No. 21-570

IN THE

Supreme Court of the United States

RALPH KELLER,

Petitioner,

v.

CHIPPEWA COUNTY BOARD OF COMMISSIONERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the lower courts correctly conclude that the Respondents did not violate the Americans with Disabilities Act or the Rehabilitation Act by allowing Petitioner Keller only supervised access to his medications and withholding Keller's removable prosthetic leg (for safety and security reasons) during Keller's four-day detention at the Chippewa County Jail?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner (who was Plaintiff below) is Ralph Keller.

Respondents (who were Defendants below) are the Chippewa County Board of Commissioners and the Chippewa County Sheriff's Department.

CORPORATE DISCLOSURE STATEMENT

None of the Respondents is a publicly owned corporation or a subsidiary or affiliate of such.

CITATIONS OF THE OPINIONS BELOW

The decision of the Court of Appeals affirming the district court's grant of summary judgment is available in the federal appendix:

Keller v. Chippewa County, Michigan Board of Commissioners, et al., 860 Fed. Appx. 381 (2021). **(Petitioner's App. 1a – 15a)**.

The district court opinion in the case, Keller v. Chippewa County Board of Commissioners, et al., No. 2:19-cv-0011, is not reported. **(Petitioner's App. 16a – 49a)**.

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STATEMENT OF THE CASE

Petitioner Keller asserts that the Respondents violated the Americans with Disabilities Act (ADA) and Rehabilitation Act by denying him possession of his inhalers and prosthetic leg without "individual assessment" of his particular situation. Keller ignores (1) the Respondents' explicit safety justifications for not allowing Keller to personally retain these items in his cell and (2) the reality that his four-day detention (two days of which were a weekend) did not afford opportunity for an individualized assessment before Keller was released.

Keller was booked into the Chippewa County jail in the early morning hours of Saturday, January 16, 2016, following arrest on an outstanding warrant for failure to appear in court on a narcotics charge. **(R. 71-2, Pg ID 373, Jail Incident Report; R. 71-17, Pg ID 488-9, 492, Keller Dep., pp. 52-4, 69)**. Keller was released the following the Tuesday morning, January 19, 2016, after pleading guilty and being sentenced to time served. **(R. 71-11, Pg ID 397-8, Judgment of Sentence)**.

Keller is a lower left leg amputee, who at the time of his 2016 detention used a prosthetic leg that Keller himself describes as a hard plastic and metal appliance weighing 10-15 pounds. **(R. 71-17, Pg ID 483-4, 485-6, Keller Dep., pp. 33-4, 41-2; R. 71-18, Photograph)**. Keller also describes that this 2016 protheses was not well-fitted, thus causing hip and back pain, which is reflected in the jail booking documents recording that Keller "has hip problems" and a "sore on left leg." **(R. 71-17, Pg ID 484-5, Keller Dep., pp. 37-8; R. 71-4, Pg ID 378, Jail Booking Questionnaire)**. Even now, with an improved protheses,

Keller acknowledges that he becomes uncomfortable and removes the leg four to six each day due to pain. **(R. 71-17, Pg ID 484, Keller Dep., pp. 34-5)**.

At the time of his arrest, Keller also had in his possession three inhalers prescribed for COPD. **(R. 71-17, Pg ID 386, 490-1, Keller Dep., pp. 45, 59, 63)**. But Keller acknowledges that he did not have the prescription boxes documenting the prescribed dosages. **(R. 71-17, Pg ID 398, Keller Dep., pp. 91-2)**.

Contrary to Keller's accusation of baseless and arbitrary "confiscation," Keller was required to surrender his inhalers and prosthetic leg for specific reasons dictated by inmate safety and security concerns. As explained by the jail administrator, "[i]nmates at the jail are not allowed to keep prescription medications with them in their cell due to the risk of overdosing, sharing with other inmates, etc." **(R. 71-1, Pg ID 366, Stanaway Affidavit, ¶ 10)**. "Plaintiff's prosthetic leg was removed during booking due to the fact that Plaintiff had a sore on his left leg and the prosthetic could be used as a weapon to harm others." **(R. 71-1, Pg ID 367, Stanaway Affidavit, ¶ 15)**. Petitioner Keller took no depositions and did not develop any rebutting evidence in this regard. Nor did Keller produce any evidence that further assessment or accommodation would not have occurred had his detention not been so brief.

Although the actions of which Petitioner Keller complains were fully justified under this Court's precedents by the safety and security concerns cited, neither the district court nor the Court of Appeals based their decisions upon those justifications. Rather, the courts

below found that Keller had not been denied his rights under the ADA or Rehabilitation Act. Such conclusion is also demonstrably correct.

With regard to the three inhalers, Keller himself acknowledges that the jail had an interest in not allowing inmates to keep medication in their possession in their cells, and he did not demand to keep the inhalers in his possession. **(R. 71-17, Pg ID 495-6, Keller Dep., pp. 81-2)**. Yet the jail took specific steps to ensure that Keller received prescribed dosages and had additional access when needed.

In the absence of documented prescription information, officers contacted the jail physician, Dr. Dood, for direction. **(R. 71-2, Pg ID 373, Jail Incident Report)**. Dr. Dood "approved all three" inhalers, specifying the dosages to be administered: Proair 4x daily as needed, Symbicort 2x daily, and Tudorza Proair once daily. **(R. 71-2, Pg ID 373, Jail Incident Report)**.

Keller's only complaint in this regard is that his treating physician, Dr. Sethi, had prescribed for Keller to take Tudorza twice a day, rather than just once. **(R. 71-17, Pg ID 500-1, Keller Dep., pp. 101-2)**. But Dr. Sethi testified that taking Tudorza only once a day is "the normal standard" dosage, and Dr. Sethi has no issue with Dr. Dood prescribing that normal dose. **(R. 71-19, Pg ID 517, Sethi Dep., p. 35)**. Moreover, Dr. Sethi acknowledges that missing a dose from any of the three inhalers would not have had any long-term consequences for Keller. **(R. 71-19, Pg ID 515, Sethi Dep., p. 29)**.

Keller tells this Court that his ability to breathe was left to "whim and caprice of his jailers." **(Petition, p. 7)**. In reality, jail officers not only followed the prescribed regimen of dosages from Dr. Dood, but also responded to Keller's respiratory complaints in between.

Neither Keller nor the jail records report any respiratory difficulties during his first day in the jail. But on the second day (Sunday, January 17, 2016), Keller accessed a phone to call 911 and complain to officers that he could not catch his breath, despite having received his Proair dosages. **(R. 71-13, Pg ID 464, Call Detail Report; R. 71-14, Pg ID 466, Jail Incident Report, 1/17/16; R. 71-17, Pg ID 495, 498, Keller Dep., pp. 80, 93)**. A jail deputy called Dr. Dood, who directed that Keller be given Prednisone once daily, which jail records confirm was done. **(R. 71-14, Pg ID 466, Jail Incident Report, 1/17/16)**. When Keller again experienced breathing difficulty later in the day, officers again contacted Dr. Dood, who directed that Keller be given additional doses of Proair and a "nebulizer treatment." **(R. 71-14, Pg ID 466, 1/17/16; R. 71-17, Pg ID 496, Keller Dep., p. 82)**.

Keller acknowledges the administration of both the inhaler and the nebulizer treatment. **(R. 71-17, Pg ID 496, 499, Keller Dep., pp. 83, 95)**. He contends that the nebulizer treatment was not fully effective and that he should have been granted his request to go to the hospital. **(R. 71-17, Pg ID 496, Keller Dep., p. 84)**. But Dr. Dood's direction to the officers was that Keller should not be sent to the hospital, unless he became discolored and his temperature was low, which had not occurred. **(R. 71-14, Pg ID 466, Jail Incident Report, 1/17/16)**.

Keller acknowledges that on the next day (Monday, January 18, 2016), he received his administrations of Proair, Symbicort and Tudorza, together with Prednisone. **(R. 71-17, Pg ID 497-8, Keller Dep., pp. 88-90)**. Keller also recalls a second oxygen treatment on January 18th, together with a dose of Nystatin. **(R. 71-17, Pg ID 497, Keller Dep., pp. 87-8)**. Other than disagreeing with the record that he received Prednisone on the January 17th, Keller has no dispute with the jail treatment records, and he does not contend that he was denied any of his medications as described by Dr. Dood. **(R. 71-17, Pg ID 499, Keller Dep., p. 96)**.

With regard to Keller's prosthetic leg, it was observed by jail personnel "to be made of metal and hard plastic and could easily be used as a weapon which could inflict harm or injury on other detainees and corrections officers." **(R. 71-7, Pg ID 368, Stanaway Affidavit, ¶¶ 27-28)**. Keller himself acknowledged that his prostheses can be removed and that he regularly removes it. **(R. 71-17, Pg ID 484, Keller Dep., pp. 34-5)**. Although Keller was noted to be "cooperative" at his booking, the officers working in the jail at that time were not familiar with Keller's behavioral proclivities, because he had not been in the jail since 2010. **(R. 71-1, Pg ID 368, Stanaway Affidavit, ¶ 29)**. The officers had no actual experience by which to judge whether Keller might use his protheses as a weapon. Equally, another detainee in the cell might have done so, if Keller had removed it. Lacking information in this regard, "[f]ailing to take proactive security measures would create an unnecessary risk of danger to everyone in the facility." **(R. 71-1, Pg ID 367, Stanaway Affidavit, ¶ 25)**.

According to Keller, he complained to officers that he needed his leg for mobility. He takes particular exception to an officer allegedly telling him that he could "hop" or "crawl."

But, Keller acknowledges that he was actually transported to and from his cell (including a trip to the recreation room/gym) by wheelchair. **(R. 71-17, Pg ID 492, 494, Keller Dep., pp. 66-7, 75, 77)**. Keller also acknowledges that he was able to maneuver around his two successive cells (e.g., to use the in-cell toilets) by scooting along the wall or shuffling. **(R. 71-17, Pg ID 492-3, Keller Dep., pp. 67-8, 70, 74)**.

Keller was able to eat, with three meals a day being delivered to him. **(R. 71-17, Pg ID 493-4, Keller Dep., pp. 72-4)**. He was also given a cup to keep with him so he could drink warm water, which helps with his respiratory issues. **(R. 71-17, Pg ID 493, Keller Dep., p. 73)**.

Without citation to any element of the record, Keller tells this Court that had to sleep on the floor. **(Petition, p. 6)**. There is no record evidence of that. Keller testified that two "younger guys" sharing his cell slept on the floor. **(R. 71-17, Pg ID 493, Keller Dep., p. 72)**. But Keller never testified that he slept on the floor. Keller testified that he had a mattress. **(R. 71-17, Pg ID 494, Keller Dep., pp. 75-6)**.

It should also be observed that there is no evidence that Keller was ever assigned to a regular jail cell during his brief stay. Rather, he spent the first two days in a "holding cell" and was then transferred to a medical "observation cell." **(R. 71-1, Pg ID 367, Stanaway Affidavit, ¶¶ 17-8; R. 71-17, Pg ID 492-3, 495, Keller Dep., pp. 69-70, 72, 78-80)**.

As described above, Keller was released on Tuesday, January 19, 2016, after Keller pled guilty and was sentenced to time served. **(R. 71-11, Pg ID 397-8, Judgment of Sentence)**. Keller's inhalers and prosthetic leg were returned to him at his release. **(R. 71-17, Pg ID 498, 501, Keller Dep., pp. 90, 101-4)**.

In fact, because Keller expressed a desire to go to the hospital, one of the deputies agreed to drive him - - and even went inside the hospital with Keller, rather than simply dropping him at the door. **(R. 71-17, Pg ID 500, Keller Dep., pp. 99-100)**. Keller acknowledges that none of the jail officers disparaged Keller's disabilities or made fun of him. **(R. 71-17, Pg ID 503, Keller Dep., p. 113)**.

The district court granted summary judgment to the Chippewa County Sheriff's Department on the basis that the department is not an entity that can be sued distinct from Chippewa County. **(Petitioner's App. 30a – 32a)**. Petitioner Keller expressly declared in his brief to the Sixth Circuit that he "is not challenging dismissal of the Chippewa County Sheriff's Department by the Lower Court." **(Appellant Keller's Sixth Circuit Brief, p. 12)**. The references in Keller's petition to the Respondents, in the plural, are thus misleading. Only the Chippewa County Board of Commissioners remains as a Defendant-Respondent in this case.

Turning to the substance of Keller's claims under the ADA and the Rehabilitation Act, the district court observed, first, that Keller had failed to present any evidence to create an issue regarding whether his cells had been structurally compliant with the ADA. **(Petitioner's App. 27a and 47a at n. 9)**. Keller tells this Court that the

cell was "non-compliant" and that the courts below issued their opinions "without any record support" in this regard. **(Petition, p. 1, n. 1)**. But it was Petitioner Keller who was obligated to create a record of evidentiary support for his allegation that the cell was non-compliant. The district court correctly ruled against Keller based upon his own failure to provide evidentiary support for his claims.

The district court granted summary judgment to the Chippewa County Board of Commissioners on the ground that Keller also had failed to present evidence sufficient to sustain any claim that he had been subjected to discrimination or denied reasonable accommodation recognizable under either the ADA or the Rehabilitation Act. In particular, the court observed that Keller failed to provide evidence showing any animus toward Keller or his disabilities. **(Petitioner's App. 48a)**. Moreover, the jail had "legitimate, non-discriminatory reasons" for the actions taken with regard to Keller's inhalers and prosthetic leg that were not a "pretext for discrimination." **(Petitioner's App. 43a, 47a – 48a)**.

The United States Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment. With regard to the inhalers, the Sixth Circuit opined that "[t]hough Keller may not have received the precise type of medical treatment that he would have preferred, undisputed facts show that he received 'meaningful access' to medical treatment." **(Petitioner's app. 11a)**. With regard to the prosthetic leg, the court found Keller's case to be "lacking," because Keller failed to provide a record of evidence showing that he was denied meaningful access to jail services, programs, or activities, including his personal hygiene needs, such as access to the toilet. **(Petitioner's App. 13a – 14a)**.

The reasoning of the courts below is correct. Moreover, the safety and security concerns specifically cited by the Respondents mandate the same result.

Further review by this Court is not justified. Keller's petition should be denied.

ARGUMENT FOR DENYING THE PETITION

As has been summarized by the Sixth Circuit, both the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 seek "to eliminate disability-based discrimination and other barriers to employment and public services for individuals with disabilities." ***Lewis v. Humboldt Acquisition Corp., Inc.***, 681 F.3d 312, 314 (6th Cir. 2012). Petitioner Keller's argument goes astray by focusing on this broad policy goal, while ignoring both the textual and contextual limitations of the statutes. In particular, Keller focuses entirely upon his personal status as a disabled person, while ignoring the context of a jail and the equally valid security and safety interests of jail staff and other detainees.

In relevant part, the Rehabilitation Act provides that:

> No otherwise qualified individual with a disability in the United States, as defined in Section 705(20) of this title, shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .
>
> 29 U.S.C. §794.

Similarly, title II of the ADA provides that:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of any public entity, or be subjected to discrimination by such entity.
>
> 42 U.S.C. §12132.

Although the Rehabilitation Act does not expressly require affirmative programmatic or physical accommodation, this Court has found an element of accommodation to be implicit in the Act to ensure "meaningful access" for disabled persons to a grantee's programs or benefits. ***Alexander v. Choate***, 469 U.S. 287, 301 (1985). Title II of the ADA includes a requirement that a public entity make "reasonable modifications in policies, practices or procedures when modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. §35.130(b)(7)(i). But the element of accommodation is not absolute under either Act.

The "reasonable accommodations" required by the Rehabilitation Act do not impose any "affirmative action obligation" or require any major adjustments of program or activity standards. ***Southeastern Community College v. Davis***, 442 U.S. 397, 410-4 (1979). Moreover, there is to be a "balance" between the statutory rights of the disabled and the "integrity" of the program or activity, such that "reasonable" accommodations do not require "fundamental or substantial modifications to accommodate the handicapped." ***Alexander***, 469 U.S. at 300.

Under Title II of the ADA, the regulations themselves incorporate this same balancing by requiring "reasonable modifications . . . 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). The regulations also expressly provide that a public entity "may impose legitimate safety requirements necessary for the save operation of its services, programs, or activities." 28 C.F.R. §35.130(h). The only caveat in this regard is that the safety requirements not be based upon "speculation, stereotypes or generalities about individuals with disabilities." 28 C.F.R. §35.130(h).

This Court has established that the Acts apply to disabled persons in jails and other correctional institutions. ***Pennsylvania Department of Corrections v. Yesky***, 524 U.S. 206, 209-10 (1998). But the "reasonableness" aspect of accommodation under either Act necessarily invokes contextual analysis of the circumstances in which an accommodation is sought and the impact of the accommodation in those circumstances. Thus, this Court's precedents regarding the circumscribed nature of rights within a jail setting become relevant.

This Court has emphasized that running a detention facility "is an inordinately difficult undertaking that requires expertise, planning and the commitment of resources." ***Turner v. Safley***, 482 U.S. 78, 84-5 (1987), ***McKune v. Lile***, 536 U.S. 24, 37 (2002). Security of such facilities is imperative, and the inclination of the inmate population to engage in criminality and breach of rules (e.g., drug use) cannot be disputed. In the words of this Court:

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence.
>
> ***Bell v. Wolfish***, 441 U.S. 520, 559 (1979).

This Court has recognized that "[c]entral to all other corrections goals is the institutional consideration of internal security within corrections facilities themselves." ***Id.***, at 546-7.

In the jail context, this Court has emphasized the need for judicial deference to the actions of corrections officials "that in their judgment are needed to preserve internal order and discipline and maintain institutional security." ***Id.***, at 547-8. Even if a facility practice burdens a fundamental constitutional right, the court should defer to the judgment of facility officials, so long as the practice at issue is "reasonably related to legitimate penological objectives." ***Turner***, 482 U.S. at 84-5, 87-8.

These principles apply "equally to pretrial detainees." ***Bell***, 441 U.S. at 546. "A detainee simply does not possess the full range of freedoms of an un-incarcerated individual." ***Id***.

The jail context of Keller's case distinguishes it from ***PGA Tour, Inc. v. Martin***, 532 U.S. 661 (2000), upon which Keller primarily relies. The question of whether "reasonable" accommodation should require the sanctioning body of a golf tournament to allow a disabled player to use a golf cart is a far cry from the question of whether it is "reasonable" to permit a jail detainee to

possess drugs and a 10-15 pound prosthetic that can be removed by the user (or a cellmate) and used as a club.

Keller's self-focused demand for accommodation takes no account of legitimate concerns about potential weaponized use of Keller's protheses and potential misuse of Keller's inhalers - - either by Keller himself or by other detainees. Unlike a golf tournament, security concerns, the rights of other inmates to be protected from potential harm, and the expertise of jail officials are all factors that limit what is "reasonable" in a jail setting.

Moreover, as both the district court and Sixth Circuit concluded, Keller has failed to present evidence that he was actually denied the benefit of any services, programs or activities during his four days in the jail. Keller was administered his prescribed dosages of respiratory medications. Officers responded to Keller's intervening complaints of respiratory difficulty. Keller received his meals and fluids. Keller had a mattress for sleeping. And Keller acknowledges he was able to maneuver to the toilets in his cells. Keller may have preferred to have his inhalers in hand and the fuller mobility afforded by his prosthetic leg, but he has no evidence that he was actually denied any service, program or activity available to other inmates during his four day detention.

Nor can Keller sustain a claim of intentional discrimination under either Act. To support such a claim, Keller must present evidence that he was denied some benefit "by reason of" disability, 42 U.S.C. §12132, or "solely by reason of" his disabilities, 29 U.S.C. §794(a). By his own acknowledgment, however, Keller has no direct evidence of any discrimination or animus directed against

his disabilities. (**R. 71-17, Pg ID 503, Keller Dep., 113**). And, as just described, the Respondents had legitimate, nondiscriminatory reasons for their actions - - i.e., the security and safety concerns that have been recognized by this Court.

It is ironic that Keller cites ***Baribeau v. City of Minneapolis***, 596 F.3d 465 (8th Cir. 2010). In that case, the jail confiscated the prosthetic leg of an arrestee who was detained for two nights as a consequence of a weekend arrest. Recognizing that the prothesis was "capable of serving as a weapon for harming others," the Eighth Circuit upheld the confiscation against an ADA Title II challenge, because nothing in the record indicated that the confiscation had resulted in any denial of access to the services, programs and activities of the jail. ***Baribeau***, 596 F.3d at 483, 484-5. The Eighth Circuit so held, despite the plaintiff's testimony that he could have made fuller use of recreational opportunities by using his prosthetic and that he wanted to "walk" in the facility. ***Id.***, at 484-5.

The other cases cited by Keller likewise fail. First, the three district court cases offer only trial court opinions at an initial "screening" stage, not at the point of summary judgment. The courts held only that the plaintiffs had pleaded plausible claims, not that they had offered proof of those claims adequate to preclude summary judgment.

Second, those cases dealt with treatment of a convicted inmate, who had been in custody (and subject to assessment) far longer than the four days Keller was in the Chippewa County jail. In ***Echols v. Illinois Department of Corrections***, No. 3:20-cv-00583, 2021 WL 25359 (S.D. Ill. 2021), the plaintiff complained of

confiscation of a prosthetic leg during a five month period when he was incarcerated at a particular correctional facility. In ***Beasley v. Hairrs***, No. 10-cv-587, 2011 WL 766980 (S.D. Ill. 2011), the plaintiff complained about lack of accommodation for his prosthetic leg during six months at a particular correctional facility. In ***Garcia v. Schnurr***, No. 19-3108, 2021 WL 2413391 (D. Cann. 2021), the plaintiff complained about unsafe shower conditions during a period of three years.

Keller's remaining reliance is upon ***Miller v. King***, 384 F.3d 1248 (11th Cir. 2004), in which the plaintiff had been incarcerated and subject to assessment for eight years. Even then, the plaintiffs' ADA claim was allowed to proceed only with regard to injunctive relief, and the opinion cited by Keller was subsequently vacated with the understanding that the defendants would have the opportunity to file new motions for summary judgment. ***Miller v. King***, 449 F.3d 1149, 1151 (2006).

In short, the ***Baribeau*** case supports the position of *the Respondents*, and the remaining cases cited by Keller are neither factually nor procedurally akin to Keller's case. None provide any support for his petition.

CONCLUSION

Petitioner Keller's arguments defy both this Court's precedents and the evidentiary record. Keller's petition is unjustified and should be denied.

Respectfully submitted,

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