IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ANTHONY TILLMAN,

Plaintiff,

v.

Cause No. 4:21-CV-00299

CITY OF ST. LOUIS, MISSOURI, et al.,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Anthony Tillman must use a wheelchair after a 2017 shooting incident that resulted in paraplegia. Since the beginning of his pretrial detention at the St. Louis City Justice Center ("CJC") on October 5, 2020 — approximately 168 days — Defendants ignored Mr. Tillman's requests and denied him an accessible shower despite his obvious disability. It was only upon this Court's entry of a temporary restraining order, ECF No. 30, that the Defendants finally relented and allowed Mr. Tillman this basic request. Unfortunately, the Defendants have shown a dogged determination to flout the requirements of Title II of the Americans with Disabilities Act of 1990 ("ADA"). An order of preliminary injunction is necessary to ensure Mr. Tillman is provided access to the shower during his detention as required under federal law and the Defendants are enjoined from continuing discriminatory treatment.

FACTS

Anthony Tillman must use a wheelchair for mobility following a 2017 shooting that resulted in paraplegia. *See* Declaration of Anthony Tillman ("Tillman Dec."), attached as Exhibit 1, at ¶ 3. During a prior, unrelated incarceration at the CJC beginning in February 2020, Mr.

Tillman fell while trying to take a shower in an inaccessible bathroom after jail staff denied his request for assistance. *Id.* at ¶¶ 4-6. As a result of the fall, he sustained a laceration and developed a severe blood infection that left him delirious and required hospitalization. *Id.* at ¶¶ 6-7. Due to the blood infection sustained, Mr. Tillman suffered from a number of persistent, open wounds on his body and ongoing complications that cause extremely dry skin and toenails that frequently fall off. *Id.* at ¶¶ 6-8. While most of his wounds have recently healed, he has one wound remaining and continuing issues with dry skin and toenails that fall off. *Id.* at ¶ 29. Given his prior experiences, Mr. Tillman remains frightened that he may suffer another blood infection absent adequate hygiene protocols. *Id.* Mr. Tillman was granted "Catastrophic Medical Release" on April 8, 2020, and returned home, where he was able to receive daily care from home health aides in the community. *Id.* at ¶¶ 4, 18.

More recently, Mr. Tillman has been incarcerated at St. Louis's CJC since October 5, 2020. *Id.* at ¶ 9. When he arrived at CJC, Mr. Tillman spoke with a nurse whose name he cannot recall and informed her that, due to his disability, he would require either (1) a shower equipped for individuals who use wheelchairs or, alternatively, (2) staff assistance in showering. *Id.* at ¶ 17. Mr. Tillman never received a shower or assistance with bathing. *Id.* at ¶¶ 18, 43. He remained in his street clothes for approximately 10 days after this initial request. *Id.* at ¶ 18. The medical staff, who were supposed to help clean his open wounds twice a day, regularly only cleaned them once per day. *Id.* at ¶ 19.

On or around October 15, 2020, prison officials provided Mr. Tillman with a wash basin and a rag with which to wash himself. *Id.* at ¶ 20. Because he has paraplegia, he cannot access the lower parts of his body with the rag. *Id.* at ¶ 21. This meant that he could not clean some of his open wounds or feet, including his toes without toenails. *Id.*

As a result of these conditions, Mr. Tillman filed an electronic Informal Resolution Request ("IRR") on a tablet in late December 2020, complaining of being unable to access a wheelchair-friendly shower and, in the alternative, the lack of staff assistance with his bathing. *Id.* at ¶ 30. Mr. Tillman never received a response. *Id*. at ¶ 31. When he asked a caseworker, Mr. Weber (first name unknown), about following-up or appealing, Mr. Weber replied, "They'll be getting back to you."[1] *Id.* at ¶ 32. Mr. Tillman relied upon Mr. Weber's assurance, but never received a response to the December IRR. *Id.* at ¶ 32, 52.

Mr. Tillman's open wound, persistent dry and cracking skin, and toenails constantly falling off leave his body with many opportune spots for infection. Because Mr. Tillman is parapeligic and has been given only a wash basin and rag with which to bathe himself, he is unable to reach many areas of his body. *Id.* at ¶ 21. Thus, he cannot ensure his cracking skin and nails remain clean, placing him at grave risk of developing wounds and infection.[2]

Mr. Tillman has continued to seek help from CJC staff to no avail. On or around January 1, 2021, Mr. Tillman saw Dr. Brenda Mallard because he was urinating blood, for which she prescribed antibiotics. *Id.* at ¶ 23. During that conversation, Mr. Tillman complained to Dr. Mallard that he had not had a shower since arriving at CJC. *Id.* at ¶ 24. Mallard told Mr. Tillman that CJC was "working on" getting a Hoyer Lift, an assistive device that allows individuals to be transferred between a bed and a chair or other similar resting places by use of electrical or

[1] In mid-January, Mr. Tillman also filed a paper grievance because Nurse Morris was leaving his medication outside his "chuckhole", where he could not access it, and because she was not changing his catheter. He filed this grievance on paper because the tablets were not working. Tillman Dec. at ¶ 33.

[2] *See generally* WHO, *Prevention and management of wound infection*, (Mar. 2, 2013), https://www.who.int/publications/i/item/prevention-and-management-of-wound-infection ("Open injuries have a potential for serious bacterial wound infections, including gas gangrene and tetanus, and these in turn may lead to long term disabilities, chronic wound or bone infection, and death.").

hydraulic power. *Id.* However, Dr. Mallard provided no immediate solutions, and to this day no such lift has been provided. *Id.* at ¶ 43, 52.

On or around January 2, 2021, Mr. Tillman asked Nurse Morris (first name unknown) if CJC could provide an individual to assist him with bathing, due to the fact that he was urinating blood at the time. *Id.* at ¶ 25. Nurse Morris denied his request, telling him: "This is not a long-term care facility! Talk to your attorney." *Id.* at ¶ 26.

On February 12, 2021, Mr. Tillman spoke with his public defender, Chelsea Harris, and social worker, Ms. Lee (first name unknown). *Id.* at 27. He told them that he had been unable to shower since arriving at CJC on October 5, 2020, due to the lack of shower facilities equipped for individuals who must use a wheelchair and refusal of prison officials to provide staff to assist him. *Id.* Ms. Lee informed Mr. Tillman that he would need to get an order form a judge in order to receive accommodations in the form of succificent facilities or staff assistance. *Id.* at ¶ 28.

On March 3, 2021, Mr. Tillman asked Ms. Lee for a grievance form, and she promised to give him one that day, yet Mr. Tillman never received the form. *Id.* at ¶¶ 34-35. The same day, Mr. Tillman made a handwritten Emergency Grievance and attempted to give it to a CO. *Id.* at ¶ 36; *see also* Exhibit 1-A, Emergency Grievance dated March 3, 2021, attached hereto. The CO refused to accept the grievance form, and would not assist Mr. Tillman in placing the grievance form in the grievance box. Tillman Dec. at ¶ 36.

On March 4, 2021, Ms. Lee told Mr. Tillman to write a note to her requesting a grievance form and give the note to CO Robinson to pass along to Ms. Lee. *Id.* at ¶ 37. Mr. Tillman wrote the note as instructed and gave it to CO Robinson, but never received the grievance form. *Id*. The next day, Mr. Tillman was able to give his Emergency Grievance form to CO Robinson who told Mr. Tillman he would pass it along to Ms. Lee. *Id.* at ¶ 38. Mr. Tillman has no indication of

whether the CO followed through. *Id.* Mr. Tillman also authorized his criminal defense attorney to send the emergency grievance to Commissioner Glass given the lack of response to prior complaints and the initial refusal by a CO to accept the emergency grievance. *Id.* at ¶ 39. Commissioner Glass has yet to respond to Mr. Tillman. *Id.*

On March 8, 2021, a corrections officer with the last name Price visited Mr. Tillman's cell and told him that they were trying to move him to a "wheelchair accessible shower."*Id.* at ¶ 40. When Mr. Tillman asked her what made this shower wheelchair accessible, she explained that it was the same inaccessible shower in which he fell and hurt himself back in early 2020, leading to a blood infection and hospitalization. *Id.* Mr. Tillman informed her of his need for a shower that could accommodate his disability, but she responded with, "We don't have that." *Id.* Given his fear of falling again, Mr. Tillman informed the CO that he would not use the inaccessible shower. *Id.*

Until this Court's Temporary Restraining Order, Mr. Tillman lacked access to shower facilities sufficient for a parapeligic detainee to fully wash and clean his own body or staff assistance in doing the same. *Id.* at ¶ 43.[3] On March 22, 2021, in accordance with this Court's order, Mr. Tillman's counsel and an independent qualified medical professional, Dr. Stacey West-Bruce visited the CJC to conduct an assessment of Mr. Tillman's new cell, including the purportedly accessible shower. Dr. West-Bruce's inspection focused on two questions: (1) whether the shower met the requirements under the ADA, and (2) whether Mr. Tillman needed any additional support to access the shower.

Dr. West-Bruce concluded that the shower does not meet ADA requirements. *See* Declaration of Dr. Stacey West-Bruce, attached as Exhibit 2, at ¶ 6. Federal regulations require

[3] Despite the Court's entry of an order granting Mr. Tillman's TRO on March 18, 2021, Defendant was unwilling to provide Mr. Tillman with the ordered assistance to shower until four days later on March 22, 2021.

transfer type shower compartments to have thresholds no higher than ½ inch. *See* ADA Accessibility Standards § 608.7 Thresholds, *available at* https://www.access-board.gov/ada/#ada-608_7. Based on Dr. West-Bruce's inspection, the threshold leading to the shower measured two inches in height and there was an incline leading up to the threshold of about one inch in height. West-Bruce Dec. at ¶ 6. Renovations of the threshold are required to ensure Mr. Tillman's safe use of the shower. *Id.* at ¶¶ 6, 10.

Dr. West-Bruce also assessed what supports Mr. Tillman needs to use the shower at CJC. Mr. Tillman requires a medical assistant to transfer from his wheelchair to the shower and back. *Id.* at ¶ 8. He needs assistance with washing the areas of his body he cannot reach, including his feet, back and buttocks. *Id.* Because of the design of the shower, a medical assistant should wash his buttocks separate from the shower, preferably on a medical bed where the assistant can provide a sponge bath to the area. *Id.* In terms of equipment, Dr. West-Bruce notes that a shower transfer bench is needed to improve the safety and ease of Mr. Tillman's transfers in and out of the shower. *Id.* at ¶ 9. A rubber shower mat is also needed to ensure Mr. Tillman does not slip. *Id.* Even with assistance, Mr. Tillman's legs still rest on the floor during the shower and during transfers, creating opportunities for him to slip and fall. *Id.* Finally, she notes that a more appropriate method to collect excess water is needed because now a pair of pants is used to collect the excess water. *Id.* **To be clear: without these modifications and this assistance, the purportedly-accessible shower at CJC is not compliant with the ADA.**

LEGAL STANDARD

District courts have "broad discretion when ruling on requests for preliminary injunctions" which are reviewed by appellate courts "only for clearly erroneous factual determinations, an error of law, or abuse of discretion." *Manion v. Nagin*, 255 F.3d 535, 538 (8th

Cir. 2001) (citation omitted). In determining whether to grant preliminary injunctive relief, courts consider the following factors: "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on the other interested parties; and (4) whether the issuance of an injunction is in the public interest." *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000) (citation omitted).

Although no single factor is dispositive, "the two most critical factors for a district court to consider in determining whether to grant a preliminary injunction are (1) the probability that plaintiff will succeed on the merits, and (2) whether the plaintiff will suffer irreparable harm if an injunction is not granted." *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204, 206 (8th Cir. 1976). As Mr. Tillman does not seek to enjoin the operation of a state statute, he need only show a "fair chance of prevailing" on the merits of the case in order to demonstrate a likelihood of success. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc).

Plaintiff easily meets this standard.

ARGUMENT

I. Mr. Tillman is Entitled to a Preliminary Injunction Order Enjoining Defendants' Discriminatory Conduct.

Because each preliminary injunction factor weighs in Mr. Tillman's favor, his Motion for Preliminary Injunction should be granted.

A. Mr. Tillman is Likely to Succeed on the Merits of his ADA Claim

When determining the likelihood of a movant's success on the merits, this Court need not decide whether the movant will ultimately win. *Jet Midwest Int'l Co., Ltd v. Jet Midwest Grp., LLC*, 953 F.3d 1041, 1044–45 (8th Cir. 2020). Though an injunction cannot issue if there is no chance of success on the merits, Mr. Tillman does not need to "prove a greater than fifty percent

likelihood that [he] will prevail on the merits." *Id*. He must simply show a "fair chance of prevailing." *Planned Parenthood Minn.*, 530 F.3d at 732. Here, Mr. Tillman has shown more than a "fair chance of prevailing" on his ADA claims.

Pursuant to Title II of the ADA: "no qualified individual shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To prove a violation of Title II of the ADA, a plaintiff must show "1) he is a qualified individual with a disability; 2) he was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the entity; and 3) that such exclusion, denial of benefits, or other discrimination, was by reason of his disability." *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998).

1. Mr. Tillman is a qualified individual under the ADA

As a person required to use a wheelchair, Tillman qualifies as an individual with a disability under the ADA. *See Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 499 (8th Cir. 2002); *see also Gorman v. Easley*, 257 F.3d 738, 750 (8th Cir. 2001), *rev'd sub nom on other grounds*, *Barnes v. Gorman*, 536 U.S. 181 (2002) (holding that a prisoner required to use a wheelchair with a catheter qualified as disabled under the ADA).

2. Mr. Tillman was excluded from participation in a public entity's service, program, or activity.

Programs, services, or activities, within the meaning of Title II, includes all operations of a public entity, *Gorman v. Bartch,* 152 F.3d 907, 911–12 (8th Cir. 1998), and "qualified individual[s] with a disability" are entitled to "meaningful access" to such benefits. *Randolph v. Rodgers,* 170 F.3d 850, 857–58 (8th Cir. 1999). State prisons and jails are "public entities" under the ADA. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998); *see also Randolph v.*

Rodgers, 170 F.3d 850, 857–58 (8th Cir. 1999) (recognizing Supreme Court holding that ADA Title II applies to state prison); *Kutrip* v. *City of St. Louis*, 329 F. App'x 683, 684-85 (8th Cir. 2009) (applying ADA to St. Louis City jail).

In its ADA implementing regulations, the Department of Justice emphasizes that detention and correctional facilities are unique facilities under Title II in that "[i]nmates cannot leave the facilities and must have their needs met by the corrections system, including needs relating to a disability." 28 C.F.R. § Pt. 35, App. A. Without accommodations, "these individuals have little recourse, particularly when the need is great (e.g., an accessible toilet; adequate catheters; or a shower chair)." *Id.* It is therefore "essential that corrections systems fulfill their nondiscrimination and program access obligations by adequately addressing the needs of prisoners with disabilities, which include, but are not limited to, … accessible toilet and shower facilities...and assistance with hygiene methods for prisoners with physical disabilities." *Id.*

Here, Mr. Tillman was excluded from the CJC shower facilities because their design does not follow ADA regulations. Section 35.151 of the Department of Justice's ADA implementing regulations requires that any part of a public entity's facility constructed after January 26, 1992, be designed and constructed "in conformance with the Uniform Federal Accessibility Standards ('UFAS') (41 C.F.R. Pt. 101–19.6, App. A) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ('ADAAG') (28 C.F.R. Pt. 36, App. A)." 28 C.F.R. § 35.151. And, to the maximum extent possible, any part of a public entity's facility altered after January 26, 1992, "in a manner that affects or could affect [its] usability" must also be altered in conformance with one of these accessibility standards. § 35.151(b), (c). The CJC, constructed in 2002, fails to conform with UFAS and/or ADAAG standards because it does not provide any accessible shower stalls for individuals with mobility impairments. *See Parker v.*

Universidad de Puerto Rico, 225 F.3d 1, 5–6 (1st Cir. 2000) (noting DOJ implementing regulations "give a high priority to mobility for persons in wheelchairs" and require structural changes to achieve compliance with these regulations). As noted by Dr. West-Bruce, the shower threshold is approximately 1.5 inches above the requirements set forth by the ADA Accessibility Standards. *See* West-Bruce Dec. at ¶ 6; *see also* ADA Accessibility Standards § 608.7 Thresholds, *available at* https://www.access-board.gov/ada/#ada-608_7.

Federal regulations allow for departures from these standards when it is "structurally impracticable", 28 C.F.R. § 35.151(a)(2)(i), or "clearly evident that equivalent access" is afforded, § 35.151(c). Here, Defendants can demonstrate neither. The *Americans with Disabilities Act Title III Technical Assistance Manual* provides:

> The phrase "structurally impracticable" means that unique characteristics of the land prevent the incorporation of accessibility features in a facility. In such a case, the new construction requirements apply, except where the private entity can demonstrate that it is structurally impracticable to meet those requirements. This exception is very narrow and should not be used in cases of merely hilly terrain. The Department expects that it will be used in only rare and unusual circumstances.

Americans with Disabilities Act: ADA Title III Technical Assistance Manual, *available at* https://www.ada.gov/reachingout/title3l3.html; *see also* 28 C.F.R. § 36.401 ("Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.").

The required renovations to the shower floor do not fall into the "structurally impracticable" exception, as there is no evidence that the CJC is built on such rare terrain. The Defendant's own exhibit, an ADA-related audit of the CJC facility, never mentions any issue of structural impracticability, and rather describes the shower floor as necessary remediation work. *See* ECF No. 19-2 at 3-24. As identified by the Court-ordered inspection of the facility, the

requested relief does not require significant structural changes and, as it stands, the shower fails to provide "equivalent access" to Mr. Tillman and others who must use a wheelchair for mobility. *See* West-Bruce Dec. at ¶¶ 6-10 (discussing the issues with the threshold of the shower facility and incline to enter the shower).

Beyond the structural failings of the CJC facilities, Defendants continued to unlawfully deny Mr. Tillman "meaningful access" to shower facilities until this Court's entry of a Temporary Restraining Order. ECF No. 30. In *United States* v. *Georgia*, Justice Scalia wrote for a unanimous Court that refusing to accommodate "disability-related needs in such fundamentals as . . . hygiene" could "constitute[] exclu[sion] from participation in or . . . deni[al of] the benefits of the prison's services, programs, or activities." 546 U.S. 151, 157 (2006). Several appellate courts have since concluded that the failure to provide accessible showers deprives individuals of their statutory rights under the ADA. *See Kutrip*, 329 F. App'x at 685 (allowing a detainee's claim under the ADA to survive summary judgment when he was denied a chair to sit in while showering in a city jail); *Furgess* v. *Pennsylvania Dep't of Corr.*, 933 F.3d 285, 291–92 (3d Cir. 2019) (holding a request for reasonable accommodations so that a prisoner with disabilities can take a shower "just like able-bodied inmates" to be a plausible claim for disability discrimination under Title II); *Pierce* v. *County of Orange*, 526 F.3d 1190, 1196 (9th Cir. 2008) (holding that "because of physical barriers that deny disabled inmates access to certain prison facilities (bathrooms, showers, exercise and other common areas) . . . the County is in violation of the ADA."); *St. Pierre* v. *McDaniel*, 172 F.3d 58 (9th Cir. 1999) (holding that an inmate had alleged viable "ADA claims concerning access to the showers"); *Kiman* v. *N.H. Dept. of Corrs.*, 451 F.3d 274, 268 (1st Cir. 2006) (holding that denial of access to a shower chair to a prisoner with disabilities raised an issue of material fact regarding whether the plaintiff had

received reasonable accommodations required by the ADA); *Grant* v. *Schuman*, 151 F.3d 1032 (7th Cir. 1998) (allowing a prisoner with paralysis and nerve pain to bring the claim that he was denied access to a shower).

The CJC showers are a "service, program or activity" as defined by the ADA, and Mr. Tillman is being denied that service because the showers are inaccessible. *See* Tillman Dec. at ¶¶ 5-6, 24, 41. CJC has not provided Mr. Tillman with staff to assist him with showering, and he was not able to use the shower facility since the beginning of his incarceration before this Court's Order. *Id.* at ¶ 41. There is no way, absent accommodation, that Tillman can use the showers. **As a result, Defendants denied Mr. Tillman a shower for over five full months of detention on no other basis besides his disability.**

3. The Defendants' discrimination was by reason of Mr. Tillman's disability.

Defendants knew about Mr. Tillman's disability, and Mr. Tillman expressed his need for accommodations in order to be able to shower at the CJC. Defendants failed to provide him with those accommodations. "In a reasonable accommodation case, the 'discrimination' is framed in terms of the failure to fulfill an affirmative duty—the failure to reasonably accommodate the disabled individual's limitations." *Peebles v. Potter,* 354 F.3d 761, 767 (8th Cir. 2004). "The known disability triggers the duty to reasonably accommodate and, if the [public entity] fails to fulfill that duty, we do not care if [the public entity] was motivated by the disability." *Rinehart v. Weitzell*, 964 F.3d 684, 689 (8th Cir. 2020) (quoting *Peebles,* 354 F.3d at 767). As a known detainee with paraplegia, Mr. Tillman need not have requested an accommodation to be granted one. *See Robertson v. Las Animas Cty Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007) (collecting cases for the proposition that an entity will know of a disabled individual's need for accommodation under ADA when need is obvious). Nonetheless, Mr. Tillman repeatedly

requested an accommodation that would allow him to use the shower. Tillman Dec. at ¶¶ 24-40. Defendants failed to provide a reasonable accommodation. *See generally Furgess*, 933 F.3d at 292. Mr. Tillman was offered a basin and a rag, which does not allow him to reach many areas of his body. Tillman Dec. at ¶¶ 20-21. Separately, he was offered a shower on March 8, 2021, that was not accessible for someone with his disability without assistance, one from which he previously fell and injured himself. *Id.* at ¶ 40. Even with the Court's order, Defendants have formulated a plan that does not provide assistance with washing Mr. Tillman's back or buttocks, both areas he cannot reach by himself. *See* Memorandum to CJC Custody/Medical Staff, attached as Exhibit 3; West-Bruce Dec. at ¶¶ 7-10.

Because Mr. Tillman has been denied use of the showers by reason of his disability, he is likely to succeed on the merits of his ADA claim.

B. Mr. Tillman Will Suffer Irreparable Harm Without a Preliminary Injunction

Absent the requested equitable relief Mr. Tillman will suffer irreparable harm. To show irreparable harm a plaintiff must show that he "has no adequate remedy at law, typically because [his] injuries cannot be fully compensated through an award of damages." *Rogers Grp., Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789 (8th Cir. 2010) (*quoting Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009)). The likelihood of harm must be more than a mere "possibility." *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Here, the harm that will befall Mr. Tillman absent a preliminary injunction is more than possible, it is certain. March 22, 2021, was the first day Mr. Tillman was provided the assistance he needed to shower due to this Court's Temporary Restraining Order. Absent continued equitable relief, Mr. Tillman will be unable to access shower facilities and adequately bathe himself. Tillman Dec. at ¶ 41. Defendants' failure to accommodate Mr. Tillman has already led to severe medical complications and, without injunctive relief, those consequences will only

worsen. *Id.* at ¶ 29. This harm falls well within the definition of irreparable harm. *See e.g. Sak v. City of Aurelia, Iowa,* 832 F. Supp. 2d 1026, 1046 (N.D. Iowa 2011) (holding that breed-specific ordinances which excluded pitbulls from the city limits would cause irreparable harm to a man who had a pitbull as a service dog).

Because Mr. Tillman is experiencing and will continue to experience irreparable harm absent relief, and because damages cannot sufficiently address the harm at issue, the "likelihood of irreparable harm" factor weighs heavily for Mr. Tillman.

C. Plaintiffs' Injuries Outweigh Any Potential Harm to Defendants Caused by a Order of Preliminary Injunction

The threat of harm to Mr. Tillman is clear: Absent relief he will be unable to shower and suffer further damage to his health and dignity as a result. *See supra*; *see also* West-Bruce Dec at ¶ 6. On the other hand, were this Court to enter a preliminary injunction in favor of Mr. Tillman, no harm would befall Defendants.

Mr. Tillman seeks renovation of the shower facility to meet the federal requirements under the ADA and the necessary assistance and equipment he needs to enter, exit and use the shower. The City is required to make all facilities constructed since January 26, 1992 accessible to those with disabilities, and construction of the CJC began long after that date. *See* 28 C.F.R. § 35.151 ("Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992."); *see also* ECF No. 19-2 at 3 (noting the CJC was constructed in 2001 and 2002). Plaintiff's Court-ordered assessment of the facility unearthed that it is not compliant with federal regulations. *See* West-Bruce Dec. at ¶ 6. Dr. West-Bruce also identified the support Mr. Tillman needs to be able to safely use the shower. *Id.* at ¶¶ 8-9.

Defendants, on the other hand, have provided this Court with no evidence as to what, if anything, it would cost the City to make the required adjustments to bring the shower into compliance with the ADA. The question is not whether the City is obligated to make the changes requested in this motion (it is), but whether it will be forced to do so by court order.

Compliance with existing statutory requirements is not a harm that can weigh against Mr. Tillman in evaluating his TRO. *White v. Martin*, No. 02-4154-CV-C-NKL, 2002 WL 32596017, at *8 (W.D. Mo. Oct. 3, 2002) ("Compliance with the law does not pose a burden on a defendant.") (collecting cases). To the extent the City would have to expend money in order to make the necessary renovations and provide Mr. Tillman reasonable accommodation, that expenditure would be *de minimis* in comparison to the harm that Tillman is suffering and continues to suffer. *Id.* at ¶ 29. And, as explained above, the requested relief is something the City is already legally required to do.

Because the continuous harm to Mr. Tillman vastly outweighs any potential harm to the City, this factor weighs in favor of Mr. Tillman.

D. A Preliminary Injunction Order Serves the Public Interest

Granting the narrow and necessary accommodation requested by Mr. Tillman serves the public interest. The ADA was enacted by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices...." 42 U.S.C. § 12101(a)(5). It is always in the public interest to ensure that this national legislative mandate is enforced. *See White*, 2002 WL 32596017, at *9 (citing *Glenwood*

Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 372 (8th Cir. 1991) ("Enforcement of laws passed by Congress is in the public interest, even when that means enjoining allegedly illegal actions by another government body."); *see also Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (holding that "...Congress has passed antidiscrimination laws such as the ADA which require reasonable modifications to public health and safety policies, it is incumbent upon the courts to insure that the mandate of federal law is achieved…"); *see also Sak* at 1047 (holding that "the national public interest in enforcement of the ADA 'trumps'" the local ordinance at issue).

Courts in the Eighth Circuit have recognized a public interest in enforcing the ADA which meets the fourth prong of *Dataphase*. *See, e.g., Smith v. Hartmann's Moonshine Shoppe, LLC*, No. 17-4211 (MJD/LIB), 2019 WL 4888996, at *4 (D. Minn. Oct. 3, 2019) (holding "public interest favors enforcing the ADA . . . which furthers the public policy of a 'clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' 42 U.S.C. § 12101(b)(1)."); *Glass v. Trowbridge*, No. 14-CV-3059-S-DGK, 2014 WL 1878820, at *5 (W.D. Mo. May 12, 2014) (ordering a temporary injunction requiring state action in enforcement of the ADA because "[a]llowing persons with disabilities equal access to public services serves the public interest."); *Sak* at 1047 (N.D. Iowa 2011) (holding there is a "national public interest in enforcement of the ADA" and issuing a preliminary injunction barring enforcement of an ordinance on ADA grounds); *Heather K. by Anita K. v. City of Mallard*, 887 F.Supp. 1249, 1260 (N.D. Iowa 1995) (reasoning the ADA's legislative history supported finding a public interest in eliminating discrimination on the basis of disability through enforcement of the ADA under the public interest prong of *Dataphase* and granting a temporary restraining order for the pendency of plaintiff's ADA claim). The public interest in enforcing the

ADA would be served by issuance of a preliminary injunction requiring the City to renovate the shower facility and provide a reasonable accommodation to Mr. Tillman.

II. The Requested Relief is Warranted At The Preliminary Injunction Stage.

A movant seeking to alter the status quo and gain relief akin to what they ultimately seek through a permanent injunction faces a heavy burden. *See Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993); *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir.1991) (citations omitted). Here, Mr. Tillman does not seek to alter the status quo, but even if this Court finds the relief requested to be akin to permanent relief, Mr. Tillman carries his burden to establish the necessity of that relief at this stage.

The status quo established by the TRO order should continue to be followed – Mr. Tillman should be allowed to shower as required by the ADA. The additional "architectural relief" that Mr. Tillman requests also would not alter the status quo as it is well in line with already existing obligations carried by CJC. Public facilities, like the CJC, are independently obligated to follow the ADA's access regulations. *See supra* at 9-10. Plaintiff has presented undisputed evidence that the shower at CJC is **not** ADA-compliant. The defendants have even provided evidence that they have been aware of the need to update the shower floor since 2009. *See* ECF No. 19-2 at 24. Following federal regulations would provide Mr. Tillman with the "architectural relief" even without the pending action. However, even if this Court finds that the requested architectural relief would be a substantive change to the status quo, Mr. Tillman carries his burden to demonstrate the necessity of such relief. *See supra* at I.A.2.

CONCLUSION

For the reasons stated above, the Court should issue a preliminary injunction, enjoining the Defendants from their discriminatory refusal to provide a wheelchair-accessible shower to Mr. Tillman. Specifically, Mr. Tillman requests the Court order the City to:

(1) file with the Court, within 7 days of the Court's entry of this order, a detailed plan to establish a wheelchair-accessible shower at CJC that is fully compliant with the ADA;

(2) build out a wheelchair-accessible shower that is fully compliant with the ADA within 21 days of the filing of the detailed plan;

(3) permanently relocate Mr. Tillman to the cell with the more accessible shower located in the Medical Unit on the second floor of the CJC for the remainder of his detention, absent emergency or exigent circumstances;

(4) assign qualified staff to assist Mr. Tillman with transferring to and from his wheelchair to the shower and with washing the areas of his body that he cannot reach, including his feet, back and buttocks, throughout the remainder of his detention at the CJC; and

(5) provide Mr. Tillman with the necessary equipment to transfer to and from the shower, including, but not limited to, a shower transfer bench.

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Respectfully submitted,

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