No. 24-_____

In the Supreme Court of the United States

JAMES GREGORY HOWELL, JR.,

Applicant,

v.

THE MOREHOUSE SCHOOL OF MEDICINE, INC.,

Respondent.

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

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Applicant James Gregory Howell, Jr. respectfully requests a 60-day extension of time, to and including Monday, November 4, 2024,[1] within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Unless extended, the time within which to file a petition for a writ of certiorari will expire on September 3, 2024. There is good cause to extend the deadline to November 4, and Applicant provides the following information in support of this application:

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion of the court of appeals (App., *infra*, at 1a-3a) is reported at 2024 WL 1460308. The court of appeals entered its judgment on April 4, 2024, and denied a petition for rehearing on June 5, 2024 (App., *infra*, at 4a-5a).

JURISDICTION

This application is being filed more than 10 days before the petition is due, *see* Sup. Ct. R. 13.5, and the jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

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[1] The 60th day is Saturday, November 2, 2024, making the due date Monday, November 4, 2024. *See* Sup. Ct. R. 30.1.

LEGAL BACKGROUND

1. Congress enacted Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, ("Section 504") because "millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing" and "individuals with disabilities constitute one of the most disadvantaged groups in society." 29 U.S.C. § 701(a)(1)-(2). Section 504 was established as a "comprehensive federal program," *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984), to ensure individuals with disabilities would not be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a); 34 C.F.R. § 104.4(a). To achieve that purpose, regulations promulgated under Section 504 provide, in relevant part, that qualified students with disabilities shall not be excluded from participation in, denied the benefits of, or otherwise discriminated against in the "aid, benefits, or services" of a postsecondary education program. 34 C.F.R. § 104.43(a).[2] For "aid, benefits, and services" to be equally effective, they "must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement [as non-handicapped persons], in the most integrated setting appropriate to the person's needs." 34 C.F.R. § 104.4(b)(2). A postsecondary educational program must also modify its "academic requirements" and provide "auxiliary aids" and "other similar services" to ensure that students with disabilities do not

[2] With respect to postsecondary education, a qualified handicapped person under Section 504 means someone "who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 34 C.F.R. § 104.3(l)(3).

experience denial of benefits, exclusion, or discrimination. 34 C.F.R. § 104.44(a), (d).

Similarly, in 1990, the Americans with Disabilities Act ("ADA") was enacted "to remedy widespread discrimination against disabled individuals," *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001), because Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem" and discrimination "persists in such critical areas as . . . education," 42 U.S.C. § 12101(a)(2)-(3). One of the many purposes of the ADA was to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). In furtherance of its congressional purpose, Title III of the ADA ("Title III") prohibits places of public accommodation from discriminating against individuals with disabilities "in the full and equal enjoyment" of the "services, facilities, privileges, advantages, or accommodations" they offer. 42 U.S.C. § 12182(a). Further, Title III prohibits denying an individual with disabilities "the opportunity . . . to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity," and prohibits providing an "opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals." 42 U.S.C. § 12182(b)(1)(A)(i)-(ii).

Both Section 504 and Title III require responsible parties to provide "necessary" and reasonable accommodations, auxiliary aids, and services to individuals with disabilities. 34 C.F.R. § 104.44(a), (d)(1)-(2) [Section 504]; 42 U.S.C. § 12182(b)(2)(A)(ii)-

(iii) [Title III]. In determining what constitutes as necessary, this Court held that Section 504 "requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the [federal] grantee offers" which may necessitate "reasonable accommodations," and that "[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Alexander v. Choate*, 469 U.S. 287, 301 (1985).[3] Similarly, under Title III, "necessary" and reasonable accommodations, auxiliary aids, and services provide an individual with disabilities the "full and equal enjoyment" of the "services, facilities, privileges, advantages, or accommodations" offered to non-disabled individuals, 42 U.S.C. § 12182(a), (b)(2)(A)(ii)-(iii), so that individuals with disabilities are not provided an "opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals," 42 U.S.C. § 12182(b)(1)(A)(i)-(ii); 28 C.F.R. § 36.202(b).

FACTUAL BACKGROUND

2. Applicant is a student with disabilities, who has life-long diagnosed learning disorders: severe attention-deficit/hyperactivity disorder and anxiety disorder. For the then upcoming 2017-2018 academic year, Applicant was accepted to three medical schools. Before Applicant choose to matriculate into Respondent's MD program, Respondent advertised to Applicant the availability of note-takers, extended time for in-class assignments and examinations, and alternative testing

[3] This Court found the standard in *Alexander v. Choate*, 469 U.S. 287, 301 (1985) also applicable to ADA cases. *Merrill v. People First of Ala.*, 141 S.Ct. 25, 27 (Mem) (2020).

environments for qualified students with a disability who are able to perform the essential requirements of the MD program. For Applicant's all three years in Respondent's MD program, Respondent annually determined he met the eligibility standards for, and was granted, the following four reasonable accommodations: (1) a note-taking accommodation, with the expectation of providing each class's notes within one-two days; (2) access to audio/video recordings of lectures, even though all students already had access; (3) double time for exams and in-class assignments; and (4) distraction-reduced testing rooms. Every accommodation granted by Respondent to enable Applicant to fulfill the MD program's academic requirements required Applicant to provide detailed and supporting medical documentation completed by a qualified and licensed professional.

Respondent's MD program has a cumulative curriculum, where class lectures build on one another, and students are reliant on note-taking during lectures to obtain all necessary information. Applicant has auditory learning deficits, and his granted note-taking accommodation was his only accommodation making lectures' orally delivered materials available in a written format. During Applicant's first two years, he submitted numerous vocal complaints and three written complaints to Respondent about its failure to effectively provide him with notes pursuant to his annually granted note-taking accommodation, all to no effect. For the first-year's note-taking accommodation, Applicant received notes for only 61% of his classes and notes received took on average 4.17 days to arrive after the class was held. For the second-year's note-taking accommodation, Applicant received notes for only 88% of his

classes and notes received took on average 14.61 days. Applicant reported to Respondent that during his first two years he was always behind in his studies. Applicant could be expected to lose up to nine hours a day attempting to transcribe his class recordings into notes (a task his granted-accommodation was supposed to provide). Applicant was further precluded from the inferably continuous disciplined study required of Respondent's MD students, forced to rely instead on cramming, causing significant impairment in his learning experience. Applicant's first- and second-year grade point average (GPA) were 2.49/4.00 and 2.68/4.00, respectively.

Although Respondent's failure to effectively provide for Applicant's granted note-taking accommodation was resolved near the end of Applicant's second year following the note-taking accommodation's responsibilities assigned to someone else, Respondent instructed Applicant that he could not learn the material in his third-year courses without first properly learning and understanding the course material in his first two years. Because of Respondent's failure to effectively provide for Applicant's granted note-taking accommodation during Applicant's first two years, Applicant was precluded from properly learning and understanding this course material. Applicant's third-year compliance complaint even outlined guidance he received from the Office of Civil Rights (OCR) about how note-taking accommodations taking longer than four-five days to provide notes are useless for medical school students because of how fast-paced medical school is and how everything builds upon itself. Even so, Applicant, at the start of his third year, inferably attempting naively to self-fix these debilitating injuries to his academic knowledgebase, requested and was granted two

additional accommodations: preferential seating for class and breaks during examinations. However, Applicant would submit complaints to Respondent's officials, halfway through third year, stating he was failing his third-year courses due to the knowledge gaps left as a consequence of Respondent's previous two years of failing to effectively provide for his granted note-taking accommodation. Applicant, seeking redress, met with Respondent's officials, but they were unconcerned about Applicant's academic failings and feelings of depression and emotional turmoil. Respondent's officials suggested Applicant use his student handbook to find a solution and suggested he contact Respondent's Chief Compliance Officer to file a compliance complaint if he felt aggrieved. However, Applicant's email to Respondent's Chief Compliance Officer about how he should prepare and file a compliance complaint would go unanswered, and Applicant was unaware of who else he could ask for help.

Because Respondent never kept track of what classes Applicant received notes for and how long it took Applicant to receive notes, and because Respondent's Chief Compliance Officer never responded to Applicant's email requesting help, the filing of Applicant's March 28, 2020, compliance complaint necessitated he conduct and include the full statistical analyses of his note-taking accommodation for the 456 classes making up the courses of his first two years. Applicant's compliance complaint outlined his current third-year course failings due to Respondent's previous two years of failing to effectively provide for his granted note-taking accommodation. As outlined in Applicant's April 28, 2020, email to Respondent, it was at this time that he disengaged from medical school and began researching his rights after he was already

failing his third-year courses, after he subsequently missed his March exams due to his time spent meeting with Respondent's officials, the time spent preparing and filing his compliance complaint with no guidance from Respondent, and because Respondent seemed unconcerned about Applicant's academic and emotional well-being. Applicant would subsequently fail his third-year courses and be dismissed by Respondent.

Respondent would overturn Applicant's dismissal, citing its previous two years of failing to effectively provide for Applicant's granted note-taking accommodation. Respondent's subsequent reentry plan for Applicant sought to: (1) only allow Applicant to retake his third-year's courses and have Applicant start after the first exam block, skipping material which Respondent states is necessary for learning subsequent third-year material; (2) have Applicant pay third-year tuition a second time despite Applicant now no longer qualifies for federal student loans because of his time already spent in Respondent's first- and second-year curriculum; and (3) not address Applicant's ongoing irreparable damage to his foundational medical knowledgebase and academic record caused by Respondent's previous two years of failing to effectively provide for Applicant's granted note-taking accommodation. During this case's litigation, Respondent now considers Applicant permanently dismissed.

Respondent's official instructed Applicant that medical residency programs, when deciding whether to accept medical school graduates, consider a graduate's grades and length of time to graduate. This official instructed Applicant that failing grades and taking longer than four years to graduate are judged very unfavorably.

Accordingly, due to Respondent's two years of failing to effectively provide notes for Applicant's granted note-taking accommodation, Applicant's current GPA is 2.02/4.00, with three failing course grades (one in first year and two in third year), and he will now require no less than six years to graduate.

REASONS JUSTIFYING AN EXTENSION OF TIME

1. This case concerns issues that are recurring, national in scope, and impede the effectiveness of federal statutes. The United States, in its amicus brief filed in the court of appeals, stated it "has a substantial interest in this appeal, which concerns the relief available under Title III . . . and Section 504." (App., *infra*, 14a.)

2. This case concerns whether, under Section 504 and Title III, a student with disabilities may obtain injunctive relief to restart medical school afresh, including grade expungement, after nearly two years of not being effectively provided notes pursuant to their annually granted note-taking accommodation, causing severe injuries to their academic knowledgebase, academic record, and ability to be successful in medical school and match into medical residency programs post-graduation. The lower court's 3-page opinion simply labelled Applicant's requested relief as novel and affirmed the district court's decision, at the motion to dismiss stage, that removing grades, and by extension Applicant's requested relief to restart medical school afresh, is never appropriate relief under the ADA or Section 504. (App., *infra*, 3a.) Other than the court below, every circuit court to have addressed the availability of expungement of records under the ADA and Section 504 (the Second, Fourth, and Ninth Circuits) has held expungement is an available remedy for prospective relief. *See Doherty v. Bice*, 101 F.4th 169, 172-73 (2nd Cir. 2024); *Shepard v. Irving*, 77 F. App'x 615, 620

(4th Cir. 2003); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir. 2005); *Motoyama v. Haw., Dept. of Transp.*, 864 F. Supp. 2d 965, 987 (D. Haw. 2012), *aff'd,* 584 Fed. Appx. 399 (9th Cir. 2014). Similarly, every circuit court to have addressed the availability of expungement of records under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688,[4] (the Sixth and Seventh Circuits) has held expungement is an available remedy for prospective relief. *See Doe v. Cummins*, 662 F. App'x 437, 444 (6th Cir. 2016); *Doe v. Purdue Univ.*, 928 F.3d 652, 666 (7th Cir. 2019).

Section 504 and Title III permit private civil suits for injunctive relief. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 2000a-3(a); *see* 42 U.S.C. § 12188(a)(1); 28 C.F.R. § 36.501(a); *Barnes* v. *Gorman*, 536 U.S. 181, 185, 187 (2002); *Alexander* v. *Sandoval*, 532 U.S. 275, 279 (2001). Applicant's irreparable damage to his foundational medical knowledgebase and academic record are the natural result of Respondent's two years of failing to effectively provide notes for his annually granted note-taking accommodation and constitute a continuing injury.[5] Respondent instructed Applicant that he could not learn the material in his third-year without first properly learning and understanding the course material in his first two years. Applicant was already failing his third-year courses before he filed a compliance complaint and before he submitted complaints to, and met with, Respondent's officials during Applicant's third year. The lower court's finding that Applicant "struggled *even more* in his [third-year] classes"

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[4] When resolving ambiguities in Section 504, this Court has looked to Title IX caselaw. *See Barnes v. Gorman,* 536 U.S. 181, 185-89 (2002); *Consol. Rail,* 465 U.S. at 635-36.

[5] Applicant reported to Respondent that he was always behind in his studies because of Respondent's two years of failing to effectively provide for his note-taking accommodation.

acknowledges the fact that Applicant struggled during his first two years whilst Respondent failed to effectively provide for his annually granted note-taking accommodation. (App., *infra*, 2a (emphasis added).) Additionally, Respondent instructed Applicant that failing grades and taking longer than four years to graduate are judged very unfavorably by medical residency programs. Accordingly, because Applicant was not afforded meaningful access or an equal opportunity to participate in or benefit from medical school as his nondisabled peers, Applicant seeks to restart medical school afresh with his prior academic record expunged. In assessing a remedy's appropriateness, the rule is "well settled" that, where Congress has provided a right to sue for invasion of rights, courts may order "any available remedy to make good the wrong done." *Barnes*, 536 U.S. at 189 (citation omitted). Additionally, the "nature and scope of the remedy are to be determined by the violation," *Milliken* v. *Bradley*, 433 U.S. 267, 281-82 (1977), with the ultimate goal of providing a plaintiff "complete relief in the light of statutory purposes," *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Further, a remedy's appropriateness must also be measured against the underlying statute's purpose that defendant has violated. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1971).

3. This case concerns whether, under Section 504 and Title III, the determination of a postsecondary student as "qualified" and an accommodation as "reasonable" is made at the time the student requests an accommodation, after they have already been admitted to or approved for retention in the postsecondary program, or sometime later after the requested accommodation has been granted and not

effectively provided for nearly two years. In support of its 3-page opinion, the court of appeals highlighted facts pertaining to Applicant's *third year* in affirming the district court's dismissal of Applicant's failure-to-accommodate claims regarding Respondent's failure to effectively provide notes pursuant to Applicant's annually granted note-taking accommodation during his *first and second year*. The highlighted facts in the lower court's opinion would find Applicant was not qualified because when Respondent's two years of failing to effectively provide for Applicant's granted note-taking accommodation were "indisputably corrected by [Applicant's] third year of school," Applicant "struggled even more in his [third-year] classes" and would fail his third-year courses. (App., *infra*, 2a.) However, a qualified individual under Section 504, with respect to postsecondary education, is "a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979) (alteration in original) (quoting 45 CFR § 84.3(k)(3) (1978)).[6] As such, Applicant was considered a qualified individual at the beginning of his first and second academic year when Respondent annually granted his note-taking accommodation and permitted Applicant to participate in Respondent's MD program.

The lower court's opinion takes the position to blame Applicant for (1) not being immune to the academic injuries suffered from Respondent's two years of failing to effectively provide for his granted note-taking accommodation, and (2) for following the third-year suggestions of Respondent's officials in attempting to find a solution to

[6] 34 C.F.R. § 104.3(l)(3) contains the same language used in 45 CFR § 84.3(k)(3) (1978).

the academic injuries incurred by Applicant, after he was already failing his third-year courses. The lower court's finding that Applicant "struggled *even more* in his [third-year] classes" acknowledges the fact that Applicant struggled during his first two years whilst Respondent failed to effectively provide for his granted note-taking accommodation. (App., *infra*, 2a (emphasis added).) The expectation that Applicant, upon Respondent's long-awaited resolution of its two years of failing to effectively provide him notes, would have zero injuries with his "foundational medical knowledge required to succeed" disregards the necessity of his annually granted note-taking accommodation during those first two years.[7] (App., *infra*, 3a.)

4. The highlighted facts in the lower court's 3-page opinion would find Applicant's annually granted note-taking accommodation was not a reasonable accommodation because when Respondent's two years of failing to effectively provide for Applicant's granted note-taking accommodation were "indisputably corrected by [Applicant's] third year of school," Applicant "struggled even more in his [third-year] classes" and would fail his third-year courses. (App., *infra*, 2a.) As similarly discussed previously, finding Applicant's note-taking accommodation unreasonable because he struggled in and failed his third-year courses disregards the necessity of Applicant's annually granted note-taking accommodation during his first two years.[8] Other than

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[7] It would be a different world if the "minority students" in *Milliken v. Bradley* were blamed for being "adversely affected by [the] discriminatory" educational practices that impeded their "educational growth." *Milliken v. Bradley*, 433 U.S. 267, 276 (1977).

[8] Indeed, accommodations must be effective, and to determine an individual is not qualified, and an accommodation is not reasonable, following Respondent's two years of failing to effectively provide *that granted-accommodation* undermines the purpose of Section 504 and the ADA. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) ("It is the word 'accommodation' . . . that conveys the need for effectiveness. An *ineffective* 'modification' or 'adjustment'

the court below, other circuit courts to have addressed the relevant requirements of responsible parties (the Fourth, Eighth, and Ninth Circuits) have held that both Section 504 and Title III require responsible parties to start by considering how their facilities are used by non-disabled individuals and then take reasonable steps to provide disabled individuals with a like experience. *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 672 (4th Cir. 2019); *Argenyi v. Creighton Univ.*, 703 F.3d 441, 451 (8th Cir. 2013); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012); *see* 42 U.S.C. § 12182(b)(1)(A)(i)-(ii) [Title III]; 28 C.F.R. § 36.202(b) [Title III]; 34 C.F.R. § 104.4(b)(1)(ii)-(iii), (b)(2) [Section 504]. As introduced earlier, Respondent not only advertised the availability of a note-taking accommodation to Applicant before his matriculation decision, but Respondent annually granted the note-taking accommodation to him. Respondent's MD program has a cumulative curriculum, where class lectures build on one another, and students are reliant on note-taking during lectures to obtain all necessary information. Applicant has auditory learning deficits, and his granted note-taking accommodation was his only accommodation making lectures' orally delivered materials available in a written format. Applicant reported to Respondent that he was always behind in his studies because of Respondent's two years of failing to effectively provide for his annually granted note-taking accommodation. Respondent instructed Applicant that he could not learn the material in his third-year without first properly learning and understanding the course material in his first two years. The lower court's finding that Applicant

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will not *accommodate* a disabled individual's limitations.").

"struggled *even more* in his [third-year] classes" acknowledges the fact that Applicant struggled during his first two years whilst Respondent failed to effectively provide for his granted note-taking accommodation. (App., *infra*, 2a (emphasis added).)

Accordingly, Applicant's annually granted note-taking accommodation was reasonable and does not "fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered" or "result in an undue burden" for Respondent, 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii); does not represent a "fundamental alteration in the nature of [Respondent's] program," *Alexander*, 469 U.S. at 299-302 (quoting *Davis*, 442 U.S. at 410); and does not represent a "requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate [Applicant]," *Davis*, 442 U.S. at 413.

5. This application seeks to accommodate Applicant's legitimate needs. Applicant started a new job in June of 2024 and his scheduled hours often overlap with the operating hours of his local law library making it difficult to adequately prepare a petition for certiorari on or before September 3, 2024. A 60-day extension would allow Applicant sufficient time to fully examine the decisions below, thoroughly research and analyze the issues presented (including whether Applicant sufficiently pled intentional discrimination with regards to the availability of compensatory damages), and prepare the petition for filing.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that this Court grant a 60-day extension, up to and including Monday, November 4, 2024, within which to file a petition for a writ of certiorari.

August 22, 2024

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

In the United States Court of Appeals For the Eleventh Circuit

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No. 22-13778

JAMES GREGORY HOWELL, JR.,

Plaintiff-Appellant,

versus

THE MOREHOUSE SCHOOL OF MEDICINE, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-03389-MHC

Before BRANCH, GRANT, and ED CARNES, Circuit Judges.

PER CURIAM:

James Howell, Jr., a former student, sued Morehouse School of Medicine after he was dismissed for academic deficiencies during his third year of medical school. Howell was granted an extensive array of disability accommodations while he was a student at Morehouse. To ameliorate the effects of his Attention-Deficit/Hyperactivity Disorder, he was given private testing rooms, designated note-takers in his classes, access to audio and video taped lectures, double time for examinations and in-class assignments, breaks during examinations and in-class assignments, and preferential seating in class. He claims, however, that Morehouse did not administer his note-taking accommodation effectively during his first two years because he did not receive notes for every class, and when he did receive notes, they were not always delivered within the 48-hour timeframe that Morehouse allegedly promised.

Though the problems with the note-taking accommodation had been indisputably corrected by Howell's third year of school, Howell struggled even more in his classes; he failed multiple courses and was academically dismissed from Morehouse School of Medicine. He admits, though, that during his third year he "really had to disengage from medical school" because he was researching his rights and "looking through over two years of emails." While ostensibly preparing for this lawsuit, he did not study, attend classes, or even take his exams.

Howell sued Morehouse, pleading fifteen counts related to the school's allegedly inadequate administration of his disability accommodations. Howell's basic theory of the case is that, because his note-taking accommodation was ineffective during his first two years, he never absorbed the foundational medical knowledge required to succeed in his later coursework. As a result, he argues that he is entitled to the novel relief of having his entire transcript wiped clean and being permitted to restart medical school "afresh." The district court dismissed all of Howell's claims and denied his third motion to amend the complaint.

After careful consideration of the record and the parties' briefs, and with the benefit of oral argument, we find no reversible error in the district court's well-reasoned orders dismissing Howell's federal and state law claims against Morehouse School of Medicine and denying his motion to amend his complaint a third time.

AFFIRMED.

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13778

JAMES GREGORY HOWELL, JR.,

Plaintiff-Appellant,

versus

THE MOREHOUSE SCHOOL OF MEDICINE, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-03389-MHC

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before BRANCH, GRANT, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES HOWELL, JR.,

Plaintiff-Appellant

v.

THE MOREHOUSE SCHOOL OF MEDICINE, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR ON THE ISSUE ADDRESSED HEREIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified in the brief filed by plaintiff-appellant, the following persons may have an interest in the outcome of this case:

1. Bell Hughes, Aileen, U.S. Department of Justice, Assistant United States Attorney, Northern District of Georgia;
2. Buchanan, Ryan K., U.S. Department of Justice, United States Attorney, Northern District of Georgia;
3. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
4. Lamm, Katherine E., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
5. Riley, Nicolas Y., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
6. Robin-Vergeer, Bonnie I., U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

Date: March 27, 2023

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13778

JAMES HOWELL, JR.,

Plaintiff-Appellant

v.

THE MOREHOUSE SCHOOL OF MEDICINE, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR ON THE ISSUE ADDRESSED HEREIN

INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns the relief available under Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12182, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. Both statutes prohibit disability discrimination at most private universities, which typically receive federal financial assistance. The Department of Justice has significant responsibility for the implementation and enforcement of Title III and Section 504, see 42 U.S.C. 12186(b), 12188(b); 29 U.S.C. 794(a), 794a; 28 C.F.R.

Pt. 36, including coordinating the enforcement of Section 504 by all federal agencies, see 28 C.F.R. Pt. 41 & App. A (Exec. Order No. 12,250). The Department of Education has responsibility for the implementation and enforcement of Section 504 with respect to programs or activities to which it provides federal financial assistance, including universities. See 29 U.S.C. 794(a), 794a; 34 C.F.R. 104.4, 104.6, 104.43-44. The United States regularly files amicus briefs addressing the proper interpretation and application of Title III and Section 504. See, *e.g.*, U.S. Br. as Amicus Curiae, *Campbell* v. *Universal City Dev. Partners*, No. 22-10646 (11th Cir. June 9, 2022) (Title III); U.S. Br. as Amicus Curiae, *Silva* v. *Baptist Health S. Fla.*, 856 F.3d 824 (11th Cir. 2017) (No. 16-10094) (Title III and Section 504); U.S. Br. as Amicus Curiae, *Argenyi* v. *Creighton Univ.*, 703 F.3d 441 (8th Cir. 2013) (No. 11-3336) (Title III and Section 504).

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. 794, require most private universities to provide reasonable accommodations to students with

disabilities.[1] The question the United States addresses here is whether a medical student who was unlawfully denied a note-taking accommodation under those statutes may obtain as relief an injunction permitting him to restart his medical education afresh.

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. 12182(a).[2] Among other things, Title III prohibits discriminatorily denying an individual with a disability "the opportunity * * * to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity," or providing an "opportunity to participate * * * that is not equal to that afforded to other individuals." 42 U.S.C. 12182(b)(1)(A)(i)-(ii).

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[1] Although Title III and the regulations implementing Section 504 in the higher education context use the term "reasonable modification," it is often used interchangeably in the case law with the term "reasonable accommodation." Here, we primarily use "reasonable accommodation," consistent with the briefing below.

[2] A "postgraduate private school" is a place of public accommodation. 42 U.S.C. 12181(7)(j).

The statute defines "discrimination" to include the "failure to make reasonable modifications in policies, practices, or procedures," when "necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter [their] nature." 42 U.S.C. 12182(b)(2)(A)(ii); see also 28 C.F.R. 36.302. A public accommodation also may violate Title III when it fails to provide "auxiliary aids and services" necessary to ensure that an individual with a disability is not "excluded, denied services, segregated, or otherwise treated differently" from others, unless providing such aids or services would constitute a fundamental alteration or result in an undue burden. 42 U.S.C. 12182(b)(2)(A)(iii); see also 28 C.F.R. 36.303.

Section 504 prohibits discrimination on the basis of disability "under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). The Department of Education's implementing regulations provide, in relevant part, that qualified students with disabilities shall not be excluded from participation in, denied the benefits of, or otherwise discriminated against in the "aid, benefits, or services" of a postsecondary education program. 34 C.F.R. 104.43(a). Nor may such students be excluded "from any course, course of study, or other part of its education program or activity." 34 C.F.R. 104.43(c). A postsecondary educational program also must modify its "academic requirements" and provide "auxiliary

aids" and "other similar services" to ensure that students with disabilities do not experience denial of benefits, exclusion, or discrimination. 34 C.F.R. 104.44(a) and (d).

Both Title III and Section 504 permit private civil suits for injunctive relief. Title III incorporates the remedies available in a provision in Title II of the Civil Rights Act of 1964 (addressing public accommodations), which include "preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order." 42 U.S.C. 2000a-3(a); see 42 U.S.C. 12188(a)(1); 28 C.F.R. 36.501(a). Section 504 incorporates the remedies of Title VI of the Civil Rights Act, 42 U.S.C. 2000d *et seq.* (addressing prohibited discrimination by recipients of federal financial assistance), which have been interpreted to encompass "any appropriate relief," including an injunction. 29 U.S.C. 794a(a)(2); see *Barnes* v. *Gorman*, 536 U.S. 181, 185, 187 (2002); *Alexander* v. *Sandoval*, 532 U.S. 275, 279 (2001).

2. Relevant Factual Background [3]

Plaintiff James Howell, Jr., was accepted to Morehouse School of Medicine in 2017 for its prospective class of 2021. Doc. 24, at 16 (Am. Compl.).[4] Howell

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[3] We take the allegations in the complaint as true, as required at the Rule 12(b)(6) stage.

[4] "Doc. __" refers to the document number on the district court docket, *Howell* v. *The Morehouse School of Medicine, Inc.*, No. 1:20-cv-3389 (N.D. Ga.).

has been diagnosed with severe attention deficit/hyperactivity disorder and other anxiety disorders, which are "mental impairments that substantially limit[] and significantly restrict[] major life activities" such as "learning, concentrating, and thinking." Doc. 24, at 14. In light of this disability, Howell requested, among other things, a "note-taking accommodation" under which he would receive lecture notes for each class. Doc. 24, at 19-20. A few weeks before the start of Howell's first semester, Morehouse agreed to the accommodation, with an expectation of providing notes 24-to-48 hours after each class. Doc. 24, at 20, 26-27.

When classes began, however, the note-taking accommodation was not in place. Doc. 24, at 33-34. A few weeks into the semester, Howell complained to school officials that he still did not have a note-taker and was struggling to keep up in his courses—which featured a lecture-heavy, cumulative curriculum—and therefore feared failing his exams. Doc. 24, at 33-34. Eventually, Howell began receiving notes for some classes, but only nine or ten days after the lectures had occurred. Doc. 24, at 43. Similar problems persisted throughout the school year: Howell calculated that he ultimately received notes for only 61% of his classes, with an average turnaround time of 4.17 days. Doc. 24, at 45.

Howell passed his first year with a grade-point average of 2.49/4.00. Doc. 24, at 46. He initially failed one class for which he did not receive over 30% of the notes. Doc. 24, at 47. Although Howell later took a comprehensive exam that

enabled him to pass the course (albeit with the lowest-possible test score), his academic record still reflects the initial failing grade. Doc. 24, at 48. Howell avers that grades are important to acceptance to residency programs. Doc. 24, at 46.

Subsequently, Morehouse "suggested" that Howell take the second-year medical school curriculum over two years instead of one, an option known as "academic deceleration." Doc. 24, at 51. Although Howell understood that the prolongment of his medical education would be viewed unfavorably by residency programs (as a Morehouse dean warned), he opted to decelerate. Doc. 24, at 52-53. He did this because of his "mounting lack of faith" in the school's ability to deliver the note-taking accommodation, his "poor grades," and "emotional turmoil." Doc. 24, at 52.

Morehouse granted Howell the note-taking accommodation for his next year of medical school, but problems persisted. Doc. 24, at 53. Howell calculated that he received notes for 88% of his classes, but that they arrived on an average 14.61-day turnaround. Doc. 24, at 58. In one course, he received no notes for five of six classes prior to the final exam. Doc. 24, at 58. As a result, Howell again struggled and achieved a grade-point average of 2.68. Doc. 24, at 58.

In Howell's third year, he began to receive notes "more or less adequately." Doc. 24, at 61. But because he had not received timely or complete notes during the preceding two years, and because the school's curriculum was cumulative, he

remained at a disadvantage: as he puts it, he was "unable to properly learn and understand" the material in his third year (which focused on abnormal human physiology) because he never had an adequate opportunity to learn the material from his first two years (which focused on normal human physiology). Doc. 24, at 62. Howell thus failed his third-year classes. Doc. 24, at 74. He attributes his poor grades to Morehouse's failure to provide him the note-taking accommodation during his first two years and the additional time he had to spend trying to remedy that failure. Doc. 24, at 74.

Morehouse attempted to dismiss Howell after his third year based on his failing grades and his inability to complete the first- and second-year curricula within three years. Doc. 24, at 74-75, 98. The school's president, however, reversed the dismissal on Howell's appeal because he had not received the note-taking accommodation during his first two years and because the school provided him with a delayed dismissal hearing. Doc. 24, at 112. Following his reinstatement, school officials proposed that Howell resume his studies five weeks into the 2020-2021 school year and that he be allowed to retake the two courses he failed in his third year. Doc. 24, at 113-114. Howell rejected this proposal as "inequitable and prejudicial." Doc. 24, at 114. Instead, he sought to "restart his medical education" with full accommodations so that he would have "a solid foundational knowledge base" in order "to become the best physician he possibly

can" and to have his academic record "deleted" so that he would not be "forever prejudiced." Doc. 24, at 116-117. He has not reenrolled at Morehouse. Doc. 47, at 25.

3. District Court Proceedings

Howell sued Morehouse in the Northern District of Georgia. See Doc. 1. The operative complaint contains 15 counts and alleges that Morehouse failed to reasonably accommodate him or provide him auxiliary aids or services in violation of Title III and Section 504. Doc. 24, at 119-126, 149-156. The complaint alleges that Morehouse is a program or activity that receives federal financial assistance. Doc. 24, at 7. Howell seeks an injunction permitting him to restart medical school and erase his prior academic record. Doc. 24, at 328, 330.

The district court granted Morehouse's motion to dismiss. Doc. 47. The court held, in relevant part, that Howell had stated a valid failure-to-accommodate claim under both Title III and Section 504 because he met his burden of pleading that he had a disability, was otherwise qualified within the meaning of the statutes, and that Morehouse denied him the reasonable accommodation. Doc. 47, at 40-48.[5] Specifically, the court held that Howell sufficiently alleged that Morehouse's failure to provide Howell with the note-taking accommodation ultimately deprived

[5] "ADA and [Rehabilitation Act] claims are governed by the same substantive standard of liability." *Silva* v. *Baptist Health S. Fla., Inc.*, 856 F.3d 824, 830-831 (11th Cir. 2017).

him of an opportunity to advance on a regular schedule and succeed academically on the same footing as his peers. Doc. 47, at 45-47. But the court nevertheless concluded that it could not grant Howell any of the relief he sought to remedy that violation. Doc. 47, at 63. The court stated that "Howell's requested relief of restarting his entire medical education with a deletion of his prior academic record is improper under the ADA or [Section 504]." Doc. 47, at 61. The court based that conclusion on an unpublished district-court decision, *Wilf* v. *Board of Regents of the University System of Georgia*, which held that "[r]emoving grades from a college transcript, even if the plaintiff were to demonstrate an ADA or Sec. 504 violation, is simply not appropriate relief under the ADA or Sec. 504." No. 1:09-CV-1877, 2010 WL 11469573, at *3 (N.D. Ga. July 6, 2010); see Doc. 47, at 62.

As relevant here, the district court further reasoned that it could not grant Howell any additional relief because Morehouse already had offered him the opportunity to retake the classes he failed in his third year, and Howell had not alleged that he would return to Morehouse if offered anything short of the opportunity to restart medical school with a clean slate. Doc. 47, at 62-63.[6] In a

[6] The district court also held that Howell had not sufficiently pleaded a claim for damages under Section 504, which requires "deliberate indifference" on the part of a person who is capable of making an official decision on the defendant's behalf. Doc. 47, at 58-61 (citing *Silberman* v. *Miami Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019) and *Saltzman* v. *Board of Comm'rs of N. Broward Hosp. Dist.*, 239 F. App'x 484, 487-488 (11th Cir. 2007)).

separate order, the court denied Howell's subsequent motion for reconsideration and held the case is moot. Doc. 74, at 18-21, 30-34.

Howell timely appealed the district court's orders dismissing his complaint on the merits, denying his motion for reconsideration, and dismissing the complaint as moot. Doc. 87.

SUMMARY OF ARGUMENT

This Court should vacate the district court's decision granting Morehouse's motion to dismiss because it rests on an incorrect premise that restarting an educational program with a clean slate is not a form of relief available under Title III or Section 504. The court's holding that such a remedy is categorically unavailable under Title III and Section 504—even when a plaintiff has stated a valid failure-to-accommodate claim—has no basis in the text of either statute or in binding case law. It also contravenes basic principles that guide courts in providing equitable relief. Indeed, such an outcome might diminish educational institutions' incentives to fully and expediently implement needed accommodations.

While restarting school afresh might not be appropriate in many cases, it nevertheless remains an important remedial option in certain cases where the failure to provide timely accommodations renders other remedies inadequate. A court's analysis of the propriety of a particular form of relief should hew to

traditional equitable principles, including whether the remedy is appropriate to correct the violation and consistent with underlying statutory purposes. This Court therefore should vacate and remand for the district court to consider the sufficiency of Howell's pleadings under traditional equitable principles, rather than impose an incorrect categorical rule regarding unavailable forms of relief.

ARGUMENT

THE DISTRICT COURT ERRED BY CATEGORICALLY REJECTING THE AVAILABILITY OF RESTARTING SCHOOL AFRESH AS RELIEF INSTEAD OF APPLYING NORMAL EQUITABLE PRINCIPLES

A. Restarting School Afresh Is Not Forbidden Relief Under Title III Or Section 504

The district court erred in holding that restarting medical school with a clean slate is not proper relief under the ADA or Section 504. Doc. 47, at 61; Doc. 74, at 18-19. This conclusion contravenes foundational cases defining courts' authority to craft equitable remedies and has no basis in either statute or its implementing regulations. Indeed, other cases and the federal government's longstanding enforcement practice show that remedies for failing to provide needed accommodations may include expungement of academic records and opportunities to redo coursework. Such remedies may be appropriate to afford students with disabilities an equal chance to participate in schools' academic programs.

As the Supreme Court has explained, "we presume the availability of all appropriate remedies"—*i.e.*, those necessary to rectify a legal wrong—"unless

Congress has expressly indicated otherwise." *Franklin* v. *Gwinnett Cnty. Schs.*, 503 U.S. 60, 66 (1992); see also *Disabled in Action* v. *Board of Elections in City of N.Y.*, 752 F.3d 189, 198 (2d Cir. 2014) (same, regarding injunctive relief available under Title II and Section 504).[7] Both Title III and Section 504 make prospective injunctive relief available to individuals who experience disability discrimination. See 42 U.S.C. 12188(a)(1) (incorporating into Title III the remedies of 42 U.S.C. 2000a-3(a), which includes "preventive relief, *including an application for a permanent or temporary injunction*, restraining order, or other order") (emphasis added); 29 U.S.C. 794a(a)(2) (incorporating into Section 504 the remedies of Title VI, 42 U.S.C. 2000d *et seq.*, which the Supreme Court has interpreted to include injunctive relief). Neither statute (or its implementing regulations) contains express limitations on the types of prospective injunctive relief that may be sought.[8]

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[7] The scope of relief available to individuals is the same under Title II and Section 504. See 42 U.S.C. 12133 ("The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."); see also 42 U.S.C. 12201 (the ADA should not be construed to provide less protection than the Rehabilitation Act).

[8] Courts have understood "preventive relief" for purposes of Title III to be synonymous with prospective relief (such as an injunction), in contrast with retrospective relief (such as monetary damages), which is unavailable under Title III. See, *e.g.*, *A.L. by and through D.L.* v. *Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1290 (11th Cir. 2018) ("Title III provides for only injunctive relief."); *Fischer* v. *SJB-P.D., Inc.*, 214 F.3d 1115, 1120 & n.6 (9th Cir. 2000)

The district court here held that Howell sufficiently pleaded that Morehouse violated Title III and Section 504 by denying him the note-taking accommodation, but then held that it was powerless to remedy that violation. In so doing, the court relied on a single, unpublished decision by another judge in the same district. Doc. 47, at 61; Doc. 74, at 18-19. That decision, *Wilf* v. *Board of Regents of the University System of Georgia*, held that "[r]emoving grades from a college transcript" is "simply not appropriate relief under the ADA or Sec. 504" in a failure-to-accommodate case. No. 1:09-CV-1877, 2010 WL 11469573, at *3 (N.D. Ga. July 6, 2010). *Wilf* offered no authorities or reasoning in support of this conclusion, other than a reference to its own statement "in a prior order." *Ibid.* But the district court in Howell's case did not cite any such order; it is not even clear to which "prior order" *Wilf* referred. Indeed, the district court here never explained why it treated *Wilf*—a decision cited by Morehouse (Doc. 36, at 31-32) but apparently by no other court—as effectively binding. Nor does there appear to be any controlling authority for the proposition that grade expungement or the opportunity for a fresh start are *never* appropriate relief under Title III or Section 504, much less where, as here, a plaintiff pleads that his academic performance

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(explaining that under Title III, "a private individual can only obtain 'preventive relief,' which means injunctions and temporary restraining orders" and not damages) (citing *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (per curiam)).

suffered because the school failed to provide a reasonable accommodation. Doc. 47, at 44-48.

This Court and other courts of appeals have implicitly endorsed remedies under the ADA and Section 504, such as grade expungement, that are similar to those that Howell seeks here. For example, in *Rudnikas* v. *Nova Southeastern University*—which postdates the district court's decision in this case—this Court, over a mootness objection, allowed a law student to pursue an injunction ordering the expungement of a failing grade (which had caused his dismissal) and reversal of a suspension as remedies for retaliation under Title III and Section 504. No. 21-12801, 2022 WL 17952580, at *6 (11th Cir. Dec. 27, 2022) (per curiam). The Court reasoned that the student's dismissal from school did not render his appeal moot, because "if we granted him the requested relief, [he] would be reinstated." *Ibid.* This reasoning assumes that academic record expungement and modification are viable remedies under Title III and Section 504. See also, *e.g.*, *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir. 2005) (allowing Section 504 claim to proceed that sought as relief expungement of a failing grade or "re-examination under reasonable circumstances").[9]

[9] Likewise, the district court erred here in concluding that Howell's failure-to-accommodate claim was "moot." The court held the claim was moot both because Howell allegedly sought impermissible relief and because after he filed suit, Morehouse reversed Howell's dismissal and offered him the opportunity to retake his third-year classes—a "portion" of his desired relief. Doc. 47, at 62-64,

The Fourth Circuit's decision in *Shepard* v. *Irving*, 77 F. App'x 615 (4th Cir. 2003), cert. dismissed, 542 U.S. 959 (2004), similarly suggests that Howell's proposed remedy is permissible. In *Shepard*, which arose under Title II and Section 504, the court rejected a state university's argument that a student's failing grade and plagiarism conviction did not constitute "a continuing injury" for purposes of seeking relief under Title II pursuant to *Ex parte Young*, holding instead that record expungement was a viable remedy. *Id.* at 620. The court further held that the student could seek, in the alternative, a new Honor Code hearing on the grade and conviction, conducted with previously-denied parental or legal representation—"circumstances in which her disability does not disadvantage her." *Ibid.*

The district court here rejected *Shepard* because it was "not binding precedent" and because "Howell has not alleged that he has accepted [Morehouse]'s plan for entry so, at this point, he would have no standing under

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83; Doc. 74, at 30-34. Mootness, however, arises "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). The court's conclusion that it was powerless to issue the relief Howell sought, even if it were correct as a legal matter (which it was not), would not eliminate the existence of a live dispute. Nor would Morehouse's voluntary offer of *partial* relief. Cf. *Campbell-Ewald, Co.* v. *Gomez*, 577 U.S. 153, 161-162 (2016).

Shepard." Doc. 47, at 62.[10] The plaintiff in *Shepard*, however, already had graduated, see 77 F. App'x at 617; it is not evident why Howell's non-acceptance of Morehouse's offer to resume his studies (while seeking to return on more favorable terms) would render his request for relief more suspect as a matter of standing. Further, the district court ignored the common premises that underpin both Shepard's claim and Howell's—that blemishes on an academic record that were produced by disability discrimination may have an ongoing impact on the student's career, and that only a "do-over" may rectify an academic process that was conducted without reasonable accommodations. See also *Constantine*, 411 F.3d at 496.

Indeed, relief of the nature Howell proposes—including opportunities to re-take courses or to have poor grades expunged—is well established in the federal government's resolution of students' ADA and Section 504 complaints alleging denials of accommodations or other discrimination. While the scope of relief available through voluntary agreements may not precisely mirror the bounds of courts' equitable powers, federal agency practice nevertheless illustrates the types

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[10] The district court cited, by way of contrast, *Alejandro* v. *Palm Beach State College*, 843 F. Supp. 2d 1263, 1273 (S.D. Fla. 2011). Doc. 47, at 62. But *Alejandro* is inapposite, as the question at issue there was whether a former student continued to have standing for a previously-granted injunction permitting her to bring a service dog to class, which the court held was resolved by an affidavit averring to the student's continued enrollment. 843 F. Supp. 2d at 1273.

of remedies needed to achieve statutory compliance. The Department of Education's Office for Civil Rights, for example, has resolved many such student complaints through agreements with schools to provide remedies that include grade expungement and opportunities to retake courses. See, *e.g.*, American Univ. of Health Sci., No. 09-20-2413 (U.S. Dep't of Educ., Off. for C.R. Oct. 19, 2020) (agreement requiring university either to expunge or change grade to incomplete for student who was denied testing accommodation and allow her to retake course with accommodations, at no cost, and receive new grade), https://perma.cc/DEJ3-GHZ9; Dallas (TX) Indep. Sch. Dist., Nos. 06171006 & 06171336 (U.S. Dep't of Educ., Off. for C.R. Aug. 23, 2017) (agreement requiring school to offer re-enrollment and expungement of low grade, along with either retaking course or redoing tests and graded coursework, to student who was denied accommodation and experienced retaliation), https://perma.cc/PM86-L3HG[11]; Legacy Traditional Sch. (AZ), No. 08-17-1078 (U.S. Dep't of Educ., Off. for C.R. May 15, 2017) (agreement requiring school to offer student re-enrollment and for parties to consider options including retaking or remediating course affected by teacher's failure to implement note-taking accommodation), https://perma.cc/DHQ7-TMGR; Onondaga-Courtland-Madison Bd. of Coop. Educ. Servs., No. 02-15-1141 (U.S.

[11] This agreement is undated, but its date appears on the Office for Civil Rights Recent Resolution Search website (https://ocrcas.ed.gov/ocr-search), where all of the cited agreements may be found.

Dep't of Educ., Off. for C.R. Sept. 17, 2015) (agreement requiring school to allow student either to retake courses during semester in which she allegedly experienced harassment, or receive a tuition refund), https://perma.cc/RKX6-SA3H; Francis Marion Univ., No. 11-14-2011 (U.S. Dep't of Educ., Off. for C.R. Jan. 8, 2014) (agreement requiring university to allow a student to retake all of his courses for one semester in which he was denied adequate auxiliary aids or services, at no cost, and expunge the student's academic records for that semester), https://perma.cc/3BJM-WW4X.

To be sure, the relief Howell seeks here—restarting medical school—is more extensive than what the students obtained in the cases discussed above. Nevertheless, the fact that his request is expansive does not render it categorically unavailable under Title III or Section 504. As explained in Section B, below, the traditional principles for granting equitable relief should guide the district court's eventual consideration of whether allowing Howell to restart school would be an appropriate way to rectify Morehouse's alleged unlawful failure to provide his note-taking accommodation.

B. Whether Morehouse May Be Ordered To Allow Howell To Restart School Afresh Should Be Analyzed Under Traditional Principles For Granting Equitable Relief

Whether Howell may obtain as relief the opportunity to restart school with a clean slate is not a question that can be answered categorically, but instead must be

analyzed within the relevant statutory framework and under the normal principles that guide courts in determining whether to afford equitable relief.

Because Congress did not expressly constrain courts' ability to fashion injunctive relief in Title III and Section 504, courts must assess whether the chosen relief is "appropriate" to correct the underlying violation. See *Franklin*, 503 U.S. at 66; see also *Disabled in Action*, 752 F.3d at 189. In making that assessment, the rule is "well settled" that, where Congress has provided a right to sue for the invasion of rights, courts may order "any available remedy to make good the wrong done." *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002) (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)); see also *Franklin*, 503 U.S. at 66. The "nature and scope of the remedy are to be determined by the violation," *Milliken* v. *Bradley*, 433 U.S. 267, 281-282 (1977), with the ultimate goal of providing a plaintiff "complete relief under a statute," *Transcontinental Gas Pipe Line Co.* v. *6.04 Acres, More or Less*, 910 F.3d 1130, 1152 (11th Cir. 2018) (citation omitted), cert. denied, 139 S. Ct. 1634 (2019).

The propriety of a remedy also must be measured against the purpose of the statute that the defendant has been found to violate. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1971). Thus, while a district court has "discretion" in crafting a remedy to redress the violation, see *Franklin*, 503 U.S. at 73-74, a court

should exercise that discretion to craft a remedy that is tethered to the achievement of that statutory purpose, see *Albemarle*, 422 U.S. at 417.

Here, the district court concluded that Howell sufficiently alleged that Morehouse violated Title III and Section 504 by failing to provide Howell the promised note-taking accommodation. To determine whether, if he proved his case, Howell would be entitled to his proposed remedy—namely, an opportunity to restart medical school afresh—the district court must consider whether that remedy would be appropriate to redress the discriminatory effect of Morehouse's conduct and to further Title III and Section 504's purposes. Those statutory purposes include providing people with disabilities an equal opportunity to participate in educational programs, including at the postsecondary level. See, *e.g.*, 29 U.S.C. 701(a)(5) and (b)(5) (finding that individuals with disabilities "continually encounter various forms of discrimination" in the "critical area[]" of "education" and stating that the Rehabilitation Act's purposes include ensuring that students with disabilities "have opportunities for postsecondary success"); 42 U.S.C. 12101(a)(3) and (a)(6) (likewise finding that discrimination against individuals with disabilities persists in the "critical area[]" of "education" and noting that such individuals are "severely disadvantaged" with respect to education).

In assessing whether the remedy is "appropriate," *Franklin*, 503 U.S. at 66, the district court also may consider the nature and consequences of Morehouse's

failure to provide the required accommodation, and any alternatives proposed by Morehouse for redressing Howell's injury. Relevant factors in this analysis may include not only Howell's allegations about the cumulative effect of Morehouse's failure to provide him with the accommodation and its impact on his grades and employment prospects, but also Morehouse's alternative proposal to allow Howell to retake two of his third-year courses.

Accordingly, this Court should vacate and remand for further proceedings so that the district court may consider, in due course, the appropriateness of Howell's requested remedy—restarting medical school afresh—under the normal principles for granting equitable relief.

CONCLUSION

For these reasons, this Court should vacate the district court's dismissal of Howell's reasonable accommodation claims and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR ON THE ISSUE ADDRESSED HEREIN:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5007 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

Date: March 27, 2023

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2023, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I further certify that four paper copies identical to the electronically filed brief will be mailed to the Clerk of the Court by Federal Express.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

No. 24-_____

In the Supreme Court of the United States

JAMES GREGORY HOWELL, JR.,

Applicant,

v.

THE MOREHOUSE SCHOOL OF MEDICINE, INC.,

Respondent.

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

PROOF OF SERVICE DECLARATION OF JAMES HOWELL PURSUANT TO 28 U.S.C. § 1746

JAMES GREGORY HOWELL, JR.
1080 River Valley Dr.
Dacula, GA 30019-3161
(678) 429-6485

PROOF OF SERVICE DECLARATION OF JAMES HOWELL PURSUANT TO 28 U.S.C. § 1746

I am Applicant James Gregory Howell, Jr. I am of legal age and competent to testify on the matters stated below.

1.

Pursuant to Rule 29.3 of this Court, Applicant hereby certifies that on this day, Thursday, August 22, 2024, he perfected service via United States Postal Service, with no less than first-class postage prepaid, of a single copy of Applicant's *Application for Extension of Time to File a Petition for a Writ of Certiorari* to Respondent's counsel of record, at:

Nakimuli Davis-Primer
One Eastover Center
100 Vision Drive, Suite 400
Jackson, MS 39211-7009
(601) 973-3612

2.

Because Applicant is presently proceeding *pro se* and *in forma pauperis*, Rule 29.3's requirement of transmitting an electronic version of Applicant's *Application for Extension of Time to File a Petition for a Writ of Certiorari* to Respondent's counsel of record is not applicable.

3.

I, James Howell, declare under penalty of perjury that the foregoing is true and correct.

James Gregory Howell, Jr.

August 22, 2024
Date of Execution