No. 21-1426

In the Supreme Court of the United States

KIRBY INGRAM,

Petitioner,

v.

LOUIS KUBIK, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should accept this case for the purpose of deciding whether public entities may have respondeat superior liability for the actions of their law enforcement officers under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*., where:

(1) lower federal courts are divided on a more fundamental, antecedent question of whether and to what extent Title II applies *at all* to law enforcement encounters, as this Court recognized in *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 610, 135 S.Ct. 1765, 1773 (2015); and where

(2) the Eleventh Circuit decision in this case and the Sixth Circuit's opinion in *Jones v. City of Detroit*, No. 21-1292 – for which a certiorari petition is pending before this Court – are the only two reported decisions within the last 20 years substantively analyzing whether respondeat superior liability exists under Title II, and they represent part of an emerging consensus view on the topic; and where

(3) this case presents a poor vehicle for any decision on either respondeat superior liability or the applicability of Title II to law enforcement encounters, because Petitioner's main merits argument was not made below – and in any event, the Title II claim was addressed on a motion to dismiss a complaint that included no allegations respecting any request for accommodations, and failed to even allege the responding officer was aware of Petitioner's claimed disability.

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Respondents Kevin Turner and Blake Dorning respectfully urges the Court to deny the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The Petition for Writ of Certiorari quotes the pertinent provisions of Title II of the Americans with Disabilities Act ("ADA"), which incorporates the "remedies, procedures, and rights" set forth in the Rehabilitation Act, 29 U.S.C. § 794a as constituting "the remedies, procedures, and rights this subchapter provides." 42 U.S.C. § 12133.

Section 794a provides, in pertinent part, as follows:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. § 794a(a)(2). While Section 794a(a)(2) refers to the "remedies, procedures, and rights set forth in title VI," *id.*, Title VI does not contain an explicit, statutory right of action. This Court has, however, recognized an implied right of action for Title VI. *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097 (2002) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979)).

STATEMENT OF THE CASE

A. Factual Background

This is a law enforcement liability case filed under 42 U.S.C. § 1983, but also including a claim under Title II of the ADA. (Pet. App. 2a).[1] The Title II claim was asserted solely against Madison County, Alabama Sheriff Kevin Turner, in his official capacity, and was predicated solely on a theory of respondeat superior liability. (Pl.App./Tab26/¶¶82-86).[2]

Ingram alleged in his amended complaint that on October 22, 2017, he experienced a "mental health crisis" and cut his wrists. (*Id.* at ¶¶ 5, 7). The complaint alleges that Deputy Louis Kubik and another deputy were dispatched to the scene after Ingram's girlfriend contacted the Veterans Administration Suicide Hotline. (*Id.* at ¶¶ 8-10). The complaint does not reveal what Deputies were told by the dispatcher. (*Id.* at *passim*). While the complaint alleges that Ingram suffers from PTSD, it nowhere alleges that deputies were apprised of this fact. (*Id.* at ¶6). Nor does the complaint allege more generally that deputies were aware of Ingram having a "mental health crisis." (*Id.*).

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[1] Citations to the record before the Eleventh Circuit are to Plaintiff's Appendix ("Pl.App.") and to the Supplemental Appendix ("Supp.App.") filed by Defendants below. Citations to the Petitioner's Appendix filed before this Court are referred to as Petitioner's Appendix ("Pet.App."). The Petition is referred to as Petition ("Pet.").

[2] The complaint, as amended, also included a claim under the Rehabilitation Act, but that claim was voluntarily dismissed. (Pet.App. 8a, 42a).

Instead, the complaint alleges that "[b]y the time the deputies arrived, Ingram had calmed down." (*Id.* at ¶11). The complaint states that "Ingram assured the deputies he was no longer suicidal," and "never expressed any desire to harm himself or any other person during his encounter with the deputies – just the opposite." (*Id.* at ¶¶14, 15).

Ingram alleges the deputies searched him for weapons and found and confiscated the pocketknife he had used to cut his wrists. (*Id.* at ¶12). After telling deputies to either arrest him or leave, Ingram allegedly fled and ran into a nearby cotton field. (*Id.*, at ¶¶16, 22). Knowing that Ingram had already succeeded in harming himself once, the deputies followed him. (*Id.*). Ingram alleges that he slowed and let the deputies catch up with him. (*Id.* at ¶23). He contends that the deputies told him that if he would return to his house and refuse medical treatment to emergency personnel who had by then arrived, they would leave. (*Id.* at ¶24). Ingram allegedly agreed to do this. (*Id.* at ¶25).

Ingram then alleges that as he walked back into the yard with the deputies behind him, he held his hands over his head and told emergency personnel that he was refusing medical treatment. (*Id.* at ¶29). Ingram claims that at this point, Deputy Kubik grabbed him under his armpits, picked him up, and threw him to the ground causing Ingram to suffer a neck injury. (*Id.* at ¶30).

Ingram alleges in a highly conclusory manner that Deputy Kubik's "decision to assault Ingram was motivated by hostility toward Ingram due to Ingram's mental illness and/or how he presented to them due to his mental illness." (*Id.* at ¶37). However, as noted above, the

complaint does not even allege that Deputy Kubik was *aware* of Ingram's claimed mental illness (PTSD), and the complaint reveals no statements by any deputy suggestive of any animus, contempt, or dislike for individuals with mental illness or suicidal ideation.

Notably, Ingram does not allege that the Sheriff of Madison County was present at the time of the occurrence of the incident. Nor does he allege that the Madison County Sheriff had failed more generally to adopt policies or observe rules regarding the treatment of individuals with disabilities. The sole basis for the Sheriff's liability is that he, "*through the actions of his officers*, failed to accommodate Ingram . . . and discriminated against him." (*Id.* at ¶85) (emphasis supplied).

B. Proceedings Below

Sheriff Turner moved to dismiss the amended complaint. (Pl.App./Tab32). The District Court granted the motion, and specifically held that Title II of the ADA did not contemplate respondeat superior liability. (Pet.App.49a-50a). The Eleventh Circuit affirmed in pertinent part, finding that "vicarious liability is unavailable under Title II." (*Id.* at 32a). In view of that holding, the Eleventh Circuit declined to address Sheriff Turner's alternative argument that "Title II does not apply to police encounters." (*Id.*).

In support of its holding, the Eleventh Circuit observed that Title II incorporates the enforcement mechanism of the Rehabilitation Act, which in turn incorporates the implied right of action this Court has found to exist in Title VI of the Civil Rights Act of 1964. (*Id.* at 33a). The Eleventh Circuit further observed that under *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274

(1998), respondeat superior liability is unavailable under the Title IX of the Education Amendments of 1972, which also relies upon Title VI's implied right of action. (Pet.App. 36a-37a). *See also Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 2100 (2002) ("[T]he Court has interpreted Title IX consistently with Title VI."). (*Id.* at 35a).

Under the Eleventh Circuit's opinion, Title II plaintiffs can still pursue claims against public entities through a showing that public officials with authority to address discrimination and to institute corrective measures on a public entity's behalf are deliberately indifferent to discrimination by law enforcement. (*Id*. at 38a). Ingram's complaint, however, failed to include any such allegations, and he declined to pursue any other theories of liability under Title II. (*Id*. at 38a).

REASONS FOR DENYING THE PETITION

There is an emerging consensus of courts recognizing that a close statutory analysis plus this Court's decision in *Gebser* preclude respondeat superior liability in ADA Title II cases. That was the holding of the Eleventh Circuit in this case (Pet. App. 32a), which endorsed the Sixth Circuit's recent decision on the same issue. *Jones v. City of Detroit*, 20 F.4th 1117, 118 (6th Cir. 2021). Notably, these are the only two courts of appeal to analyze the issue within the past 20 years.[3]

However, a growing number of district courts around the country have recently reached the same conclusion as the Sixth and Eleventh Circuits. *See Welch v. City of Hartselle*, 423 F. Supp. 3d 1277, 1283 (N.D. Ala. 2019)

[3] The First, Second, Third, Seventh, Eighth, Tenth, and D.C. Circuits have yet to address the Question Presented.

(requiring deliberate indifference); *Ravenna v. Vill. of Skokie*, 388 F. Supp. 3d 999, 1008 (N.D. Ill. 2019) (careful analysis leading to rejection of respondeat superior liability under ADA's Title II); *Arthur v. D.C. Hous. Auth.*, No. 18-CV-2037 (DLF), 2020 WL 1821111, at *11 (D.D.C. Apr. 11, 2020) ("Because entities cannot be vicariously liable on a respondeat superior theory under Title VI, the same principle applies to Title II ADA or Rehabilitation Act claims.") (citation omitted); *Lake v. Bd. of Cnty. Commissioners of Clark Cnty.*, No. 3:18-CV-143, 2020 WL 1164778, at *6 (S.D. Ohio Mar. 11, 2020) ("[T]he Supreme Court's decision to prohibit respondeat superior liability under Title IX extends to Title VI, which in turn extends to the Rehabilitation Act and the ADA because those statutes incorporate the remedies of Title VI by reference."); *Cotton v. Douglas Cnty.*, No. 4:18-CV-3138, 2020 WL 11039199, at *9 (D. Neb. Jan. 2, 2020) ("predict[ing]" that the Eighth Circuit would follow *Gebser* and reject respondeat superior liability under ADA's Title II); *Hooper v. City of St. Paul*, No. 17-CV-3442, 2019 WL 4015443, at * 9-*13 (D. Minn. Aug. 26, 2019) (careful statutory analysis demonstrating folly of earlier opinions).

Certainly, some older opinions to the contrary remain on the books in the Fourth, Fifth, and Ninth Circuits, *see Rosen v. Montgomery Cnty.*, 121 F.3d 154 (4th Cir. 1997), *Delano-Pyle v. Victoria Cnty.*, 302 F.3d 567 (5th Cir. 2002), *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001), but there are signs that reconsideration may be on the horizon within those circuits. Twice in recent years, the Fifth Circuit has narrowly avoided arguments that *Delano-Pyle* overlooked this Court's *Gebser* decision. *See Harrison v. Klein Ind. Sch. Dist.*, 856 F. App'x 480, 483 n.4 (5th Cir. 2021); *Plainscapital Bank v. Keller Indep.*

Sch. Dist., 746 F. App'x 355, 364 (5th Cir. 2018). Separately, the Fifth and the Ninth Circuit have themselves acknowledged that vicarious liability is unavailable under Title VI's implied right of action – the same right of action that is used by the ADA's Title II. *United States v. Cnty. of Maricopa*, 889 F.3d 648, 652 (9th Cir. 2018) (holding that under Title VI, "an entity cannot be held vicariously liable on a respondeat superior theory"); *Rodgers v. Smith*, 842 F. App'x 929, 929 (5th Cir. 2021) ("Title VI allows neither personal liability claims against individuals nor vicarious liability claims against employers for the acts of their employees.").[4] The Fourth Circuit, for its part, apparently has not had occasion to reconsider its 1997 *Rosen* decision since *Gebser* was decided in 1998. Thus, "further percolation in the lower courts prior to this Court granting review" would be highly beneficial here. *Calvert v. Texas*, __ U.S. __; 141 S.Ct. 1605, 1606 (2021) (statement of Sotomayor, J., respecting denial of certiorari).

While the lower courts work toward what could become a consensus on the respondeat superior question, a much larger question looms: whether and to what extent Title II of the ADA applies to law enforcement encounters *at all*. This Court fell just short of answering that question in *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 135 S.Ct. 1765 (2015). However, the instant Petition does not raise the question, and the Eleventh Circuit declined to consider it. (Pet.App. 32a). And, there's a

[4] The Eighth Circuit, yet to weigh in on the respondeat superior issue, has also acknowledged that "[t]he ADA was modeled on the Rehabilitation Act, which had been modeled after Title VI, so it follows rationally that the rights and remedies afforded under both statutes should be governed by Title VI precedent." *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011).

simple decisional off-ramp presented here, making it unlikely the Court would reach the larger question. A subsequent case would present the Court an opportunity to decide the antecedent – and more fundamental – question of Title II's applicability *vel non* to law enforcement encounters without weighing in on a purely theoretical topic.

Finally, as discussed below, the specific merits argument put forward in the Petition – that a respondeat superior cause of action is somehow not one of the "remedies, procedures, and rights" borrowed from Title VI – is self-defeating, and was not argued below.

This Court should deny the Petition for Writ of Certiorari to permit an opportunity for courts to appeal to take note of the numerous recent opinions in the lower courts recognizing that this Court's *Gebser* decision precludes respondeat superior liability in ADA Title II cases, or at least wait for a case that could also enable the Court to better address the broader question of Title II's applicability *vel non* to law enforcement encounters. *See Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, __ U.S. __, 139 S.Ct. 1780, 1784 (2019) (Thomas, J. concurring in denial of certiorari) ("further percolation may assist our review of this issue of first impression").

I. This Court Should Not Address Whether Title II of the ADA Permits Respondeat Superior Liability Until it First Answers the Antecedent Question of Whether Title II Applies *at all* to Law Enforcement Encounters.

In *City & County of San Francisco v. Sheehan*, 574 U.S. 1021 (2015) (Mem.), this Court granted certiorari to

determine whether and, if so, to what extent, Title II of the ADA applies to law enforcement officers who are actively engaging with mentally ill individuals on a scene. When the Court granted review, it "understood this question to embody . . . the argument that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 608, 135 S. Ct. 1765, 1772 (2015) (internal quotations omitted).

The Court was unable to decide the question when the Petitioner in *Sheehan* changed its argument on appeal, forcing a dismissal of the writ as improvidently granted. *Id.* at 609-10. Still, however, the Court noted that whether the ADA applies to law enforcement encounters "is an important question that would benefit from briefing and an adversary presentation." *Id.* at 610. To be sure, the Court added that its decision to dismiss the writ also rested in part on "the parties' failure to address a related question" – *i.e.*, the Question Presented in this case. *Id.* (noting that the parties agreed vicarious liability was available in Title II actions against public entities, "But we have never decided whether that is correct.").

While this Court was certainly interested in addressing *both* questions in *Sheehan*, the posture of this case only presents *one* of the two questions – and it is the logically secondary one. This secondary question is also presented here without knowing the lower court's answer to the preliminary question, involving the applicability of Title II to law enforcement encounters. While Respondents raised the applicability *vel non* of Title II below, neither the

District Court nor the Eleventh Circuit considered the matter in view of their ruling on the respondeat superior issue. (Pet.App. 32a, 47a, 49a). This Court generally does not consider questions not adjudicated in the lower court. *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 2120 (2005) (declining to address defenses raised by respondent in the court of appeal but not addressed by that court because "we are a court of review, not of first view"). Further, Petitioner has not raised the applicability of Title II to law enforcement encounters in the Question Presented. (*See* Pet. *i*) (limiting the Question Presented to "[w]hether vicarious liability is available under Title II of the Americans with Disabilities Act….").

In the absence of a decision by this Court on the preliminary question of applicability of the ADA's Title II to law enforcement encounters – a question not presented in this case –the "courts are still in tension, unable to agree on how to balance the statutory requirements for ADA compliance with the necessity of providing police the requisite leeway to keep both officers and the public safe." Robyn Levin, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 Stan. L. Rev. 269, 270 (2017).

Resolving the antecedent question of whether Title II applies to law enforcement encounters prior to weighing in on whether respondeat superior liability is available – or at least awaiting a case clearly presenting both issues simultaneously – is a more conservative use of this Court's time and attention, and a more salutary method of promoting the development of the law.

In any event, this case is a poor vehicle for answering the question of Title II's breadth and proper application.

Unlike *Sheehan*, 575 U.S. at 606, 135 S. Ct. 1770, which was a summary judgment decision, *id.*, this case comes to the Court on a motion to dismiss a complaint with very limited, and extremely slanted, allegations. A wide variety of dynamic circumstances usually attend law enforcement encounters with the disabled or mentally ill. Any decision as to the extent to which Title II should apply to those encounters should be informed by a full factual record, allowing the Court to consider the perspectives of both arrestees and officers as they exist in real life, not as they are characterized in a complaint. *See*, *e.g.*, *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1086 (11th Cir. 2007) (noting that ADA claims involving law enforcement officers are "case-by-case" and what is reasonable is "relative to the particular circumstances" presented).

II. The Circuits are Not as Hopelessly Divided as the Petition Suggests: A Potential Consensus Appears to be Emerging Around the Unavailability of Respondeat Superior Liability for Title VI's Judicially-Implied Cause of Action.

The Petition asserts that the courts of appeal are "expressly and intractably split" on the Question Presented. (Pet. 2). Even apart from the fact that a majority of the circuits (seven) have yet to address the matter, this characterization fails to tell the whole story.

There is no disagreement over the fact that "when analyzing the ADA's remedial scheme, the law operates like a matryoshka doll." *Jones v. City of Detroit*, 2019 WL 2355377, at *5 (E.D. Mich. June 4, 2019). Specifically, "Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat.

2982, as added, 29 U.S.C. § 794a." *Tennessee v. Lane*, 541 U.S. 509, 517, 124 S. Ct. 1978, 1984-85 (2004) (citing 42 U.S.C. § 12133). Section 505 of the Rehabilitation Act, in turn, invokes the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." 29 U.S.C. § 794a(a)(2)). Thus, as this Court has held, the remedies for violations of Title II of the ADA and § 504 of the Rehabilitation Act "are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq." *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 2100 (2002).

There is also no dispute that the implied right of action that authorizes suit under Title VI and Title IX does not permit respondeat superior liability. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288, 118 S. Ct. 1989, 1998 (1998) (holding that under Title IX, "Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice").[5]

In fact, most of the courts that comprise the complained-of circuit split – the Fifth, Sixth, Ninth, and

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[5] Title VI's private cause of action is "an implied right of action," *Barnes*, 536 U.S. at 185 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979)), which also serves as the basis for private suits under Title IX. *Cannon*, 441 U.S. at 710-11, 99 S. Ct. at 1965 ("[W]hen it passed Title IX, Congress was under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable"); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258, 129 S.Ct. 788, 797 (2009) ("Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was") (citation omitted); *Barnes*, 536 U.S. at 185, 122 S. Ct. at 2100 ("[T]he Court has interpreted Title IX consistently with Title VI.").

Eleventh Circuits – have recently come to **agree** that respondeat superior liability is unavailable under Title VI. *See Ingram v. Kubik*, 30 F.4th 1241, 1258 (11th Cir. 2022) (holding that "an entity cannot be held vicariously liable on a respondeat superior theory under Title VI") (quotations and alternations omitted); *M.J. by & through S.J. v. Akron City Sch. Dist. Bd. of Educ.*, 1 F.4th 436, n. 11 453 (6th Cir. 2021) ("[T]here is no vicarious liability under Title VI."); *Rodgers v. Smith*, 842 F. App'x 929, 929 (5th Cir. 2021) ("Title VI allows neither personal liability claims against individuals nor vicarious liability claims against employers for the acts of their employees."); *United States v. Cnty. of Maricopa*, 889 F.3d 648, 652 (9th Cir. 2018) (acknowledging that under Title VI, "an entity cannot be held vicariously liable on a respondeat superior theory"); *see also Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2d Cir. 2012) (applying "deliberate indifference" standard to Title VI claims). No circuit court of appeals has yet disagreed with this proposition, and district court support for it is widespread as well. *E.g.*, *Goonewardena v. New York*, 475 F.Supp.2d 310, 328 (S.D.N.Y. 2007) ("Liability under Title VI, which parallels that of Title IX, cannot be imputed to institutions based on the actions of their employees.").

The fact that the Fifth and Ninth Circuits have recently come to **agree** that Title VI's implied right of action does not support respondeat superior liability strongly suggests that they will reexamine the validity of their much older precedent authorizing respondeat superior under Title II. In fact, in two separate cases decided within the past four years, litigants within the Fifth Circuit have argued that *Delano-Pyle v. Victoria Cnty.*, 302 F.3d 567 (5th Cir. 2002) overlooked this Court's *Gebser* decision in authorizing respondeat superior under

Title II. *See Harrison v. Klein Ind. Sch. Dist.*, 856 F. App'x 480, 483 n.4 (5th Cir. 2021); *Plainscapital Bank v. Keller Indep. Sch. Dist.*, 746 F. App'x 355, 364 (5th Cir. 2018). And with good reason, since the *Delano-Pyle* decision did not even cite *Gebser*, and instead relied upon decisions interpreting **Title I** of the ADA, which relies on the explicit right of action contained within Title VII's entirely distinct remedial scheme. *See* 42 U.S.C. § 12117; *see also Hooper v. City of St. Paul*, No. 17-CV-3442, 2019 WL 4015443, at * 10 & n.17 (D. Minn. Aug. 26, 2019) (pointing out the error). While the Fifth Circuit did not reach the point in either case, it is highly likely to come up again, especially on the heels of the new decisions by the Sixth and Eleventh Circuits rejecting respondeat superior liability under Title II.

The Ninth Circuit decision cited by Petitioner, *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001), is likewise old and a prime candidate for updated Circuit consideration in view of the Ninth Circuit's 2018 ruling in *United States v. Cnty. of Maricopa*, 889 F.3d 648 (9th Cir. 2018) that "an entity cannot be held vicariously liable on a respondeat superior theory" under Title VI. *Id.* at 652. In fact, there is renewed litigation in the district courts within the Ninth Circuit over whether *Duvall* is "irreconcilable with *Gebser*." *Doe v. Alameda Cmty. Learning Ctr.*, 532 F. Supp. 3d 867, 870 (N.D. Cal. 2021). One district court in California has actually identified two separate Ninth Circuit cases that seem to contradict *Duvall* and instead give rise to the "clear implication . . . that if Title IX limits respondeat superior, so must Title VI, and so must the ADA and Section 504." *K.H. by & through Humphrey v. Antioch Unified Sch. Dist.*, 424 F. Supp. 3d 699, 701 (N.D. Cal. 2020). This Court's practice is to "usually allow the courts of appeals to clean up intra-circuit divisions on their

own." *Joseph v. United States*, __ U.S. __, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari).

This just leaves the Fourth Circuit decision cited by Petitioner, *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1997). That case was decided a year before *Gebser*, and is of dubious vitality for that reason alone (not to mention that its analysis consisted of a two-sentence footnote, and that it applied Title I principles to Title II of the ADA, *see id.* at 157 n.3). Since *Gebser*, the Fourth Circuit has never cited *Rosen* as a basis for respondeat superior liability in the Title II context; moreover, the Fourth Circuit *has* applied *Gebser* to robustly reject such liability in the Title IX context. *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001) ("*Gebser* is quite clear, however, that Title IX liability may be imposed only upon a showing that school district officials possessed actual knowledge of the discriminatory conduct in question.").

In view of the very recent developments in the Fifth, Sixth, and Ninth Circuits, it is certainly fair to provide the Fourth Circuit an opportunity to reexamine its now quarter-century old footnote. Indeed, "[a] conflict with a decision that has been discredited or that has lost all weight as authority by reason of intervening decisions of the Supreme Court or the courts of appeals will not be an adequate basis for granting certiorari." Shapiro, et al., *Supreme Court Practice*, § 4.4(d) (9th ed. 2019).

III. Petitioner's Merits Argument Contradicts His Earlier Assertions and Fails in Any Event.

As discussed above, Petitioner's respondeat superior argument is wrong, and has been rejected by all of the courts to consider it in light of *Gebser*. It is also notable,

however, that the *specific* merits argument Petitioner raises – *i.e.*, that "respondeat superior is not a remedy" within the meaning of Title II's incorporation clause (Pet. 10) – was never raised by Petitioner below. (*See* App. Br. ECF 39-61).

Before the Eleventh Circuit, Petitioner made the **opposite** argument, affirmatively characterizing vicarious liability as a remedy. (*Id.* at ECF 56 ("To further the Congressional purpose of eliminating discrimination against the disabled, public entities should be incentivized to supervise and train employees *by the traditional* ***remedy*** *of vicarious liability*.")) (emphasis supplied).[6]

This Court does not address arguments that were not presented below. *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128, 131 S. Ct. 2343, 2351 (2011) (declining to address argument not raised below); *Sheehan*, 575 U.S. at 609, 135 S. Ct. at 1773 ("The Court does not ordinarily decide questions that were not passed on below."). Thus, this case is a poor vehicle for the Court to address the full spectrum of arguments for and against vicarious liability under Title II.

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[6] Petitioner was correct to characterize respondeat superior liability as a form of "remedy" under Title II. The word "remedy" refers to "the legal means to recover a right or to prevent or obtain redress for a wrong." *Webster's New Collegiate Dictionary* 970 (150th anniv. ed. 1981); *accord Black's Law Dictionary* (11th ed. 2019) (defining "remedy" as "[t]he means of enforcing a right or preventing or redressing a wrong."). Allowing an individual to sue the employer of a wrongdoer is certainly a "means" of obtaining redress for a wrong. Indeed, in *Gebser*, this Court rejected respondeat superior liability in the parallel context of evaluating "the available *remedies*" for Title IX violations. *Gebser*, 524 U.S. at 284, 118 S.Ct. at 1996 (emphasis supplied).

In any event, Petitioner's argument proves too much. Title II not a fountainhead; it is a vessel. Section 12133 states that "any person alleging discrimination on the basis of disability" shall have the "remedies, procedures, and rights" listed in the Rehabilitation Act, 29 U.S.C. § 794a, which in turn invokes those "remedies, procedures, and rights" set forth in Title VI. *U.S. v. Georgia*, 546 U.S. 151, 154, 126 S.Ct. 877, 879 (2006). Section 12133 does not otherwise describe any independent private right of action. *Barnes v. Gorman*, 536 U.S. 181, 189 n.3, 122 S. Ct. 2097, 2103 (2002). Thus, if respondeat superior liability is not one of the "remedies, procedures, and rights" of those borrowing statutes – if it is not one of those things – then it simply does not exist **at all** for purposes of Title II. *See Jones v. City of Detroit*, 20 F.4th 1117, 1120 (6th Cir. 2021) ("Whether Title II imposes vicarious liability rises and falls with whether Title VI does."); *see also Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 247 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."). In other words, in asserting that respondeat superior liability is not a "remedy," "procedure," or "right" under Title II or Title VI, Petitioner argues himself out of a cause of action entirely.

Furthermore, under Petitioner's theory that respondeat superior is not a remedy, but a *basis* for liability (Pet.10), the right to pursue that theory would **clearly** be a "right" within the meaning of 42 U.S.C. § 12133 – literally, a right to sue someone who otherwise is not at fault. *See generally Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010) (noting that "respondeat superior imposes liability for public policy reasons upon masters though they are not at fault in any way").

Petitioner's back-up argument fails just as obviously. He asserts that *Gebser*'s reasoning "is constrained to statutes conditioning federal payments – which Title II of the ADA is not." (Pet.11). But as the Eleventh Circuit held below: "The problem for Ingram is that his argument was foreclosed by the Supreme Court in *Barnes v. Gorman*, 536 U.S. at 189-90 n.3, 122 S.Ct. 2097." (Pet.App. 37a). According to *Barnes*, "the ADA's status as a 'non Spending Clause' tort statute" is "quite irrelevant." *Barnes*, 536 U.S. at 189-90 n.3, 122 S.Ct. 2097, 2103. Congress is regarded by this Court as "thoroughly familiar" with this Court's "unusually important" Title VI precedents, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699, 99 S.Ct. 1946, 1958 (1979) and is presumed to anticipate that new enactments will "be interpreted in conformity with them." *Id*. Here, Congress freely chose to rely upon an implied cause of action from Title VI rather than fashioning a new one for Title II. Lest there be any doubt about what was being incorporated, Congress entitled the section of Title II in which it incorporated Title VI's remedies "Enforcement." 42 U.S.C. § 12133. Under such circumstances, the constitutional provenance of Title VI is beside the point.

IV. Even Were the Court to Take this Case, a Narrow Resolution Remains Obvious.

Contrary to Petitioner's claims, there are "vehicle" problems in this case. Most notably, an obvious off-ramp exists that renders it unlikely the Court will reach the question presented.

Absent definitive guidance from this Court, the courts of appeal have debated whether, and to what extent, Title

II of the ADA may apply to law enforcement encounters. *See generally Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1083-85 (11th Cir. 2007); *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000). However, courts that have adjudicated Title II claims in the context of law enforcement encounters have "identified two general theories describing ways in which a police officer may violate the ADA in executing an arrest." *Gray v. Cummings*, 917 F.3d 1, 15 (1st Cir. 2019). One such theory is intentional discrimination against those with disabilities, and the other is failing to accommodate known disabilities. *Id.* Here, however, *neither* theory would work under the unique and limited allegations of the complaint.

To be sure, the complaint alleges that Petitioner "suffers from PTSD" and "was in a mental health crisis" on the date of the encounter with law enforcement. (Pl.App./Tab26/¶¶ 5-6). However, the complaint does **not** allege that Deputy Kubik was informed of either of these two facts. Nor does the complaint allege that Petitioner requested any accommodation from Deputy Kubik, other than asking him to either arrest him or leave. (*Id.* ¶ 13). Further, the complaint actually alleges that "[b]y the time the deputies arrived, Ingram had calmed down." (*Id.* at ¶ 11). The complaint states that "Ingram assured the deputies he was no longer suicidal," and "never expressed any desire to harm himself or any other person during his encounter with the deputies – just the opposite." (*Id.* at ¶¶ 14, 15). While the complaint alleges in purely conclusory terms that Deputy Kubik "would not have assaulted Ingram but for his disability" (*id.* at ¶ 56) this is actually in the MTD response not the complaint (Pl.App./Tab42/¶ 56) there are no factual allegations to enhance or buttress

this highly presumptuous – and breathtaking – conclusion. It is a simple declaration; an argument, nothing more.[7]

This case, then, presents an unusual manifestation of an ADA claim. On the facts presently before the Court, Deputy Kubik is alleged to have assaulted an individual whom he did not know to suffer from any mental illness (for it is certainly possible to be suicidal absent mental illness[8]), and who did not request any accommodations of any type. (App. Br. 57) (agreeing that Petitioner did not request any accommodations).

Confronted with a similar situation, the First Circuit recently dodged every unsettled question under Title II, including (1) whether Title II applies to *ad hoc* police encounters with members of the public, (2) whether

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[7] Deputy Kubik's encounter with Petitioner was captured on his body-worn camera. The video footage is not in the record due to the procedural posture of this case. However, the footage is highly relevant to a full understanding of the unstable situation Deputy Kubik confronted on the date in question, and it portrays a different version of events than the complaint.

[8] *See generally* Kristin Fuller, M.D., *National Alliance on Mental Illness: 5 Common Myths About Suicide Debunked*, NAMI, https://www.nami.org/Blogs/NAMI-Blog/September-2020/5-Common-Myths-About-Suicide-Debunked (Sept. 30, 2020) (last accessed May 12, 2022) (noting that "not all people who attempt or die by suicide have mental illness. Relationship problems and other life stressors . . . are also associated with suicidal thoughts and attempts"); Angelica LaVito, *Suicide Rates are Climbing, and the CDC Says Mental Illness isn't the Only Factor to Blame*, CBNC https://www.cnbc.com/2018/06/07/suicide-rates-are-climbing-and-mental-illness-isnt-the-only-factor.html (June 7, 2018) (last accessed May 12, 2022) (quoting CDC Principal Deputy Director as stating that "mental illness isn't the only thing to acknowledge when developing strategies for preventing suicide" and identifying other "stressors").

respondeat superior liability is available, and (3) whether mere deliberate indifference is a sufficient ground for liability. *Gray*, 917 F.3d at 16. The Court in *Gray* did so because it recognized that no matter the answer to these complex questions:

> to hold the Town vicariously liable under Title II based on Cummings's deliberate indifference, Gray would have to show that [Officer] Cummings knew that Gray had a disability that required him to act differently than he would otherwise have acted, yet failed to adjust his behavior accordingly. . . . Similarly, to prevail on her version of the "accommodation" theory, Gray would at least have to show that [Officer] Cummings knew that there was a reasonable accommodation, which he was required to provide. Gray has not made either such showing.
>
> . . . .
>
> There is insufficient evidence to suggest that [Officer] Cummings knew either that Gray suffered from bipolar disorder or that she was experiencing a manic episode. Without such particularized knowledge, [Officer] Cummings had no way of gauging whether the conduct that appeared unlawful to him was likely to be a manifestation of the symptoms of Gray's mental illness. So, too, without such particularized knowledge, [Officer] Cummings had no way of gauging what specific accommodation, if any, might

> have been reasonable under the circumstances.
>
> . . . .
>
> Consequently, [Officer] Cummings had no way of knowing that an ADA-protected right was likely to be jeopardized by his actions.

Gray, 917 F.3d at 18.

Similarly, here, the complaint gives no plausible factual basis for any finding that Deputy Kubik was aware of Petitioner's claimed PTSD diagnosis (as opposed to his merely being suicidal), and Petitioner never requested any accommodation. Without more, there is no trigger for **any** liability under the ADA, vicarious or otherwise. *Accord T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 417 (5th Cir. 2021) ("The trouble is that none of the factual allegations contained in the complaint permit the inference that T.O. was ever discriminated against because of his disability. With respect to vicarious liability for Abbott's involvement in the physical altercation, the only allegations linking Abbott's conduct to T.O.'s disability are conclusional ones that cannot withstand Rule 12(b)(6) scrutiny."); *see also id.* at n.44 (characterizing complaint's allegations that the defendant was "angered by T.O.'s disabilities" and "had prejudicial animus" toward T.O. due to his disabilities as impermissibly conclusory); *Friedson v. Shoar*, 479 F.Supp.3d 1255, 1264 (M.D. Fla. 2020) ("Here, the Court need not resolve whether vicarious liability against the Sheriff is available; even if authorized, Friedson's claims fail because no reasonable jury could conclude that Wallace was deliberately indifferent to Friedson's rights under the ADA and RA").

A hallmark of this Court's practice is that it endeavors to resolve cases on the narrowest ground. *See Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 531, 111 S. Ct. 913, 922 (1991) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available.") (Stevens, J., concurring in the judgment). For that reason, "[i]f it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review." Shapiro, *et al.*, *Supreme Court Practice*, § 4.4(e) (9th ed. 2019). That is certainly the case here, and a strong reason to deny certiorari.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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