NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW KOSIBA,

Petitioner,

v.

CATHOLIC HEALTH SYSTEMS OF LONG ISLAND, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit
Appeal No. 23-6

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

Did the Second Circuit Court abuse its discretion, and legislate from the bench, by dismissing Kosiba's second amended complaint for disability discrimination and retaliation for failure to state a claim, by adopting its own recent revisionist holding from *Sharikov v. Phillips Medical Systems MR, Inc* in which it reverted to using a Congressionally-barred definition of disability that predates the 2008 amendment?

Does an employer violate the ADA's prohibition on discriminatory qualification standards when it imposes "non-job-related" treatment protocols on an employee and it treats the employee as a "direct threat" of disease without evidence?

Does an employer violate the ADA's prohibition on discriminatory qualification standards when it establishes new exclusionary qualification standards which impose "non-job-related" treatments and tests?

Did the Appellate Court abuse its discretion by failing to consider the Congressional intent and standard of review for ADA pleadings by failing to review the defendant's response to determine if it expressed any viable ADA defense?

Is a covered employer required by the ADA to show that the new "COVID policy" qualification standards for employment are "job-related" for the position in question and consistent with "business necessity"?

Is a covered employer required, by the conditions set forth in the statute, to show that an employee individually and objectively poses a "direct threat" of the specific threat the new "qualification standards" are designed to mitigate?

Did the Court abuse its discretion by refusing to properly analyze whether certain "COVID policy" medical treatments and tests qualify as "non-job-related" qualification standards?

Did the Court abuse its discretion by refusing to properly analyze whether the certain "COVID policy"-related inquiries qualify as "disability-related inquiries" because they were used as "qualification standards" ?

Did the Court abuse its discretion by refusing to accept both plaintiff's and defendant's fact allegations and evidence showing that the plaintiff was currently being singled out and treated *as if* he were a threat of deadly contagious disease?

Did the Court abuse its discretion by failing to consider that the "COVID policy" imposes new qualification standards which meet the definition of "prohibited actions"?

Is the Court biased and abusing its discretion because the Court has adopted nearly the same discriminatory policies and practices which gave rise to the complaint?

II. PARTIES TO THE PROCEEDINGS

Petitioner, Andrew Kosiba, was the plaintiff in the District Court and the appellant in the Court of Appeals.

Respondent, Catholic Health Systems, Inc., was the defendant in the District Court and the appellee in the Court of Appeals.

III. RELATED CASES

Andrew Kosiba v. Catholic Health Systems, Inc., No. 0207-2:21-CV-6416, U.S. District Court for the Eastern District of New York at Central Islip. Judgment entered December 12, 2022.

Andrew Kosiba v. Catholic Health Systems, Inc., No. 23-6, U.S. Court of Appeals, Second Circuit. Summary Order and Mandate entered on July 16, 2024.

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Petitioner Andrew Kosiba respectfully requests the issuance of a writ of certiorari to review the summary order and mandate of the United States Court of Appeals for the Second Circuit.

VII. DECISIONS BELOW

The Second Circuit's July 16, 2024, unpublished and non-precedential Summary Order and Mandate denying Kosiba's appeal No. 23-6 is attached as Appendix 2.

VIII. JURISDICTION

The Second Circuit entered a summary order and mandate on July 16, 2024. Kosiba invokes this Court's jurisdiction under *28 USC §2101(e)*, having timely filed this petition for a writ of certiorari within ninety days of the summary order and mandate affirming the District Court's order to dismiss Kosiba's second amended complaint.

IX. STATUTORY PROVISIONS INVOLVED

This case involves the definition of the terms "*disability*" and "*perceived impairment*" under the "*regarded as*" and "*record of*" prongs (*42 USC §12112*), "*qualification standards*", "*job-related*" , "*disabilty-related inquiries*", "*business necessity*" and "*direct threat*" as defined and implemented by *29 CFR Part 1630.*

The ADA was amended in 2008 by Congress to expand the definition of the protected class under the ADA-AA. The intent of Congress as related to the "regarded as" prong definition in paragraph (3) was to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong definition of impairment. The supervisory power of the Supreme Court is now required because the Second Circuit has effectively regressed to using *Sutton* reasoning instead of the reasoning in *Arline* to determine coverage under the ADA, as will be outlined below.

The 2008 ADA-AA codified that the "regarded as" prong is purposed to address irrational discrimination, such as employees experienced in the context of the "COVID pandemic". Protection from irrational discrimination based upon the fears and stigmas associated with real or imagined conditions is most frequently described as being the purpose of the "regarded as" prong. Indeed, the ADA's legislative history specifically mentions that individuals with perceived conditions are covered under the "regarded as" disability prong. The "record of" prong also explicitly outlines that it covers individuals who are misclassified as having a (perceived) impairment.

In this case, an employer, Catholic Health Systems of Long Island, Inc. (hereafter "CHSI"), engaged in irrational discrimination by treating an employee, Mr. Kosiba, *as if* he had a perceived (meaning undiagnosed or hypothetical)

condition of currently being an omnipresent threat of deadly contagious disease and CHSI took prohibited actions against the employee on this basis. The employer also misclassified the employee as in need of medical treatment for the perceived impairment. The "COVID policy" measures were new qualification standards for employment which excluded, segregated, and diminished the benefits of employees who were perceived as contagious threats by the employer. CHSI imposed these mitigation measures without satisfying the prerequisite conditions that all requisite treatments and tests be "job-related", as defined in the statute, or be a "business necessity" as established by performing the "direct threat" assessment outlined in the statute.

The text of the relevant provisions is contained in Appendix 1.

X. STATEMENT OF THE CASE

CHSI is a covered entity under Title I of the ADA-AA and Kosiba was employed by CHSI.

Kosiba alleged in his amended complaint and affidavit that CHSI started treating all employees as a "direct threat" of deadly contagious disease, when it initially adopted a "COVID policy", by quarantining employees from the work site. Kosiba alleged that CHSI subsequently implemented new "non-job-related" qualification standards, which consisted of medical inquiries, tests and treatments, in order for employees to be allowed to return to work at the job-site.

On September 27, 2021, Kosiba gave CHSI written notice of his objections to possible ADA violations triggered by the new qualifications standards which served to establish his *"protected status"* while he opposed the potential violations in good faith. Kosiba argued that he qualified for coverage related to "disability" provisions as well, under the "record of" and "regarded as" prongs of the ADA, because he was being discriminated against for a "perceived impairment". Additionally, Kosiba stated that he did not require an *"accommodation"*, rather he requested an end to *"adverse actions"* taken against him based upon discriminatory qualification standards. ADA coverage for non-job-related qualification standards is available to all employees and does not require any showing of a perceived or actual disability, thus Kosiba's coverage is not dependant upon claiming such disability. Kosiba claimed that he was subjected to adverse employment actions the moment CHSI adopted a "COVID policy"; and, as it happened, the adverse actions intensified once he gave CHSI written notice of possible ADA violations and claimed ADA protection. In the notice, Kosiba stated that because CHSI failed to perform an objective assessment diagnosing the condition CHSI demanded Kosiba be treated for; he was being regarded by CHSI as having a "perceived disability". Kosiba alleged that the "COVID policies" misclassified him in such a way that his individual employment opportunities were limited because CHSI would not permit him to do his job on-site without first submitting to the new qualification standards. Despite his protected status, CHSI nevertheless continued to impose mitigation measures and adverse actions upon Kosiba.

Kosiba pursued administrative relief with Human Resources and with the EEOC. He documented that initially he, like all employees, was considered an infectious threat of deadly disease and quarantined from the work site. Then, all employees were told that in order to remain employeed they would have to undergo treatment (marketed as the "COVID vaccine") for an undiagnosed condition. Kosiba alleged that the moment he claimed the protection of the ADA to oppose these non-job-related medical measures in good faith, he began to suffer increased adverse employment actions: harassment, isolation, segregation, denial of equal access, duress regarding the "non-job-related" medical examinations and tests; "non-job-related" medical inquiries, discriminatory qualification standards; lack of redress and competent help from HR and EEO agents, retaliation, interference with his ability to invoke his rights and ADA protections and ultimately termination of his employment.

Mr. Kosiba filed a lawsuit against CHSI on December 8, 2021. His suit was delayed until he received a Right to Sue letter and Mr. Kosiba moved to re-open his case on February 24, 2022 and filed an amended complaint. On May 10, 2022, he filed a motion requesting to appoint a Special Master conversant with the ADA prongs applicable to his case. He alleged that the Court could not impartially preside over his lawsuit because the court's "COVID policies" were nearly identical to the defendant's. On May 18, 2022, the court denied the request for Special Master. Six days later , Mr. Kosiba filed an amended request for Special Master on

May 18, 2022 which was also denied by Judge Brown. Also on May 18, 2022, Mr. Kosiba filed a request to file a second amended complaint which was granted.

On June 27, 2022, the defendant filed a motion to dismiss the second amended complaint which included the affirmative defense that claimed Mr. Kosiba had a "transitory and minor" (diagnosed?) disability which excused the defendant. On July 8, 2022, Kosiba replied to the defendant and, along with other responses, he showed that the claimed affirmative defense was not supported by law or facts.

On November 18, 2022 Magistrate Judge Arlene Lindsay made a Report and Recommendation to dismiss the case. She supported the "transitory and minor" (diagnosed?) disability defense; she found no causal relationship between the adverse employment actions and Kosiba's protected opposition to the "Covid policy" demands and deadlines.

On December 1, 2022, plaintiff objected to the recommendation. Mr. Kosiba challenged the "transitory and minor" defense, as CHSI had failed to support it with facts, and failed to address both elements of the defense; he showed that he had made a proper claim; he showed that he had alleged a causal relationship between the adverse employment actions and his opposition, and supported the allegations with facts including the demands and deadlines of the "Covid policy" itself; and he questioned the impartiality of the court.

On December 12, 2022, the court adopted the Report and Recommendations in its entirety.

On or around December 20, 2022, Kosiba filed a Notice of Appeal.

On February 6, 2023, Kosiba filed an Opening Brief with the Circuit Court. On April 12, 2023, CHSI filed its responsive brief. On May 3, 2023, Kosiba replied. Fourteen months later, the Circuit Court filed an unpublished Summary Order and Mandate that affirmed the District Court order on July 16, 2024.

The court of first instance had original and exclusive jurisdiction over plaintiff's claims pursuant to *28 USC. §1331*, in that the matters in controversy are brought pursuant to Title I of the ADA and ADA-AA of 2008.

XI. SUMMARY OF THE ARGUMENT

The Circuit Court abused its discretion by refusing to accept Kosiba's alleged facts as true:

(1) by ruling that Kosiba failed to state a claim for discrimination under the regarded as prong of the ADA-AA because the court applied an irrelevant section of the statute to Kosiba's claim and irrelevantly ruled that Kosiba was "not singled out because of any perception that he had an impairment that substantially limited him as compared to others."[1] The Second Circuit previously made an improper ruling in the *Sharikov v Phillips Medical Systems MR, Inc* case, by mis-applying "actual" disability rules to "perceived" disability and applied this incorrect ruling to Kosiba's case. Congress amended the ADA in 2008, in part, to clarify this exact issue and

[1]*Sharikov v Phillips Med. Sys., Inc.* June 4, 2024, 2ndCA, p. 17.

stated that the reasoning in *Arline* prevailed over the *Sutton* reasoning. One of the major revisions made to the ADA-AA in 2008 was the determination that the "regarded as" prong does not require showing substantial limitation (the *Sharikov* dicta quoted by the Circuit Court is both incorrect and does not apply to this case)[2].

Next, the court abused it discretion by "finding" that Kosiba failed to allege: (2) that he was fired because he opposed the policy for multiple ADA violations (protected opposition), despite Kosiba's allegations that specifically and sufficiently claimed these very facts and alleged several violations including:(i) that CHSI failed to establish Kosiba was, in fact, a "direct threat"; (ii) that CHSI imposed "non-job-related" qualification standards, that do not require any showing of disability. (3) The court abused it's discretion because Kosiba fully alleged retaliation based upon discrimination; (i) he alleged the causal relationship between adverse employment actions and the "COVID policy" measures; (ii) he exhibited his written notice of ADA violations **informing** CHSI that he claimed the protection of the ADA and was still a "qualified individual" despite new qualification standards; and (iii) he alleged that CHSI's "COVID policy" demonstrated that CHSI regarded him as having a perceived disability, despite CHSI's disingenuous denials.

The Courts further abused their discretion by: (4) dismissing Mr. Kosiba's efforts to exercise his rights under the ADA by accepting CHSI's naked claim that Kosiba's efforts were insubordination by *improperly presuming* the "COVID policy"

[2]The *Sharikov* court mistakenly applied rules found at §1630.2(j)(1)(ii) to Sharikov's pleading, despite the defininition of regarded as being explicitly defined at §1630.2(l), see Appendix 1.

was a *legitimate* corporate policy despite being based upon *agency guidelines* rather than law. The Courts refused to consider that the ADA afforded Kosiba a path to follow, by acting in good faith opposition to the policy, being respectful, attempting to engage in open and constructive communication with his employer, and rightfully refusing discriminatory qualification standards; and refusing to waive his medical privacy rights, and rights to informed consent which are squarely rooted in the ADA, *29 CFR Part 1630.14(d)(2).*

(5) These abuses further demonstrate bias because the Courts have adopted the same policies which gave rise to Kosiba's complaint, even after Kosiba twice requested a Special Master due to these circumstances.

The Appeals Court further abused its discretion by (6) refusing to correct the District Court's improper "finding" for the "transitory and minor" defense without holding an evidentiary hearing or applying logic: the qualification standards of the policy treated Kosiba as a "direct threat" which is not a "minor" classification; and the policy was not imposed for a "transitory" period of six months or less; (7) failing to find that the "qualification standards" were prohibited because they did not meet statutory conditional standards, ie; "job-related", "direct threat"; and (7.) by using errors in *Sharikov,* applying them to Kosiba's case and others, in order to legislate from the bench, and undo the reasoning in *Arline.*

XII. REASONS FOR GRANTING THE WRIT

Petitioner Andrew Kosiba petitions the United States Supreme Court for a writ of certiorari to the United States District Court of Appeals for the Second Circuit, Case No. 23-6, under the following criteria. **This petition and the criteria below involve a matter of great public importance and raise one or more significant federal questions that are in the public's interest.**

A. Court's History of Countermanding Congress

The United States District Court and its Appellate Court have a history of overruling federal law and legislating from the bench. The federal court's practice of countermanding federal law specifically includes whittling down the effectiveness of the purpose intended by Congress to protect people with disabilities from discrimination. Eighteen years after the enactment of the ADA, the United States Congress had to intervene and amend the law to further state what its intent was, and to overcome some of the case law established in the federal appeals circuits and the United States Supreme Court, that had effectively repealed the congressional intent expressed in the 1990 version of the ADA.

The recent holding in *Sharikov v. Philips Med. Sys. MR, Inc.*, No. 23-407, 2024 WL 2820927 is an attempt by the Second Circuit to overrule federal law and legislate from the bench. The *Sharikov* ruling, in effect, presumes to overturn the 2008 Congressional revision of the ADA-AA because it effectively reinstates the "substantially limited" clause that Congress removed when it clarified that *Arline,* and not *Sutton,* was correct.

Additionally, both the trial and appeals courts have imposed a greater pleading standard upon Kosiba than it would for a party represented by an attorney, or a party proceeding only under the "actual" or diagnosed prong of the ADA. The courts have presumed to become gatekeepers of the law that Congress intended to be very accessible for those with disabilities, with an intentionally low standard or threshold to invoke the court's jurisdiction and not this gauntlet of unfair conditions once again fabricated by federal courts.

People have a private property right to access the law and use it to protect other rights they have, and the federal courts have taken this right, intruded upon it, and trespassed upon it by impeding and frustrating access to justice, the sole means by which people can reach a remedy for damages to their property rights. The federal courts have no property rights over the law–their role is to provide access to the law and facilitate justice, not to own the law, and deny access to the law and justice. The law cannot be owned any more than mathematics can be owned, or any more than one person can own the thoughts of another. However, this describes very closely the manner in which the federal judges have conducted themselves, as if they own the law and as if they can ration it as they desire in the expression of their own passions and prejudice. This is far from the very least that can be expected of the courts: giving the appearance of justice. This conduct is insolent and defiant for the reason that the federal courts obtained their authority to function solely from the very people they are intended to serve.

Regarding defendant's "standard of review", Congress stated in 2008 that the main focus of the courts should be whether the employer is satisfying its obligations under the ADA. "...[I]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be *whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." (emphasis added).*[3] The standards in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) cannot be applied without consideration of Congressional intent for the ADA, especially since Congress had to amend the law in 2008 because this very Court had made decisions that countermanded the original intent of Congress and the law. It appears we are here once again, where the federal courts are attempting to create a higher threshold by their use of a legal fiction known as "implausible allegations". Congress specifically instructed courts to review the *liability* of the entity as the first order of business.

The novel application of a "plausibility" standard to *allegations* made by the plaintiff rather than to the *liability* of the defendant creates a higher threshold for those seeking relief and protection under the ADA than was intended by Congress. This is the same despicable conduct demonstrated in *Tennessee v. Lane*, 541 U.S. 509 (2004). In Kosiba's case, the District Court was not only participating in the same illegal policies as CHSI; it denied Kosiba access to the court, the law and

[3] 29 CFR Appendix to Part 1630 - Appendix to Part 1630–Interpretive Guidance on Title I of the Americans With Disabilities Act.

justice by allowing CHSI to simply deny that it discriminated and retaliated, rather than analyzing its compliance.

The trial court reviewed the complaint under a *distortion* of the standard pleading practice criteria. There is no basis for the court to presume that Kosiba has alleged falsehoods or that the defendant is not a covered entity. There is no basis for presuming Kosiba's allegations of his direct experience of being presumed to be a source of contagious disease are implausible considering he alleged the "COVID policy" measures as written and CHSI admitted the policy measures.

Furthermore, claims of: improper inquiries designed to assess a perceived disability; or non-job-related medical examinations and tests; or improper requests for disclosure of confidential medical information; or for retaliation may be brought by **any** applicant or employee, not just individuals with disabilities. See, e.g., *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 969-70 (8th Cir. 1999); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998).

The trial court should have first reviewed CHSI's response for any legally cognizable defense under the ADA, such as having conducted an individualized assessment to determine that plaintiff was a direct threat, or show that it had suffered an undue financial burden because of plaintiff's exercise of his rights under the ADA, or that his exercise of such rights would have fundamentally altered normal operations. The court never considered the fact that the defendant's policy

was not even related to plaintiff's essential job function. There is no basis for the District court to dismiss Kosiba's complaint at the pleading stage by allowing CHSI to claim the "transitory and minor" defense without benefit of an evidentiary hearing when it was clear that the new qualification standards were neither *transitory* nor *minor* and Kosiba never claimed he was infected with a contagious disease.

CHSI announced that employees who refused to be vaccinated by September 24, 2021 would be quarantined from the work environment via being taken off the schedule and refused admittance and then they would be terminated. In response to the threatened adverse action, on September 27, 2021, Kosiba sent a "Notice of Employment Discrimination and Retaliation Based Upon Disability" to CHSI's director of human resources. Kosiba claimed protected opposition status with this notice and he identified potential ADA violations. Kosiba informed CHSI that unless it could provide him with proof establishing that it had a legal duty of care to protect everyone from a known pathogen, and medical evidence showing he was a direct threat of contagious disease, that it's published intent to quarantine him and fire him was discriminatory. He further claimed that the new qualification standard was not "job-related". Kosiba declared in the notice that he was opting-out of the new qualification standard by claiming his rights protected under the ADA. CHSI refused to produce an assessment and refused to accept Kosiba's opt-out, and imposed adverse employment actions on him on the basis of his opposition to the

new qualification standards and for no other reason, as he alleged in his notice and in his complaint and supporting affidavit.

The Circuit Court provided no evidence to support it's claim that "Kosiba has not plausibly pleaded a connection between his invocations of the ADA and his termination." because Kosiba alleged the connection, CHSI has published the connection, and Kosiba exhibited his written notice claiming ADA violations responding to CHSI's published announcement.

The EEOC declared "the COVID pandemic meets the direct threat standard"[4]. Careful reading of the EEOC guidance shows that the EEOC stated: "...that a significant risk of substantial harm would be posed by having someone with COVID, or symptoms of it, present in the workplace at the current time." Clearly, the EEOC means that an individual diagnosed with "COVID" can be considered a "direct threat" as the CDC considers the disease to be a substantial risk. "An employee's ability to perform essential job functions will be impaired by a medical condition; or [a]n employee will pose a direct threat due to a medical condition."[5] Thus, the employee must be diagnosed as having the medical condition in order to establish direct threat.

CHSI never performed the required assessment, and never claimed that Kosiba was not performing his job functions, yet CHSI admittedly imposed a medical treatment upon Kosiba designed to mitigate the symptoms of "COVID" in

[4]"Pandemic Preparedness in the Workplace" EEOC guidance document from "Direct Threat" page 7.
[5]*Ibid* page 6.

the individual. These facts support Kosiba's allegations that he was *regarded as* a threat of contagious disease. CHSI effectively admits that it assumed everyone was a direct threat without any objective assessment because it admits imposing medical treatments and mitigation measures on all employees for a specific contagious disease.

CHSI's grandiose claim, although erroneous and hypothetical, that it was "preventing the spread of COVID", is not a legal defense to violating the ADA. Claiming there is a pandemic, is not a legal defense under the ADA. Neither is it a defense for CHSI to claim that "safety concerns" allowed CHSI to ignore established public health law, and federal statute.

B. The Supreme Court Has a Duty to Preserve the Status Quo and the Uniformity of the Laws

One of the functions of the Supreme Court is to preserve the uniformity of the laws and the status quo. Therefore, the Supreme Court has a duty to act which is one of the compelling reasons for review.

The District Court's decision, as affirmed by the Circuit Court, is disrupting the status quo by allowing mere guidelines and orders to overcome established laws. If the Supreme Court does not act it will be allowing the court system to both contradict established public health policy and to facilitate the improper changing of established public health policy to the detriment of everyone.

The Circuit Court affirmed improper actions by the District Court which results in up-ending public health policy which has protected people for over a century and, in fact, destroys it. The two rulings create: a) conflicts with state public health laws regarding due process and threat assessment; b) conflicts by allowing employers to improperly assume duties reserved to the Department of Health; c) conflicts with the statutory conditions set forth under "Emergency Use Authorization" guidelines, namely the right to informed consent and the right to refuse experimental treatments; d) conflicts with ADA requirements that the employer perform an individualized risk assessment as a pre-condition to treating an employee as a safety threat/direct threat; and e) conflicts with the ADA requirement that a new condition of employment must first be established as necessary to perform the essential functions of the job.

The Supreme Court produces and preserves a uniformity of decision through the whole judicial system. The District Court disregarded alleged facts and allowed an unproven defense to shut down the case at the pleading stage. The Circuit court disregarded alleged facts, failed to perform a proper review of the claims, applied incorrect legal standards, and maintained that its affirmation of the District Court's ruling did not set a precedent and consequently it is not binding. The Supreme Court has a duty to act because the lower courts are adopting different and contradictory rules of decision; and by doing so, they are leaving the citizens without remedy and without justice.

The Circuit court affirmed that 1) requiring non-job-related medical treatments, without pre-requisite authority, does not violate the ADA; while simultaneously 2) failing to find the sufficiently alleged connection between the adverse actions and Kosiba's opposition to the new qualification standards despite the nexus of Kosiba's written notice and CHSI's published announcement. CHSI admits it adopted new qualification standards which imposed injectable treatment measures on all employees which sufficiently demonstrates that CHSI considered all employees as active risks of infection.

The Circuit court relied heavily on one case and cited dicta from *Sharikov v. Philips Med. Sys. MR, Inc.*, No. 23-407, 2024 WL 2820927, (2d Cir. June 4, 2024) which stated that "To be regarded as having a disability, however, 'one must be perceived as different from most people in the general population.'"[6] This is completely false. The legal standard for making a claim under the *regarded as* prong is showing that adverse employment actions were taken against the claimant on the basis of perceived impairment, and it falls under the category of "non-accommodation claims".

The fact that CHSI does not rely on a diagnosis to impose medical treatments shows that CHSI has identified a "perceived impairment". The fact that CHSI published its intent to first quarantine and then terminate any current employee that does not receive the medical treatment, demonstrates that the qualification standard is not related to performing essential job functions. The fact that Kosiba

[6]*Summary Order and Mandate* page 3.

was terminated for not meeting a qualification standard he was challenging for ADA violations; and CHSI knew that he had filed an EEOC complaint, but fired him anyway, shows he was fired for protected opposition.

In order for CHSI to compliantly exclude Kosiba from the workplace because of posing a "direct threat" CHSI must make "an individualized assessment of the individual's present ability" to safely perform his job, based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." as outlined in 42 U.S.C. §§12111(3), 12113(a), (b); 29 C.F.R. §1630.15(b)(2), §1630.2(r). CHSI refused to fulfill this condition. In order to compliantly fire an employee engaged in protected opposition, CHSI should have waited until the EEOC ruled.

C. This Is a Case of First Impression

Many of the facts and circumstances in Kosiba's complaint and appeal are unprecedented and are enumerated by the following:

1. CHSI adopted a policy that instigated and provoked discrimination and retaliation for perceived disability and it is Kosiba's sincere belief that this is unprecedented.

As the Supreme Court has observed, these protections are particularly necessary to guard employees against misperceptions regarding communicable

diseases, given that "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness." *Arline*, 480 U.S. at 284.

Mr. Kosiba is proceeding under the prongs that specifically have no requirement to request any "accommodation" because (1) the disability is not assessed (diagnosed/"actual"); (2) no provision of the appellee's "COVID policy" was related to appellant's essential job function; (3) the qualification standards themselves constituted adverse actions; and (4) Kosiba was not allowed to opt-out of the qualification standards based on claiming the protection of the ADA-AA. Again, these facts are unprecedented.

2. Moreover, the facts giving rise to the complaint include the unprecedented situation where the government has declared a public health emergency in which every single American is regarded as a direct threat of carrying a contagious disease by the name "COVID". This outrageous presumption was made without requiring evidence that any specific individual had such contagious disease and without any physical evidence of the existence of such a public health emergency. In fact, even the government's official records from the medical examiner to the coroner to the Department of Health, have no evidence of the existence of such a public health emergency and no evidence of any commensurate change in the mortality or morbidity rates in any jurisdiction. We have only a declaration of it, without any evidence. A covered entity, like CHSI, is required to have a reasonable, individualized, objective basis to make such a declaration about an employee. This

focus on reasonableness and individualized inquiry is particularly necessary to combat the myth-based hysteria that can accompany well-publicized but misunderstood outbreaks of disease. *Arline,* 480 U.S. at 284-85. Despite the ensuing hysteria, no public health emergency declaration created any new legal duty or legal authority for any of these "COVID policies" or nullified any laws. Again, the backdrop of hysteria mixed with a lack of proper procedure is unprecedented.

3. By its enactment of the ADA-AA, Congress made important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes was to make it easier for an individual seeking protection under the ADA to establish coverage.

As a result of the Supreme Court's pre-2008 interpretations, it had become difficult for individuals to establish coverage under the "regarded as" prong. Under the revised ADA-AA, the focus for establishing coverage under the regarded as prong, analyzes how a person has been **treated** because of a perceived difference rather than on quantifying what an employer may have believed about the **limiting nature** of the person's perceived impairment.

The federal court has once again sought to countermand the intent of Congress by imposing superfluous conditions on pleadings by inventing new legal concepts such as: "fails to plausibly allege"; refusing to analyze the defendant's response and legal defense to claims of ADA violations by statutory standards; and

erroneously elevating mere website commentary (EEOC, CDC) as some sort of new legal authority which lawfully imposed a new legal duty on the parties; thereby and once again attempting to defeat the intent of Congress.

4. Attorneys lack the training and willingness to represent plaintiffs in these types of cases; specifically, no attorney would agree to represent the appellant in this matter. Appellant was unable to find an attorney who was even competent in this area of law; and yet, he is being held to a higher legal standard than any bar member and the court has frustrated appellant's access to the law by acting as its gatekeeper or owner.

5. There has never been a situation where the court has adopted and implemented the same illegal policies as the defendant, the same "COVID policies", which gave rise to the complaint. Both the District and Appellate Courts refused to explain themselves or acknowledge this conflict. Kosiba twice requested to have a Special Master trained in ADA matters present to assist the District court in this case, but his motions were denied. The conflict has expressed itself in several ways, one of which involves federal judges who have been intervening, intruding upon, and frustrating access to the court for plaintiffs who are attempting to sue their employers for ADA violations, including Mr. Kosiba.

6. The policies and practices of CHSI, which gave rise to the complaint, specifically exclude and ignore having any provisions for employees (1) to opt-out of non-job-related qualification standards; (2) to claim the protection of the ADA while

engaged in good-faith opposition; when their employer suddenly regards every employee as a threat of the same contagious disease. Despite CHSI disingenuously denying that it regarded any employee as having a perceived disability (hypothetically infected/contagious with specific disease); this set of facts is apparent on the face of the employer's policy which seeks to involuntarily impose medical treatments upon each employee as if they are a direct threat of a contagious disease.

While it is not relevant whether or not any specific person, including the employer, admits to regarding an employee as having a disability, the courts and the defendant ignore the fact that, by virtue of the government's announcement of a public health emergency, every employee was presumed to be a spreader of deadly contagion. In the language of the ADA, this is a perceived disability. The CHSI "COVID policy" was clearly based upon this premise.

Moreover, CHSI failed to provide any designated representative to competently respond to disability discrimination and retaliation complaints. In fact, the CHSI employees who would normally have this designation, are the very ones perpetuating the discriminatory violations (e.g., human resources). Again, this is unprecedented.

7. The "Emergency Use Authorization" or EUA period, establishes that any medical treatments, such as "mask wearing" (for the novel purpose of containing the wearer's viral particles), or "COVID testing" (which does not yield a *bona fide*

diagnosis of "COVID" despite positive results mistakenly being called "cases"), or the novel mRNA "vaccines" (which do not prevent infection or transmission but are only advertised to lessen severity of symptoms for the user) are all clinical trials and epidemiological experiments, none of which have been **approved** by the Food and Drug Administration and are therefore, not *bona fide* "vaccines", tests or medical treatments. Moreover, the pharmaceutical companies disclaim all liability for their experimental "vaccines" and the United States has indemnified the same pharmaceutical companies from having any liability for the manufacture, sale, or distribution of these experimental "vaccines". Courts must enforce the EUA.

8. The published and intended function of the Department of Health has been unlawfully circumvented and replaced by an association of private businesses and employers, thereby denying employees the protections normally afforded by public health policy, which places the burden of proof on the Department of Health. In the case of an employer circumventing this authority, the burden of proof is unfairly shifted to the employee, and they are made to suffer the adverse employment action of enduring new exclusionary qualification standards that are unrelated to performing job duties while having no redress to a retaliatory policy which fully intends to eliminate anyone who attempts to claim their rights which then leads to having to incur the unfair burden of trying to seek a remedy in the courts against an employer.

9. The Circuit Court erroneously determined that Kosiba failed to sufficiently plead that the new qualification standards were discriminatory and constituted prohibited actions. The Circuit court cited *Sharikov* in support of this finding. Both the *Sharikov* plaintiff and Kosiba alleged that once they objected to potential violations (engaged in protected opposition), they were met with several adverse employment actions. The legal pleading standard for determining discrimination claims brought under the *regarded as* prong under the ADA is whether adverse actions were applied once the employee claimed violations of the ADA were occuring. In 2008, the ADA-AA removed any requirement for showing "substantial limitation" from regarded as claims. The Second Circuit in the *Sharikov* case relied on incorrect legal standards and then multiplied its error by fixing them to Kosiba's case.

Kosiba alleged the provisions of CHSI's "COVID policy"; and the policy describes the medical treatments sought to be involuntarily imposed. These newly enacted qualification standards are *prohibited* because they did not meet certain statutory pre-conditions, ie; they must be job-related and they must be shown to be a business necessity by virtue of an assessment being performed. Additionally, Kosiba, who opposed the new qualification standards in good faith opposition under the protection of the ADA, suffered *adverse employment actions* triggered by his opposition. The causal relationship between the qualification standards and the adverse actions is written into the policy and was fully alleged by Kosiba. However,

the Court disingenuously claimed that the pleading failed to describe relationship between the two.

The Circuit court refused to properly analyze whether the new qualification standards[7] were *prohibited actions*[8] since they were neither *job-related* nor a *business necessity* due to a conclusive *direct threat* assessment. The Circuit court allowed CHSI to nakedly claim Kosiba was fired for insubordination because he failed to "comply with a company-wide vaccine policy"[9]. The Circuit court allowed CHSI's unlikely excuse to take precedence over Kosiba's alleged facts at the pleading stage without conducting discovery or an evidentiary hearing. The Court ignored that CHSI coerced Kosiba to comply under duress, with threats of termination and loss of benefits, while interfering with his protected rights; which are all adverse actions.

10. Kosiba provided sufficient written notice that he was "exempting" himself from the new qualification standards under the protection and guidelines of the ADA, however CHSI refused to accept it. The so-called medical/religious "exemptions" CHSI pretended to accept do not allow the employee to work. Appellee's purpose in offering these was to give the appearance of fairness while misleading an employee into a dead-end path where he has no legally enforceable rights.

[7]See Appd'x 1 for CFR 1630.2 (g) which outlines the conditions under which employers are allowed to designate medical treatments (ie; face masks, COVID drugs, unpaid quarantines), and tests (ie; temperature checks, symptom surveys, "COVID tests") as qualification standards for employment.
[8]See Appnd'x 1 CFR 1630.2 (l) which provides a short, non-exhaustive list of prohibited actions.
[9]*Summary Order and Mandate* page 5.

11. The court and employers (defendant) are receiving compensation for participating in the "pandemic" scheme and have an ulterior motive beyond the noble-sounding claim of "preventing the spread of COVID". None of them have any concern about protecting anyone, especially in view of the fact that no one has any financial responsibility for "preventing the spread of COVID", nor any financial responsibility for any adverse health consequences suffered by any employee who complies with the experimental medical treatments, nor can any employee state a cause of action against an employer for having contracted "COVID" at work because it would be impossible to establish proximate cause.

It is not even possible to "prevent the spread of COVID", because there are no controlled environments by which such a task could be managed, and employers such as CHSI have no competence or qualifications for such an undertaking.

Likewise, an employee who participates in the experimental medical treatments of the "COVID policy" is not able to state a cause of action against his employer for suffering any adverse health consequences thereby, for the simple reason that there was no legal duty to impose such a policy, there was no legal authority to impose such a policy and the policy was not legally binding upon either the employer or the employee.

12. The employer's policy, along with the government's, is disproportionately applied to different groups of employees. CHSI's "COVID policy" fails to recognize employees claiming the protection of the ADA, which demonstrates discrimination.

Second, the policy failed to: (1) identify any designated representative or employee to assist those claiming ADA violations; (2) provide any means of appeal or review of the employer's actions; and (3) provide conspicuous notice describing the manner in which the policy relates to any employee's essential job function.

The "COVID policy" applied adverse actions *disproportionately* to those who opposed the policy in good faith, by objecting to non-job-related qualification standards, than it did to those employees who participated, by taking the injected treatments. This demonstrates that good faith opposition is penalized and retaliated against.

D. Everyone Is Implausibly Regarded as Being Infected with "COVID"

A contagious disease is defined by the ADA as one type of disability. The moment the President announced a public health emergency on January 31, 2020, specifically for "COVID", everyone in the entire nation was suddenly regarded as infected or likely to become infected, with such a disease. All of the states, counties, cities, towns, and government agencies began making the same proclamation. It was based on the exceedingly implausible premise that three-hundred thirty million people could suddenly become infected with or be at risk of incurring the same exact illness within a short period of time, and this situation would continue for over two years, however, this is the premise of the emergency declarations and of the COVID policy.

Kosiba simply stated the fact that CHSI's "COVID policy", with the stated purpose of "preventing the spread of COVID", is based upon the presumption that every employee is currently a risk of contagion. The District Court invented the legal fiction of "implausible allegations" and determined Kosiba's complaint failed to state a cause of action. This Court must acknowledge that it is the "COVID policy" itself which is implausible, not Kosiba's experiences of discrimination because of it.

Denying that plaintiff is currently regarded as disabled (by the government, the CDC, his employer) is not a legal defense to allegations of ADA violations. The court invented the legal fiction that plaintiff's complaint did not state a cause of action because it is "not plausible" to allege that everyone is regarded as a threat of contagious disease ("perceived disability"), when in fact, this is the very premise of all government proclamations and every single employer's "COVID policy", including the court's.

The entire "pandemic" artifice rests upon the ridiculous and implausible presumption that everyone has incurred the same exact disability, or will imminently incur such a disability, and that everyone should be treated according to a corporate policy published as a "guideline" by the CDC.

A corporate policy is not a *bona fide* medical diagnosis. The policy is **intended** to be imposed without any *bona fide* medical diagnosis and by circumventing the legislative process and the authority of the Departments of Health, at the federal, state and county levels and thereby, circumventing judicial

oversight and denying everyone his right to due process based upon evidence. Kosiba's due process rights (including but not limited to medical privacy and informed consent) are squarely rooted in *29 CFR Part 1630.9(d)* and when he exercised them, he was retaliated against.

E. The Policy Contravenes a Century of Public Health Policy

When has it been necessary for one person to undertake a medical treatment in order to prevent illness in another person? This is the ridiculous, asinine, and illogical premise behind the "COVID policies" adopted and imposed by nearly every employer in the country, including this very Court.

The "COVID policy" imposed by the CHSI contravenes long-standing public health policy and ironically, the CDC publishes a list of bench books advising judges on the correct public health policy. These bench books establish that it is only the state legislature which can establish a legal duty to impose medical interventions, which are subject to judicial oversight based upon medical evidence. This power cannot be delegated but can only be exercised by the Department of Health, not private businesses and certainly not by a private employer.

It is long-standing public health policy, that the only way to unilaterally impose any medical intervention or mitigation measure on people is by judicial review and approval based upon the affidavit of a physician who conducted a *bona fide* medical examination of an individual with his informed consent; and having

diagnosed the contagious disease, then provided an affidavit to the local public health officer. The public health officer could then petition the court to impose isolation or quarantine measures against the individual. Appellee's policy fails to comply with any of this public health policy[10]; in fact, it is clearly **intended** to violate, circumvent, and abolish these long-standing public health policies.

Since when did the mere announcement of a contagious disease create any new legal duties and new legal authorities to violate the rights of people and create new and negligent public health risks? The mere proclamation of a "deadly contagious disease" did not suddenly change hundreds of years of public health policy or the intangible private property rights of anyone, or suddenly create any new legal duty or legal authority for anyone to implement or impose the "COVID policies".

F. The Policy Is Negligent and Has Created a Public Health Disaster

CHSI's implementation of its illegal and negligent "COVID policy" created the dangerous condition involving the involuntary imposition of the exact same experimental medical treatments on everyone without any *bona fide* diagnosis or assessment of contraindications, without judicial oversight, without any physician's

[10]As it pertains specifically to Mr. Kosiba, CHSI contravenes long-standing public health policy expressed under New York Public Health Law Articles 21-23 and NYCRR Chapter 1 Volume 10 and its counterpart in NYC Rules in Title 24. Only Department of Health officers may impose treatments under condition of a diagnosis first, obtaining a court order and observing the patient's right to heard. See New York State Public Health Legal Manual, New York State Bar (2011) available at: https://nysba.org/app/uploads/2020/04/New-York-State-Public-Health-Legal-Manual-2nd-Ed-417920E.pdf.

oversight, without any financial responsibility and in violation of each employee's medical privacy rights and rights to informed consent.

The policy is arbitrary, irrational, and unreasonable because it was based on the implausible scenario that every employee suddenly had become infected with the same exact deadly contagious disease within the same time period.

When did it cease to be *negligent* for laymen with no financial responsibility or professional accountability to impose involuntary medical treatments, that are not the result of a competent and qualified medical examination, but merely the policy of a corporation?

Why was the responsive policy so carelessly and negligently implemented? It excludes any provision for those claiming ADA protection, it failed to review applicable ADA provisions; and it penalizes anyone who questions the policy. Further, just like shouting "fire" in a crowded theater, CHSI's "COVID policy" instilled fear, anxiety, and apprehension in every employee such that every time an employee had a cough or a symptom of the common cold, he believed he was not only going to die a horrible death but that he would infect other employees with the same demise. This created a very hostile and antagonistic working environment, especially between those who believed the COVID hysteria or felt compelled to comply to keep their job and those who either were not concerned due to assessing their age and health condition or who did not agree with CHSI's policy overreach.

CHSI's "COVID policy" fails to address the screaming reality that neither CHSI, nor any scientific principles known to mankind at this time, has the ability to establish the proximate cause behind any employee becoming infected with "COVID". CHSI's negligent "COVID policy" fails to address the very obvious reality that each employee ends his shift and leaves the premises and is free to roam about the town or travel to faraway lands and engage with unknown and unidentifiable "risks" or "infected people", and then return to his job to begin his next shift. It is by this fact alone that CHSI, no matter what its policies are, is wholly unable to "prevent the spread of COVID" by any stretch of the imagination, even if such a risk did exist.

How then is it reasonable or equitable to punish any employee for refusing to participate in such a policy? The policy is completely useless simply because CHSI cannot control any employee's environment every moment of the day, whether at work or away.

G. The Policy Imposes Involuntary Experimental Medical Treatments without Notice, Due Process, FDA Approval, or Informed Consent

Every medical treatment and test in the policy is under Emergency Use Authorization ("EUA")[11] guidelines and is classified as a clinical trial or epidemiological experiment. CHSI has not obtained FDA approval to conduct clinical trials, nor has it obtained the informed consent of anyone affected by the

[11] The Emergency Use Authorization period announced by the Food and Drug Administration continues to this day.

policy. Although the COVID injectable treatments were marketed as "vaccines" they do not confer immunity or prevent transmission, rather the makers claim they lessen symptoms for the user if they contract "COVID" . Additionally, there cannot be any *bona fide* "vaccines" during an EUA period because any medical intervention is a clinical trial by definition, and not an FDA-approved medical treatment ("authorized" is not "approved").

Every medical intervention that is being administered under the EUA scheme is purely experimental and those participating in them are doing so at their own risk. However, this has not been disclosed by CHSI or any government authority, including the Department of Health which is tacitly participating and overtly facilitating.[12]

CHSI refused to inform any employee that its "COVID policy" is a clinical trial and that each person submitting to its provisions is a test subject. Mr. Kosiba asked his employer, in his written notice, for a risk/benefit analysis necessary for informed consent and to receive the EUA disclaimer sheet for each treatment or test CHSI imposed; CHSI failed to give him such information. This violates Title 21 of the Code of Federal Regulations, "Food and Drugs", Part 50.20. No one, including Mr. Kosiba, has been given the opportunity to decide whether to consent to this medical experiment free of any element of force, fraud, deceit, duress, coercion, or undue influence. No one, including Mr. Kosiba, is required to become the subject in

[12] Using the same terms from the most recent table-top exercise known as "Event 201" that preceded the January 31, 2020, announcement of the now, live-action role-playing event.

any epidemiological experiment. Mr. Kosiba's rights to informed consent and medical privacy, his right to refuse any medical treatment, is squarely rooted in *29 CFR Part 1630.9(d)* which CHSI has a legal duty to uphold.

H. More Nearly Identical Cases Are Moving Toward the Supreme Court

According to the Public Access to Court Electronic Records ("PACER"), there are more than a dozen similar cases making their way to the Supreme Court, and if not for the interference of federal judges frustrating plaintiffs' access to the court there would be many more still making their way to the Supreme Court. This does not consider the thousands of plaintiffs who could have and should have made their claims but were too intimidated by the legal process or unable to learn the process quickly enough or find a competent and willing attorney or could afford a protracted case or were simply frustrated and exhausted as was intended.

I. Budgeted for the Future and a Trillion Dollar Market Cap

There is no end in sight for this "pandemic" scheme, it will continue perpetually, and it is intended to continue perpetually because the banking system has made it profitable to engage in these policies. In its first year, the "pandemic" had a market cap in the billions of dollars, and it is an aspect of the "climate change" agenda, an entirely different scheme that is beyond the scope of this brief. The "pandemic" is a profitable business enterprise for the pharmaceutical companies, governments, and those involved with the collection of data such as medical, biographical, biometric, and other surveillance data collected from online

"contact tracing", "vaccine tracking", and "COVID testing" online portals. The repositories for this human data include the university system, specifically Johns Hopkins University.

The Global Preparedness Monitoring Board ("GPMB") includes the World Bank and the World Health Organization (a military operation), and the plan is to provide funding for nations which participate in future schemes. This is explained in hundreds of publications, but see "A World at Risk-- Annual report on global preparedness for health emergencies", September 2019[13]. Please also review the GPMB's "Six solutions for a safe world in 2022"[14], summarized by the following agenda:

> 1. Strengthen global governance; adopt an international agreement on health emergency preparedness and response and convene a Summit of Heads of State and Government, together with other stakeholders, on health emergency preparedness and response.
> 2. Build a strong WHO with greater resources, authority, and accountability.
> 3. Create an agile health emergency system that can deliver on equity through better information sharing and an end-to-end mechanism for research, development, and equitable access to common goods.
> 4. Establish a collective financing mechanism for preparedness to ensure more sustainable, predictable, flexible, and scalable financing.
> 5. Empower communities and ensure engagement of civil society and the private sector.
> 6. Strengthen independent monitoring and mutual accountability.

This is a banking and military operation that some very evil groups of people intend to thrust upon the entire world's population, and they do not appear to be going away any time soon. The "COVID pandemic" was just another test in a long

[13] Available at: https://www.gpmb.org/annual-reports/annual-report-2019.
[14] Available at: https://www.gpmb.org/news/news/item/14-02-2022-gpmb-calls-for-a-renewed-global-commitment-to-six-solutions-for-a-safer-world-in-2022.

series of trials that have been taking place for decades. See "From Worlds Apart to a World Prepared, GPMB Report" | 2021[15].

As of October 16, 2020, Congress has enacted four emergency supplemental funding bills to address the "COVID" pandemic, which collectively provide almost $3.2 billion for the global response. Of this amount, approximately $2.4 billion (75%) was designated for country, regional, and worldwide programming efforts through the State Department ($350 million), the U.S. Agency for International Development ($1.24 billion), and the CDC ($800 million); the remainder was for operating expenses. We examined the status of global "COVID" country, regional, and worldwide funding to assess how much has been committed to date and where it has been directed. See *U.S. Global Funding for COVID by Country and Region: An Analysis of USAID Data, June 29, 2022*, published by Kaiser Family Foundation.[16]

Countries that are evolving their "COVID" pandemic response into longer term investments to strengthen systems for health and pandemic preparedness can consider applying for C19RM Portfolio Optimization (PO) Wave 2. This is a process that allows countries to receive additional C19RM funds and align investments with revised priorities. Eligible Country Coordinating Mechanisms (CCMs) have received

[15] Available at: https://www.gpmb.org/annual-reports/annual-report-2021.
[16]https://www.kff.org/global-health-policy/issue-brief/u-s-global-funding-for-COVID-by-country-and-region-an-analysis-of-usaid-data/

letters with instructions on how to apply for funding. See *The Global Fund (theglobalfund.org) February 9th, 2023*[17].

The news is endless. See, *The Pandemic Fund Announces First Round of Funding to Help Countries Build Resilience to Future Pandemics*[18].

> "Washington, Feb. 3, 2023 — The Pandemic Fund Governing Board approved $300 million in financing for its first round of funding to help developing countries better prepare for and respond to future pandemics. The Fund is also inviting interested eligible countries and Implementing Entities to submit Expressions of Interest (EOI) for potential projects to be supported by this initial funding".

This scheme is funded for many years to come, please also see *COVID World Bank Emergency Response: Projects Repository*.[19]

> This was published by Artemis in **2017**:
>
> "Swedish state sector pension fund AP3 was one of the lead investors behind the recent World Bank issuance of $320 million of pandemic catastrophe bonds that support the Pandemic Emergency Financing Facility (PEF).
>
> The World Bank's International Bank for Reconstruction and Development issued $320 million of IBRD CAR 111-112 capital at risk notes, which will offer coverage to developing countries against the risk of pandemic outbreaks across the next five years."

[17] Available at: https://www.theglobalfund.org/en/updates/2023/2023-02-09-additional-funding-from-c19rm-and-the-new-pandemic-fund/.

[18] Available at: https://www.worldbank.org/en/news/press-release/2023/02/03/the-pandemic-fund-announces-first-round-of-funding-to-help-countries-build-resilience-to-future-pandemics#:~:text=3%2C%202023%20%E2%80%94%20The%20Pandemic%20Fund,and%20respond%20to%20future%20pandemics.

[19] Please consult: https://docs.google.com/spreadsheets/d/1416zufQFM7IY9OvHufmOmeF0jiQTT7V7jAlPg3Iqe9Q/edit#gid=0.

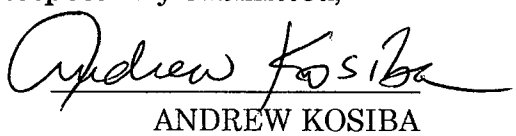
The "pandemic" is the business of the world banking system and the world military (United Nations and World Health Organization). The United States Supreme Court is in a unique position to protect employees from this diabolical scheme and set an example for the world.

XIII. CONCLUSION

This Court should grant certiorari to review the Second Circuit's summary order and mandate.

DATED this 20th day of September, 2024.

Respectfully submitted,



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XIV. APPENDICES

Appendix 1. Text of Statutory Provisions Involved

28 U.S. Code § 2101(c)

28 U.S. Code § 2101 – Supreme Court; time for appeal or certiorari; docketing; stay
(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S. Code § 1331

28 U.S. Code § 1331 - Federal question
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S. Code § 12102 (1)

42 U.S. Code § 12102 - Definition of disability
(1) DISABILITY
The term "disability" means, with respect to an individual—
(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment (as described in paragraph (3)).
(3) Regarded as having such an impairment For purposes of paragraph (1)(C):
(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S. Code §12112

42 U.S. Code § 12112 –Discrimination
(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION
As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
(3) utilizing standards, criteria, or methods of administration—
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to common administrative control;
(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

(d) Medical examinations and inquiries
(1) In general:

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(4) Examination and inquiry
(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

42 U.S. Code § 12113– Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

29 CFR 1630.2 Definitions.

§ 1630.2(g)
(g) ***Definition of "disability"*** —

(1) ***In general. Disability*** means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(ii) A record of such an impairment; or
(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

§ 1630.2(k) Has a record of such an impairment
(1) In general. An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

§ 1630.2 (l) Is regarded as having such an impairment.
The following principles apply under the "regarded as" prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on

involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

29 CFR 1630.14(d)(2) Definition of "Voluntary"

Section 1630.14(d)(2)(i) through (iii) of this part says that participation in employee health programs that include disability-related inquiries or medical examinations (such as disability-related inquiries or medical examinations that are part of a HRA) must be voluntary in order to comply with the ADA. This means that covered entities may not require employees to participate in such programs, may not deny employees access to health coverage under any of their group health plans or particular benefits packages within a group health plan for non-participation, may not limit coverage under their health plans for such employees, except to the extent the limitation (e.g., having to pay a higher deductible) may be the result of forgoing a financial incentive permissible under § 1630.14(d)(3), and may not take any other adverse action against employees who choose not to answer disability-related inquiries or undergo medical examinations. Additionally, covered entities may not retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of Section 503 of the ADA, codified at 42 U.S.C. 12203. For example, an employer may not retaliate against an employee who declines to participate in a health program or files a charge with the EEOC concerning the program, may not coerce an employee into participating in a health program or into giving the employer access to medical information collected as part of the program, and may not threaten an employee with discipline if the employee does not participate in a health program. See 42 U.S.C. 12203(a),(b); 29 CFR 1630.12.

Title 24 Department of Health and Mental Hygeine
Chapter: New York City Health Code
Title II. Control of Disease
Article 11: Reportable Diseases and Conditions
§ 11.23 Removal and Detention of Cases, Contacts and Carriers Who Are or May Be a Danger to Public Health; Other Orders.

(a)Upon determining by clear and convincing evidence that the health of others is or may be endangered by a case, contact or carrier, or suspected case, contact or carrier of a contagious disease that, in the opinion of the Commissioner, may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality, the Commissioner may order the removal and/or

detention of such a person or of a group of such persons by issuing a single order, identifying such persons either by name or by a reasonably specific description of the individuals or group being detained. Such person or group of persons shall be detained in a medical facility or other appropriate facility or premises designated by the Commissioner and complying with subdivision (d) of this section.
(b)A person or group removed or detained by order of the Commissioner pursuant to subdivision (a) of this section shall be detained for such period and in such manner as the Department may direct in accordance with this section.
(c)Notwithstanding any inconsistent provision of this section:
(1)A confirmed case or a carrier who is detained pursuant to subdivision (a) of this section shall not continue to be detained after the Department determines that such person is no longer contagious.
(2)A suspected case or suspected carrier who is detained pursuant to subdivision (a) of this section shall not continue to be detained after the Department determines, with the exercise of due diligence, that such person is not infected with or has not been exposed to such a disease, or if infected with or exposed to such a disease, no longer is or will become contagious.
(3)A person who is detained pursuant to subdivision (a) of this section as a contact of a confirmed case or a carrier shall not continue to be detained after the Department determines that the person is not infected with the disease or that such contact no longer presents a potential danger to the health of others.
(4)A person who is detained pursuant to subdivision (a) of this section as a contact of a suspected case shall not continue to be detained:
(i)after the Department determines, with the exercise of due diligence, that the suspected case was not infected with such a disease, or was not contagious at the time the contact was exposed to such individual; or
(ii)after the Department determines that the contact no longer presents a potential danger to the health of others.
(d)A person who is detained pursuant to subdivision (a) of this section shall, as is appropriate to the circumstances:
(1)have his or her medical condition and needs assessed and addressed on a regular basis, and
(2)be detained in a manner that is consistent with recognized isolation and infection control principles in order to minimize the likelihood of transmission of infection to such person and to others.
(e)When a person or group is ordered to be detained pursuant to subdivision (a) of this section for a period not exceeding three (3) business days, such person or member of such group shall, upon request, be afforded an opportunity to be heard. If a person or group detained pursuant to subdivision (a) and this subdivision needs to be detained beyond three (3) business days, they shall be provided with an additional Commissioner's order pursuant to subdivisions (f) and (g) of this section.
(f)When a person or group is ordered to be detained pursuant to subdivision (a) of this section for a period exceeding three (3) business days, and such person or member of such group requests release, the Commissioner shall make an

application for a court order authorizing such detention within three (3) business days after such request by the end of the first business day following such Saturday, Sunday, or legal holiday, which application shall include a request for an expedited hearing. After any such request for release, detention shall not continue for more than five (5) business days in the absence of a court order authorizing detention. Notwithstanding the foregoing provisions, in no event shall any person be detained for more than sixty (60) days without a court order authorizing such detention. The Commissioner shall seek further court review of such detention within ninety (90) days following the initial court order authorizing detention and thereafter within ninety (90) days of each subsequent court review. In any court proceeding to enforce a Commissioner's order for the removal or detention of a person or group issued pursuant to this subdivision or for review of the continued detention of a person or group, the Commissioner shall prove the particularized circumstances constituting the necessity for such detention by clear and convincing evidence.

(g) (1) A copy of any detention order of the Commissioner issued pursuant to subdivision (a) of this section shall be given to each detained individual; however, if the order applies to a group of individuals and it is impractical to provide individual copies, it may be posted in a conspicuous place in the detention premises. Any detention order of the Commissioner issued pursuant to subdivision (a) of this section shall set forth:

(i) the purpose of the detention and the legal authority under which the order is issued, including the particular sections of this article or other law or regulation;

(ii) a description of the circumstances and/or behavior of the detained person or group constituting the basis for the issuance of the order;

(iii) the less restrictive alternatives that were attempted and were unsuccessful and/or the less restrictive alternatives that were considered and rejected, and the reasons such alternatives were rejected;

(iv) a notice advising the person or group being detained that they have a right to request release from detention, and including instructions on how such request shall be made;

(v) a notice advising the person or group being detained that they have a right to be represented by legal counsel and that upon request of such person or group access to counsel will be facilitated to the extent feasible under the circumstances; and

(vi) a notice advising the person or group being detained that they may supply the addresses and/or telephone numbers of friends and/or relatives to receive notification of the person's detention, and that the Department shall, at the detained person's request and to the extent feasible, provide notice to a reasonable number of such people that the person is being detained.

(2) In addition, an order issued pursuant to subdivisions (a) and (f) of this section, requiring the detention of a person or group for a period exceeding three (3) business days, shall:

(I) advise the person or group being detained that the detention shall not continue for more than five (5) business days after a request for release has been made in the absence of a court order authorizing such detention;

(ii) advise the person or group being detained that, whether or not they request release from detention, the Commissioner must obtain a court order authorizing detention within sixty (60) days following the commencement of detention and thereafter must further seek court review of the detention within ninety (90) days of such court order and within ninety (90) days of each subsequent court review; and
(iii) advise the person or group being detained that they have the right to request that legal counsel be provided, that upon such request counsel shall be provided if and to the extent possible under the circumstances, and that if counsel is so provided, that such counsel will be notified that the person or group has requested legal representation.
(h) A person who is detained in a medical facility, or other appropriate facility or premises, shall not conduct himself or herself in a disorderly manner, and shall not leave or attempt to leave such facility or premises until he or she is discharged pursuant to this section.
(I) Where necessary and feasible under the circumstances, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided.
(j)The provisions of this section shall not apply to the issuance of orders pursuant to 24 RCNY Health Code § 11.21.
(k)In addition to the removal or detention orders referred to in subdivision (a) of this section, and without affecting or limiting any other authority that the Commissioner may otherwise have, the Commissioner may, in his or her discretion, issue and seek enforcement of any other orders that he or she determines are necessary or appropriate to prevent dissemination or transmission of contagious diseases or other illnesses that may pose a threat to the public health including, but not limited to, orders requiring any person or persons who are not in the custody of the Department to be excluded; to remain isolated or quarantined at home or at a premises of such person's choice that is acceptable to the Department and under such conditions and for such period as will prevent transmission of the contagious disease or other illness; to require the testing or medical examination of persons who may have been exposed to or infected by a contagious disease or who may have been exposed to or contaminated with dangerous amounts of radioactive materials or toxic chemicals; to require an individual who has been exposed to or infected by a contagious disease to complete an appropriate, prescribed course of treatment, preventive medication or vaccination, including directly observed therapy to treat the disease and follow infection control provisions for the disease; or to require an individual who has been contaminated with dangerous amounts of radioactive materials or toxic chemicals such that said individual may present a danger to others, to undergo decontamination procedures deemed necessary by the Department. Such person or persons shall, upon request, be afforded an opportunity to be heard, but the provisions of subdivisions (a) through (j) of this section shall not otherwise apply.
(l)The provisions of this section shall not be construed to permit or require the forcible administration of any medication without a prior court order.

MANDATE

23-6 Kosiba v. Cath. Health Sys. of Long Island

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of June, two thousand twenty-four.

PRESENT:

MICHAEL H. PARK,
EUNICE C. LEE,
SARAH A. L. MERRIAM,
Circuit Judges.

Andrew Kosiba,

Plaintiff-Appellant,

v. **23-6**

Catholic Health Systems of Long Island, Inc.,

Defendant-Appellee.

FOR PLAINTIFF-APPELLANT: Andrew Kosiba, pro se, South Setauket, NY.

FOR DEFENDANT-APPELLEE: Daniel J. Palermo, Roy W. Breitenbach, Harris Beach PLLC, Pittsford, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Brown, *J.*).

MANDATE ISSUED ON 07/16/2024

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Andrew Kosiba, proceeding pro se, filed suit under the Americans with Disabilities Act (ADA) against his former employer, Catholic Health Systems of Long Island, Inc. (CHSLI). Kosiba alleges that he was discriminated against based on a perceived disability for refusing to comply with COVID testing and vaccination requirements, and was fired after filing a complaint based on his perceived disability. The district court adopted the magistrate judge's report and recommendation, dismissed Kosiba's second amended complaint for failure to state a claim for ADA discrimination or retaliation, and denied further leave to amend. Kosiba moved to set aside or vacate the district court's orders and, when that motion was denied, he timely appealed. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a dismissal for failure to state a claim de novo. *See Vengalattore v. Cornell Univ.*, 36 F.4th 87, 101 (2d Cir. 2022). We accept Kosiba's factual allegations as true and draw all reasonable inferences in his favor. *See MacNaughton v. Young Living Essential Oils, LC*, 67 F.4th 89, 95 (2d Cir. 2023). To avoid dismissal, "the complaint must provide enough facts to state a claim to relief that is plausible on its face." *Id.* (cleaned up). While we are required to assume the truth of "well-pleaded factual allegations," we need not credit legal conclusions, nor "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009). Nevertheless, we afford a pro se litigant "special solicitude" by interpreting a complaint filed pro se "to raise the strongest

claims that it suggests." *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489 (2d Cir. 2018) (cleaned up).

A. ADA Discrimination

To state an employment discrimination claim under the ADA, a plaintiff must allege, among other things, that he was disabled or perceived to be disabled within the meaning of the ADA. *See Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015). "The ADA protects

not just those employees who are actually disabled, . . . but also those who are discriminated against because they . . . are 'regarded as having such an impairment.'" *Sharikov v. Philips Med. Sys. MR, Inc.*, No. 23-407, 2024 WL 2820927, at *4 (2d Cir. June 4, 2024) (quoting 42 U.S.C. § 12102(1)(C)). To be regarded as having a disability, however, "one must be perceived as different from most people in the general population." *Id.* at *6.

Kosiba does not claim to have been disabled. Instead, he argues he was "regarded as" having a disability because CHSLI adopted a COVID policy that "regarded all employees as direct threats of contagious disease(s) without any individualized assessment or diagnosis in evidence." Appellant's Br. at 13 (emphasis altered). On the basis of that perception, Kosiba argues, CHSLI required him to undertake "mitigation measures," up to and including vaccination, as a condition of employment. Supplemental App'x at 80. But CHSLI also required *all* employees whose jobs brought them into contact with other staff, patients, or residents to comply with its COVID policy. Kosiba, then, "was not singled out because of any perception that he

had an impairment that substantially limited him as compared to others." *Sharikov*, 2024 WL 2820927, at *6. He thus cannot state an employment discrimination claim under the ADA.[1]

B. ADA Retaliation

To state an ADA retaliation claim, a plaintiff "must show that he engaged in a protected activity, that he suffered an adverse employment action, and that a causal connection exists between that protected activity and the adverse employment action." *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 72-73 (2d Cir. 2019).

Kosiba alleges that CHSLI took an adverse employment action against him when it terminated his employment. He says he was "threatened with termination because [he] was deemed a 'direct threat' . . . because [he] was classified as 'unvaccinated' and declined accommodations." Supplemental App'x at 63. Kosiba also alleges that he engaged in protected activity, specifically that on September 27, 2021, he opposed CHSLI's COVID policy by

[1]To the extent that Kosiba argues that CHSLI's requirement to disclose his vaccination status was a forbidden, disability-related inquiry under 42 U.S.C. § 12112(d)(4)(A), that claim necessarily fails because Kosiba was neither disabled nor regarded as having a disability, and CHSLI never inquired into whether he had a disability.

sending a "Notice of Employment Discrimination and Retaliation Based Upon Disability" to CHSLI's director of human resources. *Id.* at 82. But Kosiba fails to allege the required causal connection between his opposition to CHSLI's COVID policy and his termination. CHSLI announced that covered employees who refused to be vaccinated would be furloughed, and then terminated, on or before September 24, 2021—three days before Kosiba complained about CHSLI's policy. "Thus, rather than show [Kosiba] was terminated because of his protected activity, the allegations in the Complaint make clear that he was fired because of his failure to

comply with the company-wide vaccine policy." *Sharikov*, 2024 WL 2820927, at *8. And because the policy applied to all employees, Kosiba "has not plausibly pleaded a connection between his invocations of the ADA and his termination." *Id.*

***

We have considered all of Kosiba's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

/s/Catherine O'Hagan Wolfe,

Clerk of Court