No. 21-1292

# In the Supreme Court of the United States

S. BAXTER JONES,

*Petitioner,*

v.

CITY OF DETROIT,

*Respondent.*

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

## BRIEF IN OPPOSITION


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June 1, 2022

## QUESTION PRESENTED

Whether this Court should deny the Petition for Writ of Certiorari regarding whether public entities may have respondeat superior liability for the actions of their law enforcement officers under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq*., where:

(1) lower federal courts are divided on a fundamental essential question of whether Title II applies to law enforcement arrests and post arrest transportation; and where

(2) the Sixth Circuit's opinion in *Jones v. City of Detroit*, No. 21-1292 and the Eleventh Circuit's opinion in *Ingram v. Kubik*, 30 F.4th 1241 (11th Cir. 2021) are the only two reported decisions within the last 20 years addressing whether respondeat superior/vicarious liability exists under Title II of the ADA, and they represent part of an emerging consensus that the courts have rejected respondent superior under Title II of the ADA.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Codes**



**Other Authority**

## OPPOSITION TO PETITION FOR CERTIORARI

Respondent City of Detroit respectfully requests this Honorable Court deny the Petition for Writ of Certiorari.

## STATUTORY PROVISIONS INVOLVED

Under Title II of the Americans with Disabilities Act (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.

The Petition for Writ of Certiorari quotes the pertinent provisions of Title II of the Americans with Disabilities Act ("ADA"), which incorporates the "remedies, procedures, and rights" set forth in the Rehabilitation Act, 29 U.S.C. § 794a as constituting "the remedies, procedures, and rights this subchapter provides." 42 U.S.C. § 12133.

Section 505 of the Rehabilitation Act provides, in pertinent part, as follows:

> 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.

29 U.S.C. § 794a(a)(2).

## STATEMENT OF THE CASE

### A. Factual Background

After police arrested Mr. Baxter Jones ("Petitioner") during a protest in Detroit, Michigan, he bought this action against the City of Detroit and the arresting police officers on several grounds, including a claim that the officers and, through vicarious liability, the City of Detroit, failed to provide a reasonable accommodation under Title II of the Americans with Disabilities Act for his arrest.

In 2014, Detroit Police Officers arrested Petitioner and eight other individuals for disorderly conduct because the parties were blocking an entrance to a city water contractor's facility. *See* Detroit Municipal Code § 31-5-1 (defining disorderly conduct). A police bus was utilized to take the protestors, other than Petitioner, to the detention center. Petitioner was unable to board because he was confined to a wheelchair, which the bus could not accommodate.

The officers decided to call in a police cargo van to transport him. The van did not have a wheelchair lift. The officers, therefore, requested Petitioner's permission to lift his wheelchair into the van. Petitioner clearly indicated his approval to do so. Police Officer Reuben Fluker placed his hand on the

Petitioner's head as he lifted Petitioner into the van in order to avoid Petitioner from striking his head on van's ceiling. He did not "push Petitioner's head down" as set forth in Petitioner's brief. Pet. Brief at 22. Further, Petitioner did not indicate any pain while he was placed in the van.

Petitioner, however, claimed that the height of the van was too low for him to sit up straight and that, because the wheelchair was only held in place by an intern placing his foot against the wheel of the wheelchair, the ride to the detention center was unsafe and exacerbated injuries in his neck. These claims are contested by the Respondent and there is no evidence that Petitioner ever complained about the van or being in pain. The State of Michigan declined to prosecute Jones for disorderly conduct.

### B. Proceedings Below

Mr. Jones filed a lawsuit against the City of Detroit and the arresting officers. He specifically brought claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*; the Rehabilitation Act, 29 U.S.C. § 701; and state law, Mich. Comp Laws 37.1101 *et seq*. He also filed a claim under 42 U.S.C. § 1983, arguing that the officers used excessive force in violation of the Fourth Amendment.

The Defendants moved for summary judgment on all counts. The district court entered an order denying the motion with regards to qualified immunity on the excessive-force claim, which prompted an interlocutory appeal. The United States Court of Appeals for the Sixth Circuit reversed and

granted qualified immunity to the officers with respect to the excessive-force claims. *Jones v. City of Detroit*, 815 F.App'x 995, 1000 (6th Cir. 2020).

The district court granted summary judgment in the City of Detroit's favor as to both the City and the arresting officers on Jones's failure-to-accommodate claims under the Americans with Disabilities Act and the Rehabilitation Act. The court held that neither statute permitted a claim of vicarious liability. The district court certified the question for appeal, specifically as to whether there was a viable claim against the City of Detroit for vicarious liability under the ADA. The Sixth Circuit Court of Appeals then granted leave to appeal.

The Sixth Circuit Court of Appeals affirmed the district court and held vicarious liability does not apply to Title II of the ADA or § 505 of the Rehabilitation Act.

The panel majority correctly found that because Title II borrows its remedies from the Rehabilitation Act, and the Rehabilitation Act 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 Rehabilitation Act necessarily depends on whether it is available under Title VI. The Court reasoned that because this Court in *Gebser v. Lago Vist Ind. Sch. Dist.*, 524 U.S. 274; 118 S.Ct. 1989; 141 L.Ed.2d 277 (1989), concluded that a school cannot be vicariously liable under Title IX of Civil Rights Act, the Sixth Circuit held that vicarious liability is also not available under Title VI of the Civil Rights Act

and, therefore, cannot be available under Title II of the ADA.

## REASONS FOR DENYING THE PETITION

Despite the Petitioner claim that this case presents a "clean vehicle" for review, this case is replete with issues that make it inappropriate for determination of whether a municipality can be held vicariously liable under Title II for an ADA violation by its employees. Most notably there has not been a determination by this Court on the essential question as to whether the ADA even applies to police in relation to arrest and post-arrest transportation. Further, even if this essential question were to be answered, there is a recent growing consensus in the lower courts after *Gebser* that there is no vicarious liability for municipalities under Title II of ADA. See *Ingram v. Turner*, 30 F.4th 1241, 1257-1259 (11th Cir. 2022) (holding there is no vicarious liability under Title II); *Ravenna v. Vill. of Skokie*, 388 F. Supp. 3d 999, 1008 (N.D. Ill. 2019) (careful analysis leading to rejection of respondeat superior liability under ADA's Title II); *Arthur v. D.C. Hous. Auth.*, No. 18-CV-2037 (DLF), 2020 WL 1821111, at *11 (D.D.C. Apr. 11, 2020) ("Because entities cannot be vicariously liable on a respondeat superior theory under Title VI, the same principle applies to Title II ADA or Rehabilitation Act claims.") *Cotton v. Douglas Cnty.*, No. 4:18-CV-3138, 2020 WL 11039199, at *9 (D. Neb. Jan. 2, 2020) ("predict[ing]" that the Eighth Circuit would follow *Gebser* and reject respondeat superior liability under ADA's Title II); *Hooper v. City of St. Paul*, No. 17-CV-3442, 2019 WL 4015443, at * 9-*13 (D. Minn. Aug. 26, 2019)

(reasoning that vicarious liability under Title II and the Rehabilitation Act are not available after the *Gebser* decision). The Petitioner cited to *Delano-Pyle v. Victoria Cnty*, 302 F.d 567 (5th Cir. 2002) for its position that vicarious liability is viable, however, Petitioner failed to indicate that the litigants within the Fifth Circuit have argued that *Delano* overlooked this Court's *Gebser* decision in authorizing respondeat superior under Title II. *See* ante at Section II. Thus, "further percolation in the lower courts prior to this Court granting review" would be highly beneficial here. *Calvert v. Texas*, __ U.S. __; 141 S.Ct. 1605, 1606; 209 L.Ed.2d 748 (2021) (statement of Sotomayor, J., respecting denial of certiorari).

## I. This Court Should First Address the Essential Question of Whether Title II Applies to Law Enforcement Arrests and Post Arrest Transportation Before It Addresses Whether There is Vicarious Liability Under the ADA For Such Law Enforcement Arrests and Post Arrest Transportation.

There has not been a determination at this time whether police arrest and post arrest transportation are subject to Title II of the ADA.

In *City & County of San Francisco v. Sheehan*, 574 U.S. 1021; 135 S.Ct. 702; 190 L.Ed.2d 434 (2015) (Mem.), this Court granted certiorari to determine whether and, if so, to what extent, Title II of the ADA applies to law enforcement officers who are actively engaging with mentally ill individuals on a scene.

When the Court granted review, it "understood this question to embody . . . the argument that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 608; 135 S. Ct. 1765; 191 L.Ed.2d 856 (2015) (internal quotations omitted).

This Court declined to decide the question when the Petitioner in *Sheehan* changed its argument on appeal, forcing a dismissal of the writ as improvidently granted. *Id.* at 609-10. Still, however, this Court noted that whether the ADA applies to law enforcement encounters "is an important question that would benefit from briefing and an adversary presentation." *Id.* at 610. To be sure, this Court added that its decision to dismiss the writ also rested in part on "the parties' failure to address a related question" – *i.e.*, the Question Presented in this case. *Id.* (noting that the parties agreed vicarious liability was available in Title II actions against public entities, "But we have never decided whether that is correct.").

Additionally, as argued by Respondent, in their response to the appeal to the Sixth Circuit, the lower court opinions cited by Petitioner held that vicarious liability under the ADA may not be applicable to law enforcement. Specifically, Respondent specifically pointed out that in *Roell v. Hamilton Cnty., Ohio/Hamilton Cnty. Bd of Cnty. Commissioners*, the court noted: "A few opinions have indeed indicated

that arrestees might be able to bring cognizable claims under Title II. But, in doing so, they have also noted that the exigent circumstances inherent in an arrest inform the reasonable-accommodation analysis." 870 F.3d 471, 488 (6th Cir. 2017), reh'g denied (Sept. 21, 2017).

Further in *Rosen v. Montgomery Cnty. Maryland,* 121 F.3d 154, 157, n. 3 (4th Cir. 1997), cited by Petitioner, the Fourth Circuit also noted:

> The most obvious problem is fitting an arrest into the ADA at all. Section 12131(b) defines "[q]ualified individual with a disability" as "an individual with a disability who, with or without ... 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." Rosen clearly has a disability, but calling a drunk driving arrest a "program or activity" of the County, the "essential eligibility requirements" of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent."

See also *Bahl v. County of Ramsey*, 695 F.3d 778, 784 (8th Cir. 2012) (noting that "[e]ven if the ADA applied to [a] traffic stop," the defendant police officer was not required to accommodate the plaintiff's disability "under the exigencies of the traffic stop"); *Hainze v. Richards*, 207 F.3d 795, 801

(5th Cir. 2000) ("Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.").

This Court generally does not consider questions not adjudicated in the lower court. *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113; 161 L.Ed.2d 1020 (2005) (declining to address defenses raised by respondent in the court of appeal but not addressed by that court because "we are a court of review, not of first view"). Further, Petitioner has not raised the applicability of Title II to law enforcement in the Question Presented. (*See* Pet. *i*) (limiting the Question Presented to "[w]hether vicarious liability is available under Title II of the Americans with Disabilities Act….").

Additionally, in this case, this related question takes on special importance as the arresting officers were dismissed from the case based on qualified immunity because there was no clear law that Petitioner was entitled to arrest and post arrest transportation accommodations under the ADA. *Jones v. City of Detroit*, 2019 WL 2355377 at *8 (E.D. Mich. 2019). Consequently, Petitioner seeks to impose vicarious liability on the City of Detroit for actions taken by police officers when the police officers had no clear legal duty to provide accommodations.

This rationale would subject the City of Detroit and other municipalities to lawsuits for money

damages for violations of Title II of the ADA even though there is no clearly established law requiring police officers to provide Title II accommodations.

In this case, there is no viable claim that the City of Detroit was directly liable for any damages to Petitioner. There is no claim the City of Detroit had a policy of failing to provide accommodations when transporting wheelchair bound arrestees. Petitioner further waived any claim that the City of Detroit was deliberately indifferent to any claim that Petitioner was disabled and required an accommodation. See *Liese v. Indian River County Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012) (applying "deliberate indifference" standard to Rehabilitation Act claims); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2d Cir. 2012) (applying "deliberate indifference" standard to Title VI claims); *Gray v. Cummings*, 917 F.3d 1, 15 (1st Cir. 2019) (applying "deliberate indifference" standard to Title II claims); *Meagley v. City of Little Rock*, 639 F.3d 384 (8th Cir. 2011) (same); *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (same).

Consequently, because Petitioner consented to the use of a cargo van after his arrest. This case is an inappropriate vehicle to address the legal issues raised by Petitioner.

Therefore, until the question of the applicability of Title II to law enforcement arrests and post arrest transportation is addressed, the question of vicarious liability for same is premature.

## II. A Potential Consensus Appears to be Emerging After the *Gebser* Decision Around the Unavailability of Respondeat Superior Liability for Title II ADA Cause of Action.

A potential consensus appears to be emerging as to the recognizing that a statutory analysis plus this Court's decision in *Gebser* preclude respondeat superior liability in ADA Title II cases. This is clearly demonstrated by the holding in the only two Circuit Court cases to address the issue since *Gebser* was decided, this case and *Ingram v. Kubik*, 30 F.4th 1241 (11th Cir. 2021).

There is no disagreement over the fact that "when analyzing the ADA's remedial scheme, the law operates like a matryoshka doll." *Jones v. City of Detroit*, 2019 WL 2355377, at *5 (E.D. Mich. June 4, 2019). Specifically, "Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, as added, 29 U.S.C. § 794a." *Tennessee v. Lane*, 541 U.S. 509, 517, 124 S. Ct. 1978, 1984-85 (2004) (citing 42 U.S.C. § 12133). Section 505 of the Rehabilitation Act, in turn, invokes the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." 29 U.S.C. § 794a(a)(2)). Thus, the remedies for violations of Title II of the ADA and § 504 of the Rehabilitation Act "are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq." *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097; 153 L.Ed.2d 230 (2002).

There is also no dispute that the implied right of action that authorizes suit under Title VI and Title IX does not permit respondeat superior liability. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288, 118 S. Ct. 1989; 141 L.Ed.2d 277 (1998) (holding that under Title IX, "Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice").[1]

In fact, most of the courts that comprise the circuit split – the Fourth, Fifth, Sixth, and Ninth – have recently come to agree that respondeat superior liability is unavailable under Title VI. *See M.J. by & through S.J. v. Akron City Sch. Dist. Bd. of Educ.*, 1 F.4th 436, 453 (6th Cir. 2021) ("[T]here is no vicarious liability under Title VI."); *Rodgers v. Smith*, 842 F. App'x 929, 929 (5th Cir. 2021) ("Title VI allows neither personal liability claims against individuals nor vicarious liability claims against employers for the acts of their employees."); *United States v. Cnty. of Maricopa*, 889 F.3d 648, 652 (9th Cir. 2018)

[1] Title VI's private cause of action is "an implied right of action," *Barnes*, 536 U.S. at 185 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979)), which also serves as the basis for private suits under Title IX. *Cannon*, 441 U.S. at 710-11, 99 S. Ct. at 1965 ("[W]hen it passed Title IX, Congress was under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable"); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258, 129 S.Ct. 788, 797 (2009) ("Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was") (citation omitted); *Barnes*, 536 U.S. at 185, 122 S. Ct. at 2100 ("[T]he Court has interpreted Title IX consistently with Title VI.").

(acknowledging that under Title VI, "an entity cannot be held vicariously liable on a respondeat superior theory"); *see also Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2d Cir. 2012) (applying "deliberate indifference" standard to Title VI claims). No circuit has yet disagreed with this proposition, and district court support for it is widespread as well. See, e.g., *Goonewardena v. New York*, 475 F.Supp.2d 310, 328 (S.D.N.Y. 2007) ("Liability under Title VI, which parallels that of Title IX, cannot be imputed to institutions based on the actions of their employees.").

The fact that the Fifth and Ninth Circuits have recently come to agree that Title VI's implied right of action does not support respondeat superior liability strongly suggests that they will reexamine the validity of their much older precedent authorizing respondeat superior under Title II. In fact, in two separate cases decided within the past four years, litigants within the Fifth Circuit have argued that *Delano-Pyle v. Victoria Cnty.*, 302 F.3d 567 (5th Cir. 2002) overlooked this Court's *Gebser* decision in authorizing respondeat superior under Title II. *See Harrison v. Klein Ind. Sch. Dist.*, 856 F. App'x 480, 483 n.4 (5th Cir. 2021); *Plainscapital Bank v. Keller Indep. Sch. Dist.*, 746 F. App'x 355, 364 (5th Cir. 2018). This is with good reason, since the *Delano-Pyle* decision did not even cite *Gebser*, and instead relied upon decisions interpreting Title I of the ADA, which relies on the explicit right of action contained within Title VII's entirely distinct remedial scheme. *See* 42 U.S.C. § 12117; *see also Hooper v. City of St. Paul*, No. 17-CV-3442, 2019 WL 4015443, at * 10 & n.17 (D. Minn. Aug. 26, 2019) (pointing out the error).

While the Fifth Circuit did not reach the point in either case, it is highly likely to come up again, especially on the heels of the new decisions by the Sixth and Eleventh Circuits rejecting respondeat superior liability under Title II.

The Ninth Circuit decision cited by Petitioner, *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001), is likewise old and a prime candidate for updated Circuit consideration in view of the Ninth Circuit's 2018 ruling in *United States v. Cnty. of Maricopa*, 889 F.3d 648 (9th Cir. 2018) that "an entity cannot be held vicariously liable on a respondeat superior theory" under Title VI. *Id.* at 652. In fact, there is renewed litigation in the district courts within the Ninth Circuit over whether *Duvall* is "irreconcilable with *Gebser*." See *Doe v. Alameda Cmty. Learning Ctr.*, 532 F. Supp. 3d 867, 870 (N.D. Cal. 2021). One district court in California has actually identified two separate Ninth Circuit cases that seem to contradict *Duvall* and instead give rise to the "clear implication . . . that if Title IX limits respondeat superior, so must Title VI, and so must the ADA and Section 504." *K.H. by & through Humphrey v. Antioch Unified Sch. Dist.*, 424 F. Supp. 3d 699, 701 (N.D. Cal. 2020). This Court's practice is to "usually allow the courts of appeals to clean up intra-circuit divisions on their own." *Joseph v. United States*, 574 U.S. 1038; 135 S. Ct. 705, 707; 190 L.Ed.2d 461 (2014) (Kagan, J., respecting denial of certiorari).

This just leaves the Fourth Circuit decision cited by Petitioner, *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1997). That case was decided a year

before *Gebser* and is of dubious vitality for that reason alone. Additionally, the Fourth Circuit's analysis consisted of a two-sentence footnote and it applied Title I principles to Title II of the ADA. *See id*. at 157 n.3. Since *Gebser*, the Fourth Circuit Court of Appeals has not cited *Rosen* as a basis for respondeat superior liability in the Title II context; moreover, the Fourth Circuit *has* applied *Gebser* to robustly reject such liability in the Title IX context. *Baynard v. Malone*, 268 F.3d 228, 237 (4th Cir. 2001) ("*Gebser* is quite clear, however, that Title IX liability may be imposed only upon a showing that school district officials possessed actual knowledge of the discriminatory conduct in question.").

In view of the recent developments in the Fifth, Sixth, Ninth, and Eleventh Circuit it is certainly fair to provide the Fourth Circuit an opportunity to reexamine its now quarter-century old footnote. Indeed, "[a] conflict with a decision that has been discredited or that has lost all weight as authority by reason of intervening decisions of the Supreme Court or the courts of appeals will not be an adequate basis for granting certiorari." Shapiro, et al., *Supreme Court Practice*, § 4.4(d) (9th ed. 2019).

## CONCLUSION

Based on the reasoning set forth above, because there is no active circuit split regarding the availability of vicarious liability in claims under Title II of the ADA and the Rehabilitation Act, and because this case is an inappropriate vehicle to resolve the question presented, this Honorable Court should deny review.

Respectfully,

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