NO. 17-1222

# In the Supreme Court of the United States

MULTNOMAH COUNTY,

*Petitioner,*

–v–

DAVID UPDIKE ET AL.,

*Respondents.*

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

## REPLY BRIEF FOR THE PETITIONER

JENNY M. MADKOUR
*COUNTY ATTORNEY*
JACQUELINE KAMINS*
*SENIOR ASSISTANT COUNTY ATTORNEY*
MULTNOMAH COUNTY ATTORNEY
501 S.E. HAWTHORNE BLVD., SUITE 500
PORTLAND, OR 97214
(503) 988-3138
JACQUELINE.KAMINS@MULTCO.US

JUNE 15, 2018 **COUNSEL OF RECORD FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

Page

### CASES

## TABLE OF AUTHORITIES—Continued

## REPLY BRIEF FOR THE PETITIONER

Both reason and precedent dictate that a public entity must only pay compensatory damages under the American with Disabilities Act if it intentionally discriminates. The decision below, however, reflects the deep and growing confusion among the lower courts as to the meaning of "intentional" discrimination. Some courts go so far as to require evidence of animus, while those on the other end of the spectrum find that a denied request for accommodation (which is the baseline for any failure-to-accommodate lawsuit) itself evinces discriminatory intent. The latter approach requires—contrary to both reason and precedent—public entities to pay damages for making good faith efforts to offer effective accommodations simply because the accommodation differed from the one requested. As a result, the issue before this Court is nothing less than this: Can a public entity discriminate against a disabled person by providing an effective accommodation?

Respondent is not interested in addressing any of that. Rather, respondent grasps for imagined factual disputes and dissects a small handful of cases from disparate circuits, not to harmonize the dissonance but rather to obfuscate the divide. Respondent then spends the bulk of his brief railing against an animus requirement (a requirement the petition does not even request). Indeed, as respondent repeatedly points out, petitioner did not advocate for an animus standard in the lower court. Rather, petitioner contends, as it did below, that both reason and precedent require evidence

of actual intent to merit a damage award. However, the circuit divide on what intent means reflects substantial confusion among the lower courts on its application—resulting in the paradox below: the provision of an effective accommodation amounts to intentional discrimination.

## I. THIS CASE PRESENTS THE IDEAL VEHICLE TO RESOLVE AN ISSUE DIVIDING THE LOWER COURTS

This case presents the ideal vehicle, both factually and legally, to resolve an issue of critical import. Factually, the undisputed evidence demonstrates that respondent received an effective accommodation, and far from intending to discriminate, all government employees subjectively believed the accommodation was effective. Procedurally, the case is presented in the only posture that can address the decision's most problematic practical impact. Under the lower court's decision, an allegation of a denied ADA accommodation request creates a factual dispute precluding summary judgment in every failure-to-accommodate lawsuit. The denial of a motion for summary judgment is the only posture that can remedy this outcome.

### A. The Key Facts Are Undisputed

Respondent argues that factual disputes preclude this Court's review and essentially asserts that petitioner is hiding the ball as to key facts in the case. But there is nothing to hide—the key facts are either not in dispute or taken in respondent's favor:

- Respondent requested an ASL interpreter (a factual dispute resolved in his favor despite

consistent testimony from County employees that he never asked for one).

- Although he prefers ASL, respondent has the ability to read and write: he graduated college; he uses closed captioning and TTY (both of which rely on written English); and the record contains examples of his use of written English.
- County employees accommodated respondent by communicating with him in written English.
- County employees believed that the communication was effective.
- Respondent had been through the routine booking and pretrial release procedures multiple times before.
- Nothing about this routine process on this day resulted in any mistakes. These undisputed facts thoroughly tee the issue for the court's review.

Respondent's efforts to identify "triable issues of fact" fall short. Opp.22. Critically, respondent fails to identify a single miscommunication that occurred to demonstrate the proffered accommodation was ineffective. Rather, respondent relies mainly on his requests for different accommodations as proof that the accommodations he did receive were ineffective. *See* Opp.9. However, the denial of the first-choice accommodation is the baseline for the lawsuit to exist, not evidence of the effectiveness of the accommodation that was provided.[1]

---

[1] Respondent's frequent references to a request for a TTY as being dispositive of this case are a red herring. After a delay,

The "miscommunication" respondent manufactures allegedly occurred during the routine booking evaluation by a nurse. Opp.6. Despite having a pen and paper, the ability to read and write (albeit in his second language), and the ability to point to his neck and back, respondent avers that he was unable to tell the nurse that his neck and back hurt. Given respondent's college degree, ability to read closed captioning and teletype, and record evidence of his written communications, this purported factual dispute is not genuine. *See Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) ("On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts.") (internal marks and citation omitted). Even suspending disbelief, this "miscommunication" does not render the communication ineffective—nothing in the record indicates that respondent actually incurred an injury of any kind, nor does it suggest that medical intervention is typically warranted for an arrestee awaiting arraignment who mentions neck and back pain.

Respondent's only other mention of a potential miscommunication occurred because the pretrial release officer was not aware respondent could report over the phone and personally experienced respondent to be argumentative. Neither of these observations reflect any errors (as demonstrated by the communications themselves, which are in the record). The record is undisputed that the accommodation of reading and writing to complete the routine booking matters was effective and error-free.

---

respondent was provided a TTY. App. 28a. A single day delay in providing a TTY, is, at best, negligence or "bureaucratic slippage."

### B. This Case Is in the Appropriate Posture for This Court's Review

The interlocutory nature of the case is appropriate, and in fact, necessary to resolve a key issue with the lower court's decision. Respondent's contention to the contrary misunderstands the decision's import. Under this now binding precedent, any time a government entity does not grant a first-choice request for accommodation (meaning every single ADA lawsuit), a triable issue of fact exists on whether defendant intentionally discriminated. This Court has long recognized that subjecting government defendants to trial is itself a burden. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (recognizing qualified immunity as providing government officials an "entitlement not to stand trial or face the other burdens of litigation") (internal citations omitted). That issue—that a government defendant cannot obtain summary judgment in a lawsuit alleging it did not provide a first-choice accommodation—cannot be resolved in any vehicle other than the denial of a motion for summary judgment.

Moreover, in light of the lower court's decision, it is unclear what "triable issues" remain. Opp.24. The record at trial will be no different than at summary judgment, and the undisputed facts will not change. Petitioner will continue to demonstrate that the government employees subjectively believed the accommodation was effective and that no mistakes were made. Respondent will continue to assert that the accommodation was not as effective as his preferred accommodation. Given the Ninth Circuit's importation of the regulatory requirement that a government defendant ensure that the alternate accommodation is

"as effective as a non-disabled person," respondent's belief that writing was not as effective as an ASL interpreter will likely be insurmountable.

Indeed, according to the lower court, the only question left to resolve is whether "the County's failure to provide an accommodation was done with deliberate indifference, rather than merely negligence." App.26a-27a. But no amount of evidence will demonstrate that the County employees accidentally failed to provide an ASL interpreter. Rather, the record is clear—the accommodation of writing was provided intentionally and with deliberateness. This case, with its record of the deliberate provision of an alternate but effective accommodation, presents an excellent vehicle to resolve the widening gap and substantial confusion among the lower courts.

## II. THE LOWER COURTS ARE EXPLICITLY SPLIT AND IMPLICITLY DISORDERED

Although the widely-recognized circuit split reflects the lack of clarity on the intent level required to award damages under the ADA, it is not the only evidence of that confusion. Respondent's dissection of the opinions adopting the animus standard is a misguided attempt to harmonize this cacophony. Indeed, it misses the point of the petition: As demonstrated in petitioner's brief (and unaddressed by respondent), even circuits that purport to apply the deliberate indifference standard have deep divisions over its nature. The result is that the most reliable indicator of whether a governmental defendant is liable for compensatory damages is the judicial circuit in which it is sued.

### A. Circuits Explicitly Applying Heightened Standard

Despite respondent's protestations, several circuits explicitly apply a heightened intent standard while the majority apply a standard of deliberate indifference. Opp.10-17; *but see e.g., S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262-63 (3d Cir. 2013) ("Five of our sister courts have explicitly rejected discriminatory animus . . . . Two courts of appeals have suggested that plaintiffs seeking compensatory damages must demonstrate a higher showing of intentional discrimination than deliberate indifference, such as discriminatory animus."). Both the First and Fifth Circuits have used—and continue to apply—a more stringent s`andard of discriminatory intent. Although respondent may be correct that the Sixth Circuit has not definitively decided the issue, it too, as discussed in part B, *infra*, requires a heightened showing of intent.

FIRST CIRCUIT: The First Circuit applies a heightened intent standard to claims for compensatory damages under the ADA or RA. *Schultz v. YMCA of the United States*, 139 F.3d 286, 290 (1st Cir. 1998). Indeed, recent district court cases in the First Circuit recognize the discriminatory animus standard. *See, e.g., Cox v. Mass. Dep't of Corr.*, No. 13-10379-FDS, 2018 U.S. Dist. LEXIS 55482, at *22 (D. Mass. Mar. 31, 2018) (recognizing that "the First Circuit appears to have adopted the more stringent standard of 'discriminatory animus'" but finding plaintiff presented sufficient evidence to prove either standard) (internal citation omitted).

Respondent, however, presents a novel theory based on a sentence fragment: the First Circuit will

award compensatory damages if a defendant acted with animus or if a plaintiff incurred economic damages. Opp.15. (citing *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 17 (1st Cir. 2006) ("[N]on-economic damages are only available when there is evidence 'of economic harm or animus toward the disabled'")). No case cited by respondent awards compensatory damages solely because the claim included economic damages, nor does any explain why pleading economic damages would eliminate the intent requirement. In any event, if respondent's reading was accurate, damages in the First Circuit would be available without any intentional discrimination at all, so long the complaint alleged economic damages. Even if this reading made sense, it would only widen the circuit split.

FIFTH CIRCUIT: As previously argued, the Fifth Circuit has required a higher intent level than deliberate indifference. *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 380 (5th Cir. 2016). To support its contention that the Fifth Circuit did not mean what it said, respondent proffers a handful of unpublished dispositions, mostly from district courts, none of which can overrule the published opinions of the Fifth Circuit. Moreover, despite respondent's assertion that the Fifth Circuit has "expressly refused to hold that proof of deliberate indifference cannot support a Title II damages award," the court expressly did no such thing. Opp.12 (citing *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 F. App'x 180 (5th Cir. 2015)). The most the unpublished opinion states on this point is that: "The parties have not briefed the issue in any depth, and we decline to make new law on the nature of intent at this time." *Id.* at 184. At best, this statement only underscores the fundamentally problematic lack of

clarity on the nature of intent among and between the circuits.

### B. The Remaining Courts Are Implicitly Split

The confusion among the lower courts is evident even within the circuits that employ a deliberate indifference standard. In some of those circuits, an alternate accommodation precludes a finding of deliberate indifference, and in others, the denial of the accommodation request—regardless of the alternate accommodation provided—itself evinces deliberate indifference.

SIXTH CIRCUIT: As argued in the Petition, the Sixth Circuit applies a higher intent standard than the Ninth Circuit. Respondent correctly points out that the cited case analyzes a disparate treatment claim, but the source of the cited language is a reasonable accommodation case. Opp.13-14 (citing *Anderson ex rel. C.A. v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015) (extensively citing *Tucker v. Tennessee*, 539 F.3d 526 (6th Cir. 2008)). In that reasonable accommodation case, a deaf family alleged that they did not receive the accommodation they requested at the jail—a TTY phone. However, because the jailers did not anticipate the family's arrival, "the failure to provide or have a TTY phone was not intentionally done in an attempt to discriminate against either of them <u>because</u> of their disability." *Id.* at 538 (emphasis in original). Rather than focusing on the denial of the requested accommodation, the court observed that the "judicial inquiry is more appropriately on the effectiveness of the communication actually received." *Id.* at 539. Despite the delay in providing a phone call, and the fact that the proffered phone call was not private

because it was conducted through jail personnel, the accommodation offered an effective, if not ideal, phone call. The Sixth Circuit does not find evidence of the denial of a request probative as to intentional discrimination; instead, that court considers the provision of an alternate accommodation to undercut the inference of intentional discrimination.[2]

ELEVENTH CIRCUIT: Similarly, in the Eleventh Circuit, the denial of a request does not itself demonstrate deliberate indifference, and providing an alternate effective accommodation, even if a plaintiff's second-choice, does not amount to discrimination. *See McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1148 (11th Cir. 2014) ("Because there is no evidence to support a conclusion that the [hospital] staff knew that their accommodations were ineffective in enabling [a deaf child] to communicate with his nurses and doctors, a reasonable jury could not find that the staff acted with deliberate indifference."); *see also Bircoll v. Miami-Dade Cty*, 480 F.3d 1072, 1086 (11th Cir. 2007) (finding that despite repeated requests for an ASL interpreter, the actual communication between a deaf arrestee and a police officer "was not so ineffective that an oral interpreter was necessary to guarantee that [the arrestee] was on equal footing with hearing individuals"); *see also Downing v. Osceola Cty. Bd. of Cty. Comm'rs*, No: 6:16-cv-872-Orl-40KRS, 2017 U.S.

---

[2] Respondent's claim (Opp.14) that an unpublished opinion reveals that the Sixth Circuit has "applied the deliberate indifference standard without mentioning animus" is mistaken. Indeed, the Sixth Circuit in that very opinion explicitly left the question open. *R.K. v. Bd. of Educ.*, 637 F. App'x 922, 925 (6th Cir. 2016) ("We assume without deciding that the parties are correct on this point.").

Dist. LEXIS 189673, *at 14 (M.D. Fla. Nov. 16, 2017) (holding that reasonable jury could not find deliberate indifference when deaf inmate requested interpreter but writing was provided and it proved effective).

EIGHTH CIRCUIT: Similarly, the Eighth Circuit has repeatedly recognized that the provision of "meaningful access" to government services, as demonstrated by evidence of a generally effective communication, is not deliberate indifference. *Bahl v. Cty. of Ramsey*, 695 F.3d 778, 787 (8th Cir. 2012) (recognizing that no reasonable jury could conclude that the written charge statement did not provide a deaf plaintiff with meaningful access as to the reason for his arrest given that he understood written English well enough to communicate in writing with another inmate); *Loye v. Cty. of Dakota*, 625 F.3d 494, 499, 501 (8th Cir. 2010) (determining that no reasonable jury could find ineffective communication given evidence that deaf plaintiff was able to write English and there was no evidence of miscommunication and explicitly declining to adopt regulatory requirement that communications be "as effective" as those of a non-disabled person).

TENTH CIRCUIT: The Tenth Circuit has also found objective evidence of an accommodation's reasonableness sufficient to undercut claims of deliberate indifference. *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1230-31 (10th Cir. 2009).[3]

---

[3] *See also Ulibarri v. City & Cty. of Denver*, 742 F. Supp. 2d 1192, 1215 (D. Colo. 2010) (holding that no ASL interpreter was needed for routine booking because "[p]laintiffs have not identified any errors in the booking process or otherwise that would indicate that some essential communication assistance was needed but

However, the Third and D.C. Circuits follow the Ninth Circuit's logic when applying the "deliberate indifference" standard at the summary judgment stage. *Chisolm v. McManimon*, 275 F.3d 315, 328 (3d Cir. 2001) (holding that a reasonable trier of fact could infer that a deaf inmate required an ASL interpreter to effectively communicate despite inmate's testimony that staff complied with his written demands); *Pierce v. D.C.*, 128 F. Supp. 3d 250 (D.D.C. 2015) (granting deaf inmate's motion for summary judgment and awarding compensatory damages because the denial of a request for an ASL interpreter amounts to deliberate indifference, despite defendants' belief that writing was effective and ample evidence of inmate's ability to write). This Court's guidance is necessary to resolve this confusion and provide consistency for government defendants.

not provided"); *accord Valanzuolo v. City of New Haven*, 972 F. Supp. 2d 263, 278 (D. Conn. 2013) ("While understandably [writing] may not be plaintiff's preferred means of communication, he can communicate in this form, and this means of communication is effective, even if the communication was not "perfect[.]"); *see also Fry v. City of Northglenn*, No. 16-cv-02318-PAB-KLM, 2018 U.S. Dist. LEXIS 28631, at *7 (D. Colo. Feb. 22, 2018) (citing the instant case and recognizing resulting conflict).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JENNY M. MADKOUR
*COUNTY ATTORNEY*
JACQUELINE KAMINS*
*SENIOR ASSISTANT COUNTY ATTORNEY*
MULTNOMAH COUNTY ATTORNEY
501 S.E. HAWTHORNE BLVD., SUITE 500
PORTLAND, OR 97214
(503) 988-3138
JACQUELINE.KAMINS@MULTCO.US

** COUNSEL OF RECORD FOR PETITIONER*

JUNE 15, 2018