No. 06-492

IN THE
Supreme Court of the United States

CURRY COUNTY; CURRY COUNTY ROAD DEPARTMENT; AND DAN CRUMLEY, individually and in his official capacity as Curry County Roadmaster,
Petitioners,

v.

ROBERT DARK,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

MANUEL C. HERNANDEZ
DAVID M. HERNANDEZ
HERNANDEZ & ASSOCIATES
1212 Alabama, Suite 25A
PO Box 979
Bandon, OR 97411
(541) 347-2911

BRIAN WOLFMAN
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondent Robert Dark

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STATEMENT OF THE CASE

The Americans with Disabilities Act (ADA) seeks to end discrimination against people with disabilities in all walks of life, including in employment. 42 U.S.C. § 12101(a)(3), (b)(1). The ADA prohibits an employer from firing an employee who is "a qualified individual with a disability because of the disability." *Id.* § 12112(a). A disability is "a physical or mental impairment that substantially limits one or more of [an individual's] major life activities." *Id.* § 12102(a). A "qualified individual" includes not only an employee who can perform his or her current job as it is presently structured, but also an employee who can be employed with "reasonable accommodation," which may include, among other things, job reassignment, *id.* § 12111(8) (defining "reasonable accommodation"); 29 C.F.R. § 1630.2(o)(3) (same), and use of an employee's accrued leave time so that the employee can obtain "necessary treatment." 29 C.F.R. Part 1630, App. § 1630.2(o).

In this case, the court of appeals found that petitioner Curry County, Oregon was not entitled to summary judgment because there were disputed issues of material fact regarding (i) whether respondent Robert Dark had been discriminated against because of his disability and (ii) whether Curry County failed to provide Mr. Dark with a reasonable accommodation. The County's petition seeking review of those fact-bound issues should be denied.[1]

A. The Relevant Facts

Robert Dark has had epilepsy since he was sixteen years old. Pet. App. 2. He has successfully treated his disability with

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[1]The petitioners are Curry County, Oregon, the Curry County Road Department, and Dan Crumley, the Curry County Roadmaster. For convenience, except where the identity of an individual petitioner is independently significant, petitioners are referred to collectively as "the County."

medication, with the exception of an occasional seizure. *Id.* Mr. Dark usually has an aura before he has a seizure, but not every aura is followed by a seizure. *Id.* When he has an aura, about half of the time a seizure follows on the same day. *Id.*

From March 4, 1985, until the 2002 firing that gave rise to this suit, Mr. Dark had worked for the Curry County Road Department. *Id.* at 31. At the time he was fired, Mr. Dark held the position of Maintenance and Construction Worker III. *Id.* at 33. His job duties included operating trucks and other equipment, minor blasting, manual labor, maintaining equipment, and training lower-level employees to operate heavy equipment. *Id.* at 15-16, 33. Until the incident at issue in this case, Mr. Dark had a record of at least satisfactory job performance and had never had an on-the-job seizure. *Id.* at 3.

On the morning of January 15, 2002, Mr. Dark had an aura. *Id.* at 32. He decided to go to work because the County was "short-handed." *Id.* About midmorning, "as a safety precaution," Mr. Dark asked a man who was flagging to trade tasks with him and take over the roller. *Id.* While they were trading tasks and Mr. Dark was moving a small truck to the place where he would be flagging, he had a seizure. *Id.* The other employee helped bring the truck to "a safe halt." *Id.* at 3.

Dan Crumley, the Curry County Roadmaster, investigated the incident and required Mr. Dark to be examined by a neurologist, Dr. John Melson. *Id.* at 33-34. On March 18, 2002, after receiving Dr. Melson's written evaluation, Mr. Crumley placed Mr. Dark on administrative leave with pay and gave Mr. Dark notice of a hearing regarding his possible termination. *Id.* at 34. On April 1, 2002, Mr. Crumley held the hearing. *Id.*

On April 17, 2002, Mr. Crumley sent Mr. Dark a letter firing Mr. Dark because, in Mr. Crumley's view, Mr. Dark could not perform the essential duties of his job and his

continued employment posed a threat to the safety of others. *Id.* at 35. The effective date of Mr. Dark's termination was the date of the letter. *Id.* at 9. The letter noted Mr. Crumley's "concerns regarding [Mr. Dark's] medical condition" and "accept[ed] Dr. Melson's findings that because of the presence of poorly controlled idiopathic epilepsy, [Mr. Dark] should not work around moving machinery." *Id.* at 7. The letter to Mr. Dark concluded that, "I believe a 'seizure free' condition is critical for workers in your occupation . . . . [Y]our condition in my opinion prevents you from performing your duties . . . . " *Id.* at 7-8. The termination letter advised Mr. Dark to make arrangements to pick up his final paycheck and that he could appeal his firing to the Board of Curry County Commissioners ("the Board"). At the time he was fired, Mr. Dark had accumulated eighty-nine days of sick leave, *id.* at 22, and three weeks of vacation time. Ninth Circuit Excerpts of Record (ER)-65.

Mr. Dark sought reasonable accommodations in two ways. First, he asked Mr. Crumley whether he could use his medical leave and his accrued vacation time to control his condition through adjustment of his medications. *Id.* Second, he sought reassignment to other jobs that had become available with the County and that he could perform despite his disability. ER-65 - ER-66. The County did not respond to either request for an accommodation. *Id.*

Mr. Dark appealed his termination to the Board, which held a hearing on May 22, 2002. On June 26, 2002, the Board affirmed Mr. Crumley's termination. Pet. App. 35. The Board concluded that Mr. Dark had engaged in misconduct because he had operated a vehicle "knowing that he had a warning of a seizure which would render him unable to operate [it]." *Id.*; *see also* ER-21. In addition, the Board made findings of fact, including a finding, based on Dr. Melson's evaluation, that, in

light of his epilepsy, Mr. Dark should not work in high places or around moving machinery. ER-20.

B. Legal Proceedings Below

Mr. Dark sought relief from the federal Equal Employment Opportunity Commission (EEOC), claiming that the County had violated his rights under the ADA. The EEOC declined to sue on Mr. Dark's behalf, but, as required, gave him ninety days to file a private suit. Pet. App. 4.

Mr. Dark then sued in the District Court for the District of Oregon, claiming that the County had violated the ADA and Oregon state anti-discrimination law. The County moved for summary judgment. A magistrate judge recommended granting summary judgment in favor of the County, *id.* at 43, and the district court adopted that recommendation, *id.* at 27.

In a unanimous decision authored by Judge Diarmuid O'Scannlain, the Ninth Circuit reversed and remanded for a trial on the merits, finding that there were disputed issues of material fact that precluded judgment in favor of the County. The bases for the court of appeals' ruling and the County's challenge to that ruling are discussed below.

REASONS FOR DENYING THE WRIT

The petition presents three questions. The first question challenges the Ninth Circuit's holding that Mr. Dark raised genuine issues of material fact as to whether he was terminated by the County on the basis of his disability. The last two questions challenge the Ninth Circuit's holding that Mr. Dark raised genuine issues of material fact as to whether the County provided him a "reasonable accommodation" under the ADA. As we now explain, both rulings were correct and neither is worthy of this Court's review.

A. The Court of Appeals Correctly Held That There Are Disputed Issues Of Material Fact As To Whether Mr. Dark Was Subject To Discrimination Because Of His Disability.

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability . . . ." 42 U.S.C. § 12112(a). The County argues that Mr. Dark is not protected by the ADA because he was terminated for misconduct, not "because of" his disability. It is undisputed that Mr. Dark suffers from a "disability," that is, that his epilepsy is "a physical . . . impairment that substantially limits one or more of [his] major life activities." *Id.* § 12102(a). And it is undisputed that the reasons given by the County, when Mr. Crumley formally terminated Mr. Dark in April 2002, related solely to his disability. *See* ER-30 - ER-31. Nonetheless, the County argues that because the ostensible reason given by the Board of Curry County Commissioners, in affirming Mr. Dark's termination two months later, was misconduct – driving while at risk of a seizure – Mr. Dark's disability was not, as a matter of law, the reason for his discharge. Pet. 8-15. The County is wrong for each of three independent reasons given by the court of appeals.

First, the County is incorrect that the Board is the body that fired Mr. Dark. As the court of appeals explained, Pet. App. 8-9, the County, acting through Dan Crumley, terminated Mr. Dark on April 17, 2002. That date, as the County conceded at oral argument below, was the effective date of the discharge. Pet. App. 9; *see also* ER-32 (Crumley's termination letter stating that "you are hereby dismissed from County service," and advising Mr. Dark to arrange to get his "final paycheck"). The Board had no mandatory role in the firing. Mr. Dark's firing would have occurred without any Board involvement if he had not exercised his optional right of appeal, underscoring

that the firing was effectuated by the County through Mr. Crumley.

Because the County had already terminated Mr. Dark by the time the matter came before the Board, the principal case cited by the County as in conflict with the decision below is inapposite. In *Collins v. New York City Transit Authority*, 305 F.3d 113 (2d Cir. 2002), the plaintiff's "termination occurred . . . only *after* a decision" of an arbitration board, *id.* at 119 (emphasis added); *see id.* at 117 (same), which found that the plaintiff was discharged because he had assaulted his supervisor, not for a discriminatory reason. The other cases cited by the County are similarly irrelevant, as they concern the circumstances under which the discriminatory conduct of a subordinate who lacks decisionmaking authority can be attributed to someone who has such authority and exercises it to an employee's detriment. *See, e.g.*, *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc). Mr. Crumley did not act as a subordinate here. He was (and is) the County's "Roadmaster," who is the chief executive of the Curry County Road Department. *See* ER-30. He terminated Mr. Dark, and no one disputes that he had the authority to do so.

Second, even if the Board's June 2002 decision were viewed as the County's only legally relevant decision, Mr. Dark raised disputed issues of material fact as to whether the stated basis for the Board's decision – misconduct – was a pretext for disability-based discrimination. To be sure, in its "conclusions of law," the Board's stated rationale was misconduct. *See* ER-21. But the Board's decision also sets forth findings of fact concerning Mr. Dark's disability, and, in particular, Mr. Dark's medical evaluation *after* the incident, ER-20 (¶ 3), which would have been irrelevant if Mr. Dark's misconduct were the sole reason for his termination. Similarly, at the hearing before the

Board, the Commissioners extensively questioned both Mr. Dark and his doctor regarding Mr. Dark's disability, his drug regimen, and his ability to return to work despite his disability. *See* ER-123 - ER-128. That questioning raised a reasonable inference that Mr. Dark's conduct on the day of the incident was not the sole reason for the Board's decision.

Moreover, as Judge O'Scannlain noted, the summary judgment record is "replete" with other evidence that the real reason for the termination was Mr. Dark's disability, Pet. App. 12, and that the Board's subsequent finding of misconduct was pretextual. This evidence included (i) the County's decision to subject Mr. Dark to a medical evaluation, (ii) Mr. Crumley's summary judgment affidavit, sworn to more than two years *after* the firing, which continued to focus on Mr. Dark's future ability to perform his job in light of his disability, Supplemental Excerpts of Record (SER)-1 - SER-3; *see* Pet. App. 13, and (iii) the fact that other, non-disabled employees had engaged in similar on-the-job misconduct but had not been fired (or even disciplined). Pet. App. 14. Thus, even if the Board were considered the entity that fired Mr. Dark, the court of appeals correctly held that there were disputed issues of material fact as to whether the Board's decision was based, at least in part, on Mr. Dark's disability.

Finally, as the court of appeals explained, although a disabled employee's misconduct can be entirely distinct from his disability, "[w]ith a few exceptions," *id.* at 9, such as alcoholism, illegal drug use, and criminal acts, *see id.* at 9-10 & n.3 (citing 42 U.S.C. § 12114(c)(4)), "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." Pet. App. 9 (quoting *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001)). Because the County concedes, as it must, that the conduct that led to Mr. Dark's firing arose from his epilepsy,

the Board's decision was, as a matter of law, based on Mr. Dark's disability.

For all of these reasons, the court of appeals correctly held that the County was not entitled to summary judgment on the ground that it terminated Mr. Dark solely on the basis of misconduct. Thus, the Court should deny review on that question.

B. Review Should Be Denied On The Reasonable Accommodation Issue.

The court of appeals held, on two independent grounds, that Mr. Dark had raised issues of material fact on the question whether he had been reasonably accommodated by the County. It held, first, that Mr. Dark had presented a jury question on whether he should have been accommodated by reassignment to a vacant position that he could have performed despite his disability. *See* 42 U.S.C. § 12111(9)(B) ("'reasonable accommodation' may include . . . reassignment to a vacant position"). In his summary judgment affidavit, Mr. Dark identified a number of County positions that had become vacant and that, with one exception, he could perform despite his epilepsy. *See* Pet. App. 20 & n.6. The County argued that it was entitled to summary judgment because Mr. Dark's affidavit did not state that the jobs had been available at the time he was fired. *See id.* at 21. Relying on an EEOC interpretive guidance (discussed in more detail below), and case law from the Tenth Circuit, the court of appeals rejected the County's position and held that "in considering reassignment as a reasonable accommodation, an employer must consider not only those contemporaneously available positions but also those that will become available within a reasonable period." *Id.*

Second, the court of appeals held that there were genuine issues of material fact as to whether Mr. Dark could have been accommodated by allowing him to use his eighty-

nine days of accumulated sick leave to adjust his medications and thereafter continue in his prior position. *Id.* at 22-24. In so holding, the court relied on its own case law and the EEOC's interpretive guidance, which identifies use of accrued or unpaid leave as potential reasonable accommodations. *Id.* at 22.

Recognizing that each holding provides a separate basis to sustain the Ninth Circuit's ruling regarding the County's reasonable accommodation obligation, the County seeks review on both issues. Neither is worthy of review.

1. Reasonable Accommodation By Reassignment To A Vacant Position.

The County claims that there is a split in the circuits on the question whether, in seeking a reasonable accommodation on the basis of reassignment, an employee must show that a vacancy existed at the exact same time that he was terminated. As we now show, no such circuit split exists; in fact, in none of the cases cited by the County was the *timing* of a vacancy at issue.

The County relies principally on *Jackan v. New York State Department of Labor*, 205 F.3d 562 (2d Cir. 2000). *See* Pet. 21-22, 23. *Jackan* stated only that "in order to recover under the ADA . . . for a failure to reasonably accommodate by transfer, a plaintiff bears the burden of establishing that a vacancy existed into which he or she might have been transferred." 205 F.3d at 566. The Second Circuit held that the plaintiff failed to meet this burden because he had not identified a specific vacant job to which he could be reassigned, and had said only that he "believed" a position he had previously held was vacant. *Id.* at 564. (Here, by contrast, the court of appeals found that Mr. Dark met his summary judgment burden by listing specific vacant positions. Pet. App. 20 & n.6.) The issue of *when* a vacancy must exist was simply not at issue in *Jackan*. Indeed, in *Jackan*, all of the interactions between the

employee and the employer as to whether there was a vacancy occurred after the employee returned from an extended medical leave and was seeking re-employment with his employer. 205 F.3d at 564. Thus, neither the parties nor the Second Circuit appears to have contemplated that reasonable accommodation via reassignment extends only to vacancies that exist at the precise moment that the loss of employment occurs.

The other cases cited by the County are similarly inapposite. The Seventh Circuit held in *Pond v. Michelin North America, Inc.*, 183 F.3d 592, 595-96 (7th Cir. 1999), that the obligation of reasonable accommodation does not require an employer to displace, or "bump," a current employee to make room for a disabled employee seeking reassignment. The only positions identified by the employee seeking accommodation were ones that were filled, and the case simply did not concern the timing of vacancies. Likewise, *Ozlowski v. Henderson*, 237 F.3d 837 (7th Cir. 2001), did not concern the timing of a vacancy. There, the plaintiff lost the case because the positions he identified for potential reassignment either were not vacant or were positions for which he was not qualified or that he could not physically perform. *Id.* at 840-41.[2] Indeed, the court's reference to "position[s] vacant during the time period in which Ozlowski requested a reasonable accommodation," *id.* at 841, suggests that the availability of a vacancy need not be assessed at one point in time. Similarly, because the court considered deposition evidence regarding whether vacancies existed during the litigation, *id.* at 840 n.1, 841 n.2, the strong implication was that an ADA plaintiff seeking a reassignment would not be required to identify a vacancy that existed when the plaintiff's discharge took place.

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[2]As in *Pond*, the court in *Ozlowski* noted that the right to reasonable accommodation does not extend to ousting a current employee to make room for a disabled employee. 237 F.3d at 841 n.2.

Finally, in *Mengine v. Runyon*, 114 F.3d 415 (3d Cir. 1997), the Third Circuit held only that the employer was not required to accommodate the disabled plaintiff's need for light-duty work, and his desire for permanent employment, by transforming a temporary position into a permanent position. *Id.* at 418-19. The case did not concern the timing of a vacancy, and, again, because the court relied on deposition testimony taken more than two years after the plaintiff's initial loss of employment occurred, the implication of the court's ruling was that a vacancy need not exist at the time of discharge. *Id.* at 417.[3]

Because there is no disagreement among the courts of appeals on the vacancy issue, review should be denied on that issue. Moreover, two additional points underscore that the court of appeals reached the correct result.

First, the petition ignores an EEOC interpretive guidance, upon which the Ninth Circuit relied, that expressly rejects the position taken by the County. Shortly after the ADA's enactment, the EEOC proposed regulations and an

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[3]Two other cases cited by the County are even further afield. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997), did not involve a request for reassignment to another position, whether vacant or not, let alone the timing of a vacancy. And, in *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc), the D.C. Circuit held that the plaintiff's collective bargaining agreement did not necessarily bar the plaintiff's reassignment to accommodate his disability and remanded for a determination of whether such a reassignment was an appropriate accommodation under the ADA. *Id.* at 1302-03. In so holding, the court noted that, on remand, the plaintiff would have to show that there existed some vacant position to which he could have been reassigned, and that the employer had a corresponding duty to help the plaintiff find such vacancies "since plaintiffs can hardly be expected to hire detectives to look for vacancies." *Id.* at 1304 n.27. Again, the timing of vacancies was not at issue.

interpretive guidance to implement the statute's employment provisions. 56 Fed. Reg. 8578 (Feb. 28, 1991). Consistent with the statutory definition of "reasonable accommodation," *see* 42 U.S.C. § 12111(9)(B), the EEOC listed "reassignment to a vacant position" as a potential accommodation. 56 Fed. Reg. at 8588 (proposed regulation), 8596 (proposed interpretive guidance). After receiving comments from the public, the EEOC finalized the regulation without change. 56 Fed. Reg. 35726 (July 26, 1991) (codified at 29 C.F.R. § 1630.2(o)(2)(ii) (2006)). However, because "commenters asked the Commission to clarify how long an employer must wait for a vacancy to arise when considering reassignment," *id.* at 35730, in its interpretive guidance, the agency "amended the discussion of reassignment to refer to reassignment to a position that is vacant 'within a reasonable amount of time . . . in light of the totality of the circumstances.'" *Id.*; *see also id.* at 35744 (codified at 29 C.F.R. Part 1630, App. § 1630.2(o)); Pet. App. 21 (quoting guidance).

The Ninth Circuit's ruling is fully consistent with the EEOC's interpretive guidance. Under the guidance, the trier of fact will decide whether Mr. Dark identified a vacant position for which he was qualified "within a reasonable amount of time," taking into account "the totality of the circumstances." In general, such circumstances might include whether the employer made efforts to inform the employee of vacancies, the needs of the employer at the time the vacancy or vacancies arose, and the employee's willingness to accept leave without pay or to use accumulated leave during any period in which no vacancies exist. The latter points seem particularly relevant here, because Mr. Dark had accumulated a significant amount of leave, *see* Pet. App. 22; ER-65 (Dark Aff. ¶¶ 6-7) (eighty-nine days of sick leave; three weeks of vacation time), and had offered to "take time off without pay as long as [he] was working towards returning to work in some capacity with the

County." ER-65 - ER-66. In any event, the point here is not to demonstrate that Mr. Dark has the better of the argument – although we believe he does – but simply to show how the EEOC's "totality of the circumstances" approach would operate in practice.[4]

Second, as the Ninth Circuit explained, Pet. App. 18, unless an accommodation was impossible, the County had a responsibility to engage in an interactive process with Mr. Dark to try to arrive at a reasonable accommodation. *See* 29 C.F.R. § 1630.2(o) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of an accommodation."). Even assuming that the employer is not required to initiate the interactive process, "[o]nce a qualified individual with a disability has requested provision of a reasonable

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[4]With one exception, none of the cases cited by the County even cites, let alone rejects, the EEOC's "totality of the circumstances" approach, further demonstrating that those cases do not address the timing issue. The one exception is *Boykin v. ATC/VanCom of Colorado, L.P.*, 247 F.3d 1061 (10th Cir. 2001), which the County apparently believes supports its position. *See* Pet. 22. But that case was relied on by the Ninth Circuit, Pet. App. 21, precisely because it *embraced* the EEOC's guidance and held that "exactly how long an employer should retain an employee on indefinite or medical leave pending the availability of a position that would accommodate the employee's disability . . . must be made on a case-by-case basis." *Boykin*, 247 F.3d at 1065. In *Boykin*, the circumstances included that the plaintiff declined one job vacancy and that the availability of future vacancies was in doubt because the employer was in negotiations with its contractor. *See id.* at 1062, 1065. The result in *Boykin* – that the employer was not required to retain the plaintiff for six months until a desired vacancy occurred – is consistent with the Ninth Circuit's holding that Mr. Dark is entitled to a trial under the "totality of the circumstances" rule. We reiterate that here, unlike in *Boykin*, Mr. Dark was not allowed to use any of his accrued leave, despite his request to do so.

accommodation, the employer *must* make a reasonable effort to determine the appropriate accommodation." 29 C.F.R. Part 1630, App. § 1630.9 ("Process of Determining the Appropriate Reasonable Accommodation") (emphasis added). As the EEOC has explained, "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer" and the employee. *Id.*

The ADA's requirement that an employer and employee engage in an interactive process conflicts with the notion that the existence of a job vacancy must, as a matter of law, be determined at only one point in time. If the employer is willing to engage in the required interactive process, the parties should be cognizant of vacant positions that the employee is capable of filling, particularly where, as here, the employee has requested reassignment as a reasonable accommodation. The interactive process necessarily will extend over a period of time. Indeed, as discussed above (at 9-11), in some of the very cases cited by the County, it appears that the availability of vacancies was considered over a significant time period, and that is precisely because the employers in those cases embraced, rather than eschewed, the interactive process. *See, e.g., Ozlowski*, 237 F.3d at 838-40; *Mengine*, 114 F.3d at 419-21; *see also Jackan*, 205 F.3d at 568 n.4; *Stewart*, 117 F.3d at 1283, 1286-87.[5]

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[5]As some of the cases relied on by the County have noted, the employer's participation in the interactive process is particularly important where the employee is seeking reassignment, because the employer is in a better position than the employee to identify vacant positions. *See, e.g., Mengine*, 114 F.3d at 420 ("[W]e do not suggest that the employee has the burden of identifying an open position before the employer's duty of accommodation is triggered. In many cases, an employee will not have the ability or resources to identify a vacant position absent participation by the employer."); *Aka*, 156 F.3d at 1304 n.27.

2. Reasonable Accommodation By Granting Medical Leave.

Mr. Dark also requested a reasonable accommodation from the County to allow him to use his accrued medical leave to adjust his medications and stabilize his condition, and the court of appeals held that there were disputed issues of material fact on that issue. The County does not argue that the court of appeals established a rule of law in conflict with decisions of other courts of appeals (or with any court for that matter). Nor does it (or could it) argue that granting medical leave is an impermissible "reasonable accommodation" under the ADA. *See* 29 C.F.R. Part 1630, App. § 1630.2(o). Instead, the County simply disagrees with the court of appeals' determination that Mr. Dark presented facts precluding summary judgment. *See* Pet. 19 (complaining that the court of appeals "ignored th[e] evidence," and that the County "demonstrated without dispute that the requested medical leave would not have enabled the plaintiff to perform the essential functions of his job"). The fundamental answer to the County's complaint is simple: The question whether the court of appeals erred in evaluating the facts under an agreed legal standard is not the type of question that this Court entertains, absent extraordinary circumstances. *See* S. Ct. Rule 10 (review rarely granted where claimed error is the misapplication of a properly stated rule of law).

In any event, the court of appeals did not err in finding that there were disputed issues of material fact. For starters, it is important to reiterate, as the court of appeals noted, *see* Pet. App. 22, that the County did not engage in an interactive process, but ignored Mr. Dark's request for medical leave. *See* ER-65 (Dark Aff. ¶¶ 6-7); *see also* ER-28 - ER-29 (termination letter). To be sure, the County relied on the evaluation of Dr. Melson, who was hired by the County to examine Mr. Dark about two months after the incident and concluded that Mr. Dark should not return to his prior job. ER-26. The record,

however, contains substantial evidence placing Dr. Melson's conclusion in doubt. First, Mr. Dark maintains that Dr. Melson's evaluation was improperly influenced by a "confidential" letter sent by the County's lawyer to Dr. Melson prior to the medical examination, which presented a one-sided account of Mr. Dark's medical condition and other "circumstantial evidence which may be of assistance to you in making your examination." ER-114. And, yet, even Dr. Melson concluded that Mr. Dark might "return to his usual duty" if "several factors," all of which concerned "medication adjustments," "have been met." ER-26. Moreover, as the court of appeals pointed out, the requested accommodation seemed plausible in Mr. Dark's case, because, in his many years with the County, Mr. Dark experienced only one on-the-job incident related to his epilepsy. Pet. App. 24 n.6. And, finally, contrary to Dr. Melson's evaluation, Mr. Dark's own physicians concluded that, in light of adjustments in his medications shortly after the incident, Mr. Dark was, in fact, able to return to work. ER-123 - ER-127.[6]

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For all of these reasons, review should be denied on the reasonable accommodation issues.

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[6]The County points to evidence that Mr. Dark had a seizure while working for another employer nearly a year and a half after the incident that led to his firing. That evidence is irrelevant to whether, in the aftermath of the incident, the accommodations requested by Mr. Dark were reasonable and should have been considered by the County. In any event, even if this evidence were relevant, it would not negate Mr. Dark's contrary evidence and thus would not undermine the court of appeals' holding that there existed disputed issues of material fact on the reasonable accommodation issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MANUEL C. HERNANDEZ
DAVID M. HERNANDEZ
HERNANDEZ & ASSOCIATES
1212 Alabama Suite 25A
PO Box 979
Bandon, OR 97411
(541) 347-2911

BRIAN WOLFMAN
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondent Robert Dark

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