NO. _____

In the Supreme Court of the United States

BRIAN E. JOHNSON,

Petitioner,

v.

MIKE DOBBINS, DUSTY RHOADES, JEFF LONG, DAN VANDENBOSCH, AND CHAD YOUKER, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,

Respondents.

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

1. Did the Sixth Circuit Court of Appeals err by holding that Title II of the American Disabilities Act ("ADA") requires a prisoner with a known disability—documented upon entry—to make a request for a reasonable accommodation in order to avoid being housed for more than 23 hours in solitary confinement?

2. Did the Appellees violate the American Disabilities Act by automatically housing a person with disabilities—whose disability requires the assistance of a mechanical device—in more than 23 hours of solitary confinement, without first performing an individual threat assessment?

3. Did the Sixth Circuit Court of Appeals err by characterizing Mr. Johnson's appeal as only arguing reasonable accommodation under the American Disabilities Act, instead of also analyzing whether intentional discrimination occurred due to discriminating against Mr. Johnson, *i.e.*, placing Mr. Johnson in solitary confinement, because of his disability?

4. Did the Sixth Circuit Court of Appeals err by analyzing Title II and Title III of the ADA with respect to the burden placed upon a prisoner versus that placed upon entities under each respective Title?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant

- Brian E. Johnson

Respondents and Defendants-Appellees, in their individual and official capacities

- Mike Dobbins
- Dusty Rhoades
- Jeff Long
- Dan Vandenbosch
- Chad Youker

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

No. 22-5310

Brian E. Johnson, *Plaintiff-Appellant,* v. Mike Dobbins, Et Al., *Defendants-Appellees.*

Date of Final Opinion: November 8, 2022

United States District Court, Middle District of Tennessee, Nashville Division

No. 3:19-cv-01160

Brian E. Johnson, *Plaintiff,* v.
Mike Dobbins, Et Al., *Defendants.*

Date of Final Opinion: April 13, 2022

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PETITION FOR WRIT OF CERTIORARI

This Court should vacate the Sixth Circuit's affirmance of the District Court's dismissal of Appellant's claims with respect to discrimination because of his disability. (*Johnson v. Dobbins*, No. 22-5310, 2022 U.S. App. LEXIS 31165 (6th Cir. Nov. 8, 2022)). Contrary to the lower court's analysis, Mr. Johnson did argue intentional discrimination, not just failure to provide a reasonable accommodation, and the jail authorities carried the burden to provide Mr. Johnson with an individualized threat assessment, as well as explore reasonable accommodations. Instead, Appellees simply had a policy of placing known disabled persons who required the assistance of a medical device into solitary confinement. That is absolutely unlawful. As such, Mr. Johnson respectfully asks the Court to vacate the Sixth Circuit's Order, consistent with this Court's instructions.

OPINIONS BELOW

The District Court for the Middle District of Tennessee dismissed Mr. Johnson's claims in *Johnson v. Dobbins*, No. 3:19-cv-01160, 2022 U.S. Dist. LEXIS 68294 (M.D. Tenn. Apr. 13, 2022). (App.13a) The Sixth Circuit Court of Appeals affirmed the dismissal. *Johnson v. Dobbins*, No. 22-5310, 2022 U.S. App. LEXIS 31165 (6th Cir. Nov. 8, 2022). (App.1a, 11a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 2022. (App.1a, 11a). Neither party sought a rehearing. This Court's jurisdiction is proper pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), codified at 42 U.S.C. §§ 12101 et seq.

Petitioner contends Appellees violated Brian E. Johnson's rights under the ADA by discriminating against him because of his disability and failing to provide a reasonable accommodation for his disability. Under the ADA Appellees meet the necessary criteria to be subject to and are subject to the ADA; Appellees thus must abide by the laws that govern the ADA and based on the facts in this case, Brian E. Johnson has a disability and is otherwise qualified for ADA protection as a result of the permanent injury to Brian E. Johnson's arm.

STATEMENT OF THE CASE

A. Procedural History

This matter commenced with Mr. Johnson filing his initial Complaint on December 26, 2019, against

Mike Dobbins, Jeff Long, Dusty Rhoades, Dan Vandenbosch and Chad Youker. The Court granted Mr. Johnson leave to amend, and Mr. Johnson filed his First Amended Complaint [Doc. 62] in November 2020. Thereafter, Appellees answered the Amended Complaint and filed a Motion to Dismiss. The Court granted in part and denied in part the Motion in June 2021. Appellees filed Motion for Summary Judgment November 1, 2021. The Court granted Summary Judgment April 13, 2022, and dismissed the Amended Complaint. Mr. Johnson appealed to the Sixth Circuit Court of Appeals. On November 8, 2022, the Sixth Circuit, before Siler, Nalbandian, and Readler, JJ., affirmed the lower court's ruling and dismissal. Petitioner, Mr. Johnson, appealed to the Supreme Court. On January 31, 2023, an application to extend the time to file a petition for a writ of certiorari from February 6, 2023 to April 7, 2023, was granted by Justice Kavanaugh.

B. Statement of Facts

Mr. Johnson was booked into Williamson County Jail four times, and on each occasion, the medical and PREA questionnaires marked Mr. Johnson as disabled, and the Appellees provided a bottom bunk accommodation to Mr. Johnson. (*See* RSUMF Ex. 37, Special Needs Reports, providing bottom bunk accommodation because of his right arm/wrist.) On top of that, these Appellees literally separated Mr. Johnson from the general population because of his specific disability and its correlated requirement of a hand/arm brace, another fact that demonstrates a specific understanding of his disability. (RSUMF Ex. 3, Jail Incident Report 7/14/16; Ex. 5, Jail Incident Report 10/1/16; Ex. 6, Jail Incident Report 12/6/17; Ex. 7, Jail Incident

Report 12/19/17, medically separating Mr. Jonson for his wrist brace.)

Also, there is no dispute that Mr. Johnson qualified as disabled under the ADA. And there is no dispute that Title II applied to the facts of this case, as recognized by the Sixth Circuit Court of Appeals.

As soon as Appellees designated Mr. Johnson as a "handicapped" person who required the assistance of a medical device, Appellees confined Mr. Johnson for more than 23 hours per day on average in solitude, for 15 months. (RSUMF Ex. 21, Youker Dep. 93:6-24.)

The fact that Appellees automatically confined this class of disabled persons in at least 23 hours of solitude per day, for their entire stay at Appellees' jail, is evidenced by testimony demonstrating that.

Appellees actually trained jail and medical staff to segregate handicapped people in 23-hour solitary confinement who required the assistance of a mechanical device. (RSUMF Ex. 10, Easterling Dep. 25:2-12, 63:17-24; Ex. 8, Wells Dep. 43:4-12, 122-23:10-3.) Appellees had a jail policy in effect that obligated it to ensure that disabled persons such as Mr. Johnson were housed in the least restrictive manner as possible, a policy that mirrors its obligation under statutory and governing law. (*See* RSUMF Ex. 47, Classification Policy, stating "inmates shall be classified and housed in the least restrictive housing available . . . ," and "inmates with disabilities, as determined by medical staff . . . shall be designed for their use and shall provide for integration with other inmates"; Tenn. Comp. R. & Regs. 1400-01-.12, setting minimum standard for jails to provide for a minimum of one hour, on average, out of cell time a day.)

A few months after Mr. Johnson began his tenure of being confined for more than 23 hours per day in solitude, Appellees actually modified their housing program, by housing a group of accused sex offenders /traffickers together, permitting them to recreate with each other all day. This lasted for about eight (8) months.

Additionally, Mr. Johnson was confined for more than 23 hours per day on average, for 15 months, and after one inmate adamantly stated that he was going to sue Appellees—Appellees demonstrated that they had the ability to modify said policy/practice, by placing Mr. Johnson in an open dormitory with 4-5 other disabled persons who required the use of mechanical-assistance device. *See Ability Ctr. of Greater*, 385 F.3d at 910); (RSUMF Ex. 16, ¶ 20; Ex. 21, Youker Dep 109:15-21, 111:2-20 demonstrating when Mr. Johnson was transferred from at least 23 and 1 med sep to open dorm, and from that point forward he and other med sep prisoners permitted to rec together in an open area.) Relevant to this fact is the fact that, in order to justify moving Mr. Johnson and other disabled persons to an open dormitory—after Mr. Johnson spent 15 months in more than 23 hours in solitude—the Appellees actually conducted an individualized security risk review/assessment of Mr. Johnson (and all disabled person that were being held in 23-hour isolation). (*Compare*, *Davis*, 226 F.3d at 511, stating, "[i]n determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party," *with* RSUMF Ex. 21, Youker Dep. 109-10:11-9, noting he found moving med sep, including Mr. Johnson, to dormitory posed only slight risk

as the individuals had never caused a problem *with* Ex. 21, Youker Dep. 127-28:14-11, stating anyone in med sep was housed in a dormitory pod.) This "review" concluded that Mr. Johnson and the 4-to-5 other disabled persons posed almost zero security risk and thus could be moved to less restrictive housing. (RSUMF Ex. 21, Youker Dep. 109-10:15-9, (noting "it makes sense to put together . . . individuals that never caused a problem . . . even though there is a slight risk they may do something.")).

Notably, during Mr. Johnson's entire 15-month period of time in more than 23-hour solitude, Appellees both possessed and had knowledge of the information that led Appellees to move Mr. Johnson and other disabled persons to said open dormitory. (*See Davis*, 226 F.3d at 511; RSUMF Ex. 18, Booking Forms 7/14/16; Ex. 19, Booking Forms 10/1/16; Ex. 20, Booking Forms 12/6/17, Booking Forms 12/19/17 (not assigning Mr. Johnson any security code based on violent history); Ex. 13, VandenBosch Dep. 98:19-23; Ex. 21, Youker Dep. 60-61:23-22, 135-36:19-2; Ex. 9, 30(b)(6) of Williamson County Jail 282:17-20.)

Lastly, during Mr. Johnson's 15-month tenure in solitude for more than 23 hours per day on average, Appellees had two types of principal housing programs, general population housing, and if you were not in general population, then almost unbelievably so, Appellees testified that they housed everyone in at minimum 23-hour lockdown. (RSUMF Ex. 21, Youker Dep. 137:18-25.)

REASONS FOR GRANTING THE WRIT

Across this Country, thousands of disabled persons —whose disability requires the assistance of a mechanical device—are incarcerated, and Tennessee jails, along with the help of the Sixth Circuit's Opinion, have chosen to blanketly place this type of disabled person in more than 23-hour solitary confinement, without any individualized threat assessment, or any attempt to provide a reasonable accommodation. The Sixth Circuit claims there is no obligation upon Title II government entities such as jails to do either, affirmatively. The Sixth Circuit Court of Appeals is wrong.

Relevantly, Congress has found, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem," and "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ." 42 U.S.C.A. § 12101. Understanding the myriad of ways in which institutions discriminate against persons suffering from disabilities led Congress to recognize that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." *Id.*

I. THE DISTRICT COURT ERRED BY FAILING TO ADDRESS IN SUBSTANCE MR. JOHNSON'S ARGUMENT THAT THE APPELLEES INTENTIONALLY VIOLATED HIS RIGHT PROTECTED BY THE ADA

A. Relevant ADA law and the law on solitary confinement

By finding that Mr. Johnson only argued a reasonable accommodation claim, when in fact, Mr. Johnson also argued an intentional discrimination claim, the district court erred in its reasoning. Foremost, without question, Mr. Johnson argued at all levels that Appellees discriminated against Mr. Johnson intentionally because of his disability:

> A triable issue exists regarding whether or not Appellee Rhoades violated the American Disabilities Act by discriminating against Mr. Johnson because of his disability by knowingly condoning and implementing a policy that confined Mr. Johnson, in solitude, for more than 23 hours on average per day, for 15 months, without any individualized, multi-factor assessment—as required by law—to justify said confinement as well as approving by signature, Johnson's placement in said conditions. (*See e.g.*, 28 C.F.R. § 35.139)

After arguing that that Appellees intentionally discriminated against Mr. Johnson and others because their disability required assistance from a mechanical device—Mr. Johnson furthered argued, in a separate numbered paragraph, that Appellees further violated Mr. Johnson's ADA rights by failing to modify said policy:

> A triable issue exist regarding whether or not Appellee Rhoades, as an entrusted operator of the jail, violated the American Disabilities Act by discriminating against Mr. Johnson because of his disability by failing to take affirmative steps to modify its policy and practice of automatically confining disabled people who require the use of a mechanical-assistance devices in 23 hour solitude without outdoor time (except two times for 15 minutes a piece), and without an administrative review to determine if continued 23-hour plus confinement was justified as well as approving by signature, Johnson's placement in said conditions (*Compare* 28 C.F.R. § 35.130(b)(7), stating that public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of the disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity," *with Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004), stating "Title II [of the ADA] imposes affirmative obligations on public entities and does not merely require them to refrain from intentionally discriminating against the disabled.")

That established, analysis of case law demonstrates the following points regarding solitary confinement:

1. Solitary confinement "represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct" *Wolff v. McDonnell*, 418 U.S. 539 (1974);

2. In revieing the nature of segregation imposed, courts look at the type of segregation and also examine whether said segregation "mirror[s] those conditions imposed upon inmates in administrative segregation and protective custody" *Sandin v. Connor*, 515 U.S. 472, 486 (1995);

3. That whether administrative segregation implicates a liberty interest is fact and context specific, including the reason for which an individual is placed in a certain type of segregation, for a certain amount of time. *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998);

4. Separating an inmate by administrative order, standing alone, is not unconstitutional, rather, courts must "consider[] the nature of the more restrictive confinement and its duration in relation to prison norms and to the terms of an individual's sentence" *HardenBey v. Rutter*, 524 F.3d 789, 793 (6th Cir. 2008).

With the above in mind, before moving into the facts of this case, the issue at hand must be properly framed to properly assess the merits of Mr. Johnson's claims. *See e.g., Seminole Tribe of Fla. v. Biegalski*, 757 F. App'x 851, 860 (11th Cir. 2018); *United States v. Hardy*, 368 F.2d 191, 192 (10th Cir. 1966). The issue

in this case is not whether merely segregating Mr. Johnson from the general population was lawful. Rather, the issue is whether segregating Mr. Johnson by confining him for over 23 hours per day on average, in solitude, for 15 months, because his disability required assistance from a mechanical device (arm brace)—without any individualized threat assessment—when Mr. Johnson had no violent criminal history, or any disciplinary infraction presents a triable issue as to whether Appellees' conduct is unconstitutional. (RSUMF Ex. 21, Youker Dep. 137:18-25 (all confinement not general population 23 and1); Ex. 18, Booking Forms 7/14/16; Ex. 19, Booking Forms 10/1/16; Ex. 20, Booking Forms 12/6/17; Booking Forms 12/19/17 (showing no security classification for prior violent crimes); Ex. 9, 30(b)(6) of Williamson County Jail 280:4-17 (only infraction received by Mr. Johnson was passing a food item, a minor infraction)).

That said, by law, Title II of the ADA places an affirmative duty upon jails to operate their facilities in a manner which respects the needs of disabled prisoners who are under their care and custody. (*Id.* (stating, "Title II [of the ADA] imposes affirmative obligations on public entities and does not merely require them to refrain from intentionally discriminating against the disabled.") Courts have consistently explained that this affirmative duty exists because of the special relationship between prisoners and jails. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 198–99, 109 S. Ct. 998, 1004–05, 103 L. Ed. 2d 249 (1989). As the Supreme Court has reasoned "because the prisoner is unable "'by reason of the deprivation of his liberty [to] care for himself,' it is only " 'just' " that the State be required to care for

him." *Id.*; *Mingus v. Butler,* 591 F.3d 474, 479 (6th Cir. 2010).

On that basis, Title II of the ADA specifically mandates that "[a] public entity [such as a jail] shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." *See also* 28 C.F.R. § 35.150; *see Ability Ctr. of Greater Toledo*, 385 F.3d at 910. Emphasis has been placed on the word shall because, as the Sixth Circuit Court of Appeals recognized decades ago "[t]he word "shall" is "the language of command" which usually, although not always, signifies that Congress intended strict and nondiscretionary application of the statute." *Cook v. United States*, 104 F.3d 886, 889 (6th Cir. 1997).

The mandate that a public entity such as Appellees' jail undertake an individualized assessment is made unambiguously clear by the express language of controlling law, 28 C.F.R. § 35.139, which states in relevant part: In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence." *See also* DOJ's *The Americans with Disabilities Act: Title II Technical Assistance Manual*, (hereinafter "TA Manual") § II–2.8000.

That same controlling law/regulation also sets forth specific assessment criteria that a public entity such as Appellees' jail must ascertain during its individualized assessment: "[t]he nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable

modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. § 35.139; *See E.E.O.C. v. Prevo's Market, Inc.*, 135 F.3d 1089, 1095 (6th Cir. 1998). *Cf. See Hamlin v. Charter Township of Flint*, 165 F.3d 426, 431-32 (6th Cir. 1999). A direct threat "is one that carries a high probability of substantial harm, not merely a speculative risk." *Id.* (emphasis added); *see also Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999) (citing *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987).

B. The district court erred profoundly so regarding obligations and duties under the ADA

Here, the district court set aside every single and expressly stated mandate regarding an individualized assessment with one simple sentence: "[j]ail officials assessed his needs and allowed him to wear the brace while imprisoned." With the utmost respect, the whole point of an individualized threat assessment is to assume the mechanical device that assists Mr. Johnson's disability is needed, and from that point, officials assess "[t]he nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. § 35.139. That assessment is what will determine whether Mr. Johnson and others like him can be housed in less restrictive housing rather than isolated in 23-hour lock down. 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 35.152. (Stating, "[p]ublic entities [such as jails] shall ensure that inmates or detainees with disabilities are housed in the most integrated setting

appropriate to the needs of the individuals.") And that assessment was not done for nearly 15 months by Appellees.

However, without doubt, the assessment could have been done based on the facts on record. (*See Ability Ctr. of Greater*, 385 F.3d at 910); (RSUMF Ex. 16, ¶ 20; Ex. 21, Youker Dep 109:15-21, 111:2-20 demonstrating when Mr. Johnson was transferred from at least 23 and 1 med sep to open dorm, and from that point forward he and other med sep prisoners permitted to rec together in an open area.); (RSUMF Ex. 21, Youker Dep. 109-10:11-9, noting he found moving med sep, including Mr. Johnson, to dormitory posed only slight risk as the individuals had never caused a problem *with* Ex. 21, Youker Dep. 127-28:14-11, stating anyone in med sep was housed in a dormitory pod.) This "review" concluded that Mr. Johnson and the 4-to-5 other disabled persons posed almost zero security risk and thus could be moved to less restrictive housing. (RSUMF Ex. 21, Youker Dep. 109-10:15-9, noting "it makes sense to put together . . . individuals that never caused a problem . . . even though there is a slight risk they may do something.")

Eventually moving Mr. Johnson to an integrated dormitory came about 15 months too late, especially given governing law's emphasis on ensuring that disabled prisoners are housed in the most integrated setting appropriate. In fact, the most integrated setting appropriate means the setting that "enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. Pt. 35, App. B (2011); *see also Henderson v. Thomas,* 913 F.Supp. 2d 1267, 1287 (M.D. Ala. 2012) (Thompson, J.). In that same vein, "[c]onsonant with the integration

mandate, the Supreme Court has concluded that unjustified isolation is properly regarded as discrimination based on disability." *Henderson,* 913 F.Supp. 2d at 1287, citing *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 591 (1999) (internal citations omitted). This law further highlights the constitutional wrong perpetrated against Mr. Johnson while also highlighting the absolute need for this court to set the record straight with respect to the treatment of disabled persons whose disability requires the use of a mechanical device—in terms of a specialized, individual threat assessment test and the modification of policies to ensure that this vulnerable population is not punished for having a disability that requires a mechanical device in a prison/jail setting.

The fact that an assessment was done, and Johnson was housed in an open dormitory with others only highlights the Sixth Circuit's confounding error. Mr. Johnson requests that this Court vacate the Sixth Circuit's holding on this issue and remand with instruction that a triable issue exists on whether the Appellees violated Mr. Johnson's ADA rights by shelving him in 23 hour-plus lock down because he suffered from a disability that required assistance from a mechanical device—without first undertaking an express, individualized threat assessment to ascertain whether he could be confined in less restrictive housing. While doing so, Mr. Johnson requests that this Court leave no doubt that automatically confining a disabled person whose disability requires the assistance of a mechanical device in 23-hour confinement, is patently unconstitutional. The Sixth Circuit further erred in claiming Mr. Johnson had the duty under Title II to request a reasonable accommodation.

The Sixth Circuit twice reasoned, erroneously so, that Title II requires Mr. Jonson to request a reasonable accommodation in order to avoid being automatically placed in 23-hour solitary confinement because his disability required the assistance of a mechanical device. First, the Sixth Circuit, unable to find any Title II law to support this erroneous reasoning borrowed from Title III, to reason that "it becomes evident that a public entity is not liable for failing to make a reasonable accommodation if the Plaintiff did not request accommodation or otherwise alert the covered entity to the need for an accommodation."

Second, the Sixth Circuit reasoned that, "any further individualized modification [beyond allowing him to wear his arm brace while imprisoned because he needed it] of the terms of Johnson's confinement . . . would have required him to alert the jail as to the need for such modification . . . . Yet Johnson failed to do so."

Stopping here. There is a huge difference between Title III of the ADA and Title II. Title III deals with private entities, to ensure that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676, 121 S. Ct. 1879, 1889-90 (2001). The law goes on to deny public accommodation, limiting the term public accommodation to encompass twelve extensive categories. *Id.*

To the compete contrary, Title II applies directly to public entities, and as such, "forbids any "public entity" from discriminating based on disability; § 504 applies the same prohibition to any federally funded "program or activity." 42 U.S.C. §§ 12131-12132; 29 U.S.C. § 794(a). A regulation implementing Title II requires a public entity to make "reasonable modifications" to its "policies, practices, or procedures" when necessary to avoid such discrimination. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 159-60, 137 S. Ct. 743, 749 (2017). Title II of the ADA encompasses county jails. *Cf. United States v. Georgia*, 546 U.S. 151, 154, 126 S. Ct. 877, 879 (2006) (stating, "[w]e have previously held that this term includes state prisons.")

Significantly, Title II, because it applies to public entities including prison and jails, automatically triggers the special relationship enunciated in *DeShaney*: "because the prisoner is unable "'by reason of the deprivation of his liberty [to] care for himself,' it is only " 'just' " that the State be required to care for him." 489 U.S. at 198–99. Part of "caring" for prisoners, is ensuring that prisoners with disabilities, such as Mr. Johnson—whose disabilities require assistance of a mechanical device—are not subjected and forced into 23-hour isolation without undertaking legally mandated assessments and policy changes. Consequently, the Sixth Circuit's use of using Title III was misplaced. And, Title II without question places the obligation on the jail, when jail officials know of a disability and when jail officials are placing people in 23-hour solitary confinement because of a disability, to affirmatively assess means of confining said disabled persons in less restrictive housing.

In this vein, the facts clearly demonstrate that Mr. Johnson's disability was known from day one, so the idea that he had to ask for an individualized assessment or reasonable accommodation is unfounded by applicable Title II law.

CONCLUSION

For the above reasons, Mr. Johnson requests this Court vacate the Sixth Circuit Court of Appeals opinion and remand this case with appropriate instructions.

Respectfully submitted,

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April 7, 2023