No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JENNIFER DUPREE *et al.*,
Petitioners,

vs.

MRS. PAMELA OWENS *et al.*,
Respondents.

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

(CA11 No. 21-13198 and 21-12571)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

In the Americans with Disabilities Act of 1990 ("ADA"), 101 P.L. 336, 104 Stat. 327 (July 26, 1990), *codified as amended* at 42 U.S.C. §§ 12101 *et seq*., Congress expressly sought to abrogate states' 11th Amendment immunity, 42 U.S.C. § 12202. This Court has previously held that that abrogation attempt was invalid as to claims under Title I of the ADA, but that it was valid as to access-to-the-courts claims under Title II of the ADA. *Compare Bd. of Trs. v. Garrett*, 531 U.S. 356, 377 (2001) *with Tennessee v. Lane*, 541 U.S. 509, 518 (2004). As the 11th Circuit noted below, [12a], this Court has not yet decided whether Congress could validly abrogate sovereign immunity for claims brought under Title V of the ADA, for retaliation. This Petition asks the Court to do so, by answering the following question:

1. Did the Eleventh Circuit err in holding that the 11th Amendment precluded Petitioners' retaliation claims under Title V of the ADA?

LIST OF PARTIES

Petitioners:

Jennifer Dupree

Detrich Battle

Respondents:

Mrs. Pamela Owens

Department of Human Services

Georgia Department of Corrections

PRIOR PROCEEDINGS

U.S. District Court for the Northern District of Georgia:

Dupree v. Owens et al., No. 1:20-cv-04915-MLB (N.D. Ga.). Judgment entered June 29, 2021 (amended on July 2 & 9, 2021).

U.S. District Court for the Middle District of Georgia:

Battle v. Georgia Department of Corrections et al., No. 5:20-cv-00063-MTT. Judgment entered August 27, 2021.

U.S. Court of Appeals for the Eleventh Circuit:

Dupree v. Owens et al., No. 21-12571, consolidated with *Battle v. Georgia Department of Corrections*, No. 21-13198. Judgment entered February 6, 2024.

U.S. Supreme Court:

Dupree v. Owens, No. 23A944. Extension of Time Granted April 22, 2024.

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TABLE OF AUTHORITIES

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OPINIONS AND ORDERS BELOW

The Eleventh Circuit Court of Appeals selected its opinion for publication. It is reported as *Dupree v. Owens*, 92 F.4th 999 (11th Cir. 2024) and is reprinted in the Appendix. [1a-16a].

Neither district court below selected its opinion for publication. The opinions are included in the Appendix. [17a-30a, 53a-58a].

JURISDICTION

The district courts below had federal-question jurisdiction. 28 U.S.C. § 1331. The U.S. District Court for the Northern District of Georgia entered final judgment in Ms. Dupree's case on June 29, 2021 (which was amended on July 2 & 9, 2021). The U.S. District Court for the Middle District of Georgia entered final judgment in Mr. Battle's case on August 27, 2021.

The U.S. Court of Appeals for the Eleventh Circuit had jurisdiction to review the final judgments for Ms. Dupree and Mr. Battle. 28 U.S.C. § 1291. The U.S. Court of Appeals for the Eleventh Circuit issued its final judgment, in the consolidated proceedings below, on February 6, 2024.

This Court has jurisdiction to review the judgment from the Court of Appeals. 28 U.S.C. § 1254. Justice Thomas, via order of April 22, 2024, extended the deadline for Ms. Dupree and Mr. Battle to file their petition for *certiorari* until June 5, 2024.

Petitioners believe that 28 U.S.C. § 2403 applies. Accordingly, a copy of this Petition is being served upon the U.S. Solicitor General. The Eleventh Circuit below, however, did not certify this action to the U.S. Attorney General pursuant to 28 U.S.C. § 2403.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XI:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

* * *

U.S. Const. Amend. XIV, §§ 1, 5.

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> …
>
> Section 5
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

42 U.S.C. § 12202:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [sic] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

* * *

42 U.S.C. § 12203:

> (a) Retaliation
>
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> (b) Interference, coercion, or intimidation
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.
>
> (c) Remedies and procedures
>
> The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.

STATEMENT OF THE CASE

I. Proceedings in the District Courts

Both Petitioners proceeded *pro se* at the district-court level.

A. The Northern District of Georgia Finds Sovereign Immunity Precludes Ms. Dupree's Claim for ADA Retaliation.

Ms. Dupree worked for about a month at the Georgia Department of Human Services. In her complaint, she alleged that after being hired, she had requested ADA accommodations, in the form of an altered work schedule, so that she could attend various medical appointments needed to manage her chronic medical conditions. Her employer not only refused to provide those accommodations but fired her. Thereafter, she filed an action in the U.S. District Court for the Northern District of Georgia, alleging ADA discrimination and retaliation. The district court dismissed her complaint, holding that that the 11th Amendment precluded her claims. [22a-24a].

B. The Middle District of Georgia Finds Sovereign Immunity Precludes Mr. Battle's Claim for ADA Retaliation.

Prior to his termination, Mr. Battle worked for the Georgia Department of Corrections, at a prison. In his complaint, Mr. Battle alleged that he had begun complaining about workplace harassment. At a meeting to discuss the issue, Mr. Battle experienced chest pain but was denied requested medical assistance. He contacted the Equal Employment Opportunity Commission, in December 2014, to complain about discrimination on the basis of disability.

In April 2015, after returning to work with medical restrictions from his doctor, he continued experiencing difficulties on the jobsite. In July 2015, he was told that he had "too many restrictions" and was placed on unpaid leave before being ultimately terminated.

He filed suit in the Middle District of Georgia, which granted judgment on the pleadings against him on 11th Amendment grounds as to his claim of ADA discrimination and retaliation. [57a-58a].

II. Proceedings in the 11th Circuit

Both Ms. Dupree and Mr. Battle appealed to the 11th Circuit, which consolidated their appeals for argument (conducted by appointed counsel) and judgment. As relevant here, they argued below that 11th Amendment immunity did not bar ADA retaliation claims. The Court of Appeals noted that "there is not controlling caselaw from…the Supreme Court addressing whether the 11th Amendment specifically bars Title V ADA claims [i.e., for retaliation] against State entities when brought with Title I claims [for disability discrimination]." [12a (footnote omitted)]. Yet, it agreed with the district courts in a published opinion and held that the 11th Amendment precluded jurisdiction over the Petitioners' retaliation claims. [14a-16a].

REASONS FOR GRANTING THE PETITION

I. The 11th Amendment Does Not Bar ADA-Retaliation Claims.

Prior to enacting the ADA, "Congress compiled a vast legislative record documenting massive, society-wide discrimination against persons with disabilities." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 377 (2001) (Breyer, J., dissenting) (quotation omitted). That record included evidence, among other things, from "13 congressional hearings" and from a special task force that "held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination firsthand." *Id.* Based upon that extensive record, a supermajority in Congress approved the ADA and its sweeping scope. Title I provides disability protections in employment, Title II does so in public services, Title III in accommodations, and Title IV does so in telecommunications. *See* ADA, 101 P.L. 336, 104 Stat. 327. Title V contains miscellaneous provisions, including, as is relevant here, provisions abrogating state sovereign immunity and prohibiting retaliation:

> SEC. 503. Notes PROHIBITION AGAINST RETALIATION AND COERCION.
>
> (a) RETALIATION. – No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

> (b) INTERFERENCE, COERCION, OR INTIMIDATION. – It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act….

ADA, 101 P.L. 336, 104 Stat. 327, 370, 378, §§ 503, *codified at* 42 U.S.C. § 12203.

Contrary to the Court of Appeals' holding below, Congress was entitled to abrogate 11th Amendment immunity with respect to retaliation claims. While that Amendment generally renders non-consenting states "immune from suits for damages" in federal court brought by private plaintiffs, "Congress may abrogate the States' immunity from suit pursuant to its powers under § 5 of the Fourteenth Amendment." *Coleman v. Court of Appeals*, 566 U.S. 30, 35 (2012) (citations omitted). To abrogate sovereign immunity, Congress need only be "unmistakably clear in the language of the statute" that it is abrogating state immunity and then act pursuant to its 14th Amendment powers, rather than its Article I powers. *Id.* at 36 (quotation omitted). Both requirements to abrogate 11th Amendment immunity are met for ADA retaliation claims.

A. Congress Sought to Abrogate 11th Amendment Immunity.

This Court has already held that the ADA contains language that "easily" satisfies the explicit-intent-to-abrogate-11th-Amendment-immunity requirement. *Tennessee v. Lane*, 541 U.S. 509, 518 (2004). Specifically, the ADA

provides that "[a] State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the ADA]." ADA, 101 P.L. 336, 104 Stat. 327, 370, § 502, *codified at* 42 U.S.C. § 12202.

B. The 14th Amendment Permits Abrogation of 11th Amendment Immunity for ADA Retaliation Claims.

Section 5 of the 14th Amendment authorizes Congress to "enforce, by appropriate legislation, the provisions [of the Amendment]," U.S. Const. Amend. XIV § 5, including its guarantee that a state may not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," *id.* § 1. This Court has determined that "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (citation omitted). The power to enact prophylactic remedies includes the power to "proscrib[e] practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520. So long as Congress is not attempting to "work a substantive change in the governing law [of the rights guaranteed under the 14th Amendment]," the judiciary must provide "Congress…a wide berth in devising

appropriate remedial and preventative measures for unconstitutional actions." *Id.* at 519. Enforcement of rights only becomes substantive alterations of them when Congress' desired remedy lacks "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

To date, this Court has not yet considered the constitutionality of ADA's anti-retaliation provisions. But in *Garrett*, 531 U.S. 356, this Court held that the 14th Amendment did not allow Congress to abrogate state sovereign immunity for ADA Title I claims (*i.e.,* those relating to employment accommodations). By contrast, this Court held in *Lane*, 541 U.S. 509, that Congress could abrogate sovereign immunity for the access-to-the-courts protections (*e.g.*, courthouse accessibility requirements) in Title II of the ADA.

This Court reached those different outcomes given the different substantive rights at issue in both cases. Title I protects the disabled only from being denied equal protection. That is a narrow right given that mere rational-basis review governs differing treatments based upon disability. *Garrett*, 531 U.S. at 366-67 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). By contrast, the access-to-the-courts provisions of Title II not only enforce the guarantee of equal protection, but also other constitutional rights that "are subject to more searching judicial review." *Lane*, 541 U.S. at 543. Included among them is the due-process requirement that states afford civil litigants "a

meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings." *Id.* (citation omitted).

In approving Congress' power to abrogate sovereign immunity under Title II to protect the right of access to the courts, *Lane* explained that Congress found widespread deprivations of access for the disabled: Congress "learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities…." *Lane*, 541 U.S. at 527 (citation omitted).

Given that "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause," *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (quotation omitted), and given the congressional finding that states were excluding the disabled from public facilities such as the courts, this Court found it "clear beyond peradventure that…access to public facilities was an appropriate subject for prophylactic legislation." *Lane*, 541 U.S. at 529. Title II's requirement for states to make reasonable accommodations to enable disabled access to courthouses was a congruent and proportional remedy to protect the "fundamental right of access to the courts." *Id.* at 533-34.

The ADA's anti-retaliation provisions fall squarely within the reasoning that *Lane* used to approve the abrogation of 11th Amendment immunity. If Congress could decide that states may not physically bar the disabled from courthouse access, Congress could also decide that states should not be able to harass, or fire, the disabled for having invoked their ADA rights. Otherwise, the disabled may be chilled from exercising their right "to petition the government for a redress of grievances," U.S. Const. Amend. I, and would lack a meaningful ability to access the courts, *see Lane*, 541 U.S. at 533 (holding that Title II's accommodation provisions "cannot be said to be so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." (citations omitted)). Indeed, securing the disabled's right "to petition the government for a redress of grievances," U.S. Const. Amend. I, goes hand in hand with protecting their right to be immune from retaliation. Fear of retaliation undermines disabled people's ability to employ their right to express grievances about perceived disability discrimination the ADA. Far from being extraordinary, an anti-retaliation prohibition is a common tool in the congressional toolkit to "maintain[] unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (citations omitted). It should, therefore, be a permissible remedy for Congress to have selected here.

That a Title V retaliation claim may be brought at the same time as a Title II discrimination claim should be irrelevant to the analysis, contrary to the opinion below. For one thing—despite the 11th Amendment—Title I always applies to the states under the Supremacy Clause, even if private plaintiffs may be limited to non-monetary relief. *Garrett*, 531 U.S. at 374 n.9 ("Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908)."). Further, given the First Amendment protections for redress of grievances, Title V's anti-retaliation provision seeks to deter independently unconstitutional conduct, which is even more appropriate for remedial legislation. *See United States v. Georgia*, 546 U.S. 151, 157-58 (2006) (holding that claims under ADA Title II for conduct that itself violates the Constitution are not barred by sovereign immunity and explaining that "no one doubts that § 5 grants Congress the power to enforce the provisions of the Amendment by creating private remedies against the States for *actual* violations of those provisions" (emphasis and alterations omitted)).

A disabled person's Title II right to physically reach the courthouse door would be a hollow one indeed if the state could simply fire the plaintiff for having done so. Congress was entitled to decide that states should be liable for non-physical barriers, too, like retaliation.

II. The Petition Presents an Important Question of Federal Law.

Even in the absence of a circuit split, *certiorari* is still appropriate when a court of appeals "has decided an important question of federal law that has not been, but should be, settled by this Court…." Sup. Ct. R. 10(c).

Congress overwhelmingly approved the ADA with a vote of 377-28 in the House and 91-6 in the Senate. *See* *https://www.congress.gov/bill/101st-congress/senate-bill/933/all-actions* And President H.W. Bush signed it. *Id.* Later presidents, for their part, have repeatedly hailed it. For example, to quote then-President Trump, the ADA was a piece of "landmark legislation that helped open the door for every person with a disability to participate fully and independently in our society." *See* *https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-anniversary-americans-disabilities-act-2020/* While this Court has the final say on the meaning of the Constitution, Congress and the President are likewise committed to upholding it. They necessarily believed that the Constitution permitted the abrogation of 11th Amendment immunity for retaliation claims. The disagreement between the views of co-equal branches of government with that of the Eleventh Circuit below merits this Court's attention.

CONCLUSION

This Court should grant the Petition and reverse the judgment below.

Dated: May 31, 2024

Respectfully submitted,

JENNIFER DUPREE
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