No. 17-1222

IN THE

Supreme Court of the United States

MULTNOMAH COUNTY,

Petitioner,

v.

DAVID UPDIKE,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner frames the question presented as whether "deliberate indifference" or "discriminatory animus" is required to obtain compensatory damages under Title II of the Americans with Disabilities Act (ADA). But petitioner did not ask the court below to adopt an animus standard. Even before this Court, petitioner makes no argument for why proof of animosity toward people with disabilities should be required or why deliberate indifference to their need for accommodation does not suffice. It is easy to see why: This Court's precedent under Title II and closely related statutes effectively foreclose an animus requirement. Unsurprisingly, petitioner has identified no circuit that has held that proof of deliberate indifference is insufficient. In fact, the circuits petitioner cites continue to allow for the recovery of compensatory damages without a showing of animus.

Nor does the petition offer any basis for the Court to grant review "regardless of the circuit split," *see* Pet. 17. Petitioner posits that certiorari is needed to decide whether "the provision of an effective accommodation [can] amount to discriminatory intent." *Id.* i. But no such issue is raised by the decision in this case because the court of appeals never held that petitioner provided an effective accommodation in the first place. It could not have: The summary judgment record is replete with evidence that respondent was not effectively accommodated—indeed, that he was not accommodated at all. The "paradox" is of petitioner's own imagining. *See id.* 1.

Finally, petitioner offers a grab-bag of arguments for why the court of appeals erred in permitting this case to proceed. This Court does not ordinarily grant

certiorari to correct errors in application of settled legal principles, let alone at the summary judgment stage. In any event, there was no error here. Petitioner's attention-grabbing assertions about the decision below depend upon an account of the opinion and relevant facts that is disturbingly incomplete and inaccurate. No further review is warranted.

STATEMENT OF THE CASE

This is a case about disability discrimination. Respondent David Updike is deaf. Petitioner Multnomah County held him for several days in two of its jails, repeatedly denying him the ability to effectively communicate with jail officials and the outside world. On at least nine different occasions, Updike sought to communicate through an interpreter or an assistive device. Petitioner rejected or ignored each of Updike's requests without explanation, despite the fact that both accommodations were readily available.

A. Statutory Background

1. In 1990, Congress enacted the Americans with Disabilities Act. Title II of the Act mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[1]

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[1] This case also involves claims under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. As the courts below and petitioner have recognized, Title II largely mirrors Section 504; thus, respondent's claims under the two statutes were analyzed

The Act addresses "various forms of discrimination" against individuals with disabilities, including the "failure to make modifications to existing" practices. *Id.* § 12101. "[W]hether a specific modification for a particular person's disability" is required is an individualized, context-specific determination. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (interpreting Title III of the ADA). But the Act does not require public entities to provide any accommodation that would result in "undue financial and administrative burdens" or that would entail a "fundamental alteration in the nature of a service, program, or activity." 28 C.F.R. § 35.164.

Congress provided a private right of action allowing persons whose Title II rights are violated to obtain both compensatory damages and injunctive relief. *See* Pet. 5-6 (citing 42 U.S.C. § 12133). Although the statute does not specify what plaintiffs must prove to obtain relief, courts generally agree that compensatory damages require proof of intentional wrongdoing. *See id.* 11-16 (collecting cases); *see also Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding that a compensatory damages claim under Title II could proceed). No such showing, however, is required to obtain prospective relief. *See* Pet. 16.

2. Title II's protections extend to persons who are incarcerated. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998). Given that such individuals are "stripped . . . of virtually every means of self-protection and foreclosed [from] access to outside aid," *Farmer v. Brennan*, 511 U.S. 825, 833 (1994),

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together and are discussed interchangeably here. *See* Pet. App. 19a; Pet. 6 n.1.

Congress recognized that Title II's protections were especially needed in correctional settings, *see Lane*, 541 U.S. at 524-25; *see also United States v. Georgia*, 546 U.S. 151, 161 (2006) (Stevens, J., concurring).

Both Congress and this Court have recognized that deaf persons in correctional settings are at particular risk of serious discrimination. Without accommodation or means of enlisting help from those outside, deaf persons cannot meaningfully participate in proceedings against them or understand communications vital to their physical safety. *See Lane*, 541 U.S. at 524-25; McCay Vernon, *The Horror of Being Deaf and in Prison*, 155 Am. Annals Deaf 311, 312, 314 (2010).

B. Facts and Proceedings Below[2]

1. Respondent David Updike was born deaf, attended a deaf school, and has only deaf friends. Updike Declaration ¶¶ 1-2, ECF No. 88. American Sign Language (ASL) is Updike's native language and primary means of communication; English is his second language. Pet. App. 2a. ASL's syntax and grammar are not derived from English. *See Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 255 n.1 (D.D.C. 2015). Having never heard spoken English, Updike finds lip-reading and speaking exceptionally

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[2] This case's summary judgment posture requires that all evidence be considered in the light most favorable to respondent's claims. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). But the petition fails to mention, and indeed flouts, that principle. For instance, the petition's recitation of the "[m]ost relevant" facts, Pet. 8, omits evidence—pertaining to refusals to provide access to the jail telephones—that is central to Updike's claim and to the court of appeals' decision. *See infra* at 21.

difficult. Pet. App. 2a. When Updike earned an associate's degree from Portland Community College, the college provided him ASL interpreters for his studies. Updike Declaration ¶ 3, ECF No. 88.

2. In January 2013, officers from the Gresham, Oregon Police Department responded to a neighbor's report of a disturbance at Updike's home. Pet. App. 3a. Unable to understand Updike, the officers arrested him. Amended Complaint ¶¶ 17-19, ECF No. 60. Charges were ultimately dismissed, but not before Updike was forced to spend three days in two of petitioner's jails. *See* Pet. App. 39a & n.3.

3. During his time in these two facilities, Updike observed that other detainees were allowed to make phone calls. Pet. App. 4a, 6a-7a. Intending to contact an attorney and his family, Updike made a number of requests for a teletypewriter (TTY), an auxiliary aid that would have enabled him to use the jail telephone. *Id.* He did so by miming the use of a telephone and attempting to say "TTY." *Id.* 4a.

Despite the fact that TTYs were on site at each facility, Pl. C.A. Br. 5, 12, petitioner rebuffed Updike's repeated requests, Pet. App. 4a, 7a. As a result, Updike, unlike the non-deaf detainees around him, was prevented from communicating with an attorney or his family. *Id.*

Updike also requested an ASL interpreter on multiple occasions so he could communicate with jail personnel. He did so during his booking, medical exam, recognizance interview, and pre-trial assessment. Pet. App. 3a-9a. Despite petitioner's contract with an ASL interpreter service and the fact that Updike's requests occurred during business hours, Updike was never provided an interpreter. *Id.* 3a; Pl. C.A. Br. 38-39.

During his exam with a nurse, for example, Updike attempted to communicate that the police had hurt his neck and back during the arrest. Pet. App. 4a. Without an ASL interpreter, the nurse was left to gesture to a standard health intake form, which Updike struggled to understand. *Id.* 4a-5a. As a result, "the nurse did not examine his neck and back." *Id.* And when Updike met with another correctional official for a triage interview, that official did "not know how to get an ASL interpreter." *Id.* 6a.

4. The State's initial attempt to arraign Updike failed. Due to miscommunication between petitioner and Oregon's judicial department, no one arranged for an ASL interpreter. The presiding judge postponed the arraignment as a result, causing Updike to spend another night in jail. Pet. App. 7a, 21a. When Updike was finally arraigned, the judge ordered his release. Pl. C.A. Br. 12. Only at that point did petitioner finally allow Updike to use the TTY to call his daughter to pick him up. Pet. App. 8a.

5. Petitioner's refusal to accommodate Updike's disability continued even after his release. Updike's pre-trial supervision case manager misinterpreted his attempts to communicate with her as argumentative behavior. *See* Pet. App. 9a n.4. The case manager also unnecessarily required Updike to report in person because she did not understand that he, like non-deaf supervisees, could do so by telephone, with the assistance of an ASL interpreter. Pl. C.A. Br. 12-13.

6. Updike filed suit against petitioner Multnomah County, the City of Gresham, and the State of Oregon, Pet. App. 9a, alleging that each had unlawfully discriminated against him on the basis of his

disability. The suit sought compensatory damages and injunctive relief. *Id.*[3]

7. The City settled with Updike. The State moved for summary judgment, which the district court granted. Pet. App. 9a-10a.

The district court relied on Ninth Circuit precedent requiring a plaintiff seeking compensatory damages under Title II to prove intentional discrimination. Opinion and Order at 4, ECF No. 77 (citing *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998)). This intent requirement is met when a defendant acts with deliberate indifference to the rights of a person with disabilities. *Id.* (citing *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001)). That is to say, a plaintiff must show that the defendant's "failure to act [was] a result of conduct that is more than negligent, and involves an element of deliberateness." *Id.* 5. (citing *Duvall*, 260 F.3d at 1139). The district court concluded that the evidence pertaining to the absence of an ASL interpreter at the arraignment "at most" showed negligence by the State. *Id.* 7.

8. Petitioner also moved for summary judgment. Pet. App. 10a. It acknowledged that the "crux of [Updike's] federal claims is that the County violated

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[3] Both the district court and the court of appeals held that the claims for injunctive relief could not go forward. They concluded that Updike lacked standing to challenge ongoing systemic mistreatment of deaf detainees because he could not show a likelihood that he would be imminently rearrested and subjected to these practices. *See* Pet. App. 12a-14a. Those claims are not before the Court.

the ADA and the Rehabilitation Act by failing to provide [Updike] with an ASL interpreter or [TDD]."[4] Defendant Multnomah County's Motion for Summary Judgment at 7, ECF No. 85. But petitioner argued that it effectively accommodated Updike by "supply[ing] writing materials" to him. *Id.* Updike opposed the motion, relying on deposition testimony regarding petitioner's denial of access to its TTY and refusals to provide an ASL interpreter. Plaintiff's Memorandum in Opposition to Defendant Multnomah County's Motion for Summary Judgment at 2-15, ECF No. 92. In response, petitioner protested this evidence on the ground that it raised factual allegations beyond those in Updike's complaint. *See* Defendant Multnomah County's Reply in Support of Motion for Summary Judgment at 2, ECF No. 100.

The district court sided with petitioner and held that Federal Rule of Civil Procedure 8(a)(2) required it to disregard the incidents described in Updike's deposition testimony. Pet. App. 52a. The court held in the alternative that the evidence did not raise a triable issue as to whether petitioner acted with deliberate indifference. *Id.* 52a-53a.

9. Updike appealed. In response to Updike's appeal, petitioner repeated its notice objections. Def. C.A. Br. 4. Indeed, petitioner's brief announced that it would not include what it called the "additional new allegations in [its] Statement of Facts." *Id.* 5.

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[4] The quoted pleading inadvertently abbreviated Telecommunication Device for the Deaf as "TTD," instead of "TDD." As the court of appeals explained, Updike and the court itself used "TDD" and "TTY" "interchangeably." Pet. App. 3a n.2.

On the merits, petitioner argued that it had not acted with deliberate indifference because "County staff reasonably believed their ongoing communication" with Updike—through methods such as lip-reading and "body gestures"—was "sufficient." Def. C.A. Br. 20-21.

10. The court of appeals reinstated Updike's damages claim against the County. The court first ruled that the district court erred in refusing to consider Updike's evidence of "the County's failure to provide auxiliary aids and services." Pet. App. 23a.

Viewing the entire record in the light most favorable to Updike, Pet. App. 10a, the court of appeals held there were triable issues both as to whether petitioner's accommodations were ineffective and as to whether petitioner acted with deliberate indifference. *Id.* 32a-33a, 35a.

In holding that "a reasonable jury [could] find that the County was deliberately indifferent," the court's opinion exhaustively detailed the record evidence that, among other things, petitioner: had "failed to provide Updike with an ASL interpreter in a multitude of interactions with County employees"; "did not offer use of a [TTY]"; "did not conduct an informed assessment of Updike's accommodation needs"; and did not give "context-specific consideration to his [accommodation] requests." Pet. App. 35a.[5]

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[5] The court of appeals also affirmed the grant of summary judgment on Updike's claims involving his failed arraignment. The court ruled that Updike's evidence did not raise a triable claim against petitioner or the State because the failure to timely arrange for an ASL interpreter at his arraignment did not

The court emphasized that it was "not hold[ing] that Updike necessarily was entitled to have an ASL interpreter as a matter of course" or "that the County should be subject to liability for failing to provide one." Pet. App. 34a. It instead remanded for the fact-finder to decide whether communication between Updike and petitioner was ineffective, and if so, whether petitioner acted with deliberate indifference or mere negligence. *Id.* 36a.

11. The County sought rehearing en banc. Nowhere did petitioner ask the Ninth Circuit to reconsider its deliberate indifference precedent or argue that an animus standard was proper. *See* Appellee Multnomah County's Petition for Rehearing En Banc, *Updike v. Multnomah County*, No. 15-35254 (9th Cir. Oct. 16, 2017), ECF No. 58. Instead, after two passing references to a circuit "split," *see id.* 4, 11 n.1, petitioner asked the en banc court to correct the panel's alleged misapplication of the Ninth Circuit's deliberate indifference case law, *id.* 11-21. The court of appeals denied the petition without recorded dissent. Pet. App. 64a-65a.

REASONS FOR DENYING THE WRIT

I. The question petitioner poses regarding the appropriate level of discriminatory intent does not warrant review.

A. The alleged circuit split is illusory.

As petitioner acknowledges, all courts of appeals, including the Ninth Circuit, require plaintiffs to demonstrate intentional discrimination to recover

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support an inference of deliberate inaction. Pet. App. 20-21a, 31a-32a.

compensatory damages under Title II. Pet. 10, 15. Petitioner claims that review is nonetheless necessary because, it alleges, three circuits have held that a plaintiff may recover compensatory damages only if she proves the defendant acted with animus, ill-will, or hostility when it violated her rights and that proof of deliberate indifference is insufficient. *Id.* 1, 10-12. But this assertion rests almost entirely on misreadings of language plucked from a handful of inapposite decisions. It is clear that neither the Fifth nor the Sixth Circuit requires proof of discriminatory animus to recover damages. The law in the First Circuit is admittedly less clear, though petitioner's description of it is exaggerated. Indeed, every court to consider the two standards has required a showing of deliberate indifference, and not disability-based animus, to establish intent under Title II.

1. No circuit would have required Updike to demonstrate disability-based animus to recover compensatory damages.

a. Petitioner completely misunderstands the Fifth Circuit rule. When the Fifth Circuit said there is "no 'deliberate indifference' standard applicable to public entities," Pet. 12 (quoting *Delano-Pyle v. Victoria County*, 302 F.3d 567, 575 (5th Cir. 2002)), it was not responding to a *plaintiff's* argument that deliberate indifference was sufficient to establish liability. Rather, the Fifth Circuit was rejecting a *defendant's* argument that a plaintiff should be required to show both intentional discrimination by a line-level government employee and deliberate indifference by the government entity (analogous to the mens reas required for certain municipal liability claims under 42 U.S.C. § 1983). *See Delano-Pyle*, 302 F.3d at 574-

75; *cf. Connick* v. *Thompson*, 563 U.S. 51 (2011). The Fifth Circuit thus explained that a Title II plaintiff need not satisfy a second "'deliberate indifference' standard" to recover damages. *Delano-Pyle*, 302 F.3d at 575. Indeed, the facts the Fifth Circuit held sufficient to affirm the "jury's finding of intentional discrimination," *id.*, were essentially similar to those in Updike's case: Law enforcement authorities forged ahead with standard practice, ignoring the fact that the plaintiff was hearing-impaired and could not comprehend their instructions. *Id.* at 570-71, 575-76. The court did not require, much less find, proof of animus, malice, or hostility.

Accordingly, the Fifth Circuit has since explained that it "did not define what [it] meant by intent in *Delano-Pyle*" and has expressly refused to hold that proof of deliberate indifference cannot support a Title II damage award. *See Perez* v. *Doctors Hosp. at Renaissance, Ltd.*, 624 Fed. Appx. 180, 184 (5th Cir. 2015); *see also McCollum* v. *Livingston*, No. 4:14-CV-3253, 2017 WL 2215627, at *2-3 (S.D. Tex. May 19, 2017); *Falls v. Bd. of Comm'rs*, No. 16-2499, 2017 WL 2730781, at *5-8 (E.D. La. June 26, 2017) (applying the deliberate indifference standard).

The only other Fifth Circuit case petitioner cites is *Campbell v. Lamar Institute of Technology*, 842 F.3d 375 (5th Cir. 2016). All *Campbell* holds is that courts "must defer to [a] university's academic decision not to alter its program," *id.* at 380—at least where a school already provides reasonable accommodations in its academic program and makes a determination that further accommodation would constitute a fundamental alteration to that program. Evidence of "'malice, ill-will, or efforts . . . to impede' a disabled

student's progress" can serve to overcome the presumption of deference, *id.* (quoting *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 859 (5th Cir. 1993))—an entirely different question than the requisite standard of intent.[6] Thus, as courts within the Fifth Circuit recognize, *Campbell*'s "malice" language pertained only to a distinct, "unique issue: a 'university's academic decision not to alter its program' to accommodate a disabled student, to which a court 'must defer.'" *See Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. 17-4803, 2017 WL 4791185, at *17 (E.D. La. Oct. 24, 2017) (quoting *Campbell*, 842 F.3d at 380); *accord Falls*, 2017 WL 2730781, at *6.

To the extent *Campbell* addressed the requisite level of intent under Title II, it merely recited that "[a] student may only recover compensatory damages upon a showing of intentional discrimination." 842 F.3d at 380 (citing *Delano-Pyle*, 302 F.3d at 574). It never went on to equate "intentional discrimination" with discriminatory animus.

b. For the Sixth Circuit, petitioner relies solely on *Anderson ex rel. C.A. v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015), for the proposition that plaintiffs subject to unlawful discrimination must prove "animus against the protected group" to recover compensatory damages under Title II. Pet. 12 (quoting *Anderson*, 798 F.3d at 357). But petitioner misunderstands *Anderson*. That case did not hold that "the plaintiff must 'present evidence [of] animus

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[6] Like *Campbell*, *McGregor* upheld a university's rejection of a student's request for an academic accommodation because his disability had already been reasonably accommodated. 3 F.3d. at 860.

against the protected group'" in order to recover compensatory damages under Title II. *Id.* at 11-12 (quoting *Anderson*, 798 F.3d at 357). In *Anderson*, 798 F.3d at 353-60, the plaintiffs brought the two types of claims that are cognizable under Title II for damages in the Sixth Circuit: a disparate treatment claim and a failure-to-accommodate claim. *See Roell v. Hamilton County*, 870 F.3d 471, 488 (6th Cir. 2017). The court held that the absence of evidence of animus was fatal to the plaintiffs' disparate treatment claim. *Anderson*, 798 F.3d at 359-60. But that absence of animus did not prevent the *Anderson* court from reversing the district court and reinstating the plaintiffs' failure-to-accommodate claim. *Id.* at 356.

Accordingly, since *Anderson*, the Sixth Circuit has applied the deliberate indifference standard without mentioning discriminatory animus. *See R.K. ex rel. J.K. v. Bd. of Educ.*, 637 Fed. Appx. 922, 925 (6th Cir. 2016) (Kethledge, J.). As have district courts within the circuit. *See, e.g.*, *K.C. ex rel. T.C. v. Bd. of Educ. of Marshall Cty. Sch.*, No. 5:16-CV-00136-TBR, 2018 WL 627161, at *5-10 (W.D. Ky. Jan. 30, 2018); *Johnston v. New Miami Local Sch. Dist. Bd. of Educ.*, No. 1:14cv973, 2016 WL 5122536, at *8 (S.D. Ohio Sept. 21, 2016).

c. As petitioner appears to concede, it is not correct that the First Circuit "require[s] a defendant to pay compensatory damages" only when that defendant has "acted with animus or ill-will." Pet. 11. In *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003), the court declined to dismiss Title II and Section 504 claims brought by a hearing-impaired student and his parents after his school ceased providing a sign language interpreter. *Id.* at 112-13. Even though there

was no suggestion of animus or hostility—the plaintiffs had only pled "irrational, arbitrary and unreasonable" conduct—the court concluded that the claim for damages was not precluded. *Id.* at 126 n.21, 127.[7] Courts within the First Circuit continue to allow claims for economic damages to move forward without a showing of animus. *See, e.g.*, *Kelley v. Mayhew*, 973 F. Supp. 2d 31, 39-40 (D. Me. 2013).

To be sure, later First Circuit decisions have attached significance to the fact that the *Nieves-Marquez* court addressed compensatory damages for economic harms and have indicated that proof of animus is relevant when non-economic compensatory damages are at issue. But petitioner overstates *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14 (1st Cir. 2006), as holding that such damages are recoverable only on proof of animus. That case recognized that plaintiffs could recover non-economic damages without a showing of animus—so long as they established economic harm. *See id.* at 17 (explaining that "non-economic damages are only available when there is evidence 'of economic harm *or* animus toward the disabled'" (emphasis added) (quoting *Nieves-Marquez*, 353 F.3d at 126-27)). The absence of animus precluded recovery of non-economic damages in that case only because the plaintiff was not seeking economic damages. *Id.*; *see also Schultz v. Young Men's Christian Ass'n*, 139 F.3d 286, 290-91 (1st Cir.

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[7] The First Circuit did not definitively rule on the damages question because the defendant was Puerto Rico, which the First Circuit treated as a state for Eleventh Amendment purposes, and because *Tennessee v. Lane*, 541 U.S. 509 (2004), which raised the question of Eleventh Amendment immunity, was pending before this Court. *See Nieves-Marquez*, 353 F.3d at 127.

1998) (similarly discussing animus only after establishing that the plaintiff made no claim of economic loss).

Because Updike seeks both economic and non-economic damages, Amended Complaint ¶¶ 43-44, ECF No. 60, the summary judgment outcome would be no different if his case had instead arisen in the First Circuit instead of the Ninth Circuit.

The same is true with respect to the Fifth and Sixth Circuits. Indeed, petitioner's lead cases from those courts held in favor of plaintiffs who brought failure-to-accommodate claims but did not allege that the defendants acted with animus. Thus, petitioner has no basis for its claim that "the most significant determinative factor" as to whether defendants will be liable for Title II compensatory damages is "the judicial circuit in which they are located." Pet. 17.

2. When one looks beyond stray language in opinions, it becomes clear that every circuit that has actually engaged in an analysis of the appropriate standard by which a plaintiff can recover compensatory damages—the Second, Third, Eighth, Ninth, Tenth, and Eleventh Circuits—has settled upon deliberate indifference and rejected the discriminatory animus requirement. *See, e.g.*, *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 344-48 (11th Cir. 2012); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262-65 (3d Cir. 2013).[8] In

[8] Petitioner is correct that the D.C. and Seventh Circuits have not definitively rejected the animus requirement. *See* Pet. 13 n.2. But district court decisions in both circuits have adopted the deliberate indifference standard. *See, e.g.*, *Prakel v. Indiana*,

contrast, the words "deliberate indifference" do not even appear in the decisions petitioner cites as establishing a split, other than irrelevantly in *Delano-Pyle*.

B. An animus requirement is untenable in light of this Court's precedent.

1. Petitioner offers no justification for imposing an animus requirement. At most, petitioner makes noises about how the Rehabilitation Act's enactment under the Spending Clause and that statute's overlap with Title II support some intent requirement for damages claims. *See* Pet. 11-12, 15-16.[9] Petitioner has already won that point: Every circuit—including the Ninth—agrees. But on the question whether Spending Clause considerations support an *animus* requirement, petitioner has lost—and properly so.

As the Third and Eleventh Circuits have recognized, this Court has firmly established that in litigation arising under Spending Clause statutes, a showing of deliberate indifference is sufficient for compensatory damages. *See Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 347-48 (11th Cir. 2012) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 264 (3d Cir. 2013) (same). As these

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100 F. Supp. 3d 661, 684-85 (S.D. Ind. 2015); *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 278-79 (D.D.C. 2015).

[9] While the ADA was enacted under the Commerce Clause and Section 5 of the Fourteenth Amendment, Title II's remedial provision references the Rehabilitation Act. 42 U.S.C. § 12133. This Court has held that Spending Clause principles generally apply to the recovery of damages under Title II. *See Barnes v. Gorman*, 536 U.S. 181, 189 n.3 (2002).

circuits have recognized, Spending Clause legislation requires a showing of intentional misconduct in order to recover damages. They have held, as has this Court, that a funding recipient intentionally violates the law when it is deliberately indifferent to its legal obligations. *See, e.g.*, *S.H.*, 729 F.3d at 264 n.24 (citing *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999)); *see also UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (holding that intentional discrimination under Title VII may occur in "the absence of a malevolent motive"); *cf. Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (noting that deliberate indifference is a "culpable state of mind" (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991))).

2. Nor can an animus requirement plausibly be reconciled with this Court's three decisions arising from Title II compensatory damages claims in the criminal justice setting: *Tennessee v. Lane*, 541 U.S. 509 (2004), *Barnes v. Gorman*, 536 U.S. 181 (2002), and *United States v. Georgia*, 546 U.S. 151 (2006). The claims of discrimination in each of these cases arose from a public entity's failure to provide reasonable accommodations. In none of these cases did the Court suggest, much less hold, that evidence of malice would be needed.[10]

In *Lane*, a person who used a wheelchair—and whose only means of accessing a second-floor courtroom was crawling up the stairs—brought a

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[10] So too in *Fry ex rel. E.F. v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), a case arising in the educational context. There, the Court did not require the plaintiff to show that the reason the school barred her from bringing her service dog to school was malicious.

Title II compensatory damages claim against the state judicial system based on its failure to reasonably accommodate his disability. *See* 541 U.S. at 513-14. The Court allowed the plaintiff's suit to proceed. *Id.* at 533-34. On petitioner's theory, a suit like Lane's would fail absent proof that a state's reason for not installing an elevator in its courthouse was "animus against the protected group." *See* Pet. 12. That theory cannot be right.

Barnes and *Georgia* likewise refute petitioner's theory. In *Barnes*, 536 U.S. at 183-84, the plaintiff, an arrestee who used a wheelchair, alleged Title II discrimination based on "reckless indifference" in securing him in a police van transporting him to jail. *See* Amended Complaint at 4, *Gorman v. Bishop*, No. 95-0475-CV-W-3 (W.D. Mo. Nov. 6, 1995), ECF No. 42. When the plaintiff proved the defendant's indifference at trial, the jury awarded both compensatory and punitive damages. *See Barnes*, 536 U.S. at 184. This Court held that punitive damages were unavailable under Title II, but its reasoning reinforced the appropriateness of the compensatory damages award. *See id.* at 189 (explaining that violations of Spending Clause legislation are "made good when the recipient *compensates* . . . for the loss caused by that failure" (emphasis in original) (quotation marks omitted)).

Finally, in *Georgia*, the Court held that an incarcerated person could sue a state for compensatory damages based on a failure "to accommodate [his] disability-related needs," at least insofar as the Title II claims were coextensive with a right to relief under the Eighth Amendment. 546 U.S. at 157, 159. Given that this Court has long held that the Eighth Amendment prohibits "deliberate indifference to serious medical

needs of prisoners," *see Estelle v. Gamble*, 429 U.S. 97, 104 (1976), there is no basis for an animus requirement under Title II. In fact, if the claim in *Georgia* had arisen from a county jail instead of a state prison, deliberate indifference would be sufficient to impose *punitive* damages for an Eighth Amendment violation. *See Smith v. Wade*, 461 U.S. 30, 51 (1983). So it makes no sense to say that deliberate indifference is insufficient to establish liability.

C. This case would be a bad vehicle for addressing issues about the requisite level of intent in Title II cases.

1. Even if there were any genuine discord regarding the requisite level of intent, this case would be an inappropriate vehicle for addressing that question.

"It is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990). Although petitioner was constrained before the panel to litigate under the Ninth Circuit's deliberate indifference precedent, petitioner was free to ask the court en banc to overrule that precedent. But petitioner did not do so. Its en banc petition contained two passing references to the supposed circuit split; it never asked the court to revisit the question in light of the alleged animus rule in other circuits. *See* Appellee Multnomah County's Petition for Rehearing En Banc at 4, 11 n.1, *Updike v. Multnomah County*, No. 15-35254 (9th Cir. Oct. 16, 2017), ECF No. 58. And its petition in this Court shows no effort to fill the void: Petitioner offers not a single argument for why an animus requirement is warranted.

And it is this Court's usual practice to deny review of decisions, like this one, which arise in an interlocutory posture. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory posture "alone furnishe[s] sufficient ground for the denial [of certiorari]"). The reasons this Court "generally await[s] final judgment" apply with full force here. *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for certiorari). Interlocutory appeals needlessly consume judicial resources and may require courts to decide abstract questions that the case does not actually present or that have no bearing on the case's outcome. *See* Eugene Gressman et al., *Supreme Court Practice* 281 n.63 (9th ed. 2007).

Indeed, this case is even less suitable for review than the typical interlocutory appeal. Ordinarily, when a case arises from a grant of summary judgment, all parties agree as to the factual basis on which a legal question should be decided. *See* Fed. R. Civ. P. 56. Not here: Petitioner's recitation of the relevant facts continues to omit, as it did before the court of appeals, *see supra* at 4 n.2, critically important evidence relating to its denial of access to a TTY and an ASL interpreter.

What is worse, this truncation requires petitioner to omit the reasoning—and indeed a square holding—of the court of appeals' decision it asks the Court to review. Not only did the decision rely heavily on this evidence in reinstating Updike's damages claims, it did so after holding that the district court erred in treating that evidence as not properly part of the case. The petition's failure to accurately present matters that are "essential to [the Court's] ready and adequate

understanding" of the case is "sufficient reason for the Court to deny [this] petition." *See* Sup. Ct. R. 14.4.

2. Petitioner identifies no reason for this Court's intervention notwithstanding these defects. Even its bald appeals for greater solicitude to governmental defendants do not hold water. Petitioner offers no example—from the Ninth Circuit or elsewhere—to substantiate its claim that courts are improperly "impos[ing] damage awards against governmental entities," Pet. 17. This is certainly not such a case. Far from imposing damages, the Ninth Circuit merely held there were triable issues and emphasized it was "not hold[ing] that . . . the County should be subject to liability." Pet. App. 34a.

For all petitioner's claims of broad significance, it cannot deny that Title II suits will proceed in every circuit regardless of the standard for compensatory damages. After all, injunctive relief is available without any showing of intent. *See* Pet. 16-17; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597-601 (1999). Indeed, injunctive relief could be awarded in a case like this if brought by an organizational plaintiff or a class of deaf detainees, rather than by an individual pre-trial detainee like Updike. *Cf. Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). And when plaintiffs prevail on claims for injunctive relief, they are entitled to recover attorneys' fees. *See* 42 U.S.C. § 12205; *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602-03 (2001).

II. The petition does not raise any other question warranting this Court's review.

Petitioner also asks the Court to review whether the provision of an effective accommodation can amount to discriminatory intent. But that question is not raised by the decision here. And none of the scattershot attacks petitioner launches on the court of appeals' opinion is worth this Court's time either.

1. Petitioner asserts that the court of appeals created "a paradox: a public entity can intentionally discriminate against a disabled individual by providing an effective accommodation." Pet. 1. But this question is not properly before this Court. The court of appeals did not hold that the relevant evidence established the effectiveness of the accommodations petitioner provided Updike. *See* Pet. App. 26a. For good reason: Petitioner clearly did not effectively accommodate Updike's disability when Updike sought to use a telephone to contact his family and an attorney. In fact, it did not accommodate him at all. Each of Updike's requests to use petitioner's on-site TTY was denied.

Moreover, the existing rule in the Ninth Circuit already establishes that an effective accommodation forecloses Title II liability. A plaintiff has no compensatory damages claim under Title II if the defendant provided an accommodation that gave the plaintiff equal access to the public service. The ultimate question is whether the public entity "provided appropriate auxiliary aids where necessary." Pet. App. 34a; *see also Duvall v. County of Kitsap*, 260 F.3d 1124, 1137 (9th Cir. 2001) (explaining that "[t]o prevail under the ADA," a plaintiff must show that the provided accommodation left him

"unable to participate equally"). Thus, in the Ninth Circuit, providing an effective accommodation does not constitute unlawful discrimination under Title II, much less give rise to a damages claim.

2. The remainder of the petition broadly protests the court of appeals' opinion—but petitioner's arguments misrepresent the opinion or ignore large swaths of it.

a. Petitioner complains that the court of appeals has "prohibited [Title II defendants] from asserting" the key defense that a requested accommodation "creates an undue financial burden." Pet. 25. Not so. The court of appeals pointed out that petitioner never even asserted that accommodating Updike's disability would have been an undue burden. *See* Pet. App. 33a n.7. More to the point, petitioner's contention is false. The court of appeals expressly recognized that under Title II, a public entity is not required to take any action that would result in an "undue financial or administrative burden." Pet. App. 18a (quoting 28 C.F.R. § 35.164); *accord Tennessee v. Lane*, 541 U.S. 509, 532 (2004). The language petitioner identifies as announcing a contrary rule only recognized that the fact that an accommodation requires some expenditure does not, in itself, establish an undue burden. *Compare* Pet. 20, *with* Pet. App. 18a.

b. Petitioner also wrongly claims that the court of appeals "improperly undercuts" the intent requirement by establishing a per se rule that "no additional evidence" is needed to recover damages "beyond the evidence of the plaintiff's request" for an accommodation. *See* Pet. 18-19.

As just noted, the court of appeals recognized that the ADA does not require a public entity to grant a

plaintiff's request for any accommodation that would impose an undue burden. Furthermore, a central tenet of the court of appeals' opinion is the need for evidence of an "element of deliberateness" above and beyond mere "bureaucratic slippage." Pet. App. 20a-21a (quoting *Duvall*, 260 F.3d at 1139). The fact that the Ninth Circuit carefully parsed Updike's various claims shows that it properly applied the ADA. For example, the court affirmed summary judgment for petitioner on Updike's claim that it failed to timely arrange for an ASL interpreter at his arraignment. Even though Updike requested but did not receive an interpreter, the court still held the evidence failed to establish a triable issue as to deliberate indifference.

c. Petitioner claims the court of appeals attached undue significance to the absence of an individualized inquiry into Updike's need for accommodation. But the court's decision did not turn on petitioner's failure to undertake such an inquiry. As the opinion makes clear, there was more than enough evidence of deliberate indifference to reverse the grant of summary judgment; the court's discussion of the numerous distinct ways petitioner failed to accommodate Updike spans five full pages of petitioner's own appendix. *See* Pet. App. 27a-31a.

At any rate, there is nothing inappropriate about treating the existence (or absence) of an individualized inquiry as probative of the defendant's intent. This Court held in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001), that refusing to consider an individual's personal circumstances "runs counter to the clear language and purpose of the ADA." Although *Martin* involved claims under Title III of the ADA, "[s]ince *Martin*, a number of courts have held that Title II

[also] requires public entities to engage in an individualized inquiry when determining whether an accommodation is reasonable." *See Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 77 (2d Cir. 2016) (holding that Title II requires an individualized inquiry).[11]

d. Finally, petitioner makes an ill-conceived argument that the court of appeals improperly considered Title II's implementing regulations. But regardless of the quoted regulations, a reasonable jury could find that petitioner "subjected [Updike] to discrimination," *see* 42 U.S.C. § 12132, by refusing him the same opportunities to communicate as non-deaf inmates, *see* Pet. App. 27a-31a.

In any event, there is nothing unusual about the court of appeals' reliance on Title II's implementing regulations. This Court relies on these regulations in construing the statute's requirements. *See, e.g.*, *Lane*, 541 U.S. at 532. And, what is more, the cases that petitioner cites also invoke them. *See, e.g.*, *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 380 (5th Cir. 2016). As did petitioner throughout its lower court briefing. *See, e.g.*, Def. C.A. Br. 17-18.

Petitioner claims that by requiring a public entity to "ensure that communications with disabled persons are as effective as communications with others," Pet. 23 (quoting Pet. App. 34a), the regulations somehow "create a right that Congress has not," *id.* 22 (quoting

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[11] Petitioner's assertion that the court extracted an individualized inquiry requirement from the regulations is simply wrong. *See* Pet. 22. The court's discussion of petitioner's failure to perform an individualized inquiry makes no mention of regulations. *See* Pet. App. 26a.

Alexander v. Sandoval, 532 U.S. 275, 291 (2001)). But such equality is exactly what Title II mandates: It requires that individuals with disabilities be able to "participate equally to all others in public facilities." *Fry ex rel. E.F. v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017).

CONCLUSION

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

Respectfully submitted,

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June 1, 2018