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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0288p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 21-1055

[Filed: December 21, 2021]

S. BAXTER JONES,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CITY OF DETROIT, MICHIGAN; REUBEN FLUKER; ROBIN CLEAVER; EDWARD HUDSON; ELVIN BARREN,	)
	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:17-cv-11744—Avern Cohn, District Judge.

Argued: November 2, 2021

Decided and Filed: December 21, 2021

Before: SUTTON, Chief Judge; MOORE and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Kathryn Bruner James, GOODMAN HURWITZ & JAMES, P.C., Detroit, Michigan, for Appellant. Cheryl L. Ronk, CITY OF DETROIT, Detroit, Michigan, for Appellees. **ON BRIEF:** Kathryn Bruner James, GOODMAN HURWITZ & JAMES, P.C., Detroit, Michigan, for Appellant. Cheryl L. Ronk, CITY OF DETROIT, Detroit, Michigan, for Appellees.

SUTTON, C.J., delivered the opinion of the court in which GRIFFIN, J., joined. MOORE, J. (pp. 10–16), delivered a separate dissenting opinion.

OPINION

SUTTON, Chief Judge. After police arrested Baxter Jones during a protest in Detroit, he sued the City on several grounds, including a claim that the police officers failed to provide a reasonable accommodation for him when they took him to the police station. Officers transported Jones, who uses a wheelchair, in a cargo van. That was unsafe and injured him, he alleged in the complaint. The district court dismissed his claim that the City was vicariously liable for the officers' failure to accommodate him. Because vicarious liability is not available for claims under Title II of the Americans with Disabilities Act, we affirm.

I.

In 2014, officers with the Detroit Police Department arrested Baxter Jones and eight other individuals as they demonstrated outside a city water contractor's facility. The protestors blocked the building's entrance, and the officers arrested them for disorderly conduct. A police bus came to take the protestors to a police station, but Jones could not board it because he uses a wheelchair, which the bus was not equipped to handle. The officers called for a cargo van to transport him.

According to Jones, the vehicle was not up to the task. Because the van did not have a wheelchair lift, the officers had to lift him into the van. The interior of the van, he claims, also created problems, as the height of the ceiling made it difficult for him to sit up straight. And the van lacked restraints. To keep the wheelchair from rolling around while the van was in transit, an officer sat in the back with Jones and braced his feet against the chair's wheels to prevent it from moving. Jones claims that the entry into the van and the jostling and bouncing of the ensuing trip exacerbated existing injuries and damaged his spine.

The State of Michigan declined to prosecute Jones for disorderly conduct, but that did not end the dispute. Jones filed a lawsuit against the City of Detroit. In addition to the City, he named a number of police officers in their individual capacities. He brought claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*; and state law, Mich. Comp. Laws § 37.1101 *et seq*. He also filed a claim under § 1983,

arguing that the officers used excessive force in violation of the Fourth Amendment.

The defendants moved for summary judgment. The district court denied their request for qualified immunity on the excessive-force claim, which prompted an interlocutory appeal. Our court reversed and granted qualified immunity to the officers with respect to the excessive-force claims against them. *Jones v. City of Detroit*, 815 F. App'x 995, 1000 (6th Cir. 2020).

The district court separately granted summary judgment in the City's favor on Jones's failure-to-accommodate claims under the Americans with Disabilities Act and the Rehabilitation Act. The court held that neither statute permits a claim of vicarious liability, the theory under which Jones sued the City. Jones asked the district court to certify that question for interlocutory appeal. It did, and we granted permission to appeal.

II.

Under Title II of the ADA, "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 Title II plaintiff may bring a claim for intentional discrimination or for failure to provide a reasonable accommodation. *Roell v. Hamilton County*, 870 F.3d 471, 488 (6th Cir. 2017).

When it comes to remedies for a violation, Title II borrows from the Rehabilitation Act. It says that the "remedies, procedures, and rights" under section 505 of

the Rehabilitation Act apply to Title II claims. 42 U.S.C. § 12133. Section 505 of the Rehabilitation Act, as it happens, is a borrower too. It says that the "remedies, procedures, and rights set forth" in Title VI of the 1964 Civil Rights Act "shall be available" for violations of the Rehabilitation Act. 29 U.S.C. § 794a(a). The upshot? The remedies available for violations of Title II of the ADA and § 505 of the Rehabilitation Act are "coextensive" with those for Title VI, *Barnes v. Gorman*, 536 U.S. 181, 185 (2002), and to borrow from the district court operate like one "matryoshka doll" within another, *Jones v. City of Detroit*, Case No. 17-11744, 2019 WL 2355377, at *5 (E.D. Mich. June 4, 2019).

That prelude sets the table for establishing that Title VI tells us whether vicarious liability is available under these provisions of the ADA and Rehabilitation Act. Whether an injured party may seek relief premised on vicarious liability turns on the nature of the "remedies, procedures, and rights" available or, in the words of the Supreme Court, on a construction of "the scope of available remedies" under the statute. *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 284–85 (1998); *see Barnes*, 536 U.S. at 187.

Hiler v. Brown confirms the point. 177 F.3d 542 (6th Cir. 1999). It evaluated whether an employee may sue a supervisor in his individual capacity in a retaliation claim under the Rehabilitation Act. *Id.* at 543. The relevant portion of the Rehabilitation Act at issue in that case incorporated Title VII's remedies in the same way that Title II incorporates Title VI's remedies. *Id.* at 545. There, we looked to Title VII to determine whether

a claimant could sue a supervisor personally under the Rehabilitation Act. *Id.* Here, we do the same. Whether Title II imposes vicarious liability rises and falls with whether Title VI does.

In answering the Title VI question, we have considerable guidance. Title II of the ADA is not the only federal civil rights statute that incorporates the remedies established by Title VI of the Civil Rights Act. Title IX of the Education Amendments of 1972 uses the same remedial scheme, *compare* 42 U.S.C. §§ 2000d-1, 2000d-2, *with* 20 U.S.C. §§ 1682, 1683; *see also Cannon v. Univ. of Chi.*, 441 U.S. 677, 695–96 (1979), and the Supreme Court to our fortune has already investigated the availability of vicarious liability under Title IX.

In *Gebser*, the Court faced a claim by a student who became embroiled in a sexual relationship with a teacher and who sued her school district for sexual harassment under Title IX. 524 U.S. at 277–78. The student did not have any evidence that other school officials knew about the teacher's misconduct, however. *Id.* at 291. Absent actual notice and deliberate indifference on the part of district officials with the authority to intervene, the Court held that the student did not have a claim for monetary damages. *Id.* at 292–93.

Three features of Title IX undergirded the Court's decision. The first was its date of enactment. At Title IX's birth in 1972, most civil rights laws did not permit money damages actions. That was true even for "principal civil rights statutes" like Title VII, which created an express cause of action. *Id.* at 285–86. Title IX by contrast has only an implied cause of action. *See*

Cannon, 441 U.S. at 717. Under these statutory circumstances, the Court thought it hard to believe that Congress would implicitly authorize damages awards under Title IX at a time when it had not done so under Title VII, which contained an express cause of action. *Gebser*, 524 U.S. at 285–86.

The second feature was Title IX's "contractual nature" as Spending Clause legislation. *Id.* at 287. When Congress invokes its Spending Clause powers and imposes conditions on the States for the receipt of federal funds, it reasoned, a recipient must have notice that noncompliance could open the door for liability in damages. *Id.* No such notice appeared in the words of the statute. A school district would justifiably be surprised to learn that, by accepting federal funds, it could be subjected to a monetary judgment mentioned nowhere in the statute due to conduct school officials knew nothing about—and even at a dollar amount exceeding the initial grant. *Id.* at 289–90. It was "sensible to assume" from this statutory silence, the Court explained, that Congress "did not envision" money-damages liability. *Id.* at 287–88.

The third feature was the enforcement scheme that Title IX lays out. While the statute does not expressly create a private cause of action, it does expressly create administrative enforcement remedies. *Id.* at 288. The key recourse is that federal agencies may file actions against noncompliant recipients of funds. Before doing so, an agency must notify the "appropriate person" employed by the recipient and attempt to achieve compliance voluntarily. *Id.*; *see* 20 U.S.C. § 1682. That reality offered one more clue to the Court. "It would be

unsound," the Court explained, "for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge." *Gebser*, 524 U.S. at 289.

Title VI shares all of these features with Title IX. It was enacted at a time when existing civil rights statutes containing express rights of action authorized private claims for injunctive and equitable relief, not monetary relief. It invoked Congress's Spending Clause powers. And it contained the same administrative enforcement mechanism, which requires actual notice to a recipient's officials. *Cannon*, 441 U.S. at 695–96, 696 n.18.

What was true for Title IX in *Gebser* is true for Title VI today. Our court previously suggested as much in *Foster v. Michigan*, 573 F. App'x 377, 389 (6th Cir. 2014). We indicated that the claimants "likely would not be able to establish Title VI liability . . . under a theory of respondeat superior." *Id.* Noting that "the *Gebser* Court recognized that Title VI and Title IX operate in the same manner," *Foster* reasoned that "*Gebser*'s interpretation that there is no vicarious[] liability under Title IX supports the notion that there is no vicarious liability under Title VI." *Id.*

Several other circuits agree. *See, e.g.*, *United States v. County of Maricopa*, 889 F.3d 648, 652 & n.2 (9th Cir. 2018) (explaining that "an entity cannot be held vicariously liable on a *respondeat superior* theory" under Title VI); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 664–65 (2d Cir. 2012) (explaining the

limited circumstances in which "courts view actions of a third party as intentional violations by the funding recipient itself" under Title VI without discussing vicarious liability); *see also Rodgers v. Smith*, 842 F. App'x 929, 929 (5th Cir. 2021) (per curiam) ("Title VI allows neither personal liability claims against individuals nor vicarious liability claims against employers for the acts of their employees.").

Because Title II of the ADA and the Rehabilitation Act import Title VI's remedial regime, that ends the inquiry. If Title VI does not allow vicarious liability, neither do these provisions of the ADA or the Rehabilitation Act.

Jones resists this approach and conclusion.

Two courts of appeals at first glance appear to have reached the opposite conclusion. *See Delano-Pyle v. Victoria County*, 302 F.3d 567, 574–75 (5th Cir. 2002); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001). But time and circumstances have not favored either decision. The Fifth Circuit decision never addressed the impact of *Gebser* on this analysis. Twice since then, the Fifth Circuit has acknowledged the possibility that *Delano-Pyle* was wrong because it did not engage with *Gebser*. In each instance, the court did not finally resolve the point. *Harrison v. Klein Ind. Sch. Dist.*, 856 F. App'x 480, 483 n.4 (5th Cir. 2021) (per curiam); *Plains Cap. Bank v. Keller Ind. Sch. Dist.*, 746 F. App'x 355, 361–62 (5th Cir. 2018) (per curiam). The Ninth Circuit decision also did not grapple with *Gebser*. It relied on in-circuit precedent without pausing to ask whether that case, a decade older than *Gebser*, remained good law. *Duvall*, 260 F.3d at 1141

(citing *Bonner v. Lewis*, 857 F.2d 559, 566–67 (9th Cir. 1988)).

One more datapoint deserves note. More recently, the Fifth and Ninth Circuits have held that Title VI does not impose vicarious liability. *See County of Maricopa*, 889 F.3d at 652 & n.2; *Rodgers*, 842 F. App'x at 929. Each decision relied on *Gebser* in doing so. Each court of appeals, to be sure, has not taken the next step of addressing the impact of those decisions on the ADA's incorporation of Title VI. But at a minimum, serious tension exists between the earlier and later decisions.

That leaves one other court of appeals that has permitted vicarious-liability claims under Title II of the ADA. But that case was decided *before Gebser* and thus had no reason to consider the relationship between the Supreme Court's conclusions about Title IX and the ADA. *See Rosen v. Montgomery County*, 121 F.3d 154, 157 n.3 (4th Cir. 1997).

Other civil rights statutes, it is true, authorize some vicarious-liability claims. Title VII offers one example. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). But the "general rule" that vicarious liability applies as a background principle has force only "absent clear direction to the contrary by Congress." *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 70–71 (1992); *see also Vinson*, 477 U.S. at 72. Just that kind of "clear direction" appears here. Congress has explicitly said that a claimant seeking relief under Title II of the ADA must use the remedies provided by Title VI.

Jones claims that *Gebser*, even on its own terms, does not apply because, unlike the student there, he does not need to show intentional discrimination to prevail on his reasonable accommodation claim. But the statute offers no reason for treating this (or that) claim differently. In no uncertain terms, it says that the remedial framework for Title VI applies to Title II of the ADA, whether the claim turns on one state of mind or another or for that matter race or disability discrimination. No matter the theory of the violation under either statute, the target of the recovery must be the perpetrators themselves.

One other distinction between *Gebser* and this case exists. While Congress invoked its Spending Clause powers to enact Title IX and Title VI, *Barnes*, 536 U.S. at 189 n.3; *Gebser*, 524 U.S. at 287, it invoked § 5 of the Fourteenth Amendment to enact the ADA, 42 U.S.C. § 12101(b)(4). But the distinction makes no difference to the issue at hand. Congress is free to define the remedies available under any kind of legislation, whether enacted under § 5 of the Fourteenth Amendment, the Spending Clause, the Commerce Clause, or the Taxing Power. Where Congress does so, it overrides any default rule or background principle applicable to the remedies available. Confirming the point is the ADA itself. It creates customized remedies depending on the type of discrimination at issue and, in doing so, separately imports distinct remedial regimes. Title I and Title III of the ADA incorporate aspects of the enforcement regimes from Title VII and Title II of the 1964 Civil Rights Act. 42 U.S.C. § 12117(a); *id.* § 12188(a)(1). And Title II of the ADA incorporates remedies from the Rehabilitation Act, which in turn

incorporates Title VI. All we do here is honor those choices. In the face of these express legislative policies, any concerns about the kinds of remedies available under different types of congressional power is "quite irrelevant." *Barnes*, 536 U.S. at 189 n.3.

III.

Our conclusion that vicarious liability does not apply to Title II of the ADA or § 505 of the Rehabilitation Act takes us to the end of the road for Jones's two failure-to-accommodate claims against the City. He brought only one version of that claim under each statute, and it was premised on vicarious liability.

Even so, Jones now contends that the record shows that the City was deliberately indifferent and that he can prevail even without using vicarious liability. But the claim comes too late. Jones made no mention of deliberate indifference in his complaint. He instead asserted that the City was vicariously liable for the acts of its police officers. The summary judgment papers did not address deliberate indifference. Indeed, in the hearing that followed, the district court specifically inquired about the theory behind Jones's failure-to-accommodate claim. The judge asked, "[W]hat directly did the City do in violation of [the] ADA for which the plaintiff is entitled to monetary damages?" And Jones's attorney responded, "The City was the employer of the individuals who failed to accommodate Mr. Jones' need for a reasonable accommodation." "So it's respondeat superior liability?" The judge clarified. "Correct," his attorney responded. R.85 at 9. It is too late to raise a different theory now.

See United States v. Walker, 615 F.3d 728, 733 (6th Cir. 2010).

We affirm.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. In alleging that officers in this case failed to accommodate his disability, Baxter Jones asserts a violation of Title II of the Americans with Disabilities Act (ADA) rather than a violation of Title VI or Title IX of the Civil Rights Act of 1964. Unlike Title IX of the Civil Rights Act, which conditions the right to nondiscrimination on a receipt of federal funds, Title II of the ADA is an outright prohibition on discrimination. On that ground, I would distinguish the Supreme Court's holding in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and hold that vicarious liability is within the scope of the remedies envisioned by Title II of the ADA.

I. RESPONDEAT SUPERIOR LIABILITY

A. Agency principles and *Gebser*'s application

When interpreting a statute, courts presume that Congress legislates against the background of common-law principles. *See e.g.*, *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020); *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 347 (2013). Following that general rule, the Supreme Court has long looked to principles of agency and tort law when analyzing remedial provisions of

statutes intended to remedy discrimination. *See Univ. of Texas Sw. Med. Ctr.*, 570 U.S. at 347; *Babb v. Wilkie*, 140 S. Ct. 1168, 1178 (2020); *Carey v. Piphus*, 435 U.S. 247, 254–55 (1978). Respondeat superior, or vicarious liability, is a "basic agency principle[]" that the Court routinely uses for its interpretation of civil-rights statutes. *Faragher v. City of Boca Raton*, 524 U.S. 775, 791 (1998); *see also Meyer v. Holley*, 537 U.S. 280, 285 (2003) (applying vicarious liability principles to the Fair Housing Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755 (1998) (relying on agency principles to hold employer vicariously liable under Title VII of the Civil Rights Act); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (looking to agency principles for guidance in interpreting Title VII). Indeed, when a plaintiff seeks compensation for discrimination under a civil-rights statute, it is logical for courts to apply tort-based principles. *See Meyer*, 537 U.S. at 287. "[A]bsent an indication to the contrary in the statute itself," we therefore presume that Congress assumed the availability of a respondeat superior theory in vindicating rights to be free from discrimination. *Univ. of Texas Sw. Med. Ctr.*, 570 U.S. at 347.

The majority interprets *Gebser* as an "indication to the contrary," holding that Congress has foreclosed the availability of respondeat superior under Title VI of the Civil Rights Act, and therefore Title II of the ADA. As the majority explains, *Gebser* looked at three data points to hold that respondeat superior liability is unavailable under Title IX of the Civil Rights Act. 524 U.S. at 287–88. Unlike the majority, I believe that all

three of those points lead to the opposite conclusion with respect to Title II of the ADA.

Gebser first examined the time frame in which Title IX was passed. Because Title IX was enacted in 1972, a time when civil-rights statutes did not provide for recovery of monetary damages, the Supreme Court did not consider it appropriate to allow an "unlimited recovery" of damages from an employer. *Id.* at 285–86. Congress passed the ADA, however, in 1990, after the Supreme Court decided *Cannon v. University of Chicago*, 441 U.S. 677 (1979), which held that private persons may enforce Title IX through an implied right of action. Courts assume after *Cannon* that Congress legislated with the full backdrop of traditional remedies—which includes monetary damages—in mind. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 70–72 (1992).

Second, the court in *Gebser* looked to "Title IX's contractual nature" to determine the scope of available remedies under the statute. 524 U.S. at 287. Because Title IX was passed under Congress's Spending Clause authority, the substance of the violation is essentially a breach of contract between an entity receiving federal funds and the U.S. government. *See* 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity *receiving Federal financial assistance*." (emphasis added)). Without the receipt of federal funds, there could be no Title IX violation. Drawing from contract-law principles, the Supreme Court has held that when Congress passes a statute under its Spending Clause powers, it is

unreasonable for an individual to recover damages from a public entity that was unaware that it was violating a contractual condition. *See Gebser,* 524 U.S. at 286–88; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

Congress passed Title II of the ADA, by contrast, under its authority to remedy Constitutional wrongs under § 5 of the Fourteenth Amendment. *See* 42 U.S.C. § 12101(b)(4); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004). A substantive violation of Title II of the ADA is a violation regardless of whether the entity receives federal funds. *See* 42 U.S.C. § 12132 ("[N]o 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."). Title II of the ADA, like Title VII of the Civil Rights Act, is an "outright prohibition" on discrimination. *Gebser*, 524 U.S. at 286. To 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 harms incurred from a breach of contract as a third-party beneficiary.

Given that Congress defined the wrong at issue as the outright violation of a right, the principles underlying respondeat superior—to make sure an employer takes care properly to hire and train its employees to prevent harm—counsel its application here. *See* Restatement (Third) of Agency § 2.04 cmt. b (Am. L. Inst. 2006). As *Gebser* recognized, an outright

prohibition "aims broadly to eradicate discrimination." 524 U.S. at 286 (internal citation omitted). Respondeat superior liability helps to further that goal. In that sense, Title II of the ADA aligns more closely with Title VII of the Civil Rights Act, which envisions vicarious liability. *See Meritor*, 477 U.S. at 72; *cf. Gebser*, 524 U.S. at 286–87 (distinguishing Title IX from Title VII in support of the argument that vicarious relief is unavailable for Title IX claims). Respondeat superior extends to tortious conduct committed by employees. That principle extends naturally to discriminatory conduct as well.

Finally, *Gebser* pointed to Title IX's administrative regulations, which require the federal entity to notify a recipient of a violation before the federal authority revokes aid, as support for the unavailability of vicarious liability. 524 U.S. at 289. Although the regulations implementing compliance with Title VI contain a similar provision, *see* 28 C.F.R. § 42.108, ADA regulations paint a different picture. In the regulations governing compliance procedures under Title II of the ADA, a "designated agency" is directed to investigate complaints and must attempt to resolve the dispute informally. 28 CFR § 35.172(a), (c). If informal resolution fails, then an agency is directed to notify the public entity of its findings. *Id*. "At any time," however, "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." *Id.* § 35.172(d). That ADA regulations allow the complainant to file a lawsuit at any time—whether or not the public entity received notice of the

violation—distinguishes the procedures under the ADA from Title IX's compliance provisions.

We must presume that general principles of agency, including respondeat superior, apply to our interpretation of the scope of the ADA unless we are faced with an indication to the contrary. Unlike the majority, I would hold that *Gebser*'s interpretation of Title IX of the Civil Rights Act does not alter that presumption with respect to Title II of the ADA.

B. Respondeat superior and coextensive interpretation of Title VI and Title II

The majority also holds that Congress's incorporation of Title VI into Title II's remedies provision is the kind of "clear direction" that forecloses claims pursued under a theory of vicarious liability. *Franklin*, 503 U.S. at 70. Because the "remedies, procedures, and rights set forth in" Title VI "shall be the remedies, procedures, and rights" Title II provides, if Title VI forecloses respondeat superior liability, the majority assumes that Title II must do so as well. 42 U.S.C. § 12133. But the majority misinterprets respondeat superior. Rooted in agency principles, "respondeat superior is a *basis* upon which the legal consequences of one person's acts may be attributed to another person." Restatement (Third) of Agency § 2.04 cmt. b (Am. L. Inst. 2006) (emphasis added). In other words, respondeat superior is a "doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Respondeat Superior*, Black's Law Dictionary (11th ed. 2019). A plaintiff could plausibly rely on different theories of liability to

vindicate the same type of right even when the statutory underpinnings of the right are different.

To be sure, the kinds of "remedies, procedures, and rights" available under the Rehabilitation Act and Title VI must be the same *kinds* of remedies available under the ADA. *See* § 12133; *Barnes v. Gorman*, 536 U.S. 181, 185, 189–90 n.3 (2002). For that reason, the Supreme Court in *Barnes* examined Title VI's contractual nature and concluded that Title VI, and therefore the ADA, do not permit recovery of punitive damages, regardless of the source of Congressional power. *Id.* at 189–90 n.3. Unlike punitive damages, however, respondeat superior is not a remedy. Nor is respondeat superior a right or procedure.

Respondeat superior is not a type of remedy but rather a *theory* of liability that affects the remedy's scope. *See Polk County v. Dodson,* 454 U.S. 312, 325 (1981) (referring to respondeat superior as a "theory of liability"); Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, *The Law of Torts* § 425 (2d ed. 2019) ("Vicarious liability is liability for the tort of another person."). In practice, then, respondeat superior affects how a plaintiff frames a case to the jury but does not change the relief a plaintiff is seeking ultimately. Respondeat superior may be part of a "remedial scheme" involved in effectuating the remedies available under the statute, *see Gebser*, 524 U.S. at 290, but the scheme is distinct from the remedy itself. No one disputes here that the same kinds of remedies, i.e., compensatory damages, are available under both Title II of the ADA and Title VI of the Civil Rights Act. *See Johnson v. City of Saline*, 151 F.3d 564, 574 (6th Cir.

1998) (holding that compensatory damages are available for violations of Title II of the ADA); *Doe v. BlueCross BlueShield of Tenn., Inc.,* 926 F.3d 235, 240 (6th Cir. 2019) (noting that compensatory damages are available under Title VI of the Civil Rights Act). Different theories of liability are available to effectuate the remedy under both statutes, but the same remedy, compensatory damages, is available.

Respondeat superior also does not create any substantive rights or delineate any procedures. The right protected under Title II is the same kind of right that Title VI protects: the right to be free from discrimination. *Compare* 42 U.S.C. § 12132 ("[N]o 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.") *with* 42 U.S.C. § 2000(d) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). And applying respondeat superior principles as a theory of liability does not affect the procedure of filing either a Title II or a Title VI lawsuit. Respondeat superior liability may affect *who* is liable but does not affect the "manner and means" by which the right to be free from discrimination is enforced. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010).

The distinction between a theory of liability and a remedy, procedure, or right, moreover, is one Congress would understand. Because Congress is presumed to legislate against a backdrop of common-law principles, *Comcast*, 140 S. Ct. at 1016, Congress understood when drafting Title II of the ADA that employer liability under a respondeat superior theory is available generally when an employee violates an individual's rights. Congress also understood that Spending Clause legislation, unlike legislation enacted under § 5 of the Fourteenth Amendment, would require that states "knowingly and voluntarily" accept the terms of a contract and subsequently have notice when the terms of the contract were violated. *See Pennhurst*, 451 U.S. at 17. Congress could have chosen to predicate the existence of the substantive right on the receipt of federal funds, as in Title VI or Title IX of the Civil Rights Act. It did not do so in defining the statutory violation. We must honor that choice.

This case illustrates the importance of holding the City vicariously liable for the acts of its employees. At oral argument, counsel for the City pronounced that "a police officer going out into the streets and reacting to a scene is not something that a city can have control over." Oral Arg. 13:53–14:00. Maybe not in all circumstances, but a city can be careful about hiring officers sensitive to the needs of disabled persons and training its officers not to discriminate against them. The threat of respondeat superior liability would incentivize it to do so, and I would hold that a respondeat superior theory is available to plaintiffs.

II. DIRECT LIABILITY

Because the scope of this interlocutory appeal is limited to whether the City could be held liable under a respondeat superior theory, we cannot decide now whether the City could be held directly liable for its failure to implement a policy that adequately accommodates persons who are disabled. I note only that Jones alleged in his amended complaint that "[a]s a direct and proximate result of Defendant City's unlawful actions, *through its own policies* and the actions of its employees and agents, Plaintiff has suffered damages." R. 32 (Am. Compl. ¶ 50) (Page ID #450) (emphasis added). I construe Jones's complaint as fairly encompassing a theory of direct liability and disagree with the majority that Jones forfeited that claim. *See Shepherd v. Wellman*, 313 F.3d 963, 967 (6th Cir. 2002) (stating that the court "construe[s] the complaint liberally in the plaintiff's favor" in reviewing a district court's grant of summary judgment). Jones did raise his alternative theory of liability, moreover, in his motion to alter or amend the judgment—the soonest Jones could respond to the district court's grant of summary judgment on an issue that the City did not raise below. R. 60 (Mot. to Alter or Am. J. ¶ 3, 4–5) (Page ID #1330–31). The district court did not acknowledge Jones's direct-liability theory in ruling on the motion. I see no reason why the district court should not address those arguments as the case proceeds.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 17-11744

HON. AVERN COHN

[Filed: June 4, 2019]

S. BAXTER JONES,
Plaintiff,

v.

CITY OF DETROIT ET AL.,
Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. 34) AND DISMISSING CERTAIN DEFENDANTS

[****Table of Contents Omitted for Printing Purposes****]

I. INTRODUCTION

This case involves the Americans with Disabilities Act (ADA),[1] the Rehabilitation Act,[2] and 42 U.S.C. § 1983. Plaintiff, Baxter Jones ("Jones"), is a wheelchair-bound individual qualified for protections provided by the ADA and the Rehabilitation Act. Jones is suing the City of Detroit ("the City") and certain police officers[3] for disability discrimination and for the use of excessive force during his arrest. Jones says that his rights were violated while being transported to a detention center in an ill-equipped police van following a lawful arrest. Jones also says that the City is non-complaint with the ADA because it lacks adequate procedures related to ADA grievances. The amended complaint contains the following counts (Doc. 32):

> Count 1: ADA claims against the City based on the actions of its officers
> Count 2: ADA claims against individual police officers
> Count 3: Rehabilitation Act claims against the City
> Count 4: Rehabilitation Act claims against individual officers
> Count 5: Fourth Amendment Excessive Force claims against individual officers

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[1] 42 U.S.C. § 12132, *et seq*.

[2] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq*.

[3] The Detroit Police Department officers named in the complaint are Sergeant Reuben Fluker, Officer Robin Cleaver, Sergeant Edward Hudson, Commander Elvin Barren, Officer Gregory Robson, Capitan Kyra Hope, and John Doe.

Count 6: Michigan's Persons with Disabilities Civil Rights Act claims against the City
Count 7: ADA claims against the City based on its ADA procedures

In previous proceedings, the Court bifurcated Jones' claims for injunctive relief from his claims for damages because the parties say that the claims for injunctive relief are in the process of being resolved. (Doc. 51). Specifically, the parties are currently working together to resolve the issues relating to the police department's ADA procedures. (Doc. 53). Therefore, the Court will not address Count 7 at this time.

The way in which Jones alleges his claims and theories of liability present issues of law that have not been squarely addressed by the Sixth Circuit and are the subject of reasonable dispute.[4] For instance, Jones' claims require the Court to interpret the language of Title II of the ADA, which in relevant part states "no qualified individual with a disability shall, by reason of such disability, be excluded from the 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. The Court must decide whether this statute (1) extends to police activities, and (2) permits an action against a municipality based on *respondeat superior* liability. Further, the Court must decide whether Jones' 42 U.S.C. § 1983 claim provides a remedy against

[4] Not all the issues discussed by the Court have been raised by the parties, however, the Court finds that it must decide these legal issues before it can address the substance of Jones' claims.

individual officers for causing a deprivation of the federal rights provided by the ADA and the Rehabilitation Act.

Now before the Court is Defendants' motion for summary judgment. (Doc. 34). For the following reasons the motion is GRANTED in part, and DENIED in part.

II. BACKGROUND

Pursuant to the Court's motion practice guidelines, a motion for summary judgment is to be accompanied by a separate document that details the relevant facts, which are to be organized into numbered paragraphs. (Doc. 19, p. 4–11). Here, the parties' enumerated statement of facts are oversimplified and do not contain all the relevant facts that the parties discuss in their briefs. This makes it difficult for the Court to be certain that its recitation of the factual record accurately reflects the material facts not in dispute. The Court's motion practice places an onus on the parties to consolidate all the relevant facts into one document. This helps reveal factual disputes. Because the parties failed to consolidate a full factual record, the Court sourced its understanding of the record from several documents filed by the parties. The facts, as best can be gleaned from the record, are as follows.

A. The Arrest

A protest took place at the Homrich Contractor Facility on W. Grand Boulevard in Detroit, Michigan on July 18, 2014 regarding residential water shutoffs for nonpayment of water bills. (Doc. 48). Jones was a protester and participated in the obstruction of the

entranceway of the Homrich Contractor Facility. (Doc. 48). Police officers were called to the scene and the protesters were ordered to move from the entranceway. (Doc. 48). When Jones refused to obey, he was arrested. (Doc. 48). Jones does not claim that his arrest was unlawful or improper. (Docs. 32, 48).

Jones was arrested with eight other individuals for disorderly conduct. (Docs. 40, 48). The eight other arrestees were transported to the detention center on a bus. (Docs. 34, 40). However, Jones could not be transported on the bus due to his wheelchair. (Docs. 34, 40). So, the police officers decided to transport Jones in a van. (Docs. 40, 48). Jones says that after he was loaded into the van he informed the police officers that his neck was in pain—which was caused by him having to duck his head due to the height of his wheelchair and the low ceiling in the van. (Doc. 40). The parties submitted a video and photo evidence of Jones being loaded into the van. (Docs. 34-8, 40-8, 40-17, 40-18).

B. The Arresting Officers

The police officers named in the complaint are: (1) Sergeant Reuben Fluker, (2) Officer Robin Cleaver, (3) Sergeant Edward Hudson, (4) Commander Elvin Barren, (5) Officer Gregory Robson, (6) Capitan Kyra Hope, and (7) John Doe.

1. Sergeant Reuben Fluker

Jones says that Fluker is individually liable for failing to accommodate him during his post-arrest transportation. Jones says Fluker is liable because: (1) he did not ask Jones whether he had any specific transportation needs, (2) he was one of the police

officers who lifted Jones' wheelchair into the van, and (3) he reached his hand between Jones' head and the doorframe to pushed Jones' head down so he could fit him into the van ("when, in fact, he did not fit"). (Docs. 32, 41).

2. Officer Robin Cleaver

Jones says that Cleaver is individually liable for failing to accommodate him during his post-arrest transportation. Jones says Cleaver was one of the police officers who participated in loading Jones into the van. Cleaver pulled the wheelchair from inside the back of the van as other police officers lifted Jones' wheelchair. (Docs. 32, 41).

3. Sergeant Edward Hudson

Jones says that Hudson is individually liable for failing to accommodate him during his post-arrest transportation. Hudson was one of the police officers who participated in loading Jones into the van. (Docs. 32, 41).

4. Commander Elvin Barren

Jones says that Barren is individually liable for failing to accommodate him during his post-arrest transportation. Jones says that Barren (1) made the decision to transport Jones in the van, (2) did not consider other transport options, as was authorized by police policy, (3) participated in Jones' arrest, (4) did not ask Jones whether he had any specific transportation needs, and (5) instructed other police officers to lift Jones into the van. (Docs. 32, 41).

5. Officer Gregory Robson

Jones and the City have agreed that Robson should be dismissed from the case.

6. Capitan Kyra Hope

Jones and the City have agreed that Hope should be dismissed from the case.

7. John Doe

Jones and the City have agreed that "John Doe" should be dismissed from the case.

This leaves only Fluker, Cleaver, Hudson, and Barren as individual defendants.

C. The Post-Arrest Transportation

Jones says that during transportation to the detention center he was not secured by a seatbelt, but instead was secured by "a DPD intern, [who] sat in the back of the van and placed a foot against a wheel of [Jones'] chair." (Doc. 40, p. 16). Jones says that while driving to the detention center his head struck the low ceiling in the van several times. (Doc. 40). Jones says that he notified the police officer driving the van that he was in pain. Id.[5]

After arriving at the detention center, Jones was released and was not prosecuted. (Docs. 40, 48). Jones says that he suffered medical damages resulting from the police officers' failure to accommodate him during

[5] The officer driving the van was not identified during discovery. Jones makes no claims against this police officer.

transportation. (Docs. 32, 40, 48). Specifically, Jones attributes medical injuries to the aggravation of his pre-existing neck injury, and says that his "slouched posture [in the van] impacted him more severely than it might have impacted another person . . . ." (Doc. 40, p. 15, n.8)[6].

D. The City of Detroit's ADA Procedures

At the time of Jones' arrest, the police department had the following procedures in place:

> Any wheelchairs, crutches, and medication, shall be transported with, but not placed in the possession of the detainee. . . . In the event a cast, brace or prosthetic device must be removed for safety concerns (e.g. hook or possible weapon) EMS shall be used for the transport.
>
> In instances when a person has a disability that prevents transport in a marked patrol vehicle, a supervisor shall be requested for assistance to determine the most appropriate method of transportation. Alternate methods of transportation may include, but are not limited to, the use of an unmarked scout car, van, or EMS transport.

(Doc. 40-14).

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[6] See also (Doc. 34-5, p. 9):

> Q: Did you have spinal cord damage as a result of the [prior] auto accident?
> A: Yes.

After the incident, Jones "sought to file a complaint pursuant to 28 C.F.R. § 35.107." (Doc. 40, p. 17). However, Jones says that no ADA grievance procedures were in place from July 2014 through October 2014. (Doc. 32). He also says that "he filed a motion in the City of Detroit bankruptcy proceeding . . . seeking leave to object to the Plan of Adjustment because the Plan did not provide for accessibility in public safety." Id. Jones ultimately filed a complaint with the City's Human Rights Department, which the City says provides its ADA grievance procedure. (Docs. 34, 40, 48).

III. LEGAL STANDARD

The summary judgment standard under Fed. R. Civ. P. 56 is well known and does not require a belabored discussion here. Ultimately, a district court will grant a summary judgment motion if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law; while drawing "all justifiable inferences in the light most favorable to the non-moving party," Hager v. Pike Cnty. Bd. of Ed., 286 F.3d 366, 370 (6th Cir. 2002).

IV. THE ADA

Title II of the ADA and Section 504 of the Rehabilitation Act are similar in purpose and scope. McPherson v. Michigan High School Atheletic Ass'n, Inc., 119 F.3d 453, 459 (6th Cir. 1997). Typically, these claims are analyzed together "because the standards under both acts are largely the same [and] cases construing one statute are instructive in construing the other." Id. at 460 (quoting Andrews v. State of Ohio,

104 F.3d 803, 807 (6th Cir. 1997)). "[T]he principal distinction between the two statutes is that the coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance." Id. "There may be other differences in the application of the two statutes," however, those differences are not implicated here. Id. Thus, for simplicity's sake, the analysis that follows will focus on the ADA and omit repetitious references to the Rehabilitation Act.

A. The Scope of the ADA

In relevant part, Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from the 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. Jones says that this language imposes a duty to accommodate disabled individuals during post-arrest police transportations. However, the Sixth Circuit has never held that the ADA applies in the context of police arrests,[7] and there is conflicting precedent on the issue. *Compare* Patrice v. Murphy, 43 F.Supp.2d 1156, 1160 (W.D. Wash. 1999) (stating "an arrest is not the type of service, program or activity from which a disabled person could be excluded or denied [] benefits"); Rosen v. Montgomery County Maryland, 121 F.3d 154, 157–158 (4th Cir. 1997) (stating "[t]he most obvious problem is fitting an arrest into the ADA at all . . .

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[7] See Roell v. Hamilton County, OH, 870 F.3d 471, 489 (2017) ("[w]e need not decide whether Title II applies in the context of arrests").

calling a[n] [] arrest a 'program or activity' of the County . . . strikes us as a stretch of the statutory language and the underlying legislative intent") *with* Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998) (holding the ADA extends to post-arrest transportations); Hainze v. Richards, 207 F.3d 795, 802 (5th Cir. 2000) (holding that police officers are "under a duty to reasonably accommodate [plaintiff's] disability in handling and transporting him").

The Court finds Gorman v. Bartch persuasive precedent because the Eighth Circuit was faced with a similar case in which a wheel-chair bound individual claimed to be injured during his post-arrest transportation because the police officers failed to provide him with an accommodation. In Gorman, the wheelchair-bound plaintiff was arrested for trespassing. Id., at 909. After his arrest, the police transported him in "a patrol wagon that was not equipped with a wheelchair lift or wheelchair restraints." Id. The plaintiff objected to the use of the van, stating that it was "not properly equipped for him to ride in." Id. During the drive to the police station, the plaintiff sustained injuries because he was not properly secured within the van. Id. at 909–910. After analyzing the ADA's statutory language and legislative history, the Eighth Circuit concluded that the ADA covers post-arrest transportations. Id. at 911–914. The court reasoned that the ADA "must be interpreted broadly to include the ordinary operations of a public entity in order to carry out the purpose of prohibiting discrimination." Id. at 913. "The 'benefit' [plaintiff] sought in this case was to be handled and transported in a safe and appropriate manner consistent with his

disability." Id. Because the facts of this case closely resemble the facts in Gorman, and the Eighth Circuit's reasoning is persuasive, the Court finds that the ADA imposes a duty to accommodate disabled individuals during their post-arrest transportation.[8] This holding, however, does carry the day for Jones. Issues remain regarding the manner in which the ADA imposes this "duty to accommodate" on municipalities and individual officers.

B. The ADA's Remedial Scheme

Before discussing whether Jones can recover under his theory of *respondeat superior* liability against the City, or whether he can sue the individual police officers under §1983 for ADA violations, it is important to understand the interrelationships between the ADA, the Rehabilitation Act, Title VI of the Civil Rights Act of 1964 ("Title VI"),[9] and Title IX of the Education Amendments of 1972 ("Title IX").[10] It is necessary to first established the relevancy of Title IX precedent to an ADA analysis because the Court later utilizes Title IX precedent to resolve the questions of law necessarily raised by Jones' claims.

In relevant part, Title II of the ADA provides that "[t]he remedies, procedures, and rights set forth in [the

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[8] This holding is narrow and should not be construed as deciding that the ADA extends to arrests generally. That issue is not before the Court. The Court only finds that post-arrest transportation is properly within the scope of the ADA.

[9] 42 U.S.C. § 2000d.

[10] 20 U.S.C. § 1681(a).

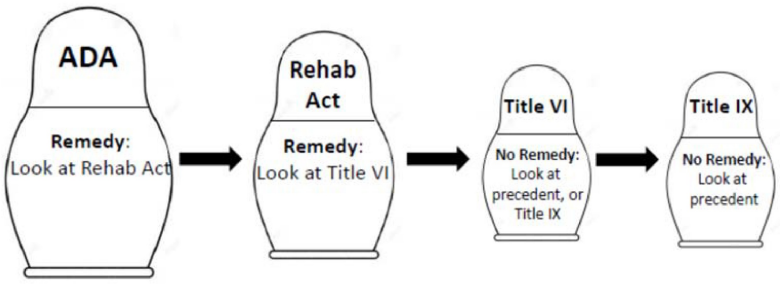
Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." Id. at § 12133. Thus, the ADA expressly adopts the remedies available under the Rehabilitation Act. In turn, the Rehabilitation Act incorporates "[t]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964." 29 U.S.C. § 794a(2).

However, Title VI "mentions no remedies—indeed, it fails to mention even a private right of action." Barnes v. Gorman, 536 U.S. 181, 187 (2002). Instead, Title VI has implied a private cause of action and remedies. See, e.g., Gebser, 524 U.S. at 284. Thus, a district court must look at Title VI precedent to determine the available remedies (and by extension, the remedies available under the Rehabilitation Act and the ADA).

The relevance of Title IX is that "[t]he statute was modeled after Title VI." Id. at 286. Consequently, "[t]he two statutes operate in the same manner . . . ." Id. When interpreting Title IX, the Supreme Court has frequently looked at Title VI to guide its interpretation, and vice versa. See, e.g., Id. at 280–290; Barnes v. Gorman, 536 U.S. at 185–187. It follows, then, that remedies available under Title IX are the same as Title VI, which are incorporated by the Rehabilitation Act and the ADA.

Thus, when analyzing the ADA's remedial scheme, the law operates like a matryoshka doll.[11] To determine whether a particular remedy is available under the ADA, the Court looks at its remedial scheme, which looks to the Rehabilitation Act, which looks to Title VI, which looks *like* Title IX. Consequently, precedent interpreting the remedies available under Title VI or Title IX must be considered when analyzing the ADA's remedial scheme. Supreme Court decisions interpreting the remedies available under Title IX have a domino effect that reverberate through Title VI, the Rehabilitation Act, and finally the ADA.[12]

Fig.1 – Civil Rights Legislation:



[11] A matryoshka doll is a Russian nesting doll that separates to reveal a smaller figure of the same sort inside, which has, in turn, another figure inside it, and so on.

[12] The decision to apply Title IX case law to the ADA is not unprecedented. See, e.g., Stahura-Uhl v. Iroquois Cent. School Dist., 836 F.Supp.2d 132, 145 (W.D.N.Y. 2011); Liese Indian River Cty. Hosp. Dist., 701 F.3d 334, 348–49 (11th Cir. 2012).

C. Municipal Liability under the ADA

The Supreme Court has not decided the issue of whether Title II of the ADA authorizes a claim against a municipality based on *respondeat superior* liability. In City & County of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765 (2015), the Supreme Court expressly recognized this issue remains an open question, stating:

> 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 held 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. at 1773–74 (internal citations omitted).

Further, the issue of *respondeat superior* liability has not been addressed by the Sixth Circuit and there exists conflicting authority amongst other circuits. *Compare* Duvall v. County of Kitsap, 260 F.3d 1124, 1141 (9th Cir. 2011) (stating that under Title II a "public entity is liable for the vicariously acts of its employees") *with* Liese Indian River Cty. Hosp. Dist., 701 F.3d 334, 348–49 (11th Cir. 2012) (stating there is no *respondeat superior* liability under the

Rehabilitation Act in light of the Gebster decision); see also Gray v. Cummings, 917 F.3d 1, 17 (2019) ("whether a public entity can be vicariously liable for money damages under Title II of the ADA" remains "an open question"); Rosen v. Montgomery Cunty Maryland, 121 F.3d 154, 156 n.2 (4th Cir. 1997). This uncertainty amongst circuits has been caused by the Supreme Court's decision in Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998).

In Gebser, the Supreme Court held that Title IX does not permit recovery on a theory of *respondeat superior* liability. Id. at 288. The Supreme Court stated, "Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability." Id. There is nothing in Gebster that calls into question its applicability to Title VI. On the contrary, the Supreme Court's back-and-forth contrast between Title IX and Title VI compels a finding that Title VI would similarly bar liability based on *respondeat superior* liability.

Thus, the Supreme Court's decision to prohibit *respondeat superior* liability under Title IX extends to Title VI, which in turn extends to the Rehabilitation Act and the ADA because those statutes incorporate the remedies of Title VI by reference.[13] Accordingly, a claim brought under Title II of the ADA for *respondeat*

[13] This holding is consistent with the Eleventh Circuit's decision in Liese, 701 F.3d at 348–49.

superior liability must fail for the same reasons it must fail under Title IX.[14]

Here, Jones does not take issue with a municipal policy, practice, or custom. Instead, Jones seeks to hold the City liable under the ADA for its police officer's failure to reasonably accommodate him during his post-arrest transport. (Doc. 32, p.11) ("[p]laintiff was excluded from participation in or was denied the benefits of the services, programs, or activities of a public entity, specifically by [the] City of Detroit's Police Department through its employees and officers . . . for whom [the] City is vicariously liable"). Because the ADA does not permit suit against a municipality based on *respondeat superior* liability, Count 1 of the complaint fails to survive summary judgment; and Jones' claims under the Rehabilitation Act (Count 3) must fail for the same reasons.

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[14] This conclusion necessitates the dismissal of Jones' claims against the City for the activities surrounding his arrests. Therefore, it unnecessary to address the City's argument that Jones was not entitled to an ADA accommodation because he failed to "request" an accommodation. The ADA's "request" requirement is found in Title I, and it is uncertain whether this "request" requirement applies to Title II. See, e.g., David A. Maas, Expecting the Unreasonable: Why a Specific Request Requirement For ADA Title II Discrimination Claims Fails to Protect Those Who Cannot Request Reasonable Accommodations, 5 HARV. L. & POL'Y REV. 217, 220–223 (2011).

D. Individual Liability under 42 U.S.C. § 1983 for ADA Violations

Jones has sued the police officers in their individual capacity, under §1983, claiming that they violated his federal ADA rights.

Claims brought pursuant to 42 U.S.C. § 1983 rely upon substantive rights that are not provided for within the statute itself. In relevant part, §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Thus, §1983 is not "a source of substantive rights, but rather, a method for vindicating federal rights conferred elsewhere in [] federal statutes." Stahura-Uhl v. Iroquois Cent. School Dist., 836 F.Supp.2d 132, 145 (W.D.N.Y. 2011) (citing Graham v. Connor, 490 U.S. 386, 393–94 (1989)). However, "§1983 does not provide an avenue for relief every time a state actor violates a federal law." City of Rancho Palos Verdes, Calif. v. Abrams, 544 U.S. 113, 119 (2005). A plaintiff seeking redress under §1983 "must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." Id. at

120. "The critical question [] is whether Congress meant the judicial remedy expressly authorized by [the statute] to coexist with an alternative remedy available in a §1983 action." Id.

"The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." Id. at 121. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Id. Therefore, to determine whether Congress intended that the remedies in §1983 coexist with the remedies in the ADA, the ADA's enforcement provisions must be analyzed.

As detailed above, Title IX precedent must be considered when deciding the remedies available under the ADA. Specifically, Fitzgerald v. Barnstable School Committee, 555 U.S. 246 (2009), is controlling. In Fitzgerald, the Supreme Court held that Title IX's remedial scheme compelled the conclusion that litigants could also seek redress under the remedies available pursuant to §1983. Thus, Title IX's remedial scheme was not sufficiently comprehensive to preclude the use of §1983. Because Title IX's remedial scheme mirrors the remedial scheme of Title VI, which provides the remedies under the ADA, it follows that the ADA's remedial scheme is likewise not sufficiently comprehensive to preclude the use of §1983.

The Court is not alone in finding that §1983 provides a remedy against individual officers for ADA violations. In Stahura-Uhl v. Iroquois Cent. School Dist., 836 F.Supp.2d 132 (W.D.N.Y. 2011), the court

recognized the significance of the Fitzgerald decision and held that "because the remedial scheme under Title IX and Title VI are nearly identical and because the Supreme Court has instructed that a Title IX claim can be vindicated under §1983, this Court has no trouble concluding that the same analysis applies to Title VI, and by extension the Rehabilitation Act." Stahura-Uhl, 836 F.Supp.2d at 146.

Accordingly, Jones has stated a cognizable legal claim against the individual police officers because §1983 authorizes an "individual capacity" claim for violations of Title II of the ADA.

V. QUALIFIED IMMUNITY

"A plaintiff's claims brought under § 1983 requires proof that: (1) the defendant was a person acting under the color of state law, and (2) the defendant deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States." Fridley v. Horrighs, 291 F.3d 867, 871–872 (6th Cir. 2002). "Moreover, the [] right must be 'clearly established' at the time of the violation so that 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Rayfield v. City of Grand Rapids, No. 18-1927, 2019 WL 1601770 at *6 (6th Cir. April 15, 2019) (quoting Klein v. Long, 275 F.3d 544, 550 (6th Cir. 2001)). Thus, the police officers cannot be held liable unless the "contours of a right" are "sufficiently clear" and every reasonable official would have understood that what he or she was doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Here, Jones seeks to hold the police officers individually liable under § 1983. Although the Court has concluded that § 1983 authorizes individual liability for police officers violating ADA rights—the police officers are entitled to qualified immunity because the law was not clearly established at the time.

As illustrated by the discussion above, the right to be accommodated during a post-arrest transportation is not a clearly established right. Even more unprecedented is the duty that the ADA imposes on *individual* police officers. Not only is there no guiding precedent in the Sixth Circuit, there are conflicting opinions amongst other circuits. Gray, 917 F.3d at 17; Duvall, 260 F.3d at 1141; Liese, 701 F.3d at 348–49; Rosen, 121 F.3d at 156 n.2. It cannot be said that the rights conferred by the ADA, and the duties it imposes on police officers, were sufficiently clear at the time of Jones' arrest. Thus, the police officers are entitled to qualified immunity for Counts 2 and 4.

VI. MICHIGAN'S PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

The ADA and Rehabilitation Act claims against the City are barred because the federal statutes confer a cause of action that does not abrogated sovereign immunity for claims based on vicarious liability. This holding does not apply to Jones' state law claim because the state is free to abrogate its sovereign immunity at will.

There is very little case law that extends Michigan's PWDCRA to municipal activities beyond employment or housing situations. Although PWDCRA claims are

frequently analyzed alongside ADA claims, there are differences here that render a parallel interpretation inappropriate.

A federal court should not interpret a state statute when the interpretation could lead to its unprecedented expansion. Because it is within the discretion of the Court to dismiss related state law claims when "the claim raises a novel or complex issue of State law," the Court declines to exercise supplemental jurisdiction over the state law claim. 28 U.S.C. § 1367(c)(1).

VII. FOURTH AMENDMENT – EXCESSIVE FORCE

While the issue of excessive force is present in the parties' papers, the matter has not received enough focus (at oral arguments or within the briefs) for the Court to make a summary judgment determination at this time. For the benefit of the parties, the discussion below details the clearly established law within the Sixth Circuit, which should be the focus of any future discussions regarding excessive force.

Under the Fourth Amendment, police officers may not use excessive force to effectuate an arrest. Smoak v. Hall, 460 F.3d 768, 783 (6th Cir. 2006) (citing St. John v. Hickey, 411 F.3d 762, 771 (6th Cir. 2005)). "Courts must determine whether a particular use of force is reasonable based on 'the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" Id. (citing Graham v. Connor, 490 U.S. 386 (1989)). "The assessment is fact-specific, based on a totality of the circumstances." Baynes v. Cleland, 799 F.3d 600, 608 (6th Cir. 2015)

In the Sixth Circuit, an arrestee who is suffering from an ailment that is not readily apparent to police officers must voice a complaint of the injury. See, e.g., Baynes, 799 F.3d at 607 (holding that a plaintiff must complain that handcuffs are too tight before a police officer can be subject to an excessive force violation). Further, "what would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which would have been unknown to a reasonable officer at the time." Windham v. Harris, Texas, 875 F.3d 229, 242 (5th Cir. 2017) (quoting Rodriguez v. Farrell, 280 F.3d 1341, 1353 (11th Cir. 2002)). A detainee must go beyond merely voicing discomfort to put an officer on notice that the force being applied may be excessive. See Standifer v. Lacon, 587 Fed.Appx. 919, 923 (6th Cir. 2014) (plaintiff "did not communicate that she was in any pain besides saying a generic 'ow'—a consistent response *any time* handcuffs are placed on one's wrists."). Finally, Jones must have complained to the police officers in a way that would have put the officers on notice that he was being subjected to force that was aggravating his pre-existing condition.

Jones admits that his "slouched posture impacted him more severely than it might have impacted another person due to his prior neck injury . . . ." (Doc. 40, p. 15, n.8). It appears from the video evidence of Jones' post-arrest transportation that a person without a prior neck injury would not have suffered an exercise of excessive force. Thus, Jones must establish that he voiced a complaint to the police officers that he was in more pain than someone of ordinary sensibilities. See,

e.g., Standifer v. Lacon, 587 Fed.Appx. 919, 923 (6th Cir. 2014) (plaintiff "did not communicate that she was in any pain besides saying a generic 'ow'—a consistent response *any time* handcuffs are placed on one's wrists."). Neither party has focused on this inquiry, which makes it inappropriate to decide summary judgment at this time.

VIII. CONCLUSION

For the reasons stated above, Defendants motion for summary judgment (Doc. is GRANTED as to Counts 1, 2, 3, and 4, and DENIED, without prejudice, as to Counts 5 and 7. The Court declines to exercise supplemental jurisdiction over Count 6, and it is DISMISSED. Lastly, Defendants Gregory Robson, Kyra Hope, and John Doe are DISMISSED from the case.

SO ORDERED.

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: 6/4/2019
Detroit, Michigan

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 17-11744

HON. AVERN COHN

[Filed: June 27, 2019]

BAXTER JONES,
Plaintiff,

v.

CITY OF DETROIT, REUBEN FLUKER, ROBIN CLEAVER, EDWARD HUDSON, ELVIN BARREN,
Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (Doc. 57)

I. INTRODUCTION

This case involves the Americans with Disabilities Act (ADA),[15] the Rehabilitation Act,[16] and 42 U.S.C. § 1983. Plaintiff, Baxter Jones ("Jones"), is a wheelchair-bound individual qualified for protections provided by the ADA and the Rehabilitation Act. Jones is suing the City of Detroit ("the City") and certain police officers[17] for disability discrimination and for the use of excessive force during his arrest. Jones says that his rights were violated while being transported to a detention center in an ill-equipped police van following a lawful arrest. Jones also says that the City is non-complaint with the ADA because it lacks adequate procedures related to ADA grievances.

On June 4, 2019, the Court issued an order granting in part, and denying in part, Defendants' motion for summary judgment. (Doc. 55). The Court denied, without prejudice, summary judgment on Jones' excessive force claims. In doing so, the Court stated that the facts and issues relating to Jones' excessive force claims had not been sufficiently discussed in the parties' briefs, nor was it the focus of oral argument (held on May 6, 2019). Nevertheless, the Court discussed relevant case law to assist the parties in focusing their arguments and narrowing the issue.

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[15] 42 U.S.C. § 12132, *et seq*.

[16] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq*.

[17] Sergeant Reuben Fluker, Officer Robin Cleaver, Sergeant Edward Hudson, Commander Elvin Barren.

In response, Jones filed a motion for reconsideration (Doc. 57). Jones takes issue with the Court's legal discussion regarding his excessive force claims. Jones says that the Court's discussion of law contains "palpable defect," and correcting the defect would result in denying summary judgment on his excessive force claims "with prejudice." (Doc. 57).

However, Defendants' motion for summary judgment was denied because the parties (and the Court) focused on Jones' ADA claims. The summary judgment denial was procedural in nature, and not based on an application of the law. Even if there was a palpable defect contained within the Court's previous legal discussion, such a defect would not undermine the Court's reasons for denying summary judgment without prejudice. Accordingly, Plaintiff's motion for reconsideration (Doc. 57) is DENIED.

SO ORDERED.

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: 6/27/2019
Detroit, Michigan

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HON. AVERN COHN
Case No. 17-11744

[Filed: December 2, 2019]

S. BAXTER JONES	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF DETROIT, REUBEN FLUKER, ROBIN CLEAVER, EDWARD HUDSON, ELVIN BARREN,	)
	)
Defendants.	)

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT AND/OR FOR RELIEF FROM JUDGMENT (ECF No. 60)

I. INTRODUCTION

This case involves the Americans with Disabilities Act (ADA),[18] the Rehabilitation Act,[19] and 42 U.S.C. § 1983. Plaintiff, Baxter Jones, is a wheelchair-bound individual qualified for protections provided by the ADA and the Rehabilitation Act. Jones is suing the City of Detroit and certain police officers for disability discrimination and for the use of excessive force during his arrest. Jones says that his rights were violated while being transported to a detention center in an ill-equipped police van following a lawful arrest.

Plaintiff's amended complaint contains the following counts (ECF No. 32):

> Count 1: ADA claims against the City based on the actions of its officers;
> Count 2: ADA claims against individual police officers;
> Count 3: Rehabilitation Act claims against the City;
> Count 4: Rehabilitation Act claims against individual officers;
> Count 5: Fourth Amendment Excessive Force claims against individual officers;
> Count 6: Michigan's Persons with Disabilities Civil Rights Act claims against the City;
> Count 7: ADA claims against the City based on its ADA procedures.

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[18] 42 U.S.C. § 12132, *et seq*.

[19] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq*.

The Court dismissed Counts 1 and 3, finding that Title II of the ADA does not permit suit against a municipality based on *respondeat superior* liability. (ECF No. 55).[20] Plaintiff filed a motion asking the Court to (1) alter or amend, or grant relief from, summary judgment and/or (2) grant leave to amend Plaintiff's complaint, which is now before the Court. (ECF No. 60).

II. ANALYSIS

Plaintiff's motion is a motion for reconsideration. Absent a significant error that changes the outcome of a ruling on a motion, a district court will not provide a party with an opportunity to relitigate issues already decided through granting a motion for reconsideration. Maiberger v. City of Livonia, 724 F. Supp. 2d 759 (E.D. Mich. 2010).

Plaintiff argues that the Court's finding was a clear error of law. (ECF No. 60). The issue of *respondeat superior* liability under the ADA has not been conclusively ruled on by the Sixth Circuit and there exists conflicting authority amongst other circuits. Accordingly, the Court did not make a clear error of law. See United States v. Williams, 53 F.3d 769, 772 (6th Cir.1995) ("a circuit split precludes a finding of

[20] The Court also dismissed Counts 2 and 4, finding the individual officers were entitled to qualified immunity under the ADA and Rehabilitation Act. Id. The Court declined to exercise supplemental jurisdiction over Count 6. In previous proceedings, the Court bifurcated Plaintiff's claims for injunctive relief from his claims for damages because the parties say that the claims for injunctive relief under Count 7 are in the process of being resolved. (ECF Nos. 51 and 53). The only claim left is Count V.

plain error"); Puckett v. United States, 556 U.S. 129, 135 (2009). A lack of binding case law that answers the question presented will also preclude a finding of plain error. United States v. Woodruff, 735 F.3d 445, 450 (6th Cir.2013).

The Court is still persuaded that the Supreme Court's decision to prohibit *respondeat superior* liability under Title IX extends to Title VI, which in turn extends to the Rehabilitation Act and the ADA because those statutes incorporate the remedies of Title VI by reference. Accordingly, a claim brought under Title II of the ADA for *respondeat superior* liability must fail for the same reasons it must fail under Title IX.

In sum, Plaintiff's motion amounts to a disagreement with the Court and does not satisfy the standard on a motion for reconsideration. See Burt v. Zych, 2009 WL 799033, at *2 (E.D. Mich. Mar. 23, 2009).

III. CONCLUSION

For the reasons stated above, Plaintiff's motion to alter or amend judgment is DENIED. In light of this determination, Plaintiff's request for leave to amend is MOOT.

SO ORDERED.

s/AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: 12/2/2019
Detroit, MI