No. _____

In the
Supreme Court of the United States

S. BAXTER JONES,
Petitioner,
v.

CITY OF DETROIT,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public entity can be vicariously liable under a theory of *respondeat superior* for its employees' violations of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*., or the Rehabilitation Act, 29 U.S.C. § 701 *et seq*.

PARTIES TO THE PROCEEDINGS

Petitioner S. Baxter Jones was plaintiff in the District Court and plaintiff-appellant in the Court of Appeals for the Sixth Circuit.

Respondent City of Detroit was defendant in the District Court and defendant-appellee in the Court of Appeals. Defendants Reuben Fluker, Robin Cleaver, Edward Hudson, and Elvin Barren were dismissed in an earlier Court of Appeals proceeding and did not take part in the Court of Appeals proceedings below. Defendants Gregory Robson, Kyra Hope, and John Doe were voluntarily dismissed in the District Court and did not take part in the Court of Appeals proceedings below.

STATEMENT OF RELATED PROCEEDINGS

- *Jones v. City of Detroit*, No. 21-1055 (6th Cir.): Opinion and judgment issued December 21, 2021 (affirming summary judgment granted for ADA and Rehabilitation Act claims against the City of Detroit in the District Court's June 4, 2019 order).

- *Jones v. City of Detroit*, No. 19-2346 (6th Cir.): Opinion and judgment issued July 14, 2020 (reversing denial of summary judgment for Fourth Amendment claim against individual defendant officers in the District Court's October 17, 2019 order).

- *Jones v. City of Detroit*, No. 17-11744 (E.D. Mich.):
    - Order denying Plaintiff's motion to alter or amend judgment and/or for relief from judgment issued December 2, 2019.
    - Order denying Defendants' motion for summary judgment issued October 17, 2019.
    - Order denying Plaintiff's motion for reconsideration issued June 27, 2019.
    - Order granting in part and denying in part Defendants' motion for summary judgment and dismissing certain defendants issued June 4, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 20 F.4th 1117 and reproduced at App. 1. The opinion of the District Court for the Eastern District of Michigan is unreported but can be accessed at 2019 WL 2355377 and is reproduced at App. 23.

JURISDICTION

The Court of Appeals issued its judgment on December 21, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Spending Clause

Section 8, Clause 1 of Article I of the United States Constitution provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

The Fourteenth Amendment

Section 1 of Amendment XIV of the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of Amendment XIV of the United States Constitution provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title IX of the Education Amendments of 1972

Subsection(a) of Section 1681 of Title 20 of the United States Code provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 1682 of Title 20 of the United States Code provides in relevant part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

<u>The Rehabilitation Act of 1973</u>

Subsection (a) of Section 701 of Title 29 of the United States Code provide in relevant part:

> Congress finds that—

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

(3) disability is a natural part of the human experience and in no way diminishes the right of individuals to—

(A) live independently;

(B) enjoy self-determination;

(C) make choices;

(D) contribute to society;

(E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;

(4) increased employment of individuals with disabilities can be achieved through implementation of statewide workforce development systems defined in section 3102 of this title that provide meaningful and effective participation for individuals with disabilities in workforce investment activities and activities carried out under the vocational rehabilitation program established under subchapter I, and through the provision of independent living

services, support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services;

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to—

(A) make informed choices and decisions; and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals; and

(7)

(A) a high proportion of students with disabilities is leaving secondary education without being employed in competitive integrated employment, or being enrolled in postsecondary education; and

(B) there is a substantial need to support such students as they transition from school to postsecondary life.

Subsections (a) and (b) of Section 794 of Title 29 of the United States Code provide in relevant part:

> (a) Promulgation of rules and regulations
>
> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.
>
> (b) "Program or activity" defined
>
> For the purposes of this section, the term "program or activity" means all of the operations of—
>
> (1)
>
> (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of career and technical education, or other school system;

(3)

(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

Subsection (a)(2) of Section 794a of Title 29 of the United States Code provides:

The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) 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 794 of this title.

Title II of the Americans with Disabilities Act

Section 12101 of Title 42 of the United States Code provides:

(a) Findings

The Congress finds that—

> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with

disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Section 12131 of Title 42 of the United States Code provides:

As used in this subchapter:

(1) Public entity

The term "public entity" means—

> (A) any State or local government;

> (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
>
> (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).
>
> (2) Qualified individual with a disability
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Section 12132 of Title 42 of the United States Code provides:

> 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.

Section 12133 of Title 42 of the United States Code provides:

> The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Regulations

Subsection (b) of Section 35.130 of Title 28 of the Code of Federal Regulations provides in relevant part:

> (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—
>
> > (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
> >
> > . . .
> >
> > (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
> >
> > . . .
> >
> > (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right,

privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

. . .

(7)

(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Subsection (a) of Section 35.150 of Title 28 of the Code of Federal Regulations provides in relevant part:

A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.

Subsections (c) and (d) of Section 35.172 of Title 28 of the Code of Federal Regulations provide:

(c) Where appropriate, the designated agency shall attempt informal resolution of any matter being investigated under this section, and, if resolution is not achieved and a violation is found, issue to the public entity and the complainant, if any, a Letter of Findings that shall include—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found (including compensatory damages where appropriate); and

(3) Notice of the rights and procedures available under paragraph (d) of this section and §§ 35.173 and 35.174.

(d) At any time, the complainant may file a private suit pursuant to section 203 of the Act, 42 U.S.C. 12133, whether or not the designated agency finds a violation.

INTRODUCTION

The Americans with Disabilities Act, "a milestone on the path to a more decent, tolerant, progressive society," *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring), represents the culmination of decades of Congressional investigation and deliberation over legislation addressing discrimination against disabled persons and was passed with large bipartisan majorities in both Houses of Congress. *Tennessee v. Lane*, 541 U.S. 509, 516 (2004). This case presents a question concerning the reach of Title II of the Americans with Disabilities Act that has divided the circuit courts: can a public entity be vicariously liable under a theory of *respondeat superior* for its employees' violations of that statute?

The question presented is important, is a pure matter of law, and is ripe for this Court's review.

Indeed, this Court recently acknowledged this important issue, but declined to hear it due to lack of briefing by the parties. *See City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 610 (2015) ("Our decision not to decide whether the ADA applies to arrests is reinforced by the parties' failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers. Only public entities are subject to Title II, and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees. *But we have never decided whether that is correct, and we decline to do so here, in the absence of adversarial briefing*.") (emphasis added). *See infra* Argument Section IV for a full discussion of this Court's withdrawal of certiorari in *Sheehan*.

* * *

In April 2015, Freddie Gray suffered a severe and fatal spinal cord injury while shackled but unsecured in the back of a Baltimore Police van.[1] Just months earlier, in July 2014, Petitioner "Baba" Baxter Jones, an activist who requires a wheelchair for mobility, was lucky to have survived a similar "rough ride" at the hands of the Detroit Police. While arresting him for alleged disorderly conduct during a peaceful protest of citywide residential water shutoffs, Detroit

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[1] Justin Fenton, *Autopsy of Freddie Gray Shows "High-energy" Impact*, THE BALTIMORE SUN (June 24, 2015), https://www.baltimoresun.com/news/crime/bs-md-ci-freddie-gray-autopsy-20150623-story.html.

Police officers forced Petitioner into the back of an old police van without adequate headroom or safety restraints for transporting people in a wheelchair. During the ensuing five-mile ride on Detroit's crumbling and pothole-dotted streets, Petitioner was bounced and rocked in his chair, resulting in significant injuries to his neck.

The police officers could have called for proper transportation, but they chose instead to use a beat-up old van that was immediately available to them. In a case of first impression in the Sixth Circuit, a panel of judges considered the important question of whether the City of Detroit could be liable for its officers' failure to accommodate Petitioner's disability. The Sixth Circuit, in an act of grave injustice, answered "no." In doing so, the panel majority misconstrued this Court's precedent and significantly restricted the federal rights of millions of disabled persons living within the Sixth Circuit's borders. It also created a conflict with decades of established law in its sister circuits.

* * *

Petitioner squarely presents to this Court a conflict between the circuit courts. The operative facts to the question presented—that a public entity's employees committed the actions that Petitioner alleges are Title II and Rehabilitation Act violations—are not in dispute, and whether those actions constituted a failure to accommodate is not challenged in this appeal. Rather, the issue at hand is a pure question of law: whether Respondent City

can be liable for *any* failure to accommodate by its officers. This Court's conclusion will be dispositive of the issue: either Respondent City can be liable for its officers' actions that violated Petitioner's federally-protected rights, or it cannot.

Petitioner thus respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit in this case. To resolve the conflict the Sixth Circuit created and to clarify the availability of *respondeat superior* liability in Title II and Rehabilitation Act claims, further review is warranted. This Court should grant the writ, correct the decisions of the lower courts, and undo a great injustice to the disabled persons of this country.

STATEMENT

I. The Americans with Disabilities Act and the Rehabilitation Act.

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*., is Congress' answer to the pervasive discrimination against disabled persons it found "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). It "aims broadly to eradicate discrimination" against persons with disabilities in three particular areas. App. 16 (Moore, J., dissenting). Title I, 42 U.S.C. § 12111 *et seq*., addresses discrimination by employers. Title II, 42 U.S.C. § 12131 *et seq*., addresses discrimination by

public entities in the operation of public services, programs, and activities. Title III, 42 U.S.C. § 12181 *et seq*., addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA (Title II), under which "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. § 12132. A "public entity" includes "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. §§ 12131(1)(A) and (B). Title II provides for enforcement through private suits. *United States v. Georgia*, 546 U.S. 151, 154 (2006) (discussing 42 U.S.C. § 12133).

Title II's prohibitions include, among other things: (1) denying a benefit to a disabled person because of their disability; (2) providing a lesser benefit to a disabled person than is given to others; and (3) limiting a disabled person's enjoyment of rights and benefits provided to the public at large. 28 C.F.R. §§ 35.130(b)(1)(i), (iii) and (vii). A public entity must also "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). Essentially, a public entity must "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to

and usable by individuals with disabilities." 28 C.F.R. § 35.150(a).

2. The Rehabilitation Act of 1973 (RA), 29 U.S.C. § 701 *et seq*., is similar to Title II in purpose and scope. *McPherson v. Michigan High School Atheletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997). Congress enacted the RA out of recognition that the millions of Americans with disabilities "constitute one of the most disadvantaged groups in society," 29 U.S.C. § 701(a)(2), and with the goal of "achiev[ing] equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency" for all disabled persons. 29 U.S.C. § 701(a)(6)(B).

Section 504 of the RA provides that "[n]o 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. § 794(a). Section 504 defines a "program or activity" as "all the operations of" a broad range of entities, "any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b). This Court has held that Section 504 requires that disabled persons have "meaningful access" to programs or activities receiving federal financial assistance. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). "[T]o assure meaningful access, reasonable accommodations in the . . . program or benefit may have to be made." *Id.*

3. The courts of appeals typically analyze Title II and RA claims together because the two statutes are governed by largely the same standards. *See, e.g.*, *McPherson*, 119 F.3d at 460 ("[T]he standards under both acts are largely the same [and] cases construing one statute are instructive in construing the other."); *Karantsalis v. City of Miami Springs*, 17 F.4th 1316, 1321–22 (11th Cir. 2021) ("Claims for discrimination under the Rehabilitation Act are governed by the same standards as the ADA [and] are generally discussed together.") (internal quotation marks omitted); *King v. Hendricks Cnty. Commissioners*, 954 F.3d 981, 988 (7th Cir. 2020) ("Claims under section 504 of the Rehabilitation Act are treated as 'functionally identical' and can be considered together with Title II claims."). "[T]he principal distinction between the two statutes is that the coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance." *McPherson*, 119 F.3d at 460. Thus, for simplicity, this Petition will focus on Title II and omit repetitious references to the RA.

II. Detroit Police Failed to Provide Reasonable Accommodations while Arresting and Transporting Petitioner.

On July 18, 2014, Petitioner was part of a peaceful group protesting widespread residential water shutoffs throughout the City of Detroit. Beginning early in the morning, the protestors demonstrated outside the facility of a contractor Respondent City had hired to perform the water shutoffs. Detroit Police were present at the scene as early as 7:00 a.m. The protest continued throughout

the morning and early afternoon, with the protestors blocking the entrance to the facility. At approximately 1:30 p.m., Detroit Police made the decision to arrest the activists for disorderly conduct.

At the time of the incident, Petitioner "Baba" Baxter Jones required the use of a manual wheelchair for mobility due to neck and back injuries he sustained in an automobile accident several years earlier.[2] The police at the scene did not have transportation that could accommodate an arrestee with a wheelchair. However, despite department policy that authorizes officers to call for alternative transportation such as EMS, the supervisor at the scene, Commander Elvin Barren, decided to transport Petitioner—wheelchair and all—in the rear of an old police van, which was just a standard utility van equipped with two benches along each side of the cargo space.

Because the van was not equipped with a wheelchair lift, Barren, along with Sergeants Reuben Fluker and Edward Hudson and another non-party officer, manually lifted Petitioner in his wheelchair while Officer Robin Cleaver pulled the chair from inside the van. During the lift, Fluker pushed Petitioner's head down to avoid bumping it on the doorframe. The downward force Fluker exerted upon Petitioner's injured neck caused him significant pain.

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[2] The parties do not dispute that Petitioner is a "qualified individual with a disability" under the ADA.

Once Petitioner was inside the van, its inadequacy became apparent. Its ceiling was too low, forcing Petitioner to slouch and keep his head at a forward angle as it rested against the ceiling. There were no seatbelts or other safety restraints to secure Petitioner or his wheelchair. Instead, a police intern put his foot against a wheel of the chair to attempt to stabilize it. Predictably, Petitioner was bounced and jostled around during the five-mile ride to the detention center, and the increased pressure on his head and neck caused him excruciating pain. Petitioner's hands, arms, and shoulders, already weakened by his earlier accident, were also in significant pain from Petitioner having to hold onto the arms of his wheelchair to secure himself during the ride.

Unlike with his fellow arrestees, Respondent City never formally charged or prosecuted Petitioner for disorderly conduct or any other crime. The rough ride Detroit Police gave Petitioner did, however, result in Petitioner suffering injuries to his neck, hands, arms, and shoulders.

III. Petitioner Sues the City of Detroit and Several Detroit Police Officers.

Petitioner sued the City of Detroit and certain Detroit Police officers in the Eastern District of Michigan, alleging violations of Title II and the RA and other claims not relevant to this Petition. The District Court had jurisdiction over this dispute under 28 U.S.C. § 1331. Petitioner alleged that Respondent City and its police officers denied him

reasonable accommodation by failing to ensure that an ADA-compliant vehicle was made available to transport him after his arrest, resulting in physical, psychological, and economic injuries. The District Court dismissed the relevant claims on grounds that a public entity cannot be vicariously liable for its employees' violations of Title II. App. 38–39.

On appeal, the Sixth Circuit affirmed. The panel majority found that because Title II borrows its remedies from the RA, and the RA in turn borrows its remedies from Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, the question of whether vicarious liability is available under Title II and the RA necessarily depends on whether it is available under Title VI. App. 5. Because Title VI's text does not speak to vicarious liability, the Sixth Circuit turned to this Court's 1998 *Gebser* decision, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), which concerned whether vicarious liability is available in claims under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, for guidance, as Title IX was modeled after Title VI. App. 6. Because *Gebser* concluded that a school cannot be vicariously liable under Title IX, the Sixth Circuit held that it must also not be available under Title VI and therefore cannot be available under Title II. App 9.

REASONS FOR GRANTING THE WRIT

This case presents a straightforward question of law: is *respondeat superior* liability available in claims made under Title II? By misconstruing the

statutes and this Court's *Gebser* precedent, the Sixth Circuit has declared part of an Act of Congress—a law that is a civil rights "milestone," *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring)—to be significantly limited in application in a way that deprives millions of Americans their federally-protected rights.

Moreover, it is particularly troubling that the Sixth Circuit's improper holding has resulted in disagreement among the lower courts over the scope of Title II's coverage in view of the statute's express purpose of "provid[ing] a *clear and comprehensive national mandate* for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (emphasis added). The happenstance of geography should not determine the scope of Title II's protections for this country's 41.1 million disabled Americans.[3]

This case presents a clean vehicle for resolving the conflict and, in the interests of justice and judicial clarity, warrants this Court's review.

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[3] U.S. CENSUS BUREAU, *Anniversary of Americans With Disabilities Act: July 26, 2021* (May 26, 2021), https://www.census.gov/newsroom/facts-for-features/2021/disabilities-act.html.

I. This Court Should Grant Review to Correct the Sixth Circuit's Incorrect Holding and Clarify that Public Entities Can Be Vicariously Liable under Title II.

Contrary to the Sixth Circuit's holding, *respondeat superior* is available as a theory of liability in Title II claims. The Sixth Circuit's incorrect decision stems from its improper use of this Court's *Gebser* decision in connection with a question that this Court has identified as an open issue. *See Sheehan*, 575 U.S. at 610. This case provides an opportunity to clarify that *Gebser* does not apply to the important question of vicarious liability in Title II, which only this Court can do. This Court should grant review to correct the Sixth Circuit's erroneous holding and clarify that public entities can be vicariously liable under Title II. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 571 (1979) (noting that certiorari was granted out of "concern that the merits of these important questions had been decided erroneously").

A. The *Gebser* Decision and the Sixth Circuit's Holding.

1. *Gebser* involved a claim under Title IX of the Education Amendments of 1972. Title IX, in relevant part, provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The petitioners in that case, a student and her

mother, sued the student's high school for damages under Title IX for sexual harassment stemming from a sexual relationship between the student and one of her teachers. The student had not, however, reported the relationship to the school. After the teacher was caught in the act, the school terminated his employment. Summary judgment for the school was granted and affirmed on appeal on the basis that the school could be liable under Title IX only if an employee with supervisory power knew of the abuse and failed to correct it.

This Court agreed, holding that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser*, 524 U.S. at 290. This conclusion rested on three considerations.

First, the *Gebser* Court highlighted that Title IX's private right of action, including the availability of damages, is judicially implied. Furthermore, when Congress enacted Title IX in 1972, damages claims were not permitted under civil rights statutes that did expressly provide for private actions. The Court saw this as a sign that Congress had not "contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs." *Gebser*, 524 U.S. at 285. Accordingly, the Court concluded that "it would 'frustrate the purposes' of Title IX to

permit damages recovery against a school . . . based on principles of *respondeat superior* . . . without actual notice to a school district official." *Id.*

The second consideration was "Title IX's contractual nature." *Id.* at 287. The Court noted that "[w]hen Congress attaches conditions to the award of federal funds under its spending power, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition." *Id.* (citations omitted). The Court found the central concern to be "with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." *Id.* (quoting *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992)) (cleaned up). The Court found that because liability based "on principles of constructive notice or *respondeat superior*" would not involve such notice, "Congress did not envision a recipient's liability in damages in that situation." *Id.* at 287–88.

Lastly, the *Gebser* Court considered the notion of "notice" very important given that Title IX's explicit administrative enforcement scheme "operates on an assumption of actual notice to officials of the funding recipient." *Id.* at 288. Title IX requires an agency to "[a]dvise the appropriate person or persons" of a violation prior to initiating any enforcement proceedings, 20 U.S.C. § 1682, with the purpose of allowing for voluntary compliance to avoid such proceedings. *Gebser*, 524 U.S. at 289. Accordingly, the Court reasoned that because Title IX requires notice for its express enforcement mechanism, it

must also require notice for its judicially-implied private enforcement mechanism. *Id*.

2. The Sixth Circuit did not analytically compare *Gebser's* reasoning with the particulars of Title II. Instead, the court engaged in a reductive analysis of the statutes and *Gebser* and concluded that public entities cannot be vicariously liable under those statutes.

The chain of reasoning, which the panel majority and the district court below analogized to a Russian nesting doll, goes like this:

(1) Title II borrows its remedies from the RA ("The remedies, procedures, and rights set forth in [the RA] shall be the remedies, procedures, and rights" provided for violations of Title II, 42 U.S.C. § 12133).
(2) The RA borrows its remedies from Title VI of the 1964 Civil Rights Act ("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" a violation of the RA, 29 U.S.C. § 794a(2)).
(3) Title VI neither explicitly provides for nor prohibits vicarious liability.
(4) Title IX was modeled after Title VI, so if there is no vicarious liability in Title IX claims, there must also be no vicarious liability in Title VI claims. App. 6, 8.
(5) Per *Gebser*, vicarious liability is not available in Title IX. App 6.

(6) Therefore, because Title II and the RA incorporate the remedies of Title VI, they also do not support vicarious liability. App. 9.

B. The Sixth Circuit Improperly Relied on *Gebser*, which is Not Controlling on the Question Presented and Does Not Otherwise Suggest that *Respondeat Superior* is Not Available under Title II.

The *Jones* decision relies on *Gebser* to infer that Title II does not allow vicarious liability. The Sixth Circuit's logic is flawed. Because *respondeat superior* is a theory of liability, and not a remedy, procedure, or substantive right, the panel majority's chain of inferences was improper from the start, and therefore its belief that *Gebser* controls the question presented was incorrect. And, when compared directly with *Gebser's* reasoning rather than through that chain of inferences, *Gebser's* analysis does not support the conclusion that a public entity cannot be vicariously liable under Title II.

1. The Sixth Circuit's "matryoshka doll" logic was flawed at the onset. The panel majority followed a chain of remedies, starting with Title VI (interpreted through Title IX and *Gebser*) and ending at Title II. Under this analysis, if the "remedies, procedures, and rights" of Title VI are those of Title II, then the unavailability of vicarious liability under Title VI necessarily means vicarious liability is not available under Title II. App. 9. As the *Jones* dissent

recognized, this analysis suffers from a fundamental mistake: *respondeat superior* is not a remedy, but rather is a *theory of liability*. App. 18–19 (Moore, J., dissenting) (citing *Polk Cnty. v. Dodson*, 454 U.S. 312, 325 (1981) (referring to the "*respondeat superior* theory of liability")).[4]

As the *Jones* dissent explains, the difference is between the *type* of remedy sought (e.g., compensatory damages or injunctive relief) and the scope of that remedy, including how liability for the remedy attaches to a particular defendant (e.g., negligence or strict liability). App. 19 (Moore, J., dissenting). Pursuing a claim under a *respondeat superior* theory says nothing about the ultimate remedy sought, but rather dictates what the plaintiff must prove to show causation. *Id.* Thus, the availability of *respondeat superior* is part of a larger "remedial scheme," *Gebser*, 524 U.S. at 290, in which the types of remedies available is another discrete part. App. 19 (Moore, J., dissenting). However, "the scheme is distinct from the remedy itself." *Id.* Indeed, *Gebser* addressed "*the circumstances* in which a damages remedy should lie;" in other words, the question there concerned "*when it is appropriate* to award monetary damages," and not whether

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[4] Nor is *respondeat superior* a "procedure" or a "right" such that its availability comes under the ambit of Title II's and the RA's borrowing statutes. The theory creates no substantive rights, and it does not affect the procedures under which a Title II or RA claim is brought. Instead, it merely affects who may be liable for violations of those statutes. App. 20 (Moore, J., dissenting).

damages were available as a remedy in the first instance, which this Court had already decided six years prior in *Franklin*. *Gebser*, 524 U.S. at 284 (emphasis added).

Because *respondeat superior* is not a remedy, procedure, or right, the Sixth Circuit's "nesting doll" analysis was improper, as neither Title II nor the RA are statutorily bound to Title VI in the way the panel majority believed. Accordingly, while *Gebser* and its treatment of Title IX may be helpful in determining whether public entities may be vicariously liable under Title II, it is not controlling on the question presented. The Sixth Circuit was wrong to so hold.

2. When viewed through a non-controlling lens, the statutory features that *Gebser* found militated against *respondeat superior* in Title IX claims are not present in Title II claims. The *Jones* dissent provided a thorough review in this regard.

First, *Gebser* found that because no civil rights statute provided for damages when Title IX was enacted in 1972, Congress could not have intended unlimited recovery of damages against employers. But the ADA was passed in 1990. App. 15 (Moore, J., dissenting). By that point, this Court had already found an implied right of action in both Title VI and Title IX, *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 702–03 (1979), and had already acknowledged the availability of a damages remedy in Title VI claims, *see Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 584 (1983). And this Court has long held that "the federal courts have the power to

award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 71, *reaff'g Bell v. Hood*, 327 U.S. 678 (1946).[5] Accordingly, Congress would have assumed that a damages remedy would have been available under Title II. App. 15 (Moore, J., dissenting).

Next, *Gebser* analogized Title IX to contract law: because Title IX is enforced under Congress' spending power, the statute is akin to a bargained-for contract by which an entity agrees to the statute's provisions in exchange for receiving federal funds. *Id.* Under this framework, a statutory violation is essentially a breach of contract, and under contract law principles, it would be unfair to punish an entity that was unaware of the breach. *Id.* (citing *Gebser*, 524 U.S. 286–88). But Title II does not draw upon the Spending Clause; a Title II violation is not predicated upon the receipt of federal funds. App. 15–16 (Moore, J., dissenting) (citing 42 U.S.C. § 12132). Instead, Title II's outright prohibition on discrimination is an exercise of Congress' authority under Section 5 of the Fourteenth Amendment. App. 16 (Moore, J., dissenting). As the *Jones* dissent succinctly explained, "[t]o remedy the violation of a substantive right, as opposed to a condition of federal funding, an entity must compensate the plaintiff for the harms incurred by the discrimination itself, rather than

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[5] "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell*, 327 U.S. at 684.

harms incurred from a breach of contract as a third-party beneficiary." *Id.* Thus, the contract law principles that informed *Gebser's* analysis do not apply to Title II claims.

Lastly, *Gebser* found the notice provisions of Title IX's administrative enforcement regulations very important to the *respondeat superior* issue. *See Gebser*, 524 U.S. at 288–90. Per *Gebser*, "[i]t would be unsound" to allow liability without notice in a judicially-implied private action while requiring notice for Title IX's express enforcement provisions. *Id.* at 289. However, Title II's enforcement regulations operate differently. App. 17–18 (Moore, J., dissenting). While it is true that *agency* enforcement of a Title II violation requires notice before formal proceedings can commence, 28 C.F.R. § 35.172(c), a complainant may file a private suit at any time, regardless of agency action. 28 C.F.R. § 35.172(d). Consequently, the notice considerations *Gebser* found compelling against the application of vicarious liability in Title IX claims are not relevant to Title II claims.

II. This Case Presents an Important Issue Over Which the Sixth Circuit's Decision Creates an Untenable Circuit Split.

As a result of the Sixth Circuit's incorrect holding, the courts of appeals do not agree on whether vicarious liability is available in Title II claims. The Sixth Circuit's holding significantly impacts the federally-protected rights of tens of millions of U.S. citizens. Thus, it is essential that this Court grant

certiorari to resolve the conflict, restore the rights of the citizens living in the Sixth Circuit, and ensure that *Jones* does not become a roadmap for the further erosion of rights in other circuits.

A. The Ninth, Fourth, and Fifth Circuits Have Explicitly Held that Public Entities can be Vicariously Liable under Title II.

1. The Ninth Circuit has long held that public entities can be vicariously liable under Title II. In *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001), the Ninth Circuit extended to Title II claims its earlier *Bonner* decision, *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988), which held that vicarious liability is available under the RA. *Bonner*, 857 F.2d at 567. The plaintiff in *Duvall*, who was deaf in his left ear and severely hearing impaired in his right ear, had asked a family court to provide live video transcription of his divorce proceedings. The court refused, and the plaintiff brought failure to accommodate claims under Title II against the county and other individuals. The district court dismissed all claims against all defendants.

The Ninth Circuit reversed. In its analysis, the court considered the issue of the county's liability under a *respondeat superior* theory. The Court acknowledged that under *Bonner*, vicarious liability is available in RA claims because "the historical justification for exempting municipalities from *respondeat superior* liability does not apply to the Rehabilitation Act," and because *respondeat superior*

is "entirely consistent" with the policy of eliminating discrimination against the disabled.[6] *Id.* at 1141. Finding that these considerations apply to Title II, the court declared that "[w]hen a plaintiff brings a direct suit under either the Rehabilitation Act or Title II of the ADA against a municipality (including a county), the public entity is liable for the vicarious acts of its employees." *Id.*

The Ninth Circuit continues to follow its *Bonner* and *Duvall* decisions with respect to *respondeat superior* under Title II. *See Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 516 n.11 (9th Cir. 2004) ("[M]unicipalities are not exempted from respondeat superior liability under the Rehabilitation Act."); *Borawick v. L.A.*, 793 F. App'x 644, 646 (9th Cir. 2020) ("Under the ADA and Rehabilitation Act,

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[6] The *Bonner* court explained that

> [t]he application of respondeat superior to § 504 suits would be entirely consistent with the policy of that statute, which is to eliminate discrimination against the handicapped. The justification for imposing vicarious liability on employers for the acts of employees is well-known. It creates an incentive for the employer to exercise special care in the selection, instruction and supervision of his employees, thereby reducing the risks of accidents. In the absence of a Congressional directive to the contrary, this court can assume only that Congress intended the judiciary to use every available tool to eliminate discrimination against the handicapped in federally funded programs.

Bonner, 857 F.2d at 566–67 (cleaned up).

municipalities are vicariously liable for the conduct of their employees."); *Lund v. Cowan*, 5 F.4th 964 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 900 (2022) ("Title II of the ADA allows respondeat superior liability.").

2. The Fourth Circuit likewise considers vicarious liability to be applicable to Title II claims against a public entity. The plaintiff in *Rosen v. Montgomery Cnty.*, 121 F.3d 154 (4th Cir. 1997), was a deaf man who had been arrested and prosecuted for drunk driving. The plaintiff sued the county under Title II for failing to provide adequate accommodations for the plaintiff's hearing disability during the arrest and in the subsequent court proceedings. The district court granted summary judgment for the county, and the Fourth Circuit affirmed on grounds that the plaintiff could show no injury from the alleged violations.

As a preliminary matter, however, the court addressed the county's argument that it could not be held vicariously liable under the ADA and that such liability could arise only from a policy of discrimination. The Fourth Circuit rejected this argument, stating that "[u]nder the ADA and similar statutes, liability may be imposed on a principal for the statutory violations of its agent." *Id.* at 157 n.3. The court supported its conclusion by citing cases applying vicarious liability to similar statutes, including the Age Discrimination in Employment Act (*Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510–11 (4th Cir. 1994), Title I of the ADA (*EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995)), and the RA (*Bonner*, 857 F.2d at 567).

3. The Fifth Circuit followed in the Fourth Circuit's footsteps with *Delano-Pyle v. Victoria Cnty.*, 302 F.3d 567 (5th Cir. 2002). In that case, the plaintiff, who had a serious hearing impairment, was involved in a traffic accident, which led to his arrest for driving while intoxicated. The plaintiff had failed the sobriety tests the county deputies administered to him, which he alleged was because he could not understand the deputies' instructions because they had not asked how to best communicate with him. A jury found for the plaintiff and awarded compensatory damages. On appeal, the Fifth Circuit agreed with the Ninth and Fourth Circuits that "when a plaintiff asserts a cause of action against an employer-municipality, under either the ADA or the RA, the public entity is liable for the vicarious acts of any of its employees as specifically provided by the ADA." *Id.* at 574–75.

The Fifth Circuit has not wavered in its application of vicarious liability in Title II claims. *See Frame v. City of Arlington*, 657 F.3d 215, 227 n.42 (5th Cir. 2011) (citing *Duvall* and *Delano-Pyle* for the proposition of vicarious liability in Title II); *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 417 (5th Cir. 2021) ("A plaintiff need not identify an official policy to sustain such a claim, and a public entity may be held vicariously liable for the acts of its employees under either statute."); *Phillips ex rel. J.H. v. Prator*, No. 20-30110, 2021 WL 3376524, at *4 (5th Cir. Aug. 3, 2021) ("The ADA and Rehabilitation Act are vicarious liability statutes.").

4. The *Jones* panel majority's attempts to distinguish these contrary circuit positions are unconvincing. The court's only points of distinction are that the decisions either: (1) came before *Gebser* (*Rosen* in the Fourth Circuit); or (2) did not discuss *Gebser* (*Duvall* in the Ninth and *Delano-Pyle* in the Fifth). App. 9–10. The Sixth Circuit said nothing of the reasoning behind its sister circuits' decisions. Instead, the panel majority implicitly presumed the unlikely event that counsel and the courts of appeals in *both* post-*Gebser* cases either missed or ignored controlling Supreme Court precedent. It did not consider that those decisions did not apply *Gebser* because *Gebser*, as Petitioner argues, is not controlling on the question presented.

The Sixth Circuit also reasoned that *Delano-Pyle* is no longer good law because the Fifth Circuit has since called that decision into question in light of *Gebser*. App. 9. The court cited two recent unpublished decisions in support of its contention. *Id.* Neither decision questions *Delano-Pyle* as the Sixth Circuit suggested. In the first, *Harrison v. Klein Indep. Sch. Dist.*, 856 F. App'x 480 (5th Cir. 2021), the court neither mentioned nor discussed "vicarious liability" or "*respondeat superior*." The Fifth Circuit instead cited *Gebser* for its test for establishing "deliberate indifference." *Id.* at 483–84. And in the other decision, *PlainsCapital Bank v. Keller Indep. Sch. Dist.*, 746 F. App'x 355 (5th Cir. 2018), rather than "acknowledg[ing] the possibility that *Delano-Pyle* was wrong because it did not engage with *Gebser*" as the Sixth Circuit stated, App. 9, the court instead acknowledged the *appellee's argument*

that *Delano-Pyle* was wrong in view of *Gebser*. *PlainsCapital Bank*, 746 F. App'x at 361–62. Ultimately, the Fifth Circuit disposed of the appeal on other grounds and did "not reach the issue of whether *Delano-Pyle* is vulnerable to arguments about overlooked Supreme Court authority." *Id.* at 364. Moreover, the Sixth Circuit failed to mention the two 2021 Fifth Circuit decisions that followed *Delano-Pyle's* vicarious liability holding, both of which preceded *Jones*. *See T.O.*, 2 F.4th at 417; *Phillips*, 2021 WL 3376524, at *4.

B. This Court Should Grant Review Now to Resolve This Conflict and Clarify this Important Issue of Law.

This Court's review is warranted because the Sixth Circuit's holding squarely conflicts with those of the Ninth, Fourth, and Fifth Circuits in a way that significantly impairs the effectiveness of Title II to meet its expansive and important goals. Indeed, the Sixth Circuit expressly acknowledged its sister circuits' opposing conclusion. App. 9. And this Court's review is appropriate now, as further consideration in the courts of appeals will not remedy the immediate impact of the Sixth Circuit's decision on the implementation of a law that is a "milestone on the path to a more decent, tolerant, progressive society." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring).

1. Whether the courts should apply *respondeat superior* in Title II actions is an important question of federal law. Congress enacted Title II pursuant to

its remedial powers under Section 5 of the Fourteenth Amendment in response to the widespread unconstitutional treatment of disabled persons it found "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Congress also found that "historically, society has tended to isolate and segregate individuals with disabilities," and that such discrimination is "a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Accordingly, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" when enacting the ADA. 42 U.S.C. § 12101(b)(4).

These problems are not isolated to a small minority of the population: recent census data identifies approximately 41.1 million people—or one in every eight U.S. citizens—as disabled.[7] Accordingly, Title II and the RA have a wide impact on the population at large. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 596 (1999) (noting that certiorari was granted "in view of the importance of the question presented to the States and affected individuals").[8] But, as a result of the Sixth Circuit's

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[7] U.S. CENSUS BUREAU, *supra* note 3.

[8] This issue also impacts the operations of countless public entities, as Title II has an exceedingly broad reach. *See* 42 U.S.C. § 12131(1) (broadly defining "public entity" as "any State or local government" and "any department, agency, special

decision, the protections of a federal civil rights statute that is designed "to provide a clear and comprehensive national mandate for the elimination of [all] discrimination" against persons with disabilities, 42 U.S.C. § 12101(b)(1), now vary depending upon where those persons live.

Title II is a nationwide law that "is designed to address . . . pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 541 U.S. at 524. The effectiveness of such an important civil rights statute should not depend on circuit court boundary lines. Yet, because of the Sixth Circuit's erroneous decision, the federal rights of approximately 33.3 million people—or about 10% of the country—now turn upon geography.[9] This Court should intervene now to resolve the circuit conflict and bring uniformity to this important area of federal law.[10]

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purpose district, or other instrumentality" thereof). And this Court has recognized that Title II's statutory reach is unambiguous: it "plainly covers state institutions *without* any exception," and its text "provides no basis for distinguishing [between different] programs, services, and activities. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209–10 (1998) (emphasis in original).

[9] U.S. CENSUS BUREAU, *STATE PROFILES: 2020 Census*, https://www.census.gov/library/stories/state-by-state.html (last visited March 17, 2022).

[10] *See Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 136 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984) (noting that certiorari was granted because the Court of Appeals' erroneous

2. Further percolation of this important issue in the circuit courts is not required. Time will only increase, not ameliorate, the division in the circuits. The circuits to have not yet weighed in on this question[11] will either deepen the split by agreeing with the Sixth Circuit that *Gebser* controls, or rule in favor of vicarious liability as the other circuits to have considered the question have for over two decades. In the former case, additional caselaw will not aid this Court in resolving the question. And in the latter, the citizens of the Sixth Circuit are left alone on an island without the full protections afforded them by Congress and the Constitution.

Justice is not served when the public entities serving the 33 million citizens of Kentucky,

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ruling "seemed to threaten the effectiveness of the private action as a vital means for enforcing" a national policy).

[11] *Respondeat superior* liability has been either assumed or acknowledged as an open question by the First and Eleventh Circuits. *See Gray v. Cummings*, 917 F.3d 1, 17 (1st Cir. 2019); *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 n.6 (11th Cir. 2019). In the circuits in which the question has not appeared at the appellate level, the district courts fall on either side of the divide. *See, e.g., Lloyd v. N.Y.C.*, 246 F. Supp. 3d 704, 726–27 (S.D.N.Y. 2017) (assuming *respondeat superior*); *Geness v. Pennsylvania*, 503 F. Supp. 3d 318, 340 (W.D. Pa. 2020) (applying *respondeat superior*); *A.V. ex rel. Hanson v. Douglas Cnty. Sch. Dist.*, No. 21-CV-0704-WJM-SKC, 2022 WL 504138, at *9 (D. Colo. Feb. 18, 2022) (applying *respondeat superior*); *Ravenna v. Vill. of Skokie*, 388 F. Supp. 3d 999, 1004–08 (N.D. Ill. 2019) (rejecting *respondeat superior*). The prevalence of this issue demonstrates that the question presented is a recurring one of national importance and that the inter-circuit division is only going to proliferate, warranting this Court's review now.

Michigan, Ohio, and Tennessee cannot be held liable for their employees' civil rights violations, while in the rest of the country the vicarious liability of public entities is either assumed or explicitly acknowledged. This Court should grant review now to correct the injustice of the Sixth Circuit's wrong decision and ensure that *Jones* is not used as a roadmap for other circuits to deprive their citizens of the federally-protected rights enjoyed by their fellow citizens in other states.

III. Public Entitles Can Be Vicariously Liable under Title II.

Jones reached a contrary conclusion to a proposition that was previously uncontroversial: a public entity can be vicariously liable for its employees' Title II violations. This notion is supported by long-established principles of tort law. And, when free of the Sixth Circuit's improper inference analysis, *see supra* Section I.B.1, *Gebser* actually supports vicarious liability in Title II through its analysis of a similar civil rights statute.

1. As the Ninth Circuit noted in *Bonner*, the general rule is that vicarious liability is available in claims under civil rights statutes. *Bonner*, 857 F.2d at 566; *see also Rosen*, 121 F.3d at 157 n.3 (noting the availability of vicarious liability in statutes similar to Title II). This is in keeping with this Court's precedents concerning the applicability of common law principles in tort-like statutory actions, such as claims of discrimination. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) (noting that a claim of housing

discrimination is a tort claim). This Court assumes that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Id.*; *cf. Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013) (presuming that Congress incorporated the default rules of tort causation into Title VII).

Beyond the standard assumption that Title II incorporates vicarious liability, the policy behind that statute fully supports application of the principle. App. 16–17 (Moore, J., dissenting). Title II "aim[s] to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs." *Fry v. Napoleon Cmty. Sch.*, __ U.S. __, 137 S. Ct. 743, 756 (2017). The threat of potential *respondeat superior* liability "creates an incentive for the employer to exercise special care in the selection, instruction and supervision of his employees" to prevent harm. *Bonner*, 857 F.2d at 566–67. Here, the harm sought to be prevented is discrimination against the disabled; when employees are properly trained to identify and respond to such discrimination, its likelihood is lessened. Thus, *respondeat superior's* enlargement of a public entity's potential liability to include the acts of its employees helps further Title II's broad goal of eliminating discrimination and ensuring equal participation. App. 16–17 (Moore, J., dissenting).

2. Contrary to the *Jones'* majority's reading of *Gebser*, that case actually supports the idea that vicarious liability is available in Title II claims. The key lies in the *Gebser* Court's comparison of Title IX to Title VII of the 1964 Civil Rights Act (Title VII), 42 U.S.C. § 2000e *et seq*., which prohibits discrimination in employment.

The petitioners in *Gebser* argued that this Court's Title VII standards, under which *respondeat superior* is available, *see Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), should govern in Title IX claims. The *Gebser* Court disagreed. For one, the Court noted that Title VII contains express provisions for a private cause of action, 42 U.S.C. § 2000e-5(f), and for money damages, 42 U.S.C. § 1981a(a)(1); Title IX, on the other hand, has only a judicially-implied private right of action and "there is thus no legislative expression of the scope of available remedies, including when it is appropriate to award monetary damages." *Gebser*, 524 U.S. at 283–84. The Court also distinguished Title IX based on its "contractual framework." *Id*. at 286. While Title IX is based on Congress' Spending Clause powers and conditions its obligations on the receipt of federal funds, Title VII "is framed in terms not of a condition but of an outright prohibition" and "applies to all employers without regard to federal funding." *Id*.

Both of these features of Title VII also distinguish Title II from Title IX. Like Title VII, Title II is an outright prohibition on discrimination that is not tethered to the receipt of federal funds. *See* 42 U.S.C.

§ 12132. It is an express exercise of Congress' enforcement powers under Section 5 of the Fourteenth Amendment, rather than its spending power. *See* 42 U.S.C. § 12101(b)(4). And, unlike Title IX, this Court had already recognized that a remedy for money damages was available in a private action under Title VI (from which Title II borrows its remedies) by the time Congress enacted Title II in 1990. *See Cannon*, 441 U.S. at 702–03; *Guardians*, 463 U.S. at 584 (1983); *see also supra* Section I.B.2.

3. Finally, the Sixth Circuit's holding effectively abrogates a portion of the Title II statute. Title II prohibits discrimination concerning "the services, programs, or *activities* of a public entity." 42 U.S.C. § 12132 (emphasis added). Public entities are not living persons—they can only act through people. This is the age-old problem that the doctrine of *respondeat superior* was developed to address. But, by holding that public entities are immune to vicarious liability, the Sixth Circuit has rendered the portion of the statute referring to the "activities of a public entity," which are necessarily performed by people, without effect.

IV. This Court Recently Acknowledged the Question Presented as an Open Issue.

This Court recently identified the question presented here as an open issue in its 2015 *San Francisco v. Sheehan* decision. *Sheehan*, 575 U.S. at 608–10. The respondent in that case, who suffered from a schizoaffective disorder, claimed that the San Francisco Police violated her Title II rights during an

arrest while she was suffering from a psychotic episode. The District Court dismissed her claims, holding that Title II does not apply during arrests. The Ninth Circuit reversed, finding that the ADA requires accommodation of disabilities in "anything a public entity does." *Id.* at 607.

San Francisco petitioned for certiorari on the question of whether 42 U.S.C. § 12132 "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." *Id.* at 608. This Court understood this to embody San Francisco's argument before the Ninth Circuit, which was that Title II does not apply to an officer's actions prior to ensuring that there is no threat of harm. *Id.* However, after this Court granted certiorari, San Francisco instead relied on an argument focusing on § 12132's phrase "qualified individual" and two related regulations.

This Court dismissed the question presented as improvidently granted because San Francisco did not raise this argument in the court below. *Id.* at 610. Per the Court:

> Whether the statutory language quoted above applies to arrests is an important question that would benefit from briefing and an adversary presentation. But San Francisco, the United States as *amicus curiae*, and Sheehan all argue (or at least accept) that § 12132 applies to arrests. No one argues the contrary view. As a result, we do not think

> that it would be prudent to decide the question in this case.

Id.[12] This Court in *Sheehan* then made an important additional observation about San Francisco's failure to address its question presented:

> Our decision not to decide whether the ADA applies to arrests is reinforced by the parties' failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers. Only public entities are subject to Title II, and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees. *But we have never decided whether that is correct*, and we decline to do so here, in the absence of adversarial briefing.

Id. (citations omitted) (emphasis added).

This is the very issue Petitioner presents to this Court. Moreover, the Sixth Circuit answered the question in the absolute: "vicarious liability does not apply to Title II of the ADA." App. 12. This holding has a much wider and more severe impact than this Court envisioned in *Sheehan*, which limited the

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[12] The District Court here considered the question of the ADA's application during arrests and found that the ADA does apply "during post-arrest transportation." App. 34. Respondent did not challenge this finding.

question to vicarious liability for arrests. *Id*. This case provides the Court with the perfect opportunity to resolve this important question with the adversarial briefing it desires.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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