No. 08-1291

IN THE
Supreme Court of the United States

ODIS TUCKER, *et al.*,

Petitioners,

v.

HARDIN COUNTY, TENNESSEE, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT HARDIN COUNTY, TENNESSEE

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's application of the required standard of proof for "failure-to-accommodate" claims arising under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA"), does not conflict with a decision of this Court or another Court of Appeals.

2. Whether Petitioners have presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's rigorous analysis of the Petitioners' evidence and its factual findings as to the "effectiveness" of the auxiliary aids that Hardin County provided the ADA-qualified Petitioners does not conflict with a decision of this Court or another Court of Appeals.

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioners have failed to demonstrate that the Sixth Circuit's April 29, 2008 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Sixth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

Petitioners attempt to portray in their Petition a "widespread and entrenched" Circuit conflict that simply does not exist. (*See* Pet. at 14). There are no Circuit splits of significance on the required standard of proof for failure-to-accommodate claims arising under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA"). The standard of proof that the Circuits require in these cases is similar, if not identical in all aspects but semantics, that the Court's intervention is unwarranted.

The Petitioners are simply incorrect in concluding that the Sixth Circuit determined as a matter of law the "effectiveness" of an auxiliary aid for an ADA qualified individual, as both the Sixth Circuit's decision and the District Court's decision were reached after each court conducted rigorous factual analyses. The issues that the Petitioners seek to present for the Court's review are inextricably fact-bound, and granting the Petition would require the Court to set aside the factual findings made by both the Sixth Circuit and the District Court.

Though cloaked in manufactured conflicts among the Circuits, the heart of the Petitioners' argument is that both the District Court and the Sixth Circuit should have created a strict liability standard to be imposed upon a public entity for the entity's failure to provide an ADA qualified individual the precise auxiliary aid that the individual requests. The Petitioners would have this Court impose liability even in circumstances when the alternative auxiliary aid provided ensures that the qualified individual receives the same opportunity of the service, benefit, or activity of the public entity that a non-disabled individual would enjoy. The Sixth Circuit declined to make such an expansion to the ADA, as should this Court.

Petitioners have failed to carry their burden in demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

Petitioners Odis, Vonnie, and Blake Tucker are deaf and mute, and the parties agree that Petitioners are qualified individuals under the ADA. (*See* Pet. Apx. at 16a). Following a domestic dispute, Savannah Police Department officers transported Blake and Odis Tucker to the Hardin County jail where they were held as arrestees charged with a variety of crimes. (Pet. Apx. at 6a, 62a). Due to the nature of the criminal charges brought against them, both were held overnight without bond until their initial court appearance the next day. (Pet. Apx. at 7a, 62a). During the course of their detention, the Hardin County jailers communicated with

Odis and Blake Tucker by exchanging handwritten notes. (Pet. Apx. at 62a-63a). As the jail was not equipped with a teletypewriter telephone ("TTY") or a telecommunications device for the deaf ("TDD"), the jailers assisted Odis and Blake in placing a phone call to Vonnie Tucker by transcribing messages from each party and using a relay telephone line for hearing-impaired persons. (Pet. Apx. at 6a-7a, 62a-63a).

The next morning, Odis and Blake Tucker were brought to court for their initial appearance. (Pet. Apx. at 7a). The judge surmised that Odis and Blake Tucker were hearing impaired, based upon their actions in the courtroom and sounds that they made, and sent a handwritten note to them stating that he would take their matter up at the end of court so that he could spend extra time with them. (Pet. Apx. at 7a, 63a). When the judge took up the Tuckers' case, a courtroom officer provided them with a written statement of their rights, the Tuckers wrote on a piece of paper that they were "not guilty", the judge set a dispositional hearing date which was provided to them in writing, and released them on their own recognizance. (Pet. Apx. at 7a, 63a).

Blake and Odis Tucker retained an attorney who contacted the court and requested that a sign language interpreter be present at the dispositional hearing. (Pet. Apx. at 7a, 63a). The presiding judge contacted the Tuckers' attorney and advised that an interpreter could not be available on the date of the scheduled hearing, but offered to continue the hearing date and reschedule it for a date on which an interpreter would be available. (Pet. Apx. at 8a, 63a). The Tuckers' attorney advised the court that he believed the matter

could be resolved through a plea agreement on the scheduled hearing date and that Vonnie Tucker could serve as an interpreter; however, if the resolution of the charges that the Tuckers' attorney anticipated did not materialize and a hearing became necessary, then he would seek a continuance so that a court-certified interpreter could be present. (Pet. Apx. at 8a, 63a).

A plea agreement was negotiated in which the charges against Odis Tucker were dismissed, and the charges against Blake Tucker were reduced. (Pet. Apx. at 8a, 63a). Blake Tucker, after having the plea agreement and his legal rights explained to him by his counsel, elected to move forward with presenting the plea agreement to the court for acceptance with Vonnie Tucker voluntarily serving as an interpreter at the Tuckers' counsel's request. (Pet. Apx. at 8a, 63a-64a). Blake Tucker, aware that a court provided interpreter was not present and that one could be made available on a different date, voluntarily chose to present his plea agreement to the court, which the court accepted. (Pet. Apx. at 8a-9a, 64a).

The Petitioners brought suit against Hardin County, Tennessee in the United States District Court for the Western District of Tennessee claiming that Hardin County violated their rights under the ADA by not having a TDD/TTY device available at the county jail, and by not having a court-provided sign language interpreter at Odis and Blake Tucker's initial appearance or at Blake Tucker's dispositional hearing. Vonnie Tucker alleged that her rights were violated through the court's use of her volunteered services as a sign language interpreter at Blake Tucker's dispositional hearing.

The District Court granted Hardin County summary judgment as to all of the Petitioners' claims brought against them, finding that Petitioners had either failed to state a claim upon which relief could be granted, lacked standing on a particular claim, or failed to demonstrate that they were discriminated against *because of* their disability in violation of the ADA. Concerning the discrimination claim under the ADA, the Petitioners were unable to show that they were denied the same "aid, benefit, or service" of their detention and court appearances that a non-disabled individual would receive. *See Tucker v. Hardin Co.,* 448 F.Supp.2d 901 (W.D.Tenn. 2006) (Pet. Apx. 61a-79a). The United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment in all respects. *Tucker v. Hardin Co., et al.*, 539 F.3d 526 (6th Cir. 2008) (Pet. Apx. 3a-43a).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or another Court of Appeals, nor do the decisions implicate a federal question that has not been resolved by this Court. Petitioners have failed to carry their burden in demonstrating that there are any compelling reasons for the Petition to be granted. *See* Sup. Ct. R. 10.

I. *The Standard of Proof that the Sixth Circuit Applied is Consistent with the Other Circuits.*

A. Petitioners Have Waived Their Argument that the Lower Courts Applied an Inconsistent Standard of Proof.

For the first time in this case, Petitioners claim that both the District Court and the Court of Appeals applied an undefined standard of proof to their ADA failure-to-accommodate claims that is inconsistent with the other Circuits. (*See* Pet. at 15-20). Petitioners did not raise this contention before either the District Court or the Sixth Circuit. Thus, Petitioners have waived this argument. *See United States v. Bean*, 537 U.S. 71, 75 n. 2 (2002) (stating that an argument was "waived" because it was "raised for the first time in his brief on the merits to this Court"); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

B. There is No Significant Conflict among the Circuits Concerning the Proof Required for an ADA Failure-to-Accommodate Claim.

In addition to waiving this argument, the Petitioners exaggerate any perceived split among the Circuits concerning the required proof for ADA failure-to-accommodate claims and have attempted to craft a Circuit split based solely upon semantics. Petitioners point to a variety of cases in which the various Circuits have used differing nomenclature to answer the fundamental question of every ADA claim: whether a disabled person was denied the benefit of a public entity's "aid, benefit, or service" that a non-disabled individual would receive *because of* the disabled individual's disability. (*See* Pet. at 15-20). For example, Petitioners submit that within the Fourth and Seventh Circuits, ADA failure-to-accommodate claims require no proof of intent to discriminate on the part of the public entity. (Pet. at 16) (*citations omitted*). Petitioners then point to the First and Eleventh Circuits for the notion that an ADA plaintiff in a failure-to-accommodate claim must satisfy a higher standard of proof by demonstrating that the public entity acted with "personal animus" to the disabled individual. (Pet. at 16) (*citations omitted*). Continuing their survey, Petitioners also submit that the Second, Ninth, and Tenth Circuits provide that "intentional discrimination" can be inferred from "deliberate indifference," in alleged contrast to the Fifth Circuit which requires proof of "intentional discrimination" but does not require proof of "deliberate indifference." (Pet at 17-18) (*citations omitted).* Petitioners contend that these alleged varying standards of proof, combined with the Sixth Circuit's

holding in this case, are inconsistent with the potential for producing differing results for ADA litigants. (Pet. at 15-20).

Petitioners fail to recognize that all of the listed Circuits require the same proof in failure-to-accommodate claims, regardless of what precise phraseology individual authoring judges of various panels throughout the federal Courts of Appeals might choose to use in a given opinion. The cases cited by Petitioners in support of their contention require that an ADA qualified individual must prove that a public entity's alleged failure to accommodate their disability caused a fundamental difference in the aid, benefit, or service that the disabled individual receives compared to what a non-disabled individual receives. *See, e.g., Fradera v. Municipality of Mayaguez*, 440 F.3d 17, 22 (1st Cir. 2006) (stating that an ADA plaintiff must show exclusion from public services because of disability); *A Helping Hand, LLC v. Balt. County*, 515 F.3d 356, 361 (4th Cir. 2008) (stating that ADA's purpose of prohibiting exclusion or denial of a public entity's services, or being discriminated against, on the basis of disability); *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 563-64 (7th Cir. 2003)(affirming summary judgment where ADA plaintiff is unable to demonstrate that public entity's alleged failure to accommodate "affected the developmentally disabled any differently than they affected all other people").

Irrespective of the words used by the differing Circuits when analyzing failure-to-accommodate claims, the question asked remains the same: "did the public

entity's alleged failure to accommodate a disability result in unequal treatment of the disabled individual?" This is the question that must be asked and answered in failure-to-accommodate claims, and the semantic differences of the Circuits reveal no fracture of this inquiry. This is the precise question that the Sixth Circuit considered with respect to Petitioners' claims the Sixth Circuit reached the conclusion that Petitioners had failed to demonstrate how Hardin County's alleged failures to accommodate their disabilities resulted in their being treated differently than non-disabled individuals. Therefore, the standard of proof that the Sixth Circuit applied in this matter is consistent with all Circuits, making this Court's review unnecessary.

II. *The Sixth Circuit Did Not Rule that the "Effectiveness" of an Auxiliary Aid is a Question of Law.*

Contrary to the Tuckers' presentation to the Court, the Sixth Circuit did not hold that the "effectiveness" of an auxiliary aid that a public entity provides to a qualified individual is a question of law. In affirming the District Court's finding that the auxiliary aid Hardin County made available to the Petitioners (the jailers' assistance in placing a telephone call) was effective, the Sixth Circuit undertook an independent factual analysis and in its *de novo* review reached the same conclusion as the District Court. The Sixth Circuit found that the auxiliary aid was effective because the communications sought to be achieved through the telephone call were, in fact, achieved. *Tucker*, 539 F.3d at 540 (Pet. Apx. at 30a).

Because the Sixth Circuit found that the undisputed material facts regarding the effectiveness of the provided auxiliary aid supported a grant of summary judgment in Hardin County's favor, Petitioners now call foul and contend that the Sixth Circuit overreached and decided the effectiveness of the provided auxiliary aid as a matter of law. The panel majority addressed Petitioners' current argument in responding to the dissent as follows:

> The dissent correctly notes that the determination here is one of fact, and we do not suggest otherwise. As is always the case in the summary judgment context, the district court assumes the facts in favor of the non-moving party and determines whether a material fact exists to create a question appropriate for submission to a jury. This is different than concluding that every factual question requires a jury determination. *We rest our decision on these facts.*

Tucker, 539 F.3d at 539 (Pet. Apx. at 29a) (emphasis added).

Petitioners cite several cases that they contend support their proposition that the effectiveness of an auxiliary aid is *always* a jury question. (Pet. at 21). These cited decisions, however, do not hold for such an inflexible rule. In *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185 (10th Cir. 2007), the questions that the Tenth Circuit found were proper for a jury to resolve were: 1) whether the public officers had knowledge of the plaintiff's disability, 2) whether

he needed an accommodation, and 3) whether he was injured by not being allowed to participate in a probable cause hearing for which his presence was not required. *Id.* at 1199. Robertson was never provided any auxiliary aids. *Id.* Unlike the *Robertson* plaintiff, Petitioners were provided an auxiliary aid, just an alternative auxiliary aid to the one that they requested. Thus, Petitioners' reliance on *Robertson* is misplaced.

Petitioners also rely upon *Chisolm v. McManimon*, 275 F.3d 315, 330 (3d Cir. 2001), in support of their position that the alternative auxiliary aids Hardin County provided to them upon their request for a TDD/TTY device is a jury question. In *Chisolm*, like *Robertson*, the jailers offered the plaintiff no alternative means of communication in response to his request for a TDD/TTY device. 275 F.3d at 318-319. Chisolm, upon his intake into the local jail, asked for a TDD/TTY device or that jail personnel contact his non-hearing impaired roommate. *Id.* The jail officials did not allow Chisolm access to a TDD/TTY or any alternative means of communication and did not contact his roommate for two days. *Id.* During this time, Chisolm was held incommunicado from his attorney, friends, or family. *Id.* Again, the present case stands in stark contract to *Chisolm*. The Hardin County jailers made diligent effort to assist the Petitioners in communicating with their family. There was no proof in the record that they were not able to effectively communicate with their family through the jailer-assisted phone call.

Petitioners also assail an Eleventh Circuit decision which, like the Sixth Circuit, found that a local jail not being equipped with a TDD/TTY device did not create

a genuine issue of fact when the hearing impaired arrestee was provided assistance by a jailer in using a relay telephone line and had access to a regular telephone line in which the disabled individual could leave messages for a loved one. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1087 (11th Cir. 2007). Instead of accepting the long standing summary judgment principle that not all factual disputes are material or require a jury, Petitioners accuse the Sixth Circuit, along with the Eleventh Circuit, of being renegade Courts at the vanguard of a seismic shift in ADA jurisprudence that will eviscerate the efficacy of the ADA.

Petitioners' argument is a thinly veiled attempt to have this Court declare that the ADA imposes strict liability on a public entity in circumstances in which a qualified individual requests a specific auxiliary aid that the public entity does not have available, even in circumstances when the public entity nonetheless provides an effective alternative. Petitioners' attempt to have a strict liability standard mandated by the Sixth Circuit failed, and should fail in this Court as well. *See Tucker*, 539 F.3d at 538-39 (Pet. Apx. at 27a-28a) (rejecting the dissent's suggestion that a public entity's failure to provide the specific accommodation requested by an ADA-qualified individual "undermines any consideration of the 'reasonableness' or 'effectiveness'" of the auxiliary aid provided). The ADA is not a strict liability statute, and no court has ever held that it is.[1]

[1] This clear pronouncement that strict liability will not be imposed on a public entity that provides a reasonable accommodation to a qualified individual, albeit not the specific accommodation requested, may be found in unreported cases. (Cont'd)

Like the Sixth Circuit, this Court should also decline to expand the language and requirements of the ADA this far.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent Hardin County, Tennessee respectfully requests that the Petition be denied.

Respectfully submitted,

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(Cont'd)
See Johnson v. Moundsvista, Inc., Civil No. 01-915 (DWF/AJB), 2002 U.S. Dist. LEXIS 16450 (D. Minn. Aug. 28, 2002) (stating that "the ADA does not create a strict liability standard; rather, an individual bringing such a cause of action must show 'tangible injury.'"); *Walters v. Universal Flavor Corp.*, No. 4:99CV00745LOD, 1999 U.S. Dist. LEXIS 22211 (E.D. Mo. Sept. 7, 1999) (stating that "[t]he ADA is not a strict liability statute").