White v. Hesse: Challenging an Oklahoma County's Bail Practices Under the Americans with Disabilities Act and the Rehabilitation Act

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INTRODUCTION

On December 10, 2019, two plaintiffs with disabilities sued the Canadian County District Court, 26th Judicial District, alleging that the Oklahoma court system's bail practices violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act.[1] Among other claims, the plaintiffs allege that the district is "violating Title II of the ADA by administering a bail policy that does not take into consideration an individual's disability [and] does not provide the modifications or effective communication services that the person may need to participate equally in the initial appearance or arraignment proceedings."[2] The 26th Judicial District filed a Motion to Dismiss, arguing that the district was not an entity that could be sued and that the plaintiffs had failed to state a claim because they do not allege that they ever requested modifications.[3] The Motion to Dismiss is pending before Judge Jodi Dishman of the United States District Court for the Western District of Oklahoma.[4]

This note will seek to assess and build on the claims alleged in *White v. Hesse*. Part I of this note will consider the arguments raised so far in the briefing, concluding that the plaintiffs have sufficiently alleged a claim to defeat the Motion to Dismiss. In doing so, the note will highlight arguments that litigants could raise to challenge bail practices in other

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[1] Complaint at 46, 48, White v. Hesse, No. 5:19-cv-01145 (W.D. Okla. filed Dec. 10, 2019) https://www.clearinghouse.net/chDocs/public/CJ-OK-0005-0001.pdf. [https://perma.cc/9GBL-8HGX]. Misty White, Janara Musgrave, and four others seek to represent a "primary class of all arrestees who are detained by Canadian County . . . for whom a secured financial condition of release has been set, without the presence of counsel, and who cannot afford the amount necessary for release on the secured money bail." *Id.* at 35. They raise claims under 42 U.S.C. § 1983 for multiple alleged constitutional violations. *Id.* at 43–46. White and Musgrave further seek to represent a "disability subclass" of "all arrestees with a disability." *Id.* at 35. This subclass raises the claims under the ADA and Rehabilitation Act. *Id.* This note focuses on White and Musgrave's individual disability claims, without addressing the other claims or the questions of class certification.

[2] *Id.* at 47. In addition to the district, the Complaint names five district judges as defendants. The judges have filed a Motion to Dismiss that, among other claims, raises arguments of judicial and legislative immunity. Motion to Dismiss of State Judges at 6, 7, White v. Hesse, No. 5:19-cv-01145 (W.D. Okla. Jan. 22, 2020). This note will focus only on the 26th Judicial District.

[3] Motion to Dismiss at 6, 9, White v. Hesse, No. 5:19-cv-01145 (W.D. Okla. filed Jan. 22, 2020).

[4] Court Docket, White v. Hesse, No. 5:19-cv-01145 (W.D. Okla. filed Dec. 10, 2019), https://www.clearinghouse.net/chDocs/public/CJ-OK-0005-9000.pdf. [https://perma.cc/M4H9-SQN7].

jurisdictions. The note will also outline the arguments the plaintiffs could raise on the merits, limited by the available facts at this early stage in the briefing. As much as possible, the note will hope to frame these arguments around a social model of disability.

Part II of this note will provide background by reviewing the facts and procedural history in *White* and by placing those facts in a broader context framed by the social model of disability. This part will highlight aspects of the Complaint that reveal White's and Musgrave's lived experiences as persons with disabilities and their sense of what would have helped them in the bail proceedings. This attempt at disability legal studies recognizes that, while in-person interviews may not be necessary, legal arguments about persons with disabilities should not be made without their meaningful participation.

Part III will analyze and reject the 26th Judicial District's defenses raised in its Motion to Dismiss. First, regardless of Oklahoma law, the ADA itself provides the legal basis for suing the district because the district is a public entity under Title II. Though the plaintiffs in *White* allocate only one sentence to *Jaegly v. Lucas County Board of Commissioners*,[5] the case offers an argument that is replicable in other jurisdictions. Second, the district had a duty to recognize and make accommodations for the plaintiffs because of the elevated likelihood that individuals with disabilities would come before bail proceedings.[6] *McCadden by McCadden v. City of Flint*,[7] which the plaintiffs relegate to a citation, offers better support than *Pierce v. District of Columbia*[8] because it does not turn on obvious disabilities.

Part IV will assess the plausibility of plaintiffs' discrimination claims, taking the factual allegations as true. First, White and Musgrave have alleged that they are individuals with disabilities because interstitial cystitis, anxiety, depression, bipolar disorder, and post-traumatic stress disorder are physical and mental impairments that substantially limit major life activities, including concentrating, thinking, communicating, interacting with others, and the major bodily functions of the bladder.[9] Second, White and Musgrave have alleged that they are qualified individuals with a disability because the bail proceedings are a service, program, or activity for which White and Musgrave meet the essential eligibility requirements as arrested members of the public.[10] Third, the 26th Judicial District did not ensure effective communication with White and Musgrave because the district did not furnish appropriate auxiliary aids or services to allow White and Musgrave to understand their initial appearance or arraignments. In

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[5] Jaegly v. Lucas County Board of Commissioners (Jaegly II), No. 16–cv–1982, 2017 WL 6042237 (N.D. Ohio Dec. 6, 2017).

[6] McCadden by McCadden v. City of Flint, No. 18-12377, 2019 WL 1584548 (E.D. Mich. 2019).

[7] *Id.*

[8] Pierce v. District of Columbia, 128 F. Supp. 3d 250 (D.D.C. Sept. 11, 2015).

[9] Complaint, *supra* note 1, at 7, 8.

[10] *Id.*

doing so, the district discriminated by denying White and Musgrave the opportunity to participate in or benefit from these proceedings. The district's failure to make reasonable modifications in its procedures further amounted to discrimination. The district likely cannot make out a defense that a modification to its bail proceedings would be a fundamental alteration. Finally, because White and Musgrave should succeed on their claims, a permanent injunction requiring the adoption of modified procedures is an appropriate remedy under Title II.

Part V will conclude by encouraging other litigants to bring cases similar to *White*.

I. BACKGROUND

A. Facts and Procedural History in *White*

Plaintiffs Misty White and Janara Musgrave are residents of Canadian County, Oklahoma.[11] White is forty years old and a member of the Cherokee Nation.[12] She alleges that her impairments include severe depression, severe anxiety, bipolar disorder, post-traumatic stress disorder, and interstitial cystitis.[13] Musgrave is forty-seven and white.[14] She alleges that her impairments include bipolar disorder I, anxiety disorder, and PTSD.[15]

Police arrested Musgrave on November 11, 2019, for the misdemeanor offenses of unlawful possession of a controlled dangerous substance, unlawful possession of drug paraphernalia, knowingly receiving stolen property, and larceny of property.[16] Police arrested White on November 16, 2019, for violation of a Victim Protective Order.[17] After the arrests, officers took White and Musgrave to the Canadian County Jail.[18] White did not receive her medications at the jail, despite her request, and she began to suffer withdrawal symptoms.[19]

On November 17, 2019, the day after her arrest, White had her initial

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[11] *Id.*

[12] *Id.* at 7.

[13] *Id.* at 7.

[14] *Id.* at 8.

[15] *Id.*

[16] *Id.* at 16.

[17] *Id.* at 12. In Oklahoma, violation of a Victim Protective Order is a misdemeanor. *See* OKLA. STAT. tit. 22, § 60.6 (2020).

[18] Complaint, *supra* note 1, at 12, 16.

[19] *Id.* at 12.

appearance, a video conference that lasted about one minute.[20] The judge told White the charges and set her bail at $3,500, which White could not afford.[21] Because withdrawal symptoms from not receiving her medications gave White insomnia and a headache, it was "difficult for her to understand what was happening or to advocate for herself" during the proceeding.[22] White alleges that she "felt intimidated," "did not know the rules," "did not know whether she could ask any questions," and "would have liked to have [had] a lawyer present at the proceeding because it felt one-sided."[23]

On November 18, 2019, one week after her arrest, Musgrave had her arraignment, a video conference that lasted between three and five minutes.[24] For the first time, the judge informed Musgrave of the charges and set her bail at $4,000, which she could not afford.[25] Musgrave alleges that she "had difficulty hearing and understanding what the judge was saying" because of her disabilities.[26] A jail officer sat directly behind Musgrave, which made her "anxious and distracted."[27] Musgrave could not hear well because the phone volume was low, and the door was open.[28] She believes that "[i]f she had felt less rushed, she could have calmed down and asked the judge a question."[29] Musgrave did not know whether she could ask questions or if she had a right to a lawyer.[30] Musgrave further alleges that "[t]here was no opportunity for [her] to obtain modifications or accommodations to participate in the proceeding."[31]

On November 26, 2019, nine days after her initial appearance, White had her arraignment, another video conference of about one minute with the same judge as before.[32] At the proceeding, White was still suffering withdrawal symptoms from not receiving her medications.[33] White did not have a lawyer with her at the arraignment.[34]

On December 10, 2019, the plaintiffs filed their Class Action Complaint against the 26th Judicial District and five judges in the United States District Court for the Western District of Oklahoma.[35] On January 22,

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[20] *Id.* at 13.

[21] *Id.* at 13. White later received a charge of Obstructing an Officer and had her bail increased to $4,500. *Id.*

[22] *Id.* at 13

[23] *Id.*

[24] *Id.* at 16, 17. Although the Complaint does not directly state as much, it appears that Musgrave did not have an initial appearance separate from her arraignment. *Id.* at 16.

[25] *Id.* at 16.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 16–17.

[29] *Id.* at 17.

[30] *Id.* at 17.

[31] *Id.* at 16.

[32] *Id.* at 13.

[33] *Id.* at 13.

[34] *Id.* at 14.

[35] *Id.* at 1.

2020, the 26th Judicial District and the judges each filed a Motion to Dismiss and Brief in Support.[36] The judicial district argued that Oklahoma law does not allow lawsuits against judicial districts and that White and Musgrave failed to state a claim because they did not allege that the district denied them any requested accommodation.[37] On February 12, 2020, the plaintiffs filed an Opposition to Motions to Dismiss against the district and the judges.[38] On February 19, 2020, the judicial district and the judges each filed a Reply to Response to Motion to Dismiss and Brief in Support.[39] At the time of writing this case remains pending before Judge Jodi W. Dishman.[40]

B. Social Model of Disability

Although this note primarily concerns White and Musgrave's legal arguments under the Americans with Disabilities Act, a brief review of theory will help to frame their claims.

As much as possible, this note seeks to adopt a social model of disability. Until the disability rights movement and, more recently, disability legal studies, the prevailing view on disability adopted a medical model in which persons with disabilities were denied agency.[41] This model presumed that disability was the consequence of diagnosis; a person experienced disability because that person was problematic in some way.[42] The difficulty of disability was one for the person to overcome, not for society to address.[43] Insofar as society served people with disabilities, society protected them by placing them in institutions.[44] Under a social model of disability, structures in society—not problems with the person—disable because barriers, not diagnoses, cause a person to experience an impairment as a disability.[45] As a consequence, the burden to rectify injustices is on

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[36] Motion to Dismiss, *supra* note 3, at 1.

[37] *Id.* at 6–7, 9.

[38] Plantiff's Opposition to Mot. to Dismiss 1, *White v. Hesse*, No. 5:19-cv-01145 (W.D. Okla. Feb. 12, 2020).

[39] Reply to Response to Mot. to Dismiss 1, *White v. Hesse*, No. 5:19-cv-01145 (W.D. Okla. Feb. 19, 2020).

[40] Court Docket, *supra* note 4, at 15.

[41] *See,* Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It* or *an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 410–16 (2011) (contrasting disability legal studies with studies of or about disability).

[42] *Id.* at 419.

[43] *Id.* at 419–20.

[44] *Id.* at 420.

[45] *Id.* at 426–27. For another helpful explanation, though using slightly different terminology, see Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare,* 54 CALIF. L. REV. 809, 814 (1966) ("For the most part it is the *cultural definition* of disability, rather than the scientific or medical definition, which is instrumental in the ascription of capacities and incapacities, roles and rights, status and security. Thus, a meaningful distinction may be made between 'disability' and

society, not on the person.[46] Additionally, a minority rights model shares a premise with a social model in that it sees society as disabling.[47] Drawing from the experiences of the Civil Rights and Women's Rights Movements, the minority rights model nonetheless places the onus for liberation on the collective will of people with disabilities.[48]

White and Musgrave allege that they did not fully understand their initial appearance and arraignments.[49] A medical model would blame White and Musgrave themselves for their inabilities. A social model properly recognizes that White's and Musgrave's lack of understanding was not the fault of their impairments but the consequence of an inaccessible proceeding. After all, White and Musgrave likely could have understood the proceeding with reasonable modifications.[50] On the other hand, a minority rights model does not resolve this situation in particular. White and Musgrave did not advocate for themselves in this situation because they did not know they could.[51] More broadly, however, by joining as plaintiffs and seeking to represent a class of persons with disabilities, White and Musgrave are taking the steps advocated by the minority rights model—collective mobilization and concrete action through political and legal channels.

Importantly, a social model would do more than blame the 26th Judicial District's proceedings for being disabling, not White's and Musgrave's impairments. A social model would also place White's and Musgrave's experiences as persons with disabilities at the forefront of any consideration of their situation.[52] Without insights from White and Musgrave, any legal response would ultimately treat them as "unfortunate, afflicted creatures," the very impression that the disability rights movement has rightfully rejected.[53] This note does not feature any interviews with White, Musgrave, or other individuals with disabilities involved in bail proceedings. Fortunately, however, the Complaint includes not just

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'handicap'—that is, between the *physical disability*, measured in objective scientific terms and the *social handicap* imposed upon the disabled by the cultural definition of their estate.").

[46] Kanter, *supra* note 41, at 427.

[47] *Id.* at 420–21.

[48] *Id.* at 422.

[49] Complaint, *supra* note 1, at 13, 16.

[50] At this stage, the note sets out theoretical positions. The claim that the social model of disability would place the onus on the 26th Judicial District to make modifications to its bail, arraignment, and other proceedings does not mean that the plaintiffs have a claim under the ADA. The ADA incorporates some concepts from the social model, but the legal analysis must of course follow from the statutory, regulatory, and judicial text, not theoretical principles.

[51] *See also* Pierce v. District of Columbia, 128 F. Supp. 3d 250, 269–270 (D.D.C. Sept. 11, 2015) (calling "baffling" the contention that an inmate with known communications-related difficulties had to communicate his own need for accommodations).

[52] For an example of disability legal studies that highlights the lived experiences of persons with disabilities, *see* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 12–17 (2000) (interviewing disability advocates).

[53] *Pierce*, 128 F. Supp. 3d at 265, (quoting Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 27 HARV. C.R.-C.L. L. REV. 413, 426–27 (1991)).

allegations of how White and Musgrave were treated by the judicial district, but also statements of how White and Musgrave experienced the treatment they received and what White and Musgrave believe would have helped them.

For example, the 26th Judicial District's procedures at White's initial appearance left her feeling "intimidated."[54] White "would have liked" to have had a lawyer with her.[55] Furthermore, the withdrawal symptoms she experienced at the proceeding came after she had tried advocating for herself at the Canadian County Jail by asking for her medication.[56] For her part, Musgrave alleges that she felt "anxious and distracted" because a jail officer sat directly behind her during the proceeding.[57] If she had not been rushed, Musgrave "could have calmed down" and asked questions.[58] She also "would have liked" a lawyer.[59] Additionally, Musgrave believes she could have heard better if the video conference's volume was higher and the door was closed.[60]

Affirming that White's and Musgrave's experiences and wishes would belong properly at the forefront of any analysis, this note turns to the specific arguments raised by the judicial district.

II. THE 26TH JUDICIAL DISTRICT'S MOTION TO DISMISS

A. Under *Jaegly*, Title II provides statutory authority to bring claims against judicial districts, even if state law does not explicitly authorize such actions

In its Motion to Dismiss, the 26th Judicial District maintains that it cannot be sued because Oklahoma law does not authorize suits against its judicial districts.[61] The district argues that the Oklahoma Governmental Tort Claim Act governs lawsuits against the state and its political subdivisions and that this act's definition of "political subdivision" does not reach judicial districts.[62] In their Opposition to Motion to Dismiss, the plaintiffs

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54 Complaint, *supra* note 1, at 13.
55 *Id.*
56 *Id.* at 12–13.
57 *Id.* at 16.
58 *Id.* at 17.
59 *Id.*
60 *Id.*
61 Motion to Dismiss, *supra* note 3, at 6–7.
62 *Id.* at 7 (citing OKLA. STAT. tit. 51, § 152(13), 153 (2020)).

devote six pages to contesting the 26th Judicial District's reading of Oklahoma law.[63] In the second to last sentence of this section, the plaintiffs turn to *Jaegly*: "Moreover, considering Title II of the ADA specifically, the Ohio District Court found that the Act itself provided the statutory authority to sue a local court."[64] Because *Jaegly* persuasively defeats the Motion to Dismiss and because it offers a more replicable argument for potential plaintiffs in other jurisdictions, this section will develop this argument beyond the one sentence that it has received so far in the *White* briefing.[65]

In *Jaegly*, the plaintiff, whose impairments included agoraphobia, panic disorder, and anxiety, had difficulty interacting with others, being in public places, and leaving his home.[66] In three separate proceedings, Jeffrey Jaegly sought a divorce in Ohio's Lucas County Court of Common Pleas, Domestic Relations Division.[67] In the first proceeding, Jaegly had to pay for a court reporter and video technology to remain at home on account of his disability.[68] In the second proceeding, the court allowed Jaegly to participate in the initial hearing by telephone but rejected his request for this accommodation at all hearings.[69] According to Jaegly, the court did not consider other options to accommodate his disability.[70] The court dismissed the divorce action after Jaegly did not appear for a settlement pre-trial conference.[71] Finally, in his third attempt, the court again denied Jaegly's Motion to Excuse Plaintiff's Presence at All Hearings.[72]

Jaegly filed a complaint under the ADA and the Rehabilitation Act against multiple defendants, including the Lucas County Court of Common Pleas, Domestic Relations Divisions, in the United States District Court for the Northern District of Ohio.[73] Among other claims, Jaegly alleged that the defendants "refused to make reasonable modifications to general practices [and] refused to provide auxiliary aids and services."[74] The Court of Common Pleas filed a Motion to Dismiss on the ground that it was not a legal entity capable of being sued.[75] The Court of Common Pleas argued that state law controlled whether it was an entity capable of being sued under Federal Rule of Civil Procedure 17(b) and that Ohio law

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[63] Plantiff's Opposition to Mot. to Dismiss, *supra* note 38, at 2–8.

[64] *Id.* at 8.

[65] Additionally, the district's Reply makes no mention of *Jaegly*. *See*, Kanter, *supra* note 41 at 1-3.

[66] Jaegly v. Lucas Cnty. Bd. of Comm'rs (Jaegly I), No. 16–cv–1982, 2017 WL 4310634, at *1 (N.D. Ohio Sept. 28, 2017), aff'd on alternative grounds by Jaegly II, No. 16–cv–1982, 2017 WL 6042237 (N.D. Ohio Dec. 6, 2017).

[67] *Id.*

[68] *Id.* This action was dismissed for independent reasons. *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* The district court ruled that collateral estoppel controlled this decision. *Id.*

[73] *Id.* at *2.

[74] *Id.*

[75] Jaegly II, No. 16–cv–1982, 2017 WL 6042237, *2 (N.D. Ohio Dec. 6, 2017).

did not authorize suits against courts.[76] In support, it cited a Supreme Court of Ohio decision that stated, "[a]bsent express statutory authority, a court can neither sue nor be sued in its own right."[77] The Court of Common Pleas then maintained that no Ohio statute gives "express statutory authority" to sue an Ohio court.[78]

The district court found "express statutory authority" in Title II of the ADA itself.[79] First, the district court determined that Ohio courts have not uniformly resolved whether federal statutes may provide the "express statutory authority."[80] Admittedly, the district court in *Jaegly* may have reached a bit in concluding that Ohio courts had been uncertain in this regard. In *Lawson v. City of Youngstown*, the district court clearly stated that "the State of Ohio is the only entity capable of providing express authority for a court to be sued."[81] Nevertheless, the district court in *Jaegly* found its support in *Hatzidakis v. Lucas County Common Pleas Court*,[82] even though the district court in that case merely considered—and ultimately rejected—the plaintiffs contention that federal law in Title VII could provide "express statutory authority."[83]

Second, after claiming that Ohio courts were not uniform as to whether federal law could provide "express statutory authority," the district court in *Jaegly* addressed the matter itself.[84] The district court decided for policy reasons that federal statutes could provide express authority.[85] Distinguishing *Lawson*, in which the plaintiff asserted claims under both Ohio and federal law, the district court noted that Jaegly had only federal claims available because Ohio lacked any statute similar to the ADA or the Rehabilitation Act.[86] The district court declared it "illogical to require that an Ohio statute provide the authority to assert a right exclusively available under federal law."[87] The district court also found support in the Supreme Court's decision in *Tennessee v. Lane*, which characterized Title II as "aimed at the enforcement of a variety of basic rights, including the right of access to the courts."[88] After all, Congress intended the ADA to address "unconstitutional treatment of disabled persons by state agencies."[89]

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[76] *Id.*; *See also* FED. R. CIV. P. 17(b).

[77] *Jaegly II*, 2017 WL 6042237, at *2.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Lawson v. City of Youngstown, 912 F. Supp. 2d 527, 530 (N.D. Ohio 2012).

[82] Hatzidakis v. Lucas County Common Pleas Court, No. 3:11CV00169, 2013 WL 3243629 (N.D. Ohio June 25, 2013).

[83] *Id.* at *3.

[84] *Jaegly II*, 2017 WL 6042237, at *2.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Tennessee v. Lane, 541 U.S. 509, 529 (2004).

[89] *Id.* at 510.

Third, the district court considered whether the ADA provided "express statutory authority" and concluded that it did.[90] *In Pennsylvania Department of Corrections v. Yeskey*, a prison argued that it was not a "public entity" for purposes of Title II.[91] The Supreme Court rejected this argument because Congress in the ADA clearly intended to cover state institutions, and no language in the text suggested an exception for prisons.[92] In *Jaegly*, the district court applied the same reasoning and did not identify any language in the text suggesting that Congress had meant to exempt courts from the ADA.[93] As the Court reasoned in *Yeskey*, that the ADA can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[94]

In *White*, the district court should follow *Jaegly*. Although Oklahoma has state anti-discrimination laws that are like Titles I and III in prohibiting discrimination by employers and public accommodations,[95] the state does not have an analog to Title II. As in *Jaegly*, it would be "illogical" to require Oklahoma law to allow plaintiffs to assert an exclusively federal claim.[96] Beyond Oklahoma law, *Yeskey* makes clear that absent a clear exception, "public entity" in Title II encompasses even those state instrumentalities that Congress might not have specifically envisioned, whether prisons or courts.[97] *Lane* further demonstrates that the ADA protects the fundamental right of access to courts.[98]

Litigants should develop arguments based on *Jaegly* for different jurisdictions. The exact steps in *Jaegly* required the district court to cite Ohio cases.[99] More broadly, *Jaegly* persuasively combined *Yeskey*, *Lane*, and the policy argument that states should not get to limit the public entities to which Title II applies; this argument does not turn on specific state law.[100] Regardless, the Opposition to Motion to Dismiss notes that many states do allow these lawsuits.[101]

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[90] *Jaegly II*, 2017 WL 6042237, at *2.

[91] Penn. Dept of Corrs. v. Yeskey, 524 U.S. 206, 208 (1998).

[92] *Id.* at 211 – 12.

[93] *Jaegly II*, 2017 WL 6042237, at *3.

[94] *Yeskey*, 524 U.S. at 212.

[95] *See* OKLA. STAT. tit. 25, §§ 1302, 1402 (discriminatory practices by employers and by public accommodations, respectively).

[96] Jaegly I, No. 16–cv–1982, 2017 WL 4310634, *2 (N.D. Ohio Sept. 28, 2017).

[97] *Yeskey*, 524 U.S. at 211–12.

[98] Tennessee v. Lane, 541 U.S. 509, 529 (2004).

[99] Jaegly II, No. 16–cv–1982, 2017 WL 6042237, *2 (N.D. Ohio Dec. 6, 2017).

[100] One court, also in Ohio, has cited *Jaegly* in denying a court system's Motion to Dismiss involving a claim arising under Title II of the Americans with Disabilities Act. *See* Bowie v. Hamilton Cnty. Juv. Ct., No.: 1:18-cv-395, 2019 WL 1305864, at 2 (S.D. Ohio Mar. 22, 2019).

[101] Plantiff's Opposition to Mot. to Dismiss, *supra* note 38, at 2.

B. Under *McCadden*, judicial districts must adopt policies to provide reasonable modifications because of the elevated likelihood their officers will interact with individuals with disabilities in bail, arraignment, and other proceedings

In its Motion to Dismiss and Brief in Support, the 26th Judicial District argues that White and Musgrave have failed to state a claim because they do not allege that the district court ever denied a requested modification.[102] In its Reply to Motion to Dismiss and Brief in Support, the 26th Judicial District elaborates that "knowledge by the party being sued of a disability (that may or may not need an accommodation) and a request for accommodation" are essential elements for the plaintiff's claim under the ADA.[103]

In their Brief in Opposition, White and Musgrave counter that the ADA imposes affirmative obligations on public entities even without notice.[104] The plaintiffs cite multiple regulations, including—as relevant for this note's argument—that a "public entity shall take appropriate steps to ensure that communications with [people] with disabilities are as effective as communications with others."[105] The plaintiffs buttress this claim with cases interpreting the regulations.[106] In particular, White and Musgrave rely on *Pierce* to discredit the 26th Judicial District's argument that its "obligations under the ADA and Section 504 depend on notification of a person's disability or request for accommodation."[107]

The plaintiffs' reliance on *Pierce* may be overstated. Though language in *Pierce* supports the proposition that public entities have an affirmative duty to ascertain whether a person has a disability and needs a modification,[108] the holding in *Pierce* is more limited. As the district court specified, "this Court holds that the failure of prison staff to conduct an informed assessment of the abilities and accommodation needs of a new inmate who is obviously disabled . . . violates Section 504 and Title II as a matter of law."[109] In *White*, the plaintiffs' disabilities are likely not so

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[102] Motion to Dismiss, *supra* note 3, at 9.

[103] Reply to Response to Mot. to Dismiss, *supra* note 39, at 5.

[104] Plantiff's Opposition to Mot. to Dismiss, *supra* note 38, at 9.

[105] 28 C.F.R. § 35.160(a)(1).

[106] Plantiff's Opposition to Mot. to Dismiss, *supra* note 38 at 18 ("Courts have repeatedly underscored the affirmative steps that the ADA requires to ensure that disabled people have equal access."); *see*, e.g., Delano-Pyle v. Victoria Cnty., 302 F.3d 567, 575 (5th Cir. 2002) ("A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability.").

[107] Plantiff's Opposition to Mot. to Dismiss, *supra* note 38, at 12 (citing *Pierce*, 128 F. Supp. 3d at 266-69).

[108] Pierce v. District of Columbia, 128 F. Supp. 3d 250, 267 (D.D.C. Sept. 11, 2015) ("The Court . . . finds that the District violated Section 504 and Title II as a matter of law when it failed to evaluate Pierce's need for accommodation at the time he was taken into custody.").

[109] *Id.* at 268. ("As explained below, this Court holds that the failure of prison staff to conduct an

obvious as Pierce's deafness. White's impairments are severe depression, severe anxiety, bipolar disorder, PTSD, and interstitial cystitis.[110] Musgrave's impairments are bipolar disorder I, anxiety disorder, and PTSD.[111] White's and Musgrave's disabilities may not give notice.

Nevertheless, plaintiffs' string citation after quoting *Pierce* refers to a case that offers support for White and Musgrave's argument that public entities have an affirmative duty to accommodate disabilities and supports similar future claims: *McCadden*.[112] The 26th Judicial District's best response to this case in its Reply to the Response to the Motion to Dismiss is to discredit it as "a district court order from a court not in the Tenth Circuit [that] has no control over this Court."[113] The district court's avoidance of the facts and reasoning in the case is telling: *McCadden* stands for the proposition that an "elevated likelihood" that a public entity will interact with persons with disabilities requires the public entity to "take[] action to address how officers [will] interact" with such individuals.[114] Because *McCadden* persuasively addresses the Motion to Dismiss and offers a more replicable argument for future plaintiffs in other jurisdictions, this section will develop the potential for a *McCadden* argument beyond its use by the *White* plaintiffs.

In *McCadden*, a seven-year-old boy with attention deficit hyperactivity disorder experienced a behavior episode induced by his disability.[115] Without inquiring whether the boy had a disability, the school resource officer "immediately" handcuffed him.[116] The boy's parent filed suit against the city under Title II of the ADA and the Rehabilitation Act, among other claims.[117] Included within the ADA claim were allegations

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informed assessment of the abilities and accommodation needs of a new inmate who is obviously disabled is intentional discrimination in the form of deliberate indifference and violates Section 504 and Title II as a matter of law.")

[110] Complaint, *supra* note 1, at 7. ("Ms. White has severe depression, severe anxiety, bipolar disorder, post-traumatic stress disorder ('PTSD'), and a painful condition called interstitial cystitis.")

[111] *Id.* at 8. ("[Plaintiff Janara Musgrave] has bipolar disorder I, anxiety disorder, and PTSD.").

[112] Plantiff's Opposition to Mot. to Dismiss, *supra* note 38 at 9; *See also* McCadden by McCadden v. City of Flint, No. 18-12377, 2019 WL 1584548, *7 (E.D. Mich. 2019).

[113] Reply to Response to Mot. to Dismiss, *supra* note 39, at 6 ("Obviously, this case is a district court order from a court not in the Tenth Circuit and has no control over this Court (unlike the Tenth Circuit cases cited that do set forth the elements of the claims and require knowledge of the disability and a request for accommodation under both Title II of the ADA and the Rehab Act).").

[114] *McCadden*, 2019 WL 1584548, at *7 (reasoning that "although the City, Johnson, and Walker are not alleged to have known about Plaintiff's disability, Plaintiff has alleged that the City knew or should have know[n] about the elevated likelihood that any Flint juveniles would suffer from a disability and should have taken action to address how officers interact with Flint juveniles."). The parties in *McCadden* reached a settlement in August 2020. *See* Sarah Cwiek, *Lawsuit over Seven-Year-Old Handcuffed by Flint Police Settled*, MICH. RADIO (Aug. 19, 2020), https://tinyurl.com/y8fk5jps [https://perma.cc/S2MS-7GSF].

[115] *McCadden*, 2019 WL 1584548, at *1.

[116] *Id.* ("Walker did not inquire whether Plaintiff had a disability or an individualized education plan ('IEP'), and Walker immediately placed Plaintiff in handcuffs.").

[117] *Id.* ("Plaintiff's Complaint includes five claims in which Johnson or the City are sued: (1) a 42 U.S.C. § 1983 claim against Defendant Police Chief Timothy Johnson ("Johnson") for unreasonable search and seizure and excessive force in violation of the Fourth and Fourteenth Amendments to the

that the city discriminated by "failing to provide reasonable modifications to policies, practices, or procedures to avoid discrimination on the basis of disability," "failing to ensure policies, practices, procedures, training, or supervision that take the needs of children with disabilities into account," and "failing to avoid unnecessary policies, practices, criteria or methods of administration that have the effect of discriminating against persons with disabilities."[118] In addition, McCadden argued that "compliance with Title II requires that public entities: (1) cease engagement in negative acts of disability discrimination, and (2) take certain affirmative steps to ensure that disabled individuals are not subjected to disability discrimination."[119]

The city filed a Motion to Dismiss, which the district court denied.[120] Most importantly for the *White* plaintiffs, the district court disregarded the fact that the city is "not alleged to have known about Plaintiff's disability, [because] Plaintiff has alleged that the City knew or should have to know [sic] about the elevated likelihood that any Flint juveniles would suffer from a disability and should have taken action to address how officers interact with Flint juveniles."[121]

In *White*, the plaintiffs have alleged that the 26th Judicial District Court knew or should have known about the "elevated likelihood" that individuals with disabilities would come before its bail, arraignment, or other proceedings. First, the plaintiffs present data showing that "60 percent of those imprisoned in Oklahoma [17,000] have symptoms or a history of mental illness."[122] Second, the plaintiffs quoted an Oklahoma County District Attorney saying that Oklahomans with mental illnesses "are coming into the criminal justice system at a rate that is just completely overwhelming."[123] Similar numbers exist elsewhere, meaning that the "elevated likelihood" that individuals with disabilities will appear in a bail proceeding is not limited to Oklahoma.[124] For this reason, litigants from other jurisdictions should rely on *McCadden* in future cases.

U.S. Constitution (Count I); (2) a Monell liability claim against the City (Count II); (3) a claim against the City for disability-based discrimination in violation of Title II of the ADA (Count III); (4) a claim for disability-based discrimination by the City for violating Section 504 of the Rehabilitation Act (Count IV 1); and (5) disability-based discrimination by the City in violation of Michigan's Persons with Disabilities Civil Rights Act ("PWDCRA") (Count V).").

[118] *Id.* at *5.

[119] *Id.* at *7.

[120] *Id.*

[121] *Id.*

[122] Plantiff's Opposition to Mot. to Dismiss, *supra* note 38 at 15, (citing Jaclyn Cosgrove, *Epidemic Ignored*, OKLAHOMAN (Nov. 13, 2016), http://oklahoman.com/special/article/5526388/epidemic-ignored-solutions-necessary-to-stop-oklahomans-from-funneling-into-jails-prisons-for-treatment [https://perma.cc/E99C-GZ4F]).

[123] *Id.*

[124] John P. Docherty, *Creating New Hope for Mental Illness and the Criminal Justice System*, NAMI (Oct. 20, 2017), https://www.nami.org/Blogs/NAMI-Blog/October-2017/Creating-New-Hope-for-Mental-Illness-and-the-Crimi [https://perma.cc/TZ8Q-QTSB] ("In 44 out of 50 states, prisons and jails hold more individuals with serious mental illness than the largest state hospital. In local jails, 64% of people experience symptoms of a mental health condition, which represents over 7 million people.").

For the above reasons, the 26th Judicial District can be sued under Title II and should have known that individuals with disabilities would come before it in bail proceedings. The next part will consider the plaintiffs' arguments directly. Analysis of White and Musgrave's claims on the merits is not wholly separate from the 26th Judicial District's Motion to Dismiss. If their factual allegations, taken as true, do not make out plausible grounds on which they might prevail on the merits, that failure would be a reason for the district court to grant the Motion to Dismiss.[125]

III. WHITE AND MUSGRAVE'S CLAIMS UNDER THE ADA TITLE II AND REHABILITATION ACT

Because the 26th Judicial District is a "public entity,"[126] Title II of the ADA determines whether the district discriminated against White and Musgrave on the basis of disability.[127]

Title II's non-discrimination provision states:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[128]

The analysis requires answering two preliminary questions: whether White and Musgrave are "individual[s] with a disability" and whether they are "qualified." The third question then becomes whether the 26th Judicial District "subjected [them] to discrimination." Finally, if the answers are yes to the above, the fourth question concerns the available remedies.

A. White and Musgrave have alleged that they are individuals with a disability

The Complaint states that White and Musgrave are "individuals with disabilities for purposes of" the Americans with Disabilities Act and the Rehabilitation Act.[129] Because the Complaint does not walk through each step of the necessary analysis, this section will demonstrate that White and

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[125] *See* FED. R. CIV. P. 8(a)(2); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

[126] *See infra* Part III.A.

[127] Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (2009). The Rehabilitation Act applies to any entity that receives federal funds. 29 U.S.C. § 794. The Complaint alleges that "[u]pon information and belief," the 26th Judicial District receives federal funds. Complaint, *supra* note 1, at 48.

[128] 42 U.S.C. § 12132. The Rehabilitation Act uses a similar prohibition. *Cf.* 29 U.S.C. § 794.

[129] Complaint, *supra* note 1, at 7–8, 47–48.

Musgrave are in fact individuals with disabilities.

The Americans with Disabilities Amendments Act of 2008 defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such an individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[130]

Before these amendments, cases often hinged on whether a plaintiff was an "individual with a disability."[131] In the 2008 amendments Congress affirmed its intent "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[132] Nevertheless, the prong for the actually disabled retains three terms that require analysis: "physical or mental impairment," "major life activities," and "substantially limits."

By congressional authority, the Equal Employment Opportunity Commission (EEOC) promulgated regulations interpreting the definition of "physical or mental impairment."[133] Under the EEOC regulations, a "physical or mental impairment" includes "[a]ny physiological disorder, or condition, . . . affecting one or more body systems, such as: . . . genitourinary."[134] A "physical or mental impairment" also includes "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."[135] The statute also excludes various traits from "mental impairment," such as "compulsive gambling, kleptomania, or pyromania."[136]

The ADA statute enumerates activities that qualify as "major life activities."[137] These include "hearing," "concentrating," and the "operation of major bodily functions," including "functions of the . . . bladder."[138] Because the text states that "major life activities" "are not limited to" those listed, the EEOC has included other activities by regulation, such as "thinking, communicating, and interacting with others."[139]

The statute directs that "the term 'substantially limits' shall be

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[130] 42 U.S.C. § 12102(1). The Rehabilitation Act mostly uses the same definition. *See* 29 U.S.C. § 705(9)(B) (referencing the ADA Amendments Act of 2008 definition).

[131] *See* RUTH COLKER & PAUL D. GROSSMAN, THE LAW OF DISABILITY DISCRIMINATION 20 (8th ed. 2013) (noting that the previous definition caused the "vast majority of disability discrimination claims filed in federal court [to] fail[] to survive a motion for summary judgment").

[132] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553(b)(5) (2008).

[133] 42 U.S.C. § 12205a.

[134] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h) (1991).

[135] *Id.*

[136] 42 U.S.C. § 12211(a)(2).

[137] *See Id.* § 12102(2)(A)-(B).

[138] *Id.*

[139] 29 C.F.R. § 1630.2(i)(1)(i).

interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."[140] In the Findings Section, Congress stated that earlier Supreme Court interpretation of the term required a "greater degree of limitation than was intended by Congress" and that earlier regulation "defining the term 'substantially limits' as 'significantly restricted' [we]re inconsistent with congressional intent, by expressing too high a standard."[141] In its Purposes Section, Congress stated that it intended "to convey congressional intent that the [earlier] standard . . . for 'substantially limits' . . . has created an inappropriately high level of limitation necessary to obtain coverage under the ADA."[142] In its "Rules of Construction," the EEOC maintains that the "determination of whether an impairment substantially limits a major life activity requires an individualized assessment."[143] Nevertheless, the EEOC also recognizes that for some impairments, the "necessary individualized assessment should be particularly simple and straightforward."[144] The EEOC includes as predictable "major depressive disorder, bipolar disorder, [and] post-traumatic stress disorder."[145] Finally, the ADA clarifies that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . [m]edication."[146]

In *White*, White and Musgrave are individuals with a disability because they allege physical or mental impairments that substantially limit one or more of their major life activities. First, White and Musgrave allege multiple physical or mental impairments. White alleges that she has interstitial cystitis, a physiological condition affecting the genitourinary system.[147] White and Musgrave also allege psychological disorders, including depression, anxiety, bipolar disorder, and post-traumatic stress disorder.[148]

Second, White and Musgrave allege that their impairments affect major life activities. Interstitial cystitis affects the major bodily function of the bladder. Their psychological disorders affect concentrating, a major life activity by statute, as well as thinking, communicating, and interacting with others, which are major life activities by regulation.[149] Moreover, the impairments affected White and Musgrave in their proceedings. At her initial proceeding, White alleges that it was "difficult for her to understand what was happening" because of insomnia and a headache, symptoms of

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[140] 42 U.S.C. § 12102(4)(B).
[141] ADA Amendments Act § 2.
[142] *Id.*
[143] 29 C.F.R. § 1630.2(j)(1)(iv) .
[144] *Id.* § 1630.2(j)(3)(ii) (1991).
[145] *Id.*
[146] 42 U.S.C. § 12102(4)(E)(i)(I) .
[147] Complaint, *supra* note 1, at 7.
[148] *Id.* at 8.
[149] *See* 42 U.S.C. § 12102(2)(A)-(B); 29 C.F.R. § 1630.2(i)(1)(i).

withdrawal after not receiving her anxiety medication.[150] In addition, Musgrave alleges that at her arraignment, she "had difficulty . . . understanding what the judge was saying during the arraignment."[151] Musgrave also stated that she "was anxious and distracted" because a jail officer sat behind her during the proceeding.[152]

Third, White and Musgrave's impairments substantially limit these major life activities for purposes of the ADA. In the amendments, Congress envisioned that an effect on a major life activity that is not a "significant restriction" may still qualify as a "substantial limitation."[153] Under the new approach, White's and Musgrave's claims should be sufficient for this low hurdle. Moreover, the psychological impairments that White and Musgrave allege—including depression, bipolar disorder, and PTSD[154]—fall within the EEOC's predictable assessments.[155] Finally, the increased anxiety and withdrawal symptoms that White experienced after being denied her medication are substantially limiting, even if they would stop with medication, because courts do not consider the ameliorative effects of mitigating measures.

In the Complaint, Musgrave alleges that she had difficulty hearing and understanding her arraignment because of her disabilities.[156] With respect to hearing, the Complaint might go too far, even for the reduced "substantial limitation" hurdle in the amended ADA. The impairments that Musgrave alleges are psychological; she does not allege a hearing impairment, whether physical or neurological.[157] Even though hearing is a major life activity by statute,[158] her impairments likely do not substantially limit her hearing. Musgrave herself stated that she could have heard better had the volume been raised and the door closed.[159] In contrast, Musgrave's allegation about not understanding is likely sufficient for showing that her impairments substantially limited her concentrating, thinking, communicating, and interacting with others.

For the above reasons, White and Musgrave are individuals with disabilities. Because White and Musgrave are actually disabled within the meaning of the ADA, the second and third prongs of the definition of

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[150] Complaint, *supra* note 1 at 13.

[151] *Id.* at 16.

[152] *Id.*

[153] *See* ADA Amendments Act § 2.

[154] Complaint, *supra* note 1, at 12, 16.

[155] *See* 29 C.F.R. § 1630.2(j)(3)(ii)

[156] Complaint, *supra* note 1, at 16.

[157] *Id.*

[158] 42 U.S.C. § 12102(2)(A).

[159] Complaint, *supra* note 1, at 17. Raising the volume and closing the door likely would not count as "mitigating measures," unless they were "reasonable accommodations" to the public entity's proceedings. *See* 42 U.S.C. § 12102(4)(E)(i)(III). If these were reasonable accommodations, then their ameliorative effects would not mean that the effect of Musgrave's impairments on hearing were not substantial. However, it remains that her impairments may not have had any effect on her hearing, and she had difficulty hearing for separate reasons.

"disability" do not require analysis.[160] Congress has stated that its purpose in the ADA Amendments Act of 2008 was to ensure that "the primary object of attention in cases brought under the ADA [was] whether entities covered under the ADA have complied with their obligations."[161] The note now turns to Title II to complete these steps in the analysis.

B. White and Musgrave have alleged that they are qualified for the 26th Judicial District's arraignment and bail proceedings

Being an "individual with a disability" is insufficient for making out a claim under the ADA. The second preliminary question is whether that individual is "qualified." Because the Complaint does not walk through the requisite analysis, this part will.

Under Title II of the ADA, a "qualified" person is:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[162]

This definition requires determining whether a public entity's offering is a "service[] . . . program[] or activit[y]" and whether the individual meets the "essential eligibility requirements."[163]

A public entity's services, programs, and activities include anything with an individual's involvement, even if not voluntary or not beneficial as might be "ordinarily understood."[164] In *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court rejected the prison's two arguments that it did not provide services, programs, or activities for purposes of the ADA. First, the Court rejected the argument that prisons do not provide inmates with "benefits" as might be "ordinarily understood."[165] After

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[160] These prongs cover individuals who were actually disabled in the past but no longer meet the statutory definition and individuals who are falsely regarded as being disabled. *See* COLKER & GROSSMAN *supra* note 131, at 172.

[161] *See* ADA Amendments Act § 2..

[162] 42 U.S.C. § 12131(2). The Rehabilitation Act's similar term, "otherwise qualified," involves two questions: the "essential attributes" of performing a function and whether the person can meet the "requirements."

[163] *Id.*

[164] *See* Penn. Dept of Corrs. v. Yeskey, 524 U.S. 206, 210–11 (1998); Galloway v. Superior Ct. of D.C., 816 F. Supp. 12, 14, 18, 20 (D.D.C. 1993). By statute, the Rehabilitation Act defines "program or activity" as "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. § 794(b)(1)(A).

[165] *Yeskey*, 524 U.S. at 210.

all, the Court observed that prisons offer multiple services, programs, or activities that "at least theoretically 'benefit' the prisoners."[166] Second, services, programs, or activities need not be voluntary.[167] Even if involuntary, judicial proceedings are services, programs, or activities under Title II because, in *Yeskey*'s terms, they at least theoretically benefit the person involved. For example, in *Galloway v. Superior Court of the District of Columbia*, the jury system was a service, program, or activity, even though a jury summons is mandatory and jury duty's benefit to the juror is only an intangible "honor and privilege."[168] Indeed, the district court considered it "obvious" that the jury system fell within Title II.[169]

Given that Title II applies to public entities and Title I applies to employment, the thrust of the "essential eligibility requirements" component under Title II is considerably less than the "essential functions" aspect of Title I.[170] In *Albertson's, Inc. v. Kirkingburg*, the Supreme Court announced that, under Title I, courts could defer to employers' qualification standards, even when they were stricter than applicable laws or regulations.[171] In contrast, for many of a public entity's services, programs, or activities, the only eligibility requirement may be membership in the general public. In the case of an arrested member of the public, their participation in subsequent involuntary procedures will not make a proceeding any less of a service, program, or activity in terms of the ADA.[172]

Title II of the ADA does not include a "direct threat" defense.[173] However, the Department of Justice's regulations allow that a "public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities."[174] Safety requirements must be "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities."[175] An actual risk could include a "direct threat," a "significant risk to the health or safety of others that cannot be eliminated."[176]

In *White*, the 26th Judicial District's arraignment and bail proceedings are services, programs, or activities for the purposes of Title II. Under Oklahoma law, an arraignment is a mandatory practice for the reading of the indictment or information to a defendant.[177] That the 26th Judicial

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[166] *Id.*

[167] *Id.* at 211.

[168] *Galloway*, 816 F. Supp. at 14, 20 (quoting Powers v. Ohio, 499 U.S. 400, 407 (1991)).

[169] *Id.* at 18.

[170] *See* 42 U.S.C. §§ 12111(8), 12131(2).

[171] Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 558 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325.

[172] *See Yeskey*, 524 U.S. at 211.

[173] COLKER & GROSSMAN *supra* note 131, at 172.

[174] 28 C.F.R. § 35.130(h).

[175] *Id.*

[176] 28 C.F.R. § 35.104.

[177] OKLA. STAT. tit. 22, § 451, 465 (2020). For purposes of the Rehabilitation Act, an arraignment is certainly an "operation" of a state instrumentality. *See* 29 U.S.C. § 794(b)(1)(A).

District held White and Musgrave in the Canadian County Jail, and they did not voluntarily choose to participate in the proceedings, does not make those procedures any less of a service, program, or activity, as the Supreme Court ruled in *Yeskey*.[178] In addition, Oklahoma law generally provides that "bail, by sufficient sureties, shall be admitted upon all arrests where the offense is not punishable by death."[179] The bail proceedings "at least theoretically" could have benefited White and Musgrave if they had been able to make bail in exchange for release.[180] If a juror can be said to benefit from the "honor and privilege" a jury system provides, then a bail system in which a defendant can receive a release from custody also provides a benefit.[181]

White and Musgrave meet the "essential eligibility criteria" for the arraignment and bail proceedings. First, even though White and Musgrave's charges are misdemeanors, such that Oklahoma law did not *require* their appearances at the arraignments,[182] they were *eligible* to appear. Second, the 26th Judicial District's bail schedule applies to anyone arrested for a felony or misdemeanor.[183] Indeed, the 26th Judicial District evidenced their belief that White and Musgrave were eligible by conducting the proceedings. Although White and Musgrave were not able to participate fully in the proceedings, their need for reasonable modifications does not affect whether they were qualified but whether they experienced discrimination.[184]

Finally, the 26th Judicial District cannot make out a safety defense to White and Musgrave's qualifications. The arraignment and bail proceedings took place by videoconference in the Canadian County Jail with jail officers present.[185] White and Musgrave did not pose a direct threat or actual risk to anyone in these proceedings.[186] Moreover, a lawyer or other reasonable modification for White and Musgrave would also not have posed any actual risks.

Under Title II, White and Musgrave are qualified individuals with disabilities for the 26th Judicial District's arraignment and bail proceedings. Following these preliminary questions, the issue becomes whether the 26th Judicial District discriminated against White and Musgrave.

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[178] *See* Penn. Dept of Corrs. v. Yeskey, 524 U.S. 206, 210 (1998); Complaint, *supra* note 1, at 12–13, 16.

[179] OKLA. STAT. tit. 22 § 1101(A). Bail "may be denied" for certain offenses more serious than White and Musgrave's misdemeanors. *Id.* § 1101(C). Again, for purposes of the Rehabilitation Act, bail is certainly an "operation" of a state instrumentality. *See* 29 U.S.C. § 794(b)(1)(A).

[180] *See Yeskey*, 524 U.S. at 210.

[181] *See* Galloway v. Superior Ct. of D.C., 816 F. Supp. 12, 20 (D.D.C. 1993) (quoting Powers v. Ohio, 499 U.S. 400, 407 (1991)).

[182] *See* OKLA. STAT. tit. 22 § 452.

[183] Complaint, *supra* note 1, at 21.

[184] *See* 42 U.S.C. § 12131(2).

[185] *See* Complaint, *supra* note 1, at 13, 16.

[186] *See* 28 C.F.R. § 35.104.

C. White and Musgrave have alleged that the 26th Judicial District denied them the opportunity to participate in the proceedings because the district did not ensure effective communication by not furnishing appropriate auxiliary aids and services and because doing so would not have been a fundamental alteration

In the Complaint, White and Musgrave claim that the 26th Judicial District is "violating Title II of the ADA by administering a bail policy that does not take into consideration an individual's disability [and] does not provide the modifications or effective communication services that the person may need to participate equally in the initial appearance or arraignment proceedings."[187] This section will now walk through the necessary steps in the analysis.

Title II's prohibition against discrimination mandates that a qualified individual shall not, by reason of disability, "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[188] The Department of Justice's regulations elaborate on how a public entity might engage in discrimination on the basis of disability, including by failing to communicate effectively.[189]

A public entity's duty to ensure effective communication is affirmative: "A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."[190] A public entity that fails to furnish appropriate auxiliary aids and services where necessary has discriminated by "[d]eny[ing] a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service."[191] Furthermore, a public entity that discriminates by denying equality of opportunity must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability."[192]

As a defense, the regulations allow public entities to not make reasonable modifications when "making the modifications would

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[187] Complaint, *supra* note 1, at 47. The plaintiffs also state other claims under the ADA. *Id.*

[188] 42 U.S.C. § 12132.

[189] 28 C.F.R. § 35.160 ("A public entity shall take appropriate steps to ensure that communications with . . . participants . . . with disabilities are as effective as communications with others."). These regulations were "[p]atterned to a considerable degree" on earlier regulations of the Rehabilitation Act. See 34 C.F.R. § 104.4; COLKER & GROSSMAN *supra* note 131, at 211.

[190] 28 C.F.R. § 35.160(b)(1).

[191] *Id.* § 35.130(b)(1)(i).

[192] *Id.* § 35.130(b)(7).

fundamentally alter the nature of the service, program, or activity."[193] A fundamental alteration occurs when a change would unacceptably affect an essential aspect of the service, program, or activity for all participants or when a less significant change would give the individual with a disability an advantage over other participants.[194] In PGA Tour, Inc. v. Martin,[195] the Supreme Court did not defer to the golf association's views on what would fundamentally alter the association's own competitions.[196] The Court insisted that the "clear language and purpose of the ADA" require an individualized inquiry.[197] In dissent, Justice Scalia promoted a more deferential approach to the golf association's "fundamental alteration" defense.[198] However, Justice Scalia's criticism of the majority's approach appears to depend more on his view of golf's purpose than on his view of the ADA's purpose.[199]

In *White*, White and Musgrave have alleged that the 26th Judicial District subjected them to discrimination because their communication was not as effective as others', they did not receive any auxiliary aids or services, and providing aids would not have been a fundamental alteration. First, White and Musgrave have alleged that their communications during the arraignment and bail proceedings were not as effective as others'. White alleges that, in her initial appearance, she "had insomnia and a headache, which made it difficult for her to understand what was happening or to advocate for herself."[200] Similarly, Musgrave alleges that, in her arraignment, she "had difficulty . . . understanding what the judge was saying."[201] Their communications were not effective. The Complaint does not directly compare White's and Musgrave's communications to others', but, revealingly, the allegations of the other plaintiffs do not specifically allege an inability to understand the proceedings.[202] This comparison provides

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[193] *Id.* Unlike Titles I and III, Title II does not offer a defense of undue hardship or burden.

[194] *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 682–83 (2001).

[195] Although the majority and the dissent disagreed in *PGA Tour* over whether Casey Martin's claim arose under Title I or Title III of the ADA, Title II clearly did not apply because the golf association is not a public entity. Compare 532 U.S. at 681 (golf club is a public accommodation under Title III), with 532 U.S. at 692 (Scalia, J., dissenting) (professional golfer is an independent contractor who is not covered by Title I). Nevertheless, the competing applications of the "fundamental alteration" defense in PGA Tour are helpful because this defense appears in the regulations for Title II and the statute for Title III. *Compare* 42 U.S.C. § 12182(b)(2)(A)(ii) (Title III statute), *with* 28 C.F.R. § 35.130(b)(7) (Title II regulations); *see also* COLKER & GROSSMAN *supra* note 131, at 172 ("DOJ has promulgated virtually identical regulations to interpret these terms under ADA Title II and Title III . . . .").

[196] *PGA Tour*, 532 U.S. at 682–83.

[197] *Id.* at 688.

[198] *Id.* at 699 (Scalia, J., dissenting).

[199] *Id.* at 700–01 (Scalia, J., dissenting) ("But since it is the very nature of a game to have no object except amusement (that is what distinguishes games from productive activity), it is quite impossible to say that any of a game's arbitrary rules is 'essential.'").

[200] Complaint, *supra* note 1, at 13.

[201] *Id.* at 16.

[202] *Id.* at 13. One plaintiff, when asked by the judge whether he understood the proceedings, answered "yes and no." *Id.* at 19. This plaintiff then tried to ask questions about his charges and the bail, which indicates that he understood more than White and Musgrave. *Id.*

evidence that White's and Musgrave's communications were not as effective as others'.

Second, White and Musgrave have alleged that the 26th Judicial District did not furnish appropriate auxiliary aids and services that would have allowed them to communicate effectively in the proceedings. Both White and Musgrave did have their proceedings conducted by video conference.[203] The furnishing of video conference does not mean, however, that White and Musgrave received appropriate auxiliary aids and services. First, quite simply, the video conference failed in providing effective communication, even if it was meant as an auxiliary aid. Second, auxiliary aids and services require individualized assessment; a general practice of using video conferences does not make it an auxiliary aid. As stated in the regulations, the "type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place."[204] Moreover, the regulations require a public entity to "give primary consideration to the requests of individuals with disabilities" in "determining what types of auxiliary aids and services are necessary."[205] Far from this, White and Musgrave instead had "no opportunity . . . to obtain modifications or accommodations to participate in the proceeding."[206] Any argument from the 26th Judicial District that the video conference was an appropriate auxiliary aid should fail. The district did not fulfill its duty to ensure effective communication.

Third, because White and Musgrave have alleged that the 26th Judicial District did not ensure effective communication by furnishing appropriate auxiliary aids or services, White and Musgrave have stated a claim that the district discriminated by denying them "the opportunity to participate in or benefit from the aid, benefit or service."[207] This discrimination means that the district must "make reasonable modifications in policies, practices, or procedures."[208]

Fourth, the 26th Judicial District likely cannot demonstrate that "making the modifications would fundamentally alter the nature of the service, program, or activity."[209] First, providing a modification would not unacceptably change arraignment or bail proceedings for all participants. Any individual at the arraignment or bail proceeding who does not need the modification could simply ignore it. Second, because arraignments and bail proceedings are not competitive, any individual who receives a

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[203] *Id.* at 13, 16.
[204] 28 C.F.R. § 35.160(b)(2).
[205] *Id.*
[206] Complaint, *supra* note 1, at 16.
[207] 28 C.F.R. § 35.130(b)(1)(i).
[208] *Id.* § 35.130(b)(7).
[209] *Id.*

modification does not receive any advantage over another defendant. As an example of how modifications in judicial proceedings are often not fundamental alterations, the district court in *Galloway* contemplated that "audio describers" as a reasonable modification for blind jurors would not mark a fundamental alteration, just as sign language interpreters do not for deaf jurors.[210] Even Justice Scalia's more deferential approach to the "fundamental alteration" defense has less thrust in this case.[211] Judicial proceedings are not games; courts can assess fundamental alteration defenses raised by defendant courts.

D. Injunctive relief is an appropriate remedy under the ADA Title II

Though the standards for compensatory or punitive damages under Title II are unclear,[212] it is clear that injunctive relief is an available remedy. Title II states that the remedies, procedures, and rights under Title II are the same as those available under the Rehabilitation Act.[213] The Rehabilitation Act states that its relief is the same as under Title VI of the Civil Rights Act of 1964.[214] In *Alexander v. Sandoval*, the Court ruled that private litigants can seek injunctive relief under Title VI.[215] To illustrate the proper use of injunctive relief, the district court in *Galloway* required the superior court to change its policy of excluding blind individuals from jury service.[216]

Sovereign immunity does not pose a hurdle to White and Musgrave's claims.[217] To begin, the suit is not against Oklahoma itself. However, even in the event that the district court agreed with the 26th Judicial District's argument and held that White and Musgrave cannot sue the judicial district and must sue the state, sovereign immunity still would not limit the suit.

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[210] Galloway v. Superior Ct. of D.C., 816 F. Supp. 12, 18 n.11 (D.D.C. 1993).

[211] *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 700–01, (2001) (Scalia, J., dissenting).

[212] COLKER & GROSSMAN *supra* note 131, at 286.

[213] 42 U.S.C. § 12133. Under the Rehabilitation Act, the termination of federal financial assistance may also be an appropriate remedy if compliance cannot be achieved. *See* 34 C.F.R. § 100–01.

[214] 29 U.S.C. § 794a.

[215] Alexander v. Sandoval, 532 U.S. 275, 279 (2001); *see also* DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL § 9, at 3.

[216] Galloway v. Superior Ct. of D.C., 816 F. Supp. 12, 20 (D.D.C. 1993).

[217] Questions of state sovereign immunity normally arise in the context of money damages, not injunctive relief. For representative cases, *see, e.g.*, United States v. Georgia, 546 U.S. 151 (2006); Tennessee v. Lane, 541 U.S. 509 (2004). Moreover, even when Congress has not validly abrogated state sovereign immunity, injunctive relief remains an available remedy against state actors under *Ex parte* Young, 209 U.S. 123 (1908). Here, the Complaint states claims against individual judges, in addition to the 26th Judicial District. Complaint, *supra* note 1, at 10–11. However, because this note focuses on the claims against the judicial district and because the judges have filed their own Motion to Dismiss, a brief consideration of the possible sovereign immunity for the district is warranted.

First, in *United States v. Georgia*, the Supreme Court held that Title II of the ADA validly abrogated state sovereign immunity with respect to claims over "conduct that *actually* violates the Fourteenth Amendment."[218] Though outside the scope of this note's ADA analysis, the Complaint also alleges that the judicial district's arraignment and bail proceedings violate due process, equal protection, and the right to counsel.[219] If the district court accepts these arguments, then any state sovereign immunity is abrogated. Even if the district court does not, however, the Supreme Court has read Congress's prophylactic powers to protect access to courts broadly.[220] Dissenting in *Tennessee v. Lane*, Chief Justice William Rehnquist criticized the majority for not identifying the specific conduct at issue in the congressional record but instead relying on "a wide-ranging account of societal discrimination against the disabled."[221] Even if the Supreme Court has approached proportionality and congruence more strictly in other contexts, Title II has still abrogated state immunity for cases implicating access to courts.[222]

In their Complaint, White and Musgrave ask for an injunction mandating the adoption of a "policy of non-discrimination and the provision of reasonable modifications for arrestees with disabilities participating in initial appearances, arraignments, and bail settings, including . . . [e]ffective communication at and about appearances, arraignments, and bail setting."[223] The Complaint also includes information that could suggest more specific changes in policy that the district might adopt following a permanent injunction. First, the 26th Judicial District could ensure defendants are not anxious or distracted by asking whether they want the jail officer to step aside or to close the door. Second, the district could require the judges to ask defendants whether they understand the proceedings and have any questions. Third, depending on the outcome of the plaintiffs' separate Sixth Amendment claim, the district could require the presence of counsel. Fourth, even if the 26th Judicial District does not control the jail, they could require that anyone coming before the court from the jail has received necessary medications. Finally, even though an effort to pass supported decision-making in Oklahoma has failed,[224] the district could nonetheless allow individuals to have a support person present to help them to understand.

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[218] *Georgia*, 546 U.S. at 159.

[219] Complaint, *supra* note 1, at 43–45.

[220] *See Lane*, 541 U.S. at 533–34.

[221] *Id.* at 541 (Rehnquist, C.J. dissenting).

[222] *Lane*, 541 U.S. at 533–34.

[223] Complaint, *supra* note 1, at 51.

[224] *Oklahoma*, NAT'L RES. FOR SUPPORTED DECISION-MAKING (Sept. 15, 2020), http://supporteddecisionmaking.org/state-review/oklahoma [https://perma.cc/D3DD-B86S].

CONCLUSION

Although White and Musgrave's lawsuit is the first class-action lawsuit to challenge bail practices under the Americans with Disabilities Act and the Rehabilitation Act,[225] their claims illustrate well-documented and alarming links among poverty, disability, and the criminal justice system.[226] Disability impoverishes; nearly half of adults in the United States with disabilities live in households with a total income of under $25,000.[227] People with disabilities, especially those with mental health issues like those alleged by White and Musgrave, disproportionately find themselves enmeshed in the criminal justice system. More than half of state prisoners and jail inmates have mental health issues.[228] The criminal justice system, especially through its bail practices, unfairly incarcerates the poor; many of the nearly 500,000 unconvicted people in jails could not afford bail.[229] One in five incarcerated people have not been convicted.[230]

As these statistics briefly sketch out, *White* is an important lawsuit. Judge Dishman should deny the 26th Judicial District's Motion to Dismiss. The 26th Judicial District is an entity that can be sued, and White and Musgrave have stated a claim. Although resolution on the merits would require more evidence and further briefing, the plaintiffs' factual allegations in the Complaint, taken as true, demonstrate that they have plausible grounds on which to prevail.[231]

Though it is the first, *White* should not be the last such lawsuit. This note encourages litigation in other jurisdictions to follow *White* by bringing claims against state judicial districts whose bail practices violate Title II and the Rehabilitation Act. If districts then file motions to dismiss, this note suggests using *Jaegly* for the proposition that the ADA authorizes suits against state judicial districts even in the absence of explicit state statutory authority. This note further suggests using *McCadden* to introduce the elevated likelihood standard for when public entities must prepare policies to make reasonable modifications. These cases offer pathways to

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[225] *White, et al. v. Hesse, et al.*, ACLU (Feb. 25, 2020), https://www.aclu.org/cases/white-et-al-v-hesse-et-al [https://perma.cc/6YBH-N5WX].

[226] *See*, e.g., tenBroek & Matson, *supra* note 45, at 809 ("Not all who are poor are physically handicapped; not all who are handicapped are poor. But the two conditions—poverty and disability—are historically so intermeshed as to be often indistinguishable.").

[227] Kanter, *supra* note 41, at 423 ("As a group, people with disabilities also are less wealthy, less independent, less educated, and less likely to reach their full potential than other disadvantaged groups.").

[228] Richard Williams, *Addressing Mental Health in the Justice System*, NAT'L CONF. STATE LEGISLATURES (Aug. 2015), https://www.ncsl.org/research/civil-and-criminal-justice/addressing-mental-health-in-the-justice-system.aspx [https://perma.cc/G3F2-3H53].

[229] Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality [https://perma.cc/FB6U-3DG9].

[230] *Id.*

[231] This note has not addressed the intermediate questions of class certification.

overcoming two hurdles likely raised in the Motions to Dismiss. On the merits, plaintiffs may bring any number of claims under the ADA. This note focuses on a public entity's duty to ensure effective communication and finds enough support to predict that the claim should succeed.