

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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DUSTIN A. KING,

Plaintiff-Appellee

v.

MARION COUNTY CIRCUIT COURT,

Defendant-Appellant

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION  
THE HONORABLE JANE E. MAGNUS-STINSON, No. 1:14-cv-01092

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BRIEF FOR THE UNITED STATES AS INTERVENOR AND AS *AMICUS*  
*CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING  
AFFIRMANCE

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**JURISDICTIONAL STATEMENT**

The defendant-appellant's jurisdictional statement is complete and correct.

**INTEREST OF THE UNITED STATES**

The United States files this brief as intervenor defending the  
constitutionality of a federal statute pursuant to 28 U.S.C. 2403(a) and as *amicus*  
*curiae* under Federal Rule of Appellate Procedure 29(a). This appeal concerns,  
*inter alia*, whether Congress had authority to enact 42 U.S.C. 12202, which



abrogated States' Eleventh Amendment immunity under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* The United States intervenes to defend the constitutionality of 42 U.S.C. 12202 and to ensure proper application of *Tennessee v. Lane*, 541 U.S. 509 (2004).

This case also concerns the proper interpretation of Title II of the ADA (Title II) and its implementing regulation as well as the appropriate standard for compensatory damages under Title II. The Attorney General has authority to bring civil actions to enforce Title II, see 42 U.S.C. 12133, and the Justice Department has authority to issue regulations interpreting the statute. See 42 U.S.C. 12133-12134, 12205a; 28 C.F.R. Pt. 35. Accordingly, the United States has an interest in ensuring that Title II and its implementing regulation are properly interpreted and applied.

### **STATEMENT OF THE ISSUES**

The United States will address the following issues:

1. Whether Eleventh Amendment immunity bars Dustin King's Title II claim.
2. Whether Marion Circuit Court violated Title II in failing to provide King, who is deaf, with an equal opportunity to participate in its mediation program.
3. Whether Marion Circuit Court may be subject to compensatory damages for violating Title II.

## STATEMENT OF THE CASE

Plaintiff-appellee Dustin King, who is deaf and communicates primarily through American Sign Language (ASL) (Doc. 128-1, at 9, 20),<sup>1</sup> alleged that defendant-appellant Marion Circuit Court<sup>2</sup> violated Title II of the ADA by refusing to provide him with a qualified ASL interpreter to afford him an equal opportunity to participate in the court's mediation program (Doc. 62, at 8-11).<sup>3</sup> The district court concluded that Marion Circuit Court violated Title II. App. 62.

### *1. The Modest Means Mediation Program*

Under Indiana law, counties may offer methods of alternative dispute resolution (ADR), including mediation, for domestic relations cases. Ind. Code

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<sup>1</sup> “Doc. \_\_\_, at \_\_\_” refers to documents in the district court record, as numbered on the district court’s docket sheet, and page numbers within the documents. “App. \_\_\_” refers to pages in Marion Circuit Court’s short appendix. “Br. \_\_\_” refers to pages in Marion Circuit Court’s opening brief as defendant-appellant.

<sup>2</sup> Although King brought this case against “Marion County Circuit Court,” the court is properly called “Marion Circuit Court.” See Ind. Code § 33-28-1-1 (2016); accord App. 1 n.1.

<sup>3</sup> King originally brought this suit against the Indiana Supreme Court, Marion Circuit Court, Marion County Office of the Court Administrator, Marion County Council, and Indiana Supreme Court Division of State Court Administration for violations of Title II and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794. Doc. 62. The district court dismissed all defendants except for Marion Circuit Court and dismissed King’s Section 504 claim against Marion Circuit Court. App. 33. Accordingly, the only claim remaining at summary judgment, and thus at issue on appeal, was King’s Title II claim against Marion Circuit Court.

§ 33-23-6-3 (2016). A participating county must adopt an ADR plan. Ind. Code § 33-23-6-2 (2016). In 2004, Marion Circuit Court and Marion Superior Court, two courts in Marion County, Indiana, jointly developed Marion County's domestic relations ADR plan "to minimize adversarial processes, promote agreed resolutions, \* \* \* [and] maximize timely case management" through mediation and "other related programs." Doc. 128-4, at 3-4; see also Doc. 128-14, at 5.

Under this plan, the courts established the Modest Means Mediation Program, which allows parties who qualify for financial assistance to participate in mediation on a sliding fee scale. Doc. 128-14, at 6, 9. Although a party may request to participate, only a court officer may refer a matter to mediation. Doc. 128-14, at 7-8. Upon making a referral, the court officer must appoint a mediator from the Indiana Supreme Court Mediator Registry to mediate under the ADR plan's terms. Doc. 128-4, at 6.

2. *King's Family Law Case*

In 2013, King was the respondent in a domestic relations case in Marion Circuit Court regarding custody of his daughter. Doc. 106, at 6; Doc. 128-1, at 22-23. King requested to participate in the Modest Means Mediation Program to avoid putting his daughter through trial and to resolve the dispute before his wedding. Doc. 128-1, at 15-16; Doc. 128-17, at 36. The court found King qualified for the program and referred the matter to mediation. App. 40.

King requested that Marion Circuit Court appoint an ASL interpreter for the mediation. Doc. 128-1, at 10. A magistrate judge denied King's request, indicating that the court "does not supply interpreters for mediation hearings" due to a lack of funding. App. 40 (citation omitted). King moved for reconsideration, contending that the denial violated the ADA. App. 61. Marion Circuit Court denied this motion. App. 41. Instead, the court waived the obligation to attend mediation to "alleviate the need for an interpreter." App. 41 (citation omitted).

King nonetheless participated in the Modest Means Mediation Program, relying primarily on his stepfather and, to a lesser extent, his then-fiancée to facilitate communication. Doc. 128-1, at 54, 76. King's stepfather, Roland Hodges, had never interpreted in court before and had no training or certification for court interpretation. Doc. 128-17, at 33. Hodges took time away from work to attend the mediation. Doc. 128-1, at 14-15. King did not pay Hodges for his assistance, but Hodges expected compensation if King "ever got paid for it in any way." Doc. 128-17, at 7.

The mediation lasted three or four hours and resolved all pending issues. Doc. 128-17, at 6-7; App. 42. King incurred attorney's fees in his effort to obtain a court-appointed interpreter (Doc. 128-19, at 3) and suffered emotional distress from the court's refusal to provide one (Doc. 128-1, at 63).

3. *The Present Lawsuit*

King filed this suit in the United States District Court for the Southern District of Indiana alleging, *inter alia*, that Marion Circuit Court violated Title II of the ADA by failing to provide auxiliary aids and services necessary for him to participate in mediation and by failing to provide a reasonable modification. Doc. 62, at 1, 11-12. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. 12132. Title II’s implementing regulation further instructs that “[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others,” 28 C.F.R. 35.160(a)(1), and a public entity must “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,” 28 C.F.R. 35.160(b)(1). A public entity must also “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. 35.130(b)(7)(1). King sought declaratory relief, actual and compensatory damages, attorney’s fees, and costs. Doc. 62, at 12.

King moved for partial summary judgment on Title II liability. Doc. 128. Marion Circuit Court filed a cross-motion for summary judgment. Doc. 141. In addition to arguing that it did not violate Title II, Marion Circuit Court contended that King lacked standing and that judicial and Eleventh Amendment immunity barred King's suit. Doc. 149, at 12-33.

4. *The Decision Below*

The district court granted King's motion and denied Marion Circuit Court's cross-motion. App. 35. It concluded that King had standing, and it rejected Marion Circuit Court's assertion of judicial immunity. App. 43-47, 51-52. It also determined that Marion Circuit Court was not entitled to Eleventh Amendment immunity, relying on *Tennessee v. Lane*, 541 U.S. 509 (2004), which held that Title II validly abrogated sovereign immunity "as it applies to the class of cases implicating the accessibility of judicial services." App. 47-50 (emphasis omitted) (quoting *Lane*, 541 U.S. at 531).

On the merits of King's ADA claim, the district court concluded that Marion Circuit Court violated Title II. App. 62. In particular, it determined that Marion Circuit Court failed to provide King with auxiliary aids and services necessary for him to participate in the Modest Means Mediation Program, which was a "service, program, or activity" of a public entity. App. 49-50, 53-54. It also concluded that Marion Circuit Court failed to provide a reasonable modification or show that

doing so would have caused a fundamental alteration or undue burden. App. 54-58. Lastly, it found Marion Circuit Court subject to compensatory damages, adopting the “deliberate indifference” standard used by the majority of circuits for identifying intentional discrimination warranting damages. App. 58-62.

The court entered final judgment in favor of King for \$10,380. App. 81. Marion Circuit Court filed a timely notice of appeal. Doc. 201.

### **SUMMARY OF ARGUMENT**

The district court correctly determined that Marion Circuit Court violated Title II by failing to provide King with a qualified interpreter to afford him an equal opportunity to participate in and benefit from the court’s mediation program.

1. The district court correctly concluded that Eleventh Amendment immunity does not bar King’s claim because Title II validly abrogated state sovereign immunity. This case fits squarely under *Tennessee v. Lane*, 541 U.S. 509, 531 (2004), which held that Title II abrogated sovereign immunity as applied “to the class of cases implicating the accessibility of judicial services.” Even if *Lane* is not directly controlling—*i.e.*, if access to mediation is somehow not access to judicial services or the courts—King’s claim is still not barred because Title II also abrogated sovereign immunity in the context of access to public legal services, including mediation.

2. The district court also properly concluded that Marion Circuit Court violated Title II. In making this determination, however, the court did not clearly distinguish between the effective communication provision of Title II's implementing regulation, 28 C.F.R. 35.160, and the reasonable modifications provision, 28 C.F.R. 35.130(b)(7). Although both provisions yield the same result, this Court should take care to disentangle the two, as each imposes different standards and burdens.

This case is best resolved under the effective communication provision. Under this provision, Marion Circuit Court violated Title II by failing to provide King with auxiliary aids and services, such as a qualified interpreter, to afford him an equal opportunity to participate in and benefit from mediation. Alternatively, King would also prevail under the reasonable modifications provision because Marion Circuit Court did not modify its policies, practices, or procedures to avoid discrimination.

3. Finally, the district court appropriately concluded that Marion Circuit Court was subject to compensatory damages for its deliberate indifference to King's Title II rights. In line with the majority of circuits, the court did not require King to show that Marion Circuit Court was motivated by "animus" or ill will but only that it knew that a federally protected right was substantially likely to be



violated and nonetheless failed to act. The court was correct to apply this standard and find it satisfied here.<sup>4</sup>

## ARGUMENT

### I

#### **ELEVENTH AMENDMENT IMMUNITY DOES NOT BAR KING'S TITLE II CLAIM BECAUSE CONGRESS ABROGATED SOVEREIGN IMMUNITY**

A. *Tennessee v. Lane Held That Congress Abrogated Sovereign Immunity In Cases Implicating Access To Judicial Services Or The Courts*

The district court correctly concluded that Eleventh Amendment immunity does not bar King's Title II claim because Congress abrogated sovereign immunity. App. 50. Although the Eleventh Amendment generally insulates States from suits by private citizens for damages in federal court, Congress may abrogate sovereign immunity if it "unequivocally expresse[s] its intent to abrogate that immunity" and "act[s] pursuant to a valid grant of constitutional authority." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). It is settled that Congress unequivocally expressed its intent to abrogate immunity under the ADA. *United States v. Georgia*, 546 U.S. 151, 154 (2006); see also 42 U.S.C. 12202.

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<sup>4</sup> We do not address Marion Circuit Court's argument regarding judicial immunity. See Br. 16-17. Nor do we address standing, as Marion Circuit Court abandoned this issue on appeal.

In *Tennessee v. Lane*, 541 U.S. 509, 518 (2004), the Supreme Court considered whether Congress had authority under Section 5 of the Fourteenth Amendment (Section 5) to enact Title II and thus to abrogate Eleventh Amendment immunity. Section 5 gives Congress the “authority both to remedy and to deter violation of [Fourteenth Amendment] rights \* \* \* by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trs. v. Garrett*, 531 U.S. 356, 365 (2001)). In other words, Section 5 enables Congress not only to remedy past violations of constitutional rights but also to enact “prophylactic legislation \* \* \* to prevent and deter unconstitutional conduct.” *Id.* at 727-728. The Court in *Lane* declined to resolve whether Congress had authority to enact Title II as a whole, but it held that “Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the *accessibility of judicial services*.” 541 U.S. at 531 (emphasis added). In other words, Title II abrogated sovereign immunity at least “as it applies to the class of cases implicating the *fundamental right of access to the courts*.” *Id.* at 533-534 (emphasis added).

This case falls squarely under *Lane*. The holding in *Lane* is not limited to cases involving *physical* access to the courts. See 541 U.S. at 527. Indeed, the Court noted that, in enacting the ADA, Congress considered the “failure of state

and local governments to provide interpretive services for the hearing impaired.”

*Ibid.*; see also *id.* at 514-515 (citing *Popovich v. Cuyahoga County Court*, 276 F.3d 808 (6th Cir.), cert. denied, 537 U.S. 812 (2002), in which a deaf litigant challenged a State’s failure to accommodate his disability in child custody proceedings). Nor is the holding limited to cases involving litigants’ access to traditional court proceedings, as the Court recognized that Congress also considered evidence of “the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service.” *Id.* at 527. This case concerns King’s access to the court’s mediation program, a judicial service like those described in *Lane*. Because this case implicates access to judicial services or the fundamental right of access to the courts, Marion Circuit Court is not entitled to immunity.

*B. Congress Also Abrogated Sovereign Immunity In Cases Implicating Access To Public Legal Services*

Even if Marion Circuit Court’s conduct did not implicate a fundamental right such that *Lane* is not directly controlling, Congress nonetheless abrogated sovereign immunity as applied here. In *United States v. Georgia*, the Supreme Court instructed that, “insofar as \* \* \* misconduct violated Title II but did *not* violate the *Fourteenth Amendment*,” a court must determine “whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is

*nevertheless valid.*” 546 U.S. at 159 (emphasis added). Accordingly, there is no basis for Marion Circuit Court’s assertion that it is entitled to immunity solely because, in its view, this case does not implicate a fundamental right.<sup>5</sup> See Br. 16. Instead, if Marion Circuit Court violated Title II but not the Fourteenth Amendment, Congress still validly abrogated sovereign immunity in the class of cases involving access to public legal services, including mediation.

Section 5 legislation is valid if it exhibits “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Title II was a congruent response to unconstitutional conduct that Congress aimed to prohibit and deter, as “the extensive record of disability discrimination that underlies [Title II] makes clear beyond peradventure that inadequate provision of public services \* \* \* was an appropriate subject for prophylactic legislation.” *Lane*, 541 U.S. at 529; see also 42 U.S.C. 12101(a)(3) (“[D]iscrimination against individuals with disabilities persists in such critical areas as \* \* \* access to public services.”). Further, Title II, as applied to public legal services, was a proportional response to the unconstitutional discrimination that Congress observed, as it targets particular

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<sup>5</sup> Marion Circuit Court also misstates the holding of *Georgia* in arguing that “[t]here is *only* a cause of action for damages against the States under Title II of the ADA for ‘conduct that *actually* violates the Fourteenth Amendment.’” Br. 15 (first emphasis added) (quoting *Georgia*, 546 U.S. at 159).

conduct and “requires only ‘reasonable modifications’ that would not fundamentally alter the nature of the service provided.” *Lane*, 541 U.S. at 532 (quoting 42 U.S.C. 12131(2)); see also *Garrett*, 531 U.S. at 391-392 (Breyer, J., dissenting) (documenting constitutional violations reviewed by Congress, including “[courts’ failure] to provide interpretive services for deaf people,” “lack of accessible police and court services for deaf people,” and “inaccessible courthouse[s]”). Accordingly, Title II validly abrogated sovereign immunity in the context of access to public legal services, including mediation.

## II

### **THE DISTRICT COURT CORRECTLY CONCLUDED THAT MARION CIRCUIT COURT VIOLATED TITLE II**

The district court properly concluded that Marion Circuit Court violated Title II by failing to provide King with auxiliary aids necessary to afford him an equal opportunity to participate in Marion Circuit Court’s mediation program. To prove a violation of Title II, a plaintiff must show that she (1) has a disability; (2) is otherwise qualified to participate in a public entity’s service, program, or activity; and (3) was denied the opportunity to do so, or was otherwise discriminated against, based on her disability. 42 U.S.C. 12132; see generally *Washington v. Indiana High Sch. Athletic Ass’n*, 181 F.3d 840, 843 (7th Cir.), cert.

denied, 528 U.S. 1046 (1999). Only portions of the second and third elements are at issue here.<sup>6</sup>

A. *Title II Applies To Marion Circuit Court's Mediation Program*

The district court correctly concluded that the Modest Means Mediation Program is a “service[], program[], or activit[y] of a public entity” under 42 U.S.C. 12132. See App. 48-50. Although the ADA does not define that phrase, Section 504, which is coextensive with Title II as relevant here, see *Washington*, 181 F.3d at 846-847, defines “program or activity” as encompassing “all of the operations of \* \* \* a department, agency, special purpose district, or other instrumentality of a State or of a local government,” 29 U.S.C. 794(b)(1)(A). See *Frame v. City of Arlington*, 657 F.3d 215, 225 (5th Cir. 2011) (en banc), cert. denied, 565 U.S. 1200 (2012). Moreover, courts have recognized that “programs, services, or activities” is a “catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.” *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997); accord *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003).

The Modest Means Mediation Program is a service, program, or activity of Marion Circuit Court. The program is authorized, regulated, and organized

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<sup>6</sup> Marion Circuit Court does not dispute that it is a public entity or that King is a qualified individual with a disability. Br. 18; App. 53.

pursuant to the court's ADR plan. See Doc. 128-4, at 3-4. Marion Circuit Court determines who may participate in the program, as only judicial officers may refer matters to mediation, and the court establishes the program's rules. Doc. 128-4, at 5-6. Marion Circuit Court also monitors disputes in mediation, as the plan requires mediators to report whether the mediation was successful. Doc. 128-4, at 6.

Particularly given the phrase's broad definition, the Modest Means Mediation Program is a service, program, or activity within the meaning of Title II. Cf. *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (recognizing that a trial is a service, program, or activity under Title II); *Prakel v. Indiana*, 100 F. Supp. 3d 661, 682 (S.D. Ind. 2015) (concluding that a pre-trial conference is a service, program, or activity under Title II).

Marion Circuit Court's arguments to the contrary are incorrect. It contended below that the "modest means mediation program," which "is utilized as part of the ADR plan," is not a service, program, or activity of the court because the program merely provides "access to an out of court proceeding, mediation, at a reduced rate." Doc. 149, at 18-19. It argued that the "Modest Means Mediation Program \* \* \* is funded privately by a fee paid by Marion County parties" and is therefore not a public program. Doc. 153, at 10. On appeal, Marion Circuit Court avoids use of the term "Modest Means Mediation Program" altogether. It instead seeks to distinguish between "the Plan," which it describes as "a program of

Marion County that the Circuit Court administers by collecting funds and providing subsidies so that parties with modest means can afford to participate in out-of-court mediation,” and “actual mediation,” which it asserts is “not a program or service of the Circuit Court.” Br. 9. No matter how Marion Circuit Court parses these services, however, “the Plan” and “actual mediation” are both operations of the public entity. Marion Circuit Court concedes that “the Plan” is a public program for purposes of Title II. Br. 9. So too is “actual mediation,” which occurs only upon the court’s referral, under the court’s rules and supervision, and under the direction of mediators that the court selects.<sup>7</sup>

*B. The District Court Correctly Concluded That Marion Circuit Court Violated Title II*

The district court also correctly concluded that Marion Circuit Court violated Title II by failing to provide King with an interpreter. See App. 56, 62. Title II states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. 12132.

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<sup>7</sup> Even if Marion Circuit Court were only subsidizing the cost of private mediation—which it was not—it would still be liable for “directly *or through contractual, licensing, or other arrangements*,” 28 C.F.R. 35.130(b)(1) (emphasis added), denying King an equal opportunity to participate in mediation. This provision “applies to all services, programs, and activities provided or *made available by public entities*.” 28 C.F.R. 35.102(a) (emphasis added).



Here, although the district court reached the correct conclusion, it conflated two regulatory provisions in reaching this result. See App. 54-56. In particular, the court analyzed King’s Title II claim under both the provision requiring a public entity to furnish auxiliary aids and services to ensure “effective communication,” 28 C.F.R. 35.160(b)(2), and the provision requiring a public entity to make “reasonable modifications” to policies, practices, or procedures to avoid discrimination, 28 C.F.R. 35.130(b)(7), without clearly distinguishing between the two. See App. 54-56.

This case is best resolved under the effective communication provision, which speaks directly to King’s claim. Under this provision, Marion Circuit Court violated Title II by failing to provide auxiliary aids and services, such as a qualified interpreter, to afford King an equal opportunity to participate in mediation. Alternatively, King would also prevail under the reasonable modifications provision because a reasonable modification was necessary to avoid discrimination. We discuss the requirements and proper application of these regulatory provisions in turn.

*1. Marion Circuit Court Failed To Provide Effective Communication*

The effective communication provision obligates a public entity to “take appropriate steps to ensure that communications with \* \* \* participants \* \* \* with disabilities are as effective as communications with others.” 28 C.F.R.

35.160(a)(1). To this end, a public entity must “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.” 28 C.F.R. 35.160(b)(1). Such auxiliary aids and services include “[q]ualified interpreters \* \* \* or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.” 28 C.F.R. 35.104. This provision also requires a public entity to “give primary consideration to the requests of individuals with disabilities.” 28 C.F.R. 35.160(b)(2).

The effective communication provision further specifies that “[a] public entity shall not require an individual with a disability to bring another individual to interpret for him or her.” 28 C.F.R. 35.160(c)(1). Similarly, “[a] public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication,” except in an emergency or in one other limited circumstance discussed below. 28 C.F.R. 35.160(c)(2). Finally, the public entity “shall honor the [individual with a disability’s] choice [of aid] unless it can demonstrate that another effective means of communication exists,” 28 C.F.R. Pt. 35, App. B, Subpt. E, or that providing the aid “would result in a fundamental

alteration in the nature of a service, program, or activity or in undue financial and administrative burdens,” 28 C.F.R. 35.164.<sup>8</sup>

a. Although King ultimately participated in mediation by relying on family members to interpret, Marion Circuit Court violated Section 35.160(b)(1) in failing to furnish auxiliary aids and services necessary to afford King an equal opportunity to participate in and benefit from the Modest Means Mediation Program.<sup>9</sup> Marion Circuit Court failed to do what the effective communication provision requires: provide “[q]ualified interpreters \* \* \* or other effective methods of making aurally delivered information available” so that King could participate in mediation. 28 C.F.R. 35.104; see also 28 C.F.R. 35.160(b)(1). Instead, it denied King what he was entitled under Title II, forcing him to choose between facing exclusion from mediation altogether and trying to participate in mediation by relying on family members who were not qualified to interpret. King’s actions to compensate for Marion Circuit Court’s failure to comply with Title II did not undo the court’s discrimination or help it avoid liability.

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<sup>8</sup> The defenses available under the effective communication provision are not coextensive with those available under the reasonable modifications provision. The former (28 C.F.R. 35.164) allows both fundamental alteration and undue burden defenses, while the latter (28 C.F.R. 35.130(b)(7)) allows only the fundamental alteration defense. The district court thus conflated the two provisions when it considered both defenses under the “Reasonable Accommodation” heading. See App. 54, 56-58.

<sup>9</sup> We address Marion Circuit Court’s affirmative defenses below.

Marion Circuit Court also violated the effective communication provision by essentially requiring King to bring others to interpret for him, see 28 C.F.R. 35.160(c)(1), and by relying on them to facilitate communication, see 28 C.F.R. 35.160(c)(2). Although Section 35.160(c)(2) allows exceptions, including “[w]here the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees[,] \* \* \* and reliance on that adult for such assistance is appropriate under the circumstances,” 28 C.F.R. 35.160(c)(2)(ii), these exceptions do not apply here. To be sure, King requested that his stepfather and fiancée interpret, and the two agreed to do so. King made these requests, however, only as a last resort because Marion Circuit Court denied him a court-appointed interpreter and he nonetheless wished to mediate. In any event, reliance on these adults was not necessarily appropriate under the circumstances. In addition to being unqualified to interpret for judicial proceedings, King’s family members may have had an interest in the custody dispute.

b. Marion Circuit Court’s arguments against liability are unavailing. Most fundamentally, its repeated assertion that it did not violate Title II because King *voluntarily* participated in mediation is not correct. See, *e.g.*, Br. 20; Doc. 149, at 14-15. Nothing in the text of Title II or its regulation suggests that only *mandatory* participation in public services, programs, or activities implicates the ADA. To the

contrary, courts have consistently applied Title II in cases where individuals sought access to public offerings that were entirely optional, as are most public services.<sup>10</sup> Marion Circuit Court's argument regarding voluntariness is therefore baseless and, if adopted, would severely limit Title II's application and undermine its purpose.

Marion Circuit Court's additional suggestion that other actors, including the mediator and King's counsel, bore responsibility for providing King with an interpreter is inapposite. See Doc. 153, at 12-13. Regardless of others' obligations, the effective communication provision provides that “[a] *public entity* shall take appropriate steps to ensure that communications with \* \* \* participants \* \* \* are as effective as communications with others” and that “[a] *public entity* shall furnish appropriate auxiliary aids and services where necessary.” 28 C.F.R. 35.160(a)(1)-(b)(1) (emphasis added). Marion Circuit Court did not comply with these requirements. Likewise, Marion Circuit Court's argument that it had no obligation to appoint an interpreter for King because it does not provide interpreters during mediation, even for those who do not speak English (see Br. 22), ignores that Title II affirmatively requires a public entity to provide auxiliary

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<sup>10</sup> See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 514 (2004) (access to courthouses for work opportunities); *Parker v. Universidad de P.R.*, 225 F.3d 1, 5 (1st Cir. 2000) (access to university botanical gardens); *Washington*, 181 F.3d at 842 (access to school basketball program).

aids to afford individuals with disabilities an equal opportunity to participate in and benefit from its programs, 28 C.F.R. 35.160(b)(1).

c. The district court also correctly concluded that Marion Circuit Court failed to demonstrate that any action would have fundamentally altered the nature of its services or caused undue burdens. App. 56-58; see also 28 C.F.R. 35.164. First, Marion Circuit Court argues that, because “[t]he Plan is separate from an actual mediation that is performed in a case[,] \* \* \* [t]o require the Circuit Court to \* \* \* provid[e] an interpreter would fundamentally alter the nature of the Plan, which is at its core a subsidy funding mechanism.” Br. 32-33; see also Doc. 149, at 25. This argument fails because the ADR plan is not simply a subsidy program. The ADR plan establishes rules governing mediation, gives court officers sole responsibility for referring matters to mediation, and requires court officers to appoint mediators upon making such referrals. Doc. 128-4, at 6; Doc. 128-14, at 6-9. Given that Marion Circuit Court already appoints the presiding mediators, it has failed to demonstrate that appointing interpreters to facilitate communication during mediation would alter the nature of its services, let alone do so fundamentally.

Second, Marion Circuit Court failed to demonstrate that appointing an interpreter would produce undue burdens. Marion Circuit Court argues that “requiring the Circuit Court to substantially expand the times it provides

interpreters to include out-of-court, voluntary proceedings will logically result in an undue financial and administrative burden.” Br. 34; see also Doc. 149, at 25. Marion Circuit Court’s attempt to support this assertion by noting that it opened 4810 paternity cases in 2013 (Br. 35; Doc. 149, at 24 n.9) is insufficient. This lone statistic tells nothing of the demand for interpreters by deaf litigants in mediation because most family law litigants are not deaf. Moreover, Marion Circuit Court has not demonstrated that providing an interpreter for four hours at \$60 per hour (see Doc. 128-5, at 5; Doc. 128-17, at 6-7) would have strained the court’s budget. This is particularly true where the court budgeted \$25,000 for interpreters for formal proceedings, which King would have needed had he not participated in mediation. See Br. 10-11, 28. Accordingly, Marion Circuit Court failed to establish an affirmative defense.

2. *Marion Circuit Court Failed To Provide Reasonable Modifications*

The district court also correctly concluded that Marion Circuit Court failed to provide reasonable modifications, even though it conflated Title II’s regulatory provisions in reaching this result. See App. 55-56. The reasonable modifications provision presents an alternative basis for Title II liability.

This provision requires a public entity to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. 35.130(b)(7); see also 42

U.S.C. 12131(2). It requires “only ‘reasonable modifications’ that would not fundamentally alter the nature of the service provided.” *Lane*, 541 U.S. at 532 (citation omitted).

Marion Circuit Court’s waiver of King’s obligation to attend mediation was not a reasonable modification because it was not a necessary action to avoid discrimination—in fact, it perpetuated discrimination by excluding King from a public service he wished to access. Because it did nothing to enable King to participate in mediation absent reliance on family members, Marion Circuit Court did not provide King with a reasonable modification.<sup>11</sup>

### III

#### **MARION CIRCUIT COURT IS SUBJECT TO COMPENSATORY DAMAGES FOR INTENTIONAL DISCRIMINATION**

A. *The District Court Appropriately Adopted The Deliberate Indifference Standard*

The district court correctly found Marion Circuit Court subject to compensatory damages for intentional discrimination. Although liability under Title II is not premised on an intent to discriminate, *Washington v. Indiana High Sch. Athletic Ass’n*, 181 F.3d 840, 846 (7th Cir.), cert. denied, 528 U.S. 1046 (1999); *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th

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<sup>11</sup> For the reasons discussed above, Marion Circuit Court’s fundamental alteration defense fails under this provision as well.



Cir. 2006) (en banc), all circuits to consider the issue have held that “compensatory damages are only available for *intentional* discrimination,” *CTL v. Ashland Sch. Dist.*, 743 F.3d 524, 528 n.4 (7th Cir. 2014); see also *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560-561 (7th Cir. 1996) (suggesting that compensatory damages under the ADA require intentional discrimination).

Not all circuits have settled on the appropriate standard for establishing intentional discrimination, see *CTL*, 743 F.3d at 528 n.4; *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262-263 (3d Cir. 2013), but the majority have applied a “deliberate indifference” standard rather than requiring, as Marion Circuit Court proposes, “discriminatory animus.”<sup>12</sup> Five circuits have adopted the deliberate indifference standard,<sup>13</sup> and a sixth has applied it without rejecting others.<sup>14</sup> This Circuit has not decided this issue. See *CTL*, 743 F.3d at 528 n.4 (noting lack of consensus and declining to reach the issue). The district court was correct in adopting the majority approach. See App. 58-60.

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<sup>12</sup> Marion Circuit Court uses the term “animus” to refer to “prejudice” or “ill will” and asserts that animus demands a “higher showing” than deliberate indifference. See Br. 25.

<sup>13</sup> See, e.g., *S.H.*, 729 F.3d at 263; *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009); *Barber v. Colorado Dep’t of Revenue*, 562 F.3d 1222, 1228-1229 (10th Cir. 2009); *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008).

<sup>14</sup> See *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011).

Establishing intentional discrimination “does not require a showing of personal ill will or animosity toward the disabled person.” *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); accord *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009); *Barber v. Colorado Dep’t of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009). Rather, intentional discrimination may be “inferred from a defendant’s deliberate indifference to the strong likelihood that pursuit of its questioned policies will \* \* \* result in a violation of federally protected rights.” *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999); accord *Loeffler*, 582 F.3d at 275; *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008). Accordingly, a plaintiff seeking to prove intentional discrimination “must present evidence that shows both: (1) *knowledge* that a federally protected right is substantially likely to be violated \* \* \* and (2) *failure to act* despite that knowledge.” *S.H.*, 729 F.3d at 265 (citing *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)). The purpose of the intentional discrimination requirement is thus “not to measure the degree of institutional ill will toward a protected group, or to weigh competing institutional motives,” but to ensure that the entity had notice that its actions might violate statutory prohibitions as a prerequisite to financial liability. *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).

This Court should affirm the district court’s decision applying the deliberate indifference standard. At the time of the ADA’s enactment, “[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.” *S.H.*, 729 F.3d at 264 (brackets in original) (quoting *Alexander v. Choate*, 469 U.S. 287, 295 (1985)); see also *Choate*, 469 U.S. at 296 (noting that Senator Humphrey stated before the Senate, “[W]e can no longer tolerate the invisibility of the handicapped in America” (quoting 118 Cong. Rec. 525 (1972))). Accordingly, most circuits have recognized that “the deliberate indifference standard is better suited to the remedial goals of \* \* \* the ADA than is the discriminatory animus alternative.” *S.H.*, 729 F.3d at 264. The deliberate indifference standard best serves the ADA’s purpose of deterring and curtailing a wide array of disability discrimination, not merely that motivated by prejudice.

*B. Marion Circuit Court Was Deliberately Indifferent To King’s Title II Rights*

The record here supports the district court’s conclusion that Marion Circuit Court was deliberately indifferent to King’s rights. When it denied King’s requests for an interpreter, Marion Circuit Court knew that a federally protected right was substantially likely to be violated—*i.e.*, that the denial constituted discrimination against King. Indeed, when Marion Circuit Court denied King’s initial request, King notified the court that this denial would violate the ADA. App. 61.

Nevertheless, Marion Circuit Court failed to appoint an interpreter to afford King an equal opportunity to participate in mediation. Therefore, Marion Circuit Court intentionally discriminated against King through deliberate indifference, and the district court correctly found it subject to compensatory damages.

*C. The District Court Properly Rejected The Discriminatory Animus Standard*

Marion Circuit Court's argument that intentional discrimination requires more than deliberate indifference and instead requires "discriminatory animus" is unpersuasive. See Br. 22-25; Doc. 149, at 21-22. Besides the six circuits that have applied the deliberate indifference standard, only two others have considered the appropriate standard for damages, and Marion Circuit Court relies on these circuits' cases. Neither has held that intentional discrimination requires "animus."

In *Schultz v. YMCA*, 139 F.3d 286, 290-291 (1998), the First Circuit declined to award compensatory damages for a violation of Section 504—which is coextensive with Title II as relevant here—because the plaintiff presented no evidence of economic harm. See *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 126-127 (1st Cir. 2003) (summarizing *Schultz*). The court only mentioned animus in stating, "We do not hold that damages for emotional injury are precluded in all cases under section 504. The situation might be different if there were some sign of actual animus toward the disabled; to call the defendant's action 'intentional,' as [plaintiff] does, is hardly the same thing." *Schultz*, 139 F.3d at 291. In other

words, the court merely suggested that absent economic harm, a plaintiff could obtain damages by showing animus. See *Nieves-Márquez*, 353 F.3d at 126-127 (“This court held that [compensatory] damages were not available when there was no evidence of economic harm or animus toward the disabled, but left open the question of whether such damages could be available in other circumstances.”).

Even if this reasoning were persuasive, King would not need to show animus, as he has shown economic harm.<sup>15</sup>

Likewise, the Fifth Circuit in *Delano-Pyle v. Victoria County*, 302 F.3d 567, 575 (2002), cert. denied, 540 U.S. 810 (2003), did not require a showing of prejudice or ill will. After ostensibly rejecting the deliberate indifference standard, the court merely stated that “to receive compensatory damages for violations of the [ADA], a plaintiff must show *intentional discrimination*.” *Ibid.* (emphasis added).

The court did not define that term, nor did it mention animus or prejudice.

Notably, the court ultimately held that the jury had not plainly erred in awarding damages where the defendant knew that the plaintiff, who had a hearing impairment, likely could not understand him but nonetheless continued to give verbal instructions. See *id.* at 575-576. In other words, as a practical matter, the court applied the deliberate indifference standard.

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<sup>15</sup> King incurred attorney’s fees before Marion Circuit Court in attempting to procure a court-appointed interpreter. Doc. 128-19, at 3.

On appeal, Marion Circuit Court also relies on *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98, 112 (2d Cir. 2001), which stated that “a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability.” See Br. 23-24. The Supreme Court’s subsequent decision in *Tennessee v. Lane*, however, did not require plaintiffs to prove that a defendant was motivated by prejudice to proceed with their private suit for damages against a State. See 541 U.S. 509, 513-514, 533-534 (2004). Moreover, the Second Circuit has more recently expressly adopted the deliberate indifference standard for damages and applied this standard without reference to *Garcia*. See *Loeffler*, 582 F.3d at 275; see also *S.H.*, 729 F.3d at 262-263 (recognizing the Second Circuit as among the majority). The reasoning of *Garcia* is therefore inapposite: King did not need to establish prejudice or ill will to bring this suit for damages, and he did not need to do so to obtain damages.

Accordingly, Marion Circuit Court has failed to show that intentional discrimination requires prejudice or ill will. The district court appropriately determined that Marion Circuit Court was deliberately indifferent to King’s rights and was subject to damages.

**CONCLUSION**

This Court should affirm the decision of the district court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS INTERVENOR AND AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE:

(1) complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29 because it contains 6995 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 2007, in 14-point Times New Roman font.

s/ Dayna J. Zolle  
DAYNA J. ZOLLE  
Attorney

Date: February 17, 2017



## CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR AND AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Seventh 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.

s/ Dayna J. Zolle \_\_\_\_\_  
DAYNA J. ZOLLE  
Attorney