No. _____

In The

Supreme Court of the United States

CYNTHIA MADEJ AND ROBERT MADEJ,

Petitioners,

v.

JEFF MAIDEN, ATHENS COUNTY ENGINEER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *PGA Tour, Inc. v. Martin*, this Court carefully examined the important question of when, under the Americans with Disabilities Act (ADA), an otherwise-reasonable accommodation would "fundamentally alter" the program in question. 532 U.S. 661 (2001). *PGA Tour* reserved, however, the equally important question of how courts should evaluate "the specifics of the claimed disability" to determine whether a requested accommodation is "necessary." *Id.* at 683 n.38. Guidance is now needed regarding the presumed reliability of the claimant's testimony about the need for an accommodation, and this case is an ideal vehicle through which to provide it.

The rule in the Fifth, Seventh, Eighth, Ninth and the District of Columbia Circuits in ADA and Fair Housing Amendments Act (FHAA) disability accommodation cases is that a claimant's self-reported medical history is presumed to be *reliable*, to the extent that such evidence is sufficiently probative to preclude summary judgment. Here, however, in diametric opposition to that consensus, the Sixth Circuit held that Petitioner's self-reported medical history is presumptively *un*reliable absent corroboration by a clinical test result.

The first question presented is:

Is a disability claimant's self-reported medical history regarding the need for an accommodation presumptively unreliable?

QUESTIONS PRESENTED – Continued

The second question presented is:

Does a public entity's deliberate refusal to gather sufficient information to meaningfully assess a request for an accommodation before rejecting that request preclude summary judgment of ADA and FHAA failure-to-accommodate claims?

PARTIES TO THE PROCEEDINGS

Petitioners Cynthia and Robert Madej were the plaintiffs-appellants below. Respondent Jeff Maiden, Athens County, Ohio, Engineer, was the defendant-appellee below.

RELATED CASES

Athens County, Ohio, Court of Common Pleas Case No. 15CI0179, *Cynthia et al., Plaintiffs v. Athens County Engineer Jeff Maiden.* Date of terminating proceeding (removal to federal court): July 7, 2016

United States District Court for the Southern District of Ohio Case No. 2:16-cv-658, *Cynthia et al., Plaintiffs v. Athens County Engineer Jeff Maiden.* Date of terminating proceeding (summary judgment): October 17, 2018

United States Court of Appeals for the Sixth Circuit, Case No. 18-4132, *Cynthia Madej; Robert Madej, Plaintiffs-Appellants v. Jeff Maiden, Athens County Engineer, Defendant-Appellee.* Date of terminating proceeding (opinion on appeal): February 24, 2020

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INTRODUCTION

In 2008, the ADA Amendments Act (ADAAA) was enacted with broad bipartisan support and signed into law by President George W. Bush. Among Congress's findings in support of the ADAAA were its explicit rejection of the inappropriately strict and demanding standard for proof of one's right to protection under the ADA that had been enunciated in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), and applied in numerous lower court decisions. ADAAA, Pub. L. No. 110-325, § 2(b)(4) & (5). Going forward, Congress emphasized, "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and . . . the question of whether an individual's impairment is a disability under the ADA *should not demand extensive analysis*." *Id.* at § 2(b)(5) (emphasis added). Following Congress's further instruction for regulations to be revised to relax evidentiary requirements, Title II regulations now state that the disability determination process "*usually will not require scientific, medical, or statistical analysis*[.]" 28 C.F.R. § 35.108(d)(1)(vii) (emphasis added).

In keeping with the nature of the ADA and the FHAA as remedial statutes, and the ADAAA's clear call for a lowering of the evidentiary standards regarding the nature of one's disability, the Fifth, Seventh, Eighth, Ninth and District of Columbia Circuits have established that a claimant's self-reported medical history is presumed to be reliable evidence of the

substantial limitations that the person is experiencing and of the need for an accommodation. Whether such evidence is challenged as self-serving,[1] or as lacking corroboration,[2] or due to the lack of evidence comparing the individual to the general population,[3] these circuits have consistently presumed the claimant's self-reported medical history to be reliable in the absence of evidence sufficient to overcome that presumption.[4]

Here, by contrast, the Sixth Circuit presumed that Ms. Madej's self-reported medical history of asphalt sensitivity is unreliable, mere "lay speculation[ ]", purportedly "a perilous basis for inferring causality" in the sense of the need for the requested accommodation. App. 22. Ms. Madej presented extensive objective evidence, however, of her need for an accommodation, and her medical experts followed the standard method of applying objective case criteria in diagnosing her medical condition and the resulting limitations, but the Sixth Circuit, drawing on toxic tort case law, held that evidence of the need for the requested accommodation

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[1] *Haynes v. Williams,* 392 F.3d 478, 482 (D.C. Cir. 2004) and *Argenyi v. Creighton Univ.,* 703 F.3d 441, 446-47 (8th Cir. 2013).

[2] *Argenyi*; *Williams v. Tarrant Cty. College Dist.*, 717 Fed. App'x 440, 448 (5th Cir. 2018); and *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 643-44 (7th Cir. 2010).

[3] *Gribben v. United Parcel Service, Inc.*, 528 F.3d 1166, 1170 (9th Cir. 2008).

[4] *Wong v. Regents of Univ. of California*, 410 F.3d 1052, 1065 (9th Cir. 2005) (student's claim to be disabled was contradicted by his academic success without special accommodations).

was inadmissible because it was primarily based on Ms. Madej's self-reported medical history.

In *PGA Tour, Inc. v. Martin,* this Court anticipated that its guidance might be later needed as to the extent to which "the specifics of the claimed disability might be examined within the context of what is a reasonable or necessary modification." 532 U.S. at 683 n.38. The necessity of the requested accommodation is now the issue here.

For the millions of individuals who experience substantial limitations on their ability to engage in major life activities, as was the case before the ADAAA, the rights of persons with disabilities are in grave jeopardy, directly contrary to the intent of Congress, which is that the statute provide "broad coverage" in pursuit of its goal of "the elimination of discrimination against individuals with disabilities." ADAAA, Pub. L. No. 110-325, § 2(a)(1). The issue is ripe and important, this Court's guidance is needed, and this case is an ideal vehicle through which to provide it.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 951 F.3d 364 (6th Cir. 2020) and reproduced at App. 1. The district court's opinion granting summary judgment to Respondent Jeff Maiden, Athens County Engineer, is reported at 2018 WL 5045768 (S.D. Ohio 2018) and reproduced at App. 26.

JURISDICTION

The court of appeals entered its judgment on February 24, 2020. Petitioners filed a Petition for Panel Rehearing and for Rehearing *En Banc* on March 9, 2020, which the court of appeals denied on March 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant portions of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12101, *et seq.* (ADA), the Fair Housing Amendments Act, 42 U.S.C. § 3601, *et seq.* (FHAA), and their accompanying regulations are reprinted in the Appendix. App. 72.

STATEMENT OF THE CASE

I. Factual Background

A. Petitioners Cynthia and Robert Madej

Ms. Madej is a disabled person who suffers from physical impairments caused by Multiple Chemical Sensitivity (MCS), fibromyalgia, and Chronic Fatigue Syndrome. She has numerous functional limitations caused by those conditions, including a longstanding history of debilitating reactions to asphalt products. (R. 38, p. 10). In its preamble to implementing regulations, the Department of Justice addressed commenters

regarding MCS stating: "An individual's major life activities of respiratory or neurological functioning may be substantially limited by allergies or sensitivity to a degree that he or she is a person with a disability." Fed. Reg. Vol. 75, No. 178, p. 56236 (emphasis added). The degree to which Ms. Madej is substantially limited qualifies her.

Ms. Madej developed these conditions following chemical exposures while working as a research biologist and exposure in her home to a now-banned pesticide, Dursban, which the U.S. EPA has stated can cause MCS. In 1997, the Social Security Administration determined that she was completely disabled. Her comorbid conditions, particularly her sensitivity to asphalt and other petrochemicals, cause severe negative impact on her health and substantially limit her ability to perform major life activities such as breathing, caring for herself, walking, learning, sleeping, eating, and working. (R. 38, pp. 10-11).

Ms. Madej's disability of chemical sensitivity has been acknowledged and accommodated by public entities including the Ohio Department of Transportation, Franklin County (Ohio) Board of Health, Ohio Department of Agriculture, and the previous administration of the Athens County Engineer's Office. (R. 38, p. 11).

Ms. Madej's reactions to asphalt products and other petrochemicals, which became pronounced in the late 1990's, have been extensively documented in the briefings for this case. Consistently, whenever she was

exposed to new asphalt for any extended period of time, such as when she was stuck in traffic in road construction areas, Ms. Madej experienced symptoms of increasing severity and duration, including shortness of breath (sometimes severe), chest tightness, severe headache, throat and eye burning, palpitations, and neurological impacts such as dizziness and impairments in coordination. Even relatively short asphalt exposures caused symptoms that could persist for days, initially, and for weeks and months in later years.

Her symptoms are consistent with those listed on the Respondent's Material Safety Data Sheet (MSDS) for chip seal asphalt. It lists as hazards from inhalation "irritation to nasal and respiratory tract and central nervous system effects. Symptoms may include labored breathing, sore throat, coughing, wheezing, headache, and nausea." The World Health Organization has identified that some people, such as Ms. Madej, are more susceptible to asphalt hazards than others: "[I]n the general population, *there are individuals who may be more sensitive to exposures and therefore exhibit more symptoms or other effects*." (R. 38, pp. 12-13 (emphasis added)).

Dr. Allan Lieberman objectively tested Ms. Madej for sensitivity to petroleum, the parent compound of asphalt,[5] and found that Ms. Madej was indeed extremely sensitive to it. (R. 38, p. 13). Dr. Lieberman is

[5] "Asphalt is a complex mixture of high molecular weight hydrocarbons produced from crude petroleum." (S.D. Ohio R. 100-1, PgID 4382).

a board certified environmental and occupational physician and the Founder and Director of the Center for Occupational and Environmental Medicine (COEM) in North Charleston, South Carolina. Dr. Lieberman's expertise results from practicing medicine for over 50 years and his over 40 years' experience in the practice of environmental and occupational medicine, with well over 10,000 patients having been treated at COEM. (R. 38, pp. 41-42).

At his deposition, Dr. Lieberman explained, "Asphalt is a petrochemical. She will react to petrochemicals." (R. 38, p. 44). He agreed that Ms. Madej's history "indicate[s] a sensitivity to asphalt or petroleum-based products." Additional tests also determined that Ms. Madej's "detoxification process was altered and abnormal, and that placed her at increased risk when she's exposed to any type of a chemical." (R. 38, p. 14). Recent genetic testing reconfirmed her predisposition to detoxification weaknesses and susceptibility to chemical sensitivity. (R. 38, pp. 45-46).

According to Dr. Lieberman, and as experienced by Petitioners, Ms. Madej's sensitivities and limitations worsened over the years. He determined that Ms. Madej is one of his most extremely sensitive patients, especially to petrochemicals like asphalt, and that, in addition to her substantial limitations, exposures had the risk of causing life-threatening complications such as respiratory or cardiac failure. Similar to a peanut allergy, Dr. Lieberman advised her that the only treatment for her extreme MCS is avoidance of the chemicals to which she is sensitive, and

recommended lifestyle changes and environmental controls for that avoidance. (R. 38, pp. 14-15).

Petitioners relocated to a rural area in Athens County because Ms. Madej could no longer tolerate the impact of petrochemicals around their Columbus home. Finding a suitable home and property proved to be an extremely difficult task, as Ms. Madej's sensitivities restricted their choices when factors such as building materials, pesticide use, proximity to farms, gas lines, and others were considered. It took many years to find their current home, which is uniquely located and was built with many special materials and features by Habitat for Humanity for another individual disabled by MCS. Even then, it took months of modifications before Ms. Madej could live there. The severity of Ms. Madej's disability prevents her from being able to stay anywhere other than her specially modified home. (R. 38, pp. 15-16).

By moving to rural Dutch Creek Road, as Dr. Lieberman advised, Ms. Madej benefits from fewer symptoms and much less pain, clean outdoor air, sunshine she requires for vitamin D, and the ability to enjoy their rural property. (R. 38, p. 16). Thus these changes have resulted in an improvement in quality of life for Ms. Madej and the opportunity to live as others do who do not have her disability.

B. The Madejs' Accommodation Requests

Before Respondent's election as County Engineer, Petitioners had an agreement with his predecessor,

who accommodated Ms. Madej's disability by agreeing to manage the low volume road[6] Petitioners live on without the use of products that would be harmful to Ms. Madej. (R. 38, p. 16). And until Respondent began applying asphalt treatments within one mile of Petitioners' home, she experienced some relief from her pain, severe muscle spasms, and sleep disruption. (R. 38, p. 17).

But then, whenever Respondent applied asphalt in proximity to Petitioners' home, Ms. Madej immediately developed the same symptoms as she had following previous asphalt exposures – symptoms that substantially limit her ability to engage in the major life activities of breathing, caring for herself, sleeping, eating, walking, and thinking. At times, her symptoms and the resulting limitations occurred for approximately three months following the application of asphalt. Though typical of her reaction to asphalt exposure, these are not symptoms she experiences routinely at her home and surroundings. (R. 38, pp. 17-18).

When Respondent expressed his intent to apply asphalt chip seal to her road, Ms. Madej requested as a reasonable accommodation that he use an alternative chemical product that would not be harmful to her instead of asphalt chip seal. Chip seal is a thin, liquid

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[6] Cornell University defines a very low volume road as a local road with average daily traffic of fewer than 400 vehicles per day. A lower design standard can be applied for such highways as almost all of the traffic is local drivers. (https://www.clrp.cornell.edu/q-a/151-low-volume.html) Respondent does not contest that Petitioners' road has average daily traffic of 100 vehicles per day.

asphalt surface treatment on a gravel road where hot liquid asphalt is applied to the gravel road surface and then is covered by a layer of gravel (chips). The proposed non-asphalt alternative road treatments are a surface material substitution for the asphalt portion of the treatment to control dust. More than a dozen such alternative treatments, such as calcium and magnesium salts and canola and soy oils, used by many state highway departments, the U.S. Forest Service, and the Federal Highway Administration, were suggested by Petitioners. These products contain no known hazardous chemicals. (R. 38, p. 19).

Petitioners provided Respondent with two letters of medical necessity confirming that exposure to petroleum products used for road maintenance, such as blacktop, tar, and asphalt, could seriously, and potentially fatally, harm Ms. Madej, that Ms. Madej cannot easily relocate, even for short periods, because she requires specialized living conditions that cannot be easily replicated, and that she cannot avoid exposure simply by remaining inside with the windows closed due to her extreme sensitivity to petroleum products. Her treating physician, Dr. Singer, further explained that, should an exposure occur, Ms. Madej cannot seek standard medical care due to her sensitivities. (S.D. Ohio R. 116-3).

Given the gravity of the risk, Petitioners pleaded with Respondent and repeatedly attempted to discuss an accommodation and options for road treatments with him, but he refused any such discussion. Indifferent to their pleas, Respondent made no effort to gather

information from Petitioners or qualified experts to determine what accommodations would be necessary. Respondent simply refused to factor Ms. Madej's disability, and the availability of satisfactory alternatives to asphalt chip seal, into his decision-making in any meaningful way. Instead, he based his decision to proceed with chip seal on the amateur opinion of his staff and a county commissioner that the asphalt fumes could not reach Petitioners' home, with full knowledge that applying the chip seal could cause serious physical harm to Ms. Madej. (R. 38, pp. 20, 56-57).

II. The Proceedings Below

A. The Madejs' Complaint

On September 15, 2015, Petitioners filed this matter in the Athens County Court of Common Pleas. On September 23, 2015, the Athens County Common Pleas Court granted a preliminary injunction ordering that no chip seal paving occur within a one-mile radius of Petitioners' house. The Athens County court noted, at that time, that the medical evidence was uncontroverted that exposure to asphalt products posed a serious risk to Ms. Madej's health. That remains the case: Respondent did not submit any medical evidence to the contrary in the course of the district court's consideration of this matter. And although the injunction did not completely eliminate Ms. Madej's reactions to asphalt products, it limited the proximity and quantity of those products, allowing her to escape the serious threats to her well-being and to continue to access her home and

benefit from the use and enjoyment of her home. (R. 38, pp. 20-21).

Petitioners filed a motion to amend their complaint to add federal claims prior to the preliminary injunction hearing, but the court proceeded first with the hearing. Following the Athens County common pleas court's decisions issuing a temporary restraining order and preliminary injunction, that court granted Petitioners leave to amend their complaint to add claims under the FHAA and the ADA. Upon the granting of leave to amend to add Petitioners' federal statutory claims, Respondent removed this case to federal court.

After discovery, Respondent filed motions in limine to exclude Petitioners' medical and engineering experts and moved for summary judgment. Petitioners filed a motion for partial summary judgment and a motion in limine to exclude Respondent's engineering expert.

In support of their Motion for Partial Summary Judgment, in addition to demonstrating the sufficiency of their evidence supporting the need for the requested accommodation, Petitioners argued that Respondent's deliberate indifference to their accommodation request, including his failure to gather sufficient information from Petitioners and qualified experts to meaningfully assess that request, constituted a separate and independent violation of the Americans with Disabilities Act. (R. 38, pp. 55-57).

On October 17, 2018, the district court granted Respondent's motion to exclude Petitioners' medical experts and, on that basis, granted Respondents' motion for summary judgment, dismissing all claims and vacating the preliminary injunction that had been in place in this matter since it was imposed by the Athens County Court of Common Pleas. App. 64-68. The basis for the district court's decision to exclude Petitioners' medical experts was that their testimony did not meet the reliability standards of Federal Rule of Evidence 702 as gauged by erroneously applying the toxic tort concept of "specific causation." App. 46-47. Having excluded Petitioners' medical experts, Respondent's motion for summary judgment was granted on the grounds that Petitioners had insufficient remaining evidence to raise genuine issues of material fact as to whether Ms. Madej would "suffer a continuing irreparable injury if the court fails to issue an injunction." App. 64.

B. Sixth Circuit Proceedings

The Sixth Circuit issued its panel decision on February 24, 2020. After noting various preliminary issues that did not form part of the basis for the court's decision, the court focused on one issue as dispositive: did the district court properly exclude Petitioners' medical evidence? If so, "the absence of that evidence compels summary judgment for the Athens County Engineer." App. 25.

The Sixth Circuit appeared to accept Petitioners' argument that the district court had excluded their medical evidence based on "irrelevant causation standards from *state tort law,* not on the standards for the *federal statutory claims*. They [Petitioners] have a point. . . . This is not a toxic-tort case. It involves claims under the Fair Housing Amendments Act and the Americans with Disabilities Act." App. 9-10 (emphasis in original). The court concluded, "the Madejs are correct that these laws do not codify a toxic-tort regime." App. 17.

The Sixth Circuit then, without explaining why, evaluated the admissibility of Petitioners' medical evidence based entirely on toxic tort evidentiary standards which, as the Sixth Circuit acknowledged, the district court had erred in using. First, the court found that Dr. Molot's testimony did not "reliably rule out" other causes of Ms. Madej's asphalt sensitivity (App. 22) – a requirement drawn not from ADA or FHAA case law, but from the toxic tort case of *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010), where the medical expert had failed to rule out causes of the plaintiff's Parkinson's disease other than exposure to manganese. *See id.* at 674.

Here, the Sixth Circuit, ignoring extensive objective evidence of Petitioner's sensitivity, ruled that Dr. Molot had not reliably ruled out other causes because, in the absence of "any objective tests" to confirm her sensitivity to asphalt, he relied on Ms. Madej's self-reported medical history. App. 22. Though the court had acknowledged and accepted Dr. Molot's testimony

regarding the fact that no clinical test even exists to definitively confirm asphalt sensitivity (*id.*), the court proceeded to quote from a second toxic tort case, *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996), to dismiss Ms. Madej's self-reported medical history in the absence of such testing as mere "lay speculations on medical causality," which "however plausible, are a perilous basis for inferring causality." App. 22. The causality in question in *Ciba-Geigy,* again, was toxic tort causality, whether wearing a Habitrol nicotine patch caused the plaintiff's heart attacks. *Rosen,* 78 F.3d at 318.

The court then quoted from a third toxic tort case, *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599 (10th Cir. 1997), in concluding that Dr. Molot's "subjective method of proving causation" was not scientifically valid. App. 23. Again, the causation issue in *Summers* was causation for purposes of proving a toxic tort claim, whether exposure to diesel exhaust had caused injuries to the plaintiffs' central nervous and respiratory systems. *Summers*, 132 F.3d at 604.

The Sixth Circuit gave no consideration to Dr. Molot's extensive education, training, and experience, or to whether Dr. Molot's method met the types of evidentiary standards applied in disability accommodation, as opposed to toxic tort, cases and excluded Molot on those grounds. It then affirmed the district court's exclusion of the testimony of Ms. Madej's treating physicians, Dr. Lieberman and Dr. Singer, again applying toxic tort causation logic: "Dr. Lieberman (like Dr. Molot) relied primarily on Ms. Madej's self-reporting to

form his opinion concerning her sensitivities." App. 23. Again, the Sixth Circuit disregarded the other objective medical evidence upon which Dr. Lieberman had relied, and it then affirmed the exclusion of Dr. Singer because she, in turn, had relied on Dr. Lieberman. *Id.* The court concluded, based on toxic tort law, that the absence of admissible expert medical testimony "compels summary judgment" for Respondent. App. 25.[7]

The Sixth Circuit did not address what Congress identified as the "primary object of attention" in cases brought under the ADA: Respondent's failure to gather sufficient information to assess the viability of Petitioners' accommodation request constituted a prior and separate violation of the ADA. Petitioners' argument on appeal, however, that the failure of Respondent to gather sufficient information from Petitioners and qualified experts before he decided not to accommodate Ms. Madej's disability barred the court from granting Respondent's Motion for Summary Judgment, was never addressed by the Sixth Circuit.

Petitioners then filed a Petition for Panel Rehearing and Rehearing *En Banc* on March 9, 2020. (R. 58-1

[7] At oral argument, Petitioners' counsel stressed the district court's abuse of discretion in evaluating the admissibility of that expert testimony according to toxic tort causation standards, an argument that the Sixth Circuit accepted. Counsel did not concede that the district court was correct to have required expert evidence. In fact, counsel stated, "I don't believe expert testimony is required under the case law."

and 60-1). Petitioners sought rehearing on the ground that the Sixth Circuit had apparently overlooked their separate and independent argument, based on Third and Ninth Circuit precedent,[8] that summary judgment cannot be granted to a public entity that fails to gather sufficient information to meaningfully consider an accommodation request before refusing it, as Respondent did here. (R. 60-1, pp. 4-12). The Sixth Circuit denied the Petition, however, stating that, although they had not been mentioned in their decision, "the issues raised in the petition were fully considered upon the original submission and decision of the case." App. 71.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit is in a direct split with the Fifth, Seventh, Eighth, Ninth and District of Columbia Circuits regarding the presumptive reliability of a claimant's testimony regarding her disability.

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), this Court noted that the issue of to what extent "the specifics of the claimed disability might be examined within the context of what is a reasonable or necessary modification" might one day need to be examined, in order to guide the lower courts. *Id.* at 683 n.38. Now that the Sixth Circuit has based its holding solely

[8] *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999); *Updike v. Multnomah Cty.*, 870 F.3d 939, 954 (9th Cir. 2017).

on the presumed unreliability of the claimant's self-reported medical history, in a series of splits with the Fifth, Seventh, Eighth, Ninth and D.C. Circuits, the issue is ripe, the case is a good vehicle, and the need for the Court's guidance is clear.

ADA Title II's implementing regulations require Respondent to make "necessary" modifications to his policies, practices, or procedures as follows:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7)(i) (emphasis added).[9]

The FHAA, similarly, defines handicap discrimination as "a refusal to make reasonable accommodations in

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[9] The Sixth Circuit questioned, without deciding, whether Petitioners' accommodation request is covered by ADA Title II because the Title II definition of public "facilities," which are not within Title II's coverage, includes its "roads." App. 15-16 (citing 28 C.F.R. § 35.104). Petitioners' Title II claim is based, however, on their position that road maintenance is a "service, program, or activity" of a public entity. Given the Sixth Circuit's broad interpretation of the phrase "services, programs, and activities," to "encompass[ ] virtually everything that a public entity *does*," like road maintenance, as opposed to facilities that it simply *has* (*Babcock v. Michigan*, 812 F.3d 531, 540 (6th Cir. 2016) (emphasis added)), the Sixth Circuit was correct to assume that Petitioners' claim falls within the scope of ADA Title II. *See* App. 16.

rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(2)(B) (emphasis added).[10]

A. The Sixth Circuit's rule that a claimant's testimony about her own disability is presumptively unreliable is in direct opposition to the rules in the Fifth, Seventh, Eighth, Ninth and District of Columbia Circuits that such testimony is presumably reliable and sufficient to preclude summary judgment.

Prior to the Sixth Circuit's *Madej* decision, the Circuit Courts had consistently presumed the disability

[10] The Sixth Circuit also questioned, without deciding, whether "roadwork on Dutch Creek Road amounts to a 'provision of services' 'in connection with' the Madejs' home" so as to bring their claim within the scope of the FHAA. App. 12. The court compared *Bullock v. City of Covington,* No. 16-56-HRW, 2016 WL 6694486 (E.D. Ky. Nov. 14, 2016) (*affirmed on other grounds,* 698 F. App'x 305 (6th Cir. 2017)), with *Vance v. City of Maumee,* 960 F.Supp.2d 720, 732-33 (N.D. Ohio 2013). *Vance,* which held that the FHAA required the city to re-open an alley to provide driving access to the rear of the claimant's property, is on point. *Bullock,* however, is completely inapposite. It did not involve a public entity's road management services. Rather, in *Bullock,* the issue was "not with the street, but with [the claimant's] own property[,] . . . the topography of her own yard." 2016 WL 6694486, at *6. In any case, the Sixth Circuit correctly assumed that the FHAA applies. 951 F.3d at 371.

claimant's self-reported medical history to be reliable evidence.

The Eighth Circuit, in *Argenyi,* rejected the district court's view that the claimant's medical history affidavit was presumptively "self-serving" and to be disregarded. 703 F.3d at 446. Instead, a claimant's self-reported medical history is generally the primary and best form of evidence of a disability: "[I]t is especially important to consider the complainant's testimony carefully because 'the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective.' " *Id.* (citing U.S. Dep't of Justice, The Americans with Disabilities Act Title II Technical Assistance Manual, at II–7.1100 (1993)). The district court had erred by disregarding the claimant's detailed affidavit, especially because it was supported by letters from his doctors and the fact that the claimant had paid for accommodation that the University had denied him. *Id.* at 447.

The District of Columbia Circuit, in *Haynes,* began by observing that the ADA actually requires evidence in the form of the individual's testimony of "the extent of the limitation . . . *in terms of their own experience*." *Haynes*, 392 F.3d at 482. In *Haynes,* as in *Argenyi,* the district court had rejected the claimant's testimony "regarding the extent to which [his] physical impairment impacted his ability to sleep" as mere "self-serving assertions," and therefore "insufficient." "In that respect," the D.C. Circuit held, "the [district] court erred." *Id.*

In *AutoZone,* the defendant argued that a claimant's own testimony was insufficient absent "medical evidence of his or her substantial limitations." 630 F.3d at 643. The Seventh Circuit rejected that argument, finding the testimony of the claimant and his wife to be sufficient, in contrast to two of its precedents, where the claimant's affidavit provided no more than "vague generalities" or "generalized assertions." *Id.* at 644 (distinguishing, respectively, *Fredricksen v. United Parcel Serv. Co.*, 581 F.3d 516, 522 (7th Cir. 2009) and *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 784 (7th Cir. 2007)). Absent such defects, the claimant's own testimony is presumed to be sufficiently probative and reliable enough to go to a jury. *Id.*

The Fifth Circuit, in *Williams,* explained how the district court had erred in disregarding the claimant's declaration as "conclusory" and lacking in corroborating evidence:

> The court's conclusion that Williams' "self-serving declaration, without medical documentation or support, is not sufficient" is incorrect. The 2008 [ADAAA] amendments and their implementing regulations broaden protection for the disabled, in part by clarifying, as noted *supra*, that showing substantial limitation "usually will not require scientific, medical, or statistical analysis". *Id.* § 1630.2(j)(1)(v). The court's requiring medical corroboration at the summary-judgment stage was, therefore, erroneous.

Williams, 717 F. App'x at 448 (5th Cir. 2018).

The Ninth Circuit, in *Gribben,* rejected the argument that the claimant's testimony alone was insufficient to support his claim:

> Gribben's testimony alone regarding the significance of his impairment is sufficient to create a genuine issue of material fact at the summary judgment stage. *See Head v. Glacier Nw., Inc.,* 413 F.3d 1053, 1058 (9th Cir.2005) ("[O]ur precedent supports the principle that a plaintiff's testimony may suffice to establish a genuine issue of material fact."). As a result, Gribben was not required to submit the comparative evidence the district court required.

528 F.3d at 1170. The U.S. Department of Justice's Technical Assistance Manual fairly summarizes the law in these circuits regarding the presumptive reliability of the individual's own testimony about the impact of their disability: "[T]he individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective." II–7.1100 (quoted in *Argenyi*).

In contrast to these cases, the Sixth Circuit held that Ms. Madej's testimony regarding her history of asphalt sensitivity was unreliable unless corroborated by objective testing. The Sixth Circuit explicitly presumed her testimony to be unreliably "subjective," as mere "lay speculations, . . . a perilous basis for inferring causality." App. 22. The Sixth Circuit declared that her medical expert "did not conduct any objective tests," and that he had based his opinions "'[o]nly from

the history of what the patient identifies'; that is, his opinions rest 'strictly on a subjective criteria of history and reported symptoms.'" Then, considering only whether a single form of objective evidence (clinical testing) had been done to overcome this presumption, the Sixth Circuit affirmed the district court's exclusion of the testimony of her medical expert, Dr. Molot. App. 25.

The court then found reasons to fault all the rest of the expert evidence as well. One of Ms. Madej's treating physicians, Dr. Lieberman, had conducted an objective test, but it was "decades-old." App. 24. Her other treating physician, Dr. Singer, had based her opinion on Dr. Lieberman's, so the court rejected hers too as invalid. App. 24. Ultimately, based solely on its presumption that Ms. Madej's testimony regarding the need for the requested accommodation was unreliable absent corroboration in the specific form of an objective test, the Sixth Circuit affirmed the district court's grant of summary judgment. App. 25.

In focusing entirely on whether any objective test corroborated Ms. Madej's testimony, the Sixth Circuit ignored the numerous other forms of objective evidence submitted in support of her claim. To summarize briefly, the medical evidence presented below to support Ms. Madej's accommodation request was extensive, including (1) her medical expert's analysis of the consistency of her symptoms with those listed on Respondent's Material Safety Data Sheet (MSDS) for asphalt chip seal; (2) a World Health Organization article indicating that a subset of the population has been

found to be especially sensitive to asphalt; (3) letters of medical necessity from 2010 and 2015; (4) her treating physician's notes going back to 1999; (5) citation to 243 supporting peer-reviewed publications; (6) a several hours-long physical examination by her medical expert that included observation of her vital signs, her appearance and effect, mobility, examination of her eyes, ears, nose, and throat, a NASA lean test, Romberg and tandem gait with multitasking to rule out balance disorders and observation of her coordination, affect, mood, and body language; (7) 80 pages of validated and standardized medical test questionnaires; (8) 18 years of laboratory data (including blood work, an x-ray, and an EKG which were performed on Ms. Madej within a week prior to the physical exam); (9) analysis of the correspondence of Ms. Madej's MCS to the results of 16 studies of capsaicin inhalation challenges; (10) Ms. Madej's maximum score on the Chemical Sensitivity Scale-Sensory Hyperreactive Questionnaire (CSS-SHQ); (11) administration of the Generalized Anxiety Disorder Scale (GAD-7) to rule out anxiety and panic disorder; (12) laboratory testing showing detoxification abnormalities in Ms. Madej "that placed her at increased risk when she's exposed to any type of a chemical"; and (13) genetic testing showing additional evidence of a compromised ability to detoxify and a predisposition to being chemically sensitive. (R. 38, pp. 12-14, 37-39).

Moreover, the Sixth Circuit's requirement that a disability claimant confirm the existence of their underlying condition with an objective test when no such

test exists has been held to be an abuse of discretion by the First, Second, Seventh, Ninth, Tenth and Eleventh Circuits in comparable contexts. Under ERISA and the Social Security Act (SSA), numerous cases from various circuits uniformly hold that it is error to deny a disability claim due to lack of testing to confirm the existence of a condition for which no objective test exists. Yet the Sixth Circuit has interpreted the ADA to require objective testing to confirm the existence of a type of sensitivity to asphalt for which no objective testing exists. As a remedial statute, and one Congress amended with the intent to eliminate overly demanding judicially-imposed standards that excluded individuals from obtaining protection under the Act, it is incontrovertibly an abuse of discretion to interpret the ADA to require medical evidence that, due to the nature of the medical condition, is impossible to obtain.

The case law from courts that have squarely faced this issue is completely consistent. In *Denmark v. Liberty Assur Co. of Boston*, 481 F.3d 16, 37 (1st Cir. 2007), the First Circuit held that it is error to require "objective evidence of the diagnosis . . . for a condition such as fibromyalgia that does not lend itself to objective verification." The First Circuit also held in *Carbone v. Sullivan*, 960 F.2d 143 (1st Cir. 1992) that it is error to discount a fibrositis diagnosis due to lack of objective testing. The Second Circuit declared, in *Miles v. Principal Life Ins. Co.*, 720 F.3d 472, 488 (2d Cir. 2013), that it is error to require objective testing of tinnitus because tinnitus is not "amenable to objective

verification." The Seventh Circuit, in *Kennedy v. Lilly Extended Disability Plan*, 856 F.3d 1136, 1139 (7th Cir. 2017) explained, sensibly, "it is error to demand laboratory data to credit the symptoms of fibromyalgia – the crucial symptoms, pain and fatigue, won't appear on laboratory tests."

In *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 678 (9th Cir. 2011), the Ninth Circuit held that it is an abuse of discretion to require objective testing of chronic fatigue syndrome and abnormalities of cognitive functioning because no such testing exists.

The Eleventh Circuit held, in *Creel v. Wachovia Corp.*, No. 08-10961, 2009 WL 179584, at *8 (11th Cir. Jan. 27, 2009), that it is error to require laboratory tests to prove the existence of migraine headaches, and in *Oliver v. Coca Cola Co.*, 497 F.3d 1181, 1197 (11th Cir. 2007), the Eleventh Circuit ruled that it is error to require objective testing of fibromyalgia and chronic fatigue syndrome.

Finally, the Tenth Circuit emphatically rejected the Sixth Circuit rule as to an entire list of conditions for which no objective testing exists. In *Smith v. Barnhart*, 61 F. App'x 647, 649-50 (10th Cir. 2003), it held that it is error to require proof of the following based on "medical test results alone": 1) mild or greater central spinal stenosis at C5-6 secondary to a small or moderate ventral bulging disc; 2) a bone spur, resulting in marked attenuation of the cervical chord; 3) adjustment reaction with mixed emotions secondary to

chronic pain; 4) musculoskeletal neck pain; 5) cervical radiculopathy; 6) myofascial pain with evidence of thoracic outlet syndrome; 7) cervical spasm and right arm parathesias of unknown origin, 8) possible fibromyalgia; 9) degenerative arthritis, 10) chondromalicia patella; 11) chronic myofascial pain; 12) tension headaches; 12) lateral epicondylitis bilaterally; and 13) peripheral nerve entrapment. The Tenth Circuit explained:

> We have rejected this concept as contrary to applicable law. 'If objective medical evidence must establish that severe pain exists, subjective testimony serves no purpose at all.' Agency regulation is in accord. *See* 20 C.F.R. § 404.1529(c)(2) ('[W]e will not reject your statements about the intensity and persistence of your pain or other symptoms . . . solely because the available objective medical evidence does not substantiate your statements.'). *Id.*

In Ms. Madej's case, the reality of her condition has been confirmed by a wide range of objective indicators, in addition to her self-reported (purportedly "subjective") medical history, evidence that the Sixth Circuit ignored due to its erroneous application of toxic tort causation standards and its unreasonable insistence on non-existent clinical testing, something that nearly every other circuit has ruled is an abuse of discretion. And because at least 50 million persons in the United States live with conditions that cannot be confirmed by a test, because no such testing exists, a

precedent allowed to stand would have broad nationally-significant impacts.

B. The federal courts, including the Eleventh Circuit and a prior Sixth Circuit decision, have not raised the bar for the admissibility of medical evidence based on the nature of the medical diagnosis in ADA and FHAA disability accommodation cases.

The Sixth Circuit's failure to consider the extensive body of objective medical evidence in support of the requested accommodation, and to insist on a clinical test demonstrating Ms. Madej's sensitivity to asphalt, was apparently fueled by its reliance on pre-ADAAA case law, many of which were toxic tort cases, that rejected MCS as a "controversial" medical diagnosis. (*See* App. 20).

Post-ADAAA, federal courts have come full circle, consistently recognizing MCS as a valid diagnosis. In 2011, the United States District Court for the Southern District of California found that the medical testimony about the plaintiff's MCS *did* meet *Daubert*[11] standards. *Zopatti v. Rancho Dorado Homeowners Ass'n*, 781 F. Supp. 2d 1019, 1023-24 (S.D. Cal. 2011). The Eastern District of Missouri did the same in 2010. *Metcalf v. Lowe's Home Centers, Inc.*, 2010 WL 1657424, at *4-6 (E.D. Mo. 2010); *see also Dickerson v. Sec'y, Dep't of Veterans Affairs Agency*, 489 F. App'x

[11] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

358, 361 (11th Cir. 2012) (medical evidence showed plaintiff suffered from disability of MCS). In fact, even pre-ADAAA, the Sixth Circuit has recognized MCS as a disability for Social Security purposes since 1996. *See Temple v. Gunsalus*, 97 F.3d 1452 (6th Cir. 1996).

The Sixth Circuit also erred in concluding that evidence was lacking "that more recent scientific advancements have led the scientific community to come to accept a multiple-chemical-sensitivity diagnosis, one of the relevant reliability factors." App. 21. A substantial body of peer-reviewed literature supports the validity of MCS as a diagnosis. Dr. Molot cites 243 peer-reviewed publications in support of his evaluation of Ms. Madej. The literature includes the biological basis (including differences in odor processing and identifiable chemical signatures for MCS), the prevalence of MCS, case criteria, definition for MCS, etiology, difference from psychological disorders, and central sensitization. Capsaicin challenge is a research technique used to test for receptor sensitivity and is a standardized test that strongly supports the theory of MCS. Sensitivity of these receptors, which are sensitive to chemicals, has been subject to peer review and it has been used to differentiate MCS patients from controls in 16 single- and double-blind studies published in peer-reviewed medical journals. Similarly, 9 studies of functional brain scans published in peer-reviewed medical journals differentiate MCS patients from controls. (R. 38, p. 37). MCS has been recognized by the

Center for Disease Control, American Lung Association, U.S. Environmental Protection Agency, American Medical Association, U.S. Department of Social Security, and U.S. Department of Housing and Urban Development, among others (S.D. Ohio R. 135, PgID 6253-6254).

Regardless, as the ADAAA made clear, and as the Fourth, Seventh and Ninth Circuits acknowledge, the focus now is not to be on the label of the disabling condition; the focus is to be on the evidence that the individual experiences substantial limitations in her ability to engage in major life activities: *J.D. v. Colonial Williamsburg Foundation*, 925 F.3d 663 (4th Cir. 2019) (after noting physicians were uncertain about diagnosis, focused on substantial limitation, with individual's own testimony sufficient to raise a genuine issue of material fact as to necessity of accommodation); *E.E.O.C. v. Autozone, Inc.*, 630 F.3d 635, 643-44 (7th Cir. 2010) (diagnosis of cause of back pain not focused on; sufficient that plaintiff able to describe manner in which limited in ability to engage in major life activities); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228-29 (9th Cir. 1998) (despite lack of scientific consensus about cause of lupus, doctor's methodology (opinion based on a physical examination and a review of medical history and records) sufficiently reliable). It is noteworthy that neither court in *Madej* mentioned or analyzed whether she was experiencing substantial limitations in her ability to engage in major life activities, which is the proper focus, rather than the question of her diagnosis.

C. Only this Court can resolve these conflicts.

The Sixth Circuit's presumption that the claimant's self-reported medical history is unreliable, a presumption that it stated could be overcome only with an objective test, is squarely at odds with the Fifth, Seventh, Eighth, Ninth and D.C. Circuits' presumption that such evidence is reliable. These circuits have consistently accepted such evidence as admissible and sufficient to preclude summary judgment.

For those seeking an accommodation under the ADA or FHAA, one's self-reported medical history is a traditionally valuable and often primary source of information about the condition underlying one's accommodation request. Moreover, that medical history will often be corroborated by various other forms of medical evidence, such as MSDS, medical records, physical examinations, standardized testing, scientific literature, and case criteria, as indeed it was in Ms. Madej's case. Certainly at the summary judgment stage, Ms. Madej's medical experts had sufficient evidence of various types on which to base their reliable opinions.

The Sixth Circuit is at odds with five other circuits, and will undoubtedly create intractable conflict that will frustrate the courts and the remedial statutory purposes of the ADAAA and FHAA. Uniformity is important to implementing fair and reasonable protections that these statutes promise disabled Americans. There is no prospect that the split on this important issue will be resolved without the Court's intervention.

II. The necessity of disability accommodations is a vital and recurring question for millions of individuals.

Review is especially warranted because of the sweeping significance and nationwide importance of the evidentiary question presented. Because the primary and best source of evidence of the need for an accommodation is typically the individual's self-reported medical history, and because there are numerous disabilities that do not have a confirming objective test, the Sixth Circuit has created an evidentiary barrier that will arise frequently in disability cases.

Innumerable disabling conditions could be subjected to the extremely demanding evidentiary standard the Sixth Circuit has promulgated, impacting millions of disabled Americans. Examples of familiar disabling conditions for which no objective test exists and for which physicians must rely on the patient's self-reporting include (approximate number of affected Americans): migraine headaches (52 million), low back pain (96 million), depressive disorders (11 million), chronic fatigue syndrome (0.8-2.5 million), fibromyalgia (6.6 million), MCS (42 million), irritable bowel syndrome (52-79 million), post-traumatic stress disorder (11.8 million), and chronic pelvic pain (36.3-66 million).[12]

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[12] Villarroel MA, Blackwell DL, Jen A. Tables of Summary Health Statistics for US Adults, 2018 National Health Interview Survey, National Center for Health Statistics (2019) (migraine headaches and low back pain); National Institute of Mental Health (https://www.nimh.nih.gov/health/statistics/major-depression.shtml)

The Sixth Circuit's evidentiary rule extends to disabilities for which tests may be available as well and would require these disadvantaged individuals to subject themselves to expense and potential unnecessary suffering to support accommodation requests that should be axiomatic. One in 4 U.S. adults – 61 million Americans – have a disability that impacts major life activities, according to the Center for Disease Control and Prevention.[13] Congress has already acted once in the ADAAA to correct the type of judicial deviation from the easily-met evidentiary bar that Congress always envisioned.

The Sixth Circuit's decision also threatens to introduce confusion into other areas of the law, such as

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(depressive disorders); Centers for Disease Control and Prevention, National Center for Emerging and Zoonotic Infectious Diseases, Division of High Consequence Pathogens and Pathology, Myalgic Encephalomyelitis/Chronic Fatigue Syndrome, Epidemiology (July 12, 2018) (chronic fatigue syndrome); Hawkins R., J. Am. Osteopath Assoc. 113(9) (2013): 680-689 (fibromyalgia); Steinemann A., National Prevalence and Effects of Multiple Chemical Sensitivities, JOEM 60:3 (March 2018) (MCS); Canavan C, West J, Card T. Review, Epidemiology of Irritable Bowel Syndrome. Clinical Epidemiology 6 (2014): 71-80 (irritable bowel syndrome); National Institute of Mental Health: https://www.nimh.nih.gov/health/statistics/post-traumatic-stress-disorder-ptsd.shtml (PTSD); Ahangari A. Pain Physician, 17:E141-E147 (2014) (chronic pelvic pain).

[13] Okoro CA, Hollis ND, Cyrus AC, Griffin-Blake S. Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults – United States, 2016. MMWR Morb Mortal Wkly Rep 2018;67:882–887. DOI: http://dx.doi.org/10.15585/mmwr.mm6732a3 (accessed August 17, 2020).

medical malpractice law, where it is standard to admit expert medical testimony based in significant part on the individual's self-reported medical history. *See*, *e.g.*, *Theis v. Lane,* 2013 – Ohio – 729, ¶ 19, 2013 WL 719871, *5 (Ohio Ct. App. 6th Dist. 2013) ("If Ohio courts considered the examination of a patient, review of his medical records, and the taking of his history to be an unreliable methodology, the bulk of all medical testimony would be inadmissible." (citing *Hutchins v. Delco Chassis Sys., GMC,* No. 16659, 1998 WL 70511, *5 (Ohio Ct. App. 2nd Dist. Feb. 20, 1998)) (emphasis added)).

If the Sixth Circuit's decision is left to stand, all entities covered by the ADA – employers, public entities and public accommodations – will be virtually immune to court proceedings due to the likelihood that the supporting medical evidence, which will necessarily be based on the individual's self-reported medical history, will be excluded.

Finally, left uncorrected, the Sixth Circuit's rule will impermissibly discriminate among persons with disabilities. It will particularly discriminate against persons with limitations that cannot be confirmed by objective, clinical testing – even though case criteria, self-reported medical history and other forms of objective evidence will be available, and competently assessed by medical experts, as here.

III. The Sixth Circuit disregarded Respondent's refusal to meaningfully consider Petitioners' accommodation prior to denying it, in a split from the lower court consensus and in contravention of Congress's purpose in enacting the ADAAA.

Under Title II of the ADA, upon receipt of an accommodation request, if a public entity fails to gather sufficient information from the disabled individual and qualified experts to meaningfully assess the accommodation request, the public entity is not entitled to summary judgment on a claim that the public entity failed to reasonably accommodate the individual's disability. As the Ninth Circuit has established, "It is well-settled that Title II . . . create[s] a duty to gather sufficient information from the [disabled individual] and qualified experts as needed to determine what accommodations are necessary." *Updike v. Multnomah Cty.*, 870 F.3d 939, 954 (9th Cir. 2017) (internal quotation marks omitted). This is in keeping with Congress's intent that "the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether the discrimination has occurred. . . ." 29 C.F.R. § 1630.2(j)(1)(iii) & 28 C.F.R. § 35.101(b). "[W]hen an entity is on notice of the need for accommodation, it 'is *required* to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation.'" *Updike*, *supra*, 870 F.3d at 957 (emphasis added).

Before deciding to proceed with chip sealing Petitioners' road, Respondent made no effort to gather

sufficient information from Petitioners or qualified experts to meaningfully assess whether a reasonable accommodation might be available. He simply refused to meaningfully assess Ms. Madej's disability, and the availability of satisfactory alternatives to asphalt chip seal, into his decision-making in any meaningful way. Respondent consulted no experts, made no effort to determine whether her doctor's letters raised legitimate concerns, and gathered no evidence about the viability of Petitioners' accommodation request until much later, many months after litigation had begun.

Instead, he based his decision to proceed with chip seal on the amateur opinion of his staff and a county commissioner that the asphalt fumes could not reach Petitioners' home:

> Q. When you say the consensus with the people you spoke with was that the smell couldn't travel 280 feet, who did you speak with about that?
>
> A. My staff, I guess. We had a discussion about it. My entire staff was here for that meeting. The county commissioner was here, Charlie Atkins. I discussed it with him. (*Id.* at 3664).

Given the uncertainty at the outset about whether the accommodation request would much later be dismissed on *Daubert* grounds, the Respondent had a duty to meaningfully assess it upon request. The policy reasons underlying this requirement are well stated in the following decision of the Third Circuit: "In short, an

employer [or, under Title II, a public entity] who has received proper notice cannot escape its duty to engage in the interactive process simply because the [disabled individual] did not come forward with a reasonable accommodation that would prevail in litigation." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999).

The whole point of the process is to avoid the need for litigation:

> The interactive process would have little meaning if it was interpreted to allow employers [or public entities], in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination [or post-refusal] litigation, try to knock down every specific accommodation as too burdensome [or, as here, lacking in *Daubert*-qualifying expert causation evidence]. That's not [what] the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement, and it unfairly exploits the employee's [or claimant's] comparative lack of information about what accommodations the employer [or public entity] might allow.

Taylor, 184 F.3d at 315-16. The *Taylor* court continued:

> [T]he interactive process can be thought of as a less formal, less costly form of mediation. *See* 67 U.S.L.W. 2255 (noting the value of mediated settlement in ADA cases). Mediated settlements, the article explains, are cheaper than litigation, can help preserve

> confidentiality, allow the employee to stay on the job, and avoid monetary damages for an employer's [or public entity's] initially hostile responses to requests for accommodations. The interactive process achieves these same goals even more effectively.

Id. at n.6.

Due to Respondent's failure to engage in any meaningful investigation prior to rejecting Petitioners' accommodation request, prior to challenging that request in this litigation, Petitioners are entitled to reversal and remand.

* * *

Protection for persons who experience substantial limitations in their ability to engage in major life activities is fundamental to the purposes of the ADA and FHAA. These statutes are, after all, remedial anti-discrimination statutes that are to be liberally interpreted. *See PGA Tour, supra*, 532 U.S. at 674-75. The Sixth Circuit's aberrant, rigid ruling has severely weakened this protection for millions of persons, while creating a deep split of authority that can be resolved only by this Court. As in *Montana v. Kennedy,* 366 U.S. 308, 309 (1961), certiorari should be granted here "in view of the apparent harshness of the result entailed."

Further, despite that the ADA is structured to ensure that accommodation requests will be meaningfully assessed at the outset, based on information gathered from the individual and appropriate experts, the Sixth Circuit's refusal to remand due to Respondent's

deliberate refusal to gather that information prior to denying Petitioners' request undermines the statutory scheme. The Sixth Circuit's decision fails to serve Congress's purpose of having covered entities comply with their responsibilities at the outset, without the need for requesting individuals to force that compliance through the courts. Millions of disabled Americans are at risk of being denied protections Congress promised them.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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AUGUST 2020