No. 14-1324

In the Supreme Court of the United States

ELLA WARD, PETITIONER

v.

ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner could not maintain claims for failure to accommodate and constructive discharge, in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, because the U.S. Department of Veterans Affairs engaged in a good-faith interactive process with petitioner following her request for an accommodation and petitioner abandoned the interactive process by submitting her resignation instead of responding to the Department's reasonable request for additional information.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulations and rule: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-37a) is reported at 762 F.3d 24. The opinion of the district court (Pet. App. 40a-62a) is not published in the *Federal Supplement*, but is available at 2012 WL 5839711.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5a-6a) was entered on August 12, 2014. A petition for rehearing was denied on December 3, 2014 (Pet. App. 1a-4a). On February 19, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 4, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act or Act), 29 U.S.C. 701 *et seq.*, provides that federal agencies shall not discriminate against an "otherwise qualified individual with a disability * * * solely by reason of her or his disability." 29 U.S.C. 794(a). For claims of employment discrimination, the Act incorporates the standards applied under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C 12101 *et seq.* See 29 U.S.C. 794(d); 29 C.F.R. 1614.203(b). Under the ADA, a "qualified individual" is "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). A "reasonable accommodation" may include "job restructuring, part-time or modified work schedules, * * * and other similar accommodations for individuals with disabilities." 42 U.S.C. 12111(9)(B); see 29 C.F.R. 1630.2(*o*)(1)(ii) (defining "reasonable accommodation" to include, *inter alia*, "[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 an individual with a disability who is qualified to perform the essential functions of that position") (emphasis omitted).

2. Petitioner worked from 2001 to 2007 as an attorney advisor for the Board of Veterans Appeals, a part of the U.S. Department of Veterans Affairs (Department). Pet. App. 8a, 40a-41a. In that role, petitioner assisted judges in deciding appeals filed by veterans seeking disability benefits. *Id.* at 10a. Petitioner held "the quintessential desk job," which included reading cases files, reviewing evidence, and

preparing draft opinions. *Ibid.*; see 1 C.A. App. A73. Petitioner "typically worked eight- to ten-hour days and, like her colleagues, was expected to produce three 'credits' per week—each credit corresponding to the preparation of roughly one case." Pet. App. 10a.

In 2005, petitioner was diagnosed with chronic lymphedema of the lower right extremity. Pet. App. 10a. The condition causes petitioner's right foot and leg to swell with fluid and substantially limits her ability to sit, stand, or carry heavy objects for long periods of time. *Ibid.*; 1 C.A. App. A195. Following her diagnosis, petitioner "testified that she struggled at times to meet the three-credit per week expectation" for productivity. Pet. App. 11a; see 1 C.A. App. A161 (narrative comment from petitioner's March 2006 performance review observing that petitioner "had some difficulty in keeping abreast of the week to week * * * goals"). To help manage her condition, petitioner periodically took leave time pursuant to the Family and Medical Leave Act of 1993, 5 U.S.C. 6381 *et seq.*, and she converted to part-time status for several months in 2006 so that she could receive treatments for her condition at a hospital. Pet. App. 11a. Petitioner's final performance review, dated April 5, 2007, rated her as "[f]ully [s]uccessful or better," *ibid.* (citation omitted; brackets in original), although "[m]uch of the review form [was] blank," *id.* at 43a.

In March or April 2007, petitioner requested that she be allowed to work from home as an accommodation for her lymphedema. Pet. App. 11a, 43a. Petitioner supported that request with a letter from her cardiothoracic and vascular surgeon. *Id.* at 11a. The letter stated that petitioner's condition "requires routine daily care at home with a compression ma-

chine, drainage, bandaging and exercises." 1 C.A. App. A205. The letter concluded by stating that petitioner would "benefit from a schedule that allows her to work from home" with "[t]he maximum number of daily work hours [to] be determined as the condition stabilizes." *Ibid.*

On May 3, 2007, petitioner met with her supervisor to discuss her accommodation request. Pet. App. 11a. That same day, petitioner's supervisor sent her a letter that acknowledged that petitioner was "requesting an arrangement to work at home" but stated that "additional medical information [wa]s needed to process [her] request." *Id.* at 12a (quoting 1 C.A. App. A243). The letter identified information that the Department "needed so that it could evaluate [petitioner's] 'ability to perform the duties of [her] position' and determine 'what specific accommodations would be required.'" *Ibid.* (second set of brackets in original) (quoting 1 C.A. App. A243).

In late May 2007, petitioner provided a letter from her internist, which described petitioner's condition and explained that it "substantially limits prolonged sitting, standing, going up and down stairs, or carrying moderately heavy case files, which [petitioner] has to do in order to perform her job duties." 1 C.A. App. A195; see Pet. App. 12a. The letter stated that petitioner "needs medical accommodations to work at home," because she "should sit for only short intervals of time as tolerated, and be able to apply treatment routines whenever needed during the work-day." *Ibid.* The letter further noted "that the treatment routines 'can take from 1 to 3 hours at a time' and that [petitioner's] 'disability also affects travel to and from work, but she should be able to commute to work once

a week as required [to retrieve new case files].'" Pet. App. 12a (second set of brackets in original) (quoting 1 C.A. App. A195).

On May 25, 2007 and May 31, 2007, petitioner met with her newly appointed supervisor to discuss her requested accommodation. During those meetings, the supervisor expressed concern regarding petitioner's ability to maintain a full-time schedule given the length of her daily medical treatments. Pet. App. 12a-13a. Petitioner's supervisor sent a follow-up memo on June 5, 2007, which stated that the Department would "strive to provide [petitioner] with a reasonable accommodation," *id.* at 13a (quoting 1 C.A. App. A246), but noted that the medical documentation petitioner had provided raised questions regarding whether she could carry case files to and from work and whether she would be able to complete a full-time schedule, "factoring in time for treatment," *ibid.* (citing 1 C.A. App. A246-A247). The letter requested that petitioner provide additional medical information to "demonstrate[] that [her] medical condition c[ould] be reasonably accommodated through a [work-at-home] arrangement." 1 C.A. App. A247. "The memo did not state any decision—one way or the other—on [petitioner's] accommodation request." Pet. App. 14a.

Petitioner "did not respond" to the request for additional information and instead submitted a letter of resignation on June 11, 2007. Pet. App. 14a. After asking the Department to defer action on her resignation, petitioner sent a letter on July 30, 2007, requesting that her resignation be processed immediately. *Ibid.* The July 30 letter asserted that petitioner "had no recourse but to resign" because the Department

had "den[ied] a reasonable accommodation for [her] chronic disability." *Ibid.* (quoting 1 C.A. App. A258).

On August 8, 2007, the Department sent petitioner a letter disputing her assertion that her request for an accommodation had been denied. Pet. App. 14a. Although petitioner had failed to submit additional medical information, the Department offered to "allow[] [her] to try work-from-home on a full-time basis." *Ibid.* (quoting 1 C.A. App. A261). Petitioner did not respond to that offer. *Ibid.*

3. Petitioner brought this civil action, alleging that the Department failed to accommodate her disability and constructively discharged her, in violation of the Rehabilitation Act. Pet. App. 8a.

a. The district court granted summary judgment in favor of the Department. Pet. App. 40a-62a.

The district court identified three independent grounds entitling the Department to summary judgment on petitioner's failure-to-accommodate claim. First, the court concluded that petitioner had not been denied an accommodation because the Department in good faith engaged in an interactive process to determine a reasonable accommodation and petitioner "walked away from the interactive process" instead of complying with the Department's reasonable request for additional information. Pet. App. 52a; see *id.* at 52a-56a. Second, the court held that no reasonable juror could find a failure to accommodate because the Department's August 8, 2007 letter "offered [petitioner] the exact accommodation she sought." *Id.* at 56a; see *id.* at 56a-58a. Third, the court found that petitioner had not demonstrated that "working from home full time would be a reasonable accommodation" because the record indicated that, even with such an

accommodation, petitioner would be unable to "perform the essential functions of her job" by completing a full-time case load. *Id.* at 59a; see *id.* at 58a-60a.

The district court further held that the Department was entitled to summary judgment on petitioner's constructive-discharge claim because "nothing in the record * * * support[s] a claim of intentional discrimination by the Department" and petitioner had "fail[ed] to establish that a reasonable person in her position would have felt she had no option but to quit." Pet. App. 61a.

b. The court of appeals affirmed. Pet. App. 7a-26a. As the court explained, to prevail on a failure-to-accommodate claim, an individual must show that a request for a reasonable accommodation was denied. *Id.* at 16a. The court concluded that "[n]o reasonable jury could find that [petitioner's] accommodation request was denied in light of the [Department's] continuing good-faith dialogue with [petitioner] to determine an appropriation accommodation, which dialogue was cut short by [petitioner's] sudden resignation." *Ibid.*[1]

The court of appeals explained that, "[t]o determine the appropriate reasonable accommodation, it may be necessary for the" parties to engage in an "interactive process" that "identif[ies] the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." Pet. App. 17a (quoting 29 C.F.R.

[1] Because the court of appeals concluded that no reasonable jury could find that petitioner was denied an accommodation, it declined to consider the alternative grounds supporting the district court's grant of summary judgment in favor of the Department. Pet. App. 16a, 20a n.4.

1630.2(*o*)(3)). As part of that process, the court recognized that an employer may reasonably request "information about the nature of the individual's disability" in order to determine an appropriate accommodation. *Ibid.* "The process contemplated is 'a flexible give-and-take' between employer and employee," and "'neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability.'" *Id.* at 18a (quoting *EEOC* v. *Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005)).

Applying those principles to the facts of this case, the court of appeals found that "the interactive process broke down before the [Department] decided on [petitioner's] request and no reasonable juror could have found that the [Department], rather than [petitioner], was responsible for the breakdown." Pet. App. 19a. The court explained that the two letters petitioner provided from her physicians "cast doubt on [her] capacity to continue working full-time" by stating that "'[t]he maximum number of daily work hours will be determined as the condition stabilizes'" and "by noting that she could not sit for long periods and that her treatments take one to three hours at a time." *Ibid.* (second set of brackets in original) (quoting 1 C.A. App. A205). The Department therefore reasonably requested additional information to determine "the 'precise limitations resulting from [petitioner's] disability' so that it could determine 'potential reasonable accommodations that could overcome those limitations.'" *Id.* at 25a n.6 (quoting 29 C.F.R. 1630.2(*o*)(3)). Because petitioner "abandoned the interactive process before the [Department] had the information it needed to determine the appropriate accommodation," the court concluded that "[n]o reason-

able juror could have found that the [Department] denied [petitioner's] request for an accommodation." *Id.* at 23a.

The court of appeals recognized that an employee may be able to establish a failure to accommodate if her employer "participated in the [interactive] process in bad faith," but it observed that the Department's interactions with petitioner "bore all the hallmarks of good faith." Pet. App. 19a, 23a. Specifically, petitioner's "supervisors promptly responded to her request for an accommodation, met with her on several occasions to discuss the request and sought more information from her physician to help them determine an appropriate accommodation." *Id.* at 23a. The court rejected petitioner's suggestion that the Department "exhibited bad faith by not immediately granting" a work-at-home accommodation "without further inquiry." *Id.* at 24a n.5. As the court noted, "in those instances where the [Department] granted other employees' work-from-home requests due to disabilities, adequate medical documentation had been provided." *Ibid.* The court observed that "[h]ad the process been allowed to play out, the [Department] may well have settled on a full-time work-from-home accommodation" or "it may instead have thought of other reasonable accommodations." *Ibid.* But petitioner could not "cut the process short and then blame her employer for not immediately granting her specific request." *Ibid.*

Having concluded "that the [Department] did not deny [petitioner's] accommodation request but rather responded promptly and in good faith," the court of appeals held that petitioner's constructive-discharge claim necessarily also failed. Pet. App. 26a.

Judge Millett dissented. Pet. App. 27a-37a. In her view, the Department did not need additional information concerning petitioner's medical condition to grant her request for an accommodation, and so "a jury could find the accommodation process was needlessly *prolonged*." *Id.* at 29a. Because she concluded that "a jury could find that" the Department "broke down the [interactive] process," she did not believe the case should be resolved on summary judgment. *Id.* at 36a.

ARGUMENT

The decision of the court of appeals is correct, and the panel's factbound application of settled law does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. To prevail on a failure-to-accommodate claim, an employee must show that (1) she is a qualified individual with a disability; (2) her employer had notice of her disability; and (3) her employer denied her request for a reasonable accommodation. *Stewart* v. *St. Elizabeths Hosp.*, 589 F.3d 1305, 1307-1308 (D.C. Cir. 2010). In this case, the court of appeals correctly concluded that no reasonable juror could find that the Department denied petitioner's request for a reasonable accommodation. Accordingly, "[t]he district court correctly awarded summary judgment to the [Department] because [petitioner] 'fail[ed] to make a showing sufficient to establish the existence of an element essential to [her] case.'" Pet. App. 23a-25a (fourth and fifth sets of brackets in original) (quoting *Celotex Corp* v. *Catrett*, 477 U.S. 317, 322 (1986)).

As the court of appeals explained, "to establish that her request [for an accommodation] was 'denied,'"

petitioner was required to "show either that the [Department] in fact ended the interactive process or that it participated in the process in bad faith." Pet. App. 18a-19a. The summary judgment record disclosed that petitioner could not make either showing. At the time petitioner resigned, the Department had not ended the interactive process, but instead had recently requested "information it needed to determine the appropriate accommodation." *Id.* at 23a. Rather than respond to that request, petitioner "walked away." *Id.* at 20a (citation omitted). Thus, the court correctly found that "the interactive process broke down before the [Department] decided on [petitioner's] request and no reasonable juror could have found that the [Department], rather than [petitioner], was responsible for the breakdown." *Id.* at 19a.

The court of appeals further correctly concluded that no juror could find that the Department participated in the interactive process in bad faith. As the court explained, petitioner's "supervisors promptly responded to her request for an accommodation, met with her on several occasions to discuss the request and sought more information from her physician to help them determine an appropriate accommodation." Pet. App. 23a; see *Taylor* v. *Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999) (observing that an employer demonstrates its good faith by "meet[ing] with the employee who requests an accommodation, request[ing] information about the condition and what limitations the employee has, ask[ing] the employee what he or she specifically wants, show[ing] some sign of having considered [the] employee's request, and offer[ing] and discuss[ing] available alternatives when the request is too burdensome"). The court found that

the information the Department requested "was unquestionably relevant in determining a reasonable accommodation" because the medical information petitioner supplied "cast doubt on [her] capacity to continue working full-time," even if she was working from home. Pet. App. 19a, 25a n.6; see 42 U.S.C. 12112(d)(4)(B) (providing that an employer "may make inquiries into the ability of an employee to perform job-related functions"). "By asking these questions, the [Department] sought—as [Equal Employment Opportunity Commission] regulations instruct—to know the 'precise limitations resulting from the disability' so that it could determine 'potential reasonable accommodations that could overcome those limitations.'" Pet. App. 25a n.6 (quoting 29 C.F.R. 1630.2(*o*)(3)). Thus, "[n]o reasonable jury could find that [petitioner's] accommodation request was denied in light of the [Department's] continuing good-faith dialogue with [petitioner] to determine an appropriate accommodation, which dialogue was cut short by [petitioner's] sudden resignation." *Id.* at 16a; see *Templeton* v. *Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) (holding that "the employee's failure to provide medical information necessary to the interactive process precludes her from claiming that the employer violated the ADA by failing to provide reasonable accommodation"); *Beck* v. *University of Wis. Bd. of Regents*, 75 F.3d 1130, 1136 (7th Cir. 1996) ("Where the missing information is of the type that can only be provided by one of the parties, failure to provide the information may be the cause of the

breakdown and the party withholding the information may be found to have obstructed the process.").[2]

Petitioner raises several factbound challenges to the court of appeals' analysis, but those claims do not warrant this Court's review because their resolution turns on the application of settled law to the facts of petitioner's case. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."); see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (observing that the Court "do[es] not grant a certiorari to review evidence and discuss specific facts.").

In any event, petitioner's arguments are unavailing. Petitioner contends that the Department admitted it denied her request for an accommodation in its answer to her complaint, which acknowledged that at the May 31, 2007 meeting petitioner's "request to work at home on a full-time basis was initially denied." Pet. 22 (citation and internal quotation marks omitted); see 1 C.A. App. A20. But as the court of appeals observed, the Department's June 5, 2007 follow-up memo "made clear that, whatever was said at the meeting, [petitioner's] accommodation request was

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[2] As the court of appeals observed, petitioner likewise could not maintain her constructive-discharge claim because the Department's good-faith participation in the interactive process necessarily precluded a finding that the Department discriminated or retaliated against her. Pet. App. 25a-26a. Petitioner does not meaningfully challenge that reasoning or suggest that her constructive-discharge claim should survive summary judgment even if her failure-to-accommodate claim does not. Pet. 28 (arguing that the constructive-discharge claim was dismissed "for the same flawed reasons" as the failure-to-accommodate claim) (citation omitted).

still under consideration." Pet. App. 20a n.3; see *id.* at 19a n.3. Petitioner's argument "ignore[s] the word 'initially' and ignore[s] the interactive process that took place." *Id.* at 57a. The district court accordingly concluded that "[u]nder no fair reading of the record can it be said * * * that the Department terminated the interactive process on May 31, 2007." *Ibid.*

Petitioner further contends (Pet. 12, 21-22) that the Department participated in the interactive process in bad faith. Petitioner argues (Pet. 8-15, 18-22) that the information sought by the Department was not relevant to her requested accommodation and that the court of appeals erred in finding that the record evidence created doubt about her ability to work a full-time schedule. But as the court explained, the letters petitioner submitted from her physicians stated that her medical "treatments take one to three hours at a time" and that "[t]he maximum number of daily work hours will be determined as the condition stabilizes." Pet. App. 19a (citation omitted; brackets in original). Because those letters "cast doubt on [petitioner's] capacity to continue working full-time" even if she was working from home, the Department reasonably requested additional information to determine whether the work-at-home accommodation would enable her to "overcome" the "precise limitations resulting from the disability." *Id.* at 19a, 25a n.6 (quoting 29 C.F.R. 1630.2(*o*)(3)). Because the Department was obligated to determine whether petitioner would be able to fulfill her job responsibilities as part of its evaluation of her accommodation request, the information the Department sought concerning petitioner's medical condition was "unquestionably relevant in determining a reasonable accommodation." *Id.* at 25a n.6; see

29 C.F.R. 1630.2(*o*)(1)(ii) (defining a "reasonable accommodation" as one "that enable[s] an individual with a disability who is qualified to perform the essential functions of that position") (emphasis omitted). There was accordingly no error in the court's conclusion that no reasonable juror could find that the Department engaged in the interactive process in bad faith.[3]

2. Petitioner contends (Pet. 16-17) that the court of appeals' decision in this case conflicts with this Court's opinion in *US Airways, Inc.* v. *Barnett*, 535 U.S. 391 (2002). In *Barnett*, an employer denied an employee's request for an accommodation and the Court considered what burden of proof governs the determination that an accommodation was reasonable and would not have constituted an undue hardship. *Id.* at 394-395, 401-402. *Barnett* is not applicable here, however, because petitioner's request for an accommodation was not denied. Pet. App. 23a. Because the

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[3] Petitioner suggests (Pet. 15) that the Department's concern about her ability to complete a full-time workload could have been addressed with a "modified work schedule." But that argument does not demonstrate that the Department acted in bad faith by raising its concerns; instead, it shows that petitioner may have been able to satisfy those concerns if she had continued to engage in the interactive process rather than abruptly resigning.

Petitioner also notes (Pet. 12) that the Department had an existing work-at-home program. But eligibility for placement in that program was made on a case-by-case basis, and the Department had previously requested medical documentation before granting other employees' work-from-home requests due to disability. Pet. App. 23a n.5. Thus, the court of appeals correctly found that the existence of that policy did not show that the Department "exhibited bad faith by not immediately granting [petitioner] that accommodation without further inquiry." *Id.* at 24a n.5.

court of appeals correctly determined that "[n]o reasonable juror could have found that the [Department] denied [petitioner's] request for an accommodation * * * because [petitioner] abandoned the interactive process before the [Department] had the information it needed to determine the appropriate accommodation," this case does not implicate the burden of proof announced in *Barnett*. *Ibid.*[4]

3. Petitioner argues (Pet. 22-27) that this Court's review is warranted because there is an alleged disagreement among the courts of appeals concerning whether employers are required to engage in an interactive process before denying an accommodation. But it is undisputed that the Department *did* engage in an interactive process here; thus, this case does not raise any question concerning "whether an interactive process is mandatory." Pet. 22. Petitioner does not attempt to identify a disagreement regarding the test for determining whether an employer engaged in an interactive process in good faith. Nor does she identi-

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[4] Petitioner is similarly mistaken in contending (Pet. 18-22) that "the definition of a 'reasonable accommodation' governs the outcome of this case." Pet. 18 (capitalization altered; emphasis omitted). It is irrelevant whether petitioner's requested accommodation ultimately would have been reasonable because she resigned before the Department had the information it needed to evaluate her proposed accommodation. "Had the process been allowed to play out, the [Department] may well have settled on a full-time work-from-home accommodation" or "may instead have thought of other reasonable accommodations," but petitioner "cut the process short." Pet. App. 24a n.5. Thus, as the court of appeals explained, petitioner "is the author of her misfortune—she and the [Department] parted ways not because the [Department] discriminated or retaliated against her based on her disability but because she acted precipitately." *Id.* at 25a.

fy any circuit conflict concerning the consequences that follow when an employee causes that process to break down by resigning rather than responding to a reasonable request for information. This case therefore does not implicate any disagreement among the courts of appeals that warrants this Court's review.

Moreover, petitioner has not identified a genuine disagreement among the courts of appeals regarding whether an interactive process is mandatory. Petitioner observes (Pet. 22-24) that some courts have held that an employer may be liable if it could have identified a reasonable accommodation but failed to do so because it did not engage in good faith in an interactive process. See *Barnett* v. *U.S. Air, Inc.*, 228 F.3d 1105, 1115 (9th Cir. 2000) (en banc), vacated, 535 U.S. 391 (2002) (observing that liability can "ensue[] for failure to engage in the interactive process when a reasonable accommodation would otherwise have been possible"). Petitioner also notes (Pet. 23) that courts have sometimes held that an employer cannot be liable for failing to engage in an interactive process when no reasonable accommodation would have been available. See *Willis* v. *Conopco, Inc.*, 108 F.3d 282, 284-285 (11th Cir. 1997) (per curiam) (observing that "where a plaintiff cannot demonstrate 'reasonable accommodation,' the employer's lack of investigation into reasonable accommodation is unimportant") (citation omitted); *Jacques* v. *Clean-Up Grp., Inc.*, 96 F.3d 506, 512-515 (1st Cir. 1996) (refusing to overturn jury verdict in favor of employer when employer did not engage in an interactive process before denying an unreasonable request for an accommodation). But petitioner identifies no court that has premised liability on an employer's failure to engage in an interactive process *even*

though no reasonable accommodation existed. See *McBride* v. *BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 100-101 (2d Cir. 2009) (noting that every court of appeals "to have considered the issue has concluded that failure to engage in an interactive process does not form the basis of an ADA claim in the absence of evidence that accommodation was possible").

In short, petitioner does not identify an actual conflict among the courts of appeals, and this case would not in any event implicate any such conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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