

No. 25-1028

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**In the Supreme Court of the United States**

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PORTER SMITH, PETITIONER

*v.*

MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONER**

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## REPLY BRIEF FOR THE PETITIONER

As the petition established, this case presents an important and recurring question of federal anti-discrimination law: whether Section 504 of the Rehabilitation Act, 29 U.S.C. 794, authorizes a private right of action for retaliation.

The circuit conflict is clear, lopsided, and entrenched. The issue arises constantly in lower courts, and its importance is self-evident: a retaliation safeguard is essential to the Act's proper operation, and the Court has repeatedly granted review to decide the same question (whether retaliation claims are authorized) in companion anti-discrimination schemes. The question is a pure question of law, and it was squarely resolved below. There are no conceivable obstacles to resolving it here.

Respondents' opposition effectively concedes the case for further review. Respondents recognize the circuit conflict, with the Sixth Circuit standing at odds with (literally) "[e]very other circuit." Opp. 3, 10. Respondents do not dispute the issue's obvious importance. Respondents do not contest that it frequently recurs. And respondents do not doubt this case is an ideal vehicle.

Instead, respondents try to kick up dust. They quibble with the depth of circuit analysis—while still admitting *eleven circuits* reached the opposite conclusion. A circuit conflict is no less a circuit conflict simply because some courts found a textual question straightforward. Respondents suggest review can wait because injured parties can always seek *lesser* remedies under the ADA (injunctive relief but no damages) or state law (no federal forum, no attorney's fees, etc.)—a proposition absurd on its face. Respondents suggest additional percolation is warranted—despite the implausibility that further percolation would do any good. There is no chance the split will

resolve itself (eleven circuits are not revisiting settled precedent and switching sides). And there are no other arguments that need further ventilation: this issue has reached (literally) every circuit, and it was exhaustively reviewed in competing opinions below. Every other court (besides the 2-1 Sixth Circuit) has read the Act to mean what it says, incorporating the ADA's express anti-retaliation provision. The competing views are clear: one side is right and the other is wrong, and this Court alone can settle the dispute.

In the meantime, the present situation is untenable. The nation's anti-discrimination laws require certainty and uniformity. There has been a "widespread" consensus for decades before the Sixth Circuit disrupted this settled national scheme. Respondents have an incentive for delay, but they have not explained how it does any good to let the Act's uniform protections vary in the Sixth Circuit alone. This case is an ideal vehicle for resolving the confusion, and it cries out for immediate review.

#### **A. There Is A Clear And Intractable Conflict**

As the petition established, the circuit conflict is square, obvious, and entrenched. Both the majority (Pet. App. 15a-16a) and dissent (*id.* at 36a) recognized the lopsided split. Expert commentators have already recognized the conflict. *E.g.*, 1 Disability Law Compliance Manual § 4:29 (the Sixth Circuit "rejected" "decisions from nearly all other circuits that had previously analyzed retaliation claims under the Rehabilitation Act"; "[t]here was a detailed dissent" "argu[ing] that Section 504(d)'s incorporation of ADA provisions should be read to authorize retaliation claims, as courts had consistently done for decades"). Indeed, this is the rare case where respondents themselves concede the obvious conflict: "*Every other circuit* has stated \* \* \* that the Rehabilitation Act prohibits retaliation." Opp. 10 (emphasis added).

The primary certworthiness factor is therefore indisputably met: “The court below departed from other circuits when it held that there is no private right of action for retaliation under the Rehabilitation Act.” Opp. 3.

1. Faced with this obvious problem, respondents resort to inventing transparent makeweights. Respondents first suggest the circuit conflict is weak because *all eleven circuits* adopted the opposite conclusion in a “perfunctory” analysis—and the Sixth Circuit alone offered the only “reasoned” decision. Opp. 11, 16.

Yet as petitioner already explained (Pet. 12-13), the circuit-level decisions may be concise, but they are indeed *reasoned*. Pet. 13-17 (detailing holdings and rationale from every circuit—only a handful of which respondents even purport to address). The circuits’ (generally) concise discussion simply reflects the relative simplicity of the statutory question. Congress explicitly directed courts to invoke the ADA’s incorporated “standards” for determining Rehabilitation Act “violations.” 29 U.S.C. 794(d). One incorporated standard (identified by its specific section) bars retaliation. 42 U.S.C. 12203(a). That direct incorporation is exactly tantamount to Congress “cut[ting] and past[ing]” the ADA’s text (and its express anti-retaliation prohibition) directly into Section 504 itself. *Jam v. International Fin. Corp.*, 586 U.S. 199, 209 (2019); Pet. 12 (citing examples tracking this rationale).

This is not rocket science. Courts did not need elaborate explanations to march through this “logical syllogism.” Opp. 13 (so conceding). The proper reading is unmistakable—which likely explains the highly unusual situation where *all eleven circuits* addressed the same text and read it exactly the same way (without a single dissent). Indeed, those eleven circuits read Section 504(d)’s plain text exactly as one would expect: “retaliation claims are a common feature in federal anti-discrimination law”

(Pet. App. 10a (so conceding)), so it is not exactly surprising to read Section 504(d) to align with Congress’s companion schemes. These (unremarkable) circuit holdings are not any less binding simply because respondents might prefer a more elaborate analysis.<sup>1</sup>

2. Respondents next suggest the Spending Clause framework is paramount—and they fault all eleven circuits for not specifically invoking that framework. Opp. 14-16. Yet here the Spending Clause’s upshot is statutory requirements must be “unambiguous[.]” (*e.g.*, Pet. App. 17a)—and all eleven circuits found that requirement satisfied. It was the Sixth Circuit alone that declared Congress somehow remained “*silent*” as to retaliation (*id.* at 18a)—despite *directly incorporating the ADA’s express anti-retaliation provision*. 29 U.S.C. 794(d); 42 U.S.C. 12203(a). That is not “silence” under any ordinary understanding—and it certainly is not “silence” under this Court’s decisions (*e.g.*, *Jam*, 586 U.S. at 209). The direct incorporation, again, acts precisely as if Congress reproduced the incorporated language (and its express anti-retaliation command) directly into Section 504(d) itself. *E.g.*, *Jarvis v. Potter*, 500 F.3d 1113, 1125 (10th Cir. 2007). That is the opposite of silence—and the Sixth Circuit created a square conflict in holding otherwise.<sup>2</sup>

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<sup>1</sup> Like the 2-1 majority below (Pet. App. 16a), respondents also fault certain circuits for adopting varying, alternative rationales. Opp. 11-12. As petitioner already explained (Pet. 13), this overstates the variance and misses the point. Not a single circuit, until now, rejected the plain-text approach; some merely offered *additional* ways to reach the same conclusion. That hardly undermines the national consensus—and respondents fail to explain otherwise.

<sup>2</sup> Respondents emphasize (Opp. 14-15, 17) this Court’s decision in *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212 (2022). Yet *Cummings* simply tracked and applied this Court’s settled Spending

Respondents, again, may disagree with the consensus plain-text approach (or refuse to credit this Court’s traditional understanding of incorporation-by-reference, see *Brown v. United States*, 602 U.S. 101, 116 (2024) (reiterating the “so-called reference canon”). But the Spending Clause’s gloss was superfluous for courts reading Section 504(d)’s plain text according to its unambiguous command. It certainly has no bearing on the eleven circuits rejecting the Sixth Circuit’s atextual approach. *E.g.*, *Kersey v. Washington Metro. Area Transit Auth.*, 586 F.3d 13, 16 (D.C. Cir. 2009).

3. Respondents finally invoke the last refuge of any petition-stage respondent: a plea for percolation. Opp. 10-16.

Yet percolation here would not do any possible good. The 2-1 Sixth Circuit rejected the views of (literally) every other circuit. There is nowhere else left to turn. And it is fanciful to think any further percolation would otherwise occur. Other circuit panels are bound by circuit authority. *E.g.*, *Hwang v. Kansas State Univ.*, 753 F.3d 1159, 1165 (10th Cir. 2014) (Gorsuch, then-J.); *Hill v. Walker*, 737 F.3d 1209, 1218 (8th Cir. 2013). Those circuits would have to go en banc to even address the Sixth Circuit’s outlier position. Circuits rarely absorb the significant time and resources for en banc review; there is no reason circuits would waste scarce bandwidth here to reconsider a longstanding, administrable rule in order to (possibly) flip sides in a lopsided split. And there is certainly no hope of *eleven circuits* abandoning their own precedent in favor of the Sixth Circuit’s atextual approach.

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Clause framework from decades earlier. See 596 U.S. at 219. It otherwise has nothing to do with this case—which is why the Sixth Circuit itself barely mentioned *Cummings*. See Pet. App. 16a (one single reference to a generic point).

This is a straightforward, discrete statutory question. It was carefully examined below in two comprehensive opinions. Opp. 10-11 (so conceding). It has already been addressed exhaustively in every other circuit. There is no need for further ventilation. And while respondents insist review is “premature” (*id.* at 16), respondents also admit at least “25 decisions” reject the Sixth Circuit’s approach (*id.* at 15)—and those are merely the representative sample cited in the petition. There is no reason to think the 26th decision will be the charm—and in fact the broader universe (spanning eleven circuits over several decades) is significantly larger.

Respondents have an obvious incentive to forestall the inevitable. But further percolation will not illuminate this decision. And delay here will come at a serious cost: rampant confusion and chaos as parties everywhere are left guessing how to proceed. State employees in the Sixth Circuit are left unsure whether and how to preserve their rights. State defendants elsewhere are left unsure whether to relitigate these questions—no matter how unlikely to gain traction. Parties need to know whether retaliation is authorized (or not) under this important federal scheme. Further review is warranted now.

**B. The Question Presented Is Exceptionally Important And Warrants Review In This Case**

1. As the petition established (Pet. 19-21), the question presented is of obvious legal and practical importance. Anti-retaliation safeguards are essential to promoting anti-discrimination regimes. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005). The decision below eliminates that vital safeguard for the Rehabilitation Act, destroying the Act’s national uniformity and debilitating its core protections. See Pet. App. 14a, 16a (conceding departure from “widespread,” “longstanding” practice). This Court has repeatedly granted review to decide the

same question (whether retaliation claims are authorized) under parallel federal schemes. See Pet. 20-21 (citing cases under the ADEA, Title IX, Section 1981, and Title VII). It is equally imperative to provide a definitive, uniform answer here.

As flagged above, leaving the split unresolved would have serious consequences. This issue affects hundreds (if not thousands) of cases each year. So long as the split persists, parties and courts will be forced to waste time and resources dealing with this threshold issue—as Sixth Circuit plaintiffs (contrary to plaintiffs everywhere else) are stuck preserving their (now-defunct) claims for further review,<sup>3</sup> and defendants nationwide are stuck wondering whether to raise a similar challenge—despite the exceedingly low odds of disrupting circuit precedent. Before the decision below, the prevailing rule nationwide provided a clear, workable baseline for all stakeholders; this new burden and complexity benefits no one.<sup>4</sup>

As it now stands, for the first time in decades, the Rehabilitation Act’s core protections vary dramatically

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<sup>3</sup> See, e.g., *Poe v. Lowe*, No. 24-cv-368, 2026 WL 1231217, at \*13 (M.D. Tenn. May 5, 2026) (“Defendants argue that Poe’s claims under Section 504 of the Rehabilitation Act of 1973 fail as a matter of law, in light of the Sixth Circuit’s recent decision in *Smith* \* \* \*. Poe does not disagree, other than to preserve his objection to *Smith* for appellate purposes.”).

<sup>4</sup> And the potential mess and confusion will predictably get worse. In many cases, the Rehabilitation Act claim will be the only hook for federal jurisdiction. If the claim is (wrongly) dismissed per the Sixth Circuit, parties would be left litigating their remaining claims in state court despite a proper right to a federal forum (under the contrary views of “[e]very other circuit,” Opp. 10). And a dismissal would leave parties stuck between abandoning their federal rights or litigating in parallel venues—with parties refile in state court while separately taking a federal appeal to preserve any challenge to the Sixth Circuit’s outlier decision. The need for immediate guidance is palpable.

based on the happenstance of where a dispute arises. This promises chaos and confusion at best, and unequal treatment of indistinguishable stakeholders at worst. The Sixth Circuit has unilaterally upset decades of “widespread” consensus on a critical issue (Pet. App. 16a), and this Court alone can resolve the conflict. There is no advantage to postponing the Court’s review.

2. Respondents have no real answer for any of this. They do not dispute the issue’s obvious importance, and for good reason: retaliation safeguards are widely recognized (including by this Court) as essential to anti-discrimination schemes. They do not question that the issue constantly arises, as any casual Westlaw search confirms. They do not contest that this Court has repeatedly found the same question certworthy for parallel federal schemes. And they do not take issue with the obvious disruption the conflict will cause nationwide—as plaintiffs in Michigan, Ohio, Kentucky, and Tennessee alone lose their rights, and stakeholders everywhere else struggle with the fallout and uncertainty.

Instead, with little else to say, respondents suggest there is no “urgency” because injured parties can always seek ADA injunctive relief or sue under state law. Opp. 3-4, 16-17. This is bizarre.

a. It is obviously cold comfort to tell state employees they can still seek *injunctive* relief under the ADA (which is all the ADA allows in this context) when every other circuit authorizes *damages* under the Rehabilitation Act. Compare *Board of Trs. Of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (ADA), with 29 U.S.C. 794a(a)(2) (Rehabilitation Act). Damages make injured parties whole; injunctive relief does not. The two remedies are not remotely the same, and the ADA is no substitute for a proper Rehabilitation Act claim.

b. Nor are overlapping state remedies any answer. State-law relief is limited in important respects. The procedures are different. *Christie v. Wayne State Univ.*, 993 N.W.2d 203, 206 (Mich. 2023); Mich. Comp. Laws § 600.6431(1) (imposing notice requirements). The prerequisites are different. Ohio Rev. Code Ann. § 4112.052(B)(1) (imposing exhaustion requirements). Certain relief is different, including the inability to recover attorney’s fees. *Speller v. Toledo Pub. Schs. Bd. of Educ.*, 38 N.E.3d 509, 520 (Ohio Ct. App. 2015) (fees unauthorized). And, of course, jurisdiction is different: state-law claims force state employees to sue the State in its own state courts, an obvious disadvantage that a *federal* right (with access to a federal forum) avoids.<sup>5</sup>

Respondents brush past the obvious daylight between these schemes, but the substantive and procedural roadblocks are meaningful. It is little surprise that a State might downplay the importance of preserving the Rehabilitation Act’s federal remedies, but state law (like ADA injunctive relief) is an inadequate substitute.<sup>6</sup>

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<sup>5</sup> Theoretically, federal jurisdiction could exist where the parties are diverse—but *state* employees (for obvious reasons) will rarely be diverse from *state* defendants.

<sup>6</sup> Respondents hypothesize that all eleven circuits have treated the question presented in abbreviated fashion because “Rehabilitation Act retaliation claims are frequently pleaded alongside parallel claims under the ADA, Title VII, or a state civil rights law.” Opp. 16. Respondents’ speculation is unfounded. Courts dutifully treat each claim separately—as each has its own distinct elements and requires its own separate analysis. Courts do not merely assume that a Rehabilitation Act claim is viable whenever it appears alongside companion claims. There is a better explanation for the so-called cursory analysis: the Act’s text is remarkably clear. Section 504(d)’s cross-reference to Section 12203 is unmistakable—the incorporated section serves the singular core function of prohibiting retaliation. Again, this

c. In any event, the Rehabilitation Act is a federal law with a national scope. It is designed to have a uniform operation. Michigan cannot opt out of the federal scheme by offering its own state-law alternative—and there is indeed “urgency” when a vital federal law is gutted by an outlier 2-1 decision destroying a national consensus. The existence of overlapping (and inadequate) state remedies hardly diminishes the need for immediate review.

3. Respondents finally jump the gun with an extended discussion of the merits. Suffice it to say that eleven circuits disagree—which underscores precisely why further review is warranted. Respondents trot out the same points refuted by the dissent below. Their reading does not give Congress’s express cross-reference (“42 U.S.C. 1220[3]”) any meaning. 29 U.S.C. 794(d). Respondents insist Section 504(d) does not cover retaliation despite it directly incorporating an express anti-retaliation provision. And respondents cannot explain why Congress would want the Rehabilitation Act alone to expose state employees to retaliation—despite banning retaliation in every parallel federal scheme (including the ADA itself).

Congress took care to incorporate a targeted set of specified ADA sections to provide “standards” for determining “violations” under Section 504. One of those incorporated provisions prohibits retaliation (and effectively does nothing else). It is a mystery how respondents can simply brush aside that plain text to discard decades of settled practice.

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In the end, the 2-1 decision below leaves federal law in disarray. Rehabilitation Act claims that would prevail in California or Texas will now lose in Ohio and Michigan.

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is not difficult—which is why every single circuit, nationwide, had no trouble arriving at the same answer until the split decision below.

The Act's core prohibitions should not turn on geography. The circuit conflict is obvious and entrenched; the federal rights at issue are critical; the vehicle is perfect; and the battle ground is clear. Until this Court intervenes, parties will be left guessing whether they have a federal claim or not—and it does no one any good to be left unsure whether federal law protects state employees from retaliation. This case easily checks off every box for certiorari, and immediate review is warranted.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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