NO. 21-_____

In the Supreme Court of the United States

BRADFORD DISNEY LUND,

Petitioner,

v.

DAVID J. COWAN, THE HONORABLE, LOS ANGELES COUNTY SUPERIOR COURT; LOS ANGELES COUNTY SUPERIOR COURT, FOR THE STATE OF CALIFORNIA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should grant Certiorari to review the Ninth Circuit's holdings that because of Judge Cowan's judicial immunity, the doctrine of *respondeat superior* did not apply to Petitioner's Title II ADA claim, even though that decision conflicts with the decisions of the Fourth, Sixth, and Eleventh Circuits, together with this court's decision on judicial immunity in *Pulliam v. Allen*?

2. Whether this court should grant Certiorari to review the Ninth Circuit's refusal to decide that Petitioner should have been able to seek prospective declaratory relief against a sitting judge on his § 1983 Civil Rights claims even though nine of the thirteen circuits have all held that such relief is available?

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 20-55764

Bradford D. Lund, *Plaintiff-Appellant, v.*
David J. Cowan, The Honorable, Los Angeles County Superior Court; Los Angeles County Superior Court, for the State of California, *Defendants-Appellees*

Date of Final Opinion: July 15, 2021

Date of Rehearing Denial: August 23, 2021

United States District Court for the
Central District of California

Case No. 2:20-cv-01894-SVW-JC

Bradford Lund *v.* David J. Cowan et al.

Date of Final Order: July 27, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bradford D. Lund ("Petitioner"), hereby submits his Petition for Certiorari as follows.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit, reported as *Lund v. Cowan*, 5 F.4th 964 (9th Cir. 2021) is included below at App.1a. The Order of the U.S. Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Request for Rehearing En Banc is included below at App.41a. The order of the U.S. District Court for the Central District of California, which is unreported, is included below at App.17a.

JURISDICTION

The Court of Appeals entered judgment on July 15, 2021. (App.1a) That published decision is located at 5 4th 964 (9th Cir. 2021). The Court of Appeals denied Panel Rehearing and Rehearing En Banc on August 23, 2021. (App.41a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983
The Civil Rights Act of 1871

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 12101
The Americans with Disabilities Act of 1990 ("ADA")

Provided below at App.43a.

42 U.S.C. § 12102
Definition of Disability

Provided below at App.45a.

42 U.S.C. § 12131
Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132
Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

INTRODUCTION AND STATEMENT OF THE CASE

> *Do I want to give 200 million dollars, effectively, to someone who may suffer, on some level, from Down syndrome? The answer is no.*

App.4a (emphasis added). This statement said about Walt Disney's grandson, Petitioner, comes from a sitting judge as part of his decision to deny Mr. Lund due process of law under the Fourteenth Amendment and his statutory right to be free of discrimination under the Americans with Disabilities Act. Petitioner asked for *only* prospective declaratory relief against the court system, that includes the Hon. David J. Cowan ("Judge Cowan"), to prevent future judges from this kind of constitutional violation and discrimination for a perceived violation. The Ninth Circuit Court of Appeals could not resist noting how "troubling" this statement was from the bench by a sitting judge. This Court should grant certiorari because there is a dispute among the circuits as to whether prospective declaratory relief is available for the constitutional or statutory violations. As this Court and three circuits have held, judicial immunity should not prevent a plaintiff's ability to obtain prospective declaratory relief to prevent future constitutional and statutory violations. As it stands, the Ninth Circuit opinion leaves Petitioner without any redress as a result of Judge Cowan's discriminatory comments from the bench, which have unjustly deprived him of his liberty and constitutional rights.

Petitioner has found himself trapped in the Los Angeles County Superior Court ("LASC") probate court for more than a decade trying to claim his family inheritance, to oust the hostile Trustees[1] who preside over his trusts, and to expose their corrupt conduct which has spanned two states, all to no avail. Even though ruling against Petitioner on the grounds of immunity, the Ninth Circuit could not have put it better:

> *For over a decade, Bradford Lund — the grandson of Walt Disney — has languished in perhaps the Unhappiest Place on Earth: probate court. Embroiled in a long-running dispute with family members and trustees, Lund has yet to claim a fortune estimated to be worth $200 million.*

App2a. (Emphasis added).

Right after Judge Cowan's comment, as the Ninth Circuit stated: Counsel undersigned "[i]mmediately informed Judge Cowan that Lund did not have Down syndrome and asked Judge Cowan to retract his statement. Judge Cowan refused. Ultimately Judge Cowan rejected the settlement." App.4a.

Without holding any hearing, Judge Cowan then appointed a guardian ad litem over Lund's case. App.4a. The Ninth Circuit recognized that Petitioner was "[u]nderstandably frustrated at this latest turn of events," which precipitated his filing of the federal civil rights and ADA case against Judge Cowan together

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[1] L. Andrew Gifford, Robert Wilson, Douglas Strode, and First Republic Trust Company, (collectively, the "Trustees").

with the Los Angeles County Superior Court ("LASC"). App.2a.

Petitioner asks this Court to accept certiorari to decide important questions involving judicial immunity when individuals all over the country seek to hold judicial officers and the court systems themselves responsible for violating the constitutional rights of those who come before them seeking justice and fairness. Judicial immunity should no longer be permitted to be used as a shield for judicial officers who would otherwise be liable for violating an individual's right to due process. Nor should immunity shield the court systems who preside over such judges when an individual's rights under the ADA are violated.

As discussed below, the Fourth Circuit's decision of *Livingston v. Guice*, 68 F.3d 460 (4th Cir. 1995) on judicial immunity within the context of the ADA, as well as decisions of the Sixth and Eleventh Circuits conflict with the Ninth Circuit opinion. The Ninth Circuit opinion also conflicts with this Court's own precedent in *Pulliam v. Allen*, 466 U.S. 522, 536-43 (1984), which is still valid for non § 1983 equitable claims against a sitting judge. Judge Cowan, as an instrumentality of the LASC, falsely perceived Petitioner as having Down syndrome and his remark was a classic prohibited discriminatory statement under the ADA.

The very purpose of the ADA legislation is the "national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101. Pursuant to the ADA an individual has a "disability" if they are "being regarded as having such an impairment." 42 U.S.C. § 12102(1)(C). Pursuant to subdivision (3)(A), of the same statute, "An individ-

ual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."

Contrary to the Ninth Circuit's opinion, Petitioner's second proposed amended complaint on his ADA claims only sought prospective declaratory and injunctive relief against Judge Cowan and monetary damages only against the LASC. As discussed below, in *Pulliam*, Justice Blackmun, writing for the majority, explained that "We never have had a rule of absolute judicial immunity from prospective relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence." 466 U.S. at 537.

Petitioner's § 1983 claims, contrary to the Ninth Circuit's holding, also seek only prospective declaratory relief. As such, consistent with the First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, even after the 1996 amendment to § 1983 by the Federal Courts Improvement Act (FCIA), prospective declaratory relief is still available against a sitting judge and judicial immunity should not be a bar.

Petitioner requests that this Court accept certiorari and grant review of these two important federal questions. Under both the ADA and the Due Process Clause of the 14th Amendment, prospective declaratory relief should be available to all plaintiffs seeking redress against a sitting judge. The ADA also should include the right to seek prospective injunctive relief. Finally, the individual immunity granted to judicial

officers should not be applied to the public entities that are liable under Title II of the ADA.

Background

One of the tactics of the Trustees in denying Petitioner his trust distributions has been to assert that he is "mentally incompetent" and cannot meet the financial maturity test contained in his trust. App.3a. The Ninth Circuit went out of its way to opine: "That someone has Down syndrome does not necessarily preclude the ability to manage one's own financial affairs. In any event, the record suggests that Lund does not have Down syndrome." App.13a.

Although previously the Trustees tried to convince another California probate judge that Petitioner was not competent, they failed, and that court specifically found[2] that: "The evidence did not rebut the statutory presumption that Mr. Lund had capacity to exercise his Trustee Removal Power."

As early as 2009, the Trustees were instrumental in teaming up with Petitioner's "estranged family"

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[2] In the 2013 decision, probate court Judge Beckloff ultimately found that the Trustees did not abuse their discretion in refusing to give Petitioner his trust inheritance. However, that was while the Arizona probate case was pending and before Petitioner was ultimately vindicated in the 2016 Arizona trial. Petitioner's Fifth Amended Petition is presently pending before the California probate court in case numbers BP109204, BP109205, BP129814, BP129815, and BP055495, out of which this Petition arises. In Petitioner's pending cases, he has given the California probate court notice of the Arizona final decision and has sought judicial notice, together with recognition by the California court under the Full Faith and Credit Clause and the principle of Comity. Judge Cowan has rejected all of these attempts for recognition of the Arizona judgment.

members in Arizona to attempt to convince the Arizona probate court that he needed a guardian and/or a conservator. App.3a. Indeed, one of Petitioner's own Trustees even testified as a star witness against him in that proceeding. After an eight-year battle and a 10-day bench trial, those estranged family members were unsuccessful and Petitioner was found to be competent, to have capacity, and not in need of any guardian or conservator. Those unsuccessful estranged family members appealed the case and in a detailed 37-page opinion, the Arizona Appellate Court unanimously affirmed the decision. The Arizona Supreme Court ultimately denied review.

Despite this victory, and a final judgment with detailed findings of fact and law by the Arizona court that Petitioner was a competent man, the hostile Trustees still pressed on in the California probate court continuing to pound their false theory that somehow Petitioner was mentally incompetent and not "financially mature" enough to handle his trust inheritance. Even though the final Arizona judgment declared Petitioner to be competent and not incapacitated, "Judge Cowan issued a *sua sponte* order to show cause whether the court should appoint a guardian ad litem over Lund." App.3a.

Not until after the Opening Brief was filed in the Ninth Circuit, on November 12, 2020, did Judge Cowan enter three orders: The first one discharged the guardian ad litem, and the second order granted Petitioner's motion to transfer the case to a new probate court judge. App.4a-5a. On this basis the Ninth Circuit ruled that Petitioner's case was deemed moot. App.6a-7a.

Petitioner submits, however, that the case should not have been deemed moot. Judge Cowan also issued a third order — an Order to Show Cause against counsel undersigned as to why she should not be disqualified for alleged conflicts of interest. App.5a. He stayed the entire case until a hearing can be held on this issue. Petitioner asserts that this OSC against counsel undersigned is nothing short of Judge Cowan's retaliation for the filing of this federal lawsuit, and a continuation of the bias and prejudice to which Petitioner continues to be exposed while trapped in the California probate court.

Moreover, Judge Cowan's discharge of the guardian ad litem is just a temporary respite from the court's ongoing prejudice against Petitioner: Judge Cowan specifically commented in the order "[t]hat if Lund's lawyer were disqualified, then the new judge might want to consider reappointing the guardian ad litem to help deal with the aftermath of the disqualification." App.5a.[3] Petitioner lives under the threat that his lead counsel will no longer be able to represent him and that the GAL will still be reappointed, without due process, over his case. Therefore, far from being moot, Petitioner continues to suffer repercussions which go to the heart of the violation of his right to due process.

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[3] The Ninth Circuit's reference to the way that Judge Cowan commented appears on page 11 of the OSC. However, on Page 2 of the OSC, Judge Cowan specifically states: "If Ms. Slaton is discharged pursuant to this OSC, the Court believes it appropriate to issue a secondary OSC re: attorney's fees and *direct* Brad's GAL, Margret Lodise, to investigate" concerns raised by Judge Cowan.

This timely Petition for Certiorari follows.[4]

REASONS FOR GRANTING THE PETITION

Petitioner's issue as to whether judicial immunity applies to his Title II ADA claims presents a clear split among the circuits that must be rectified by this Court. Second, the issue regarding whether a Petitioner may sue a sitting judge for declaratory relief regarding 42 U.S.C. § 1983 claims present an important federal question that has yet to be addressed by this Court.

The Ninth Circuit's opinion in this case presents a circuit split on whether judicial immunity applies to claims seeking equitable and injunctive relief pursuant to Title II of the ADA. In the present case, the Ninth Circuit stated: "Relying on Title II of the ADA, Lund seeks money damages against both Judge Cowan and the Superior Court based on Judge Cowan's in-court comment that he would not give money to someone who 'may suffer, on some level, from Down syndrome.'" App.10a. However, the Ninth Circuit failed to recognize that Petitioner submitted a Motion for Leave to Amend which included a proposed Second Amended Complaint establishing that Petitioner was seeking prospective equitable and injunctive relief, together with monetary damages from only the LASC.

The Ninth Circuit's decision conflicts with decisions from the Fourth Circuit (*Livingston v. Guice*, 68 F.3d 460 (4th Cir. 1995)), Sixth Circuit (*Crumbaker v.*

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[4] On August 23, 2021 the Ninth Circuit denied Petitioner's Petition for Panel Rehearing and Request for Rehearing En Banc.

McLean Cty., Ky., 37 F. App'x 784, 786 (6th Cir. 2002)), and Eleventh Circuits (*Badillo v. Thorpe*, 158 F. App'x 208, 211 (11th Cir. 2005)).

While these decisions are unreported/unpublished, such a distinction should not preclude this Court's decision to review the split. *See Mata v. Lynch*, 576 U.S. 143, 151 (2015); *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1545 (2021) (J. Sotomayor, dissenting); *Plumley v. Austin*, 574 U.S. 1127 (2015) (J. Thomas, dissenting).

In *Mata*, this Court determined that just because the Fifth Circuit had recharacterized the appeal so that it could decline taking jurisdiction, did not change the fact that the decision created a circuit split. *Mata*, 576 U.S. at 151. As Justice Kagan explained: "What the Fifth Circuit may not do is to wrap such a merits decision in jurisdictional garb so that we cannot address a possible division between that court and every other." *Id.* This Court granted certiorari to resolve the split despite the fact that the decision was unpublished.

In *Wilson*, the key issue in this Court affirming the decision of the Fourth Circuit on whether qualified immunity applied to the officers was that the petitioners failed to present any cases of controlling authority, or a "consensus of cases of persuasive authority" for their position. *Wilson*, 526 U.S. at 617. In the present case, Petitioner has established a consensus of cases of persuasive authority to reach a contrary decision from the Ninth Circuit opinion on judicial immunity within a Title II ADA claim.

In a dissent to this Court's decision in *BP P.L.C.*, Justice Sotomayor relied on an unpublished Tenth Circuit case in her analysis of how circuits have interpreted § 1447: "The Tenth Circuit had also reached this conclusion prior to Congress amending § 1447(d), albeit in an unpublished opinion." *BP P.L.C.*, 141 S. Ct. at 1545. Similarly, in the present case, the Fourth, Sixth, and Eleventh Circuit have all reached the conclusion that judicial immunity does not apply to Title II ADA cases seeking equitable relief. Therefore, just as in *BP P.L.C.*, this Court should consider the conflicting cases from the Fourth, Sixth, and Eleventh Circuits even though they are unpublished.

In a dissent to the denial of certiorari in *Plumley*, Justice Thomas explained that because the opinion: "'establishe[d] . . . a rule of law within th[at] Circuit,' 'involve[d] a legal issue of continuing public interest,' and 'create[d] a conflict with a decision in another circuit'" the opinion should have been published. *Id.* at 831. Similarly, the Fourth, Sixth, and Eleventh Circuit's opinions should have been published because they established a clear rule of law that judicial immunity did not protect sitting judges from equitable relief in Title II ADA claims.

Without question, as described above, there is a circuit split regarding the applicability of judicial immunity to suits involving Title II of the ADA claims. This Court should accept review because "a United States court of appeals [the Ninth Circuit] has entered a decision in conflict with the decision of another United States court of appeals [Fourth, Sixth, and Eleventh Circuits] on the same important matter[.]" U.S. Sup. Ct. R. 10(a); *see also Bingler v. Johnson*, 394 U.S. 741, 747 (1969) ("we granted certiorari to resolve the conflict

and to determine the proper scope of [§] 117 and Treas. Reg. [§] 1.117—4(c) with respect to payments such as those involved here."); *United States v. O'Malley*, 383 U.S. 627, 630 (1966) ("Because of these conflicting decisions we granted certiorari.").

Further, this Court has never before made a decision as to whether judicial immunity applies to Title II ADA claims for monetary damages against a public entity, or for equitable relief against a judicial officer. Therefore, this Court should grant certiorari to set forth a clear rule of law that will provide guidance to parties and courts throughout the nation.

The second issue presented in this case presents an important issue that has never been decided by this Court, but needs to be: Whether the 1996 Amendment to § 1983 by the FCIA, limiting injunctive relief against a sitting judge, also applies to declaratory relief against a sitting judge. Nine of the thirteen circuits have determined that a plaintiff may bring a § 1983 cause of action against a sitting judge when the claim for relief is only declaratory in nature. The First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have all entered specific decisions following the 1996 Amendment to § 1983. No decisions on this issue exist in the Second, Fourth, and Eighth Circuits. The Ninth Circuit in this case stated: "Our court has not yet explicitly answered whether the statutory amendment bars declaratory relief, so Lund urges us to hold that it does not. But we leave that question for another day." App.10a. fn. 3.

This Court has determined that novel questions regarding federal law are sufficient to accept certiorari. *See generally*, *Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620

(2011). In *Kossick*, this Court determined that certiorari was necessary because of the novel questions presented as to the interplay of state and maritime law. *Kossick*, 365 U.S. at 733. In *PLIVA, Inc.*, 564 U.S. 604 this Court accepted certiorari because of the novel question as to "whether conflict pre-emption should take into account these possible actions by the FDA and brand-named manufacturer."[5] *PLIVA, Inc.*, 564 U.S. at 620.

In the present case, while this Court's decision of *Pulliam* held that judicial immunity did not apply to § 1983 suits seeking prospective declaratory and injunctive relief, that decision was partially overturned by the 1996 FCIA's amendment to § 1983. *Just. Network Inc. v. Craighead Cty.*, 931 F.3d 753, 763 (8th Cir. 2019). Since then, this Court has not determined whether prospective declaratory judgments can be sought against a sitting judge under the current § 1983. A final decision by this Court is needed in order to provide unity and clear precedent to courts and parties nationwide as to whether a plaintiff may seek declaratory judgment for civil rights violations against a sitting judge.

The two issues presented to this Court for review are both worthy of certiorari.

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[5] This case involved whether it was impossible under federal law for a generic drug manufacturer to comply with state labeling laws.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE NINTH CIRCUIT'S HOLDINGS THAT BECAUSE OF JUDGE COWAN'S JUDICIAL IMMUNITY THE DOCTRINE OF *RESPONDEAT SUPERIOR* DID NOT APPLY TO PETITIONER'S TITLE II ADA CLAIM EVEN THOUGH THAT DECISION CONFLICTS WITH DECISIONS OF THE FOURTH, SIXTH, AND ELEVENTH CIRCUITS, TOGETHER WITH THIS COURT'S DECISION ON JUDICIAL IMMUNITY IN *PULLIAM V. ALLEN*.

A. Pursuant to the Fourth Circuit's Decisions Judicial Immunity Does Not Apply to Title II ADA Claims:

The Fourth Circuit, in *Livingston v. Guice*, 68 F.3d 460 (4th Cir. 1995), an unpublished decision[6], determined that the district court erred in granting of a motion to dismiss the action brought under Title II of the ADA against a superior court judge for discrimination. As the *Livingston* court stated: "Because the district court erroneously granted absolute immunity to Judge Guice and dismissed Livingston's claim against

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[6] Upon an extensive review Petitioner was unable to find a published decision regarding judicial immunity in the context of Title II ADA claims. Therefore, Petitioner cites this case pursuant to CTA4 Rule 32.1 "If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met."

the State, we reverse and remand for further proceedings." *Id*. Regarding the application of full judicial immunity to the judge in *Livingston*, the Fourth Circuit opined:

> The district court *did not consider the effect that the type of relief sought by the plaintiff* might have on Judge Guice's entitlement to absolute immunity. Livingston sought *only injunctive and declaratory relief against the judge and reserved her request for monetary damages for her claim against the state*.

Id. at *2 (Emphasis added). Similarly, in the present case, Petitioner only sought monetary damages against the LASC.

In the First Amended Complaint, Petitioner sought: "damages for the Defendants' violation of the American With Disabilities Act of 1990." Furthermore, it was made extremely clear that Petitioner was suing Judge Cowan in his official capacity only. Therefore, Petitioner was seeking monetary damages from LASC as that entity was liable for Judge Cowan's discriminatory statement. Moreover, the Petitioner in his proposed Second Amended Complaint (denied by the district court as futile) only sought declaratory and injunctive relief against Judge Cowan, not monetary damages.

Both the district court in *Livingston*, and the Ninth Circuit in the present case, failed to distinguish between requests for equitable relief and monetary damages. In *Livingston*, the Fourth Circuit quoted the lower court:

> The clearest indication of the district court's failure to recognize that Livingston was

> seeking equitable, rather than compensatory, relief from Judge Guice is the final paragraph of the court's analysis:
>
> > Although the Plaintiff might not be compensated for the alleged injury she suffered at the hands of Judge Guice, this result is the "balance between evils" that the Supreme Court has chosen.

Id. at *2-3. Similarly, the Ninth Circuit in the present case stated:

> Relying on Title II of the ADA, Lund seeks money damages against both Judge Cowan and the Superior Court based on Judge Cowan's in-court comment that he would not give money to someone who "may suffer, on some level, from Down syndrome." The district court dismissed the ADA claims, citing judicial immunity. We affirm.

App.10a. For the same reasons that the lower court in *Livingston* incorrectly determined that the judge was entitled to full absolute immunity and the state was not liable because of the same, the Ninth Circuit erred in its decision.

The *Livingston* court opined:

> "[G]enerally, a judge is immune from a suit for money damages." [Citation]. It is a principle well-entrenched in the law. [Citations]. Equally clear, however, is the principle that judges are not absolutely immune from suits for prospective injunctive relief. [Citation]. "Absolute" immunity, therefore, is only abso-

> lute insofar as it limits claims for damages brought against judges."

Id. at *3. In so opining, the *Livingston* court held: "*Pulliam's* limitation on the scope of absolute immunity is uncontroverted, yet the district court did not even cite this case. The court never considered the impact the type of relief sought has on the issue of judicial immunity, a significant mistake in light of *Pulliam's* holding that 'judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.'" *Id.* at *3. The *Livingston* court held: "With Livingston only seeking injunctive and declaratory relief against Judge Guice, there is no basis for affording the judge absolute immunity." Similarly, in the present case, the reasoning of the *Livingston* court should have been applied and Petitioner's request for monetary damages against the LASC should not have been dismissed. Additionally, because Petitioner requested injunctive and declaratory relief against Judge Cowan in the proposed second amended complaint, he should have been granted leave to amend.

Furthermore, because absolute judicial immunity does not apply, the Ninth Circuit erred in cloaking the LASC within the absolute immunity as to Judge Cowan. In *Livingston*, the Fourth Circuit determined:

> The district court's decision to wrap Judge Guice in the cloak of absolute judicial immunity directly affected the court's handling of Livingston's distinct claim against the State for monetary damages. Because we have ruled that Judge Guice is not entitled to absolute immunity, the district court's grant of the State's motion to dismiss must

> also be reversed. Petitioner submits that the Ninth Circuit's decision to determine that Petitioner could not seek monetary damages against the public entity LASC was wrong.

*Id. at *3.* Similarly, the Sixth (*Crumbaker*, 37 F. App'x at 786[7]) and Eighth Circuits (*Badillo*, 158 F. App'x at 211[8]) have also held that judicial immunity does not apply to equitable relief. In *Crumbaker*, the Sixth Circuit held: "The plaintiffs are not entitled to injunctive relief against Judge Ehlschide because they have not demonstrated an inadequate remedy at law or a serious risk of irreparable harm if injunctive relief is not granted." *Crumbaker*, 37 F. App'x at 786 (citing *Pulliam*, 466 U.S. at 537-38). In *Badillo*, the Eighth Circuit stated: "However, 'judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.'" *Badillo*, 158 F. App'x at 211 (quoting *Pulliam*, 466 U.S. at 541-42).

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7 The *Crumbaker* court ultimately affirmed the dismissal of the case; however, the dismissal was based upon Petitioner's failure to state a claim. The court determined that plaintiff was not entitled to injunctive relief on the merits because they failed to demonstrate an inadequate remedy at law or a serious risk of irreparable harm. *Crumbaker*, 37 F. App'x at 786. There, while the plaintiff sued public entities, the plaintiff failed to provide any evidence that those public entities provided the services that she was denied.

8 The *Badillo* court determined that judges were not entitled to immunity regarding equitable relief, but still dismissed the case because there is no individual liability under Title II of the ADA. There, Badillo only sued the judge and an administrative order in their individual capacity, he did not sue a public entity.

This Court should accept certiorari to review whether full judicial immunity should apply to Title II ADA claims against a judge. Indeed, in *Livingston*, the sitting judge was sued for comments made regarding a disabled individual who suffered from multiple sclerosis. Similarly, in the present case, Judge Cowan made comments about Petitioner being (falsely) perceived as having some form of Down syndrome. The ADA was enacted to mandate the elimination of discrimination. 42 U.S.C. § 12101(b)(1). Therefore, no judge should enjoy absolute immunity for any comment or act that discriminates against an individual that is "qualified" under the ADA.

B. Applying Absolute Judicial Immunity to Title II of the ADA Claims Seeking Equitable Relief Conflicts With This Court's Decision in *Pulliam*.

The application of absolute judicial immunity is contrary to this Court's precedent in *Pulliam*, 466 U.S. at 536-43. While *Pulliam* was superseded by statute regarding § 1983 claims for injunctive relief against a sitting judge after the 1996 FCIA amendment, *Justice Network Inc.*, 931 F.3d at 763, Petitioner submits that the holding remains valid that judges do not enjoy judicial immunity in suits for equitable relief in other contexts.

In *Pulliam*, this Court, in the context of determining whether attorney's fees could be ordered against a judge after successful prosecution of a § 1983 claim, determined while judges are absolutely immune from monetary damages, they are not immune from suits for equitable relief. *Id.* at 543. In so deciding the issue of judicial immunity, this Court in *Pulliam*

also analyzed the concept of judicial independence. Justice Blackmun, writing for the majority, opined:

> Our own experience is fully consistent with the common law's *rejection of a rule of judicial immunity from prospective relief. We never have had a rule of absolute judicial immunity from prospective relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence.* None of the seminal opinions on judicial immunity, either in England or in this country, has involved immunity from injunctive relief. *No Court of Appeals ever has concluded that immunity bars injunctive relief against a judge.* See n. 6, *supra.* At least seven Circuits have indicated affirmatively that *there is no immunity bar to such relief, and in situations where in their judgment an injunction against a judicial officer was necessary to prevent irreparable injury to a petitioner's constitutional rights, courts have granted that relief.*

Id. at 536-37 (Emphasis added). In so opining, this Court held: "We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id.* at 541-42. Yet, contrary to the analysis of this Court as quoted above, in the present case, the Ninth Circuit determined that the LASC could not be liable for Judge Cowan's comment because he was entitled to absolute immunity. App.14a. According to the Ninth Circuit, "Because judicial immunity bars any finding of individual liability against Judge Cowan, the Superior

Court similarly cannot be held liable for Judge Cowan's conduct." App.14a.

Judge Cowan received that absolute immunity to promote judicial independence. Yet, the Ninth Circuit's statement does not take into consideration this Court's analysis that such "collateral injunctive relief" should be available "in exceptional cases" such as Petitioner's.

While *Pulliam* has been superseded by statute regarding § 1983 claims, it is submitted that its holding that judges are not immune from suits seeking equitable relief still remains valid. *See Livingston*, 68 F.3d at * 2; *Badillo*, 158 F. App'x at 211; *Crumbaker*, 37 F. App'x at 786; *Mir v. Kirchmeyer*, No. 20-1659, 2021 WL 4484916, at *2 (2d Cir. Oct. 1, 2021)[9]. Therefore, Petitioner requests that this Court accept review and determine that Judge Cowan and LASC are not immune from suits that seek equitable relief.

C. Judicial Immunity Is an Individual Protection and Cannot Apply to Public Entities Sued Under Title II of the ADA Claims.

This Court held in *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015) ("*Sheehan*"), that "Only public entities are subject to Title II, *see*, *e.g.*, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S.

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[9] This 2021 case involved a plaintiff seeking injunctive relief pursuant to § 1983 regarding him being disbarred as a doctor for negligence in both California and New York. The *Mir* court specifically cited *Pulliam*, in its holding that absolute immunity only protected judges from suits for damages, not for suits seeking equitable relief.

206, 208 (1998)[.]" Therefore, individuals are not liable for Title II violations of the ADA.

This Court in *Sheehan* declined to weigh in on the issue of whether a public "entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees" under Title II of the Americans with Disabilities Act. *Sheehan*, 575 U.S. at 610 (""[T]he parties agree that [a public] entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees . . . [b]ut we have never decided whether that is correct, and we decline to do so here, in the absence of adversarial briefing."). Therefore, Petitioner's issue has never before been determined by this Court.

Further, the plain language of Title II of the ADA establishes that only public entities are liable for discrimination. Title 42 U.S.C. § 12132 reads in pertinent part: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of *a public entity, or be subjected to discrimination by any such entity*." (Emphasis added). Section 12131 defines a public entity as "(A) any State or local government; [¶] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]"

In the present case, the public entity is the LASC. Petitioner sought damages against that public entity for the discriminatory actions of Judge Cowan. Petitioner brought suit against both parties, alleging *inter alia* that Judge Cowan, in his official capacity as a judge of the LASC, discriminated against Petitioner.

Without question, *respondeat superior* applies to Title II ADA cases. *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001) (quoting *Bonner v. Lewis*, 857 F.2d 559, 566 (9th Cir. 1988) and *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1045 (9th Cir. 1999):

> We have held that, under § 504 of the Rehabilitation Act (upon which the ADA was explicitly modeled), *we apply the doctrine of respondeat superior to claims* brought directly under the statute, in part because the historical justification for exempting municipalities from respondeat superior liability does not apply to the Rehabilitation Act, and in part because the doctrine "*would be entirely consistent with the policy of that statute, which is to eliminate discrimination against the handicapped*." [Citation] These same considerations apply to Title II of the ADA.

Id. at 1141 (Emphasis added).

In *Geness v. Pennsylvania*, 503 F. Supp. 3d 318, 333 (W.D. Pa. 2020)[10], the district court stated:

> We held Mr. Geness adequately pleaded his Title II and Fourteenth Amendment claims and the Eleventh Amendment did not shield the AOPC from suit. *We also held the AOPC could not invoke quasi-judicial immunity because the AOPC is an entity, and only indi-*

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10 It should be noted that this case, while Judgment was rendered for the Commonwealth, went to trial with the Plaintiff permitted to bring his Title II of the ADA claims against that entity. *Geness v. Pennsylvania*, No. CV 16-876, 2021 WL 3883972, at *1 (W.D. Pa. Aug. 31, 2021)

> *viduals being sued in their individual capacity can invoke absolute immunity*. The AOPC appealed our ruling on sovereign immunity, but not our ruling on judicial immunity. Our Court of Appeals reversed our ruling on sovereign immunity and did not directly address our ruling on judicial immunity.

(Emphasis added). The *Geness* court made this statement in determining that the public entity sued there, the Commonwealth of Pennsylvania, may be vicariously liable for the judge's conduct. *Id.* at 339.

In so determining, the *Geness* court opined: "The Commonwealth cannot invoke judicial immunity *because the Commonwealth is an entity, not an individual*. We held in our May 28, 2019 Memorandum *an entity, like the Commonwealth, cannot invoke judicial immunity because judicial immunity protects only individuals* acting in their individual capacities." (Emphasis added). *Id.* at 340. Relying on an earlier Court of Appeals decision in the same case, *Geness v. Admin. Off. of Pennsylvania Cts.*, 974 F.3d 263, 276 (3d Cir. 2020), the district court further stated: "Our Court of Appeals focused on Mr. Geness's concession the AOPC had no power over judges' decision-making. The Commonwealth, by contrast, concedes the judges are its instrumentalities." In the present case, there is no question that the LASC has power over Judge Cowan, and furthermore, Judge Cowan is an instrumentality of the LASC.

Just as *Geness* determined that the "Court of Common Pleas judges" were the reason that Title II of the ADA was violated (503 F. Supp. 3d at 341), here, Petitioner has named both the judge and the LASC. The LASC is virtually the same public entity

as the Court of Common Pleas. Therefore, just as the *Geness* court determined that it could not preclude liability on the Commonwealth, so too, in the present case, it should have never been determined that Petitioner could not seek remedies from the LASC.[11]

The ADA contains specific codified purposes for its creation in 42 U.S.C. § 12101(b). First and foremost, the United States Legislature stated: "It is the purpose of this chapter – [¶] (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]" With this unambiguous purpose, there is no justification why judicial immunity should prevent a remedy. In the present case, Judge Cowan openly discriminated against Petitioner when he falsely perceived that Petitioner may suffer on some level from Down syndrome. Judge Cowan did so in the face of indisputable evidence otherwise, but refused to retract his false statement. This is precisely one of the reasons that the ADA was enacted, in order to protect individuals from disparate treatment because of perceptions, correct or incorrect, of a disability. Yet, that is exactly what happened in Judge Cowan's court.

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[11] Indeed, while the public entity in *Geness* is the commonwealth of Pennsylvania, and in the present case, the public entity is the LASC, such should not make any difference. The LASC is an instrumentality of the State pursuant to 42 U.S.C. § 12131(1)(b). Therefore, just as the Commonwealth in *Geness* was the public entity, the LASC is the public entity in the present case. Petitioner does not believe that he was required to name the State of California as a defendant because Judge Cowan is an instrumentality of the LASC itself. In turn, the LASC is a sub-division of the State. However, upon any remand, Petitioner could easily amend the First Amended Complaint and add the State of California if necessary.

As this Court reasoned in *Tennessee v. Lane*, 541 U.S. 509 (2004), "The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities." 541 U.S. at 516. Allowing judicial immunity to bar suits against public entities such as court systems like the LASC in Petitioner's case who violated the ADA, would single handedly destroy such a purpose. No federal law would be able to mandate the elimination of discrimination by courts. Rather, because of judicial immunity discrimination would be permitted to occur by an entire class of individuals and entities: sitting judicial officers and those subject to judicial immunity, together with the court systems in which those judges are employed.

Indeed, the *Tennessee* court held that congress specifically abrogated Eleventh Amendment immunity in Title II ADA claims. *Id.* at 532. Query: *Would Congress eliminate sovereign immunity in Title II claims but allow other immunities to protect those same public entities from liability for discrimination?* Petitioner submits it would not.

Petitioner urges this Court to accept certiorari to decide the very important federal question of law as to whether judicial immunity properly applies to Title II cases. While the Ninth Circuit opines: "But as a general matter, there can be no respondeat superior liability where there is no underlying wrong by the employee, which includes situations in which the employee is immune to suit." App.14a. However, pursuant to Title II of the ADA, there is no individual liability. Therefore, that public entity, otherwise subject

to Title II ADA liability, should not benefit from judicial immunity.

In *Geness*, the district court stated: "The Commonwealth cannot invoke judicial immunity because the Commonwealth is an entity, not an individual. We held in our May 28, 2019 Memorandum an entity, like the Commonwealth, cannot invoke judicial immunity because judicial immunity protects only individuals acting in their individual capacities." *Geness*, 503 F. Supp. 3d at 340. In so opining, the *Geness* court reasoned: "Neither the Supreme Court in *Jackson*[12] nor our Court of Appeals in *Geness I*[13] took issue with the defendant suing the State of Indiana for the conduct of its judges. We agree with Mr. Geness and will not disturb our earlier ruling." *Id.* at 342. Similarly, in the present case, Petitioner was seeking monetary damages against LASC, the public entity.

Therefore, this Court should accept certiorari to resolve the question of whether judicial immunity should shield public entities otherwise subject to liability pursuant to Title II of the ADA.

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12 *Jackson v. Indiana*, 406 U.S. 715, 731 (1972). In *Jackson*, involving an equal protection suit against the state for a judge's conduct, there is no discussion of judicial immunity.

13 *Geness v. Cox*, 902 F.3d 344 (3d Cir. 2018). In that case, there is no discussion of judicial immunity.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE NINTH CIRCUIT'S REFUSAL TO DECIDE THAT PETITIONER SHOULD HAVE BEEN ABLE TO SEEK PROSPECTIVE DECLARATORY RELIEF AGAINST A SITTING JUDGE ON HIS § 1983 CIVIL RIGHTS CLAIMS EVEN THOUGH NINE OF THE THIRTEEN CIRCUITS HAVE ALL HELD THAT SUCH RELIEF IS AVAILABLE.

A. Declaratory Relief Is Still Available Against Judges for Civil Rights Violations Pursuant to 42 U.S.C. § 1983.

Nine of the thirteen circuits have determined that a plaintiff may bring a § 1983 cause of action for declaratory relief. *See Brown v. Rhode Island*, 511 F. App'x 4, 6 (1st Cir. 2013); *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 195 (3d Cir. 2000); *Corliss v. O'Brien*, 200 F. App'x 80, 84 (3d Cir. 2006); *Severin v. Par. of Jefferson*, 357 F. App'x 601, 605 (5th Cir. 2009); *Ward v. City of Norwalk*, 640 F. App'x 462, 467 (6th Cir. 2016); *Johnson v. McCuskey*, 72 F. App'x 475, 477 (7th Cir. 2003); *Lawrence v. Kuenhold*, 271 F. App'x 763, 766 (10th Cir. 2008); *Schepp v. Fremont Cty., Wyo.*, 900 F.2d 1448, 1452 (10th Cir. 1990); *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000); *Roth v. King*, 449 F.3d 1272, 1286 (D.C. Cir. 2006); *Justice Network Inc.* 931 F.3d at 763 (8th Cir. 2019).

As discussed earlier, in 1996 the FCIA was passed which placed a bar on plaintiffs seeking injunctive relief against a judge for § 1983 violations of constitutional rights.

42 U.S.C. § 1983 now reads in pertinent part:

> 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, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.*

(Emphasis added).

This Court has never specifically held that a plaintiff may seek declaratory judgment against a sitting judge for violations of civil rights following the amendment to § 1983 by the FCIA. In Petitioner's case, the Ninth Circuit recognized that other circuits had come to this conclusion, but refused to address the same question. App.10a fn. 2 (citing *Justice Network Inc.*, 931 F.3d at 763)).

Petitioner calls upon this Court to resolve the question of whether an individual may seek prospective declaratory relief against a judge. Pursuant to the holdings in the First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, this Court should finally hold that a plaintiff may seek declaratory

relief against a judge for violations of § 1983 in order to bring uniformity to courts and parties nationwide.

B. Counts 1-4 Were Not Rendered Moot by Judge Cowan's Voluntary Cessation of the Appointment of a GAL and His Ultimate Recusal from Petitioner's Case.

The sole reason that the Ninth Circuit refused to decide the availability of prospective declaratory relief for a plaintiff following the statutory amendment was because they considered Counts 1-4 moot. However, pursuant to this Court's holding in *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298 (2012), that decision was in error.

In *Knox*, this Court reasoned that "[s]uch post certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Id.* at 307. There, the defendant in a class action suit opposed certiorari on the merits of the case. However, after certiorari was granted, the defendant sent out notice offering full refund to all class members, then argued for dismissal by this Court. *Id.* at 316. In concluding that such action did not render the case moot, this Court reasoned:

> The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. [Citation] and here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

Id. at 307. Similarly, following Petitioner's notice of appeal, and submission of his Opening Brief in the Ninth Circuit, Defendant Cowan voluntarily ceased the imposition of the limited guardian ad litem over Petitioner and recused himself from the case. Such a cessation should still not render this case moot.

Indeed, the orders voluntarily ceasing the appointment of the limited guardian ad litem do not include language that there was any impropriety in the appointment. Even though Judge Cowan transferred the case to another judge, his order to show cause against Petitioner's lead counsel and threat to bring back the GAL, still without a hearing, survived his recusal from the case. Judge Cowan's retaliatory and discriminatory conduct against Petitioner continues even now to cast a shadow on any semblance of fairness in a denial to Petitioner of all due process. The OSC to remove Petitioner's lead counsel for conflict of interests specifically directs that, in the event Petitioner's counsel is removed, the newly appointed judge should again appoint "Brad's GAL, Margaret Lodise, to investigate" related concerns raised in the order. While the direction is made only if the new judge disqualifies Petitioner's counsel, Judge Cowan is still holding open the threat through direction to appoint a GAL over Petitioner. Additionally, there is no mention whatsoever in the OSC that the new judge should provide Petitioner with a hearing prior to any new appointment which he was denied before the original appointment of the GAL.

Further, Petitioner asserts that the OSC against Appellant's lead counsel was issued in retaliation for the federal suit naming Judge Cowan as a party. The OSC now seeks to violate Appellant's due process

right to choice of counsel, as well as his other due process rights. Therefore, Appellant's case was not made moot by the voluntary cessation of the appointment. As held in *Knox*, the voluntary cessation in Petitioner's case is illusory and does not prevent a resumption of the challenged conduct after the dismissal.

The Opinion incorrectly determined that Petitioner "no longer faces any harm from the appointment of the GAL because Judge Cowan has lifted the order appointing her." (App.6a). Petitioner submits that Judge Cowan's voluntary cessation of the appointment is tantamount to the union's refund of the fees to the class members in *Knox*. The voluntary cessation is only a brief respite from the unconstitutional violation of Petitioner's rights.

The Ninth Circuit, in discussing why it considered Counts 1-4 moot, opines: "But Lund overstates the court's orders. Judge Cowan only wrote that *if* the new judge disqualifies Lund's counsel for conflict of interest, he or she "*may* wish to consider re-appointing the GAL (Ms. Lodise) to investigate whether the attorney's fees received by Ms. Slaton were in Brad's best interests." App.7a. (Italics in original). However, this quotation from the OSC is from deep inside that order on page 11. Petitioner submits that Judge Cowan actually *directed* how the new judge was to act, which is illustrated by the quotation on pages 1-2 of the OSC: "If Ms. Slaton is discharged pursuant to this OSC, the Court believes it appropriate to issue a secondary OSC re: attorney's fees and direct Brad's GAL, Margaret Lodise, to investigate" Judge Cowan's other concerns. This establishes that it is not an option

for the new judge, but rather direction from a previous judge on the case.

CONCLUSION

Therefore, based upon the foregoing, Petitioner respectfully requests that this Court accept his Petition for Certiorari and grant review over the two important federal questions presented. Petitioner asserts that whether judicial immunity applies to Title II ADA claims constitutes a circuit split, the decision of which will give guidance to federal courts and parties across the nation as to whether plaintiffs may bring such suits against sitting judges and their employer public entities. Petitioner further asserts that the question of whether a plaintiff may seek prospective declaratory relief against a sitting judge for violations of § 1983 is an important question of first impression for this Court that has gone unanswered since the statutory amendment by the FCIA to § 1983 in order to prevent injunctive relief against a judge. Again, a decision by this Court, following the *Pulliam* decision will give guidance to parties and federal courts throughout the nation as to whether plaintiffs may seek prospective declaratory relief against sitting judges for violations of § 1983.

Respectfully submitted,

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