No. 21-1292

In the
Supreme Court of the United States

S. BAXTER JONES,
Petitioner,

v.

CITY OF DETROIT,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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The Sixth Circuit upheld dismissal of Petitioner's claims against Respondent under Title II of the ADA and the Rehabilitation Act on grounds that vicarious liability is unavailable for each claim. Petitioner seeks certiorari and has presented to this Court a square conflict between the Sixth Circuit and its sister circuits on this important issue.[1] In opposition, Respondent attempts to minimize the existing circuit split and discredit the caselaw that conflicts with the Sixth Circuit's decision below. Respondent also raises issues that were not before the Sixth Circuit and are irrelevant to the question presented. Respondents' arguments are ineffective, and contrary to Respondent's assertion that further percolation in the lower courts "would be highly beneficial here," Opp. 6, the current disparity of outcomes in the lower courts suggests that the ultimate outcome of further lower court consideration would be a continued split in authority. *See* Pet. 43. Such division in what is meant to be a nationwide anti-discrimination regime is untenable. Pet. 40–42. Accordingly, Petitioner respectfully requests that this Court grant review.

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[1] Just weeks after Petitioner filed his petition, the Eleventh Circuit issued *Ingram v. Kubik*, 30 F.4th 1241 (11th Cir. 2022), which agrees with the Sixth Circuit's vicarious liability holding here. *Ingram* does not change Petitioner's position and in fact deepens the existing circuit split.

I. There Is a Well-Established and Active Circuit Split.

Respondent attempts to minimize the circuit split by pointing to a "growing consensus" that vicarious liability is not available under Title II. Pet. 5. Respondent also attempts to discredit the long-established caselaw comprising the split as old and ripe for reexamination in light of this "growing consensus." These attempts are unavailing, as there is no such consensus, and contrary to Respondent's contentions, the supposedly discredited precedent is alive and well.

A. There is no "growing consensus" that vicarious liability is unavailable under Title II.

1. Respondent first attempts to minimize the existing circuit split by arguing that "[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." Opp. 12. However, other than two recent circuit decisions supporting this argument (the instant case and *Ingram*), Respondent cites no other decisions in which a circuit court has even called into question the proposition that vicarious liability is not available under Title II, let alone so holding.[2]

Respondent cites to recent district court decisions in the Seventh, Eighth, and D.C. circuits in which

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[2] Respondent cites to "*Ingram v. Turner*, 30 F.4th 1241, 1257-1259 (11th Cir. 2022)," but this appears to be a typographical error meant to refer to "*Ingram v. Kubik*." Opp. 5.

respondeat superior was found unavailable, Opp. 5–6, but neglects to cite to recent district court cases in the Second, Third, and Tenth circuits in which *respondeat superior* was available. *See, e.g.*, *Lloyd v. N.Y.C.*, 246 F. Supp. 3d 704, 726–27 (S.D.N.Y. 2017); *Geness v. Pennsylvania*, 503 F. Supp. 3d 318, 340 (W.D. Pa. 2020); *A.V. ex rel. Hanson v. Douglas Cnty. Sch. Dist.*, No. 21-CV-0704-WJM-SKC, 2022 WL 504138, at *9 (D. Colo. Feb. 18, 2022); *Mullen v. Commissioners for Adams Cnty., Colorado*, No. 21-CV-02398-RM-NYW, 2022 WL 1266618, at *12 (D. Colo. Apr. 28, 2022).

2. Respondent also points to a growing consensus that "respondeat superior liability is unavailable under *Title VI*." Opp. 12 (emphasis added). This Court has cautioned that "too facile an assimilation of Title VI law to [the Rehabilitation Act] must be resisted." *Alexander v. Choate*, 469 U.S. 287, 294 n.7 (1985).[3] And, as Petitioner argues, *Gebser*[4] (which concerns Title IX, but appears to be the basis for Respondent's Title VI argument) does not control the question of vicarious liability under Title II. Pet. 30–34.

Respondent does not address Petitioner's *Gebser* arguments. Rather, Respondent incorrectly claims that "[t]here is no disagreement over the fact that 'when analyzing the ADA's remedial scheme, the law operates like a matryoshka doll.'" Opp. 11 (quoting the district court decision below, App. 36). This is not

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[3] The courts of appeals typically analyze Title II and Rehabilitation Act claims together, so this caution logically extends to Title II. Pet. 21.

[4] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

true—Petitioner strongly contests the "matryoshka doll" analysis in the context of the availability of *respondeat superior*. Pet. 30–32 ("The Sixth Circuit's 'matryoshka doll' logic was flawed at the onset.").

B. *Duvall*, *Delano-Pyle*, and *Rosen* remain good law.

Respondent next attempts to discredit the existing authority on the other side of the split, namely, *Duvall* in the Ninth Circuit,[5] *Delano-Pyle* in the Fifth Circuit,[6] and *Rosen* in the Fourth Circuit,[7] each of which found vicarious liability to be available under Title II. Respondent's arguments are unconvincing.

1. Respondent first argues that the Fifth Circuit is likely to revisit the validity of the "much older" *Delano-Pyle*. Opp. 13–14. Respondent bases this on two recent unpublished Fifth Circuit decisions in which "litigants within the Fifth Circuit have argued that [*Delano-Pyle*] overlooked this Court's *Gebser* decision." Opp. 13 (citing *Harrison v. Klein Indep. Sch. Dist.*, 856 F. App'x 480 (5th Cir. 2021) and *PlainsCapital Bank v. Keller Indep. Sch. Dist.*, 746 F. App'x 355 (5th Cir. 2018)).[8]

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[5] *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001).

[6] *Delano-Pyle v. Victoria Cnty.*, 302 F.3d 567 (5th Cir. 2002).

[7] *Rosen v. Montgomery Cnty.*, 121 F.3d 154 (4th Cir. 1997).

[8] Contrary to Respondent's contention that "Petitioner failed to indicate that the litigants within the Fifth Circuit have argued that *Delano* overlooked this Court's *Gebser* decision in authorizing

First, a litigant's questioning of the propriety of precedent is not a sign that the Fifth Circuit will revisit that precedent—this is simply what litigants facing adverse precedent do. Such questioning does not "discredit" said precedent as Respondent contends. Moreover, as Respondent acknowledges, "the Fifth Circuit did not reach the point in either case." Opp. 14.

However, Respondent believes "it is highly likely to come up again, especially on the heels of the new decisions by the Sixth and Eleventh Circuits." *Id*. Indeed, it did come up again: in two subsequent 2021 decisions, the Fifth Circuit twice followed its *Delano-Pyle* precedent to apply vicarious liability in Title II claims. See *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 417 (5th Cir. 2021) and *Phillips ex rel. J.H. v. Prator*, No. 20-30110, 2021 WL 3376524, at *4 (5th Cir. Aug. 3, 2021). Thus, the Fifth Circuit had four opportunities in recent years to overrule its *Delano-Pyle* precedent but did not do so. The idea that the Fifth Circuit will now suddenly reverse course based on the Sixth Circuit's and Eleventh Circuit's contrary decisions is implausible. Accordingly, *Delano-Pyle* remains good law.

2. Next up is the Ninth Circuit's *Duvall*, which Respondent also paints as old and attempts to discredit based on the fact that litigants have argued against it. To this end, Respondent cites a district court case it characterizes as "renewed litigation in the district courts within the Ninth Circuit over whether *Duvall* is

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respondeat superior under Title II," Opp. 6, Petitioner did address these opinions and why they are inapposite. Pet. 39.

'irreconcilable with *Gebser*.'" Opp. 14 (quoting *Doe v. Alameda Cmty. Learning Ctr.*, 532 F. Supp. 3d 867, 870 (N.D. Cal. 2021)).

Though a litigant in this case did challenge the validity of *Duvall* in the face of *Gebser*, Respondent fails to mention that the district court wholly rejected that line of argument:

> [A]lthough *K.H.* gives lip service to *Duvall* and to respondeat superior liability, what it actually does is hold that there is no respondeat superior liability under the Rehabilitation Act. That holding is contrary to binding Ninth Circuit precedent. Perhaps it would be a different story if *Gebser* had come after *Duvall*. In that situation, a district court could legitimately inquire whether *Duvall* is clearly irreconcilable with *Gebser*. And there are arguments going both ways. But under these circumstances, only the Supreme Court or an en banc panel of the Ninth Circuit has the authority to contradict *Duvall* in the way that *K.H.* did.

Alameda, 532 F. Supp. at 870 (internal citations omitted). Accordingly, after laying out a helpful guide to the current state of the law in the Ninth Circuit, the *Alameda* court followed *Duvall* and concluded that "under current Ninth Circuit law, if [an employee] discriminated against Doe solely because of her disability, the school can be held liable." *Alameda*, 532 F. Supp. at 869.

Respondent also relies on the *K.H.* district court decision discussed in *Alameda* for the proposition that

"[o]ne 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.'" Opp. 14 (quoting *K.H. by & through Humphrey v. Antioch Unified Sch. Dist.*, 424 F. Supp. 3d 699, 701 (N.D. Cal. 2020)) (alterations omitted). Petitioner challenges Respondent's reliance on *K.H.* for the same reasons the *Alameda* court rejected *K.H.'s* reasoning. *See Alameda*, 532 F. Supp. at 870.

A litigant's argument and one aberrant district court are not enough to discredit *Duvall*. And, as *Alameda* highlights, courts in the Ninth Circuit are still citing to and relying upon *Duvall's* rule that vicarious liability is available under Title II. *See Borawick v. City of L.A.*, 793 F. App'x 644, 646 (9th Cir. 2020); *see also United States v. Town of Colorado City*, 935 F.3d 804, 809 (9th Cir. 2019). Consequently, *Duvall* remains good law, and stands in stark contrast to *Jones* and *Ingram*.

3. Finally, Respondent attacks *Rosen's* vicarious liability holding on grounds that "the Fourth Circuit's analysis consisted of a two-sentence footnote" that "applied Title I principles to Title II of the ADA." Opp. 15. This is a mischaracterization of the Fourth Circuit's actual analysis, which simply noted that vicarious liability was available "[u]nder the ADA and similar statutes." *Rosen*, 121 F.3d at 157 n.3 (citing cases applying vicarious liability under the ADEA, the ADA, and the Rehabilitation Act). This is not "appl[ying] Title I principles to Title II."

Respondent also notes that "the Fourth Circuit Court of Appeals has not cited *Rosen* as a basis for respondeat superior liability in the Title II context." Opp. 15. While this appears to be technically accurate, it ignores that district courts in the Fourth Circuit have since cited to *Rosen* for the proposition that vicarious liability is available under The Rehabilitation Act and Title II. *See, e.g., Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 372 (D. Md. 2011); *Reynolds v. Am. Red Cross Nat. Headquarters*, No. 5:10-CV-00443, 2011 WL 4479054, at *9 (S.D.W. Va. Sept. 26, 2011), *aff'd in part, vacated in part on other grounds sub nom. Reynolds v. Am. Nat. Red Cross*, 701 F.3d 143 (4th Cir. 2012); *Est. of Saylor v. Regal Cinemas, Inc.*, 54 F. Supp. 3d 409, 428 (D. Md. 2014); *Brown v. Belt*, No. 2:15-CV-11549, 2019 WL 1643648, at *5 (S.D.W. Va. Apr. 15, 2019). District courts in other circuits likewise continue to cite to *Rosen* for its vicarious liability proposition. *See, e.g., Bowen v. Ruben*, 385 F. Supp. 2d 168, 180 (E.D.N.Y. 2005); *Giever v. City of Las Cruces City Comm'n*, No. CIV. 08-155 LH/LAM, 2010 WL 11626776, at *17 (D.N.M. Jan. 12, 2010); *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 348 n.47 (S.D.N.Y. 2010); *Doe v. Bd. of Cnty. Comm'rs*, No. 11-CV-0298-CVE-PJC, 2011 WL 6740285 (N.D. Okla. Dec. 22, 2011); *Rideau v. Keller Indep. Sch. Dist.*, 978 F. Supp. 2d 678, 682 (N.D. Tex. 2013); *Mullen v. Commissioners for Adams Cnty.*, No. 21-CV-02398-RM-NYW, 2022 WL 1266618, at *12 (D. Colo. Apr. 28, 2022).

Rosen thus remains good law. However, Respondent concludes that "[i]n 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." Opp. 15. But, as Petitioner argues, there are no "recent developments" in the Fifth and Ninth circuits that indicate those circuits now align with the Sixth and Eleventh circuits on the question presented. Accordingly, even if the Fourth Circuit was to revisit *Rosen*, a circuit split would continue to exist no matter the outcome.

II. Respondent Raises Issues the Sixth Circuit Did Not Consider That Are Irrelevant to Petitioner's Question Presented.

Respondent raises two issues in its Opposition that were not before the Sixth Circuit below: (1) the applicability of the ADA to post-arrest situations; and (2) the extension of qualified immunity from Respondent's officers to Respondent itself. Because these issues were not on appeal before it, the Sixth Circuit did not consider them, nor did they receive full briefing from the parties. Respondent cannot now argue matters that it did not see important enough to raise below as reasons that this Court should not consider the *respondeat superior* issues. Regardless, these issues are irrelevant to the question presented.

1. Respondent argues against this Court granting certiorari because "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." Opp. 5. To this point, Respondent discusses lower court cases questioning

such a proposal, Opp. 7–9, as well as this Court's *San Francisco v. Sheehan*[9] decision, Opp. 6–7.

However, Respondent fails to explain what makes this tangential issue "essential" to the question presented. Respondent's reliance on *Sheehan* in this regard is misplaced, as nowhere in that decision did this Court find that the two issues are inextricably intertwined.[10] Furthermore, the lower court decisions Respondent cites that discussed the post-arrest issue did not connect it to the question of vicarious liability. This makes sense—neither issue is dependent on the other. Indeed, not all Title II claims based on a *respondeat superior* theory of liability will involve post-arrest activities, just as not all Title II claims involving post-arrest activities will involve a *respondeat superior* theory of liability. There is no logical reason to consider the ADA's post-arrest applicability to be *essential* to Petitioner's question presented.

2. Respondent further contends that "in this case, this related question [of post-arrest applicability] takes

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[9] *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600 (2015). Petitioner addresses the relevance of this decision in his Petition. Pet. 47–50.

[10] In fact, the availability of vicarious liability was not one of the questions presented to the *Sheehan* Court (*see* https://www.supremecourt.gov/qp/13-01412qp.pdf), and the parties there agreed that vicarious liability was available. *Sheehan*, 575 U.S. at 610. The *Sheehan* Court's mention of the vicarious liability issue suggests that it was a potential issue in that case that the Court was ready to hear despite certiorari being granted on other issues. Likewise here, that the post-arrest applicability of Title II was never addressed below should not be an impediment to certiorari.

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." Opp. 9. Respondent argues that this is important because "impos[ing] vicarious liability . . . for actions taken by police officers when the police officers had no clear legal duty to provide accommodations [would subject] 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." Opp. 9–10. Respondent offers no authority for its conclusion that qualified immunity can be bootstrapped to immunize municipal liability under Title II.

More importantly, though, is that this Court has already addressed this issue in the context of municipal § 1983 liability. In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court provided an exhaustive analysis of whether a city could enjoy qualified immunity for its officers' good-faith constitutional violations. The *Owen* Court rejected that proposition. Per the Court, its "rejection of [this] construction of § 1983 . . . is compelled both by the legislative purpose in enacting the statute and by considerations of public policy," which included enforcing the "provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity." *Id.* at 650–51. Furthermore, the Court noted that "owing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were

also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id.* at 651 (internal citations omitted).

Given that Title II's prohibition on discrimination is based in the Fourteenth Amendment, Pet. 33, the rationale behind *Owen's* rejection of municipal immunity naturally extends to Title II. Accordingly, Respondent's officers' qualified immunity has no bearing on Respondent's liability.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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