NO. 17-_____

In the Supreme Court of the United States

MULTNOMAH COUNTY,

Petitioner,

–v–

DAVID UPDIKE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's jurisprudence, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act ("§ 504"), 29 U.S.C. § 794, require a showing of discriminatory intent prior to an award of compensatory damages. Petitioner operates a county jail in Portland, Oregon. Respondent, a frequent visitor to Oregon jails, is hearing-impaired. In January 2013, he spent two nights at the jail, achieving the routine booking and pretrial release matters through writing. No mistakes were made on his admission, housing, or release. Because respondent claimed he requested an ASL interpreter, however, the Ninth Circuit determined that a genuine dispute of fact existed as to whether petitioner committed intentional discrimination, requiring it to compensate respondent for the emotional distress associated with not receiving his first-choice accommodation.

THE QUESTION PRESENTED IS:

Is the level of discriminatory intent required to award compensatory damages under the ADA and § 504 "discriminatory animus," as three circuits have held, or "deliberate indifference," as five circuits have held, and can the provision of an effective accommodation amount to discriminatory intent?

PARTIES TO PROCEEDINGS BELOW

Multnomah County (petitioner here) was a defendant-appellee below. The State of Oregon was a defendant-appellee below and the City of Gresham was a defendant below.

David Updike (respondent here) was plaintiff-appellant below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS

INTRODUCTION

The Ninth Circuit's decision creates a paradox: a public entity can intentionally discriminate against a disabled individual by providing an effective accommodation. Yet this Court has unequivocally held that a governmental defendant must intend to violate a statute enacted pursuant to the Spending Clause to be liable for retrospective relief. Because the remedial scheme under the ADA and Rehabilitation Act is derived from the Spending Clause, a governmental entity must have notice and an opportunity to decide whether to accept federal funds and comply with the statute. If a statutory violation is unintentional, however, the necessary notice is absent. Accordingly, all circuits agree that some level of intent is required to award compensatory damages; however, the circuits are sharply split as to the level of that intent. Three circuits have determined that discriminatory animus is the appropriate standard, while five circuits apply a standard of deliberate indifference.

The confusion resulting from the split and lack of guidance from this Court has created a window for courts predisposed to the remedial aims of the statute to circumvent the constitutional intent requirement. The decision below is a case in point. The Ninth Circuit relies on a single fact that is common to all lawsuits challenging the denial of a reasonable accommodation—that the plaintiff requested an accommodation he did not receive—to presume discriminatory intent. This Court's review is needed to resolve the circuit split

and instruct the lower courts to require actual evidence of discriminatory intent.

OPINION BELOW

The court of appeals' opinion, (App.1a-36a), is reported at 870 F.3d 939 (9th Cir. 2017). The district court's opinion, (App.37a-63a), is reported at 99 F.Supp.3d 1279. (D. Or. 2015).

JURISDICTION

The court of appeals entered judgment on August 31, 2017. Petitioner sought an extension of time until October 16, 2017 to file a petition for rehearing en banc. The court ordered a response to the petition, and respondent sought an extension to file the response until November 22, 2017. The court of appeals denied the petition for rehearing en banc on November 27, 2017. App.64a-65a. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

- 42 U.S.C. § 12132
  The Americans with Disabilities Act (ADA)

  Subject to the provisions of this subchapter, no qualified individual with a disability shall, by

reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

- **42 U.S.C. § 12133**

  The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 (42 U.S.C. 12132).

- **29 U.S.C. § 794**
  The Rehabilitation Act, (§ 504)

  No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

- **29 U.S.C. § 794a(a)(2)**

  The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

- **28 C.F.R. § 35.160(a)(1)**

  (1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions

with disabilities are as effective as communications with others.

- 28 C.F.R. § 35.160(b)

  (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

  (2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.

- 28 C.F.R. § 35.164

  This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. . . .

- 28 C.F.R. § 35.104

  Auxiliary aids and services includes—(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time

> computer-aided transcription services; written materials; exchange of written notes. . . .

STATEMENT OF THE CASE

A. Legal Background

The Americans with Disabilities Act (ADA) was enacted, in part, "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)(2). To prevail under Title II of the ADA and § 504 of the Rehabilitation Act, plaintiffs must show that: (1) they are qualified individuals with a disability; (2) they were either excluded from participation in or denied the benefits of a public entity's services, programs, or activities; and (3) this exclusion or denial was by reason of their disability. 42 U.S.C. § 12132. A violation occurs when disabled individuals are excluded from the benefits of a public entity's services, that is, that they are denied "meaningful access" to those services. *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

For individuals aggrieved by violations of Title II of the ADA, the statute provides that the "remedies, procedures, and rights" are the same as those available under the Rehabilitation Act. 42 U.S.C. § 12133. The Rehabilitation Act, in turn, explains that the "remedies, procedures, and rights set forth in Title VI . . . shall be available" for violations of § 504 of the Rehabilitation Act. 29 U.S.C. § 794a(a)(2). Although there is no private right of action contained in the text of Title

VI, it is now "beyond dispute that private individuals may sue to enforce Title VI." *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (citations omitted).

Because Title VI was enacted pursuant to Congress's power under the Spending Clause, however, the "central concern . . . [is] ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (citations omitted). "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992) (addressing Title IX). This "notice problem does not arise in a case . . . in which intentional discrimination is alleged." *Id.* at 74-75. Accordingly, just as it is "beyond dispute" that a private cause of action exists, it is also "beyond dispute" that compensatory damages to remedy a violation of Title VI are only available in the event of "intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607 n.27 (1983) (opinion of White, J.) (a majority of justices held that Title VI does "not allow compensatory relief in the absence of proof of discriminatory intent.").

In light of this clear mandate from the Court, all circuits agree that proof of discriminatory intent is required before compensatory damages may be recovered under the ADA or § 504. *See* part IA, *infra*.[1]

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[1] Although Title II of the ADA is not itself enacted pursuant to Congress's Spending Clause power, Congress "unequivocally" imported the same remedies as those available under § 504. *Barnes*, 536 U.S. at 189 n. 3 (citing 42 U.S.C. § 12133; 29 U.S.C.

Courts of appeals are sharply divided, however, on what state of mind is required to establish discriminatory intent.

B. Factual Background

Respondent David Updike, a frequent visitor to county jails in Oregon, was arrested in January 2013, and spent two nights in Multnomah County jail waiting to be arraigned. App.39a. Respondent is deaf, and County employees communicated the routine booking and pretrial release matters with him through writing. App.54a-58a. Although respondent can read and write English, and indeed, graduated from college in the United States, he testified that he speaks American Sign Language (ASL) better than English. His other requested accommodations (closed captioning and TTY) both rely on written English. App.55a-56a.

The booking and pretrial release matters went without incident, as they had in his multiple previous bookings. App.54a. He received the appropriate housing assignment, custody, placement, and release processing. App.54a-56a. Respondent, however, claims (and petitioner disputes) that he asked county employees for an ASL interpreter. Despite the fact that all county employees believed their communications were effective, and no errors were made in his accommodations, respondent alleges that the lack of an ASL interpreter caused him emotional distress, entitling him to compensatory damages. App.39a, 54a-58a.

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§ 794(a)(2)). Accordingly, "[t]hese explicit provisions make discussion of the ADA's status as a "non Spending Clause" tort statute quite irrelevant." *Id.* n.3.

C. Proceedings Below

1. Respondent sued Multnomah County in federal district court, asserting jurisdiction under 28 U.S.C. § 1331 alleging violations of his rights under the Americans with Disabilities Act and § 504 of the Rehabilitation Act. Most relevant to this petition, he alleged that he requested an ASL interpreter at booking, in his housing unit, and during communications with pretrial release staff, but none was provided.

2. The district court granted petitioner's motion for summary judgment, finding that petitioner made effective alternate accommodations to address respondent's disability, and therefore did not intentionally discriminate against him, as required to award monetary damages under the ADA or § 504. App.54a-58a.

3. Relying on the implementing regulations to the ADA, the Ninth Circuit reversed. The court first recognized that intentional discrimination, established through "deliberate indifference," is required to award compensatory damages under the ADA and § 504. App.18a. Deliberate indifference "requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood." *Id.* Relying on the ADA's implementing regulations, the court next concluded that the provision of an accommodation other than respondent's alleged first-choice accommodation creates a presumption of deliberate indifference. App.14a-19a, 25a-35a.

Under those implementing regulations, a public entity must "take appropriate steps to ensure that communications with disabled persons are as effective as communications with others," and must also "give primary consideration to the [accommodation] requests

of individuals with disabilities." App.25a, 34a-35a. (citing 28 C.F.R. § 35.160). Combining these two requirements, the Ninth Circuit concluded that discriminatory intent can be inferred when a public entity does not honor the preference of the plaintiff. The court reasoned that a plaintiff's expressed preference satisfies the first element of the test of deliberate indifference because it put the defendant on notice of his needs. App.26a-28a. Denying that request involves an "element of deliberateness," and thus satisfies the second prong of deliberate indifference. App.26a, 33a-34a. Therefore, in this case, respondent's alleged request for an ASL interpreter—regardless of the petitioner's subjective belief of the effectiveness of the alternate accommodation or the objective evidence demonstrating the effectiveness of that accommodation—can alone establish deliberate indifference and defeat summary judgment.

The Ninth Circuit remanded the case so that the fact-finder could determine whether the provided accommodation was as effective as respondent's first-choice accommodation. App.33a. Although the court did not opine as to the type of evidence needed to make this showing, the person most qualified to determine whether respondent's communications are as effective as a non-disabled person is respondent himself, who has already identified the accommodation he believes achieves that standard. In sum, the Ninth Circuit concluded discriminatory intent can be proven from a single fact: respondent preferred a different accommodation to the one he received. Petitioner sought rehearing of the Ninth Circuit's opinion, but the request for rehearing was denied. App.64a-65a. Petitioner then filed this petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES A CRITICAL QUESTION ON THE INTERPRETATION AND APPLICATION OF THE ADA AND § 504 THAT HAS DIVIDED FEDERAL APPELLATE COURTS.

The question presented has divided the circuits for years, leading to confusion among the lower courts and wide-ranging results in the implementation of federal law. Although all circuits agree that, in order to award compensatory damages against a governmental defendant for ADA and § 504 violations, there must be evidence of discriminatory intent, the level of that intent is subject to active dispute. Three circuits assert that a plaintiff must prove discriminatory animus to establish discriminatory intent while five circuits find that deliberate indifference is sufficient. Even within the five circuits agreeing that deliberate indifference is the appropriate standard, the courts range broadly in how to apply that standard. The product of that dispute and resulting confusion is that some courts prioritize, rather than balance, the remedial aims of the statute against the requirement that a government intend to violate a Spending Clause statute before it is liable for damages.

The lack of agreement or clarity among the federal circuit courts has created a gap that appears to be widening rather than coalescing. In the decision below, for example, the Ninth Circuit concluded that a defendant's failure to conform to the court's evolving interpretation of the ADA's lengthy implementing regula-

tions and accompanying appendix can evince discriminatory intent. This Court's review is needed to resolve a split over a significant statutory and constitutional issue and instruct the circuits to require evidence of discriminatory intent before damages can be awarded.

A. The Circuits Are Split on the Intent Level Required to Award Damages Under the ADA and § 504.

1. Three Circuits Apply a Discriminatory Animus Standard.

The First, Fifth, and Sixth Circuits have held that, in order to require a defendant to pay compensatory damages under the ADA and Rehabilitation Act, the defendant must have acted with animus or ill-will.

FIRST CIRCUIT: The court reasoned that claims for damages to compensate for emotional injuries, as opposed to economic or physical injuries, are generally reserved for egregious, rather than merely "intentional" behavior. *Schultz v. YMCA of the United States*, 139 F.3d 286, 290 (1st Cir. 1998). Recognizing this Court's warning that the remedies under a Spending Clause statute must be "appropriate," the First Circuit endeavored to be "all the more cautious in exceeding the bounds of past practice." *Id.* (citing *Franklin*, 503 U.S. at 71). Accordingly, the court held that, in cases seeking recovery for damages for the emotional distress caused by violations of the ADA or § 504, a defendant must have acted with animus. *Id.* at 291; *see also Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 18 (1st Cir. 2006) ("Merely labeling the delay [or denial in providing an accommodation] as intentional discrimination, without some modicum of evidence demon-

strating an actual discriminatory animus, is itself not enough.").

FIFTH CIRCUIT: Recognizing that the remedial scheme for the ADA and § 504 derives from the Spending Clause, the Fifth Circuit concluded that there can be no damage remedy absent evidence of an intent to violate the statute. *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567, 574 (5th Cir. 2002). The court further clarified that "[t]here is no 'deliberate indifference' standard applicable to public entities for purposes of the ADA or [§ 504]," rather, the discrimination must be intentional. *Id.* at 575. Such intent cannot be presumed "when the record is devoid of evidence of malice, ill-will, or efforts . . . to impede a disabled individual." *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 380 (5th Cir. 2014) (citation omitted).

SIXTH CIRCUIT: The Sixth Circuit took yet a different path to ensure sufficient proof of intent. The court reasoned that, as both the ADA and § 504 require a plaintiff to show that a defendant took action because of the plaintiff's disability, the plaintiff must "present evidence that animus against the protected group was a significant factor in the position taken by [the decision-makers]." *Anderson v. City of Blue Ash*, 798 F.3d 338, 356-57 (6th Cir. 2015). Additionally, a plaintiff must prove that "the discrimination was intentionally directed toward him or her in particular." *Id.* If a plaintiff can make this showing, the defendant has the opportunity to offer a legitimate, nondiscriminatory reason for its challenged action, and then the plaintiff must demonstrate that the defendant's proffered reason is pretext. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

2. Five Circuits Apply a Deliberate Indifference Standard.

The Second, Third, Eighth, Ninth, and Eleventh Circuits employ a "deliberate indifference" standard, although, unlike animus, the contours of deliberate indifference are far from uniform.[2]

EIGHTH CIRCUIT: Recognizing that the ADA and Rehabilitation Act share a remedial scheme with Title VI, the Eighth Circuit acknowledged that proof of discriminatory intent is required. *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011) (citing *Guardians Ass'n*, 463 U.S. at 607 n.27). In adopting deliberate indifference as the appropriate standard to derive discriminatory intent, the court observed, "unlike some tests for intentional discrimination, [deliberate indifference] does not require a showing of personal ill will or animosity . . . but rather can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." *Id.* (citations omitted). In *Meagley*, there was no evidence that the defendants actually knew that their structure violated the ADA, so the plaintiff failed to establish deliberate indifference. *Id.*

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[2] While acknowledging the circuit split, the D.C. and Seventh Circuits have yet to decide the appropriate standard of intentional discrimination. *See Strominger v. Brock*, 592 Fed. App'x 508, 512 (7th Cir. 2014); *Pierce v. District of Columbia*, 128 F.Supp.3d 250, 278 (D.D.C. 2015). The Fourth Circuit has also not determined which standard applies, although the court has noted "that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children." *Sellers by Sellers v. Sch. Bd.*, 141 F.3d 524, 529 (4th Cir. 1998).

ELEVENTH CIRCUIT: The court looked to Title IX to help determine the appropriate level of intent for ADA and § 504 violations, and observed that a plaintiff suing for money damages under Title IX must demonstrate discriminatory intent, established by a showing of deliberate indifference. *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 347 (11th Cir. 2012) (citing *Gebser*, 524 U.S. at 287). Noting the similarities between Title IX and § 504, including the fact that both laws were enacted pursuant to Congress' authority under the Spending Clause, the court concluded that § 504 does not authorize money damages against recipients who are not aware that they are violating law. *Id.* at 346-47. The court further concluded that deliberate indifference "best reflects the purposes of § 504 while unambiguously providing the notice-and-opportunity requirements of Spending Clause legislation." *Id.* While a "lower standard would fail to provide the notice-and-opportunity requirements, . . . a higher standard—requiring discriminatory animus—would run counter to congressional intent as it would inhibit § 504's ability to reach knowing discrimination in the absence of animus." *Liese*, 701 F.3d. at 348. Similar to the Eighth Circuit, the Eleventh Circuit placed primary importance on evidence that the defendants actually knew that their actions violate the statute. Because "deliberate indifference is an exacting standard, . . . [defendants] will only be deemed deliberately indifferent if their response . . . or lack thereof is clearly unreasonable in light of the known circumstances." *J.S. v. Hous. Cty. Bd. of Educ.*, 877 F.3d 979, 987 (11th Cir. 2017) (citations omitted); *accord Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 274-77 (2d Cir. 2009); *Williams v. City of New*

York, 121 F.Supp.3d 354, 368 (S.D.N.Y. 2015) ("Whether a disabled individual succeeds in proving discrimination under Title II of the ADA will depend on whether the officers' accommodations were reasonable under the circumstances.").

TENTH CIRCUIT: Like the other circuits, the Tenth Circuit concluded that the deliberate indifference standard properly balances the notice and opportunity requirement with the remedial aims of the statutes. *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999). Acknowledging that deliberate indifference requires knowledge that a risk to a federally protected right is imminent, the Tenth Circuit has explicitly held that the provision of a reasonable alternate accommodation refutes a finding of such indifference. *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1230-31 (10th Cir. 2009); *accord S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262 (3d Cir. 2013).[3]

NINTH CIRCUIT: In accordance with all circuits to consider the issue, the Ninth Circuit required a plaintiff seeking monetary damages to demonstrate that any disability discrimination was intentional. *See Ferguson v. City of Phx.*, 157 F.3d 668, 674-75 (9th Cir. 1998). Although the Ninth Circuit initially acknowledged that either animus or deliberate indifference may be the correct standard, *see id.*, it later concluded that the appropriate standard in the circuit is deliberate indifference. *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001). In implementation, the Ninth

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[3] *But see Chisolm v. McManimon*, 275 F.3d 315, 321 (3d Cir. 2001) (assuming damages were appropriate without addressing the intent requirement in a case factually similar to the one at bar).

Circuit's version of deliberate indifference is at odds with the circuits that require some evidence that a defendant is on notice that its conduct violates the law. In the case at issue, the Ninth Circuit looked to the regulations implementing the ADA to conclude that the key evidence of the discriminatory intent of the governmental defendant was whether it granted the plaintiff's first choice request. *See* IIA, *infra*.[4]

B. This Split Involves an Important Issue Requiring This Court's Review.

The question presented is important. The level of intent required to award damages under the ADA and § 504 is a murky point of law that has plagued the federal appellate courts for years. Despite this Court's previous pronouncements that Congress meant what it said when creating a remedial scheme based on a Spending Clause statute, the lower courts remain at odds. *See Barnes*, 536 U.S. at 189 n. 3. Relief under a Spending Clause statute "alleging unintentional discrimination should be prospective only, because where discrimination is unintentional, it is surely not obvious that the grantee was aware that it was administering the program in violation of the condi-

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[4] Similarly, although the D.C. circuit has not weighed in on the circuit split, the District of D.C. has employed the same approach as the Ninth Circuit and presumed discriminatory intent from a defendant's infraction of the implementing regulations. Failing to undertake a fact-specific investigation regarding a plaintiff's abilities (an investigation that must amount to more than just the "lay opinions" of the employees communicating with the plaintiff) itself evinces intentional discrimination sufficient to award summary judgment in favor of the plaintiff. *Pierce*, 128 F.Supp.3d at 268.

tion." *Gebser*, 524 U.S. at 287 (citing *Guardians*, 463 U.S. at 598). Put another way, the key requirement to support a damage award is that the defendant meant to violate the federal condition.

Regardless of the standard applied—either animus or deliberate indifference—this Court's jurisprudence requires that a defendant act with discriminatory intent. The confusion regarding the appropriate level of intent has led to the imposition of damage awards against governmental entities that lack that necessary intent. Although all public entities are subject to Title II of the ADA and § 504 of the Rehabilitation Act, the compensatory damage obligations they face are unpredictable, with the most significant determinative factor being the judicial circuit in which they are located. This case presents an excellent vehicle for this Court to clarify the standard and emphasize the importance of requiring discriminatory intent before ordering retrospective damages against a governmental entity.

II. THE NINTH CIRCUIT IS WRONG.

The significance and impact of the decision below warrants correction regardless of the circuit split. The lack of clarity in the appropriate standard, combined with expansive implementing regulations, has sowed the seeds for a decision that plainly misapprehends the intent requirement. The Ninth Circuit relied on the statute's implementing regulations to shift the inquiry from an examination of the public entity's intent to instead rely on a single, and apparently controlling, fact: Did the plaintiff request a different accommodation than the one he received?

A. The Ninth Circuit Opinion Illustrates the Risk of a Wide-ranging and Unsettled Intent Requirement.

First, the lower court decision is plainly wrong. Contrary to principles of Spending Clause legislation, the Ninth Circuit presumed discriminatory intent simply because a petitioner did not provide respondent with his first-choice accommodation. Second, the facts of this case demonstrate the risk of that approach, as a public entity is required to pay compensatory damages despite its subjectively and objectively effective efforts to reasonably accommodate an individual's disability. Third, despite the Ninth Circuit's reliance, the implementing regulations neither support nor justify a deviation from the statute's language and intent. Finally, even if the regulations could justify such a deviation, they do not.

First, the lower court's analysis improperly undercuts the requirement that a defendant act with discriminatory intent prior to being assessed damages for violating a Spending Clause statute. The Ninth Circuit relied on the ADA's implementing regulations to justify this departure. The court first observed that the regulations "provide that a public entity must take appropriate steps to ensure that communications with disabled persons are as effective as communications with others." App.34a (citing 28 C.F.R. § 35.160(a)). In determining what types of accommodations are necessary to ensure equally effective communication, the court noted, "a public entity shall give primary consideration to the requests of individuals with disabilities." *Id.* (citing § 35.160(b)) (emphasis added). App.34a-35a.

Taking these regulations together, the Ninth Circuit needed no additional evidence of discriminatory intent beyond the evidence of the plaintiff's request. The court reasoned that, under the regulations, a public entity must take steps to make communication with hearing impaired-individuals as effective as communication with others, and those steps should be the ones preferred by the individual. App.34a-35a. Evidence that an accommodation was requested and not provided (regardless of whether an alternate accommodation was provided) establishes the first prong of deliberate indifference: that the public entity is on notice of the need for the accommodation. App.26a-28a. If the entity does not provide the plaintiff's first-choice accommodation—a fact common to every lawsuit challenging a public entity's provision of reasonable accommodation—it has made a deliberate choice, satisfying the second prong of deliberate indifference.[5]

Finally, the Ninth Circuit decision removed the only viable defense a public entity may have to justify employing an accommodation other than the one the plaintiff requested. Although neither statute requires a public entity "to take any action that it can demonstrate would result in . . . undue financial and administrative burdens," the Ninth Circuit held (without

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[5] Although the lower court suggested that the defendant has the opportunity to prove at trial that the provided accommodation was effective despite the fact that it was not the plaintiff's first choice, it is difficult to see how. *See* App.32a. Under the Ninth Circuit's binding view of the regulations, a defendant must make the communication as effective for the plaintiff as that of a hearing person, and thus the plaintiff's view of the most effective accommodation would likely be dispositive.

citation) that, as a matter of law, "the mere cost of the requested accommodation cannot be considered an undue burden." App.18a (citing 28 C.F.R. § 35.164; *but see Tennessee v. Lane*, 541 U.S. 509, 532 (2004) ("[I]n no event is the entity required to undertake measures that would impose an undue financial or administrative burden . . . ").

Second, this approach's risk of punishing clearly unintentional conduct is especially stark in this case, where evidence of discriminatory intent is completely lacking. According to respondent (and disputed by petitioner), he put some county employees on notice that he would prefer the accommodation of an ASL interpreter to the accommodation of writing, apparently at all times during his stay in the jail. Rather than evaluating the evidence of the effectiveness of the accommodation provided or whether any county employee was aware of a substantial likelihood of harm to plaintiff's federally protected rights, the Ninth Circuit rested its decision on that single fact—that respondent claims he requested a different accommodation than the one he received. However, other than this contention, there is no evidence that the public entity intended to discriminate against respondent.

1. Indeed, all county employees actually believed the accommodation was effective. County employees were aware that respondent had been booked into county jail multiple times and was familiar with the routine booking process. In addition to several written entries in the file that respondent can "read fine" and is "very literate," all county employees averred that it appeared, either from their perceptions or the actual content of the written conditional, that respondent

understood their written interactions. Indeed, the record demonstrates that respondent could, in fact, effectively communicate in English even if he prefers ASL. In addition to evidence in the record of his ability to write, respondent testified that he attended school in the United States and earned an associate's degree at Portland Community College, presumably involving reading as part of his studies. He also alleged that he requested the accommodations of TTY and closed captioning, both of which rely on written English, and sought the accommodation of written communication at his arraignment when an ASL interpreter was not readily available. (ER 142-43, 162, 163, 167, 171-81, SER 3-5, 15-16). County employees' uniform belief that the accommodation proffered was both reasonable and effective under the circumstances is consistent with the objective evidence of respondent's proficiency in written English. App.54a-60a.

2. Moreover, the accommodation was objectively effective—no errors were made. The information in respondent's file was accurate, and he was properly classified, housed, and released. App.54a. There is no evidence that respondent was denied "meaningful access" at the jail because his communications achieved the same results they would have with an ASL interpreter. *See Choate*, 469 U.S. at 301. Far from intending to discriminate, County employees subjectively believed that their communications with respondent were effective. The evidence demonstrates that they were, in fact, effective.

Third, regulations cannot overrule Supreme Court precedent or Congressional intent regarding the re-

quirements for establishing an ADA or § 504 violation. It is well-settled that "[l]anguage in a regulation . . . may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291. In *Sandoval*, this Court rejected a private right of action to enforce a discriminatory effect regulation under Title VI because the regulation did not simply apply Title VI's prohibition on intentional discrimination, but went further and prohibited unintentional conduct. *Id.* In short, the Court will not create a private right of action to enforce a regulation that goes beyond the statutory language. *Id.* If, as the lower court concluded, the regulations punish unintentional conduct, a private right of action to enforce that regulation plainly exceeds the scope of what is authorized by statute.

The lower court's rationale imports an additional affirmative obligation from the regulations. According to the Ninth Circuit, an issue "central to this case" is whether petitioner "undertook a fact-specific investigation to determine what constitutes a reasonable accommodation." App.25a. (citing *Duvall*, 260 F.3d at 1139). Indeed, according to the lower court, "[e]ven if a jury ultimately determines that the County was correct [that writing was an effective accommodation] . . . the County never meaningfully assessed Updike's limitations and comprehension abilities." App.32a. Apparently, even if petitioner was able to convince a jury not just that its accommodation was effective, but that it was as effective as respondent's preferred accommodation, it could still be guilty of intentional discrimination if it did not conduct a sufficient investigation into respondent's "limitations." However, because the statute does not compel this freestanding investigation, the regulations cannot require it as an

affirmative obligation with an accompanying private right of action for damages. *See Sandoval*, 532 U.S. at 291; *see also Gebser*, 524 U.S. at 292 ("We have never held . . . that the implied private right of action under Title IX allows recovery in damages for violation . . . of administrative requirements.").

Although the regulations, manuals, and appendices speak to best practices in reasonably accommodating an individual with a hearing impairment, and could potentially support an injunction ordering a public entity's compliance, they do not resolve the critical question in a damages case under the ADA—whether the government employees had discriminatory intent. The mere fact that a public entity falls short of these best practices cannot, on its own, establish discriminatory intent. Moreover, the statutes require only that a public entity provide "meaningful access" to a disabled person. *Choate*, 469 U.S. at 301. If, as the Ninth Circuit concluded, these regulations do require a public entity "to ensure that communications with disabled persons are as effective as communications with others," this obligation impermissibly exceeds the scope of the statutes. App.34a (citing 28 C.F.R. § 35.160(a)).

Fourth, even if a lack of compliance with the best practices identified in the Department of Justice's regulations and appendices evinces discriminatory intent, the Ninth Circuit's selective reading of the regulations is far from the only interpretation. Indeed, a reasonable government employee could review the regulations and conclude that the proffered accommodation was authorized in these circumstances. The "exchange of written notes" is explicitly identified as a possible accommodation for communications with deaf

individuals. 28 C.F.R. § 35.104 ("auxiliary aides" include "notetakers; . . . written materials; exchange of written notes)." The Appendix to the regulations further states: "Exchange of notes likely will be effective in situations that do not involve substantial conditional, for example, blood work for routine lab tests or regular allergy shots." 28 C.F.R. pt. 35, app. A. Rather than intending to discriminate, a government employee could reasonably conclude that written communication is an appropriate accommodation for routine interactions that respondent had been through many times before. The different available interpretations illustrate the risk of relying on the lengthy regulations to generate discriminatory intent.

B. The Decision Below Warrants Review.

1. The law in the Ninth Circuit now relies on one fact—that an individual requested an accommodation he did not receive—to adduce a public entity's discriminatory intent. This single fact is common to all lawsuits challenging the denial of a reasonable accommodation. And, according to the Ninth Circuit, the effectiveness of the accommodation is a fact-specific inquiry that can only be rebutted at a jury trial. Under this decision, cash-strapped local governments will automatically be required to proceed to a jury trial—in a statute with an attorneys' fees provision, 42 U.S.C. § 12205, 29 U.S.C. § 794a(b)—to defend a successful accommodation simply because it was not the plaintiff's first-choice. And, under the Ninth Circuit decision, the government will bear the burden at that trial of demonstrating not just that the accommodation employed was effective, but that it was just as effective for the plaintiff as his preferred

accommodation. Finally, under this decision, the government is also prohibited from asserting that providing full-time ASL interpreting services for a jail inmate creates an undue financial burden. The court's logic paints a government into a corner: grant a disabled individual's first-choice request, regardless of cost, or violate the statute.

2. Moreover, the practical implications of this decision will force local governments to pay damages in cases where they did nothing wrong. If the entirety of establishing discriminatory intent rests with a plaintiff's preference, plaintiffs need only allege that they made an unmet request for an accommodation to establish a presumption of discriminatory intent. Thus, inmates can allege, true or false, that they requested a different accommodation than the one they received to defeat summary judgment. In a statute with an attorneys' fees provision, the risk of exposure for local governments is substantial. The result is that public entities who make good faith efforts to comply with the statutes will be penalized. This result is flatly at odds with the well-settled principle that a defendant must intend to violate a Spending Clause statute to be liable for damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 26, 2018