No. 22-1067

In the
Supreme Court of the United States

BRIAN E. JOHNSON,
Petitioner,

v.

MIKE DOBBINS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

As noted herein, the Questions Presented in the Petition are premised upon unsupported assertions and mischaracterizations of the decisions below. The true questions presented by this case, should the Court decide to grant certiorari, are:

1. Whether the Sixth Circuit Court of Appeals properly held that Respondents did not violate Title II of the ADA where Williamson County Criminal Justice Center ("Jail") personnel accommodated Petitioner by granting his request to keep his wrist immobilization brace upon admission to the Jail, but placed Petitioner in separated housing in light of the safety and security concerns presented by the brace, which contained laces and two removable metal staves, and where Petitioner made no request for any alternative accommodation.

2. Whether the Sixth Circuit Court of Appeals properly held that Respondents provided an ADA-compliant individualized assessment in consultation with contracted medical personnel in response to Petitioner's request to keep his wrist immobilization brace, and allowed Petitioner to retain such brace in the Jail, subject to appropriate security measures.

3. Whether Petitioner waived any argument that the lower courts mischaracterized his ADA claim as a failure to accommodate claim where he did not challenge the District Court's characterization of his ADA claim as such on appeal to the Sixth Circuit and, even if he had not waived his right to raise this

argument, Petitioner's intentional discrimination claim would fail.

4. Whether the Sixth Circuit Court of Appeals properly applied precedent related to the obligations of an individual to request an accommodation or modification under Title II of the ADA.

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STATUTORY PROVISION INVOLVED

Under Title II of the Americans with Disabilities Act, "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 a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

INTRODUCTION

In December 2017, Petitioner Brian Johnson entered the Williamson County Criminal Justice Center ("Jail") after violating the conditions of his probation, and remained there until June 13, 2019. At intake, Petitioner indicated that he needed to wear a wrist immobilization brace due to a gunshot injury he sustained as a child. In response to this contention, Petitioner was evaluated by contracted medical personnel for the Jail, who confirmed that Petitioner's wrist brace, which contained laces and two removable metal staves, was medically necessary. The Jail therefore modified its usual practice of confiscating contraband from inmates upon intake to the facility and allowed Petitioner to keep his wrist brace. However, in light of the safety and security concerns presented by the brace, the Jail placed Petitioner in separated housing for his protection and the protection of others in the facility. After this initial accommodation was provided, there was no change in Petitioner's condition or that of the Jail which would put Jail staff on notice of the need for further modification, nor did Petitioner request an alternative

accommodation, despite knowing how to challenge his housing classification.

After his release from the Jail, Petitioner filed suit against Respondents, alleging, in relevant part, that the Jail[1] violated Title II of the ADA by not housing him in general population. (R. 1, PageID #1[2].) The District Court, characterizing Petitioner's ADA claim as a failure to accommodate claim, granted summary judgment in favor of Respondents, holding that the claim failed as a matter of law where Petitioner "never requested a reasonable accommodation or proposed an accommodation during his incarceration," and where the *post-hoc* accommodations proposed by Petitioner in litigation, even if such could be relied upon to support a failure to accommodate claim, were not reasonable. (App. 36a-39a.) The Sixth Circuit Court of Appeals affirmed, holding that the Jail provided an individualized assessment, as required by 28 C.F.R. § 35.139(b), in response to Petitioner's request to keep his wrist brace (App. 9a), and that Petitioner "failed to

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[1] Although Petitioner pursued various claims in the courts below, the Petition challenges only the dismissal of Petitioner's ADA claim against Respondent Dusty Rhoades, in his official capacity as Williamson County Sheriff, and Respondent Chad Youker, in his official capacity as Lieutenant of the Williamson County Sheriff's Office Detention Division. Because Petitioner's ADA claim against Respondents Rhoades and Youker in their official capacities is essentially a claim against the Jail itself, the claim is referred to accordingly herein for purposes of clarity.

[2] The record of the District Court is cited herein as "R. _, PageID #_." The record of the Sixth Circuit Court of Appeals is cited herein as "AR. _, Page: _." The Petition is cited as "Pet. _" and the Appendix to the Petition is cited as "App. _".

satisfy his 'initial burden' of showing that the jail was on notice as to his need for specific accommodations"; specifically, his request to be housed in general population (App. 7a).

Petitioner now asks this Court to grant certiorari, arguing for the first time that the District Court mischaracterized his ADA claim as a failure to accommodate claim and that the Sixth Circuit erred in holding that Petitioner was required to put the Jail on notice of his need for an alternative accommodation. Perhaps because the facts of this case are unfavorable to his objective of obtaining certiorari, Petitioner spills much ink discussing the broad policy goals of the ADA and the purported effects of solitary confinement while ignoring the undisputed facts which are fatal to his claim. Because there is no compelling reason for this Court's review of the dismissal of Petitioner's ADA claim, the Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Brian Johnson, a former inmate at the Williamson County Criminal Justice Center ("Jail"), challenges the grant of summary judgment in favor of Respondents as to his claim arising under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12123.[3]

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[3] Although the Petition purports to challenge the grant of summary judgment in favor of "Appellees" collectively, as noted herein, the Petition challenges only the grant of summary

Petitioner entered the Jail on December 19, 2017 after violating the conditions of his probation, and remained there until June 13, 2019. (R. 140, PageID #3347.) He entered the Jail wearing a wrist brace which he indicated (and medical staff agreed) was needed due to a childhood gunshot injury. (R. 143-7, PageID #4001; R. 124-3, PageID #2424; RR. 140, PageID #3347-49, 3523-24.) The brace, which was prescribed to Petitioner during an earlier incarceration at the Jail, contained laces and two removable metal staves that stabilized Petitioner's wrist. (R. 140, PageID #3349-55; R. 124-3, PageID #2396, 2398-99, 2412-31; R. 123-1, PageID #2103, 2151-56; R. 132-5, PageID #3238.)

The Jail is a short-term facility, housing mainly pretrial detainees and misdemeanor offenders, with an average length of incarceration of 23 days. (R. 140, PageID #3364.) Petitioner was sentenced on April 12, 2018 and, like other convicted felons with relatively short sentences, was a Tennessee Department of Corrections inmate who served his entire sentence at the Jail. (R. 140, PageID #3365-66.) At intake to the Jail, inmates are asked to identify any physical impairments they may have, and such self-reported information is passed along to contracted medical staff so that they can provide proper care. (R. 140, PageID #3489.) While inmates are asked to self-report whether they have physical handicaps for purposes of providing

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judgment as to Petitioner's ADA claim against Respondents Rhoades and Youker in their official capacities. The Petition does not challenge the grant of summary judgment in favor of Respondents Dobbins, Long, and VandenBosch.

medical care, no determination is made by Jail staff that an identified condition is a "disability." (R. 140, PageID #3489-90.)

The Jail's Inmate Classification Policy was "developed to provide reasonable and necessary security and safe housing for the inmate population, while also providing for the protection of deputies and staff." (R. 147-8, PageID #5594.) The Classification Policy provides that inmates with special needs "will be diverted to special housing when such housing space is available. Special housing units include protective custody, administrative separation, disciplinary separation and mental and medical health housing." (R. 147-8, PageID #5595.) The Policy provides that "[i]nmates with disabilities, as determined by medical staff, including temporary disabilities, shall be housed and managed in a manner that provides for their safety and security." (R. 147-8, PageID #5596.) Because of the security risks created by his brace[4], Petitioner was classified as a "medical separation" inmate, housed in a single-man cell in a pod housing other medical separation and protective custody inmates, and kept physically separate from those other inmates. (R. 143-7, PageID #4001; R. 140, PageID #3363-64, 3523-24; R. 124-2, PageID #2311, 2335, 2351-52, 2361.)

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[4] Petitioner contends that he was placed in medical separation "because of his specific disability" (Pet. 3); however, Petitioner was placed in separated housing due to safety and security concerns and not "because of" any disability, as outlined in Section II herein.

The Petition contends that Petitioner was "confined for more than 23 hours per day in solitude" (Pet. 5); however, this characterization is not supported by the record in this case. Although Petitioner was physically separated from other inmates, he could see, hear, and socially interact with them. He walked around the pod during his recreation time and visited with other inmates who were in their cells, other inmates visited Petitioner's cell during their recreation time, and inmates were able to communicate between cells. (R. 140, PageID #3369-88; R. 123-1, PageID #2106.) Petitioner's phone calls from his time in the Jail demonstrate that he had extensive knowledge of other inmates—knowledge that could only have come from significant social interaction. (R. 140, PageID #3419-37.) Petitioner earned nicknames from other inmates including "Nacho Daddy" and the "Pod Father," the latter bestowed upon him because other inmates came to him for advice. (R. 140, PageID #3437-40.) He had visitation and commissary privileges, and access to a radio, TV, and books. (R. 140, PageID #3394-96, 3399-3405.) Petitioner regularly communicated with deputies and testified that they treated him well. (R. 140, PageID #3388-94.) He spoke favorably of the cleanliness of the Jail, the safety of the Jail, and the quality of the food. (R. 140, PageID #3405-16.)

Petitioner used none of the tools at his disposal for objecting to his housing assignment. The Jail's Classification Policy provides that an inmate may request a reassessment of his or her classification or housing using the Jail's grievance procedure (R. 147-8, PageID #5596); however, Petitioner never filed a

grievance, and never filed a kiosk request[5] to Jail staff in which he requested a housing change[6] (R. 158, PageID #5736-37; R. 140, PageID #3440-42, 3448-52, 3477-78, 3515). At various times during his incarceration at the Jail, Petitioner indicated in phone calls that he knew how to be moved into general population, but that he preferred to remain in separated housing. For example, in a phone call on May 12, 2017, Petitioner stated: "I could get into gen pop . . . . I'm staying right here where I am. Do my quiet time, I keep my mouth shut . . . ." (R. 140, PageID

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[5] Petitioner's written requests demonstrate both that he knew how to use the kiosk request system and that he had no qualms about making repeated requests for things like commissary bags and sentencing information, and additional requests for trivial matters such as a return of Takis chips to the commissary, a channel change for the TV, and an adjustment to a fully functional toilet. (R. 140, PageID #3450-52.) Petitioner used the kiosk request system regularly, but never used it to send a request to Jail personnel regarding his housing placement. (R. 140, PageID #3450-52.) He understood how to use the grievance process, but admits he never filed a grievance. (R. 140, PageID #3441-42.)

[6] Petitioner made one verbal inquiry of a Jail employee, who directed him to medical staff for assessment of his brace, and filed one resulting medical request on March 2, 2018 asking about moving to general population. (R. 140, PageID #3442-43.) In response to Petitioner's medical request, Nurse Katie Jones (an employee of the Jail's contracted medical provider) instructed Petitioner to follow up with a request to be evaluated by the doctor, but Petitioner never did, nor did he follow up with Jail staff to indicate that he was dissatisfied with Nurse Jones' response to him. (R. 140, PageID #3443-46.) Petitioner thereafter told Nurse Jones that he changed his mind and wanted to stay where he was instead of switching housing placements. (R. 140, PageID #3447-48.)

#3405-07.) In another phone call on June 17, 2017, Petitioner stated:

> "I mean, the food's good here. Everything's clean. You know it's just because I'm in segregated pod. You know, I don't want to mix with these m*****f*****s, you know, I don't want to mix with them. . . . That's why I'm not in gen pop. I could be in gen pop if I wanted to . . . ."

(R. 140, PageID #3407-08.)[7]

On March 20, 2019, due to a roof leak, inmates had to be moved out of Pod 305, where Petitioner and other medical separation inmates were housed. Due to the limited housing available at that time, Petitioner was moved to Pod 111, a small dormitory, with four other inmates who had medical devices. (R. 140, PageID #3452-53.) While the safest housing for those five inmates was in single cells in Pod 305, circumstances necessitated moving some inmates, and moving those five was the "lesser of two evils" since the other option would have been to move inmates who presented a greater security threat than Petitioner and his cohorts.[8] (R. 140, PageID #3453-61.) Petitioner

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[7] Petitioner made similar statements indicating his understanding of how to move to general population in phone calls on August 27, 2017, January 11, 2018, February 19, 2018, March 16, 2018, and May 6, 2018. (R. 140, PageID #3360-63, 3408-09, 3493-94, 3503-04.)

[8] The Petition insinuates that another inmate's threat to sue the Jail was the catalyst for Petitioner's move to Pod 111 (Pet. 5); however, it is undisputed that Petitioner's relocation to a dormitory setting was necessitated by the roof leak and limited

remained in Pod 111 for the remainder of his incarceration except for a brief three-day return to Pod 305 when Pod 111 had to be cleared of male inmates to allow female inmates to shower while hot water was out in the female pod. (R. 140, PageID #3461.)

B. Procedural Background

Petitioner filed suit on December 26, 2019 against Respondents Mike Dobbins, former Captain of the Williamson County Sheriff's Office ("WCSO") Detention Division; Dusty Rhoades, former Chief Deputy and then Williamson County Sheriff; Jeff Long, former Williamson County Sheriff and then Commissioner of the Tennessee Department of Safety and Homeland Security; Dan VandenBosch, former Lieutenant of the WCSO Detention Division; and Chad Youker, former Staff Sergeant and then Lieutenant of the WCSO Detention Division (collectively, "Respondents"). (R. 1, PageID #1-61.) Petitioner filed an Amended Complaint on November 10, 2020. (R. 62, PageID #1188-1256.)

Petitioner initially pursued various claims against all Respondents, as well as claims against the Jail's contracted medical provider[9]. The District Court dismissed certain of Petitioner's claims against Respondents on June 17, 2021. (R. 91, PageID #1605-19; R. 92, PageID #1620-21.) The District Court granted Respondents' Motions for Summary Judgment

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housing availability in the facility at that time. (R. 140, PageID #3452-53.)

[9] Petitioner voluntarily dismissed his claims against the medical defendants on August 11, 2021. (R. 97, PageID #1667.)

as to the remaining claims on April 13, 2022, holding, in relevant part, that Petitioner's ADA claim against Respondents Rhoades and Youker in their official capacities failed as a matter of law where it is undisputed that Petitioner "never requested a reasonable accommodation or proposed an accommodation during his incarceration," and where the *post-hoc* accommodations proposed by Petitioner in litigation, even if such could be relied upon to support a failure to accommodate claim, were not reasonable. (App. 36a-39a.)

Petitioner appealed certain aspects of the District Court's Order granting summary judgment in favor of Respondents Dobbins, Rhoades, VandenBosch, and Youker on April 14, 2022.[10] (R. 200, PageID #6475-77.) In an unpublished opinion, the Sixth Circuit affirmed the District Court's grant of summary judgment in favor of Respondents. (App. 11a-12a.) With respect to Petitioner's ADA claim against Respondents Rhoades and Youker in their official capacities, the Sixth Circuit held that Petitioner "failed to satisfy his 'initial burden' of showing that the jail was on notice as to his need for specific accommodations"; specifically, his request to be housed in general population. (App. 7a.) The Court further held that Petitioner's allegation that the Jail failed to provide an individualized assessment pursuant to 28 C.F.R. § 35.139(b) lacked merit where, even if Petitioner could rely on Title II's private cause

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[10] Petitioner did not oppose Respondent Long's Motion for Summary Judgment in the District Court and did not challenge the grant of summary judgment in favor of Respondent Long on appeal to the Sixth Circuit. (App. 14a, 17a.)

of action to enforce the regulation, the Jail *did* provide an individualized assessment in response to Petitioner's request to keep his wrist brace. (App. 9a.)

In his Petition to this Court, Petitioner challenges only the grant of summary judgment as to his ADA claim against Respondents Rhoades and Youker in their official capacities. For the reasons outlined herein, the Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. PETITIONER DID NOT RAISE AND THE SIXTH CIRCUIT DID NOT RULE UPON PETITIONER'S CLAIM OF INTENTIONAL DISCRIMINATION UNDER TITLE II OF THE ADA, AND EVEN IF HE HAD MADE SUCH A CHALLENGE, PETITIONER'S CLAIM WOULD FAIL.

In his formulation of the questions presented by this case, Petitioner contends that the Sixth Circuit erred in characterizing his ADA claim as a failure to accommodate claim and not analyzing his claim of intentional discrimination under the ADA. (Pet. I.) Although the Petition purports to challenge the Sixth Circuit's characterization of Petitioner's ADA claim (Pet. I, 3), it actually challenges only the *District Court's* characterization of Petitioner's ADA claim as a failure to accommodate claim (Pet. 8).[11] This is because

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[11] The Petition recites two quotations from the record, without citation, to support the contention that he, "without question," has "argued [a claim of intentional discrimination] at all levels." (Pet.,

Petitioner did not raise the District Court's characterization of his ADA claim as a failure to accommodate claim as an issue on appeal, and the Sixth Circuit therefore analyzed Petitioner's ADA claim as the District Court had—under a theory of failure to accommodate. Petitioner has therefore waived his right to appeal the lower courts' characterization of his ADA claim as a failure to accommodate claim by not raising such issue on appeal in the Sixth Circuit. Because it is not appropriate for Petitioner to raise issues for the first time in this Court, certiorari as to such issue should be denied. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) (noting that this Court does not ordinarily "decide questions not raised or resolved in the lower court").

Even if Petitioner had not relinquished his right to raise this issue, the challenge lacks merit. The Petition relies solely upon 28 C.F.R. § 35.139 of Title II's implementing regulations to support Petitioner's claim of intentional discrimination. (Pet. 12.) That regulation provides:

> (a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

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p. 8.) Notably, however, both quotations are taken from Petitioner's Responses to Rhoades' and Youker's Motions for Summary Judgment *in the District Court*. (R. 150, PageID # 5620-21; R. 152, PageID # 5673-74.) Petitioner abandoned these arguments on appeal to the Sixth Circuit, and such arguments are therefore not properly before this Court.

> (b) 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, to ascertain: the 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.

It is well established that this regulation is triggered by a request for accommodation. *See, e.g., Marble v. Tennessee,* 767 F. App'x 647, 651 (6th Cir. 2019). Thus, Petitioner's failure to request any accommodation other than the one that was granted is dispositive of this issue. Even if it were not, Petitioner's contention that the Sixth Circuit erred in failing to analyze his claim that the Jail's alleged violation of this regulation constituted intentional disability discrimination is without merit. Petitioner's argument ignores the fact that, in affirming summary judgment in favor of Respondents as to Petitioner's ADA claim, the Sixth Circuit ***considered and rejected*** Petitioner's argument that Respondents failed to conduct an individualized assessment pursuant to 28 C.F.R. § 35.139. (App. 9a.) Specifically, after expressing doubt as to whether Petitioner could utilize Title II's private cause of action to enforce the regulation, the Court held:

> And even if he can [rely on Title II to enforce 28 C.F.R. § 35.139(b)], **jail officials did not violate the implementing regulation.** After Johnson alerted the jail of his interest in continuing to wear his wrist brace, jail officials assessed his needs and allowed him to wear the brace while imprisoned. Any further individualized "modification[]" of the terms of Johnson's confinement, *see* 28 C.F.R. § 35.139(b), would have required him to alert the jail as to the need for such a modification, *see Marble*, 767 F. App'x at 651 (observing that an "individualized inquiry" is required "in response to a request for accommodation"). Yet, Johnson failed to do so.

(App. 9a (emphasis added).) Petitioner's disagreement with the Sixth Circuit's conclusion does not justify a grant of certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") Accordingly, even if Petitioner had not waived this issue, the challenge lacks merit, and this Court should decline to grant certiorari.

II. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED IN THE PETITION.

A. The Questions Presented, as formulated by Petitioner, are premised upon assertions that are unsupported by the facts of this case and mischaracterizations of the decisions below.

The Questions Presented in the Petition are premised upon mischaracterizations of the holdings of the District Court and the Sixth Circuit, as well as assertions that are unsupported by the facts of this case. The shaky foundation upon which the Questions Presented in the Petition are framed renders this case a poor vehicle for addressing such issues.

As an initial matter, while the first and second Questions Presented by Petitioner refer to "a prisoner with a known disability" and "a person with disabilities" respectively (Pet. I), Respondents argued in both the District Court and the Sixth Circuit that Petitioner does not qualify as "disabled" within the meaning of the ADA. (*See* R. 115, PageID #1860-61; R. 121, PageID #1947-49; AR. 19, Page: 55.) The assertion that "there is no dispute" that Petitioner qualifies as disabled under the ADA is therefore false.[12] (Pet. 4.)

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[12] Petitioner's contention that "there is no dispute that Title II applie[s] to the facts of this case" is likewise inaccurate. (Pet. 4.) Although it is undisputed that the Jail is subject to the requirements of Title II, it is disputed that housing placement in the Jail, the sole aspect of Petitioner's confinement at issue in this case, constitutes a program or service as defined by Title II of the

However, even assuming without conceding that Petitioner qualifies as "disabled" within the meaning of the ADA, the Questions Presented in the Petition do not accurately reflect the issues presented by this case.

First, Petitioner contends that the Sixth Circuit held that "a prisoner with a known disability" is required "to make a request for a reasonable accommodation in order to avoid being housed for more than 23 hours in solitary confinement." (Pet. I.) However, this contention does not account for the factual nuances underlying the Sixth Circuit's affirmance of the dismissal of Petitioner's ADA claim. The question addressed by the Sixth Circuit, and the question that will be before this Court should certiorari be granted, is whether a Jail violates Title II of the ADA when, after providing a reasonable accommodation to an inmate, the Jail does not *sua sponte* provide the inmate with an *alternative* accommodation, despite the inmate not articulating any need or desire for an alternative accommodation and there being no change in the inmate's condition or the conditions of the Jail which would put Jail staff on notice of a need for any further or alternative accommodation. In answering this question in the negative, the Sixth Circuit properly applied the well-established principle that Title II does not require public entities to be "clairvoyant," and Petitioner was therefore required to put the Jail on notice of any additional need for accommodation. (App. 8a.) Because Petitioner could not show that he "alerted the jail to

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ADA. (*See* R. 115, PageID #1861-62; R. 121, PageID #1949-50; AR. 19, Page: 55.)

the need for accommodation to avoid disability discrimination, let alone made a specific request that he be placed in the general prison population[,]" the Sixth Circuit held that Petitioner's ADA claim failed as a matter of law. (App. 7a.) Because the Sixth Circuit's holding was dependent upon and informed by the specific facts in this case, this case would be a poor vehicle for addressing the abstract question presented by Petitioner.

Nor is this case a proper vehicle for addressing Petitioner's second Question Presented, which asks whether the Jail violated Title II by "automatically" housing Petitioner in separated housing "without first performing an individualized threat assessment." As recognized by the Sixth Circuit, the Jail *did* conduct an individual assessment in response to Petitioner's request to keep his wrist immobilization brace, allowing him to keep the brace but placing him in separated housing in light of the security concerns presented by the device. (App. 9a.)

Petitioner cites the fact that he was later moved to a small dormitory pod with four other inmates who had medical devices due to a roof leak and limited housing availability in other areas of the Jail as evidence that an individualized assessment was not conducted in the first instance. (Pet. 14-15; R. 140, PageID #3452-53.) However, that an assessment was later conducted in light of the conditions of the Jail and the inmate population at that particular time does not prove the negative. Petitioner's reliance upon his subsequent move to support the proposition that the Jail "could have" moved Petitioner to dormitory housing earlier in

his incarceration disregards the realities of jail administration, particularly in the case of a smaller, short-term facility such as the Williamson County Criminal Justice Center, where the needs of the facility and the inmate population are constantly changing. As this Court has acknowledged, "[r]unning a prison is an inordinately difficult undertaking," *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), and "safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face," *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012). *See also Procunier v. Martinez,* 416 U.S. 396, 405 (1974) (noting that "courts are ill equipped to deal with the increasingly urgent problems of prison administration"), overruled on other grounds, *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989). Prior to the roof leak, which occurred at a time in which there was limited housing available in the Jail, there was no change in the conditions of the Jail which would necessitate modification of Petitioner's previously granted accommodation, nor was there any change in Petitioner's condition or any request by Petitioner for such a modification. As with Petitioner's first Question Presented, the facts of this case controvert the second Question Presented by the Petition. Certiorari as to such issue should therefore be denied.

Petitioner also grossly mischaracterizes the Sixth Circuit's opinion in arguing that the Court, "unable to find any Title II law to support" for the contention that Petitioner was required to request an additional accommodation, improperly "borrowed from Title III[.]"

(Pet. I, 16.) While the Sixth Circuit did read the regulation requiring public entities to make "reasonable modifications" to avoid disability discrimination "alongside case law borrowed from [the Sixth Circuit's] interpretation of Title III," the Court cited the **Title II** case of *Marble v. Tennessee,* 767 F. App'x 647, 652 (6th Cir. 2019) in support of this statement. (App. 6a-7a (also citing *McPherson v. Michigan High School Athletic Association, Inc.*, 119 F.3d 453, 461 (6th Cir. 1997) (en banc), for the proposition that "only an accommodation that 'had been brought to the attention' of a public entity is 'available' as the basis for a reasonable accommodation claim under Title II.").) In *Marble*, the Sixth Circuit engaged in a detailed analysis of the applicability of certain principles derived from Titles I and III of the ADA to the plaintiff's claim under Title II. *Marble*, 767 F. App'x at 650-53. One such principle that the *Marble* Court held to be applicable to the plaintiff's Title II claims "is that a covered entity is generally not liable for failing to make reasonable accommodation if the plaintiff did not request accommodation or otherwise alert the covered entity to the need for accommodation." *Id.* at 652 (citations omitted). The Sixth Circuit applied the principles discussed in *Marble* to the facts of this case. Petitioner's disagreement with the Sixth Circuit's application of this relevant case law is not a sufficient basis for this Court's review. *See* Sup. Ct. R. 10.

B. There are numerous alternative grounds for affirming the grant of summary judgment in favor of Respondents.

In addition to the reasons outlined above, the numerous alternative grounds for affirming the grant of summary judgment in favor of Respondents warrant denial of the Petition.

As argued by Respondents in the courts below, Petitioner's ADA claim is barred by the statute of limitations, where Petitioner has not identified any request for accommodation or intentional discrimination occurring within the one-year limitations period applicable to his ADA claim. (R. 115, PageID #1869; R. 121, PageID #1956-57; AR. 19, Page: 54.) Even if Petitioner's ADA claim was timely, Petitioner cannot show that he is disabled within the meaning of the ADA. (R. 115, PageID #1860-61; R. 121, PageID #1947-49; AR. 19, Page: 55.) Even if Petitioner could make such a showing, housing placement in a correctional facility, the sole aspect of his confinement that Petitioner asserts violated the ADA, is not a program or service under the ADA and, therefore, there is no right to be housed in general population. *See Pruitt v. Lewis,* No. 06-2867, 2008 U.S. Dist. LEXIS 947, at *21-22 (W.D. Tenn. Jan. 7, 2008); R. 115, PageID #1861-62; R. 121, PageID #1949-50; AR. 19, Page: 55. Even if placement in general population constitutes a "program or service" for purposes of Title II of the ADA (it does not), Petitioner was not "otherwise qualified" for such housing placement where he did not request same and it would not have been

safe for him to be housed there. (R. 115, PageID #1862; R. 121, PageID #1950; AR. 19, Page: 61.)

Even more critically, Petitioner cannot show that he was subjected to discrimination "because of" any disability as required to state a claim under the ADA. Petitioner was placed in separated housing not by reason of his disability, but because of security concerns. *See, e.g., Banks v. Patton*, No. 17-1586, 743 F. App'x 690, 697 (7th Cir. July 26, 2018) ("Security concerns and medical opinions, specific to the offender, are neutral reasons for declining accommodations."); *Rix v. McClure*, No. 10-cv-1224-CM, 2012 U.S. Dist. LEXIS 49039, at *4-8 (D. Kan. Apr. 6, 2012) (holding that placement in medical isolation, which restricted access to activities, was not because of disability but rather was based upon concerns that the inmate's leg braces and cane could be used as weapons and would threaten order if introduced into the general population). While Petitioner cites to language from the case of *Henderson v. Thomas*, 913 F. Supp. 2d 1267 (M.D. Ala. 2012), in which that court noted that "[c]onsonant with the integration mandate, the Supreme Court has concluded that unjustified isolation is properly regarded as discrimination based on disability" (Pet. 12-13), unlike the correctional facility in *Henderson*, which "categorically segregate[ed]" and denied HIV-positive prisoners "the opportunity to be even considered for various rehabilitative services and programs," the Jail did not have a pattern or practice of placing inmates with disabilities in segregation. *Id.* at 1287.

Inmates are asked upon intake to the Jail whether they have physical handicaps for purposes of providing medical care; however, no determination is made by Jail staff that an identified condition is a "disability". (R. 140, PageID # 3489-90.) In fact, most inmates in the Jail who identify themselves as having a physical handicap upon intake are placed in the general population.[13] Inmates wearing objects that present security concerns such as Petitioner's brace, worn for medical reasons, and inmates wearing objects that present security concerns and cannot be easily removed, such as body piercings or weaves, are treated the same, regardless of whether such objects are related to a disability, or even a medical issue. (R. 140, PageID # 3363, 3491.) Petitioner's separated housing placement was not "because of" a disability.

Petitioner does not, and cannot, contend that he requested and was denied the opportunity to participate in programs offered by the Jail while in separated housing. While Petitioner was not "otherwise qualified" to participate in programs due to his failure to request same, if he had so requested, he would have been afforded the ability to participate, subject to acceptable modifications related to safety and security concerns. Adjustments in the manner in which programs or religious services were provided, or limitations on job opportunities available to Petitioner based on the security issue presented by his brace

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[13] Between December 1, 2017 and March 31, 2019, 344 male inmates identified themselves as having a physical handicap, but during that period, only 63 male inmates were placed in separated housing. (R. 140, PageID #3490-91.)

would not have been discrimination "because of" disability, where the safety concerns attendant to allowing the brace with laces and metal into population were legitimate and non-discriminatory. *See, e.g.*, Hayden, J.W., Laney, C., Kellermann A.L., 1995. Medical devices made into weapons by prisoners: an unrecognized risk. *Annals of emergency medicine*, 26(6), pp. 739-742.

Because there are numerous alternative bases upon which the grant of summary judgment in favor of Respondents as to Petitioner's ADA claim is due to be affirmed, there is no compelling reason for this Court's review and certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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