Texas A&M Law Review

Volume 9 | Issue 2

3-11-2022

# Ending the Charade: The Fifth Circuit Should Expressly Adopt the Deliberate Indifference Standard for ADA Title II and RA Section 504 Damages Claims

Derek Warden
*Louisiana State University and Agricultural and Mechanical College*, derekwarden2@gmail.com

# ENDING THE CHARADE: THE FIFTH CIRCUIT SHOULD EXPRESSLY ADOPT THE DELIBERATE INDIFFERENCE STANDARD FOR ADA TITLE II AND RA SECTION 504 DAMAGES CLAIMS

*by: Derek Warden**

## Abstract

*While the Americans with Disabilities Act ("ADA") has been law for over 30 years, the Fifth Circuit Court of Appeals has yet to adopt a definitive standard for how plaintiffs win damages under Title II of that law. Further, while the Rehabilitation Act ("RA") has been law for almost 50 years, the Fifth Circuit has failed to announce any specific standard for how plaintiffs obtain damages under that law as well. I previously wrote an article in the pages of this journal that sought to "clarify" the Fifth Circuit's jurisprudence on the issue. In* Fifth Indifference: Clarifying the Fifth Circuit's Intent Standard for Damages Under Title II of the Americans with Disabilities Act*, 7 Tex. A&M L. Rev. Arguendo 1 (2019), I argued (1) that the Fifth Circuit should adopt the "deliberate indifference" standard and (2) that no Fifth Circuit precedent should be read as explicitly forbidding the adoption of that standard. My paper has seen great success in its downloads and its recent citation in a brief to the Fifth Circuit. However, the Fifth Circuit has still failed to adopt any specific standard and continues to use phrases like "seem to have required" and "something more than deliberate indifference." Fortunately, what the Fifth Circuit has said and what it has done have been two different things. In reality, the Fifth Circuit has been using nothing more, less, or different than a standard deliberate indifference analysis. Thus, the "seem to have required more than deliberate indifference" standard is a mere charade. This charade should now be abandoned, and the Fifth Circuit should explicitly adopt the deliberate indifference standard. That standard being (1) a defendant knew of facts that presented a substantial risk of harm to an ADA or RA right and (2) the actor or entity failed to act appropriately on that risk.*

*To make this argument, this Article is divided as follows. Part I discusses the historical and doctrinal background of the ADA and the RA. Part II discusses how other circuits have addressed the issue of damages actions under Title II of the ADA and the RA. Part III discusses the Fifth Circuit's relevant jurisprudence. Part IV then explains why the Fifth Circuit should explicitly adopt deliberate indifference. Finally, Part V briefly argues why lower courts and any individual panels of the Fifth Circuit could ignore the "something more than deliberate indifference" standard and explicitly adopt ordinary "deliberate indifference."*

https://doi.org/10.37419/LR.V9.I2.4

* J.D., G.D.C.L., LL.M., S.J.D. (CDT), Attorney at Law, Career Law Clerk to Justice Piper Griffin of the Louisiana Supreme Court. The views expressed herein are my own. Special thank you is given to the Drastata family of New Braunfels, Texas. They graciously let me stay with them for an extended period of time after I evacuated New Orleans due to Hurricane Ida. The bulk of this article was written while I was in their home.

## I. HISTORICAL AND DOCTRINAL BACKGROUND

### A. *In General*

As I have said before, the history of disability discrimination is filled with horror and torment.[1] At the same time, however, it provides some of the greatest examples of hope and societal reconciliation in human existence.[2]

1. Derek Warden, *Disability Rights and the Louisiana Constitution*, 48 HASTINGS CONST. L.Q. 578, 580 (2021) [hereinafter *Disability Rights*].
2. *Id.*

Long before the United States existed, some ancient people accommodated those with serious disabilities; at other times, however, some sought to eliminate those with disabilities entirely.[3] Neanderthals cared for individuals who were born with serious illnesses or had developed impairments from war, childbirth, or other aspects of life.[4] On the other hand, ancient Greeks executed those with disabilities.[5] Even Aristotle called for the execution of children with impairments.[6]

After the birth of Christianity, the concept that sin caused disabilities largely vanished, though other aspects of disability discrimination remained. Certain conditions were considered signs of demonic possession, and others caused individuals to be shunned from society. Homes, public spaces, and entire occupational fields were inaccessible to individuals with disabilities.

In both the nineteenth and twentieth centuries, the United States incarcerated those with disabilities in massive institutions.[7] In these places, due to society's neglect and indifference, individuals suffered extreme abuse, neglect, sexual assault, and other torturous treatment.[8]

In the twentieth century, the United States began its eugenics craze.[9] That movement sought to eliminate all those born with disabilities from the gene pool.[10] In the name of compassion and science, thousands of individuals were forcibly sterilized and institutionalized.[11] The United States Supreme Court approved this practice in *Buck v. Bell*—a decision that remains good law to this day.[12]

But society, especially within the United States, began to change. State and federal legislatures began passing laws to address the needs

3. *E.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding eugenics sterilization laws).

4. Andrew Curry, *Ancient Bones Offer Clues to How Long Ago Humans Cared for the Vulnerable*, NPR (June 17, 2020, 1:07 PM), https://www.npr.org/sections/goatsandsoda/2020/06/17/878896381/ancient-bones-offer-clues-to-how-long-ago-humans-cared-for-the-vulnerable [https://perma.cc/V3QN-ZXHH].

5. *Disability Rights*, *supra* note 1, at 580.

6. John F. Muller, *Disability, Ambivalence, and the Law*, 37 AM. J.L. & MED. 469, 481 (2011).

7. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part and dissenting in part).

8. *See Willowbrook: The Last Great Disgrace* (WABC-TV television broadcast 1972) (documenting and exposing horrible conditions in asylums); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 92–93 (1984) (describing awful treatment in a mental health asylum).

9. For a very good discussion about eugenics in American history, see VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 13 (2008).

10. *City of Cleburne*, 473 U.S. at 461–62 (1985) (Marshall, J., concurring in part and dissenting in part).

11. Derek Warden, *Ex Tenebris Lux:* Buck v. Bell *and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 62 (2019).

12. *Id.* at 57.

of those with disabilities.[13] The two most pertinent federal laws are the Rehabilitation Act of 1973[14] and the Americans with Disabilities Act.[15]

### B. *The ADA and RA*

The RA is omnibus legislation that covers a large swath of federal programs and human life. Tacked onto the end of the law is what is now known as § 504.[16] Section 504 prohibits discrimination against people with disabilities by entities that receive federal financial assistance.[17] While the law is fairly popular today, it was controversial when initially enacted.[18] Indeed, the regulations to enforce that law were not implemented until mass protests broke out across the nation.[19] The longest of these protests lasted several weeks and became known as the 504 Sit-in.[20] Interestingly enough, these protests gave practical relevance to one key aspect of disability discrimination: it results most often from neglect and indifference as opposed to ill-will.[21] Once public attention turned to the protests, the regulations were signed.[22]

But the RA, while many believed it would cause a monumental shift in society, failed to live up to its lofty goals. It failed for a number of reasons that are borne out by the prima facie case for § 504 claims.[23] While it could be articulated in a number of ways, the prima facie RA claim requires that (1) a plaintiff must have a disability (2) the plaintiff must be otherwise qualified for the service, program, or activity of an entity (3) the entity must be a recipient of federal financial assistance (4) the plaintiff must have suffered discrimination and (5) the disability must have been the sole cause of the discrimination. Many public entities, private employers, and private entities never received federal aid and were thus not bound by the law. Further, while

13. Virtually every state in the union has a law that meets or exceeds various protections found in the ADA. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 n.5 (2001).

14. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

15. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213, 47 U.S.C. § 255).

16. 29 U.S.C. § 794.

17. *Id.* § 794(a).

18. Julia Carmel, *Before the A.D.A., There Was Section 504*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/us/504-sit-in-disability-rights.html [https://perma.cc/5THH-744M].

19. *Id.*

20. *Id.*

21. Alexander v. Choate, 469 U.S. 287, 295 (1985).

22. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 427 n.78 (1991).

23. Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002).

it is largely irrelevant today,[24] the causation standard seemed very high.[25] Thus, something else was needed. That something else would become the ADA.[26]

What became clear is that this new law needed to address discrimination resulting from intentional conduct as well as neglect, inaction, inaccessibility, and the disparate impact of otherwise neutral laws and policies.[27] It needed a lower standard of "causation."[28] Moreover it needed to prohibit discriminatory conduct outside of that perpetrated by recipients of federal financial assistance.[29] It needed to address healthcare and voting as well as virtually all actions of public entities, private entities, walkways, integration, unjustified institutionalization, education, and more.[30]

This sweeping legislation became the ADA. Divided into five Titles, the law governs virtually all areas of life for people with disabilities. Title I concerns employment discrimination.[31] Title II deals with public entities.[32] Title III prohibits discriminatory practices in places of public accommodation.[33] Title IV is concerned with telecommunication.[34] Finally, Title V is a sort of storage shed for the law that touches on several other topics far outside the scope of this article.[35]

Because this Article is concerned with damages actions, it is focused on Title II of the ADA. Damages claims under Title I are well established. Title III does not allow for damages claims.[36] Further, "damages" claims are essentially irrelevant to Titles IV and V.[37]

In order to bring any claim under Title II of the ADA, a plaintiff must establish the prima facie case. While the parts may be stated in several ways, a decent outline is as follows: (1) the plaintiff has a disability under the ADA; (2) the plaintiff was otherwise qualified for the service program or activity; (3) the plaintiff suffered exclusion from

24. Silver v. City of Alexandria, 470 F. Supp. 3d 616, 621 (W.D. La. 2020) (noting the distinction has become largely irrelevant).

25. *See* Pinkerton v. Spellings, 529 F.3d 513, 516 (5th Cir. 2008) (recognizing that courts apply a higher causation standard for § 504 of the Rehabilitation Act than they do for the ADA).

26. Derek Warden, *Four Pathways of Undermining* Board of Trustees of the University of Alabama v. Garrett, 42 U. ARK. LITTLE ROCK L. REV. 555, 559 (2020).

27. *See id.* at 558.

28. *Id.*

29. *Id.*

30. *See* 42 U.S.C. § 12101 (discussing the purposes and findings of the ADA).

31. *Id.* §§ 12111–12117.

32. *Id.* §§ 12131–12165.

33. *Id.* §§ 12181–12189.

34. 47 U.S.C. § 225.

35. 42 U.S.C. §§ 12201–12213.

36. Granted, the Attorney General may seek civil penalties and damages on behalf of individuals under Title III. 42 U.S.C. § 12188(b)(2); 28 C.F.R. § 36.504(a).

37. I say essentially because Title V contains the provision that purports to abrogate state immunity for lawsuits (including damages actions) under the other relevant titles of the ADA. 42 U.S.C. § 12202.

the entity's program, service, or activity, or was otherwise discriminated against by a public entity; and (4) that discrimination was by reason of their disability.[38]

Further, to win damages against public entities, every circuit that has addressed the issue agrees that the discriminatory conduct must be intentional.[39] But this is where the agreement stops. To win damages against public entities, most circuits now say that a plaintiff can prove intentional discrimination by a showing of "deliberate indifference."[40] This means (1) a government actor had knowledge of a substantial risk of harm to an ADA or RA right and (2) that actor failed to act appropriately on that risk.[41] Because the RA and Title II claims are virtually identical, they are often interpreted together.[42]

It is said that two circuits may have adopted something higher than deliberate indifference.[43] The First Circuit has required a showing of animus or ill-will.[44] The other is the Fifth Circuit, which has said the circuit "seem[s] to have required" something more than deliberate indifference.[45] At other times, it has expressly said (in possible dicta)[46] that it requires something more than deliberate indifference.[47]

The Fifth Circuit's uncertainty has led to a great deal of confusion.[48] It has also presented a potential circuit split. However, as will be shown below, this confusion and circuit splitting is totally unnecessary. First, while it has at times claimed to require something more than deliberate indifference, the Fifth Circuit has never used something more than deliberate indifference as a practical matter.[49] No Fifth Circuit case would have turned out differently at the appellate level had the circuit court simply applied ordinary deliberate indifference.[50] Further still, "deliberate indifference" is a much better fit than any other potential test, whether it be higher, lower, or otherwise distinct.[51] Finally, it is possible to read Fifth Circuit precedent as approv-

38. Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002).

39. *See* discussion *infra* Parts II, III.

40. *See* discussion *infra* Part II.

41. *See* discussion *infra* Part II.

42. *See* Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1135–36 (9th Cir. 2001).

43. Lacy v. Cook Cnty., 897 F.3d 847, 862 n.33 (7th Cir. 2018) (collecting sources and noting differing standards in the First Circuit and Fifth Circuit).

44. *See* discussion *infra* Subsection II.A.

45. Miraglia v. Bd. of Supervisors of the La. State Museum, 901 F.3d 565, 575 (5th Cir. 2018).

46. *See* discussion *infra* Part V.

47. Phillips *ex rel.* J.H. v. Prator, No. 20-30110, 2021 WL 3376524, at *2 (5th Cir. Aug. 3, 2021).

48. Derek Warden, *Fifth Indifference: Clarifying the Fifth Circuit's Intent Standard for Damages Under Title II of the Americans with Disabilities Act*, 7 TEX. A&M L. REV. ARGUENDO 1, 4 (2019) [hereinafter *Fifth Indifference*].

49. *See* discussion *infra* Part III.

50. *See* discussion *infra* Part III.

51. *See* discussion *infra* Part IV.

ing or allowing adoption of ordinary deliberate indifference.[52] Thus, as will become evident below, the "something higher than deliberate indifference" standard espoused by some panels of the Fifth Circuit is simply a charade that has led to unnecessary litigation, confusion, and harm to the law.[53] The Fifth Circuit should abandon it.

## II. How Other Circuits Have Addressed ADA and RA Damages Claims

This Part examines the jurisprudence from all other U.S. circuit courts to have addressed the issue of which standard of intent individuals must meet to win damages against entities for violations of Title II of the ADA and § 504 of the RA.[54] This survey sets the stage for the analysis in Part III, which further examines the jurisprudence of the Fifth Circuit. As is evident from this Part, the other circuits began adopting "deliberate indifference" by playing a game of "telephone,"[55] but they have since given additional reasons for adopting that standard.[56] I provide further elaboration on those reasons later in this Article.[57]

### A. *The First Circuit's Stand-Alone Jurisprudence*

The First Circuit has had multiple opportunities to address how plaintiffs may obtain damages under Title II of the ADA or § 504 of the RA.[58] While some may argue that the First Circuit has not adopted a higher standard than deliberate indifference, it certainly has. The First Circuit has, on multiple occasions, limited damages (or denied them outright) where there was no evidence "of economic harm or animus toward the disabled."[59] For example, where a teacher failed to produce evidence of outright "intentional discriminatory ani-

52. *See* discussion *infra* Part V.

53. *See* discussion *infra* Part III.

54. . . . at the time of the writing and editing of this Article, that is. Further, while district courts in other circuits have also adopted deliberate indifference, for purposes of this Article, I focus on the decisions of the relevant courts of appeals. *See* Smith v. N.C. Dep't of Safety, No. 1:18CV914, 2019 WL 3798457, at *3 (M.D.N.C. Aug. 13, 2019) (noting district court cases from the Fourth Circuit); Budd v. Summit Pointe, No. 1:19-cv-466, 2020 WL 1049838, at *7 (W.D. Mich. Feb. 14, 2020); Reed v. Illinois, 119 F. Supp. 3d 879, 884–85 (N.D. Ill. 2015); Pierce v. District of Columbia, 128 F. Supp. 3d 250, 279 (D.D.C. 2015).

55. Brief of Appellant at 29, Phillips *ex rel.* J.H. v. Prator, No. 20-30110, 2021 WL 3376524, (5th Cir. Aug. 3, 2021), 2020 WL 2071111, at *29.

56. *See* discussion *infra* Part II (examining the reasons given for adopting deliberate indifference).

57. Indeed, this Article further elaborates on the reasons I gave in my previous article on the same subject.

58. *See* Nieves-Márquez v. Puerto Rico, 353 F.3d 108, 125–27 (1st Cir. 2003) (examining the availability of damages under Title II of the ADA and § 504 of the RA); *see also* Carmona–Rivera v. Puerto Rico, 464 F.3d 14, 16–17 (1st Cir. 2006) (same).

59. *Carmona–Rivera*, 464 F.3d at 17.

mus"[60] and admitted that she had not suffered "any economic damages,"[61] she could not make out a claim for intentional discrimination. Quite frankly, the First Circuit has given little reasoning for this extremely high standard.[62] Furthermore, this standard, as explained more fully in Part IV, is in opposition to the text, history, purposes, and practical realities of the ADA and RA. As such, while I call on the Fifth Circuit to expressly adopt ordinary deliberate indifference, I likewise do so for the First Circuit. Though, unlike the Fifth Circuit, the First Circuit will certainly need an *en banc* panel or Supreme Court decision to overturn its prior rulings. No other circuit, not even the Fifth, has agreed with the First Circuit's standard.

### B. *The Second Circuit*

The Second Circuit's clearest adoption and articulation of its "deliberate indifference" standard is found in *Loeffler v. Staten Island University Hospital*.[63] In that case, the plaintiff's husband went to a hospital for surgery and then had to stay in said hospital.[64] Both spouses had hearing impairments and needed interpreters or other auxiliary aids.[65] The hospital knew the plaintiff and her husband needed such accommodations and failed to provide them.[66] Instead, their children had to interpret.[67] The plaintiffs sued under various laws, including the ADA and RA.[68]

The relevant question was whether the plaintiffs had shown that the failure to provide interpreters was the result of intentional discrimination.[69] In analyzing the issue, the circuit made several key statements and holdings. First, ADA and RA plaintiffs may obtain damages by a showing of intentional discrimination.[70] Second, intentional discrimination can be shown by establishing "deliberate indifference" on the part of the defendant.[71] This means that one need not show ill will or animus.[72] Finally, mere bureaucratic inaction is not sufficient.[73]

While the plaintiffs did not produce any evidence of outright animus, they certainly produced evidence of deliberate indifference.[74] Most importantly, while the plaintiffs did not allege that they had

60. *Id.*
61. *Id.*
62. *See id.* at 17–18 (failing to discuss why it is continuing this very high standard).
63. Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275 (2d Cir. 2009).
64. *Id.* at 270.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 273.
69. *Id.* at 275.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 276.
74. *Id.*

pointed out any specific violation of the ADA or RA, what is clear is that the plaintiffs made several attempts to obtain an interpreter from the hospital and that the requests had been "laughed" off.[75]

Therefore, to the Second Circuit, the plaintiffs had produced sufficient evidence that a reasonable jury could conclude (1) the staff at the hospital knew of discrimination against the plaintiff and her husband and (2) the hospital failed to take remedial action.[76]

### C. *The Third Circuit*

The Third Circuit did not explicitly adopt the deliberate indifference standard for ADA and RA damages claims until 2013 in *S.H. ex rel. Durrell v. Lower Merion School District*.[77] There, the plaintiff was a schoolchild who had been misdiagnosed as having a disability and placed in special education.[78] Her mother alleged that this violated various laws, including the RA and ADA.[79] The relevant question was whether the plaintiff had produced evidence showing a genuine issue of material fact as to intentional discrimination.[80]

To answer that question, however, the court had to first decide which standard of intentional discrimination applied to ADA and RA claims for damages.[81] The court acknowledged that most circuits had already adopted deliberate indifference.[82] Further, the court reasoned that the deliberate indifference model was better suited for ADA and RA claims than any other standard.[83] First, it is consistent with the general understanding that the ADA and RA were designed to address discrimination resulting from indifference and neglect, as well as animus or ill will.[84] Second, because the deliberate indifference standard requires some level of knowledge, it is in keeping with the overarching contract law principle that governs Spending Clause legislation (which the RA is)—that damages should only be awarded when a defendant had knowledge of a violation.[85]

While the Third Circuit reasoned that knowledge is required to award damages, it did not hold that a plaintiff must tell the defendant of the violation or point out any specific clause of the ADA or RA

75. *Id.* at 276–77.
76. *Id.* at 276.
77. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 263–64 (3d Cir. 2013).
78. *Id.* at 251.
79. *Id.*
80. *Id.* at 265.
81. *Id.* at 260 ("Appellants argue that no such showing [of intentional discrimination] is required. We have not yet spoken on this issue.").
82. *Id.* at 263.
83. *Id.* at 264.
84. *Id.*
85. *Id.*

that has been violated.[86] Rather, it is enough that the defendant had knowledge of the facts that violate the law.[87]

According to the Third Circuit, the plaintiffs could not meet the burden of showing deliberate indifference for several reasons.[88] Most notably, the child's mother agreed to the placement in special education; when the school discovered the child had no disability, it immediately removed her from special education.[89] Thus, the plaintiff could not prove "(1) *knowledge* that a federally protected right is substantially likely to be violated (i.e., knowledge that S.H. was likely not disabled and therefore should not have been in special education) and (2) *failure to act* despite that knowledge."[90]

### D. *The Seventh Circuit*

In 2018, the Seventh Circuit officially adopted the ordinary deliberate indifference standard in *Lacy v. Cook County.*[91] As relevant to this Article, the case involved five wheelchair users who sued a county and sheriff for damages for failure to have accessible features and other accommodations under the RA and ADA in courthouses.[92] The technical question was whether the district court had improperly relied on its own findings of fact to grant partial summary judgment in favor of the plaintiffs, instead of facts determined by a jury.[93] In the course of answering that question, the Seventh Circuit had to determine whether deliberate indifference was the best option for judging ADA Title II and RA damages claims.

The circuit court, following the lead and analysis of the various other courts, found the ordinary deliberate indifference model to be the most appropriate standard.[94] It did so because the various other circuits had adopted it[95] and because the deliberate indifference model better served the general purposes of the ADA and RA in addressing discrimination resulting from mere indifference or benign neglect, as well as animus or ill will.[96] The test announced was "the two-part standard applied by most other courts, 'requiring both (1)

86. *Id.* at 265–67 (discussing the requirements for a damages award).

87. *Id.* at 265 ("[K]nowledge that [plaintiff] was likely not disabled and therefore should not have been in special education . . . .").

88. *Id.* at 266.

89. *Id.*

90. *Id.* at 265 (emphasis in original).

91. Lacy v. Cook Cnty., 897 F.3d 847, 863 (7th Cir. 2018).

92. *Id.* at 851.

93. *Id.* at 852.

94. *Id.* at 863.

95. *Id.* at 862.

96. *Id.* at 863.

"knowledge that a harm to a federally protected right is substantially likely," and (2) "a failure to act upon that likelihood."'"[97]

### E. *The Eighth Circuit*

The Eighth Circuit expressly adopted the deliberate indifference standard for ADA Title II and § 504 RA claims in *Meagley v. City of Little Rock*.[98] In that case, a zoo patron flipped her scooter after she ran over a bridge that was not compliant with the ADA.[99] As relevant to this Article, the Eighth Circuit was tasked with deciding what standard of intent applied to ADA and RA damages claims.[100]

The Eighth Circuit properly rejected the plaintiff's argument that she did not need to show intent.[101] Further, the circuit agreed with virtually all other circuits to have decided the issue that deliberate indifference was the proper standard of intent in ADA and RA claims for damages.[102] The reasons for adopting the ordinary deliberate indifference standard were straight forward. The ADA was modeled on the RA, which in turn was based on Spending Clause legislation known as Title VI.[103] Title VI has long required some knowledge for the defendant to be cast in damages.[104] Further, the deliberate indifference model does not require ill will or animus, but rather deliberate indifference to the strong likelihood that pursuit of its questioned policies would likely result in a violation of federal law.[105] This rule is essentially the same as that used by other circuits: (1) knowledge of a substantial risk of harm to an ADA or RA right and (2) failure to act appropriately despite that risk.

The court held that the plaintiff did not meet that standard because the zoo had properly evaluated the bridge, found no issues with it,[106] and lacked knowledge of any risk to rights under the ADA or RA,[107] and it never had a patron overturn his scooter before.[108] Further, upon finding out that it was in violation of the ADA, the zoo acted appropriately by blocking off the bridge and fixing it.[109]

97. *Id.* (first quoting S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 263 (3d Cir. 2013); then quoting Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001)).

98. Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011).

99. *Id.* at 387.

100. *Id.*

101. *Id.* at 388.

102. *Id.* at 389 (discussing actions by other circuits).

103. *Id.*

104. *Id.*

105. *Id.* (quoting Barber *ex rel.* Barber v. Colo. Dep't of Revenue, 562 F.3d 1222, 1228–29 (10th Cir. 2009)).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

### F. *The Ninth Circuit*

The Ninth Circuit has long held that damages are allowed under Title II of the ADA and § 504 of the RA.[110] That circuit calls the applicable doctrine its *mens rea* standard for § 504 claims. The appropriate *mens rea* is intentional discrimination, which can be proven by a showing of "deliberate indifference."[111] That test is the same in the Ninth Circuit as in the others: "knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood."[112] Though, the Ninth Circuit has also expressly said that mere bureaucratic neglect is not sufficient.[113] Like the other circuits, the Ninth Circuit expressly adopted the deliberate indifference standard because it "is better suited to the remedial goals of Title II of the ADA than is the discriminatory animus."[114] For example, deliberate indifference could be shown where a county court failed to provide real time transcription at a marriage dissolution hearing despite repeated requests for such accommodations.[115]

### G. *The Tenth Circuit*

The Tenth Circuit expressly adopted the deliberate indifference standard for ADA and RA damages claims more than two decades ago in *Powers v. MJB Acquisition Corporation*.[116] There, an individual with mobility impairments needed accommodations at his technical school.[117] The relevant question on appeal was whether the trial court had improperly failed to give a jury instruction as to the need for the plaintiff to show proof of intentional discrimination.[118]

In deciding the issue, the Tenth Circuit determined that it would join virtually all other courts that had reached the issue, holding that plaintiffs must prove intentional discrimination to win damages under the RA.[119] Further, it held that "intentional discrimination [could] be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies would likely result in a

110. Mark H. v. Lemahieu, 513 F.3d 922, 938 (9th Cir. 2008) (discussing prior cases applying deliberate indifference).

111. *Id.*

112. *Id.* (quoting Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001)).

113. Ferguson v. City of Phoenix, 157 F.3d 668, 675 (9th Cir. 1998) (recognizing that "some not uncommon bureaucratic inertia as well as some lack of knowledge and understanding about the DOJ Manual's requirements" does not constitute intentional discrimination).

114. Duvall, 260 F.3d at 1139.

115. *Id.* at 1140–41.

116. Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999).

117. *Id.* at 1149–50.

118. *Id.* at 1152.

119. *Id.* at 1153.

violation of federally protected rights."[120] Because the district court failed to provide this instruction, the case had to be retried.[121]

### H. *The Eleventh Circuit*

The Eleventh Circuit expressly adopted the deliberate indifference standard for ADA and RA damages claims in *Liese v. Indian River County Hospital*.[122] There, a patient and her husband sued a hospital because it failed to provide them sign language interpreters for their serious hearing impairments in violation of several laws, including the RA.[123]

The main question on appeal was "whether the defendant's 'deliberate indifference,' if proven, is sufficient to establish intentional discrimination under § 504 of the RA."[124] The answer, according to the circuit, was yes.[125] The reasons were rather straightforward. On the one hand, most other circuits had also adopted it.[126] On the other, the knowledge requirement of the deliberate indifference standard fit well with the general rule applicable to Spending Clause legislation that damages cannot be awarded absent knowledge of a violation.[127] Further, it also fit well with the general understanding of the ADA and RA that both statutes were meant to address discrimination that resulted not just from animus or ill will but other sources as well (e.g., neglect, indifference, and so forth).[128]

The court held that there was "ample evidence" that would allow a reasonable jury to find the hospital and its employees were deliberately indifferent to the plaintiffs' rights.[129] For example, one doctor was informed of the plaintiffs' need for interpreters, and that doctor laughed at one plaintiff and "made exaggerated facial movements when ask[ed] whether she could read lips."[130]

One minor point about the Eleventh Circuit's opinion[131]: its discussion of actual knowledge, at first glance, suggested that a plaintiff

120. *Id.*
121. *Id.*
122. Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 336 (11th Cir. 2012).
123. *Id.*
124. *Id.*
125. *Id.* at 344–45 (recognizing the circuit had yet to decide the issue).
126. *Id.* at 345.
127. *Id.* at 347.
128. *Id.* at 348.
129. *Id.* at 351.
130. *Id.*
131. There is another point that is not entirely relevant to this Article, so I have elected to discuss it in a footnote. The Eleventh Circuit also held that the plaintiff must identity some "policy maker" who failed to act appropriately, and it appears to have rejected a strict vicarious liability standard. *Id.* at 349. Quite frankly, this rule should be abandoned for reasons evident from the *Liese* opinion itself. First, it seems that the Eleventh Circuit is the only one to have adopted it. *Id.* at 349 n.10. Second, it is in opposition to the fact that the ADA and RA are generally considered vicarious liability laws. *Id.* (noting the *respondeat superior* nature of these laws). Third, it seems

must inform a defendant of the specific violation under the ADA or RA, such as which clause the conduct violated.[132] However, because the plaintiffs did not cite specific provisions of the RA in this case—and because the circuit found that there were sufficient factual issues to preclude summary judgment—it seems that this face value reading is incorrect. Rather, the actual notice requirement is nothing more than a requirement that the defendant know of facts that place it on notice of a substantial likelihood of harm to a federally protected right.[133]

### I. *The General Rule from the Other Circuits*

Based on the foregoing, the general rule for awarding damages claims against defendants under Title II of the ADA and § 504 of the RA is as follows: first, plaintiffs may obtain such compensatory damages; and, second, this can only be done through a showing of deliberate indifference. This requires proof that (1) a defendant knew of facts that presented a substantial likelihood of harm to an ADA or RA right and (2) the defendant failed to act appropriately on that risk.

## III. The Fifth Circuit's Jurisprudence

### A. *Delano–Pyle v. Victoria County*

In *Delano–Pyle v. Victoria County*,[134] the plaintiff was involved in a car accident.[135] When the police arrived at the scene, he informed the deputies that he had a hearing impairment;[136] the deputies continued to perform various sobriety tests on him, though it was clear that he had trouble understanding the deputies' instructions.[137] No interpreter was provided.[138] Further, when he was arrested and interrogated, his *Miranda* rights were spoken to him, and it was unclear if he understood them.[139]

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to undermine the broad remedial purposes of the ADA and RA discussed throughout this Article. Fourth, the reasons given by the Eleventh Circuit for purportedly rejecting vicarious liability may have relied on too strong of a comparison between the RA and other contract law-based Spending Clause legislation without giving due regard to the purposes of the RA and ADA—a point that the Eleventh Circuit was close to recognizing itself. *Id.* at 347 n.9. Fifth, the circuit's definition of a policy maker in this context seems to be very broad such that a distinct rule requiring identification of a policy maker may ultimately be completely useless. *Id.* at 350–51 (applying the definition to an individual doctor).

132. *Id.* at 348 (discussing actual notice).

133. *See id.* at 351 (applying deliberate indifference standard to the factual evidence).

134. Delano–Pyle v. Victoria Cnty., 302 F.3d 567, 567 (5th Cir. 2002).

135. *Id.* at 570.

136. *Id.*

137. *Id.*

138. *See id.* (discussing tests and procedures law enforcement performed at the scene of the accident).

139. *Id.* at 571, 576.

The circuit court was tasked with, among other things, deciding whether the plaintiff had produced sufficient evidence to support his claim of intentional discrimination.[140] Without any analysis, the court declared that there is "no deliberate indifference standard" applicable to claims under the ADA but that discrimination by public entities had to be intentional.[141] Granted, as explained elsewhere and below, this statement may be misleading.[142] The court further held that the facts of the case supported a finding of intentional discrimination.[143]

However, the facts presented in *Delano–Pyle* are nothing more, less, or different than those in a standard deliberate indifference case that could be found in any other circuit to have adopted that standard.[144] The officer knew the individual had a disability and had a duty to accommodate. The officer knew of facts that presented a substantial likelihood of harm to the plaintiff's rights. And yet, the officer failed to act appropriately.

### B. *Perez v. Doctors Hospital at Renaissance, Ltd.*

The plaintiffs in *Perez v. Doctors Hospital*[145] had hearing impairments and needed auxiliary aids.[146] While making numerous trips to the defendant hospital for their daughter's cancer treatment, the plaintiffs were denied these accommodations.[147] The plaintiffs made several requests for auxiliary aids, and the hospital failed to provide those accommodations.[148]

In ruling that the plaintiffs had produced sufficient evidence such that there existed genuine issues of material fact,[149] the panel also noted that (1) damages under the RA[150] can only be given upon a showing of intentional discrimination[151] and (2) it did not need to specifically decide what standard of intent was applicable.[152]

Nonetheless, taking *Perez* at face value, it seems the panel applied ordinary deliberate indifference. The evidence supported the allegations that individuals at the hospital knew of facts that presented substantial risks of harm to ADA and RA rights and that they failed to

140. *Id.* at 572.
141. *Id.* at 575.
142. *Fifth Indifference*, *supra* note 48, at 10–11; *see* discussion *infra* Part V.
143. *Delano–Pyle*, 302 F.3d at 575–76.
144. *See* discussion *supra* Part II.
145. Perez v. Drs. Hosp. at Renaissance, Ltd., 624 F. App'x 180, 180 (5th Cir. 2015).
146. *Id.* at 182.
147. *Id.*
148. *Id.* at 182, 185.
149. *Id.* at 182 (noting standard for summary judgment).
150. The ADA claims were based on Title III, and as such, no damages claims were allowed under those claims. *Id.* at 182–83 (discussing plaintiffs' Title III claims).
151. *Id.* at 184.
152. *Id.*

act appropriately on those risks.[153] Furthermore, this decision is on virtually all fours with the Second Circuit's *Loeffler* opinion, discussed above, which also dealt with accommodations for hearing impaired individuals in a hospital.[154] Therefore, this case once again presents a situation where explicit application of deliberate indifference would not have changed anything aside from making the law clearer.

### C. *Miraglia v. Board of Supervisors of Louisiana State Museum*

In *Miraglia v. Board of Supervisors*,[155] the plaintiff sought access to shopping centers below a state museum.[156] These shops were owned by the museum and rented out as a source of revenue.[157] However, the shops were not accessible to those in wheelchairs.[158] During trial and on appeal, no one doubted that the shops were inaccessible.[159] On appeal, the circuit was tasked with deciding whether the plaintiff had produced evidence of intentional discrimination.[160]

In answering that question in the negative, the court first held that "actual notice" of a violation is required to prove intent.[161] Second, it held that the defendants in the lawsuit had never been aware of any violation but had effectively been guilty of bureaucratic neglect.[162]

At first glance, it appears that the *Miraglia* "actual notice" rule requires a plaintiff to pinpoint specific provisions of the ADA or RA they claim were violated. However, this cannot be the case. In other cases decided by the Fifth Circuit to have found sufficient knowledge or intent, there was no mention of a plaintiff pointing out provisions of the ADA or shouting that their ADA rights had been violated.[163] Therefore, just as with the Eleventh Circuit's decision, discussed above, the *Miraglia* "actual notice" rule should be understood as requiring the defendant to have knowledge of facts that present the ADA or RA violation—with mere bureaucratic neglect not being sufficient. But this understanding of *Miraglia* is practically nothing differ-

153. *Id.* at 185–186 ("[S]ome evidence indicates that the plaintiffs made repeated requests for auxiliary aids, yet DHR failed on several occasions to provide effective aids and in some instances refused to provide an interpreter after one had been requested.").

154. Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 270 (2d Cir. 2009).

155. Miraglia v. Bd. of Supervisors of the La. State Museum, 901 F.3d 565, 565 (5th Cir. 2018).

156. *Id.* at 570.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 574.

161. *Id.* at 575.

162. *Id.* at 575–76.

163. *See* Perez v. Drs. Hosp. at Renaissance, Ltd., 624 F. App'x 180, 185 (5th Cir. 2015) (noting that in *Delano–Pyle*, the plaintiff did not even request an accommodation under the ADA or RA, yet the court "concluded that the failure to provide an effective form of communication was evidence of intentional discrimination").

ent from the first prong of the ordinary deliberate indifference standard (i.e., knowledge of facts that present a substantial risk of harm to an ADA or RA right).

As such, *Miraglia* would have been decided the same way had the Fifth Circuit already expressly adopted the ordinary deliberate indifference standard. After all, simply no evidence existed such that the state defendants knew the buildings were not compliant.[164] They had no knowledge of any substantial risk of harm to an ADA or RA right. Thus, they could not have failed to act on knowledge that they did not have.[165]

### D. *Cadena v. El Paso County*

In *Cadena v. El Paso County*,[166] the plaintiff was in jail and needed a wheelchair and several other accommodations.[167] She received some accommodations, though allegedly not enough. At one point, the wheelchair she did have was taken away.[168] The relevant question presented was whether a genuine issue of material fact existed regarding whether the jail had intentionally discriminated against the plaintiff.[169]

The court held that a reasonable jury could have found that the jail intentionally discriminated against the plaintiff; thus, there was a genuine issue of material fact.[170] To reach this conclusion, the Fifth Circuit noted the jail was aware of the plaintiff's disability and of her continued requests for an accommodation.[171] Moreover, the circuit effectively held that a reasonable juror could have concluded that the jail failed to act appropriately under these circumstances.[172]

Again, however, it is difficult to see how this case would have ended any differently had the Fifth Circuit already expressly adopted ordinary deliberate indifference. Indeed, the *Cadena* court seemed to accept the proposition that nothing would have changed under ordinary deliberate indifference when, after paying lip service to the possible "something more than deliberate indifference" standard, it said, "[i]n practice, this court has affirmed a finding of intentional discrimination when a county deputy knew that a hearing-impaired suspect could not

164. *Miraglia*, 901 F.3d. at 575.

165. *Id.* (noting that the museum could not have acted with intent under the facts of the case).

166. Cadena v. El Paso Cnty., 946 F.3d 717, 717 (5th Cir. 2020).

167. *Id.* at 721–23.

168. *Id.* at 721.

169. *Id.* at 724.

170. *Id.* at 721 (An issue of material fact existed "because a reasonable jury could find that the County intentionally denied Cadena reasonable accommodations.").

171. *Id.* at 725–26 (applying intentional discrimination standard to facts of the case).

172. *Id.* at 726 ("A jury could find, therefore, that its ongoing refusal to let her use a wheelchair or to otherwise modify its policies was intentional.").

understand him, rendering his chosen method of communication ineffective, and the deputy made no attempt to adapt."[173] That statement is a quintessential description of deliberate indifference. Furthermore, the *Cadena* panel doubled down on describing the circuit's past practices in terms extremely close to ordinary deliberate indifference: "[A] plaintiff created a genuine dispute as to intentional discrimination when the evidence indicated that 'on several occasions, an interpreter was requested but not provided,' and one of the forms of communication that a hospital used to speak with a hearing-impaired patient was often ineffective."[174]

### E. *Smith v. Harris County*

In *Smith v. Harris County*,[175] Jacqueline Smith sued Harris County under the ADA and RA after her son committed suicide in a county jail.[176] The question presented to the court was whether the district court had properly granted summary judgment to the defendants on the ground that the plaintiff could not show intentional discrimination.[177]

In deciding the issue, the panel noted what had been noted by virtually all other courts: even if a plaintiff could successfully establish a violation of the RA or ADA, the plaintiff cannot recover damages unless the discrimination was intentional.[178] Further, the panel stated that the Fifth Circuit had yet to adopt any standard for determining "intentional discrimination."[179]

In answering the question, the panel conducted an analysis remarkably like that of the other circuits that had previously adopted ordinary deliberate indifference.[180] For example, one reason why the panel held that intentional discrimination was not present was because the moment an officer saw that the decedent's window was covered, the officer acted appropriately and removed the window covering.[181] In addition, the county jail tried to accommodate the decedent's mental illness by providing psychiatric treatment, from which he had been discharged.[182] And there was no evidence that the non-medical staff at the county jail knew that additional accommodations were necessary.[183] Therefore, in this case, the defendants largely did not

173. *Id.* at 724.
174. *Id.* (quoting Perez v. Drs. Hosp. at Renaissance, Ltd., 624 F. App'x 180, 185 (5th Cir. 2015)).
175. Smith v. Harris Cnty., 956 F.3d 311, 311 (5th Cir. 2020).
176. *Id.* at 314.
177. *Id.*
178. *Id.* at 318.
179. *Id.*
180. *Id.*
181. *Id.* at 318–19.
182. *Id.* at 319.
183. *Id.*

have any knowledge of facts that presented a substantial risk of harm to an ADA or RA right; and when they did have knowledge, the jail personnel acted appropriately to cure those risks.[184] That is nothing higher, lower, or different from deliberate indifference used by the other circuits.

### F. *Phillips ex. rel. J.H. v. Prator*

In *J.H. v. Prator*,[185] J.H. was upset, causing him to leave his special needs classroom and "linger" in his school's hallway.[186] J.H., who was nonverbal and had severe autism, did not want to return to class.[187] Some of the school officials tried to coax him back to the classroom[188] but then called a sheriff's deputy (who was contracted to provide security for the school)[189] to the scene—a standoff ensued.[190] It ended when J.H. kicked at a school administrator and the deputy responded by firing his taser.[191]

The question presented in this case was whether these facts plausibly alleged an intentional failure to accommodate under the ADA.[192]

In holding that these allegations did plausibly allege intentional discrimination, the Fifth Circuit noted several relevant points of law: (1) plaintiffs may sue public entities for money damages under the ADA and RA;[193] (2) plaintiffs must show that such discrimination was intentional;[194] (3) the Fifth Circuit has declined to adopt any specific standard but has often required something more than deliberate indifference;[195] and (4) a defendant must have had actual notice of a violation if intent is to be found.[196] Further, the court held that the conduct of Prator, the named defendant, was not intentional.[197] Rather, the intentional actions of the sheriff's deputy on the scene are imputed to the sheriff's department because the ADA and RA are vicarious liability statutes.[198]

Interestingly, even though no one told the officer or the school that they were violating the ADA, the Fifth Circuit found that there were

184. *See id.*
185. Phillips *ex rel.* J.H. v. Prator, No. 20-30110, 2021 WL 3376524, at *1 (5th Cir. Aug. 3, 2021). Given the procedural posture of this case, I have written this analysis like the Fifth Circuit would, I assumed the alleged facts were true.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at *4 (noting the Sheriff had provided in-school security).
190. *Id.* at *1.
191. *Id.*
192. *Id.*
193. *Id.* at *2.
194. *Id.*
195. *Id.*
196. *Id.* at *3.
197. *Id.* at *4.
198. *Id.*

sufficient allegations of intent.[199] The allegations that the Fifth Circuit found stated a plausible claim of intentional discrimination are as follows: (1) J.H. stuck his fingers in his ears and stood motionless;[200] (2) he continued to display the obvious signs of his disability for several minutes;[201] (3) the sheriff's deputy, after seeing this, "'did not take any steps to de-escalate the situation' and instead 'conveyed a threatening and confrontational attitude to J.H.'";[202] and (4) the sheriff's deputy did not attempt to further accommodate J.H. despite the clear indications of his disability.[203]

But once again, it is difficult to see how this case would have turned out differently in every other circuit that has adopted deliberate indifference. The officer knew of facts that presented a substantial risk of harm to the plaintiff, and he failed to act appropriately on that risk.

### G. *The General Rule from the Fifth Circuit*

Like virtually every other court, the Fifth Circuit holds that plaintiffs may obtain damages under Title II of the ADA or § 504 of the RA by showing that the defendant's discrimination was intentional. Further, a plaintiff need not seek an individual policy maker's decision to hold an entity liable; rather, the actions of employees are imputed to the entity because both the RA and ADA are vicarious liability statutes. Most courts hold that deliberate indifference suffices to show intent. The Fifth Circuit has not adopted any standard—at times saying it has no specific standard,[204] and at other times saying it may have required something more than deliberate indifference.[205] In practice, however, it has been applying an ordinary deliberate indifference standard. Therefore, the Fifth Circuit's "something more than deliberate indifference" is a game of charades that should be stopped, especially because: (1) it is at odds with decisions in virtually every other circuit; (2) it is at odds with the text, history, and purposes of the ADA and RA, as described in Part IV below; and (3) it is possible to read Fifth Circuit precedent to allow explicit adoption of ordinary deliberate indifference without an *en banc* panel or Supreme Court decision.

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199. *Id.* at *5.
200. *Id.* at *4.
201. *Id.*
202. *Id.*
203. *Id.* at *5 ("[W]e thus conclude that the allegations that Nunnery understood the limitations imposed by J.H.'s autism and chose not to accommodate them 'raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
204. Perez v. Drs. Hosp. at Renaissance, Ltd., 624 F. App'x 180, 184 (5th Cir. 2015) (noting the court has not defined its intent standard).
205. Miraglia v. Bd. of Supervisors of the La. State Museum, 901 F.3d 565, 575 (5th Cir. 2018).

## IV. Why the Fifth Circuit Should Explicitly Adopt Ordinary Deliberate Indifference

This Part offers various reasons why the deliberate indifference standard is the best theoretical and practical approach for ADA Title II and RA damages actions. This Part functions as a revisitation of, and an expansion upon, statements I made in my prior article, *Fifth Indifference*.

### A. *The Purposes of the ADA and RA*

The Americans with Disabilities Act is filled to the brim with textual provisions that show Congress designed the law to address discrimination that resulted not only from animus or ill will, but also from deliberate indifference, neglect, disparate impact, and so forth. Indeed, some such words are found in the very beginning of the Act itself:

> [I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.[206]

The word "including" necessarily means that this provision also concerns itself with discrimination outside of "outright intentional" discrimination. The same goes for phrases such as "discriminatory effects." Consistent with these provisions, courts have universally declared that the ADA was meant to strengthen earlier efforts to protect people with disabilities[207] and that Congress had a "more comprehensive" view of what constitutes discrimination than conceived of in prior statutes.[208] Further still, courts have explicitly noted that both the RA and the ADA were intended to extend beyond sheer animus.[209] Put another way, courts have recognized that "[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."[210] With these purposes and statements in mind, there can be little doubt that a "deliberate indif-

206. 42 U.S.C. § 12101(a)(5).

207. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 599 (1999) (recognizing that "[t]he ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living").

208. *Id.* at 598 ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.").

209. Alexander v. Choate, 469 U.S. 287, 295 (1985); *see also* Chapman v. Pier 1 Imps. (U.S.) Inc., 631 F.3d 939, 944–45 (9th Cir. 2011) (citing *Choate's* discussion of the enactment of the RA in relation to the ADA).

210. *Choate*, 469 U.S. at 295.

ference" standard would be far more faithful to the ADA and RA than an "animus or ill will" standard—or the Fifth Circuit's possibly "something more than deliberate indifference" standard.

### B. *The History of the ADA in Relation to the Eighth Amendment*

There is an interesting intersection between the ADA and the general civil rights enforcement statute, 42 U.S.C § 1983. That intersection is the Eighth Amendment. In my experience, disability rights plaintiffs largely abandoned constitutional arguments for statutory ones. There is one major exception to this abandonment—prisons. People with disabilities in prisons were long able to resort to the protections of the Eighth Amendment to largely the same degree as their counterparts without disabilities.[211] This is because prison healthcare-and-conditions cases often involved high risks of injury, and such risks were possible for people with disabilities and without. Indeed, due to the nature of several disabilities, it appears that the Eighth Amendment may have placed special protections on those with disabling conditions.[212] Furthermore, both § 1983 and the ADA enforce the Eighth Amendment. By its terms, § 1983 allows plaintiffs to sue for violations of the Eighth and Fourteenth Amendments.[213] Title II of the ADA is literally said to be, at times, enforcement legislation under the Fourteenth Amendment—specifically in the context of the ADA enforcing Eighth Amendment rights.[214] Importantly, the standard for bringing an Eighth Amendment conditions of confinement claim for damages under § 1983 is *deliberate indifference*.[215]

The test for deliberate indifference under the Eighth Amendment can be summarized as (1) the prison knew of a substantial risk of harm and (2) the prison failed to act appropriately on that risk.[216] This is virtually no different than that standard other circuits use in ADA Title II and RA damages claims.

Recognizing that (1) § 1983 claims under the Eighth Amendment were one of the rare areas of law where people with disabilities suc-

211. Derek Warden, *A Worsened Discrimination: How Exacerbation of Disabilities Constitutes Discrimination by Reason of Disability Under Title II of the ADA and § 504 of the Rehabilitation Act*, 46 S.U. L. REV. 14, 50 (2018) (noting that the worsening of disabilities is usually considered under the Eighth Amendment).

212. *Id.* at 48 (noting that many courts have held that prolonged solitary confinement of those with mental illness violates the Eighth Amendment).

213. 42 U.S.C. § 1983.

214. United States v. Georgia, 546 U.S. 151, 159 (2006).

215. *See* Peralta v. Dillard, 744 F.3d 1076, 1083 (9th Cir. 2014) (noting that § 1983 authorizes suits for money damages for violations of the Eighth Amendment); *see also id.* at 1081 (noting that the standard for Eighth Amendment claims is deliberate indifference).

216. Gobert v. Caldwell, 463 F.3d 339, 346 (5th Cir. 2006) ("A prison official acts with deliberate indifference 'only if [(A)] he knows that inmates face a substantial risk of serious bodily harm and [(B)] he disregards that risk by failing to take reasonable measures to abate it.'" (quoting Farmer v. Brennan, 511 U.S. 825, 847 (1994))).

ceeded and (2) the ADA was designed to step up prior laws protecting people with disabilities, it would seem absurd to say that the ADA requires a standard higher than that used in Eighth Amendment damages cases.

As such, the ADA and its relationship to the Eighth Amendment strongly suggest that *at most* deliberate indifference should apply to damages actions under Title II.

### C. *The ADA, the RA, and the Spending Clause*

As noted previously, Section 504 of the Rehabilitation Act is a precursor to Title II of the ADA. As such, the two statutes are usually construed together because they have the same remedial schemes.[217] Thus, if one could justify the deliberate indifference standard for claims under § 504 of the Rehabilitation Act, such would also justify the use of the deliberate indifference standard for Title II of the ADA.

As other authorities have noted, the nature and background of the RA do, in fact, strongly suggest that the deliberate indifference standard should apply.[218] This is so because the Rehabilitation Act is neither Commerce Clause legislation nor Fourteenth Amendment legislation. It is Spending Clause legislation.[219] Spending Clause legislation is often said to be bound up in contract-law principles.[220] One such principle often reflected in Spending Clause legislation is the theory of knowledge.[221] In other words, just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress's power to legislate under the spending power rests on whether the recipient voluntarily and knowingly accepts the terms of the contract.[222] This knowledge principle in Spending Clause cases has led to the generally accepted principle that money damages (for violations of Spending Clause-based laws) are only allowed where the entity is put on notice that it has violated the law.[223] The way this generally works under the RA or ADA in other circuits is a defendant is on notice of facts that present the substantial likelihood of harm to an ADA or RA right. For example, a hospital has sufficient notice to justify liability if it is

217. *See* Kemp v. Holder, 610 F.3d 231, 234 (5th Cir. 2010) (per curiam) (explaining that the ADA and RA have the same legal standards); Hainze v. Richards, 207 F.3d 795, 799 (5th Cir. 2000) (same).

218. S.H. *ex rel.* Durrell v. Lower Marion Sch. Dist., 729 F.3d 248, 264–65 (3d Cir. 2013); Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 348 (11th Cir. 2012).

219. *See also* U.S. CONST. art. I, § 8, cl. 1; Taylor v. Altoona Area Sch. Dist., 513 F. Supp. 2d 540, 556 (W.D. Pa. 2007).

220. Barnes v. Gorman, 536 U.S. 181, 186 (2002).

221. *Id.*

222. *Id.*

223. *Id.* at 186–87; *Durrell*, 729 F.3d at 264–65; *Liese*, 701 F.3d at 347.

aware that plaintiffs have impairments and need auxiliary aids but fails to provide such aids after repeated requests.[224]

As noted above, this standard requires knowledge and not "animus" or "ill will." Thus, it would not seem appropriate to require animus under either the RA or the ADA. In fact, any standard higher than deliberate indifference would be inappropriate, as such a standard could require knowledge plus something else. However, a standard lower than deliberate indifference would likely not fulfill the knowledge requirement.[225] Moreover, even though an "animus" or "ill will" standard would fulfill the knowledge requirement, the knowledge requirement must still be measured against the backdrop of the ADA's history and broad remedial purposes.[226]

As such, the nature of the ADA's relationship to the RA, which is Spending Clause legislation, strongly implies that *at least* deliberate indifference should be the standard applicable to ADA Title II damages actions. The other points mentioned in this Part indicate that *at most* deliberate indifference should apply. Thus, the Goldilocks point between all these interests, concerns, textual provisions, and historical points is deliberate indifference: (1) a defendant knew of facts that presented a substantial risk of harm to an ADA or RA right and (2) the defendant failed to act on that risk.

### D. *Practical Considerations*

There are several practical issues that the Fifth Circuit and lower courts should consider when deciding whether to expressly adopt the deliberate indifference standard for ADA and RA damages claims.[227]

First, simply adopting the ordinary deliberate indifference standard for ADA and RA claims would prevent an unnecessary circuit split. All the Fifth Circuit's prior cases would have been decided the same had it expressly adopted deliberate indifference anyway, so the potential "split" would be a mere verbal dispute. The courts are extremely busy as is without an entire area of federal civil rights law being the subject of a semantic fight among the circuit courts. The split would be especially ridiculous because, as described above, deliberate indifference has its roots in the history, text, and purposes of the ADA—the Fifth Circuit's supposed "something more than deliberate indifference" simply does not.[228]

Second, adopting the deliberate indifference standard would save countless dollars, hours, and stress from litigating a question that

224. See generally Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 270–71 (2d Cir. 2009), for a discussion of such case facts.

225. *Fifth Indifference*, *supra* note 48, at 8.

226. Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001).

227. These considerations became more apparent after the publication of *Fifth Indifference.*

228. *See* discussion *supra* Parts II–III and Subsections IV.A–D.

should not even need to be asked. While the current test possibly used by the Fifth Circuit is amorphous, the deliberate indifference standard used by the other circuits is not. As such, if the Fifth Circuit adopted the deliberate indifference standard, parties would not need to litigate to find what that "something more" is. Indeed, some judges on the Fifth Circuit have tried to answer that question and can only seem to refer to prior cases that have found sufficient "intent" without expressly adopting any test or standard.[229]

Third, and finally, as previously mentioned, while the Fifth Circuit has hinted that it does not adopt deliberate indifference, by and large, it has used that standard.[230] Thus, it has led to courts either (a) applying deliberate indifference without expressly stating so[231] or (b) trying desperately to use this amorphous standard that will be overruled by *actual*—though not express—application of deliberate indifference on appeal.[232] Simply adopting the deliberate indifference model will end this vicious cycle.

Therefore, not only is the deliberate indifference standard the "Goldilocks" point between various interests, purposes, and textual provisions of the ADA, it is also the "Goldilocks" point between the theoretical side of disability rights law and the various practical considerations above. There is simply no reason for the Fifth Circuit to not openly adopt that standard for ADA and RA damages claims.

## V. Possible Reading to Allow Adoption of Deliberate Indifference Without the Need for an En Banc Panel

This short and final Part offers reasons why one could read prior Fifth Circuit precedent as not necessarily rejecting the deliberate indifference standard. This would have tremendous benefit to litigants, courts, and the law, as such. First, it would mean that lower courts could expressly adopt and apply the deliberate indifference model I argue for in this Article. Second, it would mean that a panel of the Fifth Circuit would not be troubled by the rule of orderliness and could expressly adopt deliberate indifference without the need for an *en banc* panel or the Supreme Court to intervene.[233] This in turn

229. Cadena v. El Paso Cnty., 946 F.3d 717, 726 (5th Cir. 2020).

230. *See* discussion *supra* Part III.

231. As the Fifth Circuit has been doing, as noted above. *Cadena*, 946 F.3d at 726.

232. Such as what the district court attempted to do in *Prator*. J.H. *ex rel.* Phillips v. Prator, No. 18-994, 2020 WL 609642, at *4 (W.D. La. Feb. 7, 2020), *aff'd in part, rev'd in part sub nom.* Phillips *ex rel.* J.H. v. Prator, No. 20-30110, 2021 WL 3376524 (5th Cir. Aug. 3, 2021).

233. Jacobs v. Nat'l Drug Intel. Ctr., 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.").

would speed up development of the law without unnecessary litigation.

The first justification for this reading of Fifth Circuit precedent comes from the discussion above. Not a single decision of the Fifth Circuit analyzed above would have turned out differently had the Fifth Circuit simply said it was applying deliberate indifference. Thus, substantively, the Fifth Circuit has been applying deliberate indifference.[234]

Second, one could read *Delano–Pyle* as effectively adopting deliberate indifference.[235] In that opinion, the Fifth Circuit said that there was no deliberate indifference standard under the ADA.[236] It also noted that intentional discrimination was required to cast a defendant in damages.[237] Further, it held that the facts of the case were sufficient to show intentional discrimination.[238] However, as explained above, the facts of that case were deliberate indifference facts.[239] Further, at the time *Delano–Pyle* was decided, other circuits had expressly adopted or approvingly cited "deliberate indifference," but the Fifth Circuit did not analyze those cases.[240] As such, it would be nigh absurd to say that the Fifth Circuit made such an important circuit split without an iota of analysis. Thus, *Delano–Pyle* should be read as saying the generally understood rule that there is no deliberate indifference standard applicable to the ADA as a whole, but if one wants damages, they must show intentional discrimination. Such intentional discrimination can be established by a showing of deliberate indifference.[241]

Third, as noted above, some panels have said they were using something more than deliberate indifference; others have only said that our circuit has "seemed" to require something more. This may present a split within the same circuit. However, because these decisions would have turned out the same had they adopted deliberate indifference anyway, these statements of "something more than deliberate indifference" as opposed to "seem to have required something more than deliberate indifference" could potentially be read as dicta; thus, they are not binding on courts and panels that wish to expressly adopt deliberate indifference. Granted, with each passing year or statement by the Fifth Circuit, this last argument becomes less persuasive.

234. *See* discussion *supra* Part III.

235. *Fifth Indifference*, *supra* note 48, at 10–11.

236. Delano–Pyle v. Victoria Cnty., 302 F.3d 567, 575 (5th Cir. 2002).

237. *Id.*

238. *Id.*

239. *See* discussion *supra* Part III.

240. *See* Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001); Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999); Bartlett v. N.Y. State Bd. of L. Exam'rs, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); Pandazides v. Va. Bd. of Educ., 13 F.3d 823, 830 n.9 (4th Cir. 1994).

241. *See Fifth Indifference*, *supra* note 48, at 11.

## VI. Conclusion

Based on the above, I ask the judges of the Fifth Circuit and lower courts to explicitly adopt the deliberate indifference standard for damages actions under Title II of the ADA and Section 504 of the RA. That standard is (1) a defendant knew of facts that presented a substantial risk of harm to an ADA or RA right and (2) the defendant failed to act appropriately on that risk. District court judges or the individual appellate panels could adopt deliberate indifference by reading prior precedent in such a way as to allow explicit adoption of that standard. Otherwise, an *en banc* panel of the Fifth Circuit may be required to undo the semantic errors of prior Fifth Circuit cases. Either way, the Fifth Circuit's current wording of "something more than deliberate indifference" should be abandoned. It is a charade that is applied no differently than ordinary "deliberate indifference" in the other circuits. It presents a possible unnecessary circuit split on an important feature of sweeping federal civil rights laws. It leads to confusion and unnecessary litigation. Finally, and most importantly, it is simply wrong because it is anathema to the history, purposes, and text of the ADA and RA.