No. 23-776

In the

Supreme Court of the United States

JEFFREY B. ISRAELITT,

Petitioner,

v.

ENTERPRISE SERVICES LLC,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Fourth Circuit correctly held (as every other federal court of appeals to consider the issue has) that only equitable remedies are available for a retaliation claim under the Americans with Disabilities Act, and thus, that Petitioner had no constitutional or statutory right to a jury trial.

PARTIES TO PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

The caption of the case in this Court contains the names of all parties to the proceeding in the U.S. Court of Appeals for the Fourth Circuit, whose judgment is under review.

Subsequent to Israelitt's employment with Respondent, Respondent's name was changed to Perspecta Enterprise Solutions LLC and is now named Peraton Enterprise Solutions LLC. Peraton Enterprise Solutions LLC is a wholly owned subsidiary of Peraton HC LLC (formerly named Perspecta HC LLC), a wholly owned subsidiary of Peraton Solutions Inc. (formerly Perspecta Inc.). Peraton Solutions Inc. is wholly owned by Peraton Inc., which is wholly owned by Peraton Corp. Peraton Corp. is held through holding companies of two private equity funds, The Veritas Capital Fund V and the Veritas Capital VII, Veritas Capital as general partner. No publicly held entity owns 10% or more of Respondent's stock.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Rules

OPINIONS AND ORDERS BELOW

For the opinion by the U.S. Court of Appeals for the Fourth Circuit affirming the district court's dismissal of Petitioner's jury demand for his ADA retaliation claim, see *Israelitt v. Enterprise Services LLC*, 78 F.4th 647 (4th Cir. 2023). This opinion is also included in Petitioner's Appendix at 1a. The Fourth Circuit's order denying Petitioner's request for rehearing en banc is not reported but is set forth in Petitioner's Appendix at 91a. The memorandum opinion of the U.S. District Court for the District of Maryland holding that Petitioner was not entitled to a jury trial on his ADA retaliation claim is not reported but is set forth in Petitioner's Appendix at 52a.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1254(1). The U.S. Court of Appeals for the Fourth Circuit issued its Order denying Petitioner's request for rehearing en banc on September 12, 2023. Petitioner sought, and this Court granted, an extension of time for the filing of the petition until January 13, 2024. The petition was filed on January 12, 2024. Thus, the petition is timely pursuant to Supreme Court Rule 13.1.

STATUTES AT ISSUE

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.

42 U.S.C § 12117(a):

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 2000e-5(g)(1):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 U.S.C. § 1981a(a)(2):

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with

> Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

STATEMENT OF THE CASE

This matter stems from an employment-related lawsuit filed by Petitioner, Jeffrey Israelitt ("Israelitt"), against his former employer, named as Respondent Enterprise Services LLC ("Enterprise").[1] Following his discharge, Israelitt sued Enterprise alleging numerous claims under the Americans with

[1] Israelitt was employed by Hewlett Packard. Subsequent to Israelitt's employment, Hewlett Packard went through a number of corporate structure changes, spin-offs, and mergers, and the business unit in which Israelitt was employed ultimately became Respondent, Enterprise Services LLC. Respondent's corporate history is not disputed by the parties or relevant to Israelitt's petition.

Disabilities Act ("ADA"), including discrimination, denial of a reasonable accommodation, harassment, and retaliation.

Enterprise filed a motion for summary judgment, which the district court granted in part. Pet. App. 61a. Specifically, the district court dismissed Israelitt's discrimination, reasonable accommodation, and harassment claims under the ADA. *Id.* The district court denied summary judgment as to Israelitt's ADA retaliation claim. *Id.*

Given that Israelitt's ADA retaliation claim was the only claim left for trial, and in accordance with well-settled circuit court precedent, Enterprise requested that Israelitt's jury demand be stricken and that the claim be set for a bench trial. The district court agreed, holding that Israelitt was not entitled to a jury trial on his ADA retaliation claim. Pet. App. 52a.

Israelitt's ADA retaliation claim proceeded to a two-day bench trial, which resulted in a verdict in Enterprise's favor. Pet. App. 27a. Israelitt appealed,[2] and the Fourth Circuit affirmed. Pet. App. 1a. The Fourth Circuit engaged in a detailed analysis of the relevant statutory language, as well as the decisions of every other federal circuit court to consider the issue, and properly held (in concert with every other

[2] Israelitt appealed the district court's dismissal of his other ADA claims at summary judgment, as well as the district court's bench trial verdict on his retaliation claim. However, Israelitt's petition concerns only whether he was entitled to a jury trial on his ADA retaliation claim.

circuit court) that ADA retaliation plaintiffs are not entitled to legal damages and thus do not have a right to a jury trial. Pet. App. 18a-25a. The Fourth Circuit subsequently denied Israelitt's petition for rehearing en banc (Pet. App. 91a), and his petition to this Court followed.

ARGUMENT

Israelitt's petition rests, at bottom, on arguments about what he thinks the law should be, rather than what the law is. He hyperbolically mischaracterizes the state of the law in support of an unpersuasive policy argument seeking to recast the plain meaning of the relevant statutes themselves.

Critically, Israelitt's assertion that there is "widespread disagreement" over whether damages (and thus jury trials) are available for ADA retaliation claims is, at best, specious. It is indisputable that *every* circuit court to consider this issue has held that damages and jury trials are not available for ADA retaliation claims. A few errant district court decisions holding otherwise do not a circuit split make,[3] nor do they provide a compelling reason for this Court to grant Israelitt's petition.

More importantly, the relevant statutory language is clear on its face: ADA retaliation plaintiffs are not entitled to damages. Israelitt attempts to

[3] This is especially true when the overwhelming majority of district court cases to consider the issue have aligned with all of the circuit courts that have considered this issue, a fact Israelitt does not address but which is discussed in more detail *infra*.

instruct this Court as to how it should interpret the statutes (by way of snippets offered out of context and irrelevant hypotheticals), but his arguments are unpersuasive in the face of the plain statutory text and should be rejected. This Court needs no assistance or instruction on how to read or interpret unambiguous statutory language—language that must be considered in full and in context. Israelitt's policy arguments – irreconcilable with the statutes' plain terms – are not properly directed to this Court, but to Congress.

I. There is no Circuit Split or Meaningful Disagreement Among Courts as to Whether Damages and Jury Trials are Available for ADA Retaliation Claims.

Israelitt correctly notes in his petition that the Fourth, Seventh, and Ninth Circuits have all held in published opinions that damages and jury trials are not available to ADA retaliation plaintiffs.[4] Enterprise will briefly discuss the opinions of each of these courts in chronological order.

First, in *Kramer v. Banc of America Securities, LLC*, the Seventh Circuit held that because the plaintiff was "not entitled to recover compensatory and punitive damages, she has no statutory or constitutional right to a jury trial. The only remedies Kramer (or any plaintiff bringing a claim of retaliation

[4] The Third Circuit has also adopted this reasoning in an unpublished opinion, as acknowledged by Israelitt. *See Tucker v. Shulkin*, No. CV 20-1317, 2020 WL 4664805, at *1 (3d Cir. July 24, 2020).

against an employer under the ADA) was entitled to seek were equitable in nature." 355 F.3d 961, 966 (7th Cir. 2004) (citing 42 U.S.C. § 2000e-5(g)(1)) (stating that where an employer has engaged in an unlawful employment practice, a court may issue an injunction, reinstatement, order back pay, or award "any other equitable relief as the court deems appropriate"). Thus, there is no *right* to a jury where the only remedies available are equitable. *Id.*

The Seventh Circuit acknowledged that while some circuits had previously affirmed jury verdicts where compensatory and punitive damages were awarded on ADA retaliation claims, the issue is whether the plaintiff has a statutory or constitutional *right*; indeed, the court noted that none of those cases actually examined the legal question of whether such damages were authorized for an ADA retaliation claim. *Id.* at 965 (citing *Salitros v. Chrysler Corp.*, 306 F.3d 562, 570 (8th Cir. 2002); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999)). The Seventh Circuit determined that because ADA retaliation claims are not listed in § 1981a, based on the plain language, "compensatory and punitive damages are not available for such claims." *Id.* (citing *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). In sum, while there are cases in which ADA retaliation claims were tried by a jury, those cases are distinguishable because: (1) they involved other, additional claims for

which the plaintiff *was* entitled to a jury; (2) the parties explicitly agreed to a jury or implicitly agreed by not raising the issue; and/or (3) the issue was not before the court (*i.e.*, the court was considering whether there was sufficient evidence to award such damages, not the legal question of whether such damages were *authorized* for an ADA retaliation claim).

In *Alvarado v. Cajun Operating Co.*, the Ninth Circuit agreed with the Seventh Circuit, determining that that court's reasoning "adheres more closely to the precepts of statutory construction," and concluding that the text was "not ambiguous." 588 F.3d 1261, 1267-68 (9th Cir. 2009). Rather, the court stated, "[i]t explicitly delineates the specific statutes under the ADA for which punitive and compensatory damages are available." *Id.* at 1268. The court concluded that "the plain and unambiguous provisions of 42 U.S.C. § 1981a limit the availability of compensatory and punitive damages to those specific ADA claims listed. ADA retaliation is not on the list." *Id.* at 1269-70.

The Ninth Circuit also distinguished one of the cases cited by Israelitt in his petition, *Edwards v. Brookhaven Science Associates, LLC*, 390 F. Supp. 2d 225 (E.D.N.Y. 2005), a decision that ignored plain statutory language and created from whole cloth an inference that Congress must have intended ADA retaliation to be included in § 1981a. The Ninth Circuit echoed criticism of the *Edwards* decision from other courts, citing a case (from within the very same district and circuit as *Edwards*) that rejected *Edwards* "because the relevant provision of the Civil Rights Act

of 1991 authorizes additional remedies for violations of Title I (specifically, punitive and compensatory damages), and does not even mention Title V [the retaliation provision]." *Alvarado*, 588 F.3d at 1267 (quoting *Infantolino v. Joint Indus. Bd. of Elec. Indus.*, 582 F. Supp. 2d 351, 362-63 (E.D.N.Y. 2008)). The Ninth Circuit also found that reading ADA retaliation into § 1981a "voids the references to §§ 12112 and 12112(b)(5) in § 1981a(a)(2) of any meaning in any conceivable context." *Id.* (quoting *Arredondo v. S2 Yachts*, 496 F. Supp. 2d 831, 835 (W.D. Mich. 2007)).

In *Tucker v. Shulkin*, the Third Circuit held in an unpublished opinion that the plaintiff could not "recover compensatory or punitive damages as remedies for retaliation under the Rehabilitation Act." 2020 WL 4664805, at *1 (3d Cir. July 24, 2020).[5] The Third Circuit relied on the decisions from the Seventh and Ninth Circuits discussed above in reaching this holding. *Id.*

In the decision underlying this matter, the Fourth Circuit engaged in an extensive analysis of the language of the relevant statutes and agreed with the Third, Seventh, and Ninth Circuits that ADA retaliation plaintiffs are not entitled to legal damages and thus do not have a right to present their claims to a jury. *Israelitt v. Enter. Servs. LLC*, 78 F.4th 647, 660 (4th Cir. 2023). In doing so, the Fourth Circuit expressly adopted its reasoning in two prior

[5] The Rehabilitation Act and the ADA "are judged under the same legal standards, and the same remedies are available under both Acts." *Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010).

unpublished cases. *Id.* (citing *Rhoads v. F.D.I.C.*, 94 F. App'x 187, 188 (4th Cir. 2004) and *Bowles v. Carolina Cargo, Inc.*, 100 F. App'x 889, 890 (4th Cir. 2004)).

Further, and contrary to Israelitt's assertion otherwise, damages and jury trials on ADA retaliation claims are not "available within the Second Circuit." Crucially, Israelitt does not cite a single Second Circuit case where this issue is actually discussed. In fact, two of the three Second Circuit cases Israelitt cites involved ADA discrimination claims in addition to retaliation claims, creating a readily distinguishable scenario, as acknowledged by Israelitt himself later on in his petition.[6] *See* Petition at 19 (acknowledging that "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").

Moreover, while Israelitt cites just three district court cases from within the Second Circuit wherein courts held that jury trials/damages were available for ADA retaliation claims,[7] he fails to acknowledge that

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[6] *Bilancione v. Cnty. of Orange*, 182 F.3d 898 (2d Cir. 1999) (unpublished opinion affirming jury award on claims of ADA discrimination and retaliation with no discussion whatsoever as to remedies available for retaliation claims specifically); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 212 (2d Cir. 2001) (vacating district court's grant of summary judgment to defendant as to plaintiff's claims of ADA discrimination, thus leaving both ADA discrimination and retaliation claims for trial).

[7] Israelitt cites six district court cases in support of his proposition that "[j]ury trials and damages remain available in

there is another district court case within the Second Circuit holding otherwise. *See Infantolino v. Joint Indus. Bd. of Elec. Indus.*, 582 F. Supp. 2d 351, 362–63 (E.D.N.Y. 2008) (holding that "compensatory and punitive damages are not available for claims brought pursuant to the anti-retaliation provisions of the ADA"). Accordingly, Israelitt's contention that he "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" is speculative at best, and his assertion that damages and jury trials are available within the Second Circuit is inaccurate.

In sum, other than a few outlier district court cases cited by Israelitt, there is no meaningful disagreement among courts on this issue (and certainly no circuit split). In fact, given that all four circuit courts to consider the issue have reached the same conclusion, as have the vast majority of district

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ADA employment retaliation cases within the Second Circuit." Tellingly, however, three of the six cases he cites do not stand for this proposition whatsoever. *See Richter v. JBFCS-Jewish Bd. of Fam. & Child. Servs.*, 2019 WL 13277316, at *3 (E.D.N.Y. Mar. 14, 2019) (dismissing plaintiff's ADA discrimination claim for failure to state a claim); *Equal Emp. Opportunity Comm'n v. Day & Zimmerman NPS, Inc.*, 2016 WL 1449543, at *6 (D. Conn. Apr. 12, 2016) (noting there is a divide among district courts within the Second Circuit on this issue and expressly declining to decide the issue); *Mueller v. Rutland Mental Health Servs., Inc.*, 2006 WL 2585101, at *5 (D. Vt. Aug. 17, 2006) (allowing plaintiff to amend complaint to add punitive damages claim based on evidence that the defendant "failed to discuss and investigate in good faith possible accommodations, and may otherwise have sought to avoid accommodating his disability").

courts all over the country,[8] the opposite is actually true. In sum, there is no meaningful disagreement among courts as to whether damages and jury trials are available for ADA retaliation claims. Accordingly, Israelitt's petition should be denied.

II. The Plain Language of the Relevant Statutes is Clear and was Appropriately Considered by the Fourth Circuit.

Consideration of the question presented by Israelitt's petition starts and ends with the text of the

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[8] *See Equal Emp. Opportunity Comm'n v. Waterway Gas & Wash Co.*, 2021 WL 5203330, at *3 (D. Colo. Feb. 25, 2021); *Chapman v. Olymbec USA, LLC*, 2020 WL 1976829, at *6 (W.D. Tenn. Apr. 24, 2020); *Madrigal v. Unified Sch. Dist. No. 512*, 2020 WL 1547828, at *3 (D. Kan. Apr. 1, 2020); *Equal Emp. Opportunity Comm'n v. CRST Int'l, Inc.*, 351 F. Supp. 3d 1163, 1186 (N.D. Iowa 2018); *Casteel v. City of Crete*, 2017 WL 3635184, at *2 (D. Neb. Aug. 23, 2017); *Lavalle-Cervantes v. Int'l Hosp. Assocs.*, 261 F. Supp. 3d 197, 199 (D.P.R. 2016); *Miles-Hickman v. David Powers Homes, Inc.*, 613 F. Supp. 2d 872, 879 (S.D. Tex. 2009); *Simpson v. Hospira, Inc.*, 2009 WL 10706747, at *3 (D. Kan. Nov. 4, 2009); *Equal Emp. Opportunity Comm'n v. Faurecia Exhaust Sys., Inc.*, 2008 WL 11380150, at *2–3 (N.D. Ohio Dec. 3, 2008); *Arredondo v. S2 Yachts*, 496 F. Supp. 2d 831, 836 (W.D. Mich. 2007); *Cantrell v. Nissan N. Am., Inc.*, No. 3:03-0082, 2006 WL 724549, at *2 (M.D. Tenn. Mar. 21, 2006); *Santana v. Lehigh Valley Hosp. & Health Network*, 2005 WL 1941654, at *2 (E.D. Pa. Aug. 11, 2005); *Johnson v. Ed Bozarth No. 1 Park Meadows Chevrolet, Inc.*, 297 F. Supp. 2d 1286, 1289 (D. Colo. 2004); *Sabbrese v. Lowe's Home Centers, Inc.*, 320 F. Supp. 2d 311, 332 (W.D. Pa. 2004); *Boe v. AlliedSignal Inc.*, 131 F. Supp. 2d 1197, 1203 (D. Kan. 2001); *Sink v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 1085, 1100–01 (D. Kan. 2001); *Brown v. City of Lee's Summit*, No. 98-0438-CV-W-2, 1999 WL 827768, at *6 (W.D. Mo. June 1, 1999).

relevant statutes. Israelitt spends several pages of his petition telling the Court how the statutes should be interpreted, rather than simply quoting the statutes themselves. The statutes at issue are unambiguous, and the Court does not need Israelitt's (or Enterprise's) assistance in interpreting unambiguous statutes.

The Seventh Amendment to the U.S. Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." "[T]he phrase 'Suits at common law' refers to 'suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.'" *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (quoting *Parsons v. Bedford*, 3 Pet. 433, 447, 7 L.Ed. 732 (1830)) (emphasis and alterations in original). To determine whether an action involves legal rights, this Court examines the nature of the action and the available remedy. *Id.* at 565. "The second inquiry is the more important in [the Court's] analysis." *Id.* The second, more important prong of this analysis is the only one at issue in Israelitt's petition, as he acknowledges that if ADA retaliation plaintiffs are entitled to only equitable relief, they have no right to a jury. Pet. 17-18.

The ADA prohibits retaliation for engaging in conduct protected under the ADA. Specifically, 42 U.S.C. § 12203(a) reads in full: "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."

Subsection c of the same section provides the remedies available for ADA retaliation claims. It states: "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." 42 U.S.C. § 12203(c). So, for retaliation in the employment context, it refers to remedies "available under" section 12117.

Section 12117 does not actually set forth remedies, either, but instead points to 42 U.S.C. § 2000e-5. Section 12117 reads:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations

> promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 12117(a).

Section 2000e-5 finally provides substantive information about available remedies for ADA retaliation plaintiffs. It states, in relevant part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such lawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., *or any other equitable relief as the court deems appropriate*.

42 U.S.C. § 2000e-5(g)(1) (emphasis added). Thus, as the Fourth Circuit concluded after a detailed analysis of the above statutory text, only equitable relief is available for ADA retaliation plaintiffs.

There is another, later statute that must also be considered. In 1991, Congress enacted § 1981a, which expanded remedies and provided for compensatory and punitive damages for *certain* "Civil Rights" and

"Disability" plaintiffs.[9] The subsection of § 1981a regarding disability reads in relevant part:

> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 [§ 2000e-5] . . . of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)) . . .) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under ... section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [§ 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by

[9] Israelitt argues that the Fourth Circuit should not have considered § 1981a at all, but rather should have stopped "with the unambiguous language of the ADA." Pet. 27. This argument is difficult to understand considering Israelitt himself has acknowledged that § 1981a "expressly applies to both Title VII and the ADA." Pet. 7. Certainly, a statute expressly applying to the ADA would seemingly be relevant to what relief is available under the ADA. In any event, even under Israelitt's argument that § 1981a should not be considered, the unambiguous text of the ADA as discussed above (and as thoroughly considered by the Fourth Circuit) demonstrates retaliation plaintiffs are entitled to equitable relief, only.

> section 706(g) of the Civil Rights Act of 1964 [§ 2000e-5(g)], from the respondent.

42 U.S.C. § 1981a(a)(2). The plain language of this statute allows for compensatory and punitive damages for only two specifically enumerated claims—intentional discrimination under § 12112 and failure to make reasonable accommodations for an individual with a disability under § 12112(b)(5). Noticeably absent is any reference to the separate statute regarding ADA retaliation, § 12203.

This Court has addressed the changes brought about by the 1991 amendments, stating that "[p]rior to 1991, only equitable relief ... was available to Title VII plaintiffs; the statute provided no authority for an award of punitive or compensatory damages." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 536, 533-34 (1999). As the Court further observed, in passing the 1991 Act, "Congress provided for additional remedies ... for ***certain classes*** of Title VII and ADA violations." *Id.* (emphasis added). "Certain classes" clearly does not mean "all" possible claims under Title VII and the ADA. The plain language of the statute and the exclusion of ADA retaliation from § 1981a(a)(2) lead to only one outcome—ADA retaliation claims cannot yield compensatory and punitive relief.

Had Congress wanted to include retaliation in this statute, it easily could have done so; indeed, Congress specifically listed Title VII's retaliation statute in the subsection immediately preceding the subsection regarding disability. *See* § 1981a(a)(1).

This subsection allows for compensatory and punitive damages for unlawful intentional discrimination "prohibited under section . . . 704" of the Civil Rights Act of 1964. Section 704 prohibits retaliation against any individual who engaged in conduct protected by Title VII. Sec. 2000e-3(a). In contrast, § 1981a makes no reference to the equivalent ADA retaliation statute.

Thus, Congress's intent is clear: compensatory and punitive damages are available for retaliation claims under Title VII but not for such claims under the ADA. As this Court has repeatedly explained, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). When the words of a statute are unambiguous, "judicial inquiry is complete." *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Here, too, judicial inquiry should be complete (and Israelitt's petition should be denied) based upon the unambiguous language of the relevant statutes.

III. The EEOC's Opinion on this Issue is not Entitled to Deference.

Given the unambiguous language of the relevant statutes, the Court's inquiry should be complete, and no further considerations are necessary or permitted. Nevertheless, Israelitt argues that the EEOC "regularly pursue[s] damages for employees in ADA retaliation cases." The argument is both facially dubious, and misleadingly incomplete. In the two cases he cites in support of this proposition, both courts rejected the EEOC's position and held that

ADA plaintiffs were *not* entitled to damages. *See Equal Emp. Opportunity Comm'n v. Waterway Gas & Wash Co.*, 2021 WL 5203330, at *3 (D. Colo. Feb. 25, 2021) ("[T]he Court is without any authority to rewrite the plain language of § 1981a(a)(2), which most clearly does not provide for compensatory and punitive damages on an ADA retaliation claim. The Court declines to depart from the sound reasoning in the numerous circuit and district court decisions which have so held."); *Equal Emp. Opportunity Comm'n v. CRST Int'l, Inc.*, 351 F. Supp. 3d 1163, 1186 (N.D. Iowa 2018) (granting defendants' motion for summary judgment as to whether compensatory and punitive damages were available on ADA retaliation claims and granting defendants' motion to strike plaintiffs' jury demand as to such claims).[10]

Put more honestly, Israelitt should argue that the EEOC *unsuccessfully* pursues damages for ADA retaliation plaintiffs. The fact that the EEOC continues to make an erroneous legal argument (that courts all over the country have rejected) should have no bearing on this Court's consideration of Israelitt's petition.

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[10] In this section of his petition, Israelitt includes one other citation to a settlement agreement involving the Department of Justice. However, even a cursory review of the settlement agreement reveals that it did not pertain to an employment matter at all, but rather a case in which non-employee patients of a medical clinic were asserting numerous ADA violations (which do not appear to be limited to retaliation). Moreover, the settlement agreement contains no discussion of the relevant statutes or the issue presented by Israelitt's petition. As such, the citation is neither relevant nor persuasive.

Further, the EEOC compliance manual and the EEOC enforcement guidance cited by Israelitt can neither change the plain language of the statutes, nor present a persuasive argument (or any argument at all, with respect to the compliance manual) as to why the statute should be interpreted differently from how it reads. Rather, the EEOC merely claims that damages "should" be available to ADA retaliation plaintiffs, even after acknowledging that the relevant statutory provision does not mention ADA retaliation claims. *See* https://perma.cc/2J6N-R5B6. Given its cursory and unsupported nature, the EEOC's opinion on this matter is not entitled to any deference or consideration. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (noting that deference to the EEOC's statutory interpretation "is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent"); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 361 (2013) (declining to give deference to EEOC manual based on its failure to address the specific provisions of the relevant statutory scheme, the generic nature of its discussion of the relevant standards, and its circular reasoning).

IV. Israelitt's Arguments as to why Damages/Jury Trials Should be Available to ADA Retaliation Plaintiffs are Misplaced.

In an attempt to sidestep the plain language of the relevant statutes, Israelitt's petition argues that damages should be available for ADA retaliation plaintiffs for a variety of public policy reasons, and

that Congress must have intended for such damages to be available. However, it is just as reasonable to conclude (and in fact, more reasonable based on the plain language of the statute), "that Congress may well have intentionally distinguished between the remedies for ADA discrimination claims and ADA retaliation claims due to the different nature of the respective claims." *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1269 (9th Cir. 2009).[11] In particular, "Congress may have well advisedly limited punitive and compensatory damage awards to those plaintiffs who are able to prove discrimination due to an actual disability." *Id.*

Notably, as Israelitt himself acknowledges, there are other categories of ADA cases wherein plaintiffs are not entitled to damages, including claims of disparate impact and cases where an employer makes good faith efforts to provide reasonable accommodations to a disabled employee. Pet. 29; 42 U.S.C. § 1981a(a). Thus, by Israelitt's own admission, Congress clearly did not intend to provide damages to all ADA plaintiffs.

Regardless of a party's suppositions as to what the law "should" be or what Congress "must" have

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[11] This Court, too, has acknowledged that retaliation and discrimination claims are not the same (albeit in a different context), which undermines Israelitt's argument that discrimination and retaliation claims should be treated the same. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (rejecting standards applied by courts of appeals that treated the antiretaliation provision of Title VII as forbidding the same conduct prohibited by the statute's antidiscrimination provision).

meant, this Court has repeatedly stated that it must presume that Congress says what it means in a statute and means in the statute what it says. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Put another away, the starting and ending points in determining congressional intent are contained in the statutory text, and a statute must be enforced according to its terms. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). This Court accepts the plain meaning of a statute "since that approach respects the words of Congress" and avoids "the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Id.* at 536.

Accordingly, the Court should decline Israelitt's invitation to rewrite a statute that has been enforced according to its plain language by every circuit court to have been confronted with this issue.

CONCLUSION

In sum, Israelitt has not presented any compelling reason for this Court to grant his petition. Specifically, he cannot demonstrate any conflict among courts of appeals on the issue of whether ADA retaliation plaintiffs are entitled to a jury trial (because there is no such conflict). Likewise, Israelitt has not and cannot demonstrate that any lower courts departed from this Court's precedent, or that there is an unanswered question of law that the Court needs to decide. For the reasons set forth herein, Israelitt's petition should be denied.

Respectfully submitted,

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