

No. _____

IN THE
Supreme Court of the United States

TRI-CITIES HOLDINGS LLC, et al.
Petitioners,

v.

TENNESSEE ADMINISTRATIVE PROCEDURES
DIVISION, et al.
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case provides this Court with an opportunity to settle circuit conflicts involving state burdens on expansion of treatment for opioid addiction -- an epidemic projected to kill 1,000,000 Americans in the next decade.

1. Whether the lower court erred, its decision is in conflict with the decisions of this Court and at least two other circuits, when it upheld Tennessee Code Section 68-11-1607(c)(3)(Respondent HSDA's "Notice Rule"), a rule that facially discriminates against the disabled *without any rational basis* (the lower court finding none), that imposes procedural burdens and costs to be imposed *only upon* the disabled (certified mail costs of \$24.44 alone, with potential voiding of the Certificate of Need application, and loss of \$3,000 filing fee for non-compliance), and operates to galvanize local opposition to clinics serving the disabled, and burdens expansion of treatment of opioid addiction, and the lower court doing this by finding that discrimination against the disabled is acceptable under the ADA if the discrimination is "small" and "done quietly" so as not to cause public "opprobrium." 42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12132.
2. Whether the lower court erred, its decision in conflict with the decisions of at least two other circuits, when it upheld the Notice

Rule, a rule that facially discriminates against the disabled *without any rational basis* (the lower court finding none), that imposes procedural burdens and costs to be imposed *only upon* the disabled (certified mail costs of \$24.44 alone, with potential voiding of the Certificate of Need application, and loss of \$3,000 filing fee for non-compliance), and operates to galvanize local opposition to clinics serving the disabled, and burdens expansion of treatment of opioid addiction, and the lower court doing this by finding that a rule that facially discriminates against the disabled without any rational basis is not a *per se* violation of the ADA. 42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12132.

3. Whether the lower court erred, its decision in conflict with the decisions of this Court and at least two other circuits, when it refused to provide Petitioners with prospective declaratory and injunctive relief from Johnson City's conduct and Section 6.13 of the Zoning Code of Johnson City ("Zoning Ordinance"), a rule that facially discriminates against the disabled *without any rational basis*, forcing disabled persons into "disabled ghettos" for treatment for opioid addiction, and the lower court doing so by finding that significant risk of continuing and future exclusion not to be significant in determining whether an ADA title II plaintiff is entitled to prospective

declarative or injunctive relief. 42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12132.

4. By approving Respondent Johnson City officially opposing TCH's CON application before Respondent HSDA, to the point of *hiring professional lobbyists to advocate exclusion of the disabled*, the lower court opinion declaring that it is acceptable under the ADA for one state entity to lobby another to exclude the disabled, the lower court decision conflicts with decisions of this Court and other United States courts of appeals. 42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12132.
5. By finding that Respondents successfully asserted a reasonable modification defense under the ADA, in the presence of a facially discriminatory rule, and where Respondents offered no evidence of undue burden or fundamental alteration, the lower court opinion conflicts with decisions of this Court and other United States courts of appeals. 42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12132.
6. By declaring that the historical record of local animus against the disabled is "largely irrelevant" to the consideration of whether a discriminatory rule violates the ADA, the lower courts decision conflicts with decisions of other United States courts of appeals. 42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12132.

PARTIES TO PROCEEDING

Petitioners Tri-Cities Holdings LLC, Jane Doe Nos. 1-3, and John Doe Nos. 1-6 were Plaintiffs and Appellants below.

Respondents Tennessee Administrative Procedures Division, D. Kim Summers, in her official capacity as Administrative Law Judge; Tennessee Department of State; Trey Hargett, in his official capacity as Tennessee Secretary of State; Tennessee Department of Mental Health and Substance Abuse Services; E. Douglas Varney, in his official capacity as Commissioner of the Tennessee Department of Mental Health and Substance Abuse Services; Tennessee Health Services and Development Agency; Melanie M. Hill, in her official capacity as Executive Director of the Tennessee Health Services Development Agency; Keith Gaither, Elisha Hodge, Lisa Jordan, D. Lynn Johnson, James L. Wright, Charlotte C. Burns, Claudia H. Byrd, Robert S. Doolittle, Mark D. Flora, M.D., Barrett G. Haik, MD, FACS, and Thom Mills, in their official capacities as members of the Board of the Tennessee Health Services & Development Agency; City of Johnson City, Tennessee; Johnson City Board of Commissioners; and the Johnson City Board of Zoning Appeals, were Defendants and Appellees below.

CORPORATE DISCLOSURE

Petitioner Tri-Cities Holdings LLC certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock or states that there is no such corporation.

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- IV. By refusing to provide Petitioners with prospective declaratory and injunctive relief from Johnson City’s Zoning Ordinance, a rule that facially discriminates against the disabled *without any rational basis*, and the lower court doing so by finding that Petitioners did not face significant risk of exclusion, even though Johnson City’s arbitrary restrictions continued to force disabled persons into “disabled ghettos” for treatment, the lower court decision conflicts with the decisions of other United States courts of appeals. 25

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STATEMENT OF JURISDICTION

The judgments of the district court were entered on May 31, 2017 (Case No. 14-cv-233) and August 23, 2017 (Case No. 13-cv-305), respectively. Notices of appeal were filed on June 2, 2017 (Case No. 14-cv-233) and August 31, 2017 (Case No. 13-cv-305), respectively, and the cases were docketed in the court of appeals on those dates (6th Cir., Nos. 17-5628 and 17-6046). Petitioners filed a petition for writ of certiorari on May 31, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Relevant provisions of Tennessee Code Section 68-11-1607 (“Notice Rule”) and Section 6.13 of the Zoning Code of Johnson City, Tennessee (“Zoning Ordinance”) are reproduced at Pet. App. 161 and 169, respectively.

STATEMENT OF THE CASE

The opioid epidemic is the deadliest in American history,¹ an epidemic projected to kill 1,000,000² Americans in the next decade.³ In an

¹ “Trump Declares the Opioid Crisis a Public Health Emergency,” *Washington Post*, October 26, 2017 ([https://www.washingtonpost.com/news/post-politics/wp/2017/10/26/trump-plans-to-declare-the-opioid-crisis-a-public-health-emergency/?noredirect=on&utm_term=.a5430cbf4594](https://www.washingtonpost.com/news/post-politics/wp/2017/10/26/trump-plans-to-declare-the-opioid-crisis-a-public-health-emergency/?hpid=hp_hp-top-table-main-trump-declares-opioid-crisis%3Ahomepage%2Ft%3Aopioid-crisis&utm_term=.a5430cbf4594)).

² In 2016, 42,000 Americans died of an opioid overdose. Deaths are growing at over 26 percent annually. Compounded over the next decade, well over 1,000,000 will die of an opioid overdose. Drug Enforcement Administration, March 26, 2018 (42,000 opioid overdose deaths in 2016)(<https://www.dea.gov/divisions/hq/2018/hq032618.shtml>); “Continued Rise in Opioid Overdose Deaths in 2015 Shows Urgent Need for Treatment,” White House Press Release Archives, December 8, 2016 (“According to the National Center for Health Statistics, the number of overdose deaths involving opioids rose from 28,647 in 2014 to 33,091 in 2015.”)(<https://obamawhitehouse.archives.gov/the-press-office/2016/12/08/continued-rise-opioid-overdose-deaths-2015-shows-urgent-need-treatment>).

³ See “1,451 Tennesseans Die from Drug Overdoses in 2015,” Tennessee Department of Health, November 15, 2016 (<https://tn.gov/health/news/46773>). (13.8% annual growth rate). This report projects some 33,000 Tennesseans will die of an overdose over the next decade based on the current annual growth rate. Presently, the State of Tennessee expects only thirteen (13) standard of care Opioid Treatment Programs to adequately serve 69,000 addicts in Tennessee. CON Application, 221-1 Page ID # 6245-6387 (estimates), see also Overview of the Prescription Drug Epidemic in Tennessee (2013)

attempt to combat the opioid epidemic in east Tennessee, Petitioner Tri-Cities Holdings LLC (“TCH”) applied for a CON to establish an Opioid Treatment Program (“OTP”) to establish a standard of care⁴ Methadone Maintenance Treatment (“MMT”) clinic for the first time in history in Johnson City. At that time, only twelve (12) OTP’s in Tennessee served 69,000 addicts statewide—one clinic per 5,750 addicts.⁵ Some 30,000 Tennesseans are projected to die of an overdose in the next decade. ER 221-3 Page ID 6545 (estimate).⁶ The clinic was intended to

([https://tn.gov/assets/entities/behavioralhealth/sa/attachments/Prescription For Success SECTION 1.pdf](https://tn.gov/assets/entities/behavioralhealth/sa/attachments/Prescription%20For%20Success%20SECTION%201.pdf)) (69,000 in Tennessee addicted to opiates, another 151,000 “at risk” of addiction). Opioid addiction treatment also available at private physician’s offices prescribing non-standard of care drugs and therapies.

⁴ MMT is recognized in the U.S., and around the world, as the “standard of care” treatment for opiate addiction. CON Hearing Slide, RE 221-3 Page ID # 453.

⁵ CON Application , RE 221-1 Page ID # 6245-6387 (estimates), see also Overview of the Prescription Drug Epidemic in Tennessee (2013) ([https://tn.gov/assets/entities/behavioralhealth/sa/attachments/Prescription For Success SECTION 1.pdf](https://tn.gov/assets/entities/behavioralhealth/sa/attachments/Prescription%20For%20Success%20SECTION%201.pdf)) (69,000 in Tennessee addicted to opiates, another 151,000 “at risk” of addiction). Opioid addiction treatment also available at private physician’s offices prescribing non-standard of care drugs. A CON in Johnson City was finally granted by HSDA in 2016. It opened September 18, 2017. Transcript, ER 214-9 Page ID # 6050 (<http://www.johnsoncitypress.com/Health-Care/2017/09/18/Gray-addiction-clinic-endures-quiet-opening>).

⁶ See also “1,451 Tennesseans Die from Drug Overdoses in 2015,” Tennessee Department of Health, November 15, 2016

provide treatment for Petitioners Jane Doe Nos. 1-2, and John Doe Nos. 1-6 (“Individual Petitioners”)(collectively “Petitioners”). Treatment is the only hope for these disabled persons, yet it’s being blocked and burdened at both the state and local level in Tennessee.

A. HSDA’s Notice Rule violates the ADA by burdening only clinics serving the disabled without a rational basis.

HSDA’s CON criteria burden applicants serving the disabled (and only clinics serving the disabled) by requiring *only clinics serving the disabled* to give advance notice via certified mail to local politicians of an intention to open an addiction clinic anywhere in Tennessee. Tenn. Code Ann. § 68-11-1607(c)(3) (“Notice Rule”). The Notice Rule is a strict procedural 10-day notice requirement--with no exceptions. The Notice Rule operates to automatically void a CON application for a clinic serving the disabled.

Respondent HSDA’s Notice Rule imposes mandatory procedural burdens and costs *only upon applicants for clinics serving the disabled* (requiring notice letters by certified mail to local mayor, county executive, state representative, and state senator). In this case, the discriminatory costs were \$24.44 in

(<https://tn.gov/health/news/46773>). (increasing at 13.8% annual rate). This report projects some 33,000 Tennesseans will die of an overdose over the next ten years.

certified mail costs alone.

Failing to comply with the Notice Rule's strict 10-day window voids the entire CON process and loss of \$3,000 filing fee. However, the lower court found the Notice Rule did not violate the ADA because this burden "appears to be so vanishingly small that we cannot say that there was, in fact, any kind of exclusion, deprivation, or discrimination." Pet. App. 25. In doing so, the lower court overlooks the fact that the Notice Rule and Zoning Ordinance *themselves* amounts to discrimination (when it was enacted the Johnson City Mayor declared the ordinance sent the message that "methadone clinics are not welcome in Johnson City")⁷, imposes real financial costs and procedural burdens only upon those serving the disabled (in this case at least \$24.44 in certified mail costs), and can reasonably be anticipated to galvanize local opposition.

HSDA's Notice Rule galvanized local opposition to treatment for the disabled. Many, including Johnson City officials, traveled 250 miles to Nashville to oppose TCH. See Statement of the Case, p. 8-10, *infra*; Tri-Cities II, RE 41-7 (local opposition).

⁷ "Methadone Clinic Rejected," *Johnson City Press*, May 7, 2003 (<http://www.mapinc.org/drugnews/v03/n702/a01.html>), Tri-Cities Holdings LLC et al. v. HSDA et al., Case No. 13-cv-305 (*Tri-Cities II*), RE 42-1 ID # 1199-1200.

B. Respondent HSDA discriminated against the Petitioners while employing a vague, virtually meaningless CON criteria.

Respondent HSDA discriminated against Petitioners based on a vague, unquantifiable, subjective, and arguably meaningless criteria requiring an applicant to demonstrate “need,” “economic feasibility,” and “orderly development.” Tenn. Code Ann. § 68-11-1603.

C. Johnson City Zoning Ordinance continues to violate the ADA by forcing disabled persons into “disabled ghettos” for treatment.

Johnson City’s Zoning Ordinance has no rational basis and applies only to clinics serving the disabled. Johnson City Ord. No. 3899 (October 17, 2002)(“Zoning Ordinance”) RE 44-1 Page ID # 1820. The Zoning Ordinance forces the disabled into “disabled ghettos” that comprise only about 1% of available land in the city. For example, Johnson City bars disabled persons from receiving treatment within 200 feet of a school or park. *Id.* Johnson City’s attorney even admitted that parts of the Zoning Ordinance have no “rational basis.” Article, RE 221-4 Page ID # 6567 (time restriction has “no rational basis”); *see also* Ordinance, RE 214-7 Page ID ## 6039 (“New Zoning Ordinance”). HSDA noted that TCH

lacked Johnson City's zoning approval. Report, RE 214-4 Page ID # 6012; Transcript, RE 45-10 Page ID # 2914.⁸

Petitioners made multiple requests to Respondents for a modification of the CON criteria and the Zoning Ordinance.

Respondents failed to provide TCH a reasonable modification--refusing to attempt a modification or even discuss the subject. RE 45-10 Page ID # 2648-58. Respondents also never identified any specific cost any potential modification might entail. Respondents failed to comply with any of the ADA implementing regulations. See 28 C.F.R. § 35.150 (a)(3) and 35.164 (duties to modify, specify costs, etc.).

On June 26, 2013, HSDA conducted a public hearing on TCH's CON application ("CON hearing"). At that time, Tennessee Department of Mental Health and Substance Abuse Services ("TDMHSAS") issued a report to HSDA whether TCH met the CON criteria. Tenn. Code Ann. § 68-11-1614(a) and (b). TDMHSAS issued a negative report that TCH had only "possibly

⁸ In an arguable attempt to sidestep the awkward position of denying the CON based on a patently illegal zoning ordinance, HSDA's attorney advised the lower court "not to consider" TCH's lack of zoning approval. This is akin to saying "please don't consider the ordinance barring services to African-Americans." Despite HSDA's counsel's admonishments, TCH's lack of zoning due to Johnson City's ordinance was duly noted and considered by the HSDA board.

established economic feasibility,” in part because Johnson City had refused TCH zoning approval based on its discriminatory Zoning Ordinance. Report, RE 214-4 Page ID # 6012-14.⁹

D. The Respondent Johnson City officially opposed integration of the disabled – to the point of hiring professional lobbyists to lobby Respondent HSDA to exclude the disabled.

At the hearing for TCH’s CON application, wide-spread community animus was apparent. The lower court noted dozens of letters in opposition, including the Mayor, a State Senator, a State Representative (all receiving advanced notice of TCH’s plan under the Notice Rule), and even a Congressman. Transcript, RE 45-10 Page ID # 2810. Johnson City’s Mayor appeared at the CON hearing in his official capacity and voiced opposition. Transcript, RE 45-10 Page ID ## 2858-67. Johnson City even went so far as to hire a state-registered, professional lobbyist to “lead the opposition” at the CON hearing. Transcript,

⁹ HSDA Board Member Dr. Martin Fleming MD mocked TDMHSAS’ finding [adopted by some HSDA Board Members] that that TCH had not “clearly established” need for standard of care MMT in Johnson City: “From a physician's perspective, the question of does it meet the criteria for need is almost comical in our state. I mean, we're so far off the charts in need. This [MSHA’s OTP clinic] is a drop in the bucket [to address need]....” # 6012; Report, RE 214-4 Page ID Transcript, RE 214-9 Page ID # 6127.

RE 45-10 Page ID # 2847-58.

At the CON hearing, HSDA board members noted strong local opposition.¹⁰ Indeed, a *Johnson City Press* news story was read aloud quoting a Johnson City Commissioner at the time of enactment of the Johnson City Zoning Ordinance: “We want the applicant to get the message methadone clinics are not welcome in Johnson City.” CON Hearing Transcript, *Tri-Cities II*, RE 45-10 Page ID # 2890-91; RE 42-1 ID # 1199-1200 (*Johnson City Press* article).

After HSDA denied TCH’s CON application, Petitioners filed this action against HSDA and Johnson City. ER 1 Page ID # 1 (“*Tri-Cities II*”)(filed on July 8, 2013). Petitioners had suffered further, daily, continuing harm under the continuing operation of Respondents’ rules and conduct. Complaint, ER 1 Page ID # 1; ER 136 Page ID # 3849 (Second Amended Complaint). Petitioners’ injuries, related to past, present, and future stigma, exclusion, segregation, and economic damages, included:

- (a) Stigmatic injury, on a daily basis, including the humiliation of being forced into “disabled ghettos” for

¹⁰ “Mr. Southwick: ‘[T]here is no political support, no community support....’” Transcript, RE 45-10 Page ID # 2990. “Mr. Southwick: ‘I see it really as a staunch opposition in this particular area to this kind of treatment [methadone].’” Transcript, RE 45-10 Page ID # 2992. “Mr. Mills: ‘I’m seeing a lot of opposition from, you know, the City of Johnson City....’” Transcript, RE 45-10 Page ID # 2996.

treatment (the disabled not deemed worthy of treatment within 200 feet of Johnson City schools, parks, etc.);¹¹

- (b) Continuing unjustified segregation and exclusion;¹²
- (c) Continuing being forced to drive to NC for treatment and additional gasoline and auto costs thereof with a clear risk of injury or death on dangerous mountain roads;¹³
- (d) The Zoning Ordinance's continuing interference with any attempt by TCH, or anyone, to

¹¹ Zoning Ordinance, Pet App. 169; See Jane Doe No. 2 Declaration, *Tri-Cities II*, RE 131, ¶13; *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)(relegation to “white ghetto” confers standing under Art. III).

¹² *Mental Disability Law Clinic v. Hogan*, 2008 WL 4104460 (E.D.N.Y. Aug. 28, 2008) , at *15 (“even the risk of unjustified segregation may be sufficient under *Olmstead*”), *Ray v. School Dist. of Desoto County*, 666 F. Supp. 1524, 1534-35 (M.D. Fla. 1987) (stigmatic injury from exclusion in context of RA).

¹³ Second Declaration of Jane Doe No. 2, *Tri-Cities II*, RE 131, ¶10, “Judge Wants To Look Up Law Before Accepting Plea In Vehicular Homicide Case,” *Johnson City Press*, March 29, 2013 (22-year old killed in crash caused by exhausted patient returning from NC).

locate a clinic in Johnson City by foreclosing 99% of the city to addiction treatment clinics;

- (e) Continuing interference in TCH's option to lease its proposed location;¹⁴
- (f) Johnson City's official interference with TCH's CON application, including the Mayor appearing in his official capacity to oppose it, in violation of the *Olmstead* integration mandate;¹⁵

¹⁴ HSDA board members expressly agreed to avoid any mention of TCH's lack of zoning approval to avoid the appearance that Johnson City's illegal zoning caused harm to TCH's CON application. HSDA's attorney saying "I would recommend and urge that the decision not be based on zoning itself today." RE 45-10 Page ID # 2814. This amounts to collusion to enable the evade ADA.

¹⁵ *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999); Transcript, *Tri-Cities II*, RE 45-10, p. 42-51 Page ID # 2848-59. The District Court dismisses Petitioners' Title II claims against Johnson City, in part, because Petitioners failed to specifically allege an "*Olmstead* mandate" claim. *Olmstead v. L.C.*, 527 U.S. 581 (1999). Order, Page ID # 6893("...such a cause of action [*Olmstead claim*] is not asserted in the second amended complaint"). The Supreme Court in *Olmstead* did not establish a separate and distinct "*Olmstead* cause of action" that must be specifically pleaded. Rather, in *Olmstead*, the Supreme Court interpreted the ADA, and implementing regulations, as constituting a broad "mandate," in general, to integrate the disabled. *Id.*

- (g) Johnson City hiring a lobbyist to “lead the opposition” to the CON,¹⁶
- (h) Johnson City’s illegal influence on TDMHSAS’ negative CON report (finding no clear evidence of “economic feasibility” due to TCH’s lack of a letter demonstrating zoning approval);¹⁷
- (i) Respondents’ overt, official, and blatant violations of the *Olmstead* integration mandate at TCH’s CON hearing by *officially opposing, to the point of hiring lobbyists to oppose*, TCH’s attempts to integrate the disabled into the Johnson City community;
- (j) Respondents illegally causing past and continuing injury to the Individual Petitioners and others. *Tri-Cities II*, ER 214-9 Page ID # 6074 (Rhonda Coffee (sic) Testimony); ER 131 Page ID # 3834 (Jane Doe No. 2 declaration

¹⁶ Transcript, *Tri-Cities II*, ER 45-10 Page ID # 2859-66.

¹⁷ TDMHSAS refused to give an unqualified approval that economic feasibility had been met due to lack of letter showing zoning approval of TCH’s clinic location. Report, 214-4 Page ID # 6012-14.

on driving cost, stigma); ER 45-8 (fatal crash caused by an exhausted driver seeking nearest MMT treatment in NC).

- (k) On February 15, 2015, Johnson City imposed additional burdens *only on clinics treating the disabled*. New Zoning Ordinance, *Tri-Cities II*, RE 214-7 Page ID ## 6039 (enacted 2015).

Petitioners filed three separate actions against various Respondents alleging violations of the ADA and the Rehabilitation Act of 1973 (“RA”). Petitioners’ first action against Johnson City entities only was *TCH et al. v. Johnson City*, Case No. 13-cv-108 (E.D. Tenn. 2013)(“*Tri-Cities I*”). This ADA action was dismissed by the District Court without prejudice based on lack of ripeness.

Petitioners’ second action was filed after the dismissal without prejudice of *Tri-Cities I* after denial of TCH’s CON that brought claims against both Johnson City and HSDA, *TCH et al. v. HSDA et al.*, Case No. 13-cv-305 (E.D. Tenn. 2013)(“*Tri-Cities II*”). This action is against the HSDA and Johnson City Respondents.

Petitioners’ third action brought claims against the Tennessee Administrative Procedures Division (“APD”), the ALJ, the Tennessee Department of Mental Health and Substance Abuse Services, and other state defendants. *TCH et al. v. APD et al.*, Case No. 14-cv-233 (E.D. Tenn. 2014)(“*Tri-Cities III*”).

In *Tri-Cities II* and *Tri-Cities III*, the District Court granted Respondents’ Motion for Summary Judgment and denied Petitioners’ Motion for Summary Judgment. Orders, Pet. App. 45 and 91; Petitioners appealed. The Sixth Circuit affirmed. Pet. App. 1.

REASONS FOR GRANTING THE PETITION

This case provides this Court with an opportunity to settle several circuit conflicts that impact the expansion of treatment to the disabled to treat opioid addiction – an epidemic projected to kill 1,000,000 Americans in the next decade.

- I. By upholding Respondent HSDA's Notice Rule, a rule that facially discriminates against the disabled *without any rational basis* (the lower court finding none) and operates to materially burden, and galvanize local opposition to, clinics treating the disabled, and the lower court doing this by allowing discriminatory procedural burdens and costs to be imposed *only on the disabled* (in this case certified mail costs of \$24.44, with potential voiding of CON application and loss of \$3,000 filing fee), and the lower court doing this by adding a new proof of "opprobrium" element into a title II ADA claim, so as to allow discrimination so long as it is "small" and "done quietly," the lower court opinion conflicts with decisions of other United States courts of appeals.

The lower court upheld HSDA's Notice Rule that facially discriminates against the disabled

without any rational basis (the lower court finding no rational basis for it) and operates to galvanize local opposition to clinics treating the disabled, and the lower court doing this by allowing discriminatory costs and procedural burdens to be imposed *only on the disabled*. Pet. App. 29. In doing so, the lower court established a new and conflicting “small” threshold of harm below which even blatant discrimination against the disabled is allowed under the ADA, and establishing a new proof of causation of “opprobrium” element of a title II ADA claim. *Id.* at 30. Thus, the lower court declared “small and quiet discrimination” acceptable under the ADA. In doing so, the lower court opinion conflicts with decisions of the Supreme Court and decisions of other United States courts of appeals.

The Third and Ninth Circuits have declared for nearly twenty years that facially discriminatory rules without a rational basis are a *per se* violation of the ADA, with no minimal “quantum of discrimination” threshold and no “proof of opprobrium” being imposed on ADA plaintiffs. *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293 (3rd Cir. 2007); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 735 (9th Cir. 1999) (facially discriminatory rule is a *per se* ADA violation); *see also Olmstead v. L.C.*, 527 U.S. 581, 607 (1999); *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 (1987);

The lower court ruled that a facially discriminatory rule *without any rational basis* is not only not a *per se* violation of the ADA, but that such a rule is completely acceptable under the ADA as long as the burden it imposes on the disabled is “small”

(\$24.44 or less) and the discrimination is done “quietly,” so as not to cause “opprobrium.” Pet. App. 30. Thus, the lower court’s decision is in direct conflict with decisions of this Court and other federal circuits holding that facial discrimination against the disabled without a rational is a *per se* violation of the ADA even if the discrimination is “small” and “done quietly.”

In addition, the lower court opinion creates an entirely *new and conflicting* element within a title II claim requiring that a plaintiff show proof of “opprobrium” caused by the otherwise illegal notice rule. *Id.* In doing so, the lower court opinion presumably allows other discriminatory burdens and costs applying to Jews, blacks, or other disfavored groups, so long as costs are sufficiently “small” and no resulting “opprobrium” is shown. *Id.* This conflicting interpretation of the ADA runs counter to other United States courts of appeals that have long and uniformly held that a rule is unlawful if it does not apply equally to similar programs for the non-disabled. *New Directions*, 490 F.3d at 293 (3rd Cir. 2007); *Bay Area*, 179 F.3d at 725.

The lower court’s decision strongly conflicts with other federal courts in other circuits declaring that discriminatory notice rules that operate to galvanize local opposition violate the ADA. *New Directions*, 490 F.3d at 304–05 (3d Cir. 2007) (ruling that a law seriously restricting placement of methadone clinics violates ADA); *Potomac Group Home v. Montgomery County, Md.*, 823 F. Supp. 1285, 1296 (D. Md. 1993)(discriminatory notice rule violates ADA); *Human Res. Research & Mgmt. Grp. Inc. v.*

Cnty. of Suffolk, 687 F. Supp.2d 237 (E.D.N.Y. 2010) (same).

In this case, the lower court ignores overt discrimination, discriminatory burdens, financial costs and risks, and widespread harm arising from the Notice Rule, merely comparing Petitioners' case to a prisoner's *de minimis*, frivolous injury claim for being moved into a group dormitory rather than an individual cell. *Robinson v. Corr. Corp. of Am.*, 14 F. App'x 382, 383 (6th Cir. 2001) (unpublished). Pet. App. 29. In fact, the frivolous injury claim in *Robinson* is no way comparable to the Notice Rule -- a rule that imposes *without any rational basis* clear burdens, financial costs, and risks *only upon the disabled*, and can be reasonably expected to, and did in this case, galvanize local opposition to the services for the disabled. The Notice Rule has operated since 2002, and will continue to burden treatment for the foreseeable future.

Federal courts in other circuits reject even negligible burdens on protected groups. *Cnty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 223-24 (D.D.C. 2003) (\$57 certificate of occupancy filing fee plus inspection requirement is sufficiently burdensome to violate the FHAA).¹⁸ Declaring the Notice Rule acceptable under

¹⁸ *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 46-47 (6th Cir. 1992)(discriminatory procedural requirements violates FHAA).

the ADA (and, presumably, approving similar notice rules for blacks, Jews, etc.), the lower court opens a Pandora's Box of discrimination. Given the lower court's "green light," cities throughout the circuit (and the nation) will enact their own "Notice Rules" that discriminate against the disabled, galvanize local opposition to addiction clinics, and burden expansion of treatment amidst a national opioid epidemic. As such, the lower court opinion creates grave, disastrous effects that make the opioid epidemic unstoppable.

The Notice Rule, combined with local zoning ordinances like Johnson City's, have blocked all new standard of care Opioid Treatment Programs clinics in the last decade (only 12 total standard of care clinics statewide since 2002 are expected to serve 69,000 addicts until the one licensed in Johnson City in 2017 after Petitioners' CON was denied). These ADA violations have combined to turn Tennessee into an opioid overdose death zone with 10,000 overdose deaths in the last decade, and another 30,000 overdose deaths projected in the next decade.

Unfortunately, by giving the "green light" to discriminatory rules that block treatment for opioid addiction, the lower court's decision inspires copycat discriminatory notice rules *that are proliferating throughout the United States*. O.C.G.A. § 26-5-21, O.C.G.A. 26-5-40 et seq. (Georgia); Virginia Code § 37.2-406 (Virginia); Ohio Rev. Code 5119 (Ohio); N.J.S.A. 26:2H-11.1 (New Jersey). It should be no mystery why America is an opioid slaughterhouse given all the barriers to treatment being maintained in violation of the ADA. This Court must step forward and rectify these violations of the ADA that are

impeding treatment in the middle of a catastrophic epidemic.

- II. By refusing to provide Petitioners with declaratory and prospective injunctive relief from Johnson City’s Zoning Ordinance that creates “disabled ghettos” in the city, a rule that facially discriminates against the disabled *without any rational basis*, and doing so by finding that Petitioners’ claims were barred by “issue preclusion” from a prior action that was dismissed without prejudice on ripeness grounds *before Petitioners’ claims even arose*, the lower court opinion conflicts with decisions of this Court and other United States courts of appeals.**

The lower court’s opinion found all of Petitioners’ claims against Johnson City, even those arising after dismissal without prejudice of *Tri-Cities I* (including the continued maintenance of “disabled ghettos” in Johnson City), were subject to issue preclusion and Petitioners had no right to prospective injunctive and declaratory relief. Pet. App. 27. In doing so, the lower court ruled that Petitioners’ future relegation to “disabled ghettos” within Johnson City

for treatment is acceptable under the ADA and that Respondents bore no affirmative¹⁹ or continuing²⁰ obligations to promptly²¹ comply with the ADA. Pet. App. 28. This decision strongly conflicts with decisions of this Court and other United States courts of appeals. *Trafficante*, 409 U.S. at 208 (illegal relegation to “white ghetto”). *New Directions*, 490 F.3d at 293; *Bay Area*, 179 F.3d at 725.

¹⁹ *Ability Center, Toledo v. City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004) (public entities must take affirmative actions to provide access)(citations).

²⁰ *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001) (“the duty to accommodate is a continuing duty that is not exhausted by one effort”), *cited with approval in Dark v. Curry County*, 451 F.3d 1078, 1084 (9th Cir. 2006).

²¹ DOJ’s ADA Title II Technical Assistance Manual (<https://www.ada.gov/taman2.html>) (“[T]he public entity must adopt and publish grievance procedures providing for *prompt* and equitable resolution of complaints alleging any action that would be prohibited by Title II.”).

III. By approving Johnson City's refusal to provide a reasonable modification, and approving its official opposition to TCH's CON application before another state agency, to the point of hiring *professional lobbyists to advocate exclusion of the disabled*, the lower court opinion conflicts with decisions of the this Court and other circuit courts.

When it afforded Johnson City a right to defy the ADA's integration mandate by *continuing to refuse* TCH a reasonable modification, and officially opposing TCH's effort to provide treatment for the disabled before another state agency (even after dismissal of *Tri-Cities I*), to the point of even *hiring professional lobbyists to advocate exclusion of the disabled*, the lower court opinion conflicts with decisions of the Supreme Court. Pet. App. 19. The lower court's opinion allows state agencies to lobby *each other* to deny services to the disabled. Such lobbying violates the ADA's integration mandate. *Olmstead*, 527 U.S. at 607.

Johnson City hired a full-time, professional lobbyist to "lead the opposition" to Petitioners' attempt to provide standard of care treatment for opioid addiction. *Tri-Cities Holdings et al. v. Tenn. Health Services*, Case No. 13-cv-305 PageID # 2847. This is a flagrant violation of this Court's *Olmstead* mandate. State agencies cannot be allowed under this Court's *Olmstead* decision to oppose integration of the disabled -- even to the point of hiring professional

lobbyists to lobby other state agencies. The right arm of the state can now lobby the left arm to deny services to the disabled. Despite this astounding evisceration of the ADA, the Sixth Circuit affirmed the District Court's finding that Johnson City enjoys First Amendment rights that allow it to ignore its obligations under the ADA. This decision violently conflicts with decisions of this Court and other United States courts of appeal. *Frederick L. v. Dept. of Public Welfare of Pa.*, 422 F.3d 151, 157 (Fed. 3rd Cir. 2005); *Frame v. City of Arlington*, 657 F.3d 215, 223, (5th Cir. 2011); *Onishea v. Hopper*, 171 F.3d 1289, 1303 (11th 1999).

The lower court also adopted a policy of disregarding the historical record of a facially discriminatory rule. This conflicts with other circuits that declare it essential to consider the historical context of a rule to determine its discriminatory intent. *Regional Economic Community v. City of Middletown*, 294 F.3d 35, 49 (2nd Cir. 2002) ("Discriminatory intent may be inferred from the totality of the circumstances, including ... the historical background of the decision ...; the specific sequence of events leading up to the challenged decision ...; [and] contemporary statements by members of the decisionmaking body...."), citing *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir.1995) (citations and internal quotation marks omitted). Certainly, in this case, the Johnson City official having declared, at the time of enactment of the facially discriminatory Zoning Ordinance, that it "sent the message that methadone clinics are not welcome here" indicates in the clearest way possible a

discriminatory intent to the ordinance. CON Hearing Transcript, *Tri-Cities II*, Case No. 13-cv-305, RE 45-10 Page ID # 2890-91; RE 42-1 Page ID # 1199 (quoting Johnson City Mayor at time of enactment of Zoning Ordinance that methadone clinics “not welcome”²²). Yet the analysis employed by the lower court ignores overwhelming evidence of historical animus. In fact, the lower court not only ignored this historical evidence, calling it “largely irrelevant,” but *blamed Petitioners for noting it* during the CON hearing as “manufacturing an issue.” Pet. App. 26. Thus, the lower court policy of finding historical animus “largely irrelevant,” and blaming an ADA plaintiff for noting amounts to “manufacturing an issue,” is an enormous conflict between circuits that should be resolved by this Court.

²² “Methadone Clinic Rejected,” *Johnson City Press*, May 7, 2003 (<http://www.mapinc.org/drugnews/v03/n702/a01.html>).

IV. By refusing to provide Petitioners with prospective declaratory and injunctive relief from Johnson City’s Zoning Ordinance, a rule that facially discriminates against the disabled *without any rational basis*, and the lower court doing so by finding that Petitioners did not face significant risk of exclusion, even though Johnson City’s arbitrary restrictions continued to force disabled persons into “disabled ghettos” for treatment, the lower court decision conflicts with the decisions of other United States courts of appeals.

The lower court erred, its decision is in conflict with the decisions of this Court and at least two other circuits, when it refused to provide Petitioners with prospective declaratory and injunctive relief from Johnson City’s Zoning Ordinance, a rule that facially discriminates against the disabled without any rational basis, creating “disabled ghettos,” and the lower court doing so by finding that Petitioners’ faced significant risk of exclusion, even though Johnson City’s ordinance with arbitrary restrictions that created “disabled ghettos” continued in operation. *Olmstead*, 527 U.S. at 607 (1999); *Arline*, 480 U.S. 273, 287 (1987); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (continuing risk of injury); *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) (*Olmstead* extends to persons at serious risk of segregation); *Fisher v. Oklahoma*, 335 F.3d 1175, 1181 (10th Cir. 2003) (risk

of institutionalization).

Although numerous other United States courts of appeals hold that *Olmstead* extends to disabled persons at risk of segregation, the lower court adopted a completely different policy and approved the continued operation of Johnson City's Zoning Ordinance that establishes "disabled ghettos" (relegating the disabled seeking treatment to 1% of the available land area in the city). Petitioners' disparate treatment was not "abandoned" as the lower court found. Pet. App. 42 n. 13; Petitioner's Amended Complaint, RE 136, *Tri-Cities II*, p. 8, 58 Page ID ## 3861, 3911 (disparate treatment claim); Petitioners' District Court Brief, *Tri-Cities II*, RE 213 p. 9-15, Page ID ## 5520-5525 (arguing disparate treatment); Petitioner's Sixth Circuit Brief, *Tri-Cities Holdings et al. v. Tenn. Health Serv.*, Case No. 17-6046, Doc. 20, p. 18 (arguing disparate treatment).

V. By allowing Respondents to assert a reasonable modification defense in the presence of a facially discriminatory rule, where Respondents offered no evidence of undue burden or fundamental alteration, the lower court opinion conflicts with decisions of other United States courts of appeals.

By finding Respondents could assert a reasonable modification defense, in the presence of a facially discriminatory rule, and where Respondents offered no evidence of undue burden or fundamental alteration, the lower court opinion conflicts with

decisions of other United States courts of appeals. Pet. App. 26. Three circuits prohibit a reasonable modification defense in the presence of facially discriminatory rules. *New Directions*, 490 F.3d at 293; *Bay Area*, 179 F.3d at 733. Appellee operated under such rules. “Fly-specking” a CON application for “problems,” without more, does not comply with the ADA. Respondents offered no ADA-required evidence of administrative burden or fundamental alteration—not one penny. See 28 C.F.R. § 35.150 (a)(3) and 35.164 (state entity’s duties to specify costs, etc.). Yet the lower court adopted a policy of ignoring facially discriminatory rules without any rational basis, and allowed Respondents to assert reasonable modification defenses (though no costs were ever offered and Respondents did not even plead this defense in their answers), and gave all Respondents a “free pass” to ignore ADA implementing regulations and deny Petitioners a reasonable modification. This conflicts with other circuits that hold the reasonable modification defense is not available in the face of a facially discriminatory rule. *New Directions*, 490 F.3d at 293; *Bay Area*, 179 F.3d at 733.

CONCLUSION

This Court has an enormous opportunity to settle major conflicts between federal circuits and to scrutinize state and local barriers to treatment for opioid addiction that can help save some of the 1,000,000 Americans who are projected to die of opioid overdoses in the next decade.

Therefore, this Court should grant the petition for certiorari.

Respectfully submitted,

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