No. 23-776

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent Enterprise Services LLC (Enterprise) does not dispute that this case involves an important and frequently litigated question: whether the Americans With Disabilities Act (ADA) provides for damages—and therefore jury trials—in employment retaliation cases. Nor could it. As the Equal Employment Opportunity Commission (EEOC) has explained in this very case, the availability of "compensatory and punitive damages for ADA retaliation claims" is critical to the "core purpose" of the ADA. EEOC C.A. Br. 28; *see also* Pet. 16. The Fourth Circuit's reading of the ADA would deny *any* remedy for some of the most harmful forms of retaliation, such as giving a falsely negative job reference or filing a false criminal complaint. Pet. 16-17. And the question presented implicates the right to trial by jury under the Seventh Amendment. As this Court has long recognized, any denial of the right to a jury "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

Nor does Enterprise dispute that this case is an ideal vehicle for resolving this critical question. *See* Pet. 18-21.

Instead, Enterprise stakes its argument against review on two propositions: first, that although lower courts have reached different conclusions, there is no "meaningful disagreement" on the question presented; and second, that the "plain language of the relevant statutes" forecloses damages liability. BIO 13 (capitalization omitted).

Enterprise is mistaken on both counts. There is indeed meaningful disagreement. And the text of the ADA, read properly, provides for damages in employment retaliation cases.

This Court should grant certiorari and reverse.

I. The conflict among the lower courts is real and will not resolve itself without this Court's intervention.

Both parties agree that damages are unavailable to ADA retaliation plaintiffs in the Fourth, Seventh, and Ninth Circuits. BIO 7; Pet. 11-12. Turning to the other side of the conflict petitioner asks this Court to resolve, Enterprise argues that the Second Circuit has not "actually discussed" the issue, BIO 11, and there are only a "few outlier district court cases" authorizing damages, *id.* 12. Neither argument is persuasive.

1. The Second Circuit's decision in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), approves the award of damages for ADA employment retaliation claims.

The plaintiff in *Muller* alleged both discrimination on the basis of his respiratory ailment and retaliation for his having sought accommodations. The jury returned a verdict in his favor on both claims awarding, among other things, compensatory damages of $285,000 for "pain and suffering and mental anguish." 187 F.3d at 306. The district court also awarded equitable remedies of reinstatement and back pay. *Id.* at 315.

On appeal, the Second Circuit held "that there was insufficient evidence before the jury" to support a finding that Muller was actually disabled; therefore,

his discrimination claim failed. *Muller*, 187 F.3d at 313. But after asking the parties to brief the question whether the jury's award of compensatory damages could be "justified solely on the retaliation finding," the Second Circuit held that it could and affirmed the district court's judgment. *Id.* at 314. The Second Circuit also rejected defendants' requested remand for recalculation of damages, reasoning that it was "appropriate to find that the jury intended Muller to receive the full amount in compensation for his injury, regardless of the legal provision violated." *Id.* at 315. The only way to understand that holding is that ADA employment plaintiffs who establish that they were subjected to unlawful retaliation are eligible for compensatory damages awards.

Given *Muller*, Enterprise's assertion that "damages and jury trials on ADA retaliation claims are not available within the Second Circuit," BIO 11, falls flat. Under *Muller*, Mr. Israelitt would have been entitled to seek damages and would have been entitled to a jury trial for his retaliation claim. But the Fourth Circuit, unlike the Second, denied him both those rights. *See* Pet. App. 24a.

2. In light of *Muller* and the Second Circuit's decision affirming the jury's award of damages for a retaliation claim in *Bilancione v. County of Orange*, 1999 WL 376836 (2d Cir. 1999), it is hardly surprising that district courts within the Second Circuit "have routinely allowed juries to decide ADA retaliation claims." *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236, 240 (W.D.N.Y. 2003); *see* Pet. 13-14. Enterprise asserts that there are only "a few

outlier" decisions to that effect. BIO 12. But this is mistaken. For more than twenty years, damages and jury trials have been available for ADA retaliation plaintiffs within the Second Circuit. For cases in the past decade, see, for example, *Felix v. Dep't of Educ.*, 2023 WL 4706097, at *12 (S.D.N.Y. July 24, 2023) (analyzing the issue in detail); *Richter v. JBFCS-Jewish Bd. of Fam. & Child. Servs.*, 2019 WL 13277316, at *3 (E.D.N.Y. Mar. 14, 2019) (explaining on a motion to dismiss that "compensatory and punitive damages" as well as "trial by jury" are available for ADA retaliation plaintiffs); *Equal Emp. Opportunity Comm'n v. Day & Zimmerman NPS, Inc.*, 2016 WL 1449543, at *6 (D. Conn. Apr. 12, 2016) (explaining on a motion for summary judgment, where an ADA retaliation plaintiff demanded both a jury trial and damages, that it would "not dismiss either of these requests for relief"). For earlier cases, see, for example, *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*, 242 F. Supp. 2d at 240-41.[1]

To be sure, Enterprise has found a single district court case within the Second Circuit that has taken a

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[1] For examples of district courts outside the Second Circuit that have taken a similar approach, see, for example, *Baker v. Windsor Republic Doors*, 635 F. Supp. 2d 765, 766-71 (W.D. Tenn. 2009), *aff'd*, 414 F. Appx. 764 (6th Cir. 2011); *Rumler v. Dep't of Corr.*, 546 F. Supp. 2d 1334, 1339-43 (M.D. Fla. 2008); *Niece v. Fitzner*, 922 F. Supp. 1208, 1219 (E.D. Mich. 1996).

contrary position. BIO 11-12 (citing *Infantolino v. Joint Indus. Bd. of Elec. Indus.*, 582 F. Supp. 2d 351 (E.D.N.Y. 2008)). But *that* case is the "outlier," BIO 12, within the Second Circuit. And tellingly, even the *Infantolino* court, which never addressed *Muller*, conceded that it could not "fathom why Congress would draft a statute that effectively, even if obliquely, forecloses a damages remedy for such cases." *Infantolino*, 582 F. Supp. 2d at 363. As petitioner explains below, *see infra* pp. 5-10, Congress actually did no such thing.

3. The conflict over the availability of damages will not resolve itself without this Court's intervention. Most notably, as Enterprise recognizes, the EEOC continues to "pursue[] damages for ADA retaliation plaintiffs." BIO 20; *see also* Pet. 14-15. Contrary to Enterprise's suggestion, BIO 19-21, it does not matter whether this Court owes deference to the EEOC's interpretation of the ADA. Because the EEOC continues to advance its decades-long interpretation, conflict and confusion over the question presented will persist until this Court resolves the issue.

II. The text of the ADA authorizes damages for violations of the anti-retaliation provision.

Enterprise's merits argument rests on the proposition that "simply quoting the statutes themselves," BIO 14, shows that damages are unavailable. To the contrary, the plain text of the ADA authorizes damages for retaliation claims twice over.

1. First, the ADA's anti-retaliation provision—Section 12203—expressly links the remedies for

retaliation to the remedies provided by the ADA's protected-status provisions. Specifically, Section 12203(c) states that the "remedies and procedures available under section[] 12117"—that is, the remedies available for protected-status claims in employment cases—"shall be available to aggrieved persons for violations of" the ADA antiretaliation provision. *See* 42 U.S.C. § 12203(c).

Enterprise does not contest that damages are currently available for ADA protected-status claims. Nor could it: Damages are expressly authorized in cases brought under "42 U.S.C. 12117(a)" against employers "who engaged in unlawful intentional discrimination." 42 U.S.C. § 1981a(a)(2) (providing for damages). Because the text of Section 12203(c) requires that the remedies for protected-status discrimination "shall be available" to plaintiffs proving unlawful retaliation, damages must be "available" for violations of the ADA's anti-retaliation provision. *See* Pet. 21-24. After all, retaliation by definition involves unlawful intentional discrimination. *See id.* 30.

Second, this Court long ago held that it "could not be clearer" that when a remedial provision of the ADA cross-references a remedial provision of the Civil Rights Act of 1964, the two remedial provisions are "coextensive." *Barnes v. Gorman*, 536 U.S. 181, 185, 189 n.3 (2002); *see also* Pet. 25-26; EEOC C.A. Br. 25-26. The retaliation provision of the ADA cross-references the remedial provision of Title VII of the Civil Rights Act of 1964. Section 12117, the remedial provision governing ADA employment retaliation claims, expressly makes available the remedies "set

forth" in 42 U.S.C. § 2000e-5 of Title VII (the remedial provision for employment discrimination claims). *See* 42 U.S.C. § 12117(a).

Enterprise seems to think that Section 2000e-5 provides for only equitable relief in retaliation cases, and therefore that the ADA's retaliation remedies are similarly limited. *See* BIO 16. Enterprise is mistaken. Its argument quotes only the subsection of Section 2000e-5 that provides for equitable relief, *id.* 16 (quoting 42 U.S.C. § 2000e-5(g)(1)), implying that this excludes damages. But Section 2000e-5 recognizes that plaintiffs are *also* entitled to "any relief authorized by section 1981a." 42 U.S.C. § 2000e-5(e)(3)(B). Section 1981a in turn authorizes damages for retaliation in violation of Title VII, as it expressly authorizes damages for actions "prohibited by section[] . . . 704"—Title VII's antiretaliation provision. 42 U.S.C. § 1981a(a)(1). So, applying the principle announced in *Barnes*—that the remedies for ADA plaintiffs are "coextensive" with the remedies for Civil Rights Act plaintiffs, 536 U.S. at 189 n.3—now that compensatory damages are available for Title VII retaliation plaintiffs, they are also available for ADA retaliation plaintiffs.

2. Enterprise not only overlooks how the remedial provisions of the ADA and Title VII interlock, but it also misreads Section 1981a.

As Enterprise acknowledges, in enacting Section 1981a, Congress provided additional remedies "for certain classes of Title VII and ADA violations." BIO 18 (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 536, 533-34 (1999)). The key question is to which class of ADA violations does retaliation belong—the class for

which damages are now available or the class for which they are not? The answer is that ADA retaliation claims belong to the first category.

Enterprise claims that because there is no reference to Section 12203—the ADA prohibition on retaliation—in Section 1981a, no damages are available for retaliation under the ADA. *See* BIO 18-19. But this inference from statutory silence is illogical. *See* Pet. 26-30; EEOC C.A. Br. 21-22. Section 1981a lists provisions under the ADA that are eligible for damages, like the protected status provisions. *See* 42 U.S.C. § 1981a(a)(2). But it also specifies ADA provisions that are *ineligible* for damages, like those that make conduct "unlawful because of its disparate impact." *Id.* Because Section 1981a does not place Section 12203 on *either* the eligible or ineligible list, the statutory canon of *expressio unius* is inapplicable.

Instead, as the petition explains, statutes must be read "in light of context, structure, and related statutory provisions." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 558 (2005). Doing so shows that damages are available for ADA retaliation claims. *See* Pet. 29-30. Considering the dynamic relationship between the ADA's protected status and retaliation provisions and the dynamic relationship between the ADA's remedial regime and Title VII's remedial regime, there was no need for Congress to expressly list retaliation claims in Section 1981a as a distinct set of ADA claims eligible for damages. By providing damages for protected status discrimination claims in Section 1981a, Congress accomplished that goal. Listing ADA retaliation in Section 1981a would have been redundant.

3. Enterprise claims that petitioner's reading of the ADA is a "policy argument seeking to recast the plain meaning of the relevant statutes." BIO 6. Not so. When confronted with a complex statute like the ADA, courts must interpret the statute "as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into a harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted). This is because "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken" more "specifically to the topic at hand." *Id.* Enterprise offers no explanation of why Congress would have authorized damages for all intentional violations of the ADA except for intentional retaliation.

Moreover, Enterprise completely ignores this Court's decision in *Barnes*, which confirms that the meaning of the ADA turns on provisions in other acts, namely the Civil Rights Act of 1964. *See supra* p. 6. Thus, Enterprise offers no explanation for why, when the ADA's retaliation remedy is explicitly linked to Title VII's retaliation remedy, the two provisions' remedies would somehow not be coextensive. This was the background rule of statutory interpretation that Congress legislated against when it wrote the textual cross-references into the ADA. "[I]f 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." H.R. Rep. No. 101-485, pt. 3 at 48 (1990). Now that damages are undeniably available for Title VII retaliation claims, they are necessarily available for ADA retaliation claims as well.

If anything, it is Enterprise that has resorted to policy arguments when it rehashes the Ninth Circuit's evidence-free conjecture that Congress sought to distinguish between retaliation and discrimination "due to the different nature of the respective claims." BIO 22 (quoting *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1269 (9th Cir. 2009)). If such speculation were warranted—and it is not—Enterprise's argument would still fail because even the courts that have adopted its bottom line "can discern no logic" in such a distinction. *Equal Emp. Opportunity Comm'n v. Waterway Gas*, 2021 WL 5203330, at *3 (D. Colo. Feb. 25, 2021); *see also* BIO 12 (citing *Infantolino v. Joint Indus. Bd. of Elec. Indus.*, 582 F. Supp. 2d 351, 362-63 (E.D.N.Y. 2008), where the court "could not fathom" why Congress would have intentionally adopted such a rule). Enterprise certainly offers none. And an inability to offer *any* coherent reason for a position several lower courts have adopted is powerful evidence that this Court's review is warranted.

CONCLUSION

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

Respectfully submitted,

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