

**OPPOSITION TO DEFENDANTS-APPELLANTS' WRIT APPLICATION ON BEHALF
OF PLAINTIFFS-APPELLEES, COLLETTE JOSEY COVINGTON AND JADE
COVINGTON**

MAY IT PLEASE THE COURT:

Plaintiffs-Appellees, COLLETTE JOSEY COVINGTON and JADE COVINGTON, (“Plaintiffs” or “Covington”) respectfully submit, through undersigned counsel, their Opposition to Defendants-Appellants Board of Supervisors/McNeese State University’s (collectively, “McNeese”) Application in the captioned matter, in compliance with the Louisiana Code of Civil Procedure and the Rules of this Honorable Court.

STATEMENT OF THE CASE

This is a simple case involving the well-settled right of the disabled to attend a public university free from discrimination. There is nothing novel about this right, and there is nothing unusual about this case, except for McNeese’s continued determination to misstate the facts¹ and the law in an effort to avoid its obligations under the Americans with Disabilities Act (ADA) and related state and federal statutes.

On January 31, 2001, wheelchair-bound and epileptic McNeese student Collette Covington entered the McNeese Old Ranch Student Union (hereinafter, “Student Union”) to use the restroom while waiting for her Medicaid-funded Louisiana Vocational Rehabilitation van for the disabled to transport her from campus to her home. McNeese and the State of Louisiana designated the Student Union as the waiting place for Covington and other disabled students, and McNeese placed signs on the building indicating that it complied with the ADA despite the fact that not a single accessible restroom exists in the building.²

Covington entered the restroom but was unable to fit her wheelchair into any of the inaccessible stalls. Unable to reach the toilet and with sutures in her bladder, Covington was forced to urinate on herself.³ Humiliated and soaked in her own urine, she attempted to exit the restroom in her wheelchair by pulling on the narrow, heavy restroom door which McNeese admits does not

¹ Notably, McNeese does not provide a single citation to the Record in its entire Writ Application.

² Indeed, the Student Union restrooms did not even meet the Louisiana standards for accessibility in place in 1967 when they were constructed. La. R.S. 49:148 provided that all educational institutions built with state funds after July 27, 1966 had to meet certain minimum standards for accessibility. The Student Union restrooms were constructed in 1967 and did not meet even those standards.

³ Deposition of Collette Covington, Record, page 1033:15-23. McNeese belittles the fact that Covington was forced to urinate on herself by claiming that she made a “mountain out of a molehill” over the humiliation and injuries she endured because of McNeese’s refusal to comply with the law.

comply with the ADA.⁴ Covington was unable to gain sufficient leverage on the non-compliant door from her wheelchair and injured her arm.⁵ The McNeese Police responded, and the McNeese Police Chief and one of his officers testified in their depositions that Covington was injured and transported to her physician for treatment.⁶

The semester **prior** to this accident, Covington contacted McNeese Director of Services for Students with Disabilities, Tim Delaney, **three or four times**⁷ seeking assistance because she had difficulty navigating McNeese's inaccessible campus. **Delaney admitted this and testified that McNeese would not help Covington** because it only provides services to students with academic problems and that those with mobility problems are left to fend for themselves.⁸ Delaney admits that McNeese even located his office for disabled students upstairs in an inaccessible building that those in wheelchairs have great difficulty reaching.⁹

After the accident, Covington recovered from her injuries and attempted to re-enroll at McNeese. McNeese informed her that it would no longer honor her credits, despite her being only one semester shy of graduating. Undeterred by this retaliatory act, Covington again contacted Delaney seeking assistance so that future accidents could be avoided, but McNeese once again refused to offer any accommodations to her in her wheelchair, or even to engage in the interactive

⁴ See McNeese's Response to Covington's Requests for Admissions Nos. 4, 6, 7, 13, 15, and 16, where McNeese admitted every element of Covington's case, Record, page 284-286. See also deposition of McNeese Facilities and Planning Director Richard Rhoden, who repeatedly testified that no accessible restroom exists in the Old Ranch, Record, pages 156:6-157:1; 155:11-18; 158:15-19; and 159:15-20; and the deposition of McNeese President Dr. Robert Hebert, 493:13-22, who testified that he was not surprised that the Student Union restrooms are noncompliant because McNeese has chosen not to comply with the ADA.

⁵ See testimony of responding McNeese Police Lt. Vickie Boudreaux and the McNeese police report attached to her deposition documenting Covington's accident, Record, page 273. See also Covington's deposition, Record page 1033:15-23.

⁶ The accident facts are not in dispute, despite McNeese's unsupported assertion that Covington had a "memory dysfunction" and fabricated the accident and her many documented disabilities.

⁷ Deposition of Tim Delaney, Record, page 465:1-9. See also where Delaney again admitted that Covington sought his assistance prior to the accident because of problems ambulating at McNeese, Record, page 472:10-473:12.

⁸ Deposition of Tim Delaney, Record, page 1004:15-18. Delaney testified that he refused to act as a liaison between the disabled and McNeese to advocate for accessible facilities. Delaney reaffirmed his unwillingness to help Covington on page 475:8-18 of the Record, where he stated that he only helps students who have "something wrong with their brains" and need extra time on tests. He specifically explained that Covington, "wouldn't need our assistance" because his office does not help those in wheelchairs. This is supported by Covington, who noted in her deposition that the Louisiana Vocational Rehabilitation Service advised her to contact Delaney as McNeese's disabilities liaison but that Delaney laughed at her when she asked for accommodations and told her, "Well, go back over there and tell them that we don't provide the services," Record, page 937:1-6.

⁹ Deposition of Tim Delaney, Record, page 467:23-471:4. Ironically, McNeese produced an internal document advocating that the Office of Services for Students with Disabilities be moved to the inaccessible Student Union where Covington was injured, Record, page 351.

process to determine what, if any, reasonable accommodations might be available.¹⁰ Delaney testified that he was unwilling to even look at the restroom where Covington was injured and would not advocate on her behalf to have any facilities upgraded to comply with the ADA.¹¹

Proceedings Below

Left with no other option, Covington filed suit, and despite McNeese's overt acts of retaliation and discrimination, she sought only a modest partial summary judgment asking the trial court to affirm the obvious—that the ADA mandates that she and other disabled students have the right to at least one accessible restroom in the McNeese Student Union, and that McNeese could not lawfully maintain the policy of excluding the disabled from its facilities.

McNeese fought this modest request and argued that the disabled are not entitled to utilize McNeese's 60,000 square foot Student Union building because it is not “fundamentally important” for the disabled to eat in the cafeteria or participate in the student government or the student newspaper, yearbook, job placement services, or any other activities except for attending class.¹² Indeed, McNeese's President Robert Hebert testified that McNeese does not consider it part of the “role of the institution” to provide the disabled with access to the McNeese campus.

Furthermore, Dr. Hebert testified that McNeese will not upgrade buildings such as the Student Union unless the students on campus **take up a collection and pay for the renovations themselves**, since McNeese does not consider complying with the Americans with Disabilities Act to be a priority.¹³ McNeese further acknowledged its systemic pattern and practice of discrimination when Delaney admitted under oath that McNeese has historically deterred 75 percent of the disabled students who would otherwise have attended because the university discriminates against those students.¹⁴

¹⁰ See Affidavit of Covington, Record, pages 136-137. See also, deposition of Delaney, Record, page 478:15-21, where Delaney testified, amazingly, that even after six years as a McNeese employee charged with assisting the disabled, he did not even know where the Student Union was located on campus.

¹¹ See Deposition of Delaney, Record page 1004:15-18. Delaney, McNeese's Director of Services for Students with Disabilities, also disparaged the disabled in his deposition and bizarrely volunteered his unsolicited and unsupported opinion that the disabled like to purchase their wheelchairs at “pawnshops” and fake their disabilities, presumably to make his job more difficult, Record pages 474:15-475:12 and 465:12-466:10.

¹² Hebert testified that it is not “fundamental” for the disabled to access the Student Union and further noted that, “I'm not sure I would regard it as a high priority” for the disabled to be able to access the McNeese campus. Video deposition of McNeese President Dr. Robert Hebert, Record, page 501:13-17.

¹³ Deposition of Hebert, Record page 503:6-17. Ironically, Dr. Hebert also testified that he understood McNeese's obligations under the ADA but that McNeese “simply didn't do it [comply].”

¹⁴ Deposition of Delaney, Record, page 482:13-25.

The trial court judge is a McNeese alumnus who was reluctant to issue a ruling against the University. He stated on the record that McNeese was a “vital institution to the community” and that its president was a “good” one.¹⁵ Yet he was visibly stunned when he viewed Dr. Hebert’s video deposition testimony, read McNeese’s judicial admissions and the testimony of its officials, and considered McNeese’s arguments, which included its claims that the disabled were not entitled to utilize the McNeese campus and that Covington should learn to hold her bladder at McNeese or learn to walk without her prescribed wheelchair or crutches if she wished to utilize restrooms on campus. In deference to McNeese, the trial judge provided defendants with opportunities at three different hearings to come up with any sort of issue of material fact with respect to McNeese’s violations or to clarify the shocking testimony of its officials. Yet McNeese could not do so.

At the January 4, 2007 hearing,¹⁶ counsel for McNeese had no alternative but to agree with Judge Carter that McNeese had admitted that Covington was in a wheelchair, that she had been injured in the McNeese Student Union and required assistance from the campus police, and that the restroom in the Student Union, particularly the narrow and heavy door that caused Covington to injure her arm, was not ADA compliant or wheelchair-accessible, as required by law.¹⁷ Finally, exasperated, the judge candidly asked McNeese what it could possibly say in its defense if it were granted the opportunity for a trial. Counsel for McNeese admitted that McNeese had no additional evidence or defense and said simply, and without further elaboration, that McNeese wished to attack Covington’s character.¹⁸ Nine months later, after careful deliberation, the trial court ruled.¹⁹

Under the settled law of the ADA, the trial court had no choice but to render a partial summary judgment, but it tailored its ruling to be narrow and measured. The judgment does not require the expenditure of any state funds, does not issue a monetary award, and does not address tort liability. The judgment simply holds, as it must, that the ADA requires at least one accessible restroom in the McNeese Student Union, yet it does not even order such a restroom.

¹⁵ Transcript of Summary Judgment Hearing, p. 147.

¹⁶ McNeese purportedly attached to its Writ Application a copy of Judge Carter’s oral reasons for judgment. However, McNeese’s attachment is incomplete in that it does not include the trial judge’s extensive discussion of the facts and law at the first two hearings, in which the trial judge went to great lengths to allow McNeese to explain its bizarre positions in this case.

¹⁷ Transcript of Summary Judgment Hearing, pp. 108-109.

¹⁸ Transcript of Summary Judgment Hearing, p. 110.

¹⁹ The trial judge noted that McNeese had not taken the ADA and state law on the rights of the disabled seriously enough “to give it the attention it deserves.” He felt that this ruling on summary judgment and this suit, “has brought it to McNeese’s attention, and I’m comfortable that the President, who I know to be a good President and wanting the best for the community and the university would take appropriate action.” Transcript of hearing, p. 172. The Court felt that this judgment would be that catalyst.

McNeese appealed this modest partial judgment by engaging in an unkind, unprovoked, unnecessary, and unsupported personal assault on Collette Covington’s character which was so severe as to compel the Third Circuit to publish the longest civil opinion of the year—an opinion which admonished McNeese for its misrepresentations of the facts and law and for its unlawful, disingenuous, and insensitive tactics.

The Third Circuit considered McNeese’s briefs, its oral arguments, its numerous motions to strike, and its application for rehearing and took great pains to review the answers to requests for admissions, depositions, affidavits, and certified medical records filed in the record. After chronicling the facts, the trial court and Third Circuit unanimously found **no evidence** to support McNeese’s allegation that an issue of material fact exists and was forced to conclude that McNeese simply ignored the record and manufactured its own unsupported version of events.

The ultimate conclusion of the trial court and court of appeal is that a public entity must comply with 42 U.S.C. Section 12132, *se seq.* Furthermore, a public university may not declare that the disabled are unwelcome on campus or that they are unworthy to participate in such fundamental activities as eating in a school’s cafeteria or participating in job placement or student government. The lower courts correctly affirmed these rights.

ARGUMENT

I. THERE ARE NO REASONS TO GRANT A WRIT UNDER RULE X

The Louisiana Supreme Court’s grant of a writ to review a civil ruling is a matter of discretion. As noted in *Boudreaux vs. State DOTD*, 815 So.2d 7, 10 (La. 2/26/02), “any further review after the first appeal should be provided only in the interest of the law and the legal system.” The question involved in considering a petition for review is not whether a case is meritorious, or even when it arguably might have been decided the other way, but whether it is more important for decision than other cases competing for the [court’s] attention.” *Id.*

Louisiana Supreme Court Rule X provides that writs are granted within this Court’s sound judicial discretion, but five factors weigh heavily in the Court’s decision. These are: (1) the resolution of conflicting decisions; (2) significant unresolved issues of law; (3) overruling or modification of controlling precedents; (4) erroneous interpretation or application of Constitution or laws; and (5) gross departure from proper judicial proceedings. None of these factors apply, despite McNeese’s unexplained and unsupported assertion that this case involves conflicting

decisions, unresolved issues of law, and the erroneous interpretation or application of the Constitution and laws.

There are no conflicting decisions in this case. The trial court in this case judiciously reviewed the record, almost all of which was submitted by Covington and consisted of sworn medical evidence, admissions by McNeese, and depositions of McNeese personnel. The trial court then provided McNeese nearly a year to respond to Covington's evidence and recessed oral arguments three times to provide McNeese opportunities to create a genuine issue of material fact. When McNeese conceded that it could not do so, the trial court granted summary judgment. The appeals court again reviewed the record, heard oral arguments, and rendered a strongly worded, unanimous opinion affirming the trial court. The appellate court then considered and unanimously denied McNeese's application for rehearing. Thus, four Louisiana judges carefully reviewed the evidence in this case and reached unanimous and consistent conclusions as mandated by law.

There are no unresolved issues of law with respect to the definition of "disabled" under the ADA, and the courts correctly interpreted the law to conclude that Covington is disabled. There is nothing erroneous about how the courts decided this case, and the issues of law are well-settled. Regarding Covington's standing as disabled, the courts concluded, as they had to, that a person meets the statutory definition of disabled under the ADA as a matter of law when it is undisputed that four treating physicians concluded that she was disabled and prescribed her long-term Medicaid-reimbursed wheelchairs and crutches because of orthopedic conditions, neurological weaknesses, frequent falls, blackouts, epileptic seizures,²⁰ urinary dysfunction, and other debilitating conditions.

This conclusion was bolstered by the fact that the State of Louisiana, the Social Security Administration, Medicaid, and McNeese **all recognized Covington as disabled** under standards far more stringent than those established under Title II of the ADA, and that Covington was even entitled to receive all applicable state and federal services for the disabled, including disability compensation and transportation to McNeese in a Louisiana Vocational Rehabilitation wheelchair-accessible van. By contrast, McNeese presented **absolutely no medical evidence**.

Furthermore, McNeese even offered a McNeese-employed expert who testified, based on his personal knowledge of Covington at McNeese, that Covington met the statutory definition of disabled and that **McNeese recognized Covington as disabled the semester prior to her**

²⁰ As noted, *infra*, a person with epilepsy qualifies, *per se*, as disabled under Title II under 29 CFR 1630.2.

accident.²¹ He even testified that McNeese encouraged Covington to register as disabled and had actual knowledge that she was having problems navigating around the inaccessible campus with her orthopedic aids.²² The Third Circuit was so compelled by the fact that McNeese actually conceded Covington's disabilities while appealing them, it stated in its opinion that it would have granted Covington a Motion for Frivolous Appeal if she had requested it.²³

Furthermore, the lower courts recognized that McNeese misstated the facts and took Covington and her physicians' statements out of context in a desperate effort to manufacture an issue of material fact as to issues McNeese had already admitted. Finally, the courts noted that **McNeese failed to even recognize** that there are three independent ways a person can meet the statutory definition of disabled under the ADA and that Covington meets all three, thus giving her standing to sue under the Act. Therefore, there is no erroneous interpretation of law or unresolved issues of law regarding Covington's disabilities.

There are no unresolved issues of law, and the court correctly concluded that McNeese violated the ADA. The ADA provides clear standards for accessibility. These standards relate to the width of doors, bathroom stalls, sink heights, and other building code requirements.²⁴ The U.S. Department of Justice promulgates these standards pursuant to Congressional mandate and publishes them in the Federal Register. Facilities meeting these standards are considered accessible.

Under 42 U.S.C. 12132, *et seq.* and 28 C.F.R. 35.150, Congress ordered public entities to evaluate their "services, programs, and activities" and prepare a self-evaluation and transition plan under the ADA. **McNeese admits that it failed to do so.** Congress then gave McNeese from 1990 until January 26, 1995 to provide at least one accessible restroom in every public building on its campus, regardless of whether the building had previously been renovated or when it was constructed. This is the very minimum in compliance requirements, which **McNeese concedes it did not do.** McNeese also concedes that it spent \$450,000 renovating the Student Union in the late

²¹ See Deposition of Tim Delaney, Record, page 466:21-467:22, where Delaney testified that Covington was automatically considered disabled by McNeese because of her acceptance as disabled by Louisiana Vocational Rehabilitation, which requires extensive verification of disabilities. Delaney testified, ". . . if you're accepted by them, then you would automatically be accepted through my office." Furthermore, as noted by the Third Circuit, Delaney repeatedly testified that Covington was disabled under the ADA.

²² Deposition of Delaney, Record, page 472:10-473:12.

²³ Third Circuit opinion, November 5, 2008, page 16.

²⁴ 42 U.S.C. 10101(b) establishes Congress's objective of making the ADA a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" through "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." Through the U.S. DOJ's Accessibility Guidelines (the building "code"), Congress has achieved that goal.

1990s, and that these renovations added new services, programs, and activities such as a state-of-the-art computer lab to the Student Union.²⁵ Thus, McNeese voluntarily subjected itself to even more stringent requirements of 28 C.F.R. 35.151, which mandates that McNeese upgrade both of its women's restrooms rather than just one. There is nothing ambiguous about these requirements or McNeese's failure to comply. Thus, there are no issues of fact or law regarding McNeese's violations of the ADA.

McNeese defends its actions by stating that it believes it has the right to exclude the disabled from its facilities because the disabled have **no "fundamental right" to use the Student Union, school cafeteria, or computer lab** or to be integrated with the able-bodied. The lower courts held that, as a matter of law, this policy is discriminatory because McNeese must provide at least one accessible restroom in its Student Union and cannot actively deter the disabled from using the Student Union. There is nothing ambiguous about this requirement.

Congress's mandates are clear, and McNeese cannot point to a single case or statute which exonerates it from these requirements or allows it to declare the disabled unworthy of utilizing such basic facilities as a cafeteria, Student Union, or a restroom. There is no need to "clarify, harmonize, shape and develop applicable law" or to address "conflicting decisions significant unresolved issues of law; and the erroneous interpretation or application of the Constitution and laws of this state and the United States" as alleged by McNeese.²⁶ McNeese violated these clear standards and admits its violations. Covington was discriminated against when she went into a restroom marked as accessible and was forced to urinate on herself and injured her arm. She was further discriminated against when McNeese told her she was unwelcome on its campus in a wheelchair.

This judgment does not cost any public money. This judgment does not significantly affect the "public fisc," as alleged by McNeese, because it does not provide for any monetary or injunctive relief. The judgment simply finds that McNeese violated the law, a fact which McNeese readily admits in its depositions, affidavits, and requests for admissions. The eventual remedy for that violation will be a \$4,000 repair²⁷ and the recognition that the disabled should not be excluded from accessing Louisiana's public universities. Any issues of damages which might involve the "public fisc" are reserved for trial and, thus, not ripe for appeal.

²⁵ Deposition of Richard Rhoden, Record, pages 160:14-161:3 and 161:15-25.

²⁶ McNeese Writ Application, p. 1.

²⁷ McNeese concedes that it would only cost \$4,000 to bring the Student Union into compliance.

The U.S. Congress and the Louisiana Legislature have also found that complying with Code requirements for the disabled costs the public far less than discriminating against the disabled. The Louisiana Legislature also declared the State's policy with regard to the disabled in La. R.S. 46:2252. That statute provides that discrimination against the disabled, "menaces the institutions, the foundation of a free democratic state, and threatens the peace, order, health, safety, and general welfare of the state and its inhabitants."

The granting of a writ in this case would be a waste of judicial resources. The lower courts exhaustively reviewed the evidence in a light most favorable to McNeese, and four lower court judges correctly and unanimously concluded that there are no issues of material fact. McNeese's efforts to defend its practice of not complying with the ADA are akin to asking this Court to determine whether McNeese may exclude minorities from its campus—it is a principle so well established as not to warrant spending additional judicial resources.

Finally, the impact of this judgment is extremely narrow, as it affects a single restroom in a single building on a single campus. Thus, the granting of writs would not afford this Court the opportunity to consider any novel or far-reaching matters of law and would result in the Sisyphean task of the trial judge again reaching the same conclusions in this eight-year-old case.

II. RESPONSE TO ASSIGNMENT OF ERROR NO 1: THE LOWER COURTS CORRECTLY APPLIED SUMMARY JUDGMENT STANDARDS TO FIND THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT THAT MCNEESE DISCRIMINATED AGAINST COVINGTON

A court "must" grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." LSA-C.C.P. art. 966(B); *Costello vs. Hardy*, 2003-1146 (La. 1/21/04), 864 So.2d 129, 137-138. As this Court stated in *Costello*, "summary judgment procedure is now favored under our law." 864 So.2d at 137, citing LSA-C.C.P. art. 966(A)(2).

In 1997, the legislature amended LSA-C.C.P. art. 966(C)(2) to clarify the burden of proof in summary judgment proceedings. This Court explained the effect of the amendment in *Costello*, 864 So.2d at 137-138. Therein, this Court noted, in pertinent part: "**Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion.**" 864 So.2d at 137-138 (emphasis added); *Babin vs. Winn-Dixie Louisiana, Inc.*, 2000-0078 (La. 6/30/00), 764 So.2d 37, 39-40.

To prevail on an ADA claim under 42 U.S.C. 12132, Plaintiffs merely must establish that Covington is a qualified individual with disabilities and that she was denied access to a service, program, or activity at McNeese, or, alternatively, that she was otherwise discriminated against in some way because of her disability. Quite simply, McNeese **admitted** in response to plaintiffs' Requests for Admissions, in the depositions of its officials, and at the hearing before the trial court, every element of Covington's claim and then added insult to injury by not only admitting discrimination, but boasting that it will continue to discriminate.

In support of its argument that the trial court applied the wrong standard, McNeese attempts to manufacture a "credibility issue" regarding Covington's disability,²⁸ however, her alleged lack of credibility is not only untrue, but it is not **material**. It is undisputed that Covington has been in a prescribed wheelchair for more than eight years and was recognized as disabled by her medical providers and the state and federal governments. The court noted that McNeese did not even dispute that Covington was in a wheelchair on the date of the accident. Moreover, although the Court did not so state, Covington's long-standing epilepsy also unconditionally qualifies her by law as disabled, especially since it was one reason Covington was confined to a wheelchair.²⁹ As such, the courts correctly determined that no genuine issue of material fact exists that Covington is disabled.

The Court's conclusion on disability was supported by the deposition testimony and reports of four doctors and ten exhibits. McNeese, by contrast, submitted **no evidence on this issue, medical or otherwise. No doctor has testified or opined that Miss Covington was not disabled.** Rather, McNeese's effort to dispute Miss Covington's disability is based upon its own incompetent lay interpretation of a note in her medical records that is expressly contradicted by the actual Reports and depositions from her doctors. **McNeese's lay opinion of Miss Covington's medical records is not "evidence."** Again, "the failure of the non-moving party to produce evidence of a

²⁸ McNeese alleges that "plaintiff's credibility is lacking" and that "plaintiff's statements directly conflict with her medical providers and with the defendant's Director of Services for Students with Disabilities." Covington's testimony is completely consistent with all medical conclusions and reports. Indeed, the only two physicians that McNeese names in its argument both prescribed Covington wheelchairs.

Covington's testimony is also materially consistent with that of McNeese Director of Services for Students with Disabilities Tim Delaney. The only inconsistent testimony in this entire case occurs as to matters that McNeese admits in its appellate brief that Delaney "misspoke" about. The contradictory statements of Tim Delaney do not create a material issue of fact with respect to the Student Union's lack of compliance or Covington's accident and do not constitute a material contradiction with Covington.

²⁹ See, 29 CFR 1630.2. Contrary to McNeese's assertion, Covington's epilepsy was one reason she required a wheelchair on January 31, 2001. Dr. Shamieh testified that he wanted Covington to use a wheelchair because her seizures, blackouts, and neurological weakness had become so pronounced that she was suffering regular falls requiring hospitalization.

material factual dispute mandates the granting of the motion.” *Costello*, 864 So.2d at 137-138 (emphasis added).

In sum, there is no material factual dispute in this case that Miss Covington was and is disabled and that McNeese discriminated against her under the ADA. Covington’s alleged lack of “credibility” as to the details of her disability is immaterial. As discussed, *infra*, the Court applied the correct standards for summary judgment, and its decision should be affirmed.

McNeese brazenly maintains its discredited arguments in its writ application. Even more incredibly, McNeese, for the first time, now argues, without citation to the Record, that the lower courts relied upon “a voluminous amount of unsworn and unverified documents” which are “insufficient” in a motion for summary judgment. This is an unbelievable assertion by McNeese because **all of the deposition testimony, affidavits, and medical records introduced by Plaintiffs are sworn documents that McNeese has never previously challenged. Indeed, McNeese does not cite a single “unsworn” document in its brief.**³⁰

III. RESPONSE TO ASSIGNMENT OF ERROR NO 2: THE LOWER COURTS CORRECTLY FOUND THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT COVINGTON QUALIFIES AS DISABLED UNDER THE ADA

Because McNeese cannot defend against the non-compliance that it has already admitted, it attacks Covington’s standing as a disabled person. However, courts very generously construe the definition of disabled in Title II Access Cases because, unlike all other ADA cases, Access Cases do not require the defendants to make any particularized accommodation for the plaintiff. Instead, Access Cases simply seek to have a public entity upgrade its facilities for all disabled individuals as Congress mandated on or before January 26, 1995. Nevertheless, there is no genuine issue of

³⁰ This new assertion by McNeese defies explanation. McNeese’s **Requests for Admissions** found on pages 282-286 of the Record do not have to be certified, as they are judicial admissions signed by counsel for McNeese. The signed certification page for **Dr. Shamieh’s medical records** can be found on page 439 of the Record. The signed certification page for **Dr. Foret’s medical records** can be found at page 386 of the Record. The signed certification page for the **Lake Charles Memorial Hospital records** can be found at page 411 of the Record. The signed certification page for the **St. Patrick Hospital records** can be found at page 454 of the Record. The court reporter’s signed certification of **Dr. Hebert’s deposition** can be found at page 504 of the Record (plus a certified video was submitted to all lower courts). The court reporter’s signed certification of **Tim Delaney’s deposition** can be found at page 483 of the Record. The court reporter’s signed certification of **McNeese Police Chief Benada’s deposition** can be found at page 281 of the Record. The court reporter’s signed certification of **McNeese Police Lt. Vickie Boudreaux’s deposition** can be found at page 272 of the Record. The court reporter’s signed certification of **Dr. Shamieh’s deposition** can be found at page 409 of the Record. The court reporter’s signed certification of the **Richard Rhoden’s deposition** can be found at page 163 of the Record. **Covington’s affidavit** was notarized and can be found on page 136 of the Record. The other documents provided by Plaintiffs in this case were either certified or attached to a deposition. McNeese has simply fabricated its claim that the lower courts relied upon unsworn documents, just as it fabricated many of its other assertions in this case.

material fact that Covington has standing under the ADA regardless of how broadly or narrowly the definition of disabled is construed.

Collette Covington has a complex set of disabilities documented by hundreds of pages of medical records from nearly a dozen medical providers over the last 20 years. Since 2000, at least four physicians, one registered nurse, the Social Security Administration, the State of Louisiana, and even McNeese have declared Covington disabled, and no medical provider has disagreed with this assessment. Covington’s physicians span a wide range of specialties, yet each concluded that Covington suffers from multiple impairments substantially limiting the major life activities of walking, attending class, and caring for herself. McNeese has grossly misstated the facts in its writ application. The record reflects the following:

- Covington was born with epilepsy and a degenerative neurological condition for which she has been treated consistently since the early 1990s;³¹
- Covington’s seizures were once controlled but grew worse the year prior to her accident. Treating neurologist Dr. Fayeze Shamieh urged Covington to ambulate in a wheelchair because of her neurological conditions and prescribed medical transportation for Covington to get to and from McNeese in her wheelchair the year before her accident;³²
- Dr. Shamieh personally witnessed Covington’s seizures, and he testified that she even had seizures in his own waiting room while in her wheelchair;³³
- In September, 2003, Dr. Shamieh noted that Covington had been unable to ambulate without a wheelchair for several years;³⁴
- Covington has a myriad of disabilities, including chronic pain and orthopedic impairments requiring surgeries in 1996, 1999, and 2000. Among other things, Covington has been diagnosed with, “carpel tunnel syndrome, bilaterally, shoulder

³¹ At times during the 1990s, Covington’s seizures were relatively controlled, but she always had neurological weakness and suffered from frequent falls. Therefore, Dr. Fayeze Shamieh, her neurologist, prescribed her medication and a wheelchair. Deposition of Dr. Shamieh, Record pages 405:15-406:14; 407:14-23; and 408:4-18. Covington was hospitalized because of her neurological problems and weakness many times prior to and since her January 31, 2001 accident. The Record shows that even when her seizures were relatively controlled during the 1990s, she was hospitalized at the Lake Charles Memorial Hospital numerous times in 1997, 1998, 1999, and 2000 because of falls.

³² Dr. Shamieh noted three months prior to the accident that Covington had abnormal EEGs following a blackout. He documented that she was having “very frequent seizures as well as headaches and having difficulty ambulating. . .” and that these seizures were complex and uncontrolled despite medication. He also noted that her seizures were grand mal and caused her to fall if she attempted to ambulate without a wheelchair. Deposition of Dr. Shamieh, Record pages 407:14-23 and Dr. Shamieh medical records, Record pages 440-454.

³³ Dr. Shamieh testified that Covington thrashes her arms, legs, and head, and her eyes roll back involuntarily. Upon recovery, Covington is momentarily confused and sleepy and suffers memory dysfunction. Dr. Shamieh has no doubt that Covington has a significant and permanent seizure disorder and other neurological problems which substantially affected many major life functions. Deposition of Dr. Shamieh, Record pages 405:15-406:14.

³⁴ Dr. Shamieh noted that Covington was starting to attempt to ambulate with the aid of a leg brace. Nevertheless, he preferred that she use a wheelchair to ambulate because of her neurological and orthopedic problems. Deposition of Dr. Shamieh, Record pages 408:4-18.

subacromial and hip greater trochanter bursitis, fibromyalgia generalized, tennis elbow, sacroiliitis, rule out variant disease arthritis, cervical and lumbosacral compression radiculopathy, bilateral shoulder subacromial bursitis and left shoulder rotator cuff tendonitis, left leg neuropathy, atypical seizures, mechanical derangement” and severe pain which also prevented Covington from ambulating.³⁵

- On January 3, 2001, only three weeks prior to her accident, St. Patrick Hospital performed a functional assessment on Covington, concluding that she needed “total assistance” to, among other things, bathe, dress, care for herself, and perform wheelchair transfers;³⁶
- On May 16, 2000, Dr. Lynn Foret prescribed Canadian crutches and a walker for Covington because of her neurological weakness and orthopedic problems.³⁷ This prescription was given nearly a year before Covington’s accident, and it was given independently of Dr. Shamieh’s prescription.
- On December 21, 2000, Dr. Foret realized that Covington could no longer take the stress of attempting to walk even with a walker and specialized crutches, and he ordered her to use a wheelchair.³⁸
- On January 17, 2001, Dr. Foret’s nurse noted that Dr. Foret wanted to see if Covington could walk. The same day, Dr. Foret examined Covington and concluded that she could not and that she needed a power wheelchair, rather than the manual wheelchair she had been using, so that she could walk/ambulate more quickly on the sprawling McNeese campus.³⁹
- On October 31, 2001, Dr. Foret prescribed Covington a lift chair for her vehicle and a tub lift device to make it easier for Covington to bathe with her disabilities.⁴⁰ On May 29, 2001, Dr. Foret wrote a prescription so that Medicaid would help to reimburse the renovations of Covington’s home to accommodate the needs of her power wheelchair.⁴¹ On July 30, 2003, two and a half years after the accident, Dr. Foret wrote a prescription for Covington’s power wheelchair to be repaired.⁴² To this day, Dr. Foret orders Covington to use her power wheelchair and maintains that she is disabled.
- The Social Security Administration began paying Covington SSI disability payments a year prior to the accident, and Medicaid and the Louisiana Vocational Rehabilitation

³⁵ Dr. Raul Varela medical records, Record, page 458 and Covington deposition.

³⁶ This assessment is significant because it conclusively establishes, only weeks before the accident, that Covington was substantially limited in the ability to perform several major life activities covered by the ADA. St. Patrick Hospital records, Record, page 455.

³⁷ Dr. Foret medical records, Record, page 397. Dr. Foret treated Covington for various chronic orthopedic problems and performed numerous surgeries on her over the years. He urged her to use crutches, a walker, a wheelchair, and a power wheelchair to ambulate as her conditions grew worse.

³⁸ Dr. Foret medical records, Record, page 393.

³⁹ Dr. Foret had to upgrade Covington from a manual wheelchair to a power wheelchair in part because McNeese would not accommodate Covington by allowing her more time to get to her classes. Dr. Foret medical records, Record, page 387-397.

⁴⁰ Dr. Foret medical records, Record, page 388.

⁴¹ Dr. Foret medical records, Record, page 391. It is worth noting that Medicaid recognizes Covington as disabled and is willing to renovate her private home to accommodate her disabilities, while McNeese is unwilling to renovate any part of its campus for any of its disabled students.

⁴² Dr. Foret medical records, Record, page 387.

service recognize Covington as disabled under standards much more stringent than those required by the ADA.⁴³

- In 2003, Dr. Shamieh noted that Covington was depressed because of her years of disabilities, and he suggested that Covington speak with a psychiatrist because “[s]he cries all of the time. She is having seizures almost every day. She continues to be in the wheelchair and cannot function.”⁴⁴
- McNeese’s ADA expert, Tim Delaney, testified that he was familiar with Covington’s disabilities a semester prior to her accident at McNeese because Covington went to see him requesting accommodations. Delaney admitted that, “I remember her disability,” and that anyone who is accepted as disabled through the Louisiana Vocational Rehabilitation Service is recognized as disabled by McNeese.⁴⁵ Delaney further testified that he accepted Covington’s registration as disabled with McNeese.

Despite McNeese’s admissions and these undisputed facts, McNeese still challenged whether epileptic and wheelchair-bound Covington is disabled. **The Third Circuit was appalled by this tactic, particularly since McNeese never introduced any medical evidence** to counter the hundreds of pages of sworn medical evidence spanning a decade submitted by Covington. McNeese never even bothered to depose any of Covington’s physicians, except for her neurologist. In that deposition, McNeese took the position that Covington was disabled, and the doctor agreed.⁴⁶ Furthermore, as noted, McNeese’s own expert testified that he regarded Covington as disabled. Even McNeese’s own police officers testified that were aware that Covington was disabled the year prior to her accident.⁴⁷

There are three ways to be classified as disabled under the ADA. The ADA and Rehabilitation Act utilize the definition of “disability” found in 29 CFR 1630.2, which provides three distinct ways that Covington could be disabled. She could: (1) have an actual physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment.⁴⁸ Covington satisfies all three definitions.

⁴³ The standards for receiving compensation from the Government for a disability are much higher than the standards for being disabled under Title II of the ADA. Disability payments require a person to not only be substantially limited in a major life activity, but to be so limited as to be unable to work. Congress intended for the ADA to be much broader, even stating in its preamble that 20 percent of the American population qualified as disabled under the ADA. McNeese never disputes that Covington qualified as disabled under these more stringent standards, and McNeese’s expert even testified that Covington was automatically classified as disabled under the ADA because she qualified through Louisiana Vocational Rehabilitation *See* Deposition of Covington, Record, page 935:5-12.

⁴⁴ Dr. Shamieh medical records, Record page 443. McNeese seized upon the concern of Covington’s treating physician and shamefully argues in its briefs that because Dr. Shamieh offered to refer Covington to a psychiatrist for depression over her disabilities, Covington’s testimony is not worthy of consideration.

⁴⁵ Tim Delaney deposition, Record, pages 466:21-467:22; 1004:15-18; and 1005:13-21.

⁴⁶ *See* deposition of Dr. Shamieh, Record, page 407:14-23.

⁴⁷ Deposition of McNeese Lt. Vickie Boudreaux, Record, page 270:3-11.

⁴⁸ Cases interpreting Title II have defined “disability” broadly to deter public entities from forcing those with putative disabilities to undergo a medical exam each time they enter a public facility. Title II requires

McNeese never addressed the second and third prongs of 29 CFR 1630.2. McNeese offered (and still offers) no coherent arguments as to the second and third prongs of this definition, prompting the Third Circuit to state in its opinion that it would have been inclined to award Covington damages for McNeese's filing of a frivolous appeal if Covington had requested it.⁴⁹

McNeese does not dispute that Covington has a record of having physical impairments that substantially limit one or more major life activities, and McNeese does dispute the fact that Tim Delaney, McNeese's own disabilities director/expert witness testified that McNeese regarded Covington as having physical impairments which substantially limited major life activities and that Delaney specifically testified that he was aware of Covington's disabilities and regarded Covington as disabled because of his personal conversations with her and because McNeese automatically regards students as disabled if the State of Louisiana has declared them eligible for disability assistance from the Louisiana Vocational Rehabilitation Service.⁵⁰ Delaney testified that Covington met this standard, and he accepted her "registration" as disabled on McNeese's behalf. Therefore, McNeese undeniably regarded Covington as disabled, satisfying the third prong of 29 CFR 1630.2 as a matter of law. This alone is enough to grant summary judgment on this issue.

Covington also satisfies the first prong of 29 CFR 1630.2. With regard to the first of the three permissible tests, 29 CFR 1630.2 conspicuously does not require Covington to prove that she cannot perform one or more major life activities. She simply must show that she was substantially limited in her ability to perform them as compared to the average person in the general population.⁵¹ Furthermore, there is no minimum length of time that Covington has to have her impairment, so long as there is a long-term impact.

The Louisiana Eastern District explained in *U.S. Equal Opportunity Employment Commission vs. E.I. DuPont de Nemours & Co.*, 406 F. Supp.2d 645, 654, *reversed in part on other grounds*, 480 F.3d 724, (5th Cir. (La.) 2007), that even under the more stringent requirements of Title I, the ADA compares a person's physical impairments with those of the average person in society. In *DuPont*, a woman was disabled under the ADA when she could walk unaided for up to

that public entities recognize that people do not fabricate medical records or ride around in medically prescribed wheelchairs without purpose. Requiring the disabled to submit to rigorous challenges to their disabilities every time they wish to use the restroom would render the ADA meaningless.

⁴⁹ Third Circuit opinion, November 5, 2008, page 16.

⁵⁰ Deposition of Tim Delaney, Record, page 466:21-467:22. Delaney also admitted that he advised Covington that she qualified to register as a disabled student at McNeese and himself urged her to do. She did, and he accepted her registration. Record, page 472:10;473:12.

⁵¹ 29 CFR 1630.2(j).

ten to fifteen minutes at a time without assistance and could stand for an hour without rest if she were willing to experience pain afterwards. The plaintiff could even walk up stairs and walk on a steep levee on occasion, but because she was substantially limited in her ability to walk as compared to the average person, she was under the first prong of the ADA. The court ruled that a person can be substantially limited in her ability to walk and, thus, disabled, even if she never requires any assistance device.

Other courts have made similar rulings. For instance, in the Title II access case *Schonfeld vs. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997) *affirmed*, 172 F.3d 876 (9th Cir. 1999), it was held that, “Plaintiff Alice Schonfeld, *who, at times must use a wheelchair*” meets the test for being disabled under Title II of the ADA.⁵²

Indeed, even temporary disabilities qualify under the ADA, so long as the conditions are not “fleeting,” such as a sprained ankle in which a prompt recovery is expected.⁵³ In *Witt vs. Northwest Aluminum Co.*, 177 F.Supp.2d 1127, 1129 (D.Or.2001), it was held that when a patient had to rest after walking 50 feet because of a vascular insufficiency, that patient was disabled under the ADA, notwithstanding the fact that his physician concluded that his condition was temporary. The court held that when a physician is unable to determine with any certainty when the patient will recover, that person qualifies as disabled under the ADA. *Id.* Furthermore, McNeese’s ADA expert, Tim Delaney, conceded that any student who is disabled for longer than a semester is recognized as disabled by McNeese under the ADA.⁵⁴

Covington’s epilepsy automatically qualifies her as disabled under the ADA.

Furthermore, the official comments to 29 CFR 1630.2 note that:

. . . persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

As a matter of law, those with epilepsy qualify as disabled if it substantially limits a major life activity. It is undisputed that the effects of Covington’s epilepsy, including seizures, frequent

⁵² See also *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 802 (7th Cir. 2005) (holding that being unable to walk fast and a “severe difficulty in walking the equivalent of one city block was a substantial limitation compared to the walking most people do daily.”)

⁵³ It would defy explanation for the ADA to have a “waiting period” for someone in a wheelchair to be free from being discriminated against. Yet McNeese seems to suggest this. Instead, the ADA applies the minute someone suffers from a substantial impairment of a major life activity which is, *or* is expected to be, *or* ends up being, of a long term duration. This is established by 29 CFR 1630, which provides that a court should look to the “duration *or* expected duration of the impairment and the permanent *or* long term impact *or* expected permanent *or* long term impact of or resulting from the impairment.” In Covington’s case, the duration was clearly long term.

⁵⁴ See Deposition of Delaney, Record, page 1016:10-13.

falls and hospitalizations, memory loss, blackouts, neurological problems, weakness and confusion, contributed to her need for a wheelchair and substantially limited Covington's major life activities of walking and caring for herself. Thus, as a matter of law, Covington qualifies as disabled under the first prong of the ADA.

Many of McNeese's statements are either factually inaccurate or completely irrelevant to this case. These include:

- a. McNeese claims that a credibility issue exists regarding Covington's 2001 discovery answers and her 2005 affidavit. This is false and irrelevant even if it were true.**

In 2001, McNeese asked Covington in interrogatories why she needed a power wheelchair [as opposed to a manual wheelchair]. Covington correctly stated that it was to help her get around the McNeese campus faster.⁵⁵ In 2005, Covington noted in her affidavit that she was unable to walk without assistance from orthopedic aids. There is nothing inconsistent about these statements, and McNeese's attack on Covington's "credibility" is disingenuous. Even if Covington's statements had been inconsistent, that inconsistency would be irrelevant since Covington's treating physicians, not Covington, who reached the medical conclusion that Covington is disabled. Thus, Covington's testimony (and thus, her credibility) was never a factor in establishing that she was disabled.

Furthermore, McNeese relies heavily on the fact that Covington stated in one of her interrogatories that she hoped her knee condition would get better with physical therapy. This hopeful statement by a patient does not constitute a genuine issue of material fact as to whether Covington was disabled under the ADA. The Third Circuit pointed out that because McNeese submitted no medical evidence and its officials actually testified that Covington was disabled, there was no weighing of evidence required as to Covington's disabilities. It noted that:

McNeese focused its argument that Covington did not fit under 42 U.S.C.A. 12102(2)(A) by questioning Covington's credibility in the way of pointing out some inconsistencies in her answers to interrogatories verses her depositions, and her statements versus her statements recorded in her medical records. We find these "credibility issues" irrelevant to whether Covington was disabled under 42 U.S.C.A. 12102(2)(A).⁵⁶

- b. McNeese claims that Dr. Shamieh could find nothing wrong with Covington, an assertion that is completely unsupported by the record.**

Covington's EEGs are irrelevant. Dr. Shamieh testified that on one occasion, Covington's EEG was normal. Based on this statement, McNeese claims that an issue of material fact exists as

⁵⁵ Covington noted that she could "walk" faster with an electric wheelchair than she could "walk" with a manual wheelchair. Those in wheelchairs use "walk" as the vernacular for traveling in their wheelchairs because it is less dehumanizing and there are no better, commonly used words.

⁵⁶ Third Circuit's November 5, 2008 opinion, p. 14.

to whether Covington is disabled. However, Dr. Shamieh also testified that on other occasions, Covington's EEGs were abnormal and that EEGs were often normal with seizure patients. Dr. Shamieh specifically concluded that there was no significance to Covington's occasional normal EEGs and that such a finding has no relevance to the fact that Covington has a seizure disorder and neurological problems, especially since he personally witnessed her seizures and, as a neurologist, recognized them as being severe.⁵⁷

Covington's depression supports the fact that she is disabled. McNeese next claims that Covington fabricated her decades of disabilities and that Dr. Shamieh wanted her to see a psychiatrist because of it. Yet Dr. Shamieh testified that he was willing to refer Covington to a psychiatrist because she was depressed over her disabilities. Thus, Dr. Shamieh's referral supports the fact that Covington was disabled.⁵⁸

Covington's memory dysfunction following seizures supports the fact that she is disabled and has nothing to do with whether she can walk. Dr. Shamieh testified that following her seizures, Covington suffered from memory dysfunction and confusion, a normal symptom of her neurological disabilities. McNeese insultingly implies that Covington's testimony should be disregarded and that she should be considered incompetent because of this condition. McNeese never even produces countervailing facts to Covington's testimony. Instead, McNeese simply instructs the courts to disregard all of Covington's testimony and assume that nothing that she testified about occurred. This is not only insulting to Covington and a testament to McNeese's insensitivity to her disabilities, but it is not the proper standard for summary judgment.

c. McNeese claims that Dr. Foret said that Covington could walk. The record contradicts this assertion.

One of Dr. Foret's nurse's notes states that Dr. Foret wanted Covington to exercise and walk [with her crutches] *if possible*. However, later that very day, Dr. Foret examined Covington and concluded that she could not walk, and Dr. Foret immediately upgraded her wheelchair to a power wheelchair.⁵⁹ Yet McNeese takes this isolated statement and argues that Covington was not substantially limited in her ability to walk. McNeese's ridiculous conclusion is contradicted by Dr. Foret, who always maintained that Covington was disabled and in need of a wheelchair. As the Third Circuit noted, all doctors encourage their patients who struggle to walk, and this need for encouragement only affirms that Covington was substantially limited in her ability to walk as

⁵⁷ Dr. Shamieh medical records, Record page 405:15-406:14.

⁵⁸ Dr. Shamieh medical records, Record page 443.

⁵⁹ Dr. Foret medical records, Record page 392.

compared to the average person in society, which is the first permissible standard for establishing a disability under the ADA. Indeed, had Covington been able to walk on January 31, 2001, she would not have been in a wheelchair and would not have been forced to urinate on herself.

At times, Dr. Foret reported some normal anatomical findings while examining Covington. However, McNeese takes these findings out of context, just as it took Dr. Foret's nurse's notes out of context. Having a leg that appears normal on the surface does not mean that a person can walk, as McNeese suggests. McNeese is not a medical expert, and McNeese's counsel's medical opinions are not expert opinions. Dr. Foret always asserted that Covington required a wheelchair to ambulate, and McNeese's wild speculations that Dr. Foret secretly thought Covington did not need her wheelchair, contrary to Dr. Foret's clear conclusions, fail to raise an issue of **fact**.

d. Covington's shoulder injuries have nothing to do with this case.

McNeese discusses Covington's January and May, 2001 shoulder injuries at great length and implies that these injuries have some relevance to this case. Covington's disabilities cause her to fall frequently and she has been injured many times because of her difficulty ambulating. These subsequent injuries have nothing to do with this case or with whether McNeese discriminated against Covington and are relevant only to reinforce Covington's need for a wheelchair.

Incredibly, McNeese now also claims that Covington did not require a wheelchair until she injured her shoulder while in her wheelchair at McNeese. This argument defies all reason.

e. Covington's urinary condition is not her disability.

McNeese bizarrely focuses on the fact that Covington had sutures in her bladder on the day of her accident and claims that Covington only had to use the restroom because her sutures caused her to urinate too frequently. McNeese proclaims that needing to urinate frequently is not a disability. Thus, under McNeese's logic, McNeese does not have to provide an accessible restroom in its Student Union for anyone in a wheelchair because Covington's need to urinate was not a disability. This is absurd. People in wheelchairs need to urinate just like people who are not in wheelchairs. If there are no accessible restrooms, those in wheelchairs must urinate on themselves, as Covington was forced to do. That is discrimination under the ADA.

f. Covington did not "attend McNeese for eight years with no known complaints" as McNeese asserts. McNeese claims that Covington could not be disabled because she "attended McNeese for eight years with no known complaints." First, this is illogical. Second, it is untrue. Delaney admits that Covington approached him seeking accommodations three or four times in

previous semesters.⁶⁰ Indeed, it is partly because of McNeese’s lack of accommodations that it took Covington so long to earn enough credits to be only one semester from graduating.

Covington was disabled as a matter of law. Covington presented substantial evidence to satisfy all three disability tests under the ADA, and **McNeese presented no countervailing evidence.** McNeese’s sole strategy of attacking Covington’s credibility without putting forth any evidence fails to create an issue of fact with respect to Covington’s status as disabled under the first prong of 29 CFR 1630.2. Furthermore, McNeese fails to even address the other two prongs. Thus, there is no genuine issue of material fact that Covington is disabled and has standing to sue under the ADA—a conclusion that all four lower court judges unanimously reached.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO 3: THE LOWER COURTS CORRECTLY FOUND THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT MCNEESE DISCRIMINATED AGAINST COVINGTON

McNeese admits its discrimination. The overriding mandate of 42 U.S.C. 12132⁶¹ is that McNeese cannot deny Covington the benefits of any service, program, or activity at McNeese or subject Covington to any form of discrimination or segregation because of her disability. The ADA is a broad civil rights statute. Just as McNeese cannot maintain segregated facilities based on race, McNeese may also not maintain outdated architectural barriers such as narrow doorways that exclude or segregate the disabled from the rest of the student body.

In *Chaffin vs. Kansas State Fair Board*, 348 F.3d 850, 858 (10th Cir. 2003), the 10th Circuit noted that Congress found that discrimination is usually inadvertent rather than hostile and takes the forms of segregation of the disabled, “failing to modify existing facilities and practices,” and “relegation to lesser services, programs, activities, benefits, and other opportunities.” *Chaffin* held that, even in older facilities, a public entity has an affirmative obligation to remove architectural barriers to preemptively prevent discrimination, and that the failure to take affirmative steps to upgrade facilities by the deadlines mandated by Congress constitutes discrimination.

The trial court easily determined that McNeese discriminated against Covington, as McNeese judicially admits that it maintains architectural barriers throughout its campus, including

⁶⁰ The record also reveals that Covington and other students were forced to document their own complaints in the school newspaper and yearbook for at least 10 years prior to Covington’s accident, because McNeese would not address their grievances or acknowledge their rights under the ADA. *See* Record, pages 380-383. Furthermore, Delaney himself admits that McNeese historically deterred the disabled from even enrolling. Deposition of Delaney, Record, page 482:13-25.

⁶¹ 42 U.S.C. 12132 provides that, “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 such entity.”

the Student Union and has long been aware of these barriers but will not correct them.⁶² McNeese even commissioned an internal study which concluded that McNeese deterred 75 percent of its potential disabled students from attending college because of its abysmal record of discrimination.⁶³ Furthermore, McNeese was aware that its restrooms pose a particular problem for the disabled.⁶⁴

Dr. Hebert exacerbated the harm when he testified that McNeese will not bring the Student Union up to Code because he does not regard it as important or a priority for the disabled to be integrated into the student body or to have access to the Student Union or its many resources.⁶⁵ In other words, McNeese believes that the disabled should not be allowed to eat in the school cafeteria, join the debate team, participate in student government, write for the campus newspaper, or even enter the Student Union to wait for their transportation or use the restroom. Dr. Hebert affirmed that he was not just misspeaking with he repeatedly maintained his assertion. He even testified that if the disabled students at McNeese want an accessible campus, they should take up a collection to build it, because McNeese will spend no money to do so.⁶⁶

McNeese essentially forces Covington and other disabled students to wait only in classrooms or outside in the heat, cold, or rain for their transportation while the able-bodied use the Student Union's facilities. McNeese even stated in its appellate brief that "Ms. Covington would be better served if her transportation picked her up at her classroom building"⁶⁷ so that McNeese will not have to spend \$4,000 to make its Student Union accessible. By definition, McNeese has "relegated the disabled to lesser services, programs, activities, benefits, and other opportunities" and has engaged in segregation in its ugliest form.⁶⁸

⁶² See "Statement of the Case" and "Proceedings Below" sections, *supra*, for additional details regarding McNeese's lack of compliance. McNeese judicially admitted its failure to bring the Student Union, or much of the rest of campus, into compliance in its requests for admissions, Record, page 284-286 and the depositions of Richard Rhoden, Dr. Hebert, and Tim Delaney.

⁶³ Deposition of Tim Delaney, Record, page 482:13-25

⁶⁴ Smith Report produced by McNeese, which concluded that McNeese's restrooms are inaccessible and pose a substantial hardship to the disabled. Record, Page 343. Dr. Hebert testified that he was aware of this report but that McNeese would not address the concerns raised by it because they are, "not our priorities." Deposition of Dr. Hebert, Record, page 495:10-497:14.

⁶⁵ Dr. Hebert specifically testified, "Whether or not it's fundamental for them [the disabled] to get into that student union annex [Old Ranch], or that it's fundamentally important for them to obtain an education, I would question that. I'm not sure I would regard it as a high priority." Deposition of Dr. Hebert, Record, page 501:13-17.

⁶⁶ Deposition of Dr. Hebert, Record, page 502:5-7 and 503:6-17.

⁶⁷ McNeese appellate brief, pg. 27.

⁶⁸ This is *prima facie* discrimination under 42 U.S.C. 12132, *et seq.*

The trial court properly found that McNeese has altered the Student Union. McNeese admits that it made \$450,000 in alterations to the Student Union after the passage of the ADA but would not spend \$4,000 to provide the disabled with a single accessible restroom in the building. Under 28 CFR 35.151, the Student Union is a renovated structure because it was altered after January 26, 1992. It must therefore be, “readily accessible to and usable by individuals with disabilities to the maximum extent feasible.” Courts have universally concluded, as McNeese concedes, that this mandates that every restroom in the Student Union must comply with the ADA’s accessibility guidelines/building codes.

McNeese argues that the \$450,000 in work that it did on the Student Union was minor and does not trigger 28 CFR 35.151. However, the regulations do not distinguish between minor renovations and major renovations, and there is no genuine issue of material fact that McNeese’s extensive renovations trigger 28 CFR 35.151. This makes particular sense in the Student Union, because McNeese added the new service of a state-of-the-art computer lab to the Student Union. In *Kinney vs. Yerusalim*, 9 F.3d 1067, 1073 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1033, 114 S.Ct. 1545, 128 L.Ed.2d 196 (1994), the Third Circuit held:

[c]hanges to the defining characteristic of a facility—to that which makes the facility desirable to the public—mandates that the facility be made accessible to all. Further, accessibility is generously construed to accommodate a wide range of needs, to ensure that patrons ‘are able to get to, enter, and use the facility.’ For example, the path of travel to bathrooms, telephones, and drinking fountains [must be] readily accessible to and usable by individuals with disabilities.

It is undisputed that when the Student Union was built in 1967, no one could have anticipated that it would house a state-of-the-art computer lab. This is, by definition, a “change to the defining characteristic” of the Student Union, and it was done to make the Student Union more “usable” to the students and more “desirable”, a fact which even President Hebert admitted.⁶⁹

Even “existing facilities” at McNeese must be readily accessible, usable, and integrated. Assuming, *arguendo*, that the trial and appellate courts erred in ruling that the undisputed renovations and the addition of a new computer lab constituted an alteration or the addition of a new service, program, or activity under the ADA, then the courts’ error would be harmless since McNeese violates even the standard for existing facilities.

⁶⁹ Shockingly, even Dr. Hebert begrudgingly admitted that the Student Union includes new construction and should have an accessible restroom. While admitting on one hand that the Student Union has been renovated and should include an accessible restroom, McNeese claims on the other that it does not have to provide such a restroom. Deposition of Dr. Hebert, Record, pages 499:18-25; 502:5-7; and 503:6-17.

28 CFR 35.150(a)⁷⁰ requires that “existing” facilities be modified so that they are “readily accessible and usable by individuals with disabilities” on or before January 26, 1995.⁷¹ McNeese concedes that under the “existing facilities” standard, the law requires it to, “ensure that each service, program, or activity, when viewed in *its* entirety, is readily accessible to and usable by individuals with disabilities.” However, McNeese emphasizes the phrase *when viewed in its entirety* to improperly suggest that McNeese’s campus is one single service, program, or activity. Under this erroneous interpretation, McNeese could claim that a single restroom anywhere on McNeese’s sprawling 100 acre campus satisfies all of its campus-wide restroom obligations under the ADA. Instead, the regulation requires that *each service, program, or activity* at McNeese, be readily accessible to the disabled. The McNeese Student Union houses numerous services, programs, and activities, and *each* of them must be readily accessible and usable to the disabled.⁷²

In *Chaffin, supra*. Mandy Chaffin attended a concert at the Kansas State Fair, an existing facility subject to the less stringent guidelines of 28 CFR 35.150. Ms. Chaffin was in a wheelchair and soiled herself when she was unable to reach a restroom in time due to the distance between the designated wheelchair seating area and the Fair’s accessible restrooms.⁷³ Unlike McNeese, the Fair did provide clearly marked accessible restrooms but still discriminated because they were too far away and because not enough of them were accessible. The court ruled that it is not enough for the Fair to provide access to restrooms; the Fair must assure that the access is meaningful and that the disabled can easily find and use the restrooms.⁷⁴

⁷⁰ 28 CFR 35.150(a) provides that: “General. A public entity shall operate *each service, program, or activity* so that the service, program, or activity, when viewed in *its* entirety, is readily accessible to and usable by individuals with disabilities.”

⁷¹ Public entities can never be “grandfathered” out of ADA compliance.

⁷² In common parlance, that means that McNeese must provide at least a reasonable number of accessible restrooms in the Student Union. McNeese did not provide any. Under 28 CFR 35.150, McNeese had from 1992 until January 26, 1995 to comply. Instead of complying, McNeese simply posted signs claiming to comply while knowing that it did not.

⁷³ In *Chaffin*, it was undisputed that 12 of 34 restrooms in the vicinity complied with the ADA, and the Kansas State Fair, unlike McNeese, conducted a self-evaluation and transition plan and attempted to upgrade each of its existing facilities for the disabled. Also unlike McNeese, the Fair never discouraged the disabled from using its facilities. Nevertheless, the appeals court held that the Fair discriminated against Ms. Chaffin and denied the disabled “meaningful access” to the Fair because there were not enough accessible restrooms.

⁷⁴ See also, *Shotz vs. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001), which held: “A violation of Title II, however, does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity. The regulations [for “existing” facilities] specifically requires that services, programs, and activities be ‘readily accessible.’ 28 CFR 35.150. If the Courthouse’s wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is ‘readily accessible’, regardless of whether the disabled person manages in some fashion to attend the trial.”

In *Parker vs. Universidad de Puerto Rico*, 225 F.3d 1, 15 (1st Cir., 2000), a guest at a public university suffered an injury similar to Covington's when his wheelchair tipped over at an old and non-compliant campus botanical garden that he was visiting. The First Circuit held that the University discriminated against the man by not providing compliant facilities in the gardens, despite the fact that they had not been altered since the passage of the ADA.

Parker forecloses on each of McNeese's legal arguments. Existing facilities do not have to be 100 percent compliant, but, as *Chaffin* and *Parker* hold, they must still be "readily accessible and usable in the most integrated setting appropriate," which means at least one accessible restroom. This duty extends to all parts of a public entity, including botanical gardens, sidewalks, gymnasiums, and even prison recreational facilities.⁷⁵

McNeese cannot use the "other methods" defense. 28 CFR 35.150(b)(1) offers public entities the opportunity to accommodate the disabled in *existing* facilities with "other methods" besides Code compliance. However, the McNeese Student Union is not an existing facility because it has been extensively renovated since the passage of the ADA. Thus, McNeese may not avoid its obligation to upgrade its facilities.

Even if McNeese could use "other methods" to accommodate Covington, it did not. Delaney testified that McNeese would not use any "other methods" to assist Covington. Furthermore, McNeese never explained what these "other methods" might be (will Tim Delaney pick Covington up from her wheelchair and place her on the inaccessible restroom toilet?)⁷⁶

Under *Chaffin*, the 10th Circuit held that public entities such as McNeese have the burden of proving that their "other methods" are just as effective as Code compliance, and that if the public entity cannot do so, it must upgrade its facilities to meet the ADA Code. McNeese cannot even specify what its "other methods" are, much less prove their effectiveness. In any event, the Third Circuit correctly noted that whatever "other methods" McNeese had in mind failed Covington, when she was forced to urinate on herself and her arm was injured.

⁷⁵ For additional cases and support, see relevant portions of Plaintiffs Memorandum in Support of Motion for Summary Judgment, Record, page 80-103.

⁷⁶ In *Matthews vs. Jefferson*, 29 F.Supp.2d 525, 533 (W.D. Ark, 1998), a court admonished a public entity that even making such a suggestion would be discrimination under the ADA. Yet McNeese seems to suggest that it would not hesitate to belittle Covington in such a manner when it highlights the phrase "assignment of aides to beneficiaries" on page 18 of McNeese's Writ Application. Aides to beneficiaries refers to things such as providing the deaf with interpreters, not lifting the half-naked body of a student onto a toilet seat in an inaccessible bathroom stall.

V. RESPONSE TO ASSIGNMENT OF ERROR NO 4: THE LOWER COURTS CORRECTLY FOUND THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT MCNEESE IS NOT IMMUNE FROM THE ADA UNDER THE 11TH AMENDMENT

McNeese provides no authority or rationale for its argument that it is immune from the ADA under the 11th Amendment. The Federal Fifth Circuit and U.S. Supreme Court have ruled that Louisiana public entities are required to follow Title II of the ADA. *Pace vs. Bogalusa School Board*, 403 F.3d 272 (5th Cir. 2005), *cert. denied*, 546 U.S. 933, 126 S.Ct. 416, 163 L.Ed.2d 317 (2005) and *Bennett-Nelson vs. Louisiana Bd. of Regents*, 431 F.3d 448 (5th Cir. 2005), *cert. denied*, 547 U.S. 1098, 126 S.Ct. 1888, 164 L.Ed.2d 568 (2006).

CONCLUSION

This entire case boils down to one easy legal determination—are the disabled entitled to at least one wheelchair-accessible restroom in the renovated Old Ranch Student Union? McNeese does not dispute any material facts. Instead, it argues that the disabled are not entitled to use the Student Union and should be segregated and denied access to services, programs, and activities which are enjoyed exclusively by the able-bodied. Furthermore, it argues that epileptic and wheelchair-bound Covington conspired with her physicians and a myriad of government entities to fabricate disabilities for years so that she could have standing to file suit over a single restroom door. These outrageous claims are not countervailing evidence, and four Louisiana judges have unanimously concluded that no genuine issue of material fact exists that McNeese discriminated against Covington. Thus, this narrow and modest judgment should be allowed to stand, and this Honorable Court should deny the Board of Supervisors for the University of Louisiana System and McNeese State University's Application for Supervisory Writs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Opposition to Writ Application was sent by United States mail, postage prepaid and properly addressed to all counsel of record:

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On this, the 26th day of January, 2009

SETH HOPKINS