodation mandate for employers with a "consistent and honest policy to hire the best applicant for the particular job in question." 227 F.3d at 1028-29. The Seventh Circuit's exception is based on an overly narrow view of the purposes of the ADA, encompassing only the goal of "enabling the disabled [employee] to compete," *id.* at 1029, and overlooking the goal of retaining qualified disabled employees in the workplace, and preventing their unemployment and dependence on the public weal. In each hypothetical listed by the Seventh Circuit, application of the plain language of 42 U.S.C. § 12111(9) would result in the retention of two qualified employees, rather than the termination of a disabled qualified employee. *See* 227 F.3d at 1027.[21]

In *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27 (1987), this Court declined to create an exception in the Fair Labor Standards Act in the face of a similar statutory interpretation argument:

> Petitioner urges us to look beyond the plain language of the statute, citing the often-quoted passage from

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[21] The hypotheticals include facts with respect to the competing candidates that might be considered as part of an undue hardship analysis. No such facts exist in this case, where there is no evidence that Mr. Barnett was not the best qualified candidate; or that the successful bidder had a competing discrimination claim.

> *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892): "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." . . . According to petitioner, the sole aim of the FLSA was to establish decent wages and hours for American workers. This goal, petitioner claims, is not furthered by application of § 15(a)(1) to creditors who acquire "hot goods" by foreclosure and are not themselves responsible for the minimum wage and overtime violations. However, we conclude that the legislative intent fully supports the result achieved by application of the plain language.
>
> While improving working conditions was undoubtedly *one* of Congress' concerns, it was certainly not the *only* aim of the FLSA. In addition to the goal identified by petitioner, the Act's declaration of policy, contained in § 2(a), reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions.

Id. at 35-36 (emphasis in original, citations omitted). Here, the reassignment clause furthers the express vocational goals of the Act.

Similarly, and in the face of comparable public policy arguments, this Court declined in *PGA Tour v. Martin* to exempt professional golf tours from Title III's requirement that public accommodations make modifications to their policies:

> [P]etitioner's claim that all the substantive rules for its "highest-level" competitions are sacrosanct and cannot be modified under any circumstances is effectively a contention that it is exempt from Title

> III's reasonable modification requirement. But that provision carves out no exemption for elite athletics, and given Title III's coverage not only of places of "exhibition or entertainment" but also of "golf course[s]," 42 U.S.C. §§ 12181(7)(C), (L), its application to petitioner's tournaments cannot be said to be unintended or unexpected, see §§ 12101(a)(1), (5). Even if it were, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."

121 S. Ct. at 1896 (citing *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)).

Here, Mr. Barnett's situation falls directly within the plain language and purposes of the Act. With ten years seniority, Mr. Barnett was not at risk of layoff: he had sufficient seniority to bid for and obtain the cargo position, and would have done so, remaining gainfully employed, but for his disability and need for accommodation. Accordingly, had Mr. Barnett been accommodated by continuation in the mailroom position, the impact or "ripple effect" would *not* have been the layoff of a nondisabled person who otherwise would have remained employed. The actual impact would have been modest: the replacement of one assignment (the mailroom position) with another (the cargo position) on the list of possible assignments for those employees with enough seniority to bid. Most importantly, Mr. Barnett would have remained in the workplace.[22]

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[22] The equities are further illustrated by the "three worker problem." Imagine a layoff in which three workers who have lost their original positions must compete for two remaining jobs, storeroom clerk and receptionist. Further assume that there are two non-disabled workers, with 15 and five years seniority, respectively, and one disabled employee with ten years seniority. Under the petitioner's analysis, the 15-year worker may bid on and obtain the file clerk job, leaving the ten-year

The purpose of the mailroom accommodation was not to give Mr. Barnett a different job than he would have held had he not been disabled, but to assure him the same employment status – employed rather than jobless – that he would have enjoyed absent his disability. Although many of the circumstances of this case are in dispute, one critical fact is undeniable – had Mr. Barnett not become disabled, he would have remained employed by US Airways. Mr. Barnett had ample seniority to obtain a position in cargo, and would have continued to work there but for his disability. The unavoidable collateral impact on the more senior employee who might apply for the position does not invalidate an exemplary application of a listed accommodation. This Court has determined that the denial of a possible future employment opportunity does not present the same concern as the loss of an existing position. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986); *Firefighters v. Stotts*, 467 U.S. 561, 574-76 (1984); *Steel Workers v. Weber*, 443 U.S. 193, 208 (1979).

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worker – who is unable to move boxes in the storeroom – unemployed. The petitioner's reading would permit the most junior, five-year worker to leapfrog over the ten-year veteran to take the storeroom job and remain at work – a windfall benefit of the ten-year veteran's disability. The ADA was not enacted to protect the windfall benefits that might otherwise accrue to junior employees because of the misfortunes of their more senior colleagues. The respondent's analysis – that the disabled worker should be provided the accommodation of assignment to the file clerk position – would retain the two most senior workers as employees, just as would have occurred absent the disability, but in different jobs than would have been the case had the ten-year veteran been non-disabled. The petitioner objects that this sort of accommodation leaves the ten-year veteran in a better position than the 15-year veteran, in the limited sense that the former ends up in the job both desired. But the purpose of the accommodation is not to accord the disabled worker a "preference" over the senior worker in job selection, but to avoid discriminating against the disabled worker in favor of the junior employee with regard to who will be laid off.

2. The Accommodation Requested by Barnett Cannot Be Rejected as Unrelated to His Disability.

The petitioner asserts that the accommodation is unreasonable because it ameliorates a lack of seniority rather than a "disability-related obstacle." Petitioner's Brief at 12, 19-20. There is no statutory basis for construing the listed accommodations as including only those modifications that eliminate a "disability-related obstacle." The statutory requirement is that the reasonable accommodations be "to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A).

Here, Mr. Barnett's disability imposed an obstacle to retaining employment: but for his disability and need for accommodation, Mr. Barnett would have obtained and worked the cargo position, for which he had adequate seniority. Retaining Mr. Barnett in the mailroom would have ameliorated his physical limitations by assigning him to a position that he could physically perform. Contrary to the petitioner's argument, the requested accommodation would fall squarely within the ambit of 29 C.F.R. § 1630.2(o) as a modification "that enable[s] a covered entity's employee with a disability to enjoy equal benefits and privileges of employment" – *i.e.* continued employment – "as are enjoyed by its other similarly situated employees without disabilities" – *i.e.* other employees with enough seniority to avoid layoff. [23]

[23] Further, the distinction proffered by the petitioner is boundless, as it can be applied to bar access to any reassignment or any accommodation ordinarily assigned through an employer's policy. Where offices are assigned by lottery, a wheelchair user who needs but is denied the office next to the restroom encounters not a "disability-related obstacle," but the obstacle of unluckiness. Where support staff is provided only to managers, a wheelchair using sales associate requiring assistance in filing documents simply has the wrong job title. The distinction also excludes

3. The Accommodation Requested by Barnett Cannot Be Rejected Because Its Evaluation Would Impose Administrative Burdens.

The petitioner asserts that the accommodation is unreasonable because it requires an employer to demonstrate an "undue hardship" defense. According to the petitioner, permitting modifications to "neutral" employer policies would entail "profound practical implications" by forcing employers to accede to requests for policy modifications "in virtually every instance." Petitioner's Brief at 15. In light of the plain language of 42 U.S.C. § 12111(9) and 42 U.S.C. § 12112(b)(5)(A), the petitioner's complaint is plainly with Congress, and not with the Ninth Circuit. *See PGA Tour v. Martin*, 121 S. Ct. at 1897 n.51 ("[p]etitioner's questioning of the ability of courts to apply the reasonable modification requirement to athletic competition is a complaint more properly directed to Congress, which drafted the ADA's coverage broadly.").

Further, Congress explicitly considered the interests of employers that must respond to requests for accommodations, and carefully drafted numerous express exceptions and defenses to the accommodation mandate: the employee must be "disabled" within the meaning of the ADA, 42 U.S.C. § 12102(2); the employee must be qualified – able to perform the essential job functions – with or without accommodation, 42 U.S.C. §§ 12112(b)(5)(A), 12111(8); the disability and need for accommodation must be known to the employer, 42 U.S.C. § 12112(b)(5)(A); the

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any policy modification needed to obtain reassignment, such as a modification to a "no transfer" policy, in direct contravention to the EEOC's guidance. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, at questions 21-25 (Mar. 1, 1999). The statute expressly instructs the EEOC to provide technical assistance and guidance. 42 U.S.C. § 12206(c).

employer may choose among effective accommodations, *id*., H. R. REP. NO. 485(III) at 40; the accommodation must not impose an "undue hardship," 42 U.S.C. § 12112(b)(5)(A), 12111(10); and the employee must not impose a "direct threat," 42 U.S.C. 12113(b). Employers that demonstrate "good faith efforts" to make reasonable accommodations are not subject to damage awards. 42 U.S.C. § 1981(a)(3). In light of this balanced statutory scheme, there is no basis for the contention that employers will be so intimidated by the possibility of litigation that they will invariably give in to any request for an accommodation, no matter how costly or disruptive. Corporate officials regularly make decisions with an awareness of some risk of legal dispute.

This Court has rejected the argument that the administrative burdens of the ADA can support a judicially created exemption from its requirements:

> The ADA admittedly imposes some administrative burdens on the operators of places of public accommodation that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities. . . . However, we think petitioner's contention that the task of assessing requests for modifications will amount to a substantial burden is overstated. . . . In addition, we believe petitioner's point is misplaced, as nowhere in § 12182(b)(2)(A)(ii) does Congress limit the reasonable modification requirement only to requests that are easy to evaluate.

PGA Tour v. Martin, 121 S. Ct. at 1897 & n.53.

III. THE ACCOMMODATION OF REASSIGNMENT MEANS REASSIGNMENT, NOT "CONSIDER FOR REASSIGNMENT."

Mr. Barnett's requested accommodation – to be permitted to remain in the mailroom by having his position not be put up for bid – did not require either a "reassignment" or a modification of the petitioner's seniority policy. However, assuming that the requested accommodation was to be "reassigned" to the mailroom position, this modification is expressly permitted by the Act. The statute lists "reassignment to a vacant position" as a form of reasonable accommodation. 42 U.S.C. § 12111(9); *see also* 29 C.F.R. § 1630.2(o)(2) ("Reasonable accommodation may include but is not limited to . . . reassignment to a vacant position…"); 29 U.S.C. § 794 (ADA standards apply to Rehabilitation Act).[24]

Prior to the enactment of the ADA, there was a conflict as to whether reassignment to a vacant position was a possible accommodation under the Rehabilitation Act. In 1984, the EEOC concluded that reassignment was an available reasonable accommodation, and the Office of Personnel Management and the Civil Service Commission concurred. *Ignacio v. U.S. Postal Service*, Fed. Equal Opp. Rptr. ¶ 843159 (EEOC, Sept. 4, 1984); *see also* United States Office of Personnel Management, Handbook on Reasonable Accommodation, OPM Doc. 720-A (March 1980). The Merit Systems Protection Board and the United States Postal Service disagreed with that interpretation of the Act and regulations,

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[24] "[T]he ADA's definition of reasonable accommodation specifies that reasonable accommodation includes . . . reassignment to a vacant position[.] Now those who are covered by title V of the Rehabilitation Act will know that [this is] the definition[ ] of reasonable accommodation[.]" 138 CONG. REC. S 16608-05 (Oct. 5, 1992) (Statement of Harkin).

and the matter was referred to an inter-agency Special Panel. The panel by a margin of 2-1 sided with the EEOC. *Ignacio v. U.S. Postal Service*, 30 M.S.P.R. 471 (Special Panel No. 1, Feb. 27, 1986).

The Postal Service, however, declined to accede to the holding of the Special Panel, the interpretation of the EEOC, or the directives from OPM and the Civil Service Commission, and continued to refuse to reassign disabled workers. Disabled workers who had been denied reassignment and been dismissed by the Postal Service brought suit under the Rehabilitation Act. A number of lower courts sided with the Postal Service, holding that the Act did not require an employer to accommodate a disabled worker by assigning him or her to another position. These lower courts relied upon the text of the Rehabilitation Act regulations, reasoning that the regulations did not expressly mention reassignment, and that the regulatory definition of "qualified" referred only to the position an employee currently held. [25]

To resolve the conflict in favor of including reassignment as an accommodation, Congress added specific language in the ADA. First, Congress expressly included reassignment in the list of possible reasonable accommodations. 42 U.S.C. § 12111(9)(B). Second, Congress expanded the definition of "qualified individual" to include 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) (emphasis added).

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[25] *Black v. Frank*, 730 F. Supp. 1087, 1091 (S.D. Ala. 1990); *Davis v. U.S. Postal Service*, 675 F. Supp. 225, 233 (M.D. Pa. 1987); *Fields v. Lyng*, 705 F. Supp. 1134, 1137 (D. Md. 1987); *Dancy v. Kline*, 639 F. Supp. 1076, 1080 (N.D. Ill. 1986); *Wimbley v. Bolger*, 642 F. Supp. 481, 486 (W.D. Tenn. 1986); *Carty v. Carlin*, 623 F. Supp. 1181, 1188 (D. Md. 1985); *Alderson v. Postmaster General of the United States*, 598 F. Supp. 49, 55 (W.D.Okla. 1984).

The petitioner acknowledges that Congress sought to overturn earlier case law, but asserts that the only accommodation which had been held unavailable by the pre-1990 Rehabilitation Act decisions was "consider[ation]" for reassignment, not actual reassignment." Petitioner's Brief at 26. This is not correct – the cases addressed the question of actual reassignment.

A. The Petitioner's Reading of the "Reassignment" Clause is Inconsistent with the Plain Language of the Statute.

The petitioner asserts that the "reassignment" clause does not mean actual reassignment, but rather "consider for reassignment." The selection by Congress of the phrase "reassignment to a vacant position" is inconsistent with an intent to authorize only "consideration for reassignment," and to avoid imposing on employers an obligation to actually reassign disabled workers.[26] "The statute does not say 'consideration of a reassignment to a vacant position.'" *Smith v. Midland Brake*, 180 F.3d 1154, 1164 (10th Cir. 1999) (en banc). "To assign, according to *Webster's Third New International Dictionary*, means 'to appoint (one) to a post or duty.' . . . To begin with the statutory text, the word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been 'reassigned'; the core word 'assign' implies some active effort on the part of the employer." *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1302, 1304 (D.C. Cir. 1998) (en banc). The petitioner's

[26] The petitioner does not suggest, for example, that the accommodation of "job restructuring" actually means only "consideration of job restructuring," or that any of the other listed types of accommodation actually refer to mere consideration rather than real world action by the employer that actually benefits the worker with the disability.

proposed definition does violence to the literal meaning of the word "reassignment." *Smith,* 180 F.3d at 1164.

Further, the ADA's reference to "reassignment" would be surplusage if "consider for reassignment" were all that it meant. *Id.* The ADA already prohibits discrimination against disabled employees in regard to job application procedures, advancement, and all terms and conditions of employment. 42 U.S.C. § 12112(a); *see also Aka,* 156 F.3d at 1304. Indeed, without any reassignment language, it was established that alternative employment positions reasonably available under the employer's own policies could not be denied to disabled employees. *Arline,* 480 U.S. at 289 n.19 (1987).

The petitioner's attempts to inject substance into the word "reassignment" without defining it as actual reassignment fall short. First, contrary to the petitioner's argument on page 26, there is no need for the reassignment language to "make clear" that an employer must consider the feasibility of assigning the employee to a different job in accordance with the employer's own selection process. *See* 42 U.S.C. § 12112(a); *Arline,* 480 U.S. at 289 n.19 (1987). Second, there is no need for the "reassignment" language to make clear that an individual may receive accommodations in order to perform the alternate position. Petitioner's Brief, pp. 26-27. This basic concept would remain if the "reassignment" clause were deleted from 42 U.S.C. § 12111(9). *See* 42 U.S.C. § 12112(5)(A) ("accommodations," plural) and 42 U.S.C. § 12111(8) (individual is qualified and thereby protected by 42 U.S.C. § 12112(a) if "with or without accommodation, can perform the essential functions of the employment position that such individual . . . desires"). Similarly, the requirement that an employer work with disabled employees to identify possible accommodations, *see* Petitioner's Brief at 27, does not arise from the "reassignment" clause or from any related legislative

or regulatory material on the topic.[27] This requirement – which applies to any accommodation, whether or not "reassignment" – cannot bolster the petitioner's interpretation.

B. The Petitioner's Reading of the "Reassignment" Clause is Inconsistent with the Goal of Effective Accommodations Enabling Disabled Employees to Retain Employment.

The petitioner's proposed substitution of the phrase "consider for reassignment" is inconsistent with the principle that accommodation must be effective for the disabled employee. *See* Petitioner's Brief at 16 (acknowledging that accommodation must be effective); *see also* 29 C.F.R. § 1630.2(o)(1)(i) (reasonable accommodation means modifications or adjustments "*that enable*" the employee with a disability to work and enjoy employment benefits). Mere "consideration for reassignment" without actual reassignment would not be a reasonable accommodation because it would not actually "enable" the disabled worker to avoid dismissal, and could not be characterized as "effective." When no other accommodation exists, the employee needs actual reassignment, not dismissal with the consolation of knowing that the employer considered but then rejected reassignment.

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[27] The legislative history details the practical steps toward identifying effective accommodations for disabled employees. S. REP. NO. 116 at 34-35; H. R. REP. NO. 485(II) at 65-67 ("Having identified one or more possible accommodations, the third informal step is to assess the reasonableness of each in terms of effectiveness and equal opportunity. A reasonable accommodation should be effective for the employee."); *see also* 29 C.F.R. § 1630.2(o)(3). There is no evidence in this record that the petitioner followed any of the steps that it now identifies as part of the "reassignment (but not actual reassignment)" clause. Indeed, the petitioner has consistently taken the position that it has no obligation to so engage with its disabled employees.

The legislative history describes actual, effective reassignment. S. REP. NO. 116 at 31-32; H.R. REP. NO. 485(II) at 63. Similarly, the EEOC interprets its own regulations to mean actual reassignment.[28] Effective, actual reassignment is necessary to reach the public policy goals of the Act, including effective accommodations and increased employment for disabled workers. S. REP. NO. 116 at 35 (reasonable accommodation should be "effective" and "meaningful"); H.R. REP. NO. 485(II) at 66 (same); *see also* authorities cited *supra.*, at page 23-24 and footnote 20.

C. There is No Basis for Substituting the Petitioner's Judgment for that of Congress.

The petitioner asserts that the reassignment clause cannot be read literally because, in its estimation, it would make no sense for Congress to permit incumbents to seek a reasonable accommodation transfer to a vacant position, but not to an occupied position. If Congress had really meant to authorize actual reassignment, "Congress presumably would have allowed for bumping at least in some situations," such as where the incumbent has held the position only for a short time. Petitioner's Brief at 23. According to the petitioner, "[t]here is no meaningful distinction between an individual who has occupied a position for a very short time and an

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[28] 29 C.F.R. Part 1630, App., § 1630.2(o) ("Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. . . . Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. . . . An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation."); EEOC Enforcement Guidance on Reasonable Accommodation, question 29.

individual who is entitled to occupy the position within a very short time." Petitioner's Brief at 37. Alternatively, the petitioner posits, the fact that Congress limited reassignment to vacant positions confirms an intention not to interfere with settled expectations which, the petitioner reasons, is consistent with an intention *not* to require reasonable accommodation transfers where there is a seniority policy. Petitioner's Brief at 38. Whatever the petitioner's views on how to balance various interests in drafting legislation, Congress made particular judgments, reflected in the plain language of the statute, distinguishing between reassignment to vacancies and reassignment to occupied positions.[29]

IV. THE PETITIONER FAILED TO DEMONSTRATE THAT IT WAS ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF "UNDUE HARDSHIP."

The petitioner advances one of the ADA statutory defenses, arguing that permitting Barnett to remain in the mailroom would have caused it "undue hardship." The petitioner asserts that accommodating Mr. Barnett would have caused: "reduced productivity," "deterioration in morale," "labor unrest," and "adverse . . . employment relations." Petitioner's Brief at 10, 32. At summary judgment, such a showing must be so decisive that no reasonable juror could fail to find undue hardship, based on undisputed evidence. *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133 (2000).

The record is devoid of any evidence whatsoever regarding reduced productivity, morale, labor unrest, or workplace relations at the San Francisco facility of US

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[29] 42 U.S.C. §§ 12111(8), (9); S. REP. NO. 116 at 32 ("[R]eassignment need only be to a vacant position – "bumping" an employee out of a position to create a vacancy is not required."); *see also* H.R. REP. NO. 485(II) at 63.

Airways. There is nothing in the record about whether other employees would have objected if Mr. Barnett's job was opened for bidding, or felt, rather, that it was unfair for the employer to in effect dismiss Mr. Barnett because of an injury that had occurred on the job, or simply did not know or care about the matter at all. The record is equally silent about why the more senior worker wanted Mr. Barnett's job or whether he actually cared very much about whether he worked in the mailroom or in cargo. Moreover, on this record, there were no competing seniority "rights" or even legitimate expectations on the part of other employees. At best, there were the unsupported preferences of a few employees.

The ADA's undue hardship defense requires proof of "undue hardship *on the operation of the business*," 42 U.S.C. § 12112(b)(5)(A) (emphasis added), and does not encompass the preferences and disappointments of a fellow worker. Similarly, the direct threat defense requires a direct threat "to the *health or safety* of other individuals in the workplace," 42 U.S.C. § 12113(b) (emphasis added), not a threat, direct or otherwise, to the job assignment preferences of the other individuals.

The petitioner relies on the EEOC's Interpretative Guidance, citing a passage stating that "an employer could demonstrate that a particular accommodation would be unduly disruptive to its other employees or to the functioning of it business," in making an undue hardship showing. 29 C.F.R. Part 1630, App., § 1630.15(d). There is no evidence of such disruption to employees here. Further, the regulation to which this passage refers identifies as a factor relevant to undue hardship "the impact on the ability of other employees to perform their duties." 29 C.F.R. § 1630.2(p)(2)(v). There is no such impact here.

The petitioner also asserts that the company would be adversely affected by the proposed accommodation because

other employees would object to, or be offended by, the accommodation resulting in impaired morale and/or productivity.[30] As a factual matter, there is no evidence supporting the assertion that letting Mr. Barnett keep his job would demoralize the US Airways workforce, or lead to some sort of work slowdown. More fundamentally, Congress did not intend the undue hardship provision to exempt employers from the commands of the ADA whenever another employee objected to compliance with the law. *See* 29 C.F.R. Part 1630, App., § 1630.15(d) ("[T]he employer would not be able to show undue hardship . . . by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs.").

Given the weakness of the record on "undue hardship," the petitioner does not contend that there are no disputed issues as to the defense. Instead, the petitioner asserts that it is under no obligation to support with actual evidence its motion for summary judgment on undue hardship grounds: the mere fact that a requested accommodation would violate a "neutral employment policy" conclusively establishes undue hardship.[31] This cannot be the rule: virtually any type of reasonable accommodation – whether modified equipment, a leave of absence, a modified schedule, or reassignment – could be limited or eliminated through "neutral" employer policies. The petitioner's argument would apply to policies such as:

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[30] Productivity would not be directly impaired by Mr. Barnett's assignment to the mailroom position, as there is no dispute that Mr. Barnett could have continued to do his own job as well or better than any substitute.

[31] The Petitioner's limitation of its proposed exemption to "neutral" policies is meaningless: a non-neutral policy – "We don't hire or make modifications for people in wheelchairs" – would be discriminatory on its face under 42 U.S.C. § 12112(a), and could not be justified by the "undue hardship" defense.

> Employee requests will be granted only when the expense is less than $10. (Consider a disabled employee who needs $300.00 voice-activated software.)
>
> Employees who take time off for any reason will be terminated. (Consider a disabled employee who needs to spend three weeks in the hospital.)

The petitioner's reading would legally sanction "neutral" policies that rule out virtually any type of accommodation in any case. This interpretation has been properly rejected by most Circuit courts.[32]

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[32] *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646 (1st Cir. 2000) ("The company's apparent position that the ADA can never impose an obligation on a company to grant an accommodation beyond the leave allowed under the company's own leave policy is flatly wrong under our precedent."); *Fedro v. Reno*, 21 F.3d 1391, 1396 (7th Cir. 1994) ("reasonable accommodation may even include a requirement that an employer alter existing policies or procedures that it would not change for nonhandicapped employees"); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir. 1998) (defendant's medical layoff and reinstatement policy which excluded certain vacant jobs, and which required "physical fitness" for new positions, did not meet accommodation obligation); *Gile v. United Airlines,. Inc.*, 213 F.3d 365, 374 (7th Cir. 2000) (employee not required to comply with United's bidding and competitive transfer procedures) *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions"); *Cravens v. Blue Cross and Blue Shield*, 214 F.3d 1011, 1020-21 (8th Cir. 2000) (employer's internal application procedure insufficient to provide accommodation to employee who requested assistance in locating job within the company); *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999) ("An employer's policy that does not provide accommodations for non-disabled workers . . . will not excuse the employer's failure to reasonably accommodate disabled workers").

The petitioner's suggestion that employers be exempted from actually having to prove undue hardship, at least where their reason for not providing an accommodation is a "neutral" policy, cannot be reconciled with the plain language of the ADA. 42 U.S.C. §§ 12111(9), (10). The ADA specifies that an employer bear the burden of proof that undue hardship would be caused. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a); *Garrett*, 531 U.S. 356, 121 S. Ct. at 967. The employer must demonstrate "significant difficulty or expense." 42 U.S.C. § 12111(10)(A); *see also* 42 U.S.C. § 12111(10)(B) (four factors). These provisions would be meaningless if the mere assertion of an undue hardship defense is conclusive.

The petitioner argues that permitting other workers to bid on Barnett's job reduces the risk of unionization. Petitioner's Brief at 41. However much the petitioner or any other employer may wish to remain non-union, unionization is not an "undue hardship" within the meaning of the ADA. To the contrary, unionization is a normal part of modern economic life, one that Congress has both sanctioned and regulated to a considerable degree.

V. THE REASONING OF *HARDISON* DOES NOT PRECLUDE THE ACCOMMODATION REQUESTED BY BARNETT.

In drafting the ADA's reasonable accommodation provisions, Congress intentionally declined to use the language of Title VII interpreted by the Court in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). First, in adopting the ADA, Congress conspicuously chose not to include any special provision regarding seniority. The *Hardison* Court relied on the special treatment accorded to seniority systems under 42 U.S.C. § 2000e-2(h) of Title VII. 432 U.S. at 81-83. Similar provisions according special protections for seniority rules are

found in the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2)(A), and the Equal Pay Act, 29 U.S.C. § 206(1)(i). The deliberate omission of such a provision from the ADA is inconsistent with the special solicitude for seniority policies that the petitioner urges this Court to read into the statute.[33]

Second, unlike Title VII, the ADA provides a detailed definition of the term "undue hardship." This definition was intended, *inter alia*, to make clear that the reasoning of *Hardison* should not apply to the statute. H.R. REP. NO. 485(III) at 40 (1990) ("a definition [of undue hardship] was included in order to distinguish the duty to provide reasonable accommodation in the ADA from the Supreme Court's interpretation of Title VII in *TWA v. Hardison*").

Third, *Hardison* notes that the requested accommodation would have conflicted with the contractual provisions of the employer's collective bargaining agreement with the union. 432 U.S. at 79-81 (Congress did not mean to deprive employees "of their contractual rights, in order to accommodate . . . others."). The ADA, however, expressly defines discrimination to include "participating in a contractual . . . relationship that has the effect of subjecting a covered entity's qualified . . . employee with a disability to the discrimination prohibited by this title," and states that such relationship "includes a relationship with [a] . . . labor organization." 42 U.S.C. § 12112(b)(2).[34] The *Hardison*

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[33] The Petitioner properly acknowledges that this portion of the *Hardison* holding does not apply to the ADA. Petitioner's Brief at 34.

[34] *See also* 29 C.F.R. § 1630.6(a), (b); H.R. REP. NO. 485(II) at 60 ("The contractual relationship adds no new obligations in and of itself beyond the obligations imposed by the Act, nor does it reduce the obligations imposed by the Act"); S. REP. NO. 116 at 32 (seniority provision of collective bargaining agreement "may be considered a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job"); H. R. REP. NO. 485(II) at 63 (same); 29

reasoning cannot apply to this matter in any event: there are no contractual or collectively bargained rights at issue here.

Fourth, *Hardison* reasoned that the accommodation sought in that case was inconsistent with Title VII because it would have discriminated against workers whose particular religious views did not preclude work on Saturdays. 432 U.S. at 81. The textual basis of this holding, as the Court stressed, was that Title VII forbade any discrimination on the basis of religion, "when it is directed against majorities as well as minorities." 432 U.S. at 81. Unlike Title VII, which is written "symmetrically," the ADA does not bar an employer from considering with solicitude an employee's disability. While it would be unlawful under Title VII for TWA to have adopted a shift policy for the purpose of affording special benefits to employees who observed the sabbath on Saturdays, it would be permissible under the ADA for US Airways to give priority in reassignments to disabled workers.

While acknowledging that Congress intended to distinguish the *de minimis* cost standard in *Hardison* from the "undue hardship" standard of the ADA, the petitioner asserts that Congress intended to codify the remainder of the *Hardison* analysis of reasonable accommodation. This analysis is unpersuasive. The analyses are inextricably intertwined. A primary basis for the *de minimus* rule announced by the Court in *Hardison* was that a requirement of significant expenditures by TWA to accommodate Mr. Hardison would have discriminated against workers with different religious views. 432 U.S. at 84-85.

C.F.R. Part 1630, App., § 1630.6 ("[A]n employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement."); *PGA Tour v. Martin*, 121 S. Ct. at 1891 ("clauses [(i) through (iii)] make clear on the one hand that their prohibitions cannot be avoided by means of contract, while clause (iv) makes clear on the other hand that contractual relationships will not expand a public accommodation's obligations").

Further, the seniority portions of *Hardison* are inconsistent with the omission from the ADA of the "seniority system" provision of Title VII, and the inclusion in the ADA of the contract language. They are also inconsistent with the language of the committee reports, disavowing *Hardison* in broad terms. *See* S. REP. NO. 116 at 36 ("The [Senate Committee on Labor and Human Resources] wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison* . . .are not applicable to this legislation"); H.R. REP. NO. 485(II) at 68 ("The [House Committee on Education and Labor] wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison* . . . are not applicable to this legislation. . . . This higher standard [in the ADA] is necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities.").

VI. THE PETITIONER'S REMAINING STATUTORY ARGUMENTS ARE UNPERSUASIVE.

A. Barnett Was Qualified for the Mailroom Position.

"The term 'qualified individual with a disability' means 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." 42 U.S.C. § 12111(8). This statutory definition is derived from the Rehabilitation Act regulations, which state that a "[q]ualified handicapped person means . . . a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 42 Fed. Reg. 22676 (May 4, 1977) (adopting 45 C.F.R.S. 84.3). At the time the mailroom position was put up for bid,

Mr. Barnett had successfully performed the essential functions of the position for more than two years. The record in this case is devoid of any evidence or contention that Mr. Barnett was less than an exemplary mailroom employee. There is nothing in the record to indicate that whoever replaced Mr. Barnett had any prior experience in the mailroom, or indeed had ever worked at the San Francisco facility. In all likelihood an experienced mailroom employee had to instruct the new replacement about all the tasks, routines and equipment with which Barnett himself was already well familiar. The petitioner has never argued that Mr. Barnett would be rejected for the mailroom position regardless of the seniority policy because he was not qualified.[35]

In normal usage the word "qualified" applies to the job prerequisites, not to the selection standard. However, in petitioner's view, the only "qualified" applicant for a position would be the particular applicant who actually obtained it. According to the petitioner's usage, Mr. Barnett was qualified to work in the mailroom in 1990, when he obtained that position with 10 years of seniority, but was no longer qualified when he lost the position in 1992 despite then having 12 years of seniority. This does not comport with the "ordinary sense of the word." *See Buckhannon*, 121 S. Ct. at 1839-1841.

The petitioner argues that Mr. Barnett was not "qualified" because he did not have enough seniority to obtain the mailroom position under the seniority policy. The statutory standard, however, refers to an individual's ability to do the job, not to his or her ability to win the position over other competing applicants. The petitioner quotes the Commission's regulation that a "[q]ualified individual with a disability means an individual with a disability who satisfies the requisite skill,

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[35] Indeed, it could not, as it permitted Mr. Barnett to work the position for two years, and removed him, they assert, only due to their job assignment policies.

experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). The petitioner interprets "job-related requirement" to mean whatever standards or policies an employer utilizes to choose among competent applicants. By so reading, the petitioner excludes consideration of reasonable accommodation, in contravention of the plain language of 42 U.S.C. § 12111(8).

B. The Mailroom Position Was "Vacant."

Mr. Barnett's requested accommodation – to be permitted to remain in the mailroom by having his position not put up for bid – did not require a "reassignment." However, even assuming that the requested accommodation was to be "reassigned" to the mailroom position, that position was assuredly "vacant." Under the ADA, reassignment is only available to "a vacant position." 42 U.S.C. § 12111(9)(B).

The petitioner asserts that where an employer has a policy for selecting among employees to fill positions, there are no "vacancies" as the position is only "vacant" to the person who successfully obtains the position. Under the petitioner's analysis, if the occupant of a given job suddenly resigned, the job would not be vacant, but would be held by a theoretical construct – the unidentified individual who will be awarded the job upon application of the employer's selection standard. This interpretation does not comport with "respect for ordinary language." *Buckhannon*, 121 S. Ct. at 1839-1841.

In ordinary English, a job is characterized as vacant if no employee currently holds that position. *See* BLACK'S LAW DICTIONARY 1546 (defining "vacancy" as "1. The state or fact

of a lack of occupancy in an office, post, or piece of property. 2. The time during which an office, post, or piece of property is not occupied. 3. An unoccupied office, post, or piece of property; an empty place."). Indeed, the word "vacant" is used in its ordinary sense – that of no actual occupant – in US Airways own personnel documents. Respondent's Lodging at 9-27. The word "vacant" is used in numerous provisions of the United States Code, and invariably refers to a position with no actual current occupant.[36] This Court has

[36] 29 U.S.C. § 2931(b)(3)(B) ("A participant . . . shall not be employed in a job if. . . the employer has terminated the employment of any regular employee or otherwise reduced the workforce of the employer with the intention of filling the vacancy so created with the participant"); 42 U.S.C. §§ 603(a)(5)(I)(i)(I), (III)(bb) ("[A]n adult in a family receiving assistance attributable to funds provided under this paragraph may fill a vacant employment position in order to engage in a work activity. . . . An adult participant in a work activity engaged in under a program operated with funds provided under this paragraph shall not be employed or assigned . . . if the employer has terminated the employment of any regular employee or otherwise caused an involuntary reduction in its workforce with the intention of filling the vacancy so created with the participant"); 42 U.S.C. § 607(f) ("[A]n adult in a family receiving assistance under a State program funded . . . may fill a vacant employment position in order to engage in a work activity . . . No adult in a work activity . . . shall be employed or assigned . . . if the employer has terminated the employment of any regular employee or otherwise caused an involuntary reduction of its workforce in order to fill the vacancy so created"); 42 U.S.C. § 211 ("Officers in a professional category of the Regular Corps, found pursuant to subsection (c) to be qualified, may be given permanent promotions to fill any or all vacancies"); 42 U.S.C. § 3028(b)(3)(E) ("[N]o amounts received by the State . . . will be used to hire any individual to fill a job opening created by the action of the State in laying off or terminating the employment of any regular employee . . . in anticipation of filling the vacancy so created by hiring an employee to be supported through use of amounts received under this paragraph."); *see also* 42 U.S.C. § 2000e-4(a) ("Any individual chosen to fill a vacancy [on the Commission] shall be appointed only for the unexpired term of the member whom he shall succeed"); 42 U.S.C. § 423(d)(2)(A); 42 U.S.C. § 1382c-(a)(3)(B).

consistently utilized "vacant" with this same established meaning.[37]

Congress chose the word "vacant" to limit reassignment to jobs with no current occupant. If a position were only "vacant" under the ADA to whoever would be entitled to that job pursuant to the employer's selection standard, then a disabled worker could only obtain the reasonable accommodation of "reassignment to a vacant position" when that very worker was already going to receive the assignment. So limited the reassignment clause would be utterly meaningless.

Although the petitioner acknowledges that the "vacant position" language was included to prevent bumping, the petitioner asserts a new definition of "bumping." According to the petitioner, bumping occurs whenever, in filling a position with no actual current occupant, the law intervenes to award the position to a person other than the individual whom the employer itself would have selected. There is, however, a substantial body of pre-1990 case law about bumping, an issue that arose frequently in Title VII litigation. In those decisions "bumping" refers specifically to the displacement of actual incumbents.[38]

The purpose of the reassignment clause was to overturn a number of lower court decisions that held that reassignment was not an available reasonable accommodation under the Rehabilitation Act. The petitioner's proposed interpretation of

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[37] *See, e.g. Johnson v. Transp. Agency*, 480 U.S. 616, 623 (1987); *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875 (1984).

[38] *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 116-122 (1985); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 566-567, 571 (1984); *California Brewers Assoc. v. Bryant*, 444 U.S. at 603; *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 766 (1976).

"vacant position" would actually codify rather than overturn those Rehabilitation Act decisions.

CONCLUSION

For all of the reasons stated herein, the *en banc* decision of the Ninth Circuit should be affirmed.

Dated: September 24, 2001 Respectfully submitted,

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