No. 25-1073

In the Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Petitioners,

v.

JOSE MONTANEZ, ET AL.,
Respondents.

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

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Montanez's brief is most notable for what it fails to include: A single citation to the record where he actually argued that the Commonwealth of Pennsylvania could or should be liable for the alleged acts of the Medical Defendants *before* the Third Circuit broached the subject. That omission is no accident. The fact is, Montanez never articulated *any* theory of derivative liability before the Third Circuit "interjected" that avenue of recovery into the case. *United States v. Sineneng-Smith*, 590 U.S. 371, 380 (2020).

Attempting a sleight-of-hand, Montanez now recasts both his pre-"interjection" briefing and the Third Circuit's opinion as raising and ruling on a "direct" theory of liability, under which the Commonwealth is liable for the Medical Defendants' alleged violations because they were plausibly aware of them. But Montanez's creative interpretation of his briefing cannot change the fact that that briefing boldly confirmed that naming the Commonwealth as a defendant was "redundant." But, of course, naming the Commonwealth would not have been "redundant" if Montanez *actually* sought to hold the Commonwealth liable for the acts of the third-party contractors.

Nor can Montanez's wordplay change the fact that the Third Circuit definitively resolved the vicarious liability issue it improperly injected into this case. In a subsection of its opinion titled "Montanez Has Pleaded Entitlement to Compensatory Damages," *see* App. 25a, the Third Circuit blatantly ignored the Commonwealth's entreaties to confine itself to that "direct" theory of liability. Instead, it held that the Commonwealth has an unconditional and unqualified "obligation to ensure" the third-party Medical Defendants' compliance

with Title II and Section 504, and that it was "error for the District Court to dismiss *** Montanez's request for compensatory damages" because he stated claims against those third parties. App. 31. The effect of these holdings cannot be clearer: In the Third Circuit, states are now vicariously liable any time any contractor commits any violation of Title II or Section 504.

Summary reversal is warranted because the vicarious liability issue was conjured up by the Third Circuit itself, in violation of the party-presentation principle. Alternately, because the circuit courts are deeply divided on this issue, this Court should exercise plenary review and resolve it.

I. THE THIRD CIRCUIT HELD THAT THE COMMONWEALTH IS VICARIOUSLY LIABLE FOR ALL TITLE II AND SECTION 504 VIOLATIONS COMMITTED BY ANY OF ITS CONTRACTORS.

In his reply brief below, Montanez forcefully asserted that naming the Commonwealth as a defendant in this action was "*redundant*," because he had "brought claims against *prison officials* in their official capacit[ies,]" which *individual-specific* claims would presumably provide him all the recovery he sought from the Commonwealth. C.A. Dkt. 46 at 2 (emphasis added). Indeed, when making this assertion, Montanez never even *mentioned* the Medical Defendants, refuting his current assertion that had tried to hold the Commonwealth "directly" liable for those third parties' actions. Nevertheless, a few days before oral argument, the Third Circuit ordered the parties to be "prepared to discuss *** [t]he extent to which the Commonwealth remains liable under Title II of the [Americans with Disabilities Act, 42 U.S.C. § 12132,] and [Section 504

of] the Rehabilitation Act[, 29 U.S.C. § 792,] for the actions of private contractors providing medical services to inmates within state prisons." App. 37a–38a.

In response, the Commonwealth Defendants emphasized that the issue of derivative liability was not before the court because Montanez himself never sought to hold the Commonwealth liable for the Medical Defendants' alleged acts. *Sineneng-Smith*, 590 U.S. at 376 (under the party-presentation principle, federal courts should "decide only the questions presented by the parties"). The Commonwealth Defendants alternatively argued that, if the court was nevertheless determined to pass on that issue, it should hold that any liability for damages is curtailed by the principle announced by this Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) ("[D]amages may not be recovered *** unless an official *** who at a minimum has authority to institute corrective measures on [an entity's] behalf has actual notice of, and is deliberately indifferent to, the [alleged] misconduct."); *see* C.A. Dkt. 81 at 5–6 ("If any form of derivative liability is available, [] Montanez must allege that prison officials knew or had reason to believe that the Medical Defendants were mistreating or not treating him.").

In its later opinion, the Third Circuit held that the Commonwealth has an "obligation to ensure compliance with Title II and Section 504 even when it contracts out the operation of [its] programs, services, or activities to third parties." App. 27a. Then, relying in part on its conclusion that the Medical Defendants plausibly violated Title II and Section 504—and without ever considering whether any Commonwealth official was ever plausibly aware of those alleged violations—the Third Circuit held that "[i]t was *** error for

the District Court to dismiss *** Montanez's request for compensatory damages." App. 31a.

As a result of the Third Circuit's interjection of the derivative-liability issue, the Commonwealth is now vicariously liable for *all* Title II and Section 504 violations committed by *any* of its contractors (medical or otherwise) at *any* time—in direct contravention of *Gebser* and other related cases, *see* Petition at 19–23.

Montanez repeatedly attempts to reinterpret the Third Circuit's holding to align with *Gebser*. Indeed, Montanez obliquely concedes that *Gebser*'s deliberate-indifference standard is the correct one when attempting to recover compensatory damages under Title II and Section 504. Respondent's Br. at 24–26.[1] He also asserts that *Gebser* "highlights the important difference between direct and vicarious liability." *Id.* at 24. And he argues that the Third Circuit's holding is "most fairly read," *id.* at 30, and "best understood as embracing [only a] theory of direct liability" that requires a

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[1] Despite this concession, Montanez nevertheless cites to the Restatement of Agency to suggest that the Commonwealth would be liable if, *inter alia*, it was "negligent in selecting, supervising, or otherwise controlling" the Medical Defendants. Respondent's Br. at 25 (citing Restatement (3d) Agency § 7.03). But *Gebser* "rejected the use of agency principles," and "declined the invitation to impose liability under what amounted to a negligence standard[.]" *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999). *Gebser* also specifically declined to impose liability when "a public entity or federal-funding recipient *may* have known or *should have* known about the conduct of the contractor and failed to stop it." Respondent's Br. at 25 (emphasis added); *cf. Davis Next Friend LaShonda D.*, 526 U.S. at 642 ("[W]e declined *** [to] hold[] the district liable for its failure to react to teacher-student harassment of which it *** *should have* known." (emphasis in original)).

showing of deliberate indifference by Commonwealth officials, *id.* at 8.

Yet Montanez also concedes that, when reversing the District Court's ruling on compensatory damages, the Third Circuit *never even considered* whether Montanez plausibly alleged that any Commonwealth official was deliberately indifferent to the Title II and Section 504 violations allegedly committed by the Medical Defendants. Respondent's Br. at 26 ("[T]he Third Circuit *** [did not] identify[] sufficient allegations showing that the Commonwealth was deliberately indifferent ***."). It is highly unlikely that that failure was accidental. As noted above, the Commonwealth Defendants' supplemental brief implored the Third Circuit to impose *Gebser*'s deliberate-indifference standard. But the Third Circuit ignored that plea, and failed to give *Gebser* even a passing glance. Montanez's aspirational reinterpretation of what the Third Circuit "presumably held," *id.* at 13, then, is flatly wrong.

More fundamentally, the Third Circuit's holding that the Commonwealth has an "obligation to ensure [contractors'] compliance with Title II and Section 504," App. 27a, can only be interpreted as imposing vicarious liability whenever those contractors violate the law, even if Commonwealth officials had no involvement in, or even knowledge of, those violations. *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) ("oblig[ing a party] to control the conduct of others" imposes "vicarious liability" on that party under 42 U.S.C. § 1983).

Facing *Pembaur*, Montanez concedes that "imposing a responsibility on an employer to ensure that its employees do not commit constitutional torts *necessarily* invokes vicarious liability." Respondent's Br. at

23 (emphasis added). But he argues that imposing that same responsibility with respect to violations of Title II or Section 504 somehow does not, because those statutes impose an "affirmative obligation" on the Commonwealth, whereas Section 1983 imposes none. *Ibid.* As noted above, *Gebser* and other decisions of this Court instruct that an entity's "affirmative obligation" under Title II and Section 504—for the purposes of a damages remedy, at least—is merely to rectify or prevent *known* violations of those statutes. The Third Circuit's holding that the Commonwealth must affirmatively "ensure compliance" with those statutes, App. 27a—and its pointed, specific reversal of the District Court's dismissal of "Montanez's request for compensatory damages" against the Commonwealth, without any consideration of whether Commonwealth official had knowledge of any violations, App. 31a—drastically expands that "affirmative obligation."[2]

The Third Circuit, then, unmistakably held that the Commonwealth is vicariously liable for all Title II and Section 504 violations committed by its contractors.

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[2] To be clear, the Commonwealth does not argue—and has never argued—that it can "evade [any] affirmative obligations under Title II or Section 504 by contracting out its public services." Respondent's Br. at 19. And despite the Third Circuit's characterization to the contrary, the Commonwealth never "contend[ed] that it cannot be liable for *any* Title II and Section 504 violations of the Medical Defendants because they are contractors, not government employees." App. 27a (emphasis added). The Commonwealth only argued that, if the Third Circuit insisted on reaching the derivative-liability issue, it should hold that *Gebser*'s deliberate-indifference standard applies when a plaintiff seeks damages. *See* C.A. Dkt. 81 at 3–5.

II. MONTANEZ CONCEDES THAT THE THIRD CIRCUIT INTERJECTED THE VICARIOUS-LIABILITY ISSUE INTO THIS CASE.

Montanez concedes, as he must, that the issue of vicarious liability was "unbriefed and unargued" below. Respondent's Br. at 30. But as explained above, the Third Circuit nevertheless independently raised and resolved that issue in its opinion. Montanez thus necessarily concedes that the Third Circuit "interjected," *Sineneng-Smith*, 590 U.S. at 380, the vicarious-liability issue into the case below.

But, relying on his "presum[ptive]" reinterpretation of the Third Circuit's decision as consistent with *Gebser*, *see* Respondent's Br. at 13, Montanez argues that he continuously sought to hold the Commonwealth "directly" liable for the Title II and Section 504 violations allegedly Committed by the Medical Defendants. *Id.* at 7–8. That is, he argues that, in the District Court, and before the "interjection" by the Circuit Court, he continuously asserted that the Commonwealth should be directly liable for the Medical Defendants' violations because his allegations satisfied *Gebser*'s deliberate-indifference standard. *Id.* at 10–12. In support, Montanez asserts that it "made good sense" for him to name the Commonwealth as a defendant "because [he] filed grievances about the conduct of" the Medical Defendants, "thus putting the Commonwealth on notice of repeated disability discrimination at its facilities." *Id.* at 10. He also asserts that his Opening Brief before the Third Circuit referenced a "pattern of discriminatory conduct involving multiple facilities and *** medical contractor employees." *Id.* at 11.

It may have "made good sense" for Montanez to name the Commonwealth as a defendant, and his

Opening Brief to the Third Circuit may have referenced an alleged "pattern" of behavior in contravention of Title II and Section 504. But, before the Third Circuit's "interjection" of the derivative-liability issue—and despite having counsel on appeal—Montanez never asserted or argued that the Commonwealth *itself* should be liable ("directly" or otherwise) for the Title II and Section 504 violations allegedly committed by the Medical Defendants. Notably, Montanez points to not a single page of pre-"interjection" briefing in which he actually articulated this theory of liability. To the contrary—and as conspicuously omitted in his brief in opposition—Montanez's final brief before the Third Circuit's "interjection" took the position that naming the Commonwealth as a defendant was actually "*redundant*." C.A. Dkt. 46 at 2.

The Third Circuit, then, did not simply "clarify[]" Montanez's argument. Respondent's Br. at 8. Instead, it *sua sponte* "interjected" the entire issue of derivative liability, resulting in its ultimate holding regarding vicarious liability.

III. THE THIRD CIRCUIT'S DECISION DEEPENED A CIRCUIT SPLIT.

Montanez concedes that the Sixth and Eleventh Circuits have explicitly held that vicarious liability is unavailable under Title II and Section 504, and that the Fourth, Fifth, and Ninth Circuits have explicitly held the opposite. *See* Respondent's Br. at 24 n.7. Montanez thus concedes that the circuit courts are split on the availability of vicarious liability under these statutes. But Montanez nevertheless argues that the Third Circuit's decision below does not "implicate[]" this circuit split. *Id.* at 26.

Montanez is wrong—because his "presum[ptive]" reinterpretation of the Third Circuit's decision is wrong. *Id.* at 13. As explained above, the Third Circuit held that the Commonwealth has an affirmative obligation to "ensure compliance" with Title II and Section 504, and then specifically reinstated Montanez's "request for compensatory damages" without ever considering whether any Commonwealth official was plausibly aware of the Medical Defendants' alleged conduct. App. 31a. This ruling imposed vicarious liability on the Commonwealth, and aligned the Third Circuit with explicit holdings of the Fourth, Fifth, and Ninth Circuits, in opposition to explicit holdings from the Sixth and Eleventh Circuits.

In furtherance of his quest to soften the implications of the Third Circuit's ruling that the Commonwealth must "ensure compliance" with Title II and Section 504, Montanez notes that other circuit courts have reached similar conclusions without explicitly "[f]inding vicarious liability available as a theory of recovery" under those statutes. Respondent's Br. at 26–28.

Two of the decisions Montanez cites, however, did not involve requests for damages, and thus the issue of vicarious liability for that remedy necessarily could not have been reached. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063–64 (9th Cir. 2010) (noting that "[a]t issue in the . . . appeal" was the plaintiff's request for injunctive relief); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 265 (2d Cir. 2003) (noting that plaintiffs were appealing the district court's "findings of liability" and "imposition of injunctive relief"). And while the remaining cited decisions do not explicitly hold that vicarious liability is available, both strongly suggest that it is.

See Castle v. Eurofresh, Inc., 731 F.3d 901, 905, 910–11 (9th Cir. 2013) (in a case where plaintiff sought *only* "money damages," noting *only* that the state could avoid liability by showing that the requested accommodations were not "reasonable"); *Marks v. Colorado Dep't of Corr.*, 976 F.3d 1087, 1097 n.10 (10th Cir. 2020) (noting that "compensatory damages" against the state agency would be available even if the agency "couldn't prevent" the Title II and Section 504 violations, and even if those violations occurred "without the authority or consent" of the agency).

Taking a different approach, Montanez also attempts to bridge the gulf between the Third Circuit, on the one hand, and the Sixth and Eleventh Circuits, on the other hand, by arguing that the plaintiffs in the Sixth and Eleventh Circuits were explicitly seeking recover under a theory of vicarious liability, where he purportedly only ever advanced a theory of "direct liability." Respondent's Br. at 28–30. But, as explained above, Montanez never actually advanced his "direct liability" theory below. More importantly, the fact that those other plaintiffs explicitly sought vicarious liability does nothing to alter the ramifications of Third Circuit's decision—i.e., that vicarious liability is available. And the fact that that conclusion was reached only after the impermissible "interjection" of the derivative-liability issue—which by itself warrants summary reversal—compounds the Third Circuit's error.

The Third Circuit's decision, then, deepened an acknowledged circuit split on the issue of vicarious liability under Title II and Section 504.

* * *

A few days ago, this Court summarily reversed the Fourth Circuit on party-presentation grounds—for the second time in six months. *See Margolin v. Nat'l Ass'n of Immigr. Judges*, No. 25–767, 608 U.S. ---, 2026 WL 1463466 (U.S. May 26, 2026) (per curiam); *cf. Clark v. Sweeney*, 607 U.S. 7 (2025) (per curiam).

There, an association of immigration judges challenged a policy adopted by the Executive Office for Immigration Review. *Id.* at *1. The district court determined that the challenge had to be brought to the Merit Systems Protection Board, and dismissed the case for lack of jurisdiction. *Ibid.* The Fourth Circuit agreed that the applicable statute divested the district court of jurisdiction. *Ibid.* But it did not affirm. *Ibid.* Instead, it *sua sponte* concluded "that factual circumstances had called into question whether the [statute] was functioning as Congress intended." *Ibid.*

The Fourth Circuit did not resolve that "question" itself. Instead, it vacated the district court's ruling and "remanded for factfinding" related to that issue. *Ibid.* This Court nevertheless determined that the Fourth Circuit's decision to even "address[] [that] much broader" argument "violated the principle of party presentation," and summarily reversed. *Id.* at **1–2.

Here, the Third Circuit did not merely "address," *id.* at *2, the derivative-liability issue. It firmly resolved it (in Montanez's favor). And the Third Circuit did so despite the Commonwealth Defendants' repeated requests to, at a bare minimum, allow the district court to decide the issue in the first instance. *See* C.A. Dkt. 74 at 45 ("[W]e would ask that the court not pass on that specific issue, and let the District Court sort it out in the first instance[.]"). The Third Circuit's conduct in

the case below, therefore, is objectively more egregious than the Fourth Circuit's conduct in *Margolin*. In other words, if summary reversal was warranted in *Margolin*, it is surely warranted here, too.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Third Circuit on the first question presented. Alternatively, the Court should grant the petition, exercise plenary review, and resolve the second question presented.

Respectfully submitted,

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