No. 23-_____

IN THE

Supreme Court of the United States

JEFFREY B. ISRAELITT,

Petitioner,

v.

ENTERPRISE SERVICES LLC,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Americans with Disabilities Act provides for damages (and therefore a trial by jury) in cases alleging that an employer has violated the Act's anti-retaliation provision, 42 U.S.C. § 12203(a).

RELATED PROCEEDINGS

Israelitt v. Enterprise Services LLC, No. 18-CV-01454 (D. Md. Mar. 7, 2022).

Israelitt v. Enterprise Services LLC, 78 F.4th 647 (4th Cir. 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Israelitt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-26a) is published at 78 F.4th 647.

The district court's memorandum opinion denying the defendants' motion for summary judgment on the retaliation claim (Pet. App. 61a-90a) is unpublished but available at 2021 WL 795150. The district court's memorandum opinion rejecting the plaintiff's demand for a jury trial (Pet. App. 52a-60a) is unpublished but available at 2022 WL 80486. The district court's memorandum of decision after the bench trial (Pet. App. 27a-51a) is unpublished but available at 2022 WL 672158.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2023. Pet. App. 1a. A timely petition for rehearing was denied on September 12, 2023. *Id.* 91a-92a. On November 16, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 13, 2024. No. 23A442. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment provides, in relevant part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The Appendix to this petition reproduces the relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1991, 42 U.S.C. § 1981a. *See* Pet. App. 93a-117a.

INTRODUCTION

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, provides civil rights protections to people with disabilities.

This case addresses a surprising area of uncertainty given the ADA's plain text and this Court's precedent: the availability of damages in ADA employment retaliation cases.

The ADA's text provides damages for employment retaliation cases twice over. First, the text expressly links the remedies available in ADA employment retaliation cases to those available in ADA employment discrimination cases. *See* 42 U.S.C. § 12203(c). Damages are available in ADA intentional discrimination cases involving employment, *id.* § 1981a(a)(2), and are thus available in retaliation cases too.

Second, this Court has held that "the ADA could not be clearer" that its remedies are "coextensive" with

the remedies of the Civil Rights Act of 1964. *See Barnes v. Gorman*, 536 U.S. 181, 185, 190 n.3 (2002). Damages are available in retaliation cases under Title VII of the 1964 Act, 42 U.S.C. § 1981a(a)(2), and are thus available in ADA retaliation cases too.

Nevertheless, and contrary to the Government's longstanding position and the established practice in the Second Circuit, the Fourth Circuit joined two other circuits in holding that damages are unavailable under the ADA's employment retaliation provision. In doing so, the Fourth Circuit raced past the plain text of the ADA itself. Instead, it rested its decision on an improper application of the *expressio unius* canon to language in a different statute. The result of its decision is that plaintiffs in ADA retaliation cases are deprived both of the right to damages and of the right to have a jury determine the facts underlying their claim. This Court should grant certiorari to hold that the ADA means what it says.

STATEMENT OF THE CASE

A. Statutory background

This case involves the interaction of five statutory provisions:

- **42 U.S.C. § 12112 (the ADA protected status provision):** Section 12112 of the Americans with Disabilities Act (ADA) forbids discrimination in employment on the basis of an individual's disability. *See* Pet. App. 109a-111a.
- **42 U.S.C. § 12203 (the ADA anti-retaliation provision):** Section 12203 of the ADA forbids discrimination against any individual who

engages in conduct protected by the ADA, including protesting violations of the Act. The remedies for violations of this prohibition are those made "available under section[] 12117." 42 U.S.C. § 12203(c) (referring to 42 U.S.C. § 12117). *See* Pet. App. 116a-117a.

- **42 U.S.C. § 12117 (the ADA remedy provision):** Section 12117 of the ADA provides that the "remedies" available to "any person alleging discrimination on the basis of disability in violation of any provision of" the ADA "shall be" those set forth in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (referring to 42 U.S.C. § 2000e-5). *See* Pet. App. 115a.
- **42 U.S.C. § 2000e-5 (the Title VII remedy provision):** Section 2000e-5 of Title VII provides for both equitable relief, *id.* § 2000e-5(g), Pet. App. 107a, and "any relief authorized by section 1981a" of Title 42 of the U.S. Code, 42 U.S.C. § 2000e-5(e)(3)(B), *id.* 102a.
- **42 U.S.C. § 1981a:** This provision makes damages available in cases of intentional discrimination in employment, including in ADA cases. *See* Pet. App. 93a-94a.

1. The Americans with Disabilities Act. Enacted in 1990, the ADA "provide[s] civil rights protections for persons with disabilities that are parallel to those available to minorities and women" under federal civil rights laws, particularly the Civil Rights Act of 1964. H.R. Rep. No. 101-485, pt. 3, at 48 (1990). The remedies under the ADA "shall be the same as, and parallel to" the remedies under the Civil Rights Act of 1964. *Id.*

Title VII of the Civil Rights Act of 1964 addresses employment. It prohibits two forms of intentional discrimination. First, Section 703(a) makes it unlawful to treat an employee less favorably because of a protected characteristic like race or sex. *See* 42 U.S.C. § 2000e-2(a). Second, Section 704(a) makes it unlawful to "discriminate against any individual" because that individual has "opposed any practice" forbidden by the Act or "participated in any manner in an investigation, proceeding, or hearing" related to the Act. *Id.* § 2000e-3(a). Thus, Title VII prohibits both protected status-based discrimination and protected conduct-based discrimination (the latter usually referred to as "retaliation"). Initially, Title VII provided equitable relief for both forms of intentional discrimination but did not provide for damages. *Id.* § 2000e-5(g).[1]

The ADA has adopted both the liability and the remedy approaches of Title VII.

As to liability, the ADA bars the same two forms of intentional discrimination. First, parallel to Section 703(a) of Title VII, Section 12112 of the ADA makes it unlawful to "discriminate against" an employee or applicant because of his disability. 42 U.S.C. § 12112(a). Second, parallel to Section 704(a) of Title VII, Section 12203 of the ADA makes it unlawful to "discriminate against any individual" (whether or not

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[1] In addition to its prohibitions of intentional discrimination, Title VII also prohibits employment practices that have a disparate impact on individuals in protected classes. *See* 42 U.S.C. § 2000e(k)(1). The prohibition on practices that have a disparate impact is not relevant to this case.

the individual himself has a disability) because he has "opposed any act or practice made unlawful" by the ADA or has "participated in any manner in an investigation, proceeding, or hearing" in an ADA-related matter. *Id.* § 12203(a).

As to remedies, Section 12203(c) of the ADA provides that the remedies and procedures in an ADA retaliation case involving employees "shall be" the "remedies and procedures available under section[] 12117" of the ADA, which provides the remedies for the protected status provision. 42 U.S.C. § 12203(c). In turn, Section 12117(a) states that the "powers, remedies, and procedures set forth" in Title VII "shall be the powers, remedies, and procedures" available to plaintiffs raising employment-related claims under the ADA. *Id.* § 12117(a).

As the House report accompanying the ADA explained, the Act included cross-references to Title VII to permanently link the remedies available under the two statutes. *See* H.R. Rep. No. 101-485, pt. 3, at 48 (1990). This would ensure that "if the powers, remedies and procedures change in [T]itle VII of the 1964 Act, they will change identically under the ADA for persons with disabilities." *Id.*

2. Civil Rights Act of 1991. In 1991, Congress passed omnibus civil rights legislation—the Civil Rights Act of 1991—in part because it determined that "additional remedies under Federal law [were] needed to deter unlawful harassment and intentional discrimination in the workplace." Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991).

Accordingly, Congress enacted a provision, now codified as 42 U.S.C. § 1981a, whose section heading

describes its purpose as authorizing "[d]amages in cases involving intentional discrimination in employment." 42 U.S.C. § 1981a. Section 1981a(a)(2) expressly applies to both Title VII and the ADA. It states that a complaining party "may recover compensatory and punitive damages" in an action brought "under" the remedies and procedures "provided in Section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a))." *Id.* § 1981a(a)(2). These compensatory and punitive damages are allowed "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964," codified as 42 U.S.C. § 2000e-5(g), which provides for injunctive relief. 42 U.S.C. § 1981a(a)(2).

Since the enactment of Section 1981a, the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice, which jointly have responsibility for enforcing the ADA, have taken the position that "compensatory and punitive damages are available for retaliation or interference in violation of the ADA." EEOC, Enforcement Guidance on Retaliation and Related Issues § 8 (2016), https://perma.cc/2J6N-R5B6; *see also* EEOC, Compliance Manual: Retaliation § 8, at 28 (1998), https://perma.cc/DL6Z-WWXC.

B. Proceedings below

1. Petitioner Jeffrey B. Israelitt is an expert in cybersecurity and a military veteran who suffers from hallux rigiditis, which involves "degenerative changes in his right first metatarsophalangeal joint and right great toe." Pet. App. 62a. Mr. Israelitt testified that the impairment can cause significant pain, to the point

where he can sometimes "barely walk." *Id.* 63a. In 2013, Mr. Israelitt began work at respondent Enterprise Services LLP, at the time a subsidiary of Hewlett Packard, as a senior architect in its Cybersecurity Solutions Group. *Id.* 62a.

Mr. Israelitt requested minor accommodations for his disability so he could attend a series of professional meetings that were being held away from the office—one a conference in Washington, D.C. and the other a team-building retreat in Florida. Pet. App. 63a-67a. Enterprise refused to provide any accommodation, and Mr. Israelitt was unable to attend. *Id.* Shortly thereafter, Enterprise excluded Mr. Israelitt from team meetings, removed him from his only billable project, and assigned him additional work on a short time frame. *Id.* 67a. Enterprise then fired him. *Id.* 68a. Mr. Israelitt's firing following his request for an accommodation led to a prolonged period of unemployment, as dozens of employers declined to hire Mr. Israelitt despite his technical skills. *See* ROA 647-738 (employment emails).[2]

2. Mr. Israelitt filed a charge with the Equal Employment Opportunity Commission (EEOC). ROA 1293. The EEOC determined that there was reasonable cause to conclude that Enterprise had discriminated and retaliated against Mr. Israelitt in violation of the ADA. *Id.*

After exhausting his administrative remedies, Mr. Israelitt sued Enterprise in the U.S. District Court for the District of Maryland. As relevant here, he brought two claims under the ADA. Pet. App. 69a. He

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[2] "ROA" refers to the record on appeal in the Fourth Circuit.

alleged both that he had been discriminated against because of his disability in violation of Section 12112 (the protected status provision) and that he had been discriminated against for seeking accommodations in violation of Section 12203 (the anti-retaliation provision). He sought damages and demanded a jury trial. *Id.* 55a.

Following discovery, Enterprise moved for summary judgment on both claims. The district court granted summary judgment on Mr. Israelitt's discrimination claim because it did not believe that his hallux rigiditis qualified as a "disability" under the ADA. Pet. App. 73a-75a. But the district court denied summary judgment on Mr. Israelitt's retaliation claim, which does not require proof of a disability covered by the Act. With respect to the elements of the retaliation claim, the district court found that Mr. Israelitt had "established the existence of a genuine dispute of material fact" as to every element. *Id.* 83a. Thus, the retaliation claim could be resolved only by a trial. *Id.* 84a.

Before trial, Enterprise moved to strike Mr. Israelitt's demand for a jury. Pet. App. 52a. The district court granted the motion because it believed that Mr. Israelitt was limited to equitable relief for his ADA retaliation claim and, therefore, had no Seventh Amendment right to a jury trial. *Id.* 58a. The district court acknowledged that many courts in other circuits had awarded damages in ADA retaliation cases. *Id.* Nevertheless, the court relied on two unpublished Fourth Circuit opinions to hold otherwise. *Id.* 55a-58a.

Following trial, the district court issued a memorandum of decision in favor of Enterprise. Pet.

App. 27a. It "[a]ssum[ed] Mr. Israelitt [had] engaged in protected conduct" under the ADA, *id.* 47a, when he made "his benign requests for accommodations," *id.* 49a. But it then found that that conduct "was not the 'but-for' cause of his termination." *Id.* 47a.

3. Mr. Israelitt appealed. He, along with the EEOC as an amicus, argued that money damages are available to employees alleging violations of the ADA anti-retaliation provision, and that the district court had therefore erred in denying his Seventh Amendment right to a jury trial. *See* Petr. C.A. Br. 27-40; EEOC C.A. Br. 19-29 ("EEOC Amicus Br.").

The Fourth Circuit disagreed and affirmed the district court. Pet. App. 24a. Instead of relying on the text of the ADA, the court focused its attention on Section 1981a(a)(2). The court reasoned that because Section 1981a(a)(2) specifically includes some references to plaintiffs under the ADA's protected status provision but "does not list ADA-retaliation plaintiffs," retaliation plaintiffs "cannot get legal damages under that section." *Id.* 23a.

The Fourth Circuit subsequently denied rehearing en banc. Pet. App. 91a-92a.

REASONS FOR GRANTING THE WRIT

The plain text of the Americans with Disabilities Act (ADA) makes clear twice over that plaintiffs are entitled to seek money damages in cases asserting retaliation claims. Nevertheless, decisions from circuit and district courts disagree about whether the Act means what it says. And even courts that deny plaintiffs the right to seek damages admit they "can discern no logic in a rule that precludes an award of

compensatory and punitive damages in an ADA retaliation case when such damages are available in Title VII retaliation cases." *Equal Emp. Opportunity Comm'n v. Waterway Gas and Wash Co.*, 2021 WL 5203330, at *3 (D. Colo. Feb. 25, 2021). Only this Court can resolve the conflict over this important question of law, which directly implicates the Seventh Amendment right to a jury trial. This case provides an ideal vehicle for doing so.

I. There is widespread disagreement over whether damages are available to employees alleging retaliation in violation of the Americans with Disabilities Act.

Courts disagree about whether the Americans with Disabilities Act (ADA) makes damages available to plaintiffs alleging retaliation. *See Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1267 (9th Cir. 2009) (acknowledging this "lack of uniformity"). Damages are unavailable to ADA retaliation plaintiffs in the Fourth, Seventh, and Ninth Circuits, whereas plaintiffs can recover damages in the Second Circuit. That disagreement persists, even in the face of the Government's longstanding position that damages are available in these cases.

A. Damages and jury trials are not available in the Fourth, Seventh, and Ninth Circuits.

In 2004, the Seventh Circuit recognized that in the dozen years since the passage of the 1991 Civil Rights Act, other circuits had affirmed jury verdicts awarding money damages for ADA retaliation claims. *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 965

(7th Cir. 2004). Nevertheless, the Seventh Circuit held that such damages were unavailable.

The Seventh Circuit acknowledged that the availability of damages turned on the relationship among the ADA's remedies provision (42 U.S.C. § 12117), Title VII's remedies provision (42 U.S.C. § 2000e-5), and Section 1981a. *Kramer*, 355 F.3d. at 964. But resting entirely on the language of Section 1981a(a)(2), it emphasized that "claims of retaliation under the ADA (Section 12203) are not listed" in that subsection, and thus "compensatory and punitive damages are not available for such claims." *Kramer*, 355 F.3d. at 965. "Instead, the remedies available for ADA retaliation claims against an employer are limited to the remedies set forth in § 2000e-5(g)(1)," which authorizes only injunctive relief. *Kramer*, 355 F.3d at 965.

Two additional circuits have adopted *Kramer*'s reasoning wholesale. The Ninth Circuit adopted this position in *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009), stating that it was "persuaded by the Seventh Circuit's reliance" on Section 1981a. *Id.* at 1267-68. And in this case, the Fourth Circuit followed suit. Pet. App. 18a-25a.[3]

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[3] The Third Circuit also followed *Alvarado* and *Kramer* in an unpublished opinion interpreting the Rehabilitation Act, which has cross-references that render its employment retaliation remedies coextensive with the ADA. *See Tucker v. Shulkin*, 2020 WL 4664805, at *1 (3d Cir. July 24, 2020).

B. Damages and jury trials are available within the Second Circuit.

In contrast to the Seventh, Ninth, and now the Fourth Circuits, damages and jury trials have long been available to ADA retaliation plaintiffs within the Second Circuit. For example, in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), the Second Circuit, after throwing out a plaintiff's ADA protected status claim, affirmed the jury's damages award "solely" on the basis of the plaintiff's ADA retaliation claim. *Id.* at 314. Similarly, in *Bilancione v. County of Orange*, 1999 WL 376836 (2d Cir. 1999), the Second Circuit affirmed a jury's award of damages in an ADA retaliation case. And in *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.,* 263 F.3d 208, (2d Cir. 2001), the Second Circuit held that the alleged facts could "support a jury's finding" of retaliation, entitling the plaintiff to a trial to determine whether she was entitled to damages. *Id.* at 223-24.

Jury trials and damages remain available in ADA employment retaliation cases within the Second Circuit. For recent examples, *see, e.g.*, *Felix v. N.Y. City Dep't of Educ.*, 2023 WL 4706097, at *12 (S.D.N.Y. July 24, 2023); *Richter v. JBFCS-Jewish Bd. of Fam. & Child. Servs.*, 2019 WL 13277316, at *3 (E.D.N.Y. Mar. 14, 2019); *Equal Emp. Opportunity Comm'n v. Day & Zimmerman NPS, Inc.*, 2016 WL 1449543, at *6 (D. Conn. Apr. 12, 2016). This follows longstanding practice. *See, e.g.*, *Mueller v. Rutland Mental Health Servs., Inc.*, 2006 WL 2585101, at *4 (D. Vt. Aug. 17, 2006); *Edwards v. Brookhaven Sci. Assocs., LLC*, 390 F. Supp. 2d 225, 233-36 (E.D.N.Y.

2005); *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236, 240-41 (W.D.N.Y. 2003).

Thus, Mr. Israelitt would have been entitled to seek damages and to have a jury resolve the factual disputes in his case had he been able to litigate in the Second Circuit.

C. In the face of this split, the Government continues to seek damages in ADA retaliation cases.

The Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) are the government agencies responsible for enforcing the ADA. They can bring suit against employers, seeking remedies available under the Act. 42 U.S.C. § 12117(a).

For the past twenty-six years, the EEOC and DOJ position has remained consistent: Compensatory and punitive damages *are* available for retaliation claims brought under the ADA. *See* EEOC, Compliance Manual: Retaliation § 8 (1998), https://perma.cc/DL6Z-WWXC; EEOC, Enforcement Guidance on Retaliation and Related Issues § 8 (2016), https://perma.cc/2J6N-R5B6. The basis for this position is that the ADA's language, context, and structure "link the remedies for ADA retaliation claims involving employment to the compensatory and punitive damages available through § 1981a." EEOC Amicus Br. at 21.

Both agencies therefore regularly pursue damages for employees in ADA retaliation cases. *See, e.g.*, *Equal Emp. Opportunity Comm'n v. Waterway Gas & Wash Co.*, 2021 WL 5203330, at *2-3 (D. Colo.

Feb. 25, 2021); *Equal Emp. Opportunity Comm'n v. CRST Int'l, Inc.,* 351 F. Supp. 3d 1163, 1184-87 (N.D. Iowa 2018); Settlement Agreement ¶ 7, United States v. Hal W. Brown (S.D. Fla. 2013) No. 13-141310, https://perma.cc/W2Y3-9353 (DOJ recovering damages for retaliation plaintiffs under ADA).

This conflict will not go away on its own. Indeed, the Government continues to seek damages in circuits that have not foreclosed their availability and courts in the Second Circuit continue to grant them. Only this Court can bring uniformity.

II. The question presented is important.

The question presented has two aspects: whether the Americans with Disabilities Act (ADA) makes damages available to employees alleging unlawful retaliation, and therefore whether either party is entitled to trial by jury. Both aspects merit this Court's attention.

A. The availability of damages, particularly in ADA cases, is a critical question of federal law.

1. In recent years, this Court has repeatedly granted review to decide whether damages are available for violation of a federal statute. *See, e.g.*, *Warner Chappell Music v. Sherman Nealy*, 2023 WL 6319656, at *1 (U.S. Sept. 29, 2023) (No. 22-1078) (availability of damages under 17 U.S.C. § 507(b)); *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1569 (2022) (availability of damages under 29 U.S.C. § 794(a); 42 U.S.C. § 18116); *Tanzin v. Tanvir*,

141 S. Ct. 486, 489 (2020) (availability of damages under 42 U.S.C. § 2000bb).

2. Whether damages are available in ADA retaliation cases is a particularly important version of this question. Statutory schemes that aim to end employment discrimination hinge on the availability of damages. Damages "cause employers to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of discrimination." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995). Damages allow plaintiffs to "vindicate[] the important congressional policy against discriminatory employment practices." *Id.* (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974)).

What's more, for certain kinds of ADA retaliation claims, it's damages or nothing.

First, consider retaliation cases arising within the workplace. If an employee has been "continually harassed" at work for filing a claim with the EEOC, *Edwards v. Brookhaven Sci. Assocs., LLC*, 390 F. Supp. 2d 225, 228 (E.D.N.Y. 2005), an injunction can prevent only future harassment. It cannot compensate for the mental anguish or physical consequences (such as medical expenses) that resulted from the harassment which has already occurred. And in many cases where retaliation has led a worker to quit his job, reinstatement would be "impracticable" because "the employer-employee relationship has been damaged beyond repair." Br. for Plaintiffs-Appellees-Cross-Appellants 46, *Bilancione v. County of Orange*, 1999 WL 376836 (2d Cir. June 2, 1999) (No. 98-9099)

(quoting the magistrate's Amendment Memorandum Decision and Order (July 11, 1998)).

Second, consider cases involving retaliation "*outside* the workplace." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). If an employer has ruined an employee's future job prospects by providing "negative job references," *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 725 (8th Cir. 2003), the lost future income from another employer cannot be recovered as an equitable remedy. Or if an employer has "filed false criminal charges against [a] former employee who complained about discrimination," *id.* at 64, the employee may have incurred legal fees to defend himself. Injunctive relief would do nothing to defray those costs.

B. The availability of trial by jury is a vital question of federal law.

1. In recent years, this Court has frequently granted review to decide whether particular issues should be determined by a jury. *See, e.g.*, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1200 (2021); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 150 (2015).

2. In this case, the question has constitutional dimensions. The Seventh Amendment "requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194 (1973). But if ADA retaliation plaintiffs are

entitled only to equitable relief, these plaintiffs will lose their right to a jury.

Whether a jury trial is available is an important question because the right to trial by jury is a central constitutional value. "THE WANT OF A CONSTITUTIONAL PROVISION for the trial by jury in civil cases" was the "objection" to the Constitution with "the most success" prior to ratification. The Federalist No. 83 (Alexander Hamilton). As Justice Story explained, "[a]s soon as the constitution was adopted, this right was secured by the seventh amendment" and "received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 445 (1830).

Accordingly, this Court has long been vigilant in protecting the Seventh Amendment's guarantee of a civil jury trial. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

Put together, the question whether damages, and thus a jury trial, are available to workers alleging retaliation in violation of the ADA calls for this Court's intervention.

III. This case is an excellent vehicle for resolving the question presented.

1. This case provides an ideal opportunity to address whether employees bringing Americans with

Disabilities Act (ADA) retaliation claims can seek money damages. Mr. Israelitt demanded damages and a jury trial in his complaint and fully preserved that issue in both the district court and the court of appeals. Both courts addressed and resolved that question against him. Pet. App. 24a-25a, 58a.

2. This case is also an ideal vehicle because Mr. Israelitt was denied both his right to seek damages and his right to trial by jury.

By contrast, in many cases, an ADA plaintiff will have been denied only the former right. That is because in a case that goes to trial on both a protected status claim and a retaliation claim, trial by jury is available if damages are sought for the protected status claim. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). And any factual determinations "common to both claims" must be "resolved by [the] jury." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 (1990). So in those cases, at most an ADA retaliation plaintiff will have a jury-right claim only with respect to issues unique to the retaliation claim; the other issues will already be presented to the jury.

In still other cases, courts have gotten sidetracked from the question presented. For example, although the Eleventh Circuit acknowledged that it is an open question in that circuit whether damages are available in ADA retaliation cases, it concluded in *Kovelesky v. First Data Corp.* that it "need not resolve this issue" in the case at hand because it could read the facts to find a waiver by the plaintiff. 534 Fed. Appx. 811, 816 (11th Cir. 2013). In a similar vein, the Sixth Circuit held that "[d]espite the time and effort expended by the

parties and by the EEOC in briefing this issue, we need not address it" because it could find that retaliation damages were authorized under Tennessee law. *Baker v. Windsor Republic Doors*, 414 Fed. Appx. 764, 779 (6th Cir. 2011).

Here, however, the district court granted summary judgment on Mr. Israelitt's Section 12112 claim, leaving only his Section 12203 claim for trial. Thus, at this point, the question whether he was entitled to a jury trial and to seek damages is the only question left in this case.

Indeed, it is telling that the Fourth Circuit used *this* case to resolve the question presented in a published opinion, after declining that opportunity twice before in other cases. Pet. App. 19a-20a. This case thus presents an ideal opportunity to settle the law.

3. Finally, if this Court were to hold that damages are available for ADA retaliation claims, reversal would be required. The district court denied respondent's motion for summary judgment on Mr. Israelitt's retaliation claim because Mr. Israelitt had "established the existence of a genuine dispute of material fact" that could be resolved only by a trial. Pet. App. 83a-84a. If petitioner wins on the question presented, he would be entitled to the jury trial he demanded. This Court's longstanding precedent requires that in cases where a plaintiff was wrongly denied a jury trial, the "case in its entirety" be "reversed and remanded" for "a trial before a jury." *Lytle*, 494 U.S. at 553 (1990). This is because "a jury and a judge can draw different conclusions from the same evidence." *Id.* at 555. Put another way, the denial

of a jury trial on Mr. Israelitt's retaliation claim cannot be harmless error.

IV. The Americans with Disabilities Act allows for damages for retaliation plaintiffs.

In cases involving statutory interpretation, courts must always "start with the text." *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1218 (2023). Equally important, however, is starting with the *right* text.

Starting with the text of the Americans with Disabilities Act (ADA) shows that damages are available in retaliation cases for two independent but mutually reinforcing reasons. First, the ADA expressly links its anti-retaliation and protected status provisions: The remedies available for one cause of action shall be available for the other. Since protected status plaintiffs can recover damages, the plain language dictates that retaliation plaintiffs can too. Second, the ADA links the remedies for both its anti-retaliation and protected status provisions to the remedies available for analogous causes of action under Title VII. Since Title VII retaliation plaintiffs can recover money damages, the plain language dictates that ADA retaliation plaintiffs can too.

A. The textual link between the ADA's protected status and anti-retaliation provisions shows that damages are available for ADA retaliation claims.

1. Start with the rules for protected status claims. These rules make damages available for intentional violations.

Section 12112(a), the ADA's protected status provision, makes it unlawful for an employer to "discriminate against a qualified individual on the basis of disability." Section 12117 provides the remedies for the protected status provision. Those remedies include compensatory and punitive damages in cases involving intentional violations of Section 12112(a). This is because Section 12117 provides the remedies "set forth" in 42 U.S.C. § 2000e-5. That section in turn makes available, among other things, "any relief authorized by Section 1981a of this title." 42 U.S.C. § 2000e-5(e)(3)(A). No one disputes that Section 1981a makes damages available for Section 12112(a) claims. 42. U.S.C. § 1981a(a)(2). Completing the syllogism, Section 1981a makes damages available in cases of intentional discrimination.

2. Now turn to the question of what damages are available for retaliation claims.

The rules governing retaliation claims appear in Section 12203 of the ADA. Section 12203(a) prohibits retaliation by any actor covered by the ADA. It thus squarely prohibits covered employers, like Enterprise, from retaliating against employees who request accommodations.[4]

Section 12203(c) governs the "remedies and procedures" for bringing a retaliation claim. If the retaliation occurs in the employment context, then "[t]he remedies and procedures available under

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[4] Section 12203 also prohibits retaliation under the other titles of the ADA, which apply to public entities, public accommodations, and telecommunications.

section[] 12117" for protected status claims "shall be available" here as well. 42 U.S.C. § 12203(c).

Since damages are available under Section 12117 for cases of intentional protected status discrimination, they are therefore available for cases of intentional retaliation as well. After all, all retaliation claims in fact involve claims the defendant acted discriminatorily and intentionally. *See infra* pp. 29-30.

3. This analysis is reinforced by the language of Section 12117 itself. Section 12117(a) provides that its remedies are available to any person alleging discrimination "in violation of *any* provision of this chapter" that "concern[s] employment." 42 U.S.C. § 12117(a) (emphasis added). Section 12203(a) is undeniably a provision of Chapter 126, which contains the entire ADA. "In this context, as in so many others, 'any' means 'every.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018). Because Section 12117's remedies are available for "any" provision of the ADA "concerning employment," violations of Section 12203 receive Section 12117's remedies (which include damages).

4. The dynamic link between the remedies available for protected status claims and the remedies available for retaliation claims underscores this conclusion. Section 12203 states that the remedies that Section 12117 provides "with respect to" ADA Title I employment discrimination claims "shall be" available to plaintiffs under the anti-retaliation provision as well. 42 U.S.C. § 12203(c). Any change in the remedies available for the former automatically carries over to the latter.

Shall is "used to express simple futurity." *Shall,* Webster's Third New Int'l Dictionary (3d ed. 1993). When *shall* is followed by an auxiliary verb—here, *be*—it forms the future tense, especially when used in "statements of legal requirements." The Chicago Manual of Style ¶ 5.131. Courts acknowledge that *shall* "speaks to future conduct. Even the most demanding among us cannot reasonably expect that a person 'shall' do something yesterday." *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir. 1999).

An example illustrates the point. Imagine that an interscholastic athletic association requires that the equipment given to a girls' hockey team at a member school "shall be the same" as the equipment the boys' team receives. Originally, John Marshall High School provides boys with skates and helmets, but leaves it to each player to buy his own stick. At that point, girls at John Marshall are entitled only to school-provided skates and helmets. But if John Marshall later provides sticks to the boys, the association rule would clearly require it to provide sticks to the girls as well.

In the same way, the plain text of Section 12203 mandates that the remedies available for violations of the protected status provision be available for violations of the anti-retaliation provision. So, since Section 1981a authorizes money damages in cases under the ADA's protected status provision, it makes them available under the retaliation provision as well.

B. The textual link between the ADA and Title VII shows that damages are available for ADA retaliation claims.

The ADA's text offers a second route to conclude that damages are available in retaliation cases. The ADA makes a remedy available for employment-related claims if that remedy is available for analogous Title VII claims. Because damages are available for claims of retaliation under Title VII, it follows that they are available for retaliation claims under the ADA.

Everyone, including the Fourth Circuit, agrees that damages are available in Title VII retaliation cases. *See Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 544 (4th Cir. 2003). The ADA's remedial provision, Section 12117, moves in lockstep with Title VII. This is because the remedies under Title I of the ADA (which applies to employment) expressly cross-reference Section 2000e-5 (Title VII's remedial provision). *See* 42 U.S.C. § 12117(a) (providing that the "remedies" that are "set forth" in 42 U.S.C. § 2000e-5 "shall be" the remedies "this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination"). This Court has already held that when the ADA references the Civil Rights Act of 1964 in this way, "the ADA could not be clearer" that the two statutes' remedies are "coextensive." *See Barnes v. Gorman*, 536 U.S. 181, 185, 189 n.3 (2002). Therefore, now that Title VII

expressly authorizes damages in retaliation cases, so too does the ADA.[5]

This reading of the statutory text accords with Congress's stated intent in passing the ADA. The House Committee report for the ADA states that the remedies for ADA plaintiffs "shall be the same as, and parallel to" the remedies for Title VII violations. H.R. Rep. No. 101-485, pt. 3, at 48 (1990). The "cross reference to Title VII" indicates that "the remedies of [T]itle VII, currently and as amended in the future, will be applicable to persons with disabilities." *Id.*

* * *

In short, any construction of the ADA that starts with the text of the ADA will reach the same conclusion: Damages are available in retaliation cases.

C. The Fourth Circuit's reliance on Section 1981a is incorrect.

"If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last."

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[5] While *Barnes v. Gorman* itself involved the link between Title VI of the Civil Rights Act of 1964 and Title II of the ADA, courts of appeals consistently use the same analysis in cases involving Title VII of the Civil Rights Act of 1964 and Title I of the ADA. *See e.g., Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1017 (7th Cir. 1996) ("[I]n analyzing claims under the ADA, it is appropriate to borrow from our approach to the respective analog under Title VII."); *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 299, 234 (5th Cir. 2001) ("Not only are Title VII and the ADA similar in their language, they are also alike in their purposes and remedial structures."); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 16 (1st Cir. 1994) (examining Title VII caselaw to ascertain meaning of "employer" under ADA).

Rotkiske v. Klemm, 140 S. Ct. 355, 360 (2019). But instead of stopping with the unambiguous language of the ADA, the Fourth Circuit turned its attention to the language of Section 1981a, and then rested its holding on an unwarranted invocation of *expressio unius*. A proper reading of Section 1981a actually reinforces the conclusion that damages are available in ADA retaliation cases.

1. Section 1981a authorizes the award of damages in certain "cases of intentional discrimination in employment." 42 U.S.C. § 1981a (section heading). It expressly includes violations of the ADA protected status provision. *Id.* § 1981a(a)(2). It expressly excludes several other kinds of ADA claims. It is silent as to ADA retaliation claims. Applying the canon of *expressio unius, exclusio alterius*, the Fourth Circuit assumed that this silence required excluding damages for retaliation plaintiffs. Pet. App. 23a.

The Fourth Circuit was mistaken. The *expressio unius est exclusio alterius* canon—the proposition that "the expression of one is the exclusion of the others"—can work only if a statutory provision delineates two, and *only* two, categories. These categories are: (1) the expressly included and (2) everything else (which the canon operates to exclude). The canon does not work when interpreting a statute that delineates *three* categories: (1) the expressly included, (2) the expressly excluded, and (3) everything else.

To see why, consider a babysitter hired to watch three siblings: Abraham, Isaac, and Jacob. The children's parents leave the following note on the kitchen table: "Please give Abraham some dessert after dinner, but don't give any dessert to Isaac."

Because Jacob was not mentioned in *either* list, the babysitter cannot infer from the note standing alone that Jacob should not get dessert. The parents' silence about Jacob cannot be read as an implicit directive one way or the other. To determine whether to give Jacob dessert, the babysitter must know the context behind the parents' decision to give dessert to Abraham but not Isaac. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) ("To strip a word of its context is to strip that word of its meaning."); *see also id.* at 2379-81 (for a similar interpretive example). Using that context, the babysitter would then decide whether Jacob is more like Abraham or Isaac with regard to dessert.

Indeed, if the parents had left another note—this one on the refrigerator—saying that "Jacob gets whatever food Abraham gets," then the babysitter's question would be answered: Jacob gets dessert too. Here, the ADA is that refrigerator note. It provides the default rule that governs in the face of statutory silence.

Returning to the ADA, the statute creates several theories of liability that a plaintiff can employ to state a claim: (1) protected status discrimination, (2) disparate impact, (3) failure to accommodate, and (4) retaliation. Section 1981a sorts these potential causes of action into three categories, not two.

First, Section 1981a expressly extends damages to claims in the first category, which involves a "respondent who engaged in unlawful intentional discrimination" under the protected status provision, 42 U.S.C. § 12112(a). *See* 42 U.S.C. § 1981a(a)(2).

Second, Section 1981a expressly excludes certain claims from recovering damages. These claims involve conduct that "is unlawful because of its disparate impact," rather than a forbidden purpose, 42 U.S.C. § 1981a(a)(2)—the second category—or conduct by employers making "good faith efforts" to provide the reasonable accommodations to a disabled employee required by 42 U.S.C. § 12112(b)(5)(A), a subset of the third category. *See id.* § 1981a(a)(3).

Finally, Section 1981a is silent as to retaliation claims: It neither expressly includes nor expressly excludes them. Since the statute includes two separate lists—ADA claims that are included, and ADA claims that are excluded—the Fourth Circuit's resort to *expressio unius* was misguided.

2. The Fourth Circuit's erroneous reliance on *expressio unius* deflected it from the proper way to analyze Section 1981a. Because Section 1981a neither includes nor excludes ADA retaliation claims, a court considering whether Section 1981a's authorization of damages includes retaliation claims should ask itself this question: Is retaliation more like (1) an intentional discrimination claim (for which damages are available) or (2) an "unintentional" discrimination claim (for which damages are unavailable)?

To ask this question is to answer it. To begin, retaliation *is* a form of intentional discrimination. To discriminate means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Discriminate*, Webster's Third New Int'l Dictionary (3d ed. 1993). When an employer takes an adverse action against an employee who has requested disability accommodation or opposed a

violation of the ADA, it has intentionally treated that employee differently on a basis other than individual merit.

The text of the ADA reinforces this conclusion. First, it does so in the substantive section that defines retaliation, which begins with "[n]o person shall discriminate." 42 U.S.C. § 12203(a). Second, it does so in the remedies provision that governs retaliation claims, which provides a cause of action to "any person alleging discrimination," without listing "retaliation" separately from other forms of discrimination. 42 U.S.C. § 12117(a). Retaliation must be a form of discrimination, because otherwise the ADA would provide no remedy at all for retaliation claims.

Moreover, this Court's reading of other civil rights statutes confirms that retaliation is a form of intentional discrimination. For example, this Court has held that Title IX's prohibition of intentional sex discrimination included retaliation because retaliation "is another form of intentional sex discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). The Court emphasized that retaliation is, "by definition, an intentional act," and that it is inherently discriminatory because "the complainant is being subjected to differential treatment." *Id.* at 173-74.

In short, the ADA's text, the Civil Rights Act of 1991's text, and this Court's precedent demonstrate that "retaliation is, quintessentially, a form of intentional discrimination." EEOC Amicus Br. at 22-23. It follows that ADA retaliation claims are within the scope of Section 1981a(a)(2)'s grant of compensatory and punitive damages.

D. The Fourth Circuit's decision frustrates the ADA's objectives.

Even courts that reach the same conclusion as the Fourth Circuit admit that they "can discern no logic in a rule that precludes an award of compensatory and punitive damages in an ADA retaliation case when such damages are available in Title VII retaliation cases." *Equal Emp. Opportunity Comm'n v. Waterway Gas and Wash Co.*, 2021 WL 5203330, at *3 (D. Colo. Feb. 25, 2021); *Cantrell v. Nissan N. Am., Inc.*, 2006 WL 724549, at *2 (M.D. Tenn. Mar. 21, 2006); *Sink v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 1085, 1101 (D. Kan. 2001). That admission is both telling and correct because denying the availability of damages undermines the ADA as a whole.

Anti-retaliation provisions are critical to "maintaining unfettered access to statutory remedial mechanisms" contained in civil rights statutes. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). These provisions "secure that primary objective" of ending workplace discrimination "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). As this Court has explained, "if retaliation were not prohibited," an antidiscrimination "enforcement scheme would unravel." *Jackson*, 544 U.S. at 180.

Indeed, as the petition has already explained, without damages, many victims of unlawful retaliation will have no remedy at all. *See supra* pp. 16-17. That is why Congress amended the remedy provisions of the ADA by enacting Section 1981a to

authorize damages. "Compensatory damages are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity and for other consequential harms." 137 Cong. Rec. 30,661 (1991).

So too with respect to deterrence. Precisely because damages are the only meaningful remedy for certain forms of retaliation, if damages are unavailable, employers will face no cost for violating the ADA. For example, there would be nothing to deter a retaliatory employer from writing a negative reference or filing false criminal accusations against a former employee. *See supra* p. 17 (describing cases where this has occurred). That cannot be right. Congress amended the civil rights laws to make damages available precisely because those laws required more "effective deterrence" than equitable remedies alone were providing. H.R. Rep. No. 102-40, pt. 2, at 1 (1991).

This Court should intervene to ensure that plaintiffs in ADA retaliation cases receive the protections Congress provided them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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