No. _____

In The
Supreme Court of the United States

ODIS TUCKER, VONNIE TUCKER,
and BLAKE TUCKER,
Petitioners,

v.

HARDIN COUNTY, a political subdivision of State of Tennessee, SAVANNAH POLICE DEPARTMENT,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case seeking damages for the failure to provide a reasonable accommodation under Title II of The Americans with Disabilities Act (42 U.S.C. §12132), the plaintiff must prove as a part of his claim, (i) "intentional discrimination" as required by the Sixth Circuit, (ii) "personal animus" underlying the failure to accommodate, as required by the First and Eleventh Circuits; (iii) "deliberate indifference to a recognized federal right", as required by the law of the Second, Ninth, and Tenth Circuits, (iv) intentional discrimination by failing to accommodate as required by the Fifth Circuit; or (v) simply an unreasonable "failure to accommodate" as held by the Fourth and Seventh Circuits?

2. Whether, under Title II of The Americans with Disabilities Act (42 U.S.C. §12132), the "effectiveness" of a "auxiliary aid" proved by a public entity is a question of law to be decided by the court, as held by the Sixth and Eleventh Circuits or is it a question of fact to be decided by a jury as held by the Third, Eighth and Ninth?

LIST OF PARTIES

All the parties are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Odis Tucker, Vonnie Tucker, and Blake Tucker, who are the original plaintiffs in this matter, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit that the Petitioners, as a matter of law, failed to prove that defendants, City of Savannah Tennessee Police Department, and Hardin County, Tennessee had intentionally discriminated against them due to their hearing and speech disability by failing to provide "auxiliary aids" or that these public entities failed to provide effective "auxiliary aids" to accommodate their disabilities in violation of *42 U. S. C. §12132; 28 C.F.R. § 35.130* and *28 C.F.R. § 35.160*.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (Apx. Pg. 3a) is reported at 539 F.3d 526 (6th Cir. 2008). The District Court opinion as to the Petitioners claims against City of Savannah, Tennessee is reported at 443 F.Supp.2d 971 (W.D. TN, 2006)(Apx. Pg. 49a). The District Court opinion as to the Petitioners' claims against Hardin County, Tennessee is reported at 448 F.Supp.2d 901 (W.D. TN, 2006)(Apx. Pg. 61a). Petitioners' claims against the State of Tennessee were dismissed by the District Court on August 2, 2005. That opinion is unreported. (Apx. Pg. 74a) Petitioners did not pursue an appeal to the Sixth Circuit against that public entity.

JURISDICTION

The initial judgment of the Court of Appeals was entered on August 29, 2008. A timely petition for re-hearing and hearing *en banc* was filed on September 15, 2008. The petition for re-hearing and hearing *en banc* was denied on January 16, 2009. (Apx. Pg. 1a) The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS AND REGULATIONS OF THE DEPARTMENT OF JUSTICE

Title II of the Americans with Disability Act of 1990 provides in pertinent part:

42 U.S.C. §12132 states:

> "Subject to the provisions of this subchapter, 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. §12133 states:

> "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."

28 C.F.R. Part 35 states in pertinent part:

28 C.F.R. §35.130

"(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability –

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless

such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others; . . .

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service."

28 C.F.R. §35.160 states in pertinent part:

"(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities."

28 C.F.R. §35.164

"This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature or a service, program or

activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity."

STATEMENT OF THE CASE

1. Congress enacted the Americans with Disabilities Act" ("ADA") to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *42 U.S.C. §12101(b)(1); see Tennessee v. Lane*, 541 U.S. 509, 517 (2004). Title II specifically provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or

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.*

To promote the effective integration of this national mandate into practice, the Congress required the Attorney General to enact regulations no later than July 26, 1991 to implement the law. *42 U.S.C. §12134* In compliance with that requirement, the Attorney General adopted enabling regulations that have been published at *28 C.F.R. Part 35.* These regulations are entitled to substantial deference by the courts. *Blum v. Bacon*, 457 U.S. 132 (1982).

Included in those regulations are provisions that prohibit public entities from denying a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service. *28 C.F.R. §35.130(b)(1)(I).* The regulations make clear that a public entity has an affirmative duty to accommodate the individual with a disability by providing "auxiliary aids" that ensure communications with hearing and speech disabled persons are as effective as communications with others. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 275-76 (2nd Cir., 2003); *Ferguson v. City of Phoenix,* 157 F.3d 668, 678(9th Cir., 1998). This accommodation must be done giving "primary consideration" to the aid requested by the disabled person. *28 C.F.R. §35.160.*

This duty to provide accommodations as requested by the disabled person is limited by proof presented by the public entity that, considering all funding and operating resources available, the proposed accommodation would result in (1) a fundamental alteration in the nature of the service, program or

activity; or (2) undue financial or administrative burdens. In order for these exemptions, a public entity must provide a written statement explaining its justifications. *28 C.F.R. §35.164.*

2. The Petitioners, Odis Tucker and Vonnie Tucker are husband and wife. Blake Tucker is Vonnie's son.[1] These Petitioners are disabled because they are deaf and mute. These parties, at the time of this incident were all residents of the State of Alabama.. Blake Tucker was married to Lauren Tucker. They had a baby together. Lauren and the baby also have hearing and speech disabilities. (6th Cir. Joint Apx. Pgs. 30; 41)

On the evening of Sunday, February 29, 2004, Blake and Odis Tucker drove from their home in Alabama to pick up Lauren and the baby. Lauren had been visiting with her mother Donna Spears at her home in Savannah, Tennessee. Donna Spears did not have a disability. Lauren had been visiting with her mother for a few days prior to the Tucker's arrival. While the Tuckers were waiting for Lauren to come out and leave with the baby, one of the neighbors called the police. (6th Cir. Joint Apx. 43)

(1) Contact by the Petitioners Odis and Blake Tucker with officers of the City of Savannah Police Department.

Officer Mike Pope of the Savannah Police Department was the first to arrive after the call. He knew that Lauren was deaf and mute. Blake tried to

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[1] The parties will be referred to hereafter by their first name for brevity purposes.

communicate with Officer Pope through writing. When Blake tried to write something on a piece of paper, the officer responded by asking him if he "read lips". Blake responded that he didn't, and the police officer wrote on the paper, "What's going on?" Blake responded, "I don't know, why are you here?" To that, the officer responded, "Let me check." The police were clearly informed that the Tuckers wanted the assistance of a sign language interpreter. Thereafter, there was no written communications between Blake Tucker and the police. There was no written communications between the police and Odis Tucker. (6th Cir. Joint Apx. Pgs. 16; 219-220; 338-40; 415-16; 442-42; 443-445).

Lauren Tucker told the police in writing that she wanted to go with Blake. She was not able to understand what was being said around her in conversations between the officers and her mother. Lauren specifically requested that a sign language interpreter be provided. She was so frustrated with her inability to communicate that she began screaming: "Get an interpreter, Get an Interpreter". (6th Cir. Joint Apx. Pgs. 443 - 47).

Donna Spears, Lauren's mother, played an active role in escalating the tensions between the parties. She had the advantage because she was not hearing and speech disabled. Her ability to communicate enabled her to persuade the police to let her continue to be involved and obstruct the Tuckers departure. (6th Cir., Joint Apx. Pgs. 225-32; 344-56)

During the Tuckers attempt to leave, and for no apparent reason, Officer Pope put Blake in his patrol car and "spoke" to him. Blake interpreted Pope's

comments to him as being that Lauren wanted to go home with him, but if he didn't treat her well, he would get him. This was Blake's understanding because Pope put his fist in the air like he was going to hit him, and writing this comment on a piece of paper. (6th Cir. Joint Apx. Pgs. 349-350)

After the Tuckers understood that they were able to leave, Donna Spears and her neighbor, Judy Crotts, spoke with the officers and got the officers to interfere again with the departure so that they could hold the baby again. (6th Cir. Joint Apx. Pgs. 247; 351-54; 447-50; 559). Blake tried to close the door to the vehicle when Donna Spears assaulted him and pulled him in the way of the closing door ripping his shirt. The police then took Donna to the ground. Blake then again tried to close the door and Judy Crotts got in the way trying to prevent him from closing the door. He put his arm out to keep her from interfering and she fell back to the ground. The police then jumped him. He tried to "sign" to them, "Wait a minute, Wait a minute" in an effort to communicate with them and tell them that he wasn't getting physical. The police then took him to the ground. Blake refused to put his hands behind his back because that was how he "communicated". They then hit him in the mouth with a gun chipping his tooth, and he was punched in the face three or four times. (6th Cir. Joint Apx. Pgs. 353-56).

While the arrest of Blake was taking place, Odis was "screaming" in sign language telling the officers to not hit Blake. Odis approached the officers signing to them to not hurt Blake. Odis was pushed back by one of the officers. At that time, Officer Pope pulled his gun and pointed it at Odis and started saying things to

him that he did not understand. He thought that the officers wanted him to follow them. That was when they arrested him. (6th Cir. Joint Apx. Pgs. 251-54).

At the time of this incident, the City of Savannah had a policy that sign language interpreters would be provided upon request. This policy was adopted by the City in order for them to come into compliance with Title II of the ADA and its enabling regulations. This policy was known by the officers at the scene. (6th Cir. Joint Apx. Pgs. 511, 524; 554-55). The officers interpreted the sign language gestures of the Tuckers as "anger and agitation". (6th Cir. Joint Apx. Pgs. 610-611). The officers had no training concerning how to deal with people who were hearing and speech disabled, and expected the Tucker's to "read their lips". (6th Cir. Joint Apx. Pgs. 522; 559-60). There were sign language interpreters readily available in Hardin County. (6th Cir. Joint Apx. Pg. 553). Despite their policy, and the availability of sign language interpreters, City of Savannah had no list of available sign language interpreters that were available to the officers. (6th Cir. Joint Apx. Pgs. 526).

(2) The booking of the Petitioners at the Hardin County Jail.

Odis and Blake were taken to the Hardin County Jail after their arrest. Blake and Odis were booked shortly after coming into the jail and before they were allowed a telephone call. (6th Cir. Joint Apx. Pgs. 371-372). Blake requested to make a phone call and was initially denied. Some time later, Blake again requested a phone call from Hardin County Officer Franks and asked to use a TTY device. Blake was

advised that Hardin County didn't have a TTY device. (6th Cir. Joint Apx. Pgs. 393-95).

Vonnie Tucker called the jail sometime thereafter, and Odis was taken out of the cell to receive the call. Thereafter, Jailers Franks and Pinson transcribed the messages from Vonnie that they received from the relay operator and then read hand written messages to the relay operator. (6th Cir. Joint Apx. Pgs. 276-77; 371-72; 393-95; 397-402; 793-94; 803; 923-94; 956) Officer Pinson testified that the Tuckers were treated differently than any other person who was arrested who were not disabled. (6th Cir. Joint Apx. Pgs. 956)

Hardin County did not provide any training to their officers as to how to address the needs of individuals with disabilities in the jail. (6th Cir. Joint Apx. 947-48; 954). In addition, Hardin County had failed to modify their policies or procedures for their employees to follow to come into compliance with the ADA requirements to accommodate individuals with hearing and speech disabilities. Hardin County had not performed a self-evaluation as required by the regulations and there existed no training manuals, videos, or plan of action to address the communication needs of deaf and/or mute individuals. (6th Cir. Joint Apx. Pgs. 947-50)

(3) The arraignment of the Petitioners in the Hardin County General Sessions Court.

While the Tuckers were at the jail the night before, they were told that they would be going before the Judge the next morning. They specifically inquired and requested that a sign language interpreter be present for the hearing and were told by Officer

Franks that he was not sure but thought one would be there for them. (6th Cir. Joint Apx. Pgs. 908-909). When they arrived for court the next morning, there was not sign language interpreter. The General Sessions Judge was aware of his responsibility as a member of the Judiciary to provide sign language interpreters. (6th Cir. Joint Apx. Pgs. 958).

The Judge sent a note to Blake and Odis stating that he would save their case for last so that they could have more time to communicate with them. When their case was called and they were motioned to come forward, they started asking for an interpreter. They got no response. They wrote down on a piece of paper that they were not guilty. (6th Cir. Joint Apx. Pgs. 311; 421-22). They were not advised of their rights or what they were charged with (6th Cir. Joint Apx. Pgs. 278-81; 311-12; 402-05) This was despite the fact that the Judge acknowledged that it was his responsibility to make sure the defendants knew their rights and what they were charged with. He felt that they understood their rights because they "shook their heads" when he told them their charges. (6th Cir. Joint Apx. Pgs. 690; 692). The Tuckers did not understand what he was saying to them. (6th Cir. Joint Apx. Pg. 312-13; 421). They were given a card that told them to be back for court on March 19, 2004.

(4) The Dispositional Hearing of the Petitioners.

Prior to the March 19, 2004 dispositional hearing, the Tuckers hired attorney Rusty Larson. They meet with him on March 11, 2004. He sent a notice to the court on March 15, 2004 of their need for an interpreter. According to Mr. Larson, he received no

response to that request, and was not aware that the proceedings would be postponed. He did raise the issue with Asst. Dist. Atty. John Overton who told him that there would be no interpreter because they were "too expensive". (6th Cir. Joint Apx. Pgs. 913-14). The Tuckers became aware that there would be no sign language interpreter present when they arrived for court on March 19, 2004. (6th Cir. Joint Apx. Pg. 914).

When the Tuckers arrived at the court house, Blake was upset due to Judge Smith's representation to him at the arraignment that an interpreter would be present for the March 19, 2004 hearing. (6th Cir. Joint Apx. Pgs. 404) Their lawyer discussed and negotiated the charges with the Asst. Dist. Atty. After this negotiation, Larson presented the plea to them. Blake felt that he had to accept the plea agreement that day or it would not be available to him and the charges would not be dropped on Odis. If the hearing date was postponed, there was no guarantee that Hardin County would provide an interpreter due to the cost. (6th Cir. Joint Apx. Pgs. 370-71; 337-38; 811-15; 914-16; 928; 940) Blake did not understand the information that was presented to him in the court room due to its legal nature, and was never aware that the judge advised him of any of his rights. There was little if any communication between he and the judge. He was confused and frustrated because he did not understand what was being said and what was going on in court. (6th Cir. Joint Apx. Pgs. 420-41; 423-25)

Vonnie Tucker is not a certified sign language interpreter and did not attend the court proceedings for the benefit of the court. She was requested to serve as the interpreter for the proceedings where Blake's plea was taken by the court because she was the only

"auxiliary aid" available. She was uncomfortable with the situation and found the translating in the court room very difficult. She could not understand what the court was saying because she was having to read the judge's lips. (6th Cir. Joint Apx. Pgs. 926-27; 972)

On August 29, 2008, a divided court of appeals, sustained the District Court's grant of Summary Judgment as to the Tuckers's claims of discrimination based on these set of facts. *Tucker v. Hardin County, Tennessee,* 539 F.3d 526 (6th Cir. 2008; Apx. Pg. 3a) The Petitioners filed a Motion for Rehearing or in the alternative hearing *en banc.* This motion was denied on January 16, 2009.

REASONS FOR GRANTING THE PETITION

This Court's review is needed to resolve two widespread and entrenched conflicts in the Circuits pertaining to the proof of one of the most common types of claims raised under the ADA - the failure to reasonably accommodate an individuals disability through the provision of auxiliary aids or services. Although the ADA is a single federal statute prescribing uniform federal standards for nationwide application, the required proof for such failure-to-accommodate claims diverges widely based on nothing more than circuit geography because of those circuit conflicts. In some Circuits, these petitioners would be required to prove that intentional discrimination or personal animus motivated the failure to accommodate; other plaintiffs in other Circuits must prove deliberate indifference; while sill other plaintiffs need only prove the unreasonable failure to accommodate. Likewise, the adequacy of the accommodation is a fact question for the jury in some

Circuits, while it is resolved as a question of law in other Circuits. Only this Court's review can bring stability and uniformity to the interpretation and enforcement of this widely invoked and important civil rights statute.

1. UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT (42 U.S.C. §12132) INVOLVING CLAIMS FOR COMPENSATORY DAMAGES, THERE ARE SERIOUS CONFLICTS IN THE CIRCUIT COURTS AS TO WHETHER THE DISCRIMINATION AGAINST A QUALIFIED INDIVIDUAL WITH A DISABILITY MAY BE PROVEN BY (1) EVIDENCE OF AN UNREASONABLE "FAILURE TO ACCOMMODATE" AS HELD BY THE FOURTH AND SEVENTH CIRCUITS; (2) "PERSONAL ANIMUS" AS HELD BY THE FIRST AND ELEVENTH CIRCUITS; (3) "DELIBERATE INDIFFERENCE" TO A RECOGNIZED FEDERAL RIGHT AS HELD BY THE SECOND, NINTH, AND ELEVENTH CIRCUITS; (4) "INTENTIONAL DISCRIMINATION" AS HELD BY THE SIXTH CIRCUIT; OR (5) INTENTIONAL DISCRIMINATION BY FAILING TO REASONABLY ACCOMMODATE AS REQUIRED BY THE FIFTH CIRCUIT.

The court of appeals here upheld dismissal of the petitioner's case because they had failed to prove that the defendants had "intentionally discriminated" in denying them reasonable and adequate accommodations under the ADA. While the standard has been echoed by a couple of other courts of appeals, in other Circuits, very different standards govern cases just like the petitioners.

On the issue of what kind of discrimination must be proven by a plaintiff, there appear to be five different standards of proof that have been established by the various Circuits that have addressed the issue. In this case, the Sixth Circuit has established a standard described as "Intentional Discrimination". There is no explanation of what that term means other than these plaintiffs failed to prove that the public entities were intentionally discriminating against them by not providing requested auxiliary aids. *Tucker v. Hardin County, TN*, 539 F.3d 526(6th Cir. 2008).

In the Fourth and Seventh Circuits, actions for compensatory damages may be brought under either an "intentional discrimination" theory or a "failure to accommodate standard". Under the "failure to accommodate standard" there is no requirement to prove any form of "intent" on the part of the public entities. *A Helping Hand, LLC v. Baltimore County, MD,* 515 F.3d 356, 362 (4th Cir. 2008)(failure to make reasonable accommodations constitutes actionable discrimination); *Good Shepherd Manor Foundation, Inc. v. City of Momence,*323 F.3d 557, 561-562 (7th Cir. (Ill.), 2003)(failure to accommodate is actionable as discrimination no matter the motive of the public entity).

On the other extreme, in the First and Eleventh Circuits, an ADA plaintiff must prove that the public entity had "personal animus" towards the disabled person. *Fradera v. City of Mayaguez*, 440 F.3d 17, 22-23 (1st Cir., 2006)(failure to prove disability based animus was fatal to discrimination claim); *Wood v. President and Trustees of Spring Hill College in City of Mobile*, 978 F.2d 1214, 1219 (11th Cir. (Ala.),1992)(what is required in circuit to prove

discrimination is unclear, but jury charge requiring proof of discriminatory animus was not plain error).[2]

Yet a fourth standard governs in the Second, Ninth, and Tenth Circuits, which hold that proof of "deliberate indifference" by the public entity presents a *prima facia* case. *Bartlett v. New York State Bd. of Law Examiners,* 156 F.3d 321, 331-332 (2ndCir.,1998)(intentional discrimination is inferred from a policy holders deliberate indifference to a recognized federal right); *Lovell v. Chandler*, 303 F.3d 1039, (9th Cir., (Hawaii), 2002)(intentional discrimination is inferred from conduct that shows deliberate indifference to protected federal right); *Duval v. County of Kitsup,* 260 F.3d 1124, 1129 - 1138 (9th Cir. 2001)(same as *Lovell)*; *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. (Wyo.),1999)(intentional discrimination is inferred from deliberate indifference).

The Fifth Circuit, for its part, has concluded that proof of "intentional discrimination" is required, but discounted a "deliberate indifference" standard. In

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[2] In the unreported case of *Saltzman v. Board of Com'rs of North Broward Hosp. Dist.,* 239 Fed.Appx. 484, 2007 WL 1732893 (2007), the Eleventh Circuit said that they had not held one way or the other whether "intentional discrimination" required personal animus or whether deliberate indifference would qualify. In that case, the court held that the hospital had no responsibility to provide a sign language interpreter for a patient because the failure to provide one was not "intentional discrimination". This case shows that there is uncertainty not only among the Circuit Courts, but in the Circuit Courts. This Circuit appears to be unprepared to make a definitive ruling.

Delano-Pyle v. Victoria County, Tex., 302 F.3d 567 (5th Cir., 2002) the court noted:

> "there is no requirement to prove that a public entity has a "policy of discrimination" to establish intentional discrimination. In addition, there is no "deliberate indifference" standard under the ADA. The failure to respond to a circumstance where an accommodation is obvious and the failure to provide a hearing impaired individual a reasonable accommodation can constitute "intentional discrimination". Id at 575.

It is also significant in that the guidance from the Justice Department does not require or even mention "intentional discrimination" as a requirement for a public entity to be held accountable for discrimination. For example, on the issue of the necessity of sign language interpreters at police confrontations, the Department of Justice guidance in a publication entitled "Communicating with People who are Deaf or Hard of Hearing" (Apx. Pg. 103a), there is a discussion and explanation entitled *"What Situations Require an Interpreter"*. This guidance specifically notes that under circumstances, such as those confronted by the Petitioners at the initial contact with the City of Savannah Police Department, a sign language interpreter would be required. It further notes that it is "inappropriate" to ask a family member or companion to interpret.

This is further addressed in a DOJ publication entitled, "Commonly Asked Questions About the Americans with Disability Act and Law Enforcement". (Apx. Pg. 80a) Question 10 states, "Do police

departments have to arrange for a sign language interpreter every time an officer interacts with a person who is deaf?" Thereafter, there is a discussion that states that the necessity of a sign language interpreter depends on the circumstances. It gives the example of a deaf mother who calls the police to report a crime in which the child has been abused by her father. A sign language interpreter is requested, but law enforcement refuses and enlists the mother to interpret for the daughter. In this scenario, the DOJ states emphatically that: "The police department in this example has violated the ADA because it ignored the mother's request and inappropriately relied on a family member to interpret". (Apx. Pg. 90a).

The violation in this example is quite clear, and it has nothing to do with "personal animus". It also does not give the police agency an out because they "could not have anticipated this event". This scenario violates the ADA because the police department ignored the mother's request.

In the case before the court, there is no question that at the initial contact with the City of Savannah Police Department, the Tuckers requested a sign language interpreter. There is no question that the police relied on Lauren Tucker's mother as an interpreter. However, in the Sixth Circuit, because of the holding in this case, a police department never has to provide a sign language interpreter at a police confrontation, because the failure to do so does not constitute "intentional discrimination" as a matter of law.

In the case now before the court, the plaintiffs were specifically denied requested accommodations by the

public entity in each of the circumstances they were confronted. In each case, the public entity denied the requested accommodation of a sign language interpreter. The public entity never went through the undue burden analysis required by *28 C.F.R. §35.164.* These defendants just decided to apply their own *ad hoc* alternative without any consideration of the law or regulations.

It is clear that if the Tuckers's case had been brought in the Second, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits, they would not have had Summary Judgment granted against them due to their failure to prove that the public entity "intentionally discriminated" against them.[3] However, because they happened to be discriminated against in a Circuit that requires proof of undefined "intentional discrimination", their claims are not actionable as a matter of law. This inconsistent standard among the Circuits is a condition that this court must not let continue because it denies all parties a consistent standard of law that should be applied to all under the ADA.

II. THERE ARE SERIOUS CONFLICTS IN THE CIRCUIT COURTS AS TO WHETHER THE "EFFECTIVENESS" OF A PROFFERED "AUXILIARY AID" BY A PUBLIC ENTITY IS A QUESTION OF LAW TO BE DECIDED BY THE COURT OR A QUESTION OF FACT THAT SHOULD BE DECIDED BY A JURY WITH THE SIXTH AND ELEVENTH CIRCUITS HOLDING

[3] The Third and Eighth Circuits do not appear to have addressed the requirement to prove "intentional discrimination".

THAT "EFFECTIVENESS" IS A QUESTION OF LAW, AND THE THIRD, EIGHTH, AND NINTH CIRCUITS HOLDING THAT "EFFECTIVENESS" IS A QUESTION OF FACT.

In the case before the court, in each of the events that the Plaintiffs were in contact with the public entities, they specifically requested the assistance of a sign language interpreter or, as in the case of their booking at the Hardin County Jail, they requested a TTY/TTD machine to facilitate their communications with their family. In each of the circumstances raised by the Plaintiffs, the Court held that as a matter of law, the provided aids of hand gestures, pen and paper, lip reading, untrained relay operators, and hearing and speech disabled family members serving as interpreters, were effective enough to provide the Petitioners the benefit of the service, program or activity. This finding was despite the Petitioners's testimony that they were confused as to what was being said by others, and that the communications were not "effective".

All Circuit courts, other than the Sixth Circuit in this case and the Eleventh Circuit, have held that the "effectiveness" of an "auxiliary aid" tendered by a public entity as an alternative to the one requested by the disabled person to be a fact question submitted to a trier of fact. *Chisolm v. McManimon*, 275 F.3d 315, 327-328 (3d Cir. 2001); *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999); *Duffy v. Riveland*, 98 F.3d 447, 454, 455 (9th Cir. 1996).

Here, however, the Sixth Circuit decided in the face of numerous genuine issue of material fact that, as a

matter of law, that these accommodations were effective.

A specific example of how serious the conflict is on this point involves the TTY/TTD machine. The defendant Hardin County had never had one. When Vonnie Tucker called the jail, after Odis and Blake were denied their required phone call, two untrained jailers, based on their own decision, provided the communications by taking written notes from the plaintiffs, reading them over the phone to another relay operator who in turn relayed the communications to Vonnie Tucker.

Despite the fact that the Hardin County Jailers acknowledged that this process was different than that provided to other inmates who were not disabled, the majority opinion concluded that this was "as effective as those provided to non-disabled persons". *Tucker* at 538.[4] As such, the Circuit Court concludes, the Plaintiffs testimony not withstanding, that as a matter of law an untrained jailer serving as a relay operator is sufficiently "effective" that there are no material issues of fact.

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[4] At one point, the majority opinion acknowledged the determination of whether the use of the "relay operators" was effective was a question of fact. Despite this acknowledgment, the majority opinion thereafter concluded that there were no material issues of fact that the failure of Hardin County to have a TTY/TTD machine as standard equipment, and that the accommodation provided to them was not only reasonable, but allowed the Tuckers a means of communication that was as effective as that provided to non-disabled persons. *Tucker* at 539.

This flies in the face not only of the rulings of other circuits, but also of the regulations established by the Department of Justice. 28 C.F.R. § 35.160 which provide:

> (b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.
>
> (2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities. (Emphasis added).

In support of this regulation the Department of Justice has provided guidance to police agencies in the form of "Frequently Asked Questions". In reference to the issue of how arrestees may communicate on the telephone in jail, it states:

> "• Arrestees who are deaf or hard of hearing, or who have speech disabilities, may require a TDD device for making out going calls. TDD's must be available to inmates with disabilities under the same conditions under the same terms and conditions as telephone privileges are offered to all inmates, and information indicating the availability of the TDD should be provided." U.S. Dept. of Justice, "Commonly Asked Questions About the Americans With Disabilities Act and Law Enforcement", at Question 16. (Apx. Pg. 38a).

The dissenting opinion in this case relied extensively on this statement in holding that petitioners should have been able to go to the jury on their claims. *Id.* at 543.

The opinion also contradicts other guidance given to police agencies as to when interpreters are necessary. In a directive published by the Department of Justice entitled "Communicating With People Who Are Deaf or Hard of Hearing, ADA Guide for Law Enforcement Officers" (Apx. Pg. 103a). A sign language interpreter is required during "domestic disturbances". It also notes that it is "inappropriate" to ask a family member or companion to interpret because of emotional issues. Clearly, this guidance as to how police officials should communicate with hearing and speech impaired individuals is an example of why a court cannot and should not decide these issues in the form of Summary Judgment.

There is a substantial conflict in the Circuits about the necessity of having a TTY/TTD machine available. There is much disagreement as to whether it is an actionable claim of discrimination for failing to provide a TTY/TTD machine, despite the Federal regulatory guidance to the contrary. In the Sixth and Eleventh Circuits, it appears that the failure to provide these machines does not constitute discrimination because passing notes and reading the notes over the telephone is effective as a matter of law. *Tucker,* supra.; *Bircoll v. Miami Dade County, Fl,* 480 F.3d 1072, 1088 (11th Cir., 2007). However, in the Third and Tenth Circuits, such a fact situation does not constitute grounds for Summary Judgment. *Robertson v. Las Animas County Sheriff's Dept.*, 500 F.3d 1185, 1198

(10th Cir. 2007); *Chisolm v. McManimon*, 275 F.3d 315, 319 (3rd Cir., 2001).

In light of these profound disagreements, it is vital for this court to grant certiorari in this matter.

CONCLUSION

The conflict in the circuit courts as to the issues presented in this Petition are not only profound but the resolution of this conflict is of critical national importance to the future success of the ADA. The record in this case is replete with examples of defendant public entities failing to modify their programs to provide reasonable and effective accommodations for hearing and speech disabled citizens, and instead providing *ad hoc* responses with no forethought, training, policies or most importantly the accommodation requested by the disabled person as required by *28 C.F.R. §35.160(b)(2).* The result of a failure by this court to grant the Petition will be that, at least in the Sixth Circuit, an arrestee will never have a right to <u>any</u> requested accommodation, no matter the surrounding circumstances before or after his arrest, because that person can never prove "intentional discrimination".

No jails in the Sixth Circuit will ever have to have a TTY/TTD machine, the Justice Department regulations and guidance not with standing, because a disabled person can never prove that the public entity's failure to have one in place constitutes "intentional discrimination". In the Sixth Circuit, the use of pen and paper, and the enlisting of family members to serve as interpreters in court proceedings will become standard procedure, both Federal

regulations and state law to the contrary, because disabled people can never prove that a court's failure to provide a sign language interpreter was "intentional discrimination" or that the provided aid was not effective in providing the same benefit. The hearing and speech disabled persons complaints of not understanding what was occurring will always be cast aside as "general confusion" not worthy of judicial consideration.

With the holding in this case as a reported opinion, the Sixth Circuit has given a specific statement to public entities that they have no duties to train their employees, plan for circumstances when hearing and speech disabled persons are confronted, nor any requirement to modify their polices. Actual discrimination against the disabled will be perpetuated, only this time, it will have a stamp of judicial approval. The noble national mandate of the ADA will truly become a hollow promise. The conflict in the circuits on these issues cannot be permitted to continue. Only this Court has the ability and authority to eliminate the conflict demonstrated, and it is of upmost national importance.

Respectfully submitted,
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