No. 21-647

In The
Supreme Court of the United States

JANET PERDUE,
Petitioner,

v.

SANOFI-AVENTIS U.S., LLC,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should this Court review the holding by the Fourth Circuit that a part-time job-share position that requires managerial approval to create is not a reasonable accommodation in the ordinary run of cases because the ADA does not require companies to create new positions to accommodate their employees with disabilities?

DISCLOSURE STATEMENT

sanofi-aventis U.S. LLC is an indirect wholly-owned subsidiary of Sanofi S.A. Sanofi S.A. is a publicly traded company on the New York Stock Exchange under the ticker symbol SNY. No parent corporation or publicly held corporation owns 10% or more of Sanofi S.A.'s stock.

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INTRODUCTION

Petitioner Janet Perdue's ("Perdue") characterization of the questions presented does not accurately describe the question presented or the unanimous decision of the Fourth Circuit below. Specifically, Perdue' petition predominantly claims that the Fourth Circuit contradicted this Court's decision in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002) ("*Barnett*"), which held that it is not a reasonable accommodation in the ordinary run of cases to ask an employer to reassign a disabled employee to an existing position if that reassignment would violate the employer's seniority system.

The Fourth Circuit correctly found here, however, that *Barnett* does not apply because Perdue identified no existing and vacant position to which she could be assigned as a reasonable accommodation. Perdue instead requested a nonexistent "job share" position, which required Respondent sanofi-aventis U.S. LLC ("Sanofi") to first approve the request of an able-bodied employee—Caitlin Hunt ("Hunt")—to split Hunt's position into two part-time positions. Sanofi's policies clearly state that Sanofi employees, such as Hunt, are not entitled to job share their position and any request to job share must be first approved by Hunt's manager. In this case, Hunt's manager denied Hunt's request to job share her position. The Fourth Circuit thus correctly held that no job share position existed. Because Perdue could not request a reassignment to the nonexistent position and the Americans with Disabilities Act does not require Sanofi to create a new, part-time position as an accommodation, the Fourth Circuit affirmed the

district court's order granting summary judgment for Sanofi.

The Fourth Circuit's decision thus does not contradict this Court's decision in *Barnett* or any decisions of the Courts of Appeal. Sanofi thus respectively requests that this Court deny Perdue's Petition.

REASONS FOR DENYING CERTIORARI

Certiorari should only be granted if (i) the Fourth Circuit's decision conflicts with the decision of another United States court of appeals on the same important matter, conflicts with a state court decision by a state's court of last resort, or has departed from the "from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for an exercise of this Court's supervisory power," Supreme Court Rule 10(a), or (ii) the Fourth Circuit "decided an important question of federal law that has not been decided, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court," Supreme Court Rule 10(c). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[1] Supreme Court Rule 10. Because Perdue cannot show that this case meets any of the

[1] Sanofi disagrees with Perdue's short argument on pages 30 and 31 of her Petition, but did not address them directly in this opposition because the argument addresses precisely the type of supposed "erroneous factual findings" or "misapplication of a properly stated rule of law" that this Court rarely considers.

requirements of the Supreme Court Rules, her petition for writ of certiorari should be denied.

I. THE FOURTH CIRCUIT'S UNANIMOUS DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BARNETT*

Perdue primarily claims the Fourth Circuit's decision is:

> [E]xceptional[ly] important[]" because it "allows a company's ordinary neutral work rule to trump the provisions of the ADA and *Barnett*'s analysis comes within this Rule 10(c)'s guidance about the considerations which point toward the granting of a petition for certiorari, i.e., that 'a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court.

Pet. at 22.

This argument overstates the breadth of the Fourth Circuit's ruling below and this Court's decision in *Barnett*.

The Fourth Circuit held that "a part-time job-share position that requires managerial approval to create is not a reasonable accommodation in the ordinary run of cases because the ADA does not require companies to create new positions to accommodate their employees with disabilities."

Perdue v. Sanofi-Aventis U.S., LLC, 999 F.3d 954, 962 (4th Cir. 2021). As the Fourth Circuit correctly explained, this Court's decision in *Barnett* does not apply here because *Barnett* and its Fourth Circuit progeny "discuss the superiority of company policies that determine how to fill vacant *existing* positions over ADA accommodations" and "Sanofi's policy instead dictates when a new position can be created," not how to fill vacant positions. *Id.* at 961.

In *Barnett*, this Court addressed a ***vacant*** position and decided that "the interests of other workers with superior rights to bid for [a] job under an employer's seniority system" will, in the ordinary run of cases, trump "the interests of a disabled worker who seeks assignment to a particular position as a 'reasonable accommodation.'" *Barnett*, 535 U.S. at 393. Here, as the Fourth Circuit explained, no position—vacant or filled—existed for a part-time job share position in Greenville, South Carolina when Perdue applied because Sanofi's manager did not approve Hunt's request to job share her position with Perdue. In other words, unlike in *Barnett,* where the disabled employee sought reassignment to a vacant position and the employer denied that request because the seniority policy dictated that other employers should be reassigned to the vacant position instead of the disabled employee, no vacant position existed at Sanofi based on a policy that determines when job share positions are available to any employee. Thus, the Fourth Circuit correctly held that *Barnett* did not apply and nothing in the Fourth Circuit's holding contradicts *Barnett*.

II. THE FOURTH CIRCUIT'S UNANIMOUS DECISION DOES NOT CONFLICT WITH ANOTHER UNITED STATES COURT OF APPEALS DECISION ON AN IMPORTANT MATTER.

Perdue also expands the Fourth Circuit's holding to argue that the Fourth Circuit's decision contradicts decisions by other circuits that, according to Perdue, found that "the text of the ADA itself as well as *Barnett*'s holding make clear that allowing an employer's uniformly-applied, disability-neutral policies to trump the ADA would eviscerate the Act's requirement of providing reasonable accommodation to disabled employees in the workplace." Pet. at 29. Yet none of the decisions cited by Perdue conflict with the Fourth Circuit's holding that the ADA does not require companies to create new positions to accommodate disabilities, including a part-time job share position that requires managerial approval. *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647-48 (1st Cir. 2000) (holding that "the requested accommodation of a few additional months of unsalaried leave, with the job functions being satisfactorily performed in the meantime, is reasonable"); *EEOC v. United Airlines, Inc.*, 683 F.3d 760, 763-64 (7th Cir. 2012) (overturning decision of the district court and remanding to decide whether mandatory reassignment to a vacant position is reasonable in the ordinary run of cases); *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1249 (11th Cir. 2007) (overturning lower court's decision because "genuine issues of material fact exist concerning whether strict punctuality was an 'essential function' of [plaintiff's] position" and the trial court erred by requiring the plaint to show "evidence that his

employer treated him differently than his non-disabled co-workers"); *Taylor v. Rice*, 451 F.3d 898, 911 (D.C. Cir. 2006) (holding that plaintiff presented a genuine issue of material fact about whether a proposed accommodation was reasonable).

Thus, the Fourth Circuit's decision does not contradict the decision of any other Court of Appeal.

CONCLUSION

Sanofi respectfully requests that the Court deny Perdue's Petition for Writ of Certiorari.

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