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

EMERGENCY APPLICATION FOR PRELIMINARY INJUNCTION

DAVID T. BALL
Counsel of Record
Member, Supreme Court Bar
ROSENBERG & BALL CO., LPA
205 SOUTH PROSPECT ST.
GRANVILLE, OH 43023

FAZEEL S. KHAN
Member, Supreme Court Bar
HAYNES, KESSLER, MYERS & POSTALAKIS, INC.
300 W. WILSON BRIDGE RD.
SUITE 100
WORTHINGTON, OH 43085

Counsel for Petitioners

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Petitioners Cynthia and Robert Madej ("Petitioners") respectfully yet urgently seek an injunction requiring Respondent Jeff Maiden, Athens (Ohio) County Engineer, to give Petitioners at least 30 days' advance notice before applying asphalt in any form within one mile of Petitioners' home. Petitioners ask this Court to issue this injunction to maintain the status quo pending the filing of their Petition for Writ of Certiorari, which seeks reversal of a Sixth Circuit decision denying Petitioners permanent injunctive relief against the use of asphalt-containing chip seal[1] within one mile of Petitioners' home. Petitioners will file their Petition for Certiorari on or before August 24, 2020, which is within 150 days of the Sixth Circuit's March 26, 2020, denial of Petitioners' Petition for Rehearing and Rehearing *En Banc*.

Pursuant to Supreme Court Rules 23.1 and 23.2 and under the authority of 28 U.S.C. § 2101(f), the injunction may lawfully be granted. Petitioners' previously moved the district court and the Sixth Circuit Court of Appeals for injunctive relief, to restore the preliminary injunction's protections pending appeal. The district court granted their motion, but for only one week, so that the Sixth Circuit could act on the motion. (Exhibit J). The Sixth Circuit then denied Petitioners' motion for an injunction pending appeal. (Exhibit K).

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[1] Chip seal is a thin, liquid 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).

Given that Respondent is poised to take action as soon as tomorrow that could endanger Ms. Madej's health and moot the issues to be presented in her Petition for Writ of Certiorari, and that the courts below have declined to reinstate the preliminary injunction pending appeal, this truly presents the kind of extraordinary circumstance warranting injunctive relief from this Court.

Introduction

Since 2015, Cynthia and Robert Madej have sought injunctive relief under the Americans with Disabilities Act and the Fair Housing Amendments Act to prevent treatment of their road with chip seal. Chip seal contains asphalt, which consists of a variety of volatile organic petrochemicals that off-gas from the road and drift into Petitioners' nearby home, posing a grave risk to Ms. Madej's health. Because of that risk, two federal courts have encouraged Respondent to give Petitioners notice far in advance of any plan to apply chip seal on their road. Respondent has previously promised to provide them with advance notice, but now as he proceeds apace to prepare the road for chip seal, he has ceased communicating with Petitioners and given no notice.

Petitioners submitted voluminous medical evidence, in the form of their own personal observations and numerous forms of objective evidence, that Ms. Madej consistently experiences severe physical reactions upon exposure to asphalt fumes. Consistently, whenever she is exposed to new asphalt for any extended period of time, Ms. Madej experiences 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 cause symptoms that persisted for days, initially, and for weeks and months in recent years. Unlike most in the general population, these reactions substantially limit Ms. Madej's major life activities of breathing, caring for herself, learning (thinking), walking, working, and sleeping. (S.D. Ohio Doc. 129, ¶ 2; Doc. 115, ¶¶ 64, 65, 80; Doc. 130, ¶ 14; Doc. 122, Exhibit A, ¶ 1 (copies of excerpts cited filed as Exhibit A)).

Her symptoms are consistent with those listed on the Respondent's Material Safety Data Sheet (MSDS) for chip seal asphalt. (S.D. Ohio Doc. 100-1, PgID 4381 (copy filed as Exhibit B)). 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." (*Id.*) 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*." (S.D. Ohio Doc. 105-1, Exhibit I, PgID 5268 (copy filed as Exhibit C) (emphasis added)).

Due to her extreme sensitivity to asphalt fumes, Petitioners seek an accommodation that would require the Respondent to maintain the road without the use of asphalt, using any of several alternative treatments that do not contain the substance. 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 Defendant's Material Safety Data Sheet (MSDS) for chip seal asphalt; (2) letters of medical necessity from 2010 and 2015; (3) her treating physician's notes going back to 1999; (4) citation to 243 supporting peer-reviewed publications; (5) 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; (6) 80 pages of validated and standardized medical test questionnaires; (7) 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); (8) analysis of the correspondence of Ms. Madej's Multiple Chemical Sensitivity to the results of 16 studies of capsaicin inhalation challenges; (9) Ms. Madej's maximum score on the Chemical Sensitivity Scale-Sensory Hyperreactive Questionnaire (CSS-SHQ); (10) administration of the Generalized Anxiety Disorder Scale (GAD-7) to rule out anxiety and panic disorder; (11) 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 (12) genetic testing showing additional evidence of a compromised ability to detoxify and a predisposition to being chemically sensitive. (6th Cir. Doc. 38, pp. 12-14, 37-39 (copy filed as Exhibit D)).

The Sixth Circuit disregarded this extensive body of evidence solely on the grounds that Ms. Madej's medical experts had relied on Ms. Madej's personal

testimony about her own experience upon exposure to asphalt fumes in forming their opinions. The Sixth Circuit did not identify any inconsistency or implausibility in her testimony; it simply presumed her medical experts' opinions to be unreliable. *See Madej v. Maiden,* 951 F.3d 364, 376 (6th Cir. 2020) (copy attached as Exhibit H). The Sixth Circuit affirmed the district court's exclusion of her medical experts' opinions entirely on the basis of this presumption of unreliability, and then affirmed the district court's grant of summary judgment only due to a purported lack of admissible expert medical evidence. *Id.* at 377.

As the Petition for Certiorari will demonstrate, the Sixth Circuit's presumption is erroneous. Ms. Madej's personal testimony regarding the severe reactions she experiences upon exposure to asphalt fumes during the application of chip seal is presumptively reliable. Thus the Sixth Circuit erred in declining to reverse and remand for the district court to reinstate the injunction that had been protecting Petitioners since 2015.

The district court nevertheless acknowledged that "Ms. Madej is quite ill, a fact that is undisputed." *Madej v. Maiden,* No. 2:16-CV-658, 2018 WL 5045768 (S.D. Ohio Oct. 17, 2018), at *16 (copy attached as Exhibit I). Accordingly, it encouraged Respondent "to give Ms. Madej notice far in advance of road work and to explore any remedial measures which could reduce environmental emissions near her home." *Id.* On appeal, the Sixth Circuit reiterated the encouragement for Respondent to give Petitioners advance notice: "we second the district court's hope that the county engineer will give the Madejs 'notice far in advance of road work.'" 951 F.3d at 377.

Until recently, Respondent had agreed to comply with what two federal courts had encouraged, by providing at least 30 days' notice prior to commencing any major road work on Petitioners' road. As is set forth below, however, Respondent has ceased all communication with Petitioners as he prepares to apply chip seal without any advance notice. An injunction requiring at least 30 days' advance notice prior to the application of chip seal would protect Ms. Madej until the issues to be raised in the Petition for Certiorari can be properly presented to this honorable Court.

REASONS FOR GRANTING THE INJUNCTION

As this Court recently held, "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087, 198 L. Ed. 2d 643 (2017). In deciding whether to grant a preliminary injunction, this Court is to (1) "balance the equities as the litigation moves forward" and (2) "'conside[r] ... the overall public interest.'" *Id.* (internal citation omitted). Here, the equities and the public interest justify granting Petitioners' application.

Ever since the district court lifted the preliminary injunction that had prevented Respondent from applying chip seal within one mile of Petitioners' home, Respondent had been promising to give Petitioners notice well in advance of commencing such a project. In an October 2018 press release that Respondent issued immediately after the preliminary injunction was lifted, he promised, "I will notify

the Madejs well in advance before doing road work on that section of Dutch Creek." (Respondent's October 19, 2018, Press Release; copy attached as Exhibit E).

In the following months, when less threatening road work was commenced without notice, Respondent's counsel reiterated his commitment as follows:

> Mr. Maiden will provide three (3) days notice to the Madejs of any pothole patching or other maintenance work on the 2 mile section of Dutch Creek Road. That is at least two days more notice than given previously. For any serious major repaving work he will provide them thirty (30) days notice. (October 26, 2018, email from Maribeth Meluch, counsel for Respondent, to David Ball, copy attached as Exhibit F).

For the past several days, Petitioners have grown increasingly concerned that Respondent is preparing to chip seal the section of Dutch Creek Road upon which they live. (Affidavit of Cynthia Madej in Support of Emergency Application for Preliminary Injunction ("Madej Afd."), ¶¶ 2-3). Due to that concern, on August 4, 2020, counsel for Petitioners emailed Respondent's counsel to request information about what kind of project is underway:

> We understand that the Athens County Engineer's road crews have been active on Dutch Creek Road over the past several days. We would appreciate any information that you can provide about what type of work is underway. You had indicated previously that the Engineer would provide 3 days notice of any pothole patching or other maintenance work on the 2 mile section of Dutch Creek Road and thirty days notice of any major repaving work. The Madej's have not received any notice regarding this recent activity. (August 4, 2020, email from David Ball to Maribeth Meluch, copy attached as Exhibit G).

Respondent's counsel replied as follows, disavowing the earlier promises about notice:

> There is no outstanding order that the Engineer provide notice to the Madejs of his intent to perform work within a mile of their residence. Nor is there any prohibition against his use of asphalt or chip seal.

> Notwithstanding, I will share your message with Mr. Maiden. In the future, please have the Madejs contact him directly with their concerns. (August 5, 2020, email from Maribeth Meluch to David Ball, Exhibit G).

On August 5, 2020, apparently in response to the communication with Respondent's counsel, Respondent's Garage Manager, Lyle Fuller, left voicemail for Petitioners repeatedly saying that he had "dropped the ball," and that he should have called the week before to give them notice of work being done on their section of the road. Mr. Fuller's message did not, however, state whether the work was in preparation to apply chip seal. (Madej Afd., ¶ 6). Petitioners promptly called Mr. Fuller back, left voicemail requesting a return call. (Madej Afd., ¶ 7). A few minutes later, Respondent's Assistant Superintendent, Kenny Waggoner, returned their call. Mr. Waggoner stated that he was not sure whether chip seal was going to be applied, that Respondent was still trying to figure that out. (Madej Afd., ¶ 8).

On August 10, 2020, as it appeared that Respondent was nearing the completion of the preparations necessary to apply chip seal (ditching, berming and grading), Petitioners called Respondent personally along with three members of his staff (Mr. Fuller, Mr. Waggoner and Assistant Engineer Donnie Stevens), leaving messages about whether chip seal was about to begin. Respondent and his staff did not return any of the calls. (Madej Afd., ¶¶ 9-12, 14). Meanwhile, two acquaintances of Petitioners contacted them to say that they had each spoken to two members of the road crew, who had confirmed that Respondent is about to chip seal the road. (Affidavit of George Kridler In Support of Emergency Application for Preliminary Injunction, ¶¶ 2 & 3; Affidavit of Peggy Gish In Support of Emergency Application

for Preliminary Injunction, ¶¶ 2 & 3). Once the preparation work is completed, Petitioners' section of Dutch Creek Road can be chip sealed in less than a day. Once chip sealing comes within one mile of the Madej's home, its severe impact on Ms. Madej cannot be avoided.

Given that for nearly two years Respondent has promised to give Petitioners at least 30 days' notice before treating their road with chip seal, and that he is now proceeding with no notice as soon as tomorrow, the equities certainly favor Petitioners. Just as they are about to file their Petition for Certiorari, Respondent's rash action threatens not only to moot the issues they will raise, but also to devastate Ms. Madej's health.

Petitioners' Petition for Certiorari will present the question of whether Ms. Madej's testimony about her personal experience of consistent and severe reactions upon exposure to asphalt fumes is presumptively unreliable, as the Sixth Circuit held it to be. The Fifth, Seventh, Eighth, Ninth and District of Columbia Circuits all hold to the contrary, that a disability accommodation claimant's personal testimony is presumptively reliable. *Williams v. Tarrant Cty. College Dist.*, 717 Fed. App'x 440, 448 (5th Cir. 2018); *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 643-44 (7th Cir. 2010); *Argenyi v. Creighton Univ.,* 703 F.3d 441, 446-47 (8th Cir. 2013); *Gribben v. United Parcel Service, Inc.*, 528 F.3d 1166, 1170 (9th Cir. 2008); *Haynes v. Williams,* 392 F.3d 478, 482 (D.C. Cir. 2004).

The rule in these circuits is in keeping with the implementing regulations of the Americans with Disabilities Act, which clearly imply that no testimony other than

the individual's will typically be required: "the disability determination process "*usually will not require scientific, medical, or statistical analysis*[.]" 28 C.F.R. § 35.108(d)(1)(vii) (emphasis added). The rule in these circuits that the individual's own testimony is presumptively reliable is also consistent with this Court's statement in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that "the ADA requires those 'claiming the Act's protection ... to prove a disability by offering evidence that the extent of the limitation ... *in terms of their own experience* ... is substantial.' " 534 U.S. 184, 198, 122 S.Ct. 681, 691–92, 151 L.Ed.2d 615 (2002) (emphasis added).

In *PGA Tour, Inc. v. Martin,* this Court noted but reserved the important question of how courts should evaluate "the specifics of the claimed disability" to determine whether a requested accommodation is "necessary." 532 U.S. 661, 683 n.38 (2001). The Sixth Circuit's split shows that guidance is needed regarding the presumed reliability of a disability accommodation claimant's testimony about the need for an accommodation. That guidance is needed here, too, to protect Ms. Madej.

Not only is the Sixth Circuit's rule a clear split from the Fifth, Seventh, Eighth, Ninth and District of Columbia Circuits, at odds with the implementing regulations of the ADA, and contrary to the reliance on personal testimony required by *Toyota,* it is also contrary to Congress's determination that "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.* ADAAA, Pub. L. No. 110-325, § 2(b)(5) (emphasis added).

To protect Petitioners from Respondent's action that is only permissible because of the Sixth Circuit's erroneous holding, by applying a rule that splits with five other circuits and that ignores this Court's precedent and Congress's intent in enacting the ADAAA, is unquestionably in the public interest. There is no countervailing public interest of significance. The road has been in use without application of chip seal since the injunction was entered in 2015 and lifted in 2018.

CONCLUSION

Under these circumstances, where the equities and the public interest weigh so decisively in Petitioners' favor, and when a delay of even a day poses grave risk to Ms. Madej's health, Petitioners respectfully apply for an emergency preliminary injunction requiring Respondent to give at least 30 days' notice before treating Dutch Creek Road in Athens County, Ohio, with chip seal or any form of asphalt pending consideration and disposition of Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

/s/ David T. Ball
DAVID T. BALL
Counsel of Record
Member, Supreme Court Bar
ROSENBERG& BALL CO., LPA
395 North Pearl Street
Granville, OH 43023
Phone: (614) 316-8222
Fax: (866) 498-0811
Email: dball@rosenbergball.com

FAZEEL S. KHAN
Member, Supreme Court Bar
HAYNES, KESSLER, MYERS& POSTALAKIS, INC.
300 W. Wilson Bridge Road, Suite 100

Worthington, OH 43085
Tel.: (614) 764-0681
Fax: (614) 764-0774
Email: fazeel@ohiolawyersgroup.com

Counsel for Petitioners

AUGUST 2020

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of August, 2020, service of the foregoing Emergency Application for Preliminary Injunction was made in compliance with Supreme Court Rule 29.3 on all parties required to be served by regular U.S. mail and email as follows:

Maribeth Meluch, Esq.
mmeluch@isaacwiles.com
Molly Gwin, Esq.
mgwin@isaacwiles.com
Isaac, Wiles, Burkholder & Teetor, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215
Counsel for Respondent Jeff Maiden, Athens County Engineer

/s/ David T. Ball
DAVID T. BALL
Member, Supreme Court Bar
Counsel for Petitioners