No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MARC FISHMAN,

Petitioner,

VS.

OFFICE OF COURT ADMINISTRATION NEW YORK STATE COURTS, ET. AL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is of great National and public importance as the holding of the Court of Appeals that the state family court is shielded from any claims by a litigant with a cognitive and hearing disability for failing to provide effective reasonable accommodations will prevent any person with a disability from challenging a local court's actions as violative of the Americans Disabilities Act (hereinafter "ADA"), thereby running afoul of the clear purpose of the ADA and this Court's decision in *Tennessee v Lane*, 541 U.S. 509 (2004). The family court willfully violated the petitioner's rights to access as evidenced by the Judge's comments that: "[Y]ou're saying I'm discriminating against you because you're disabled, and what I'm saying is that as you sit here right now, there is no apparent disability. You're not in a wheelchair, you didn't come in with a cane, you don't have crutches, you don't have a brace on you. There's no physical indication that you have any disability."

The record below and the respondents' own rules and procedures with respect to the provision of reasonable accommodations made clear that the actions of the family court judge's court attorney in denying reasonable accommodations were administrative actions and as such, could not shielded by any characterization of the doctrine of judicial immunity. Moreover, at least one circuit court has ruled differently and found a question of fact on the issue of whether judicial immunity would protect a similar judicial employee since providing reasonable accommodations under the ADA is deemed an administrative and not judicial function. *See Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001). This Court must resolve the split

between the circuits as to whether judicial immunity applies to a court employee's wrongful actions in denying the reasonable accommodations necessary to ensure meaningful access to the courts by persons with disabilities.

The questions presented are:

1. Whether a judicial court attorney is shielded from a claim that she violated a litigant's rights under the ADA by refusing to provide a reasonable accommodation, where the state court's own rules and procedures define the function of determining reasonable accommodations as administrative in nature and where the actual conduct of the court attorney was not part of any judicial function?

2. Whether a state court system may provide alternative accommodations to a disabled litigant which are ineffective to afford meaningful access to court proceedings and avoid a claim of discrimination under the ADA?

LIST OF PARTIES

All parties **do not appear** in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner is Marc H. Fishman.

Respondents are Office of Court Administration New York State Courts, Michelle D'Ambrosio, in her Administrative and Official Capacity, New York State Unified Court System, Nancy J. Barry, District Executive of 9th District NY Courts, in her Administrative and Official Capacity, Dan Weitz, Professional Director, in his Administrative and Official Capacity.

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Petitioner Marc H. Fishman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order denying the timely petition for rehearing and rehearing *en banc* is unreported and is found at App. 40. The opinion of the court of appeals is unreported but available at 2021 U.S. App. LEXIS 29233, 2021 WL 4434698 and found at App. 1. The district court's order is unreported but available at 2020 U.S. Dist. LEXIS 38890, 2020 WL 1082560 and is found at App 10.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2021. The court of appeals denied a timely petition for rehearing and rehearing *en banc* on November 1, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Americans With Disabilities Act (42 U.S.C. 12101, *et seq*.), Rehabilitation Act of 1973 (29 U.S.C. 701, *et seq*.), and the Department of Justice regulations implementing such statutes (35 C.F.R. Part 35).

STATEMENT OF THE CASE

Petitioner is a father with a cognitive and hearing disability. The disabilities substantially affect the petitioner's short-term memory, word and phrase registration and ability to recall information. The family court denied him effective accommodations necessary to understand the proceedings. As a result, he has not seen his children in almost two years and was found guilty of violating an order of

protection that he was never served with, which verdict was conceded as legally defective by the local prosecutor's office. Had the court provided basic effective reasonable accommodations petitioner would have had meaningful access to the family court proceeding and the outcome would have been different.

For example, in the face of the substantial litigation over petitioner's claims for reasonable accommodation, the criminal court judge has now agreed to provide a computer-assisted-real-time-transcription ("CART") transcriber for sentencing despite denying such accommodations during the criminal trial. It shocks the conscience and denies due process for a disabled person to be found guilty at a criminal trial without proper effective accommodations only to be provided such accommodations after being found guilty and only for sentencing. At the same time the criminal court judge denied the petitioner's request to appear for his sentencing remotely due to his disabilities and medical conditions and issued a bench warrant against him in January 2022.

The United States District Court and the Court of Appeals held that petitioner could not pursue his claims for failure to accommodate as the court attorney for the judge involved in the family court matter has immunity. The lower courts failed to recognize that the provision of accommodations to a disabled litigant is an administrative function that should never be cloaked with any judicial immunity. The respondent's own court system rules and procedures defined the accommodation process engaged in by the family court attorney as purely administrative.

The court of appeals also wrongly held that a proposed alternative accommodation which was unreasonable ineffective and not actually provided was all the family court needed to offer to avoid any claims for discrimination under the Americans with Disabilities Act. In the same breath the court of appeals granted the petitioner's request for an accommodation during oral argument and provided a live CART transcriber. When faced with this inconsistency, it is clear that the court of appeals did not feel comfortable expanding disabled litigants' rights against judicial employees who violate their rights, requiring this Court to uphold the disabled's rights to meaningful access to justice and to hold finally that judicial immunity cannot apply to denials of requests for reasonable accommodations under the ADA.

In making its merits determination the court of appeals accepted the respondent's failure to abide by the definition of disability under the ADA by putting an onerous burden on petitioner to both prove his disability and to establish why he needed a specific accommodation, while also sidestepping the question altogether. The court of appeals also incorrectly held that it was required to abstain from jurisdiction under these circumstances in deviation from this Court's decisions.

Since the very beginning of petitioner's requests for reasonable accommodations for his disability he faced prejudicial comments by the assigned family court judge. When petitioner first requested an accommodation the family court judge stated: "[Y]ou're saying I'm discriminating against you because you're disabled, and what I'm saying is that as you sit here right now, there is no apparent disability. You're not in a wheelchair, you didn't come in with a cane, you don't have

crutches, you don't have a brace on you. There's no physical indication that you have any disability." The family court judge continued her discrimination for several years and then stated "As far as I can see, there's no disabilities, only new ideas as to how this court can accommodate whatever disabilities he says he has. And frankly, some of these requests are ridiculous." Respondent Michelle D'Ambrosio was the judge's court attorney during the time the comments were made and was involved in the events challenged in this case. The judge and her court attorney never provided petitioner a note taker at any stage of the proceedings and never with a CART transcriber to ensure he had meaningful access to the proceedings.

On the administrative side of the New York State Court System's accommodation procedures, non-judicial court officials likewise refused to accept petitioner's non apparent disability. On June 22, 2018, respondent Nancy Barry denied petitioner's request for an accommodation for CART services by stating such accommodation is only for persons with hearing impairments. In denying such accommodation, respondent Barry felt petitioner did not prove his disability sufficiently to warrant such accommodation. On August 7, 2018 respondent Dan Weitz affirmed the denial of the accommodation by Barry and again held that petitioner failed to prove he was disabled or entitled to the accommodations he requested. This was despite petitioner's submission of a letter from his doctor stating the petitioner had cognitive impairments rendering the requested accommodations helpful.

The court refused to provide petitioner with CART services, which involves a transcriber typing all spoken words during a court proceeding real time to permit a person with hearing or cognitive impairments to follow the proceeding live and immediately. And the respondents wrongly denied CART to the petitioner based on an improper understanding of the auxiliary aid and instead forced petitioner to incur $30,000 in economic damages for purchasing court reporter audio files and to then have such audio files transcribed.

On March 5, 2020, the district court issued an opinion and order dismissing plaintiff's second amended complaint. The district court held that respondent court attorney, was shielded by judicial immunity, that all claims were barred by the Eleventh Amendment to the United States Constitution and that the doctrines of *Rooker-Feldman* (*Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415—16 (1923) & *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983), *Younger v. Harris*, 401 U.S. 37, 43-44 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974) required the district court to abstain from exercising jurisdiction.

On April 3, 2020, the petitioner, proceeding *pro se* and *in forma pauperis* filed a notice of appeal. On July 15, 2020 pro bono counsel was retained and appeared in the court of appeals on July 16, 2020. Several mediations were held to no avail.

On June 2, 2021, the petitioner filed a motion for reasonable accommodations during oral argument on the basis of his demonstrated cognitive and hearing disabilities. In support of the motion, the petitioner relied upon mostly the same medical documentation submitted to the respondents when the accommodations were

requested in the family court. On June 2, 2021, the Second Circuit issued an order deferring determination of the motion for reasonable accommodations to the panel that would hear the appeal on the merits.

On July 16, 2021, the Second Circuit issued an order granting the motion for reasonable accommodations for plaintiff's communications disability. Thereafter the clerk's office and its technology department worked with petitioner's counsel to test and conduct a trial run of providing the CART transcriber for oral argument.

During oral argument on September 10, 2021, the petitioner was fully accommodated and was able to follow along with the assistance of the live CART transcriber.

On September 28, 2021, the court of appeals affirmed the district court's dismissal of petitioner's second amended complaint. The court of appeals reasoned that the court attorney's actions in denying petitioner reasonable accommodations were subject to judicial immunity as such actions were taken by her in the capacity of court attorney. The court of appeals also held that it was "either unlawful or imprudent" for the court to enter "any order directing the state family court to conduct its affairs differently than it did in dealing with" petitioner. The court of appeals went further and held that petitioner's claims failed to state a claim for relief for damages against the OCA defendants. In rendering such holding the court of appeals failed to properly assess whether the proposed accommodations offered to petitioner were effective or sufficient to afford him meaningful access. In fact, the supposed alternative accommodations offered to petitioner in the form of a note taker were

never provided. The court of appeals could not reconcile its own grant of CART to petitioner at oral argument and its decision to uphold the respondents' refusal to provide CART on the basis that proper medical documentation was not provided. The same medical documentation that was submitted to the court of appeals on the motion for accommodations was previously submitted to the family court.

After the court of appeals' decision, which did not formally rule upon whether or not petitioner was disabled despite granting him an accommodation, the United States District Court for the Southern District of New York, in *Marc H. Fishman v. City of New Rochelle, et al.*, 19-cv-00265-NSR (S.D.N.Y. Oct. 19, 2021) (Roman, D.J.), held that petitioner plausibly alleged he was disabled and that the City Defendants failed to accommodate his disabilities, requiring denial of a motion to dismiss.

REASONS FOR GRANTING CERTIORARI

A. Certiorari Should be Granted as it is of Great National Importance for this Court to Determine Finally Whether a Local Court System's Determinations as to Whether a Disabled Litigant Should be Afforded a Reasonable Accommodation is Subject to Judicial Immunity and to Resolve the Split Between the Second, Ninth and D.C. Circuits as to the Particular Test for Determining Judicial Immunity and Whether Immunity Should Apply at all to Determinations of Requests for Reasonable Accommodations

This Court has held that "The touchstone for the doctrine[of judicial immunity's] applicability has been performance of the function of resolving disputes between parties or of authoritatively adjudicating private rights." *Antoine v. Byers & Anderson*, 508 U.S. 429, 436 (U.S. 1993). In *Forrester v. White*, 484 U.S. 291, 230 (U.S. 1988), the Court explained "To conclude that because a judge acts within the scope of his authority, such…decisions are brought within the court's jurisdiction or

controverted into judicial acts would lift form above substance." As such, in *Antoine* this Court described a "Hypothetical case in which a common law judge felt himself bound to transcribe an entire proceeding verbatim," for which this Court questioned whether such "administrative duty would be protected," by absolute immunity. *See* 508 U.S. at 435. Thus, "Judges are not entitled to absolute immunity when acting in their administrative capacity," because "whether he was a…judge or not is of no importance," to the analysis. *See id*; *Forrester*, 484 U.S. at 227. Importantly, the Court has not applied judicial immunity to claims of racial discrimination by a judge in selecting trial jurors. *See Forrester*, 484 U.S. at 227 (citing *Ex Parte Virginia*, 100 U.S. 339 (1880)).

In *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001), the defendant court ADA coordinator alleged she was entitled to quasi-judicial immunity because she could only arrange courtroom disability accommodations for disabled persons in consultation with the presiding judge. However, the Ninth Circuit Court of Appeals held that "[I]t appears that when a statute requires, or perhaps even authorizes, the provision of a particular form of assistive device to a hearing-impaired individual, [the ADA coordinator] has the authority to make the necessary arrangements therefor, as an administrative matter." *See id*. The Ninth Circuit then held that the claims against the ADA coordinator could not be dismissed on the basis of judicial immunity as a question of fact existed as to whether she engaged in administrative rather than judicial conduct as it related to the provision of disability accommodations. *See id*.

The D.C. Circuit Court of Appeals declined to afford judicial immunity to a juror officer under analogous facts and circumstances. In *Atherton v. D.C. Office of Mayor*, 567 F.3d 673, 874 (D.C. Cir. 2009), the court explained that the officer's duties in "review[ing] written requests for juror excuses or deferrals and grant[ing] or deny[ing] such requests in conformity with policies established by the courts," made clear the functions were not subject to judicial immunity. The D.C. Circuit held "These administrative and managerial activities, even if essential to the smooth and efficient functioning of the Superior court operations, are not functions that justify the application of…immunity." *See id*. It is obvious that the juror officer's duties would also encompass rendering determinations on providing reasonable accommodations to disabled jurors, which duties and functions the D.C. Circuit has implicitly held are not subject to judicial immunity.

The New York State Court of Appeals has also explained the difference between judicial and administrative/ministerial actions. In *Tango v. Tulevech*, 61 N.Y.2d 34, 41 (N.Y. 1985) the court held "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result." Ultimately, "To be immune from civil responsibility the judicial officer involved must be doing something in the nature of a judicial function calling for weighing facts and evidence, considering legal principles, and making a decision thereon." *Waterman v. State*, 35 Misc. 2d 954, 957 (N.Y. Ct. Cl. 1962). Otherwise, the actions and functions of the judicial officer would be deemed

ministerial and not subject to any absolute immunity. *See Glowinski v. Braun*, 105 A.D.2d 1153 (4th Dep't. 1985).

In line with the above dichotomy between administrative and judicial functions, the respondents in this matter created a disability accommodation system which delineates the difference between administrative and judicial accommodations. As per www.nycourts.gov, the Court's administrative office can provide such "accommodations including [the]…furnishing [of] auxiliary aids…such as…CART [and] in large print [orders]." *See* http://ww2.nycourts.gov/Accessibility/CourtUsers_Guidelines.shtml#how, *last visited* January 28, 2022. The website then goes on to explain that "Court administrators cannot grant, as an ADA accommodation, requests that would implicate the rights of parties to the proceeding or the Judge's inherent power to manage the courtroom and proceeding." *Id*. The website provides examples of judicial related accommodations as "requests for extension of time, change of venue or participating via telephone or video conferencing." *Id*. Thus, by the New York State Unified Court System's own policies, court attorney Michelle D'Ambrosio was clearly not acting in a judicial or quasi-judicial capacity when she denied the provision of auxiliary aids to plaintiff, even in consultation with or at the behest of Judge Schauer.

As set forth above, there is a clear circuit split between at least the Second Circuit and Ninth Circuit as to whether the function of a judicial employee in granting or denying a reasonable accommodation request is subject to absolute judicial immunity. Moreover, the Second Circuit commented in *Gross v. Rell*, 585 F.3d 72 (2d

Cir. 2009) that the test for judicial immunity as explained by the D.C. Circuit in *Atherton* is "narrower" than the test established by the state of Connecticut as to the analysis of judicial immunity. The Second Circuit explained that "We note this difference…only to point out how a federal court and a state court, employing the same legal framework, may come to different conclusions, when one is applying federal law and the other is applying state law." *See Gross*, 585 F.3d at 86—7.

In the case at bar the Second Circuit came "to [a] different conclusion," from the Ninth Circuit when assessing whether a judicial employee's actions in denying a request for a reasonable accommodation is shieled from any claims of liability pursuant to judicial immunity. The Second Circuit also wrongly applied abstention[1] to this matter. The Second Circuit in the case at bar also implicitly splits from the D.C. Circuit, which applies a narrower test as commented on by the Second Circuit for such determinations.

As such, this Court should grant the petition for *certiorari* to resolve the split between the Second, Ninth and D.C. Circuits and departure from this Court's jurisprudence on judicial immunity. This determination is of great National Importance as there must be uniformity in decisions that a local court's actions in

[1] The lower courts deviated from this Court's decisions as to abstention in holding it could not render a determination of petitioner's claims as per *Rooker-Feldman*, *Younger* and *O'Shea*. Initially, the respondents waived any arguments under *Rooker-Feldman* by failing to address it in their briefs before the court of appeals. The record demonstrates that the petitioner does not "invite district court review and rejection" of a state court judgment or that the district court proceedings were commenced after the state judgments were issued. Further, the lower courts failed to follow this Court's holding in *Sprint Communs, Inc. v. Jacobs*, 134 S.Ct. 583, 591 (U.S. 2013), that abstention under *Younger* "is limited to the[] three exceptional categories" of "ongoing state criminal prosecutions, state-initiated civil enforcement proceedings and state civil proceedings that involve the ability of state courts to perform their judicial functions." Finally, abstention under *O'Shea* was improper as this Court has only applied such holding to civil cases in very limited circumstances.

effectuating disabled litigants' rights under the Americans with Disabilities Act cannot be shieled by judicial immunity as ruling on requests for reasonable accommodations are administrative and ministerial acts.

B. Certiorari Should be Granted as the Second Circuit Split from Other Circuits in Allowing Respondents to Escape Liability Under the Americans with Disabilities Act by Offering to Provide an Alternative Accommodation Without Establishing that Such Accommodation Was Actually Provided or that Same Would be Effective to Ensure Meaningful Access to the Courts

In the case at bar the court of appeals held that petitioner did not plausibly allege he was discriminated against on the basis of his disability for failure to provide him with a CART transcriber primarily on the incorrect assertion that an alternative accommodation in the form of a note taker was offered and/or provided to petitioner. However, in *Matter of Solomon v. Fishman*, 162 A.D.3d 1052, 1053 (2d Dep't. 2018), the New York Appellate Division made it clear that the family court never offered or provided such "alternative" accommodation as it instead "den[ied] the father's request for the use by him of a personal note-taker or tape recorder at court proceedings."

The Appellate Division's determination as to whether petitioner established he was disabled is of no legal import as it relied upon a completely abrogated analysis of whether a person is disabled, which was specifically overruled by the enactment of the ADA Amendments Act of 2008. In making such decision the state appeal court relied upon *Kadanoff v. Kadanoff*, 46 A.D.3d 626, 627 (2007), which applied the abrogated standard that a person must prove that "by reason of her alleged disability, she was substantially limited in a major life activity." *Kadanoff* relied upon a district

court opinion which applied this Court's overruled decision of *Toyota Motor Mfg. Ky v. Williams*, 534 U.S. 184 (U.S. 2002). *Toyota* was specifically overruled with the enactment of the ADA Amendments Act of 2008.

The court of appeals being acutely aware of such developments in the law granted the petitioner's request for reasonable accommodations at oral argument and also refused to answer whether or not petitioner was disabled in the merits decision. However, it based its ruling on the provision of an alternative accommodation by respondents, which was never actually provided as made clear in the above referenced state appellate court decision. Even if the alternative was provided, dismissal of petitioner's claims was not warranted.

This is because simply providing an alternate accommodation does not end the analysis. The alternate offered must be proven to be effective in achieving meaningful access; a fact specific inquiry. The Circuits have all applied the standard that meaningful access requires the public entity to provide reasonable accommodations or modifications in the program, service or activity offered. *See Pollack v Reg'l Sch. Unit 75*, 886 F.3d 75, 80 (1st Cir. 2018) (holding meaningful access required via reasonable modifications unless such modifications would fundamentally alter the program); *Wright v N.Y. State Dep't of Corr. & Cmty. Supervision*, 831 F.3d 64, 72 (2d Cir. 2016) (holding that a public entity must provide reasonable accommodations to ensure meaningful access that are effective); *Berardelli v Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104 (3rd Cir. 2018) ("When necessary to realize [meaningful] access…the statutes require reasonable modifications"); *Nat'l Fed'n of the Blind v*

Lamone, 813 F.3d 494, 507—8 (4th Cir. 2016) (holding that a public entity must make reasonable modifications that allow the disabled meaningful access and that the burden of proving a modification is not necessary rests on the defendant); *Frame v City of Arlington*, 657 F.3d 215 (5th Cir. 2011) ("Reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access"); *Bedford v Michigan*, 722 Fed. Appx. 515, 518 (6th Cir. 2018) ("Reasonable accommodation may be necessary to ensure meaningful access and a refusal to modify…may in view of the circumstances, become unreasonable and discriminatory"); *Banks v Patton*, 743 Fed. Appx. 690 (7th Cir. 2018) (holding that providing meaningful access requires accessible reasonable alternatives that are effective); *Folkerts v City of Waverly*, 707 F.3d 975, 984 (8th Cir. 2013) (holding disabled persons are entitled to meaningful access and that a public entity must afford such access via reasonable modifications); *Crowder v Kitagwa*, 81 F.3d 1480, 1483 (9th Cir. 1996) (holding that in determining disability discrimination it must be assessed whether disabled persons are denied meaningful access and that public entities may need to make reasonable modifications to avoid discrimination); *Shotz v Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (holding that a county is obligated to ensure each service program or activity at its courthouse, when viewed in its entirety, was readily accessible and that structural changes may need to be made where other methods to accommodate are not effective); *Am. Council of the Blind v Paulson*, 525 F.3d 1256, 1268 (D.C. Cir. 2008) (holding that reasonable accommodations must be made to ensure meaningful access and acknowledging a pattern that meaningful

access is generally denied when a plaintiff identifies an obstacle impeding access such as an inaccessible staircase).

The Circuits have made clear that determining whether a disabled person is not afforded meaningful access is a fact specific inquiry, where the defendant has the burden to establish otherwise. In *Folkerts*, the Eighth Circuit stated that this "Inquiry is inherently fact intensive and largely depends on context." 707 F.3d at 984. Likewise, the Ninth Circuit held in *Crowder* that the "Determination of what constitutes reasonable modification is highly fact specific." 81 F.3d at 1483. Similarly, the D.C. Circuit held "Cases addressing meaningful access are necessarily fact specific." *Am. Council of the Blind*, 525 F.3d at 1268; *see also Wright*, 831 F.3d at 72 (Second Circuit holding that "Determining the reasonableness of an accommodation is a fact specific question that often must be resolved by fact finder.").

The Third Circuit has made clear that "[W]hile a plaintiff may not insist on a particular accommodation if another reasonable accommodation was offered…such alternative, in order to serve as a defense, also must provide…meaningful access." *Berardelli*, 900 F.3d at 104. The D.C. Circuit also held that a defendant "May assert as an affirmative defense to liability that accommodating the disabled would constitute an undue burden." *Am. Council of the Blind*, 525 F.3d at 1268. As such, "Reasonable modifications…are necessary to avoid discrimination…unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the…program." *Crowder*, 81 F.3d at 1485.

Even where such an alternate accommodation permits a disabled person the ability to participate in a court proceeding, meaningful access may still be denied because a "Violation of Title II does not occur only when a disabled person is completely prevented from enjoying a program." *Shotz*, 256 F.3d 1077, 1080 (11th Cir. 2001).

Here the Second Circuit split from all other circuits, including its own, by holding that plaintiff did not plausibly allege he was discriminated against because the respondents offered alternative accommodations without requiring respondents to prove that such alternatives were are effective to constitute meaningful access, whether the accommodations proposed by petitioner would fundamentally alter the program or constitute an undue burden and whether the alternative was provided at all.

In the case at bar, the "Alternate means…of participating [as offered by defendants] do not address the scope of the denial of access that plaintiff" suffered by refusing to provide a note taker or CART transcriber. *See Am. Council of the Blind*, at 1269. It is settled law that the mere provision of alternative accommodations alone does not serve as a defense to a claim under the ADA or RA. Instead, a fact specific inquiry is required into whether a plaintiff requires reasonable accommodations to ensure meaningful access and whether a defendant is able to show its current scheme of accommodations are effective to ensure meaningful access.

Accordingly, certiorari should be granted to resolve the split in the circuits as to whether ineffective alternative accommodations which are offered to a disabled

litigant preclude any claims for discrimination under the Americans with Disabilities Act.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition.