

THE DISABILITY DOCKET

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The monumental changes emanating from the contemporary Supreme Court have now generated abundant commentary—but it remains possible to glean new insights if we review the Court’s work from an alternative perspective, one that does not often inform mainstream accounts. Drawing on insights from Disability Legal Studies and other critical approaches to law, as well as from the trenches of disability advocacy and civil litigation, this Article applies a “disability lens” to the Supreme Court’s 2021 and 2022 Terms. Our review of the Court’s published decisions and broader docket suggests three themes. We highlight (1) the role of disability cases in the retrenchment of civil rights, (2) the vast and underappreciated effects that certain “non-disability” cases are likely to have on people with disabilities, and (3) the difficult choices that disability law litigators and advocates face when disability law cases end up before this Court. Throughout the Article, we suggest legal areas that would benefit from further examination through a “disability lens.”

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INTRODUCTION

The 2022 Supreme Court Term made history in several respects. The sun set on Justice Stephen Breyer’s tenure, making space for the Court’s first African American woman, Justice Ketanji Brown Jackson. Karla Gilbride, counsel for Public Justice, became the first blind lawyer

to argue before the Court.¹ In-person oral arguments resumed, showing that the Court was ready to abandon certain COVID-19 pandemic precautions, but, in a boon to public access, the Court continued to provide a live audio feed.² Hanging over all of these developments was a larger transformation: a Supreme Court that already leaned conservative offered striking glimpses of just how radically a 6-3 conservative majority could reshape American law.³ At the time of this Article's writing, it is not clear how the Court will decide some of the most momentous legal questions of the Term—encompassing such issues as affirmative action,⁴ redistricting and the

1. See Amanda Ottaway, *What Gilbride's EEOC Nomination Means to Disabled Workers*, LAW360 (Sept. 16, 2022), <https://www.law360.com/employment-authority/articles/1530602/what-gilbride-s-ecoc-nomination-means-to-disabled-workers> [<https://perma.cc/B3Q3-D7M8>]. Perhaps even more noteworthy, Gilbride secured a unanimous favorable opinion in an arbitration related case. See generally *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022).

2. The Court has been under pressure to livestream oral arguments via video to enhance public access to its proceedings. See, e.g., Editorial Board, *Good on the Supreme Court for Keeping Live Audio. Now It's Time to Go Further*, WASH. POST (Oct. 2, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/10/02/supreme-court-audio-broadcasts-cameras-video> [<https://perma.cc/5FRV-ZUWZ>]. But, to date, it has not done so. The Court has also declined to provide live audio of opinion announcements, returning to a pre-pandemic practice in which only a small group of reporters, Court personnel, and invited guests may access real-time audio (while the broader public waits until the beginning of the next Term). Amy Howe, *Court Will Resume Opinion Announcements from the Bench, But Won't Provide Live Audio*, SCOTUSBLOG, (Dec. 12, 2022, 5:17 PM), <https://www.scotusblog.com/2022/12/court-will-resume-opinion-announcements-from-the-bench-but-wont-provide-live-audio> [<https://perma.cc/5A2D-KTHU>]. For an overview of the relevant concerns, see U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-437, U.S. SUPREME COURT: POLICIES AND PERSPECTIVES ON VIDEO AND AUDIO COVERAGE OF APPELLATE COURT PROCEEDINGS (2016), <https://www.gao.gov/assets/gao-16-437.pdf> [<https://perma.cc/LW2R-A3DK>].

3. Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html> [<https://perma.cc/GKF6-7M4P>].

4. See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, No. 20-1199 (U.S. argued Oct. 31, 2022); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted*, No. 21-707 (U.S. argued Oct. 31, 2022).

Voting Rights Act,⁵ and the intersection of free speech and same-sex marriage⁶—but historic opinions are expected.

In times of significant change, scholars find it useful to sort and sift the Court's work in different ways, looking for themes or patterns that make sense of what has happened and that might help predict the future. That is the task of this Article. We do it via a dimension that is too often marginalized or omitted: disability.⁷

In Part I, we explain what it means to apply a “disability lens” to the Supreme Court's docket and why it is worth doing so. Subsequent Parts offer three lessons that application of a disability lens allows us to discern from the Court's recent output. In Part II, we show that disability-related cases have been a vehicle through which the Court has retrenched civil rights more generally. This is not a new phenomenon, as two of us have argued in recent work,⁸ but it is strikingly visible in recent cases and arguments, including the damages case *Cummings v. Premier Rehab Keller P.L.L.C.*⁹ and the nursing home abuse case *Health and Hospital Corporation of Marion County v. Talevski* (still pending at the time of this writing).¹⁰ In Part III, we show that a

5. See generally *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022), cert. granted sub nom., *Merrill v. Milligan*, Nos. 21-1086 & 21-1087 (U.S. argued Oct. 4, 2022).

6. See generally *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), cert. granted, No. 21-476 (U.S. argued Dec. 5, 2022).

7. In doing so, we take inspiration from the small set of scholars who have emphasized the disability dimension of Supreme Court cases. See, e.g., Jamelia N. Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489 (2022); Karen M. Tani, *The Pennhurst Doctrines and the Lost Disability History of the “New Federalism”*, 110 CALIF. L. REV. 1157 (2022); Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. (forthcoming) (on file with authors).

8. Tani, *The Pennhurst Doctrines*, supra note 7, at 1183–98; Eyer & Tani supra note 7; Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 58-61 (2020); see also William Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621, 622–26 (2017).

9. See generally *Cummings v. Premier Rehab Keller PLLC*, 142 S. Ct. 1562 (2022) (holding that emotional distress damages are not recoverable under the Rehabilitation Act or the Affordable Care Act, and implying unavailability under other Spending Clause antidiscrimination statutes). For further discussion, see *infra* Section II.A..

10. 6 F.4th 713 (7th Cir. 2021), cert. granted, No. 21-806 (U.S. argued Nov. 8, 2022). See generally U.S. Sup. Ct. Docket, *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-806.html> [<https://perma.cc/92N2-GX2V>] (inviting the Court to question whether

number of cases that are ostensibly *not* about disability, at least according to media coverage, are likely to have powerful effects on disabled people. In discussing high-profile cases such as *Dobbs v. Jackson Women's Health Organization*¹¹ and *West Virginia v. Environmental Protection Agency*,¹² we ask whether litigators, Supreme Court Justices, and the broader public accurately understood the stakes of these disputes.¹³ In Part IV, we emphasize that the current Supreme Court is a dangerous place for cases that invoke disability law. Savvy disability rights litigators, in concert with disabled communities, have sometimes found ways to avoid unfavorable outcomes through community organizing efforts and strategic communications, as in *Doe v. CVS Pharmacy Inc.*¹⁴ But in situations where that kind of strategizing is less available, we see reason for alarm.¹⁵ We conclude by flagging the Court's grant of certiorari in *Laufer v. Acheson Hotels, LLC*,¹⁶ a disability-related standing case that could do wide-ranging harm to civil rights enforcement.¹⁷

Before proceeding, a brief comment on how we are using the term “disability”: it is a complex and contested term, with socio-legal

Spending Clause legislation gives rise to privately enforceable rights under 42 U.S.C. § 1983, as it has previously held, and, if so, whether the Federal Nursing Home Amendments Act of 1987's transfer and medication rules may be privately enforced). For further discussion, see *infra* Part II; see also Eyer & Tani, *supra* note 7.

11. 142 S. Ct. 2228 (2022). See generally *id.* (overruling *Roe v. Wade* and *Planned Parenthood v. Casey* to return the authority to regulate abortions to the individual states).

12. 142 S. Ct. 2587 (2022). See *id.* at 2614 (holding that the “generation-shifting” mandates in the Environmental Protection Agency's Clean Power Plan exceeded the agency's statutory delegation of authority under the Clean Air Act).

13. Cf. Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. 971 (2023).

14. 982 F.3d 1204 (9th Cir. 2020); Lisa Deaderick, *Recent Disability Rights Work Reminds Us That “Treating Everyone the Same” Can Still Cause Inequalities*, SAN DIEGO UNION-TRIB. (Dec. 5, 2021, 6:00 AM), <https://www.sandiegouniontribune.com/columnists/story/2021-12-05/recent-disability-rights-work-reminds-us-that-treating-everyone-the-same-can-still-cause-inequalities> [<https://perma.cc/996V-ZJAV>]; see *infra* Section IV.A..

15. That said, in cases involving particularly egregious facts and highly sympathetic plaintiffs, such as *Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023), discussed *infra* Section II.D., narrow victories are possible.

16. 50 F.4th 259 (1st Cir. 2022), *cert. granted*, No. 22-429 (U.S. Mar. 27, 2023).

17. See *id.* at 265 (raising the question of whether an ADA “tester” has Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website if that tester lacks any intention of visiting that place of public accommodation).

meanings that, by design, do not always track more medicalized definitions. Some uses of the term suggest further divisions (visible/invisible; social/medical; disclosed/undisclosed; physical/mental; acquired/congenital).¹⁸ These divisions may be useful in some contexts, but are not central to our project. We use “disability” to refer to an impairment experienced at the individual level and constructed at the societal level. We use “disabled” to refer to the condition of having a disability, recognizing as we do so that not everyone who has a disability chooses to so identify (and that others may find any such choice highly constrained).¹⁹ This relatively capacious definition allows us to bring together cases that explicitly engage disability law, cases that matter materially to those who experience disability, and legal controversies that are only available to the Court because of a disability-related dispute.

I. A “DISABILITY LENS”: WHAT IT IS AND WHY IT IS VALUABLE

Legal scholars have long recognized the value in applying critical analytical lenses to judicial decision making.²⁰ Epistemologically, this mode of analysis unearths factual circumstances, patterns, and connections to social context that judicial opinions tend to erase or elide and, in doing so, generates new insights, both about law and

18. See, e.g., Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 487 n.133 (2015) (providing examples of socio-legal sources on models of disability).

19. See, e.g., Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 941 (2019) (discussing the “perceptibility” of disability and its socially constructed markers); see also Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1689–90 (2021) and Katie R. Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 552–54 (2021).

20. See, e.g., Maggie Blackhawk, *On Power and the Law: McGirt v. Oklahoma*, 2020 SUP. CT. REV. 1, 2 (2021); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 (2012); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710–21 (1998); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 1 (2013); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 948 (2002); Russell Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 151 (2016); Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605 (2023).

about the lives that law touches. Attention to disability's role in judicial decision making, like attention to the role of race, gender, sexuality, and colonial subjecthood, is particularly likely to illuminate law's relationship to *power*—including the power to cast some humans as expendable and exploitable.²¹

That said, we appreciate that a “disability lens” may not be as familiar to readers as other critical lenses. The Supreme Court, after all, has often treated disability-based decisionmaking as above interrogation—which might imply that when disability is involved, there is nothing much to see.²²

We therefore devote this first Part to explaining what it means to apply a disability lens to the output of the Supreme Court.²³

21. Cf. Blackhawk, *supra* note 20, at 2.

22. We refer here to the Court's tendency to treat state decision-making on the basis of disability as legitimate, entitled to significant deference, and, as a matter of law, presumptively rational. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (rejecting the argument that people with intellectual and developmental disabilities were a “suspect class” for purposes of constitutional Equal Protection analysis and applying instead rational basis review, albeit in the context of holding that the City of Cleburne violated the Equal Protection Clause when it required the Cleburne Living Center to obtain a special use permit to operate a proposed group home for thirteen men and women with developmental disabilities). The Court crystallized the rational basis standard of review in subsequent decisions. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 255 (2004) (“As we observed, classifications based on disability violate that constitutional command [of Equal Protection] if they lack a rational relationship to a legitimate governmental purpose.”) (internal citations omitted); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 357, 367–68 (2001) (“[T]he result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational . . . If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.”).

23. Our use of the phrase “disability lens” incorporates and builds on the work of other legal scholars who have sought to bridge disability studies and legal scholarship. *See, e.g.*, Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 *YALE J.L. & HUMAN.* 63 (2006); Arlene Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 *COLUM. HUMAN RTS. L. REV.* 403 (2011). As Arlene Kanter has stated: “Disability Studies provides a vehicle with which to explore questions about the rights and responsibilities of citizens and the general role of the government in promoting and protecting the welfare of all citizens.” *Id.* at 462. Rabia Belt and Doron Dorfman likewise put it well when, quoting journalist Joe Shapiro, they note that “every case ‘has

Applying a disability lens means, *first*, asking whether disability is an important part of a case's facts. Is disability relevant to how the case arose, or to legal arguments about how it should resolve? Is disability part of the experience of one or more of the parties, in ways that are relevant to the case? If disability appears, how does it appear? This is an important step because disability may offer a compelling explanation of what happened as a legal matter, even if the legal actors involved do not acknowledge it as such.²⁴ It can also help us make sense of when (and how and why) people exercise rights—that is, when they perceive an injury to their legal interests and whether they believe that injury to be worth pursuing as a formal matter.²⁵

Consider, for example, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁶: the case began with a pregnant woman, Joyce Daubert; a prescription during her first trimester for a drug called Bendectin (to treat nausea);²⁷ and, later, a son born with birth defects of his limbs.²⁸ It ended with a Supreme Court decision that famously defined contemporary standards for the use of scientific evidence in American law²⁹ and thrust federal judges into the business of evaluating the

a disability angle' to it, one that influences evaluation of the facts and can illuminate new claims or defenses." Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in THE OXFORD HANDBOOK OF LAW AND HUMANITIES 157 (2019) (internal citation omitted); see also Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383 (2012).

24. From a more scholarly perspective, contextualizing disability in the underlying facts is also helpful because it may illuminate a phenomenon that we still do not understand very well: how the concept of disability operates in American law. As a legal concept, disability has done an extraordinary amount of work, some of it at cross-purposes. See, e.g., DEBORAH STONE, THE DISABLED STATE (1986); JENNIFER L. ERKULWATER, DISABILITY RIGHTS AND THE AMERICAN SOCIAL SAFETY NET (2006).

25. See, e.g., DAVID M. ENGEL AND FRANK W. MUNGER, RIGHTS OF INCLUSION 7 (2003) (discussing, in the context of disability, the importance of asking how laws "become interwoven with the life histories and legal consciousness of individuals who might assert them").

26. 509 U.S. 579 (1993).

27. *Id.* at 582.

28. *Id.*; Peter Andrey Smith, *Where Science Enters the Courtroom, the Daubert Name Looms Large*, UNDARK (Feb. 17, 2020), <https://undark.org/2020/02/17/daubert-standard-joyce-jason> [<https://perma.cc/2N43-MGHB>] (noting that, by their own admission, the Dauberts were sympathetic plaintiffs, despite Jason Daubert's profession: "I don't act disabled . . .").

29. *Daubert*, 509 U.S. at 597–98.

quality of expert evidence.³⁰ A robust literature now contends with the competency and efficacy of judges as gatekeepers of scientific evidence and the proper doctrinal standards—that is, with *Daubert's* legal holding. But there has been comparably little discussion of disability,³¹ even though the role of disability in the case was fundamental.

To briefly elaborate, disability is often framed as personal tragedy (and thus private responsibility), but it can sometimes appear so tragic that, when paired with a plausible causal agent, a person evaluating the situation may feel inspired to make a conceptual leap—from a framing of private misfortune to one of a more public harm (that is, one worthy of court intervention and remediation). *Daubert* shows how the Court acknowledged that leap-taking impulse and searched for a principled way of instead building a bridge, sufficient to support a legitimate crossing, so to speak. The rule that resulted is, of course, not limited to cases involving disability,³² but it was designed around the

30. See Edward Imwinkelried, *The Meaning of 'Facts or Data' in Federal Rule of Evidence 703: The Significance of the Supreme Court's Decision to Rely on Federal Rule 702 in Daubert v. Merrell Dow Chemical Pharmaceutical, Inc.*, 54 MD. L. REV. 352 (1995).

31. *Daubert* regulates whether scientific evidence ever reaches a jury for consideration—which has meant that pre-trial *Daubert* motion practice and hearings can shape the course of litigation. Consider the swath of cases where the availability of scientific evidence might shape the scope and content of legally recognized rights, most recently in *Dobbs* about the degree and timing of fetal pain experienced. See Brief of Society for Maternal-Fetal Medicine, et al as Amici Curiae in Support of Respondents at 14–25, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (challenging the State's experts' contentions around fetal pain through the language of *Daubert*). All of this has to do with science that can either be allowed into courts or altogether excluded from consideration and never reach a jury.

32. *Daubert*, 509 U.S. at 580. In noting the rule's broad application, we do not mean to imply that it has the same ramifications in every legal context. Because the medical model of disability (positing that disability is an individual deficit treatable through medical science) is so entrenched in American law, *Daubert* is of particular importance to cases involving disability benefits and disability anti-discrimination rights. Research in the years since the Supreme Court decided *Daubert* shows how the decision has intimately shaped judicial conceptions of standing, liability, and damages in disability law cases. See, e.g., Ruby Afram, *New Diagnoses and the ADA: A Case Study of Fibromyalgia and Multiple Chemical Sensitivity*, 4 YALE J. HEALTH POL'Y L. & ETHICS 85, 92 (2004) (“Because ADA litigation is often so fact-specific, every piece of information about an employee's condition may be vital to the outcome of the case. Defendants have exploited this by using *Daubert*, originally established in the field of mass tort litigation, to effectively exclude expert testimony about [less empirically “provable” disabilities].”); see also Peter D. Blanck and Heidi M. Berven, *Evidence of Disability After*

power of disability—the way that seeing or hearing about a disabled plaintiff might make people feel.

Other examples of Supreme Court cases where disability was at the heart of the underlying facts include canonical civil procedure and federal courts cases—dictating, for example, the contours and requirements of constitutional due process (*Matthews v. Eldridge*),³³ the ability of the Equal Employment Opportunity Commission to seek relief on behalf of employees subject to mandatory arbitration clauses (*Equal Employment Opportunity Commission v. Waffle House*),³⁴ and the ability of federal courts, via their pendent jurisdiction, to consider state law claims against states (*Pennhurst State School and Hospital v. Halderman*).³⁵

To be sure, sometimes the facts are just the facts; disability related disputes were the occasion for the articulation of a particular rule but have no broader significance. But in other situations, there is something about the underlying facts that affected the emergent legal holding—how it was phrased, how it might apply to future cases, how (and why) the case gained traction in court in the first place. Applying a disability lens means inviting people to consider these possibilities—and to thereby consider whether the law had to develop as it did.

Second, applying a disability lens means asking about the implications (material, discursive, and otherwise) that a legal decision has for disabled people and subjecting the resulting findings to public airing and critique.³⁶ Does a particular case stand to empower or disempower people who identify as disabled or who might be labeled as such? Does it affect a subset of people under the umbrella label of disability?

Daubert, 5 PSYCH., PUB. POL'Y & L. 16 (1999) (discussing how *Daubert* has shaped evidentiary decisions in disability cases).

33. 424 U.S. 319 (1976).

34. 534 U.S. 279 (2009).

35. 465 U.S. 89 (1984).

36. In referring here to “disabled people,” we recognize that disability is often but one facet of a person’s identity or experience. Applying a disability lens need not mean essentializing people or their experiences. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141–50 (1989) (laying out Crenshaw’s theory of intersectionality).

Answering these questions can help illuminate not only the ableist³⁷ baseline assumptions embedded in American law, but also the way in which law may advance and entrench ableism.³⁸

Cases that are ripe for this kind of analysis are too numerous to list, but consider, for example, the Supreme Court’s 2012 decision striking down the “Medicaid expansion” provision of the Patient Protection and Affordable Care Act (ACA), *National Federation of Independent Business v. Sebelius*.³⁹ Applying a disability lens means that we would not only note the case’s legal-doctrinal import (here, a reassertion by the Court of its role in policing Congress’s use of its spending power), but also that we would foreground the implications for the low-income uninsured or under-insured Americans who stood to benefit from Medicaid expansion, many of whom were disabled, people of color, and women.⁴⁰ To be sure, the surviving provisions of the ACA have broadened access to affordable healthcare, but the effect of *Sebelius* has been to allow a slower and more uneven expansion of government-provided health insurance than the ACA’s drafters envisioned—meaning a perpetuation of the poor health outcomes, precarity, and

37. See, e.g., Talila A. Lewis, *Working Definition of Ableism—January 2022 Update*, TALILA A. LEWIS (Jan. 1, 2022), <https://www.talilalewis.com/blog/working-definition-of-ableism-january-2022-update> [<https://perma.cc/ZS8D-VALL>] (defining “ableism” as “[a] system of assigning value to people’s bodies and minds based on societally constructed ideas of normalcy, productivity, desirability, intelligence, excellence, and fitness”; explaining that “[t]hese constructed ideas are deeply rooted in eugenics, anti-Blackness, misogyny, colonialism, imperialism, and capitalism”; noting that ableism amounts to “systemic oppression” and that “[y]ou do not have to be disabled to experience ableism”).

38. In this regard, the disability lens aligns with the projects of Critical Legal Studies and the Law and Political Economy movement: it seeks to denaturalize taken-for-granted elements of our world and show how law and legal decisionmakers construct them. See, e.g., LPE PROJECT, <https://lpeproject.org/about> [<https://perma.cc/HM6Q-FWNK>]; *Critical Legal Theory*, CORNELL LEGAL INFO. INST. [<https://perma.cc/QT6J-6D92>], https://www.law.cornell.edu/wex/critical_legal_theory; James Boyle, *The Politics of Reason: Critical Legal Theory and local Social Thought*, 133 U. PA. L. REV. 685, 688 (1985).

39. 567 U.S. 519 (2012).

40. Vasu Sunkara & Sara Rosenbaum, *The Constitution and the Public’s Health: The Consequences of the US Supreme Court’s Medicaid Decision in NFIB v. Sebelius*, 131 PUB. HEALTH REPS. 844, 845 (2016).

financial hardship that Congress intended to address.⁴¹ Notably, some of the states that declined or hesitated to expand Medicaid are those where poor, disabled people of color disproportionately reside.⁴²

Another good contender for the type of analysis we suggest is *Department of Homeland Security v. New York*⁴³ in which the Court allowed the Trump Administration to begin implementing its controversial update to the “public charge” rule (interpreting the public-charge ground of inadmissibility in the Immigration and Nationality Act). Under that rule (since unraveled by the Biden Administration’s Department of Homeland Security), a non-citizen’s use of public benefits became a more significant factor in administrative determinations of whether to grant lawful permanent residence.⁴⁴ Many commentators noted the rule’s harshness and its chilling effect on immigrants’ use of public benefits (including by immigrants not technically covered by the rule).⁴⁵ Less remarked upon (although

41. See Rachel Garfield & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAM. FOUND., Oct 2017, <https://collections.nlm.nih.gov/master/borndig/101717244/Issue-Brief-The-Coverage-Gap-Uninsured-Poor-Adults-in-States-that-Do-Not-Expand-Medicaid.pdf> [<https://perma.cc/4ZHC-7YQG>]; Robin Rudowitz, Patricia Drake, Jennifer Tolbert & Anthony Damico, *How Many Uninsured Are in the Coverage Gap and How Many Could Be Eligible If All States Adopted the Medicaid Expansion*, KAISER FAM. FOUND. (Mar. 31, 2023), <https://www.kff.org/medicaid/issue-brief/how-many-uninsured-are-in-the-coverage-gap-and-how-many-could-be-eligible-if-all-states-adopted-the-medicaid-expansion> [<https://perma.cc/L3TR-C87K>]; *Status of Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Mar. 27, 2023), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map> [<https://perma.cc/7KVD-VDTN>].

42. For example, nearly one in five people in Mississippi lives below the poverty line and one in three adults in the state is disabled. *Disability & Health U.S. State Profile Data for Mississippi*, CDC, <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/mississippi.html> [<https://perma.cc/LM2B-UHVY>] (documenting the prevalence of disability within Mississippi); Adam Striar, Patricia M. Boozang & Cindy Mann, *Medicaid Expansion in Mississippi—What’s at Stake*, THE COMMONWEALTH FUND (Feb. 3, 2022), <https://www.commonwealthfund.org/blog/2022/medicaid-expansion-mississippi-whats-stake> [<https://perma.cc/7RNG-RHFZ>] (reporting on the poverty rate in Mississippi). In 2019, the state’s rate of uninsurance was the fifth highest in the country.

43. 140 S. Ct. 599, 600 (2020); see also *Wolf v. Cook Cnty.*, 140 S. Ct. 681 (2020).

44. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

45. See, e.g., Medha D. Makhoul & Jasmine Sandhu, *Immigrants and Interdependence: How the Covid-19 Pandemic Exposes the Folly of the New Public Charge Rule*, 114 Nw. U. L.

certainly not missed by members of the disability community) was the connection to disability: rates of disabled poverty are high, and disability can translate into extraordinary financial burdens, meaning that people with disabilities have often relied on the very benefits programs that the rule treated as a negative factor.⁴⁶ In other words, the rule not only singled out economically vulnerable immigrants for negative immigration consequences, but it also, by implication, targeted disabled immigrants and their families.⁴⁷

Third, applying a disability lens means turning a critical eye to deliberate invocations of disability law and interrogating litigants' choices.⁴⁸ We are mindful that in some instances, disability law is unavoidable: it may be the only viable avenue that a litigant has to name an injury or remedy a wrong. In these situations, applying a disability lens might prompt us to ask how broadly or narrowly the litigant has framed their claim, whether the claim invokes a novel interpretation of disability law, and whether the claim at issue has the potential to generate systemic change for people with disabilities (i.e., change that goes beyond altering the circumstances of the individual litigants). Asking such questions attunes us to the maneuvering room that still exists within disability law (a relatively new legal field) and

REV. 146, 156 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1294&context=nulr_online [<https://perma.cc/PZ76-RPZJ>].

46. In noting this reliance, we would be remiss if we did not mention an important critique of U.S. social welfare provision: the need-based programs that many people with disabilities rely on have an “all-or-nothing” benefits structure and also come with asset limitations, which can deter disabled people from securing sustainable employment and accumulating wealth. *See e.g.*, Mary C. Daly & Mark Duggan, *When One Size Does Not Fit All: Modernizing the Supplemental Security Income Program*, 686 ANNALS AM. ACADEMY POL. & SOC. SCI. 229, 243 (2019).

47. *See* Rebecca Cokley & Hannah Leibson, *Trump's Public-Charge Rule Would Threaten Disabled Immigrants' Health and Safety*, CTR. FOR AM. PROGRESS (Aug. 8, 2018), <https://www.americanprogress.org/article/trumps-public-charge-rule-threaten-disabled-immigrants-health-safety> [<https://perma.cc/4KPL-R9TB>] (characterizing the rule as “targeted discrimination”); Mark C. Weber, *Taking Disability Discrimination Out of the Public Charge Rule*, REGUL. REV. (Oct. 28, 2021), <https://www.theregreview.org/2021/10/28/weber-public-charge> [<https://perma.cc/2C82-7SG3>] (explaining why it is fair to read the rule as “effectively target[ing] disability”).

48. This question was central to “The Disability Frame” symposium in Volume 170 of the University of Pennsylvania Law Review. *See* Jasmine E. Harris & Karen M. Tani, *The Disability Frame*, 170 U. PA. L. REV. 1663, 1664–70 (2022) (reviewing the themes of that symposium and highlighting contributions from other symposium authors).

helps illuminate the various possible futures that different litigation choices may portend.

In other instances, a disability law “framing” is not destiny; it represents a claims-making device that a litigant chose (with assistance from one or more lawyers) from multiple options. Such a choice might feel appropriate when casting the injury at issue in disability terms is most likely to secure redress, even if that injury also implicates, for example, racial discrimination or animus toward a person’s sexual orientation.⁴⁹

This example is not far-fetched. Consider the facts underlying *Bragdon v. Abbott*,⁵⁰ which became the first occasion for the Supreme Court to resolve a significant legal question arising under the Americans with Disabilities Act (ADA): Sidney Abbott was an HIV-positive but asymptomatic person who needed a cavity filling; Dr. Randon Bragdon categorically refused to treat her, citing concerns about safety and contagion.⁵¹ Abbott (and others) experienced a type of discrimination that was entwined with negative societal attitudes toward homosexual conduct and LGBTQ identity, but as she and her lawyers decided how to frame her injury, they saw a disability-based claim as the most promising remedial path.⁵² Similar choices abound today in areas ranging from transgender rights to school reform.

49. See Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293 (2018); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005); Craig Konnoth, *Race and Medical Double-Binds*, 121 COLUM. L. REV. F. 135 (2021); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020).

50. 524 U.S. 624 (1998).

51. *Id.* at 628–30.

52. Ben Klein, “*This is the Clerk of the U.S. Supreme Court Calling . . .*”: *Bragdon v. Abbott at the Supreme Court in 1997*, GLAD (Nov. 20, 2018), <https://www.glad.org/post/this-is-the-clerk-of-the-u-s-supreme-court-calling-bragdon-v-abbott-at-the-supreme-court-in-1997> [https://perma.cc/2939-992R] (quoting Sidney Abbott’s discussion of the ADA as offering “powerful protections for people living with HIV and AIDS, people who at the time faced harsh discrimination in nearly every realm of life”). This was not an easy choice. Early advocacy by gay rights organizations faced a dilemma: how to reject the pathologizing labels of deviance that the medical establishment had imposed on gay and lesbian communities (for example, via the inclusion of “homosexuality” within the Diagnostic and Statistical Manual) while also making legible the unequal treatment that LGBTQ communities and people with HIV/AIDS experienced when they sought access to employment, affordable

We are mindful, of course, that in choosing to engage with disability law (or not), litigants and lawyers may not be thinking beyond their own interests, and perhaps properly so.⁵³ But there is value in the kind of retrospective dissection we suggest here. Doing so can inform future litigation by illuminating the benefits of invoking disability, as well as the potential costs.⁵⁴ It might also help us recognize situations where no existing legal frame really matches the harm at issue, and where an injured party's effort to invoke law may do its own kind of harm.⁵⁵

To summarize, applying a disability lens can yield rich and important insights—about trends in contemporary jurisprudence and their real-world effects; about the experiences of people who identify as disabled or are so labeled; and about the current workings of the concept of disability, a malleable and manipulable term that has had various

health care and housing, public services and programs, and places of public accommodations. *See, e.g.*, AZIZA AHMED, RISK AND RESISTANCE: HOW FEMINISTS TRANSFORMED THE LAW AND SCIENCE OF AIDS (forthcoming 2023); Nancy E. Brown, AIDS and the Politics of Disability in the 1980s (August 2019) (Ph.D. dissertation, Purdue University).

53. Lawyers, for example, must abide by ethical rules of professional conduct, including diligence and zealous representation on behalf of individual clients, as well as avoiding conflicts with client interests. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r.1.3 cmt. (AM. BAR. ASS'N 2023) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”); *Id.* r.1.7 cmt. (“Loyalty [is an] essential element[] in the lawyer's relationship to a client . . . [C]onflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.”).

54. *See* Rabia Belt, *The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future*, 110 GEO. L.J. 785, 786, 788, 792–94 (2022) (discussing the environmental and structural harms that generate disability and recognizing that these harms might create tension with disability pride perspectives in law and policy); *see also* Jasmine E. Harris, *Locating Disability Within a Health Justice Framework*, 50 J. LAW, MED., & ETHICS 663, 665 (2022) (arguing that situating disability as a demographic in the health justice framework offers a broader understanding of the harm, which, in turn, may offer legal remedial pathways that would otherwise be unavailable).

55. *See, e.g.*, LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023) (arguing that reform efforts designed to advance gender justice through state action have become another form of violence, particularly against women of color, transgender, and gender-non-conforming survivors); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 4 (1990) (discussing how race, gender, and class can prevent people from taking full advantage of procedural legal opportunities available to them).

meanings and uses throughout U.S. history. We turn now to the insights we have gleaned from applying a disability lens to the Supreme Court's recent and current cases.

II. DISABILITY CASES AND THE RETRENCHMENT OF CIVIL RIGHTS

As many scholars and legal commentators have observed, the apparent expansion of civil rights protections in the last fifty years (to people with disabilities, to LGBTQ individuals, etc.) has unfolded alongside a variety of doctrinal changes that have made it more difficult for rights-holders to secure meaningful redress in federal court.⁵⁶ A less appreciated aspect of this roll-back is that it has often occurred via disability rights cases.⁵⁷ Consider, for example, *Board of Trustees of the University of Alabama v. Garrett*,⁵⁸ which began with ADA claims against a state employer.⁵⁹ The case culminated in a constitutional holding that further restricted Congress's ability to exercise its authority under Section Five of the Fourteenth Amendment.⁶⁰ Or consider *Barnes v. Gorman*,⁶¹ a case that began with a disability rights claim against Missouri police officials and resulted in the Supreme Court finding that punitive damages were unavailable to private litigants under a range of civil rights provisions.⁶² This Part

56. See, e.g., STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE US (Lynda G. Dodd, ed. 2019); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1131–32 (2007); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 172–76 (2021).

57. For examples of scholarship that has recognized this, see Tani, *The Pennhurst Doctrines*, *supra* note 7, at 1158, 1206, 1216 (2022); Eyer & Tani, *supra* note 7.

58. 531 U.S. 356 (2001).

59. *Id.* at 362.

60. *Id.* at 364, 368, 374.

61. 536 U.S. 181 (2002).

62. *Id.* at 183–84, 189. In order to decide whether punitive damages were allowed under the ADA and Section 504, the Court had to consider Title VI of the Civil Rights Act of 1964. *Id.* at 185 (“Thus, the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964 . . .”). The Court’s conclusion—that “Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages”—now governs not only

shows how the trend has continued, despite valiant efforts by the disability rights bar (discussed further in Part IV).

A. *Cummings v. Premier Rehab Keller, P.L.L.C. and the Narrowing of Compensatory Damages*

*Cummings v. Premier Rehab Keller, P.L.L.C.*⁶³ began when Jane Cummings sought physical therapy treatment from Premier Rehab and encountered a disability-based obstacle to access.⁶⁴ Described in court filings as “deaf and legally blind,”⁶⁵ Cummings “primarily communicates in American Sign Language (“ASL”),”⁶⁶ but Premier Rehab declined to provide an ASL interpreter for her appointment.⁶⁷ Cummings sued Premier Rehab, alleging violations of Section 504 of the Rehabilitation Act of 1973 and Section 1557 of the ACA.⁶⁸ Part of the same family of statutes as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, these statutes prohibit certain recipients of federal funds from discriminating on the basis of protected traits.⁶⁹ In other words, these statutes draw on Congress’s spending power to define and enforce individual anti-discrimination rights.⁷⁰ The District Court dismissed Cummings’s suit, finding that the type of damages sought—compensation for emotional harm—was not recoverable in a private action to enforce the cited statutes.⁷¹ After the Fifth Circuit affirmed, Cummings petitioned the

Section 504 claims, but also (obviously) Title VI claims and Title IX claims. *Id.* at 188. For another example in this vein, see *Buckhannon Bd. & Home Care, Inc. v. W. Va. Dep’t of Health & Hum. Res.*, 532 U.S. 598, 607 (2001).

63. No. 4:18-CV-649-A, 2019 WL 227411 (N.D. Tex. Jan. 16, 2019), *aff’d*, 948 F.3d 673 (5th Cir. 2020).

64. *Id.* at *1.

65. Brief for Petitioner at 10, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022) (No. 20-219).

66. Brief for United States as Amicus Curiae at 3, *Cummings*, 142 S. Ct. 1562 (No. 20-219).

67. *Id.*

68. *Id.* at 4.

69. *Discrimination on the Basis of Disability*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 12, 2023), <https://www.hhs.gov/civil-rights/for-individuals/disability/index.html> [<https://perma.cc/G74M-8CSV>].

70. See Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 72–73 (2022) (explaining how Title VI and related statutes draw on Congress’s Spending Clause authority to “creat[e] a legal framework of civil rights protections”).

71. *Cummings*, 2019 WL 227411, at *4.

Supreme Court for review,⁷² noting that the Supreme Court had previously characterized compensatory damages as entirely permissible under this family of statutes.⁷³

The Supreme Court granted Cummings's petition but did not rule as Cummings hoped. Writing for the six justices in the majority, Chief Justice Roberts began with the foundational Spending Clause case *Pennhurst State School and Hospital v. Halderman*⁷⁴ (also a disability case) and noted that when Congress enacts legislation pursuant to the spending power, such legislation is "much in the nature of a contract."⁷⁵ When the Court had applied that analogy in previous private actions to enforce Spending Clause statutes—most notably in *Barnes v. Gorman*⁷⁶—it held that the concept of notice limited the scope of available remedies.⁷⁷ Chief Justice Roberts thus framed the question in *Cummings* as follows: "[w]ould a prospective funding recipient, at the time it 'engaged in the process of deciding whether [to] accept' federal dollars, have been aware that it would face [liability for emotional distress damages]?"⁷⁸ To answer that question, Chief Justice Roberts looked to contract law doctrine,⁷⁹ or at least one interpretation of contract law's "general rules,"⁸⁰ and concluded that "emotional

72. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 680 (5th Cir. 2020), *aff'd*, 142 S. Ct. 1562.

73. Petition for Writ of Certiorari, *Cummings*, 142 S. Ct. 1562 (No. 20-219).

74. 451 U.S. 1 (1981).

75. *Cummings*, 142 S. Ct. at 1568 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). On the significance of the *Pennhurst* litigation and the importance of disability to the Supreme Court's Spending Clause jurisprudence, see Tani, *The Pennhurst Doctrines*, *supra* note 7, at 1206 (documenting how the *Pennhurst* litigation limited Congress's use of the spending power and enabled further limitations in subsequent cases).

76. 536 U.S. 181 (2002).

77. *Cummings*, 142 S. Ct. at 1572 (citing *Barnes v. Gorman*, 536 U.S. 181, 187–88 (2002)) (holding that a remedy is appropriate relief only if the recipient of federal funding is on notice that by accepting federal funding, it exposes itself to liability).

78. *Id.* at 1570–71 (quoting *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006)).

79. This move is significant. As various justices and scholars have noted, it is one thing to describe Spending Clause legislation as analogous to contract law. It is another to apply actual contract law to interpret statutes. Tani, *The Pennhurst Doctrines*, *supra* note 7, at 1206–07; Eyer & Tani, *supra* note 7.

80. *Cummings*, 142 S. Ct. at 1572. This invocation of generality was an answer to the petitioner's invocation of contract law doctrines that supported her position. Chief

distress damages are not recoverable under the Spending Clause antidiscrimination statutes we consider here.”⁸¹

This ruling has disturbing implications for disabled people, as numerous disability organizations argued in a joint amicus filing: “[o]ften, violations of the relevant statutes do not cost individuals with disabilities money, nor do they impose physical harm”; instead, these violations cause such individuals to be “humiliated, singled out, mocked, or made to go without regular access to the service to which they are entitled.”⁸² If disabled plaintiffs are unable to recover damages for these kinds of injuries, rights violators may experience no significant consequences for their illegal behavior—both because their financial liability may be so minimal and because plaintiffs’ lawyers may feel dissuaded from even initiating these cases. Indeed, according to the National Council on Disability, these projected outcomes are already discernible.⁸³

The *Cummings* decision raises similar concerns for people who are vulnerable to discrimination based on race, sex, nationality, or some other protected category. Should plaintiffs seek damages under Title VI or Title IX, defendants are likely to claim that pain, suffering, embarrassment, and other “emotional” injuries are uncompensable (drawing on an implied interpretation of Title VI that, in turn, governs

Justice Roberts characterized these doctrines as too particular and specific to satisfy the notice principle. *Id.* On the multiple ways of interpreting contract law in this context, see *id.* at 1576 (Kavanaugh, J., concurring) (“The dueling and persuasive opinions illustrate . . . that the contract-law analogy is an imperfect way to determine the remedies for this implied cause of action.”).

81. *Id.* at 1572 (majority opinion)

82. Brief for Disability Organizations as Amici Curiae Supporting Petitioner at 8–9, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022) (No. 20-219); see also NAT’L COUNCIL ON DISABILITY, *CUMMINGS V. PREMIER REHAB KELLER PLLC: IMPLICATIONS AND AVENUES FOR REFORM* 7 (2023) (describing how those who experience disability-based discrimination often suffer emotional distress and may be less likely to have suffered economic loss).

83. NAT’L COUNCIL ON DISABILITY, *supra* note 82, at 19 (“Following the *Cummings* decision, disability advocates have learned of cases in which attorneys declined representation since potential plaintiffs lacked damages other than emotional distress or have had to dismiss cases where emotional distress damages were the sole remedy sought.”); *id.* at 21 (connecting a plaintiff’s inability to collect emotional distress damages to a reduced likelihood of effecting systemic change at the defendant school).

an entire suite of Spending Clause civil rights statutes).⁸⁴ As Justice Breyer noted in his dissent, this result is “difficult to square” with Congress’s long-recognized intent to vindicate “human dignity.”⁸⁵ Through a relatively low-salience remedies decision, the Court has given major civil rights statutes a new and more restrictive real-world meaning.

The decision also has implications for other areas of disability law, directly or by analogy. For example, lower courts have begun to extend the Supreme Court’s decision in *Cummings* to dismiss plaintiffs’ claims for emotional distress damages under Title II of the ADA,⁸⁶ which, while not Spending Clause legislation like the Rehabilitation Act, has legislative roots in the Rehabilitation Act.⁸⁷ Title II’s reach extends to state and local programs and services, including law enforcement (policing), carceral institutions (jails and prisons), and education—all arenas where pain and suffering are predictable consequences of prohibited behavior.⁸⁸

B. *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc. and the Future of Disparate Impact Liability*

If *Cummings* was an underappreciated incursion on civil rights law, the statutory interpretation case *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc.*⁸⁹ was even more so. In this Section, we

84. *Cummings*, 142 S. Ct. at 1576 (Kavanaugh, J., concurring) (characterizing the question before the Court as one of “whether compensatory damages for emotional distress are available under the implied Title VI cause of action”); *id.* at 1578 (Breyer, J., dissenting) (noting that, according to the Court’s precedents, Title VI, Title IX, Section 504, and the ACA provide “coextensive remedies,” meaning that “the Court’s decision today will . . . impact[] victims of race, sex, disability, and age discrimination alike”).

85. *Id.* at 1582 (Breyer, J., dissenting) (citation omitted).

86. *See, e.g.*, Order, *A.W. v. Coweta County School District*, No. 3:21-cv-218-TCB, Northern District of Georgia, Nov. 16, 2022, at 9–10 (listing examples of post-*Cummings* dismissals under the ADA).

87. Congress designed Title II to expand the protections of Section 504; under Title II, the antidiscrimination mandate extends to states, localities, and their instrumentalities regardless of whether they receive federal financial assistance. Americans with Disabilities Act, Title II (2018) (codified at 42 U.S.C. § 12132); Rehabilitation Act, Section 504, 29 U.S.C. § 794 (2018); *see* 29 U.S.C. § 701 (b).

88. *See, e.g.*, *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1199 (11th Cir. 2007) (“As a matter of both common sense and case law, emotional distress is a predictable, and thus foreseeable, consequence of discrimination.”).

89. 142 S. Ct. 1968 (2022).

explain why this dry and technical case, involving the costs of healthcare services to a person with end-stage renal disease (“ESRD”), merits attention from all groups whose claims to equal treatment depend on disparate impact theories of liability (rather than theories grounded in disparate treatment or discriminatory intent).

At its core, the case is about the flow of money through the U.S. healthcare system and the desire by healthcare providers—here, a leading provider of dialysis treatment in the United States—to receive the best possible reimbursement rate from healthcare insurers for the services they provide. Plaintiff DaVita’s specific complaint concerned the Marietta Memorial Hospital Employee Health Plan (the “Plan”), which covers dialysis care for Plan participants with ESRD (as it is legally required to do), but treats *all* outpatient dialysis providers as “out-of-network” and reimburses them at lower “out-of-network” rates.⁹⁰ DaVita’s legal basis for objecting to this scheme was the Medicare Secondary Payer Act and that Act’s specific concern for patients with ESRD, for whom Medicare assumes “secondary” responsibility⁹¹: DaVita argued that Marietta’s general policy toward outpatient dialysis amounted to a policy toward patients with ESRD (according to DaVita, 99.5% of its outpatient dialysis patients have or develop ESRD), thereby running afoul of the statute’s command that “primary payers” (here, Marietta) not “differentiate” in the benefits they provide as between individuals with ESRD and other covered individuals.⁹² For its part, defendant Marietta seized on the inferential leap that DaVita’s claim required: DaVita was asking the Court to find “differentiation” between patients with ESRD and other patients solely on the basis of differential *effect*. Phrased differently, Marietta alleged

90. For a fuller discussion of why DaVita found this reimbursement rate unfair, see *DaVita, Inc. v. Marietta Mem’l Hosp. Emp. Health Benefit Plan*, 978 F.3d 326, 331–32 (6th Cir. 2020) (discussing the lower reimbursement amounts and other restrictions that come with being classed a “tier 3” provider and the allegation of reimbursement rates below the “reasonable and customary” industry standard), *rev’d*, 142 S. Ct. 1968 (2022). On how this factual scenario relates to DaVita’s business model, see *DAVITA INC: Supreme Court Ruling No Impact on Moody’s ‘Ba2’ CFR*, LEXIS: TROUBLED CO. REP. (Aug. 3, 2022).

91. *Marietta Mem’l Hosp.*, 142 S. Ct. at 1972.

92. DaVita claimed the right to make this claim via an anonymous patient who was diagnosed with ESRD, who received dialysis services from DaVita, and who had, prior to receiving treatment, assigned their rights under the Plan to DaVita. *DaVita Inc. v. Va. Mason Mem’l Hosp.*, 981 F.3d 679, 682 (6th Cir. 2020).

that DaVita sought to transform a statutory anti-differentiation provision into a source of disparate impact liability.

Writing for the majority in a rather short (seven-page) opinion, Justice Kavanaugh held that the Medicare Secondary Payer statute does not authorize disparate-impact liability and that the Marietta Plan's coverage terms for outpatient dialysis do not violate the statute because those terms apply uniformly to all covered individuals.⁹³

Although some commentators characterized the case as simply a statutory interpretation matter, or “yet another Medicare-reimbursement dispute,”⁹⁴ we see significance in (1) a private dialysis corporation's strategic invocation of the disability anti-discrimination frame, and (2) the clear rejection of that framing by the Supreme Court, offering a possible window into how this Court views disparate impact legal theories.

On the first point: it is worth asking whether DaVita was the party best suited to champion disability rights or disparate impact theories. DaVita emphasized the hardships that the Plan created for patients with ESRD, who might feel compelled “to abandon their private coverage in favor of Medicare”⁹⁵—but DaVita's profit motive was also very clear. And with earnings that surpassed \$11.6 billion in 2021,⁹⁶ DaVita is remote from the experience of disabled patients. In retrospect, it is not surprising that the case did so little to illuminate the stakes for the patients whose interests DaVita claimed to represent, or to highlight intersections between ESRD and other experiences of disadvantage. Close to 800,000 people in the United States live with ESRD; ESRD's precursor, chronic kidney disease, affects more than one in seven U.S. adults (an estimated thirty-seven million

93. *Marietta Mem'l Hosp.*, 142 S. Ct. at 1974–75.

94. See Ronald Mann, *Justices to Consider Yet Another Medicare-Reimbursement Dispute*, SCOTUSBLOG (Feb. 25, 2022, 9:53 AM), <https://www.scotusblog.com/2022/02/justices-to-consider-yet-another-medicare-reimbursement-dispute> [<https://perma.cc/MB2X-AQKR>] (predicting that DaVita's argument would involve straightforward statutory interpretation).

95. Abby Wargo, *DaVita Tells Justices Not to Touch Win in Reimbursement Row*, LAW360 (Jan. 20, 2022, 3:05 PM) <https://www.law360.com/articles/1456809/davita-tells-justices-not-to-touch-win-in-reimbursement-row> [<https://perma.cc/V6E7-XR8E>] (analyzing DaVita's brief submitted to the United States Supreme Court).

96. Fourth Quarter 2021 Financial Disclosure, DAVITA (Feb. 10, 2022), <https://investors.davita.com/2022-02-10-DaVita-Inc-4th-Quarter-2021-Results> [<https://perma.cc/8MGG-A6D4>].

Americans).⁹⁷ The prevalence of ESRD was 3.4 times higher in Black Americans than white Americans in 2018.⁹⁸ What might it mean, moreover, for one's life-sustaining dialysis treatments to be subject to the ungenerous reimbursement rates that the Plan set forth? The practical consequences of the Plan's design are payment of higher co-payments, coinsurance, and deductibles—or the decision to forgo treatment. Other consequences take the form of administrative burdens (which can easily translate into financial burdens): paying “out of pocket” and then seeking reimbursement after the fact; navigating the administrative reviews that come with any treatments that the Plan identifies as particularly costly; and deciding whether to give up the Plan and switch to Medicare as a primary insurer.⁹⁹ While DaVita's interests appeared to align with those of its patients in this case, the reality is that DaVita may bill patients for any amounts that their insurers will not cover. Patients unable to pay face the prospect of falling into medical arrears, with the parade of horrors that accompanies it.¹⁰⁰

To our second point: with the human stakes so poorly represented, this case provided the Court with a relatively boring and bloodless forum in which to consider a disparate impact theory of

97. *Kidney Disease Statistics for the United States*, NAT'L INST. OF HEALTH, <https://www.niddk.nih.gov/health-information/health-statistics/kidney-disease> [<https://perma.cc/A3NC-JFHH>].

98. NAT'L INSTS. OF HEALTH, UNITED STATES RENAL DATA SYSTEM 2020 ANNUAL DATA REPORT, Ch. 1 (Jan. 6, 2021), <https://usrds-adr.niddk.nih.gov/2020/end-stage-renal-disease/1-incidence-prevalence-patient-characteristics-and-treatment-modalities> [<https://perma.cc/C3F4-4KM6>].

99. *Id.* at Ch. 9 (Medicare-related spending for beneficiaries with ESKD totaled \$49.2 billion in 2018). This additional process/scrutiny subjects disabled individuals to greater “disability admin.” See, e.g., Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2331 (2021).

100. See, e.g., David U. Himmelstein, Samuel L. Dickman, Danny McCormick, David H. Bor, Adam Gaffney & Steffie Woolhandler, *Prevalence and Risk Factors for Medical Debt and Subsequent Changes in Social Determinants of Health in the US*, 5 JAMA NETWORK 1, 10 (2022) (“Our findings suggest that incurring medical debt leaves many unable to pay for utilities, and worsens housing and food security, key [social determinants of health] associated with adverse health outcomes”); Lucie Kalousova & Sarah A. Burgard, *Debt and Foregone Medical Care*, 54 J. HEALTH SOC. BEHAV. 204, 207 (2013) (noting that “having medical debt is correlated with foregoing physician visits, putting off needed care, and not filling prescription medications”) (citation omitted).

discrimination—and to reject it.¹⁰¹ Notably, while the Sixth Circuit characterized the two statutory provisions in the case as “antidiscrimination provision[s],”¹⁰² Justice Kavanaugh’s textualist reading discerned instead “a coordination-of-benefits statute, not a traditional antidiscrimination statute.”¹⁰³ The relevant inquiry for the Court was thus whether a plan provides different benefits and not whether otherwise neutral, non-differentiating language in the plan has unequal effects.¹⁰⁴ In a later part of the opinion, however, Justice Kavanaugh went beyond the text to make a point about the workability of a disparate impact theory in this context: it “would be all but impossible to fairly implement,” because of difficulties determining “an objective benchmark or comparator”; “judicial and administrative chaos” would likely follow.¹⁰⁵ These observations are arguably confined to the facts of this case, but they invoke critiques that are broadly familiar to scholars and practitioners of equality law.

As to whether DaVita’s anti-differentiation/anti-discrimination argument was as baseless as the majority suggests, we refer readers to the partial dissent by Justices Kagan and Sotomayor.¹⁰⁶ More important, for our purposes, is to note (1) how the Court’s disposition of this case may spill over into the interpretation of other “antidifferentiation” provisions in statutes that may be silent on

101. The Court has long expressed ambivalence about this theory. *See, e.g.*, *Alexander v. Choate*, 469 U.S. 287, 298–99 (1985) (“Any interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.”).

102. *DaVita, Inc. v. Marietta Mem’l Hosp. Emp. Health Benefit Plan*, 978 F.3d 326, 335 (6th Cir. 2020), *rev’d*, 142 S. Ct. 1968 (2022).

103. *Marietta Mem’l Hosp.*, 142 S. Ct. at 1974 n.2.

104. *Id.* at 1974.

105. *Id.*

106. *Id.* at 1975–76 (Kagan, J., dissenting in part) (noting that a patient’s need for “[o]utpatient dialysis is an almost perfect proxy for end stage renal disease” and citing prior cases in which the Court recognized that differential treatment of a proxy for a protected status or trait was the equivalent of differential treatment on the basis of that status or trait). The dissent also responds to Justice Kavanaugh’s textualist reading by drawing attention to plain language in the statute proscribing differentiation because of a “need for renal dialysis, or in any other manner.” *Id.* At 1976 (quoting 42 U.S.C. § 1395y(b)(1)(C)(ii)).

disparate impact and (2) what it might augur for the Court's future interpretations of the nondiscrimination provisions of disability laws, including the ADA, Section 504 of the Rehabilitation Act, and Section 1557 of the ACA. While these statutes, as currently interpreted, allow for disparate impact theories to advance,¹⁰⁷ such theories of relief have faced continued challenge in federal courts—including, as we discuss, in the recent case *CVS, Inc. v. Doe*.¹⁰⁸

C. Health and Hospital Corporation of Marion County, Indiana v. Talevski *and the Attack on Section 1983*

In the 2022 Term, the Court took up yet another disability-related case with major implications for civil rights litigation: *Health and Hospital Corporation of Marion County, Indiana v. Talevski*.¹⁰⁹ The litigation began with a complaint of nursing home abuse: family members of Gorgi Talevski, an elderly man with advancing dementia, alleged that Talevski's residential care facility abused and neglected him, in violation of the rights and standards set forth in the Federal Nursing Home Reform Act ("FNHRA").¹¹⁰ The FNHRA applies to all

107. See *Alexander v. Choate*, 469 U.S. 287 (1985). The *Choate* Court specifically considered "whether proof of discriminatory animus is always required to establish a violation of § 504 and its implementing regulations, or whether federal law also reaches action . . . that discriminates against the handicapped by effect rather than by design." *Id.* at 292. The Court ultimately "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact." *Id.* Although *Choate* treated Section 504 as a guarantee of meaningful access, which might sound capacious, the dicta's ambivalence toward disparate impact claims created an incentive for litigators to frame defendants' conduct differently (e.g., as "failure to provide reasonable accommodations" to affected individuals) to avoid the negative connotations of "disparate impact." See Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1418 (2017) (offering disability as an example where non accommodation principles merge with disparate impact theories); see also Jessica Roberts & Hannah Eichner, *Disability Rights in Health Care Dodge a Bullet*, JAMA HEALTH F., June 2022, at 1 (discussing how the withdrawal of *CVS v. Doe* from the Court's docket avoided the opportunity for the Court to directly decide the question of disparate impact under Section 1557 of the ACA).

108. *Doe v. CVS Pharm., Inc.*, 982 F.3d 1204 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 480 (2021) (No. 20-1374).

109. 6 F.4th 713 (7th Cir. 2021), *cert. granted*, No. 21-806 (U.S. argued Nov. 8, 2022).

110. 42 U.S.C. §§ 1395i-3, 1396r; 6 F.4th at 715-16.

nursing homes that receive federal Medicaid funds.¹¹¹ Talevski's family claimed that they had the right to seek damages under Section 1983 of the Civil Rights Act of 1871, a Reconstruction-era statute aimed at remedying violations of federal rights by persons acting under color of state law.¹¹² After a district court dismissed the case¹¹³ and the Seventh Circuit reversed,¹¹⁴ the defendants sought Supreme Court review.¹¹⁵ They urged the Court to disallow the use of Section 1983 to enforce the terms of the FNHRA and, further, to find that Spending Clause legislation *in general* is not privately enforceable under Section 1983 (a position that would require reversing decades of precedent).¹¹⁶

At the time of this Article's writing, the Court has yet to decide this case, but the stakes are clear. Should the Court accept the defendants' narrowest argument—that the cited provisions of FNHRA are not privately enforceable under Section 1983—residents of state-run, federally funded nursing homes will lose what has historically been their best vehicle for holding those facilities accountable when they violate federal standards.¹¹⁷ As filings by Talevski and amici note, (1)

111. *Id.* at 715 (“FNHRA establishes the minimum standards of care to which nursing-home facilities must adhere in order to receive federal funds in the Medicaid program.”).

112. 42 U.S.C. § 1983; *see also Talevski*, 6 F.4th at 715. Talevski's care facility is state-managed (it is a licensee of an Indiana municipal corporation), bringing it within the class of defendants that Section 1983 contemplates.

113. *Talevski*, 6 F.4th at 715.

114. *Id.* at 726.

115. Petition for a Writ of Certiorari, *Talevski*, No. 21-806 (U.S. argued Nov. 8, 2022).

116. *Id.* at 3, 8–9. In 1980, the Supreme Court interpreted Section 1983 to authorize private lawsuits to enforce federal statutory rights (clarifying that Section 1983 was not limited to constitutional rights). The statute at issue was classic Spending Clause legislation: the plaintiffs had sued to enforce their rights under one of the public assistance titles of the Social Security Act. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). For a further explanation, as well as a discussion of subsequent reliance on *Thiboutot* and related cases, see Brief Amicus Curiae of Statutory Interpretation Law Scholars in Support of Respondent at 1–7, *Talevski*, No. 21-806 (U.S. argued Nov. 8, 2022).

117. Brief of Indiana Disability Rights as Amici Curiae in Support of Respondent at 4–6, *Talevski*, No. 21-806 (U.S. argued Nov. 8, 2022) [hereinafter Indiana Disability Rights Brief] (documenting the “[n]umerous times” that “Hoosier Medicaid beneficiaries have had to invoke 42 U.S.C. § 1983 to enforce germane rights granted by Congress”).

federal enforcement has long been inadequate to the task,¹¹⁸ and (2) tort-based medical malpractice lawsuits are difficult to bring, especially in states that have enacted damage caps and other procedural hurdles for would-be plaintiffs.¹¹⁹ Should the Court accept the defendants' broader argument, a whole suite of federal-state programs would be affected, involving food assistance, income support, healthcare, and more.¹²⁰ Program beneficiaries would lose the ability to sue state and local providers for violating the conditions attached to often substantial amounts of federal funding, which would, in turn, force the federal government to either tolerate violations of federal law or dramatically ramp up federal enforcement mechanisms.¹²¹

D. Perez v. Sturgis Public Schools: Overlapping Statutes, Divergent Remedies, and the Scope of Administrative Exhaustion Requirements

A final case that deserves mention in this Part is *Perez v. Sturgis Public Schools*,¹²² argued in January 2023. It is another example of a disability-related case that had the potential to narrow existing individual or

118. Brief for Judge David L. Bazelon Center for Mental Health Law et al. as Amici Curiae in Support of Respondent at 29–30, *Talevski*, No. 21-806 (U.S. argued Nov. 8, 2022) (noting that “Medicaid’s administrative scheme is limited to a narrow subset of issues” and that it is unrealistic to expect the Centers for Medicare & Medicaid Services to use the blunt and drastic enforcement tool at its disposal); Indiana Disability Rights Brief, *supra* note 117, at 12–27 (detailing the inadequacies of state and federal nursing home oversight, as well as the deficiencies of the administrative complaint process for addressing the kinds of harms that Talevski experienced); Brief of Former Senior Officials of Department of Health and Human Services as Amici Curiae in Support of Respondent at 2, *Talevski*, No. 21-806 [hereinafter Former Senior Officials’ Brief] (explaining that “[p]rivate enforcement is integral to [the Department of Health and Human Service’s] ability to enforce the FNHRA’s requirements, particularly as states have demonstrated that they cannot function as reliable partners to enforce the federal mandate”).

119. Brief of the Indiana Trial Lawyers Association as Amicus Curiae in Support of Respondent at 3, *Talevski*, No. 21-806.

120. Brief of Members of Congress as Amici Curiae in Support of the Respondent at 23–27, *Talevski*, No. 21-806 (noting that “[p]ursuant to the Spending Clause, Congress allocates billions of dollars each year to federal-state programs for the purpose of ensuring that America’s most vulnerable are protected” and listing some of those programs).

121. Former Senior Officials’ Brief, *supra* note 118, at 11 (explaining the “impossible position” that the federal government would be in absent private enforcement of Spending Clause legislation).

122. Brief of the Petitioner, *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 81 (2022) (No. 21-887).

collective rights, in that it addressed how many administrative hurdles a plaintiff might have to clear before seeking relief for a civil rights violation directly in federal court.¹²³ The case ultimately resulted in a unanimous decision in favor of Perez and represents an important victory for disabled students, but the oral argument signaled even more potential trouble ahead for the availability of compensatory damages under the ADA.¹²⁴

The facts of this case were exceptionally sympathetic and teed up a relatively narrow legal question, procedural in nature. Perez, the plaintiff, is a deaf student who was assigned an aide from his school district to translate classroom instruction into sign language, but the aides he received were unqualified or absent from the classroom for hours.¹²⁵ Meanwhile, over the course of a decade, the school district misrepresented Perez's educational progress, leading his parents to believe he was on track to graduate from high school.¹²⁶ Then, months before graduation, the district informed Perez that he would not receive a diploma.¹²⁷ Perez and his family filed a complaint under the Individuals with Disabilities Education Act (IDEA)¹²⁸ against the district ("Sturgis") with the state Department of Education and reached a settlement prior to the administrative hearing that would have otherwise resulted.¹²⁹

123. Unlike other disability law cases we discuss, which reached the Supreme Court contrary to the wishes of disability rights lawyers and advocates, see *infra* Part IV.A, Perez advanced with their support. *National Disability Rights Groups File Amicus Brief in Perez v. Sturgis*, THE ARC (Nov. 18, 2022), <https://thearc.org/blog/national-disability-rights-groups-file-amicus-in-perez-v-sturgis> [<https://perma.cc/U4TD-9SDW>]; see also Brief for Amici Curiae The Arc of United States et al. as Amici Curiae in Support of Petitioner at 1–7, *Perez*, 143 S. Ct. 81 (No. 21-887), 2022 WL 17093232.

124. *Perez*, 143 S. Ct. at 865.

125. *Id.* at 862.

126. *Id.*

127. *Id.*

128. 20 U.S.C. §§ 1400–82.

129. *Id.* The IDEA provides for a due process hearing where the parties have been unable to resolve the conflict themselves. At a due process hearing, each party has the opportunity to present their arguments before an impartial, trained hearing officer who hears the evidence and issues a hearing decision. This decision may ultimately be appealed to federal court, but the administrative complaint and hearing process is required prior to pursuing a civil action under the IDEA. This process is referred to as "administrative exhaustion." 34 C.F.R. § 300.511. The ADA has no such requirements.

Perez then filed a lawsuit in federal district court under the ADA seeking compensatory damages,¹³⁰ which Sturgis defended against by arguing that Perez could not bring an ADA claim without first exhausting the IDEA's administrative procedures.¹³¹ The district court dismissed Perez's lawsuit on these grounds and the Sixth Circuit affirmed.¹³² The Supreme Court granted certiorari to address the extent to which children with disabilities must exhaust administrative procedures under the IDEA before seeking relief under other federal antidiscrimination statutes, such as the ADA.

Although the Court ultimately reversed the Sixth Circuit, helpfully clarifying that the IDEA's exhaustion requirement does *not* preclude a student in Perez's position from moving forward with an ADA lawsuit, the oral argument surfaced at least one troubling point, regarding damages.¹³³ It came up in connection with Perez's futility argument: counsel for Perez had pointed out that if a student in Perez's position wants money damages, then he *must* go to federal court under the ADA; the IDEA does not allow for compensatory damages, only equitable relief, and so it would make no sense to pursue money damages via an IDEA claim. In this context, Justice Kagan asked

130. *Perez*, 143 S. Ct. at 862.

131. *Id.*

132. *Id.* at 862–63.

133. See generally Oral Argument at 49:44, *Perez*, 143 S. Ct. 81 (No. 21-887), <https://www.oyez.org/cases/2022/21-887> [<https://perma.cc/Y733-R4EY>] [hereinafter *Perez* Oral Argument]. Another exchange from oral argument also bears mention. Counsel for Sturgis raised the 2017 decision *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017), in which the Court wrestled with the question of whether a student alleging disability discrimination at school must exhaust the IDEA simply because such discrimination occurred at school and the allegations are against the school. *Perez* Oral Argument, *supra*. The Court found in *Fry* that unless the focus (or “gravamen”) of the lawsuit is an allegation that the child did not receive a “free appropriate public education” as guaranteed by the IDEA, the student alleging violations of the ADA and the Rehabilitation Act of 1973 need not first exhaust administrative procedures set forth in the IDEA. *Id.* at 1:10, 43:47. Counsel for Sturgis suggested a reading of *Fry* that would have covered Perez's situation, too (and resulted in a finding in Sturgis's favor). The unresponsive response from Justice Kagan, the author of *Fry*, seems to have helped the Court resist the conflation of the two cases' legal questions and left a pathway open for Perez. *Id.* at 1:22:45. But because of the way that statutory protections overlap in the education context, we suspect that this line of argument will reappear in other, similar cases, with the potential to muddy the waters even after the *Perez* decision.

Anthony Yang, Assistant Attorney General,¹³⁴ what kinds of compensatory damages are available after *Cummings*: “I mean, is—is there any at this point? And for what?”¹³⁵ In reply, Yang acknowledged that, should the case move forward in federal court, there is an argument that *Cummings*, a case under the Rehabilitation Act, forecloses ADA relief for emotional damages, as well as an argument that other types of compensatory damages might also be precluded.¹³⁶ As this case returns to the district court, the colloquy on the scope of compensatory damages may signal where our attention should go next.¹³⁷

Elsewhere, some of us have explored *why* disability cases have served as vehicles for the retrenchment of civil rights.¹³⁸ For our purposes

134. The United States sought leave to participate in oral argument in *Perez* because of its “significant interest in the questions presented.” “The Department of Education administers the IDEA, has promulgated IDEA implementing regulations . . . and has shared administrative ADA enforcement authority for public educational institutions The Department of Justice exercises ADA enforcement authority and has promulgated ADA implementing regulations.” Motion of the United States as Amicus Curiae Supporting Petitioner for Leave to Participate in, Enlargement of, and Divided Oral Argument at 2, *Perez*, 143 S. Ct. 81 (No. 21-887), https://www.supremecourt.gov/DocketPDF/21/21-887/246735/20221116172508292_21-887%20Perez-US%20Divided%20Argument%20Motion.pdf [https://perma.cc/9S2M-FXMP]; see also Brief for the United States as Amicus Curiae, *Perez*, 143 S. Ct. 81 (No. 21-887), https://www.supremecourt.gov/DocketPDF/21/21-887/234412/20220824163230846_21-887%20Perez%20US%20Invitation%20Br.pdf [https://perma.cc/5V69-7M6P].

135. *Perez* Oral Argument at 36:49, 40:37.

136. *Id.* at 40:46.

137. The decision also left open the question of futility—that is, when a party can forgo administrative exhaustion because it would be “futile” to do so under the IDEA, leaving the circuit courts to hash out the details post-decision. The question of futility within the exhaustion requirement and the proverbial administrative “Catch-22” exists in other areas and has been the subject of scholarly attention and debate. See, e.g., *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1035 (9th Cir. 2016) (discussing the “Catch-22” that existed for a class of unrepresented immigrant children who wished to challenge the failure to provide them with legal representation but first had to exhaust complex immigration administrative processes without the benefit of lawyers). Because courts have held that questions of administrative exhaustion are “jurisdictional,” courts (and parties) have little doctrinal discretion around exhaustion. See generally Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234 (2018).

138. Karen M. Tani, “Liberalism’s Last Rights: Disability Inclusion and the Rise of the Cost-Benefit State” (draft chapter on file with authors); Eyer & Tani, *supra* note 7; Harris, *The Frailty of Disability Rights*, *supra* note 8.

today it is sufficient to note the pattern—and to encourage litigators and the broader public to recognize pending and future disability rights cases as the battleground that they are.

III. DISABILITY AND THE DISTRIBUTION OF HARM

A second lesson extracted from recent Supreme Court jurisprudence is that some cases discussed by commentators as “harmful” to individual and collective rights look even more harmful when we consider the disparate impacts of the decisions on disabled people and those with intersectional identities. Unfortunately, there is nothing surprising about this underappreciation of harm—for although disability is pervasive (affecting an estimated sixty-one million adults in the U.S.),¹³⁹ public discourse still tends to characterize disablement as the experience of a small minority (represented in the public mind by visibly and severely disabled people). Public discourse also tends to imagine disabled people’s needs as “special” rather than commonly shared. By calling attention to the effects of Supreme Court decision making on people with disabilities, we thus not only augment assessments of the impact of those decisions, but we also contest the narrative of disability’s smallness and specialness.

The specific cases we analyze are *Dobbs*, *Vaello Madero*, and *West Virginia*. For each case we suggest that mainstream commentators have under-appreciated the potential harm of the legal holding because they have not paid enough attention to the harms that disabled people (especially disabled people with other marginalized attributes) have described and experienced. Our ambition, to be clear, is not to assert that disabled people have been harmed more than others, but rather to urge greater integration of these perspectives into efforts to respond to these controversial decisions and to navigate the changed legal landscape.

A. *The Expressive and Material Dimensions of Social Welfare Provision:* United States v. Vaello Madero

In the 2021 Term, the Court decided *United States v. Vaello Madero*,¹⁴⁰ a case that commentators tended to discuss in terms of racial

139. Press Release, CDC, 1 in 4 US Adults Live with a Disability (Aug. 16, 2018), <https://www.cdc.gov/media/releases/2018/p0816-disability.html> [<https://perma.cc/L33C-LLAK>].

140. 142 S. Ct. 1539 (2021).

inequality, U.S. colonialism, and the “social safety net.”¹⁴¹ Those associations are entirely appropriate, but the case also has a fundamental connection to disability.

The case originated with a federal government effort to recoup public benefits from Jose Luis Vaello Madero.¹⁴² Vaello Madero began receiving Supplemental Security Income (“SSI”), a disability- and need-based source of income support, when he was a resident of New York City.¹⁴³ He continued to receive benefits by direct deposit after he moved to Puerto Rico to care for family, and in doing so ran afoul of federal law: the Social Security Act excludes residents of Puerto Rico and three other U.S. territories from the SSI program; residents of Puerto Rico may instead apply for a less generous and more restrictive program called Aid to the Aged, Blind, and Disabled (“AABD”).¹⁴⁴ In response to the government’s recoupment effort, Vaello Madero claimed that this differential treatment violated his rights under the

141. See, e.g., Adam Liptak, *Supreme Court Looks at Puerto Rico’s Status in Case on Benefits*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/11/09/us/supreme-court-puerto-rico-social-security.html> [https://perma.cc/Q8SB-KL6P]; Ian Milhiser, *The Surprisingly High Stakes in a Supreme Court Case About \$28,000: The Court Takes up a Difficult Case About Colonialism and Democracy*, VOX (Nov. 5, 2021, 8:00 AM), <https://www.vox.com/2021/11/5/22751097/supreme-court-puerto-rico-ssi-united-states-vaello-madero-democracy-colonialism-rational-basis> [https://perma.cc/NU6P-PTDS]; Ariane de Vogue, *Supreme Court Rules Puerto Ricans Don’t Have Constitutional Right to Some Federal Benefits*, CNN (Apr. 21, 2022, 4:15 PM), <https://www.cnn.com/2022/04/21/politics/puerto-rico-supreme-court-federal-disability-benefits/index.html> [https://perma.cc/L3LJ-XHMK]; Yarimar Bonilla, *For Puerto Ricans, Another Reminder That We Are Second-Class Citizens*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/opinion/puerto-rico-supreme-court-social-security.html> [https://perma.cc/5LD7-YZUU].

142. *Vaello Madero*, 142 S. Ct. at 1542.

143. *Id.*

144. AABD has more stringent eligibility criteria than SSI, provides lower benefits, and is subject a statutory cap on total expenditures (i.e., even for eligible claimants, the money may simply run out). On the Aid to the Aged, Blind, and Disabled program, see generally *Policy Basics: Aid to the Aged, Blind, and Disabled*, CTR. ON BUDGET & POL’Y PRIORITIES (Jan. 15, 2021), <https://www.cbpp.org/research/aid-to-the-aged-blind-and-disabled> [https://perma.cc/X3JH-AAUJ] (noting that AABD is capped at approximately \$36 million, a figure not indexed to inflation).

Fifth Amendment.¹⁴⁵ This argument persuaded both the district court and the First Circuit.¹⁴⁶

The Supreme Court reversed.¹⁴⁷ Writing for the majority, Justice Kavanaugh began by identifying the “deferential rational-basis test” as the appropriate standard for reviewing the challenged legislation, rather than the heightened standard that Vaello Madero urged.¹⁴⁸ Justice Kavanaugh then found that Puerto Rico’s favorable tax status supplied a rational basis for treating residents of Puerto Rico less favorably with regards to the SSI program.¹⁴⁹ Only Justice Sotomayor dissented, arguing that there is no rational basis for excluding concededly needy citizens from a program that, aside from its treatment of Puerto Rico and three other territories, is “uniform, nationalized,” and aimed at the neediest citizens.¹⁵⁰

Post-decision coverage of the case focused largely on what it signified about Puerto Rico’s status and whether the Court was overdue for a reckoning with the now-infamous *Insular Cases*,¹⁵¹ a suite of cases that denied territorial residents the full protection of the U.S. Constitution and gave Congress a largely free hand in legislating for the Territories.¹⁵² In light of strong language in Justice Gorsuch’s

145. *Vaello Madero*, 142 S. Ct. 1539, 1542 (2022).

146. *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 215 (D.P.R. 2019) (characterizing the federal legislation at issue as “creat[ing] a citizenship apartheid based on historical and social ethnicity within United States soil,” in violation of the equal guarantee that has been read into the Fifth Amendment); *United States v. Vaello Madero*, 956 F.3d 12, 18, 32 (1st Cir. 2020) (applying rational basis review to the plaintiff’s equal protection claim and finding no rational basis for the differential treatment of U.S. citizens residing in Puerto Rico).

147. *Vaello Madero*, 142 S. Ct. at 1540, 1544 (explaining that “residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes” and characterizing this favorable tax treatment as a rational basis for providing less generous benefits).

148. *Id.* at 1543.

149. *Id.*

150. *Id.* at 1561 (Sotomayor, J., dissenting).

151. See, e.g., Bonilla, *supra* note 141; Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2524–37 (2022); Natalie Gomez-Velez, *De Jure Separate and Unequal Treatment of the People of Puerto Rico and the U.S. Territories*, 91 FORDHAM L. REV. 1727, 1731–52 (2023)

152. The *Insular Cases* are a suite of cases from the early twentieth century, starting with *Downes v. Bidwell*, 182 U.S. 244, 287 (1901), that considered the applicability of various provisions of the Constitution to the Territories. The gist of these decisions is

concurring opinion (referring to the *Insular Cases* as “flaw[ed],” “shameful,” rooted in “ugly racial stereotypes,” and built on a “rotten foundation”),¹⁵³ it is not surprising that this framing predominated. (And we celebrate this attention.) But the case also has important implications for people with disabilities.

One implication is conceptual: Justice Kavanaugh’s opinion strongly suggests that if you are needy and disabled and a U.S. citizen, that status in no way implies a moral or legal claim on the national government to provide a minimally adequate standard of living. Such a claim is always mediated by one’s sub-national jurisdiction (state or territory) and the willingness or ability of taxpayers in that jurisdiction to effectively “pay your way.” This is apparent from Justice Kavanaugh’s implied prediction of what would happen “if this Court were to require identical treatment [of residents of Puerto Rico and residents of the States]” for purposes of access to the SSI program. In his view, “residents of the States could presumably insist that federal *taxes* be imposed on residents of Puerto Rico . . . in the same way that those taxes are imposed on residents of the States.”¹⁵⁴ Fortunately for “the Puerto Rican people and the Puerto Rican economy,” he continued, “[t]he Constitution does not require that extreme outcome.”¹⁵⁵

But is this the only way to think about the connection between disability, citizenship, and social welfare provision? As Justice Sotomayor noted in dissent, the SSI program arguably represents a different paradigm. As compared to the programs it displaced, SSI connects needy, disabled citizens much more directly to the national government and does not tether an eligible citizen’s baseline benefits

that the U.S. Constitution does not “follow the flag” in every respect. *See generally* Christina Duffy Burnett, *A Note on the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 389 (Christina Duffy Burnett & Burke Marshall eds., 2001).

153. *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring) (registering his belief that “[t]he *Insular Cases* have no foundation in the Constitution” and suggesting that he would have overruled these cases had the litigants squarely presented this opportunity). Also pertinent was the not-so-distant memory of Hurricane Maria, which caused massive casualties and large-scale devastation in Puerto Rico in 2017. Coverage of the storm’s aftermath connected the scale of the disaster to Puerto Rico’s inadequate infrastructure, vulnerable population, and lack of resources. Some coverage also linked the disaster to U.S. colonialism and to a failure by mainland U.S. citizens to recognize Puerto Ricans as part of the same political community.

154. *Id.* at 1543 (majority opinion).

155. *Id.*

to the tax effort or contribution of that individual's state of residence.¹⁵⁶ The majority opinion does not acknowledge this paradigm shift and, by omission, leans into the notion that needy, disabled people are a state and local burden that the federal government attends to only because it is an efficient gatherer and distributor of state and local funds.¹⁵⁷ The distinction is meaningful: one paradigm imagines a form of social, economic, and political belonging that is uniform across the nation; the other accepts variegated experiences of belonging, some dignified and some degraded.¹⁵⁸

In addition to this conceptual implication, there is a material one. According to the National Council on Disability, about twenty-one percent of Puerto Rico's residents were disabled in 2019.¹⁵⁹ Among this group, the poverty rate was a stunning forty-eight percent in 2018.¹⁶⁰ In other words, there is a dire need for the kind of assistance that SSI offers. The AABD program offers some relief, but it is no replacement.¹⁶¹ Using 2020 data, Andrew Hammond calculated that “[a]n American who receives SSI in the fifty states and the District of Columbia” could receive up to “\$783 in monthly benefits,” whereas “[i]n Puerto Rico, a family would receive \$75 plus a small housing-

156. *Id.* at 1559 (Sotomayor, J., dissenting).

157. *See id.* at 1542 (majority opinion) (recounting the origins of the SSI program in a way that makes no mention of the deliberate nationalization of need-based income support for older Americans and disabled Americans).

158. On how the structure and administration of U.S. social welfare programs have created variations in the experience of citizenship, see KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972* 113–49 (2016); JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* (2018). Andrew Hammond has explored how federal social welfare policies vis-à-vis the Territories contribute to this phenomenon and has cited the *Vaello Madero* case as a paradigmatic example. Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639 (2021).

159. NAT'L COUNCIL ON DISABILITY, *DISPARATE TREATMENT OF PUERTO RICO RESIDENTS WITH DISABILITIES IN FEDERAL PROGRAMS AND BENEFITS* 21 (2022), https://ncd.gov/sites/default/files/NCD_Puerto_Rico_Report_508.pdf [<https://perma.cc/PJ8J-8J99>].

160. *Id.* at 20.

161. CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 144 (citing a Government Accountability Office study for the finding that in 2011, “federal spending on AABD was less than 2 percent of what it would have been if Puerto Ricans received full SSI benefits” and “that monthly benefits for an individual, which averaged only \$58 under AABD in 2011, would have been \$418 under SSI”).

related benefit.”¹⁶² What is more, as Hammond and others have noted, SSI is not the only program that excludes residents of Puerto Rico or treats them less generously than residents of the fifty states.¹⁶³ Medicare and Medicaid, to cite two other vital examples, also apply differently in Puerto Rico, in ways that “contribute to a lower standard of care, service, and quality of life for Puerto Rican residents with disabilities.”¹⁶⁴ To be sure, all of these programs have flaws and relying on them is no panacea, but to offer disabled residents of Puerto Rico worse versions of basic social support programs is to consign them to “a cycle of extreme poverty they will likely never escape.”¹⁶⁵ This will further naturalize the connection between poverty and disability, and further normalize the notion that Territorial residents are somehow different, in negative ways (e.g., more burdensome), from citizens residing on the mainland.

B. Reproductive Rights as Disability Justice: Dobbs v. Jackson Women’s Health Organization

The Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* to end the constitutional right to abortion holds the title for the most widely read, lengthy, and discussed case of the 2021 Term.¹⁶⁶ Not only did it overturn *Roe v. Wade*,¹⁶⁷ the Court’s well-established precedent on reproductive freedom, but it also signaled that, going forward, state laws regulating abortion need clear only “rational basis review.”¹⁶⁸ How exactly *Dobbs* will reshape the legal

162. Hammond, *supra* note 158, at 1677.

163. *See id.* at 1673–74; NATIONAL COUNCIL ON DISABILITY, *supra* note 159, at 41.

164. NATIONAL COUNCIL ON DISABILITY, *supra* note 159, at 31.

165. *Id.* at 45.

166. 142 S. Ct. 2228 (2022). The collective set of opinions totals more than 200 pages, with Justice Alito’s majority opinion (with appendices) coming in at 108 pages, making it “the third-longest Supreme Court opinion since the beginning of the 1946–47 term.” Jake S. Truscott & Adam Feldman, *Lengthier Opinions and Shrinking Cohesion: Indications for the Future of the Supreme Court*, SCOTUSBLOG (July 28, 2022, 4:26 PM), <https://www.scotusblog.com/2022/07/lengthier-opinions-and-shrinking-cohesion-indications-for-the-future-of-the-supreme-court> [<https://perma.cc/M9HD-B6BE>].

167. 410 U.S. 113 (1973).

168. Under this deferential standard, states must have a legitimate purpose and the law must be rationally related to that articulated purpose. *Dobbs*, 142 S. Ct. at 2284. It represents the lowest tier (most deferential) of constitutional review. *See id.* at 2283 (holding that if a state has a legitimate reason for regulating abortions, courts cannot

landscape remains to be seen, but as countless commentators have now noted, a “seismic shift in reproductive rights” appears underway.¹⁶⁹ In this Section, we amplify commentators who have explored *Dobbs*’s likely impact on people with disabilities, as well as the complex ways in which access to meaningful reproductive choice intersects with race, class, gender, and disability.¹⁷⁰

Some commentators have contributed importantly to the conversation by simply underscoring the connection between health and reproductive choice. As Nicole Huberfeld has explained, many medical authorities regard abortion as a form of healthcare, which must be available in order to preserve maternal and child health.¹⁷¹ But in some jurisdictions, that healthcare now cannot be legally delivered—or can be delivered only belatedly, with hesitation and fear. In short, *Dobbs* has “increased the risk of avoidable harms to both individual and public health.”¹⁷² Research suggests that this change will disproportionately harm people on the economic margins and those from historically marginalized groups.¹⁷³

substitute their own social and economic beliefs for those of state legislative bodies). Not coincidentally, this is the same level of scrutiny that the Court gives to laws that accord different treatment on the basis of disability. See Araiza, *supra* note 8, at 629.

169. Amy Howe, *Supreme Court Overturns Constitutional Right to Abortion*, SCOTUSBLOG (June 24, 2022, 10:13 AM), <https://www.scotusblog.com/2022/06/supreme-court-overturns-constitutional-right-to-abortion> [https://perma.cc/3TE]; see also Ruth Colker, *Disability Misappropriation*, 72 AM. U. L. REV. 1579 (2023).

170. Howe, *supra* note 169.

171. Nicole Huberfeld, *Returning Regulation to the States, and Predictable Harms to Health*, SCOTUSBLOG (June 30, 2022, 9:28 AM), <https://www.scotusblog.com/2022/06/returning-regulation-to-the-states-and-predictable-harms-to-health> [https://perma.cc/8CGN-UCRD]. Notably, forced births themselves may produce new physical and psychiatric disabilities for the person giving birth. See, e.g., Frances Stead Sellers, *Her Baby Has a Deadly Diagnosis. Her Florida Doctors Refused an Abortion*, WASH. POST (Feb. 18, 2023, 7:40 AM), <https://www.washingtonpost.com/health/2023/02/18/florida-abortion-ban-unviable-pregnancy-potter-syndrome> [https://perma.cc/G7EN-KQZ2] (reporting on a woman who will continue her pregnancy without amniotic fluid, which may cause physical disabilities to her body in addition to potential psychiatric disabilities that may arise from the trauma associated with forced pregnancy and birth).

172. Huberfeld, *supra* note 171.

173. See, e.g., S. Marie Harvey, Annie E. Larson & Jocelyn T. Warren, *The Dobbs Decision—Exacerbating U.S. Health Inequity*, NEW ENG. J. MED. (Apr. 15, 2023),

We especially value commentaries that have highlighted these intersections—between pregnancy, health, disability, race, gender, and class¹⁷⁴—because the justices in the *Dobbs* majority have at times cited evidence from these intersections for their own purposes. They have, for example, cast abortion as a tool for maintaining white supremacy.¹⁷⁵ And—importantly for purposes of this Article—they have expressed concern about abortion as a vehicle for preventing the birth of disabled infants. Kendall Ciesemier, among others, has helped the public understand why the Court’s purported commitment to disabled lives rings hollow.¹⁷⁶ Robyn Powell, too, has helped teach

<https://www.nejm.org/doi/full/10.1056/NEJMp2216698> [<https://perma.cc/YQ9V-HKFW>] (“Although abortion restrictions will negatively affect the health and well-being of all pregnant people and their families, those most affected by this changing landscape will include low-income women and members of marginalized racial and ethnic groups.”); Samantha Artiga, Latoya Hill, Usha Ranji & Ivette Gomez, *What Are the Implications of the Overturning of Roe v. Wade for Racial Disparities?* KAISER FAM. FOUND. (July 15, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities> [<https://perma.cc/Q9Z9-G4UM>] (explaining the disparate impact of *Dobbs*, in part, by noting that as of May 2022, more than four in ten (43%) women between ages 18–49 living in states where abortion has become or will likely become illegal are women of color).

174. See generally Dorothy Roberts & Sujatha Jesudason, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies* 10 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 313 (2013) (promoting a social justice approach to race, gender, and disability in a reproductive genetic testing context).

175. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2081, 2089–90 (2021).

176. See Kendall Ciesemier, *Leave My Disability Out of Your Anti-Abortion Propaganda*, N.Y. TIMES (July 31, 2022), <https://www.nytimes.com/2022/07/31/opinion/disability-rights-anti-abortion.html> [<https://perma.cc/TTH4-QB9U>] (noting that “[d]espite the fact that abortion opponents would champion [her] disabled ‘life’ in [her] mom’s womb, the laws they’ve levied across the country now put [her] life and that of other disabled and chronically ill people in danger by potentially forcing [them] to carry a pregnancy to term even in the face of serious health consequences”). To elaborate on this point, it has not escaped notice that the same politicians who claim concern for disabled infants have not shown the same zeal for the type of policy changes that would materially enhance disabled people’s quality of life, including better Medicaid funding for Home and Community-Based Services, an end to programs that allow employers to pay subminimum wages to disabled workers, elimination of the asset limits that prevent recipients of disability-based income support programs from escaping poverty, and reforms to policing practices that pose a disproportionate risk to people with

proponents of reproductive rights and justice how to disarm this type of argument and, further, how they might center disability in their work.¹⁷⁷ One important step in this direction, as Liz Bowen has argued, is to broaden the conversation about beyond fetal abnormalities, a topic that often has brought great attention to the perspectives of presumptively non-disabled parents, and to foreground the experiences of adults with disabilities.¹⁷⁸

In that spirit, we highlight three immediate effects of *Dobbs* that disproportionately burden disabled people (predominantly disabled female-identifying persons). First, *Dobbs* may result in restrictions on or delays in accessing needed healthcare, including (but not exclusively) reproductive care. The existence of certain disabilities (physical, psychiatric, or developmental) may compound health risks to the disabled pregnant person and/or to the fetus.¹⁷⁹ If a complication occurs, doctors, fearful of post-*Dobbs* liability, may delay medically necessary terminations or procedures, such as those related to miscarriages and ectopic pregnancies, while awaiting guidance from medical and legal professionals.¹⁸⁰

Second, and relatedly, disabled adults may face riskier pregnancies for reasons directly related to the medications they use to manage chronic conditions. For example, certain medications used to manage

disabilities, especially those who are non-white. On how anti-abortion forces have invoked disability and the extent to which those invocations reflect a genuine commitment to disability rights and justice, *see also* Colker, *supra* note 169; Liz Bowen, *Dobbs Is a Disaster for Disability Justice*, SOC'Y FOR CULTURAL ANTHROPOLOGY (Oct. 3, 2022), <https://culanth.org/fieldsights/dobbs-is-a-disaster-for-disability-justice> [<https://perma.cc/S53J-UZX6>] (discussing how the anti-abortion movement coopts the disability justice movement).

177. *See generally* Robyn Powell, *Disability Reproductive Justice*, 170 U. PA. L. REV. 1851 (2022) (proposing a framework for activists, legal professionals, scholars, and policymakers to merge the disability justice and reproductive rights movements); *see also* Bowen, *supra* note 176 (“It’s easy enough to profess to care about disabled lives in utero—but it’s time to start listening to us about what we need outside the womb.”).

178. Bowen, *supra* note 176.

179. Brief of the Autistic Self Advocacy Network and the Disability Rights Education and Defense Fund as *Amici Curiae* in Support of Respondents at 10, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

180. Olivia Goldhill, ‘A Scary time’: Fear of Prosecution Forces Doctors to Choose Between Protecting Themselves or Their Patients, STAT NEWS (July 5, 2022), <https://www.statnews.com/2022/07/05/a-scary-time-fear-of-prosecution-forces-doctors-to-choose-between-protecting-themselves-or-their-patients> [<https://perma.cc/GGY8-TGQE>].

epilepsy, auto-immune disabilities, or bipolar disorder are considered teratogenic, meaning they may negatively affect fetal development or viability.¹⁸¹ What effect will *Dobbs* have on doctors' standard of care and what constraints (actual or perceived) does it place on the decisions of disabled people who desire to become pregnant? For some people, *Dobbs* would appear to create a bad set of choices: between weaning off or forgoing critical health care, with hopes of maximizing the chances of a healthy fetus, or protecting their own health, but risking prosecution under state and local laws should a pregnancy become unviable or otherwise untenable.

Third, the organizing efforts around interstate travel to mitigate the effects of state abortion bans does not consider the pre-*Dobbs* world, where architectural and programmatic access were widespread issues for disabled people. Consider the barriers to air travel alone.¹⁸²

Beyond these three immediate effects, there is reason to worry about a fourth: *Dobbs* also risks imposing constraints on sexual agency that are not technically "abortion"-related but nevertheless disproportionately burden people with disabilities (not just women). Consider, for example, the way in which group homes and residential institutions for people with intellectual and developmental disabilities ("IDD") will be incentivized to respond after *Dobbs*. The risk of sexual violence is high for people with IDD (an estimated seven times that of nondisabled people).¹⁸³ Public perceptions of people with IDD as asexual or infantile, combined with these sobering statistics, have led to policies and practices designed to mitigate liability. The possibility of forced pregnancy and birth post-*Dobbs* may create additional institutional incentives to restrict sexual agency. Other points on the slippery slope include restrictions on intimate relationships, including the ability to marry. (Lest this sound hyperbolic, note that an existing

181. Meena Venkataramanan, *Their Medications Cause Pregnancy Issues. Post-Roe, That Could Be Dangerous*, WASH. POST (July 25, 2022, 11:39 AM), <https://www.washingtonpost.com/health/2022/07/25/disabled-people-abortion-restrictions> [<https://perma.cc/XQ64-8WUX>].

182. See, e.g., Jasmine E. Harris, *Disability and the Right to Move in the World*, REGUL. REV. (Mar. 27, 2023), <https://www.theregreview.org/2023/03/27/harris-disability-and-the-right-to-move-in-the-world/> [<https://perma.cc/T9VV-KL3Q>].

183. Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. REV. 480, 491, 535 (2018) (discussing recent research on statistics of sexual assault).

legal mechanism, conservatorship/guardianship, provides ready legal machinery for this task.¹⁸⁴)

C. “*Major Questions*” and Disabled Populations: *West Virginia v. Environmental Protection Agency*

Another one of the most remarked-upon cases in 2022 was *West Virginia v. Environmental Protection Agency*, involving the authority of the Environmental Protection Agency (EPA) under the Clean Air Act¹⁸⁵ to regulate carbon dioxide emissions and thereby combat climate change.¹⁸⁶ Specifically at issue was the agency’s authority to issue a rule like the one it issued in 2015, when it required existing coal-fired power plants to either reduce their own production of electricity or subsidize increased generation by “cleaner” sources of energy.¹⁸⁷ Writing for the six-justice majority, Chief Justice Roberts framed the case as one that required the Court to apply the “major questions doctrine,” an approach to reviewing agency action reserved for those “‘extraordinary cases’ . . . in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”¹⁸⁸ In such a case, Roberts explained, the doctrine requires “clear congressional authorization” for the agency’s asserted power.¹⁸⁹ Such authorization was missing here.¹⁹⁰

As numerous commentators have noted, and as the three dissenting justices emphasized, this case has significant public law implications: the newly styled¹⁹¹ and entirely judge-made major questions doctrine

184. *Id.*; see also Natalie M. Chin, *Group Homes as Sex Police and the Role of the Olmstead Integration Mandate*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 383, 398 (2018).

185. 42 U.S.C. §§ 7401–7671q.

186. *West Virginia v. EPA*, 142 S. Ct. 2587, 2599–2600 (2022).

187. *Id.* at 2602–03.

188. *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

189. *Id.* at 2609 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

190. *Id.* at 2616.

191. What the Court terms the “major questions doctrine” has been recognized by academics for some time, see, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2606 (2006); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 76–77

will surely prove useful to judges who are hostile to the administrative state, and it will be catnip to any litigant who dislikes a particular political administration's use of administrative authority to tackle a large problem.¹⁹²

The large problem that the case most directly implicated was, of course, climate change. Here, we should acknowledge that in the wake of the Inflation Reduction Act,¹⁹³ with its significant environmental components, the major questions doctrine may not be the climate change disaster that some commentators initially feared (because it is no longer the case that major climate change initiatives will have to be

(2007), and, in recent years, astute Court-watchers have noted its “resurgence,” *see, e.g.*, Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 376–77 (2016); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2022 (2018). According to Justice Kagan, however, the majority opinion in *West Virginia v. EPA* represented the first time that the Court had actually used that term; prior applications of the so-called doctrine were, in her view, “statutory construction of a familiar sort.” *West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023).

192. *See, e.g.*, *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (describing the “major questions doctrine” as among the “special canons” that the current Court had developed to avoid textualism when it conflicts with “broader goals”—here, the goal of “[p]revent[ing] agencies from doing important work, even though that is what Congress directed”); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 235 (2022) (describing how “the Trump Administration employed arbitrary and malleable metrics to weaponize the doctrine against rules it disfavored”); Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, ATLANTIC (July 26, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618> [<https://perma.cc/F4TU-VTUH>] (describing this case’s version of the “major questions doctrine” as the “latest obstacle to effective regulation” and predicting that it will hamper the federal government’s ability to tackle society’s gravest problems); Alex Guillén, *Impact of Supreme Court’s Climate Ruling Spreads*, POLITICO (July 20, 2022, 12:00 PM), <https://www.politico.com/news/2022/07/20/chill-from-scotus-climate-ruling-hits-wide-range-of-biden-actions-00045920> [<https://perma.cc/UV8S-2LAK>] (characterizing the recent deployment of “major questions claims as a long-percolating pushback on the federal administrative state”). *But see* Dan Farber, *Emerging Answers to Major Questions*, LEGAL PLANET (July 11, 2022), <https://legal-planet.org/2022/07/11/some-useful-answers-to-some-major-questions> [<https://perma.cc/RKU3-QEPN>] (noting that the majority opinion “steers away from the most problematic and open-ended formulations of the doctrine,” which suggests that the Chief Justice, at least, does not want the doctrine to “be just a wildcard for judges to play”).

193. Pub. L. No. 117-169, 136 Stat. 1818–2090 (2022).

anchored in old statutes).¹⁹⁴ But the Inflation Reduction Act by no means “overturns” *West Virginia v. EPA*,¹⁹⁵ and to the extent that future Congresses struggle to enact new or updated environmental legislation, disabled people have cause for concern.¹⁹⁶ As Penelope J.S. Stein and Michael Ashley Stein have explained, the effects of global warming include a higher incidence of droughts, wildfires, floods, and hurricanes—“and each disaster disproportionately threatens the human rights of persons with disabilities.”¹⁹⁷ Inaccessible infrastructure and emergency services are perhaps the most obvious reason that individuals with disabilities are “asymmetrically affected,” but there are many others: “they may lose possession of assistive devices and medication,” for example, “or be separated from families and

194. On pre-Inflation Reduction Act concerns, see, e.g., David Freeman Engstrom & John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State*, STAN. L. SCH. BLOG (July 6, 2022), <https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state> [<https://perma.cc/2NZB-4VKJ>] (observing that “the Court struck a devastating blow” to the fight against climate change, in part because it forces reliance on a Congress that “is so polarized it’s paralyzed”).

195. See Kate Aranoff, *No, the Inflation Reduction Act Did Not “Overturn” West Virginia v. EPA*, NEW REPUBLIC (Aug. 24, 2022), <https://newrepublic.com/article/167520/inflation-reduction-act-overturn-west-virginia-epa> [<https://perma.cc/8PDH-PZVK>] (noting that although the Inflation Reduction Act gives the EPA a non-trivial degree of authority to regulate carbon and methane, “it doesn’t do much to change the nature of the threat the *West Virginia v. EPA* ruling poses to environmental rules and to the administrative state in general”).

196. Penelope J.S. Stein & Michael Ashley Stein, *Disability, Human Rights, and Climate Justice*, 44 HUM. RTS. Q. 81, 82 (2022); Sebastien Jodoin, Nilani Ananthamoorthy & Katherine Lofts, *A Disability Rights Approach to Climate Governance*, 47 ECOLOGY L.Q. 73, 75 (2020); Alice Kaswan, *Domestic Climate Change Adaptation and Equity*, 42 ENV’T L. REP. 11125, 11127, 11131 (2012). The Environmental Protection Agency itself acknowledges the vulnerability of people with disabilities. See *Climate Change and the Health of People with Disabilities*, EPA, <https://www.epa.gov/climateimpacts/climate-change-and-health-people-disabilities> [<https://perma.cc/3N2K-NSSL>]. But critiques remain regarding disabled people’s lack of inclusion in policymaking conversations; see, e.g., Imani Barbarin, *Climate Darwinism Makes Disabled People Expendable*, FORBES (Nov. 2, 2019, 9:50 AM), <https://www.forbes.com/sites/imanibarbarin/2019/11/02/climate-darwinism-makes-disabled-people-expendable/?sh=12b28c783d5a> [<https://perma.cc/6R5E-US56>].

197. Stein & Stein, *supra* note 196, at 86; see also JANET E. LORD, MICHAEL E. WATERSTONE, & MICHAEL ASHLEY STEIN, *Natural Disasters and Persons with Disabilities*, in LAW AND RECOVERY FROM DISASTER: HURRICANE KATRINA 71, 72 (Robin Paul Malloy ed., 2009) (discussing recent national disasters and their respective impacts on disabled individuals who are “not adequately acknowledged” at the federal level during disaster preparation).

established support systems.”¹⁹⁸ More generally, research shows that “climate change magnifies existing inequalities,”¹⁹⁹ and disability is a well-documented axis of inequality. People with disabilities “disproportionately experience exclusion from healthcare, education, and employment”; have an “increased likelihood of food insecurity”; and, because of mobility obstacles, are less likely than non-disabled comparators to be able to migrate to safer, more supportive locations.²⁰⁰ In short, to the extent that *West Virginia v. EPA* hinders the U.S. government’s ability to combat climate change, disabled people around the world will disproportionately suffer.

Scholars and Court-watchers also agree that climate change is not the only policymaking challenge that is likely to summon the major questions doctrine. As Daniel T. Deacon and Leah M. Litman have observed, the doctrine has already played a role in the Court’s evaluation of two COVID-related administrative actions: the Center for Disease Control’s “eviction moratorium” and the Occupational Safety and Health Administration’s (OSHA) “vaccine mandate.”²⁰¹ Moreover, Deacon and Litman note, the Court has described the doctrine’s triggering conditions in a way that invites judges to consult their own political preferences, raising the likelihood that they will see

198. Stein & Stein, *supra* note 196, at 86. For journalistic documentation of this point, see, e.g., Eden Gillespie, *Advocates Say People with Disability Are Increasingly ‘Forgotten’ in Emergency Planning*, *GUARDIAN* (Apr. 10, 2022, 1:30 PM), <https://www.theguardian.com/australia-news/2022/apr/11/advocates-say-people-with-disability-are-increasingly-forgotten-in-emergency-planning> [<https://perma.cc/GZA8-TYJ5>]; Amanda Morris, “*We Didn’t Have a Plan*”: *Disabled People Struggle to Evacuate from Wildfires*, *N.Y. TIMES* (Sept. 15, 2021), <https://www.nytimes.com/2021/09/12/us/wildfires-disabled-people-evacuation.html> [<https://perma.cc/ZM9Z-QN46>]; Natalie Orenstein, *Berkeley Residents with Disabilities Say Their Needs ‘Not Built into’ PG&E Shutoff Policy*, *BERKELEYSIDE* (Nov. 15, 2019, 4:00 PM), <https://www.berkeleyside.org/2019/11/05/berkeley-residents-with-disabilities-say-their-needs-not-built-into-pge-shutoff-policy> [<https://perma.cc/6D4A-TEN2>]; Nicole Acevedo & Farnoush Amiri, *Hurricane Maria Exposed Big Gaps in Help for Puerto Rico’s Disabled. So How to Fix It?*, *NBC NEWS* (Aug. 28, 2018, 4:47 AM), <https://www.nbcnews.com/storyline/puerto-rico-crisis/hurricane-maria-exposed-big-gaps-help-puerto-rico-s-disabled-n903921> [<https://perma.cc/ME3S-QLL3>].

199. Stein & Stein, *supra* note 196, at 87.

200. *Id.* at 86–89.

201. Deacon & Litman, *supra* note 191.

“majorness” when an administrative action simply conflicts with what they (or the party that appointed them) would prefer.²⁰²

For people with disabilities, this does not bode well. The political party with the most appointees on the current Supreme Court has historically been the most skeptical of social welfare spending, government-provided healthcare, robust civil rights enforcement, and accessible voting systems—issues that disability rights and disability justice organizers have consistently foregrounded.²⁰³ To the extent that disabled Americans win administrative victories going forward, those victories may well attract a fatal level of scrutiny from the federal judiciary.

Anecdotally, the decisions we have discussed in this Part are among the most fiercely contested. People who wished these cases would have come out differently should think more about talking to members of disability communities and hearing their articulations of impact. Those consequences may not matter to members of this Court,²⁰⁴ but they could matter in the “court of public opinion,” and they could affect the thinking of lower court judges, lawyers, and the clients and constituencies that lawyers represent.

202. *Id.*

203. Though beyond the scope of this Article, it is important to note the significant differences between the disability rights and justice frameworks, the former rooted in legal rights and the latter focused more broadly on oppression, disenfranchisement, and the inherent limitations of the legal system. *See, e.g., What Is Disability Justice*, SINS INVALID (June 16, 2020), <https://www.sinsinvalid.org/news-1/2020/6/16/what-is-disability-justice> [<https://perma.cc/6G2V-ME9D>] (“At its core, the disability rights framework centers people who can achieve status, power and access through a legal or rights-based framework, which we know is not possible for many disabled people, or appropriate for all situations. The political strategy of the Disability Rights Movement relied on litigation and the establishment of a disability bureaucratic sector at the expense of developing a broad-based popular movement. Popular movements often begin when people develop political consciousness and name their experiences. Rights-based strategies often address the symptoms of inequity but not the root. The root of disability oppression is ableism, and we must work to understand it, combat it, and create alternative practices rooted in justice.”); *see also* Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 705–17 (2021) (explaining connections and distinctions among “disability rights,” “discrit,” and “disability justice” approaches).

204. *See* Tang, *supra* note 13, at 979–85 (discussing the Court’s purported distaste for consequentialism as a mode of constitutional interpretation).

We offer a final note here on the Court's use of its "shadow docket"—which also has had important effects on disabled people but which, by definition, is hard to see. By "shadow docket," we refer to those non-merits cases decided by the Court without the same degree of doctrinal development or public attention (e.g., grants of stay, injunctive relief, or summary reversals).²⁰⁵ Often these cases are decided with limited briefing (if any) and without a hearing, and by tradition, the resulting decisions need include neither explanation nor indication of how individual Justices voted.²⁰⁶ As many legal scholars have now noted, the Court has both increased the activity on its shadow docket²⁰⁷ and used that docket in ways that go beyond the death penalty matters and procedural case-management orders for which it historically seemed suited.²⁰⁸ In the 2021 Term, the Court used the shadow docket to, among other things, limit voting rights in three separate cases and to block the OSHA's vaccinate-or-test rule for businesses with 100 or more employees.²⁰⁹ The voting rights cases implicate voting access for people with disabilities, including people of

205. See, e.g., William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3, 5 (2015) (coining the term "shadow docket"); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 157 (2019) (contending that the Court's practice of making significant doctrinal changes through the shadow docket undermines the Court's legitimacy because it risks signaling to the public that the Court's decisions are political).

206. Vladeck, *supra* note 205, at 157.

207. Kristen E. Parnigoni, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743, 2747–48 (2022).

208. See *Supreme Court's "Shadow Docket" Shapes Death Penalty Litigation*, AM. BAR ASS'N (Jan. 25, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/the-influence-of-the-shadow-docket-on-death-penalty-litigation [https://perma.cc/T8KD-2NDJ]; Harry Isaiah Black & Alicia Bannon, *The Supreme Court 'Shadow Docket,'* BRENNAN CTR. FOR JUST. (July 19, 2022), <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket> [https://perma.cc/DH54-KP27]; Parnigoni, *supra* note 207 at 2746; Steve Vladeck, *The Supreme Court Doesn't Just Abuse Its Shadow Docket. It Does so Inconsistently.*, WASH. POST (Sept. 3, 2021, 10:43 AM), <https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion> [https://perma.cc/5NW8-SA56]; *Louisiana v. Am. Rivers on application for stay*, No. 21A539, slip op. at 3 (Apr. 6, 2022) (Kagan, J., dissenting) (suggesting that the Court is increasingly using the "emergency docket not for emergencies at all," but instead to change the law without briefing, argument, or justification).

209. *Nat'l Fed'n Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 662–64 (2022).

color with disabilities. As for the OSHA rule, its life-saving and health-preserving aims²¹⁰ are of clear relevance for people with disabilities (some of whom face greater health risks if exposed to COVID-19), as well as for people who wish to avoid the disablement that COVID-19 has in some cases produced.

In short, although the “shadow docket” is, by design, difficult to see, there is good reason to apply the disability lens to its output, lest the public misapprehend the stakes of these decisions.

IV. DISABILITY LAW, THE “DISABILITY FRAME,” AND STRATEGIC LITIGATION

A third lesson to be gained from applying a disability lens to the work of the Supreme Court comes from the awareness that disability law is a tool: litigants have a choice in how and when they invoke it. In some instances, there are multiple ways of framing a particular injury or dispute, with disability law representing just one of them.²¹¹ In other instances, disability law is effectively the only viable option—but litigators retain some control over how they use it and, importantly, whether they engage the Supreme Court at all. In this Part, we discuss recent examples of how the disability community has responded to disability law cases at or approaching the Supreme Court level.²¹² In the current climate, advocating for robust protections for people with disabilities has often meant trying to control which legal arguments the Court has an opportunity to consider in the first instance.

210. OSHA estimated the rule would have saved 6,500 lives and prevented 250,000 hospitalizations over six months. *Id.* at 666.

211. See Harris & Tani, *The Disability Frame*, *supra* note 48, at 1664.

212. By studying the ways in which disability lawyers and community advocates have partnered together to anticipate, respond to, and mitigate doctrinal limitations on disability rights, this Article (and this Part in particular) contributes to the literature on law and social movements and movement lawyering. See, e.g., Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1689–1716 (“[M]ovement lawyering is the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define.”) and, in the context of disability, see Michael E. Waterstone, Michael Ashley Stein, & David B. Wilkins, *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287 (2012) and Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658 (2010) (book review).

A. *Getting Off the Docket: CVS Pharmacy, Inc. v. Doe*

This Section covers a case that was on the Supreme Court's docket for the 2021 term and then disappeared, allowing it to go largely unnoticed by legal scholars and court-watchers: *CVS Pharmacy, Inc. v. Doe*.²¹³ The case's disappearance resulted from recognition by the disability community that the defendant-petitioner's narrow reading of disability rights laws (limiting them to intentional discrimination) might find favor with conservative justices, despite its dissonance with both statutory language and legislative intent. Advocates, therefore, made a determined, and ultimately successful, effort to find a path forward that did not involve the Court.²¹⁴

CVS Pharmacy began with a claim of unequal access to prescription drug benefits by plaintiffs living with HIV—a group that has historically faced disability-based discrimination in healthcare provision.²¹⁵ Specifically, Plaintiffs alleged that CVS discriminated against them when it restricted them to mail order-only delivery of their HIV medications, with no access to consultations from a pharmacist or other pharmacy services.²¹⁶ These restrictions effectively required plaintiffs to pay full price for their HIV medications, costing individuals thousands of dollars each month and making these medications unaffordable.²¹⁷ In contrast, patients with other prescriptions enjoyed

213. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204 (9th Cir. 2020), *cert. granted in part*, 141 S. Ct. 2882 (2021) (No. 20-1374). Despite a grant of certiorari from the Supreme Court and amici briefs having been filed, the parties jointly filed a motion to dismiss the case.

214. Michael Roppolo, *CVS Withdraws Supreme Court Case on Disability Rights, Announces New Partnership*, CBS NEWS (Nov. 22, 2021), <https://www.cbsnews.com/news/supreme-court-cvs-doe-withdraw-partnership/?login=1> [<https://perma.cc/T9RG-F9SE>] (reporting that CVS reached an agreement to work collaboratively with the plaintiffs and the disability community to address their concerns about health care access and affordability).

215. Prior to the enactment of the Affordable Care Act (ACA), health insurers would often deny people with HIV access to health insurance based on preexisting conditions. See Jennifer Kates & Lindsey Dawson, *Insurance Coverage Changes for People with HIV Under the ACA*, KAISER FAM. FOUND. (Feb. 14, 2017), <https://www.kff.org/health-reform/issue-brief/insurance-coverage-changes-for-people-with-hiv-under-the-aca> [<https://perma.cc/Q3RQ-NJH3>].

216. *CVS Pharmacy*, 982 F.3d at 1207–08.

217. Brief in Opposition to Petition for Writ of Certiorari at 7, *CVS Pharmacy Inc.*, 141 S. Ct. 2882 (No. 20-1374).

full access to CVS Pharmacy and its services.²¹⁸ Plaintiffs alleged violation of Section 1557 of the ACA, among other laws.²¹⁹

The case reached the Supreme Court after a district court dismissed the plaintiffs' complaint and the Ninth Circuit reversed.²²⁰ The crux of the disagreement between the district court and the appellate court was how to interpret the reach of Section 504, which in turn determined the reach of Section 1557.²²¹ When a plaintiff alleges a disability-based denial of access to a federally funded healthcare program or service, must the plaintiff show discriminatory motive on the part of the alleged discriminator, or might disparate impact suffice? The district court took a restrictive view.²²² But the Ninth Circuit interpreted the relevant Supreme Court precedent (the 1985 case *Alexander v. Choate*²²³) to mean that Section 504 applied more generously to disabled access-seekers.²²⁴ Relying on *Choate*, the Ninth

218. Before CVS enrolled Plaintiffs in the specialty program, patients with HIV could access the full range of pharmacy benefits offered to other patients. They could obtain their HIV medications from any participating in-network pharmacies and pharmacists, including non-CVS pharmacies with pharmacists on staff with knowledge of plaintiffs' medical history and specializing in HIV medications who could make needed modifications to their medications to avoid dangerous drug interactions or side effects. Such services are critical to HIV patients who require a long-term, consistent medication plan to manage their chronic illness. Brief in Opposition to Petition for a Writ of Certiorari at 6–7, *CVS Pharmacy Inc.*, 141 S. Ct. 2882 (No. 20-1374).

219. Brief in Opposition at 2, *CVS Pharmacy Inc.*, 141 S. Ct. 2882 (No. 20-1374). Section 1557 of the ACA prohibits discrimination on the basis of disability, age, sex, and race by any health program or activity that receives federal financial assistance. Affordable Care Act, 42 U.S.C. § 18116.

220. *Doe v. CVS Pharmacy, Inc.*, 348 F. Supp. 3d 976, 983–84 (N.D. Cal. 2018), *rev'd*, 982 F.3d 1204 (9th Cir. 2020) (the District Court dismissed the plaintiffs' Section 1557 claims on the grounds that they had not alleged "statistical evidence sufficient to show that Defendant's Program has a 'significantly adverse or disproportionate impact' on . . . HIV/AIDS patients" and that, even if they had, "that impact is not so significant as to constitute a denial of 'meaningful access' to Plaintiffs' prescription drug benefits").

221. *Id.* at 982.

222. *Id.*

223. 469 U.S. 287 (1985).

224. In *Alexander v. Choate*, the Supreme treated "meaningful access" as a touchstone of Section 504 and held that a defendant might deprive a disabled plaintiff of meaningful access even without a discriminatory motive. Section 504 does not outlaw all conduct with a disparate impact on people with disabilities, *Choate*

Circuit held that a violation of Section 504 may occur where a policy denies people with disabilities meaningful access to a benefit to which they are entitled, even where the policy also applies to non-disabled people.²²⁵ This, in turn, meant that the plaintiff's Section 1557 claim should not have been dismissed.²²⁶

CVS appealed to the Supreme Court and the Court granted certiorari to address “[w]hether Section 504 of the Rehabilitation Act of 1973”—and by extension “Section 1557 of the Patient Protection and Affordable Care Act,” which “incorporates the ‘enforcement mechanisms’ of other federal antidiscrimination statutes”—“provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.”²²⁷

At the briefing stage, two starkly different interpretations of Section 504 emerged.²²⁸ CVS argued that Section 504 does *not* cover disparate impact claims because, among other reasons, that provision does not have the same language as other statutes authorizing disparate impact claims and because three very similar Spending Clause civil rights statutes (Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, and the Age Discrimination Act, respectively) have been held not to reach disparate impact claims.²²⁹ Plaintiffs,

explained, but neither does it require proof of intentional discrimination. *Id.* at 301–04.

225. *CVS Pharmacy*, 982 F.3d at 1210–11.

226. *Id.* at 1212. Defendants petitioned for a rehearing en banc, which the Ninth Circuit denied. Appellee’s Petition For Rehearing and Petition For Rehearing En Banc at 10–11, *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1211 (9th Cir. 2020) (No. 19-15074).

227. Petition for a Writ of Certiorari, *CVS Pharmacy, Inc. v. Doe*, 141 S. Ct. 2882 (2021) (No. 20-1374).

228. Although the parties focused their arguments on Section 504, a brief from the National Health Law Program and Disability Rights California drew on the history of the ACA and Section 1557 to question whether the precedent on Section 504 should necessarily be imported into interpreting Section 1557. *See* Brief of National Health Law Program and Disability Rights California in Support of Respondents at 3, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374).

229. Brief for Petitioners at 3–4, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374). By contrast, CVS noted, the ADA explicitly refers to “effects”—i.e., impact. *Id.* at 35. CVS also pointed to language in Section 504 that trains attention on the funding recipient’s reason for differential treatment (the law references discrimination that is “solely by reason of” their disability). CVS contended that this language is incompatible with disparate impact claims, which focus on an action’s effect rather than the intent behind it. *Id.* at 10.

joined by several disability and civil rights groups as amici, fiercely disputed this interpretation.²³⁰ For example, a brief submitted by The Arc, the American Association of People with Disabilities (“AAPD”), and other disability groups cited language in *Choate* that contradicted CVS’s position,²³¹ as well as “decades of near-uniform judicial and regulatory construction of Section 504 to prohibit discrimination that deprives individuals of meaningful access, even where the discrimination is the result of benign neglect and not of invidious animus.”²³² Legislative history supports the same interpretation,

230. Other amici urged the Court to consider whether the *CVS Pharmacy* case was actually the right vehicle for resolving the interpretive dispute. A brief by Paralyzed Veterans of America and the Bazelon Center for Mental Health Law, among other groups, characterized the allegations in the CVS case as, in fact, involving intentional discrimination, thereby making the case an inappropriate vehicle for the Court to decide whether Section 504 covers disparate impact claims. See Brief of Paralyzed Veterans of America et al. as Amici Curiae Supporting Respondents at 2–3, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374). This brief also noted that although CVS framed the division between disparate impact and disparate treatment as clear cut, Section 504 claims may blur this line. For example, with regards to claims of unjust institutionalization, the Supreme Court held in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that there is no need for a disparate impact comparison between people with disabilities and people without disabilities under the ADA. But neither do *Olmstead* claims require allegations of intent. Rather, a remedy is available when “community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available and the needs of others with mental disabilities.” Brief of Paralyzed Veterans of America et al. as Amici Curiae Supporting Respondents at 22, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374) (quoting *Olmstead*, 527 U.S. at 587).

231. The brief emphasized the following language from *Choate*: “Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect” and “much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.” Brief for The Arc of the United States and the American Association of People with Disabilities, et al. as Amici Curiae Supporting Respondents at 7–8, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374), 2021 WL 5167055 (quoting *Alexander v. Choate*, 469 U.S. 287, 295–97 (1985)) [hereinafter AAPD Brief].

232. *Id.* at 8; see also Brief of Paralyzed Veterans of America et al. as Amici Curiae Supporting Respondents at 28–30, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374), 2021 WL 5180608 (disputing CVS’s interpretation of “solely by reason of” disability as precluding any other reason for an adverse action and noting that such an

according to this brief.²³³ The United States also submitted a brief in support of the plaintiffs' interpretation of Section 504,²³⁴ as did the NAACP Legal Defense Fund²³⁵ and other advocacy groups.²³⁶

During all of this briefing, meanwhile, a different form of advocacy was occurring: the disability community, including nationally renowned disability activist and leader Judith Heumann,²³⁷ the AAPD, the Disability Rights Education and Defense Fund ("DREDF"), the National Council on Independent Living, and the Bazelon Center for Mental Health Law ("Bazelon Center"), engaged in discussions directly with CVS.²³⁸ Representatives from these and other organizations explained to CVS the significant harms that an adverse decision could bring in undermining the foundations of federal

interpretation is inconsistent with decades of Section 504 jurisprudence and would strip Section 504 of its meaning).

233. See AAPD Brief, *supra* note 231, at 34 (demonstrating that each time Congress reauthorized Section 504, it took steps to reaffirm that the law reaches policies that have a discriminatory effect on people with disabilities).

234. Brief for the United States as Amicus Curiae Supporting Respondents at 19–21, 24–25, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374), 2021 WL 5055103 (pointing out CVS's concession that reasonable modification claims may be available under Section 504 and noting how this undercuts their argument that Section 504 only allows intentional discrimination claims).

235. Brief of NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Respondents at 4, 8–13, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374), 2021 WL 5137946 (explaining that courts have treated the word "discrimination" broadly to include disparate impact claims when this is consistent with Congressional intent and arguing that interpreting Section 504 to cover such claims would be consistent with Congressional intent, as well as with case law on other civil rights statutes).

236. A brief by the Council of Parent Attorney Advocates explained the importance of Section 504 reaching discriminatory effects in the educational context and clarified that, in light of the limited reach of the IDEA, this interpretation is necessary to protect students with disabilities. Brief for Council of Parent Attorneys and Advocates, Inc. as Amicus Curiae in Support of Respondents at 3–5, *CVS Pharmacy*, 141 S. Ct. 2882 (No. 20-1374), 2021 WL 5137945.

237. Alex Traub, *Judy Heumann, Who Led the Fight for Disability Rights, Dies at 75*, N.Y. TIMES (Mar. 8, 2023), <https://www.nytimes.com/2023/03/05/obituaries/judy-heumann-dead.html> [<https://perma.cc/8RGH-ZD53>].

238. See, e.g., *Letter to the Board of Directors of CVS Health*, DISABILITY RTS. EDUC. & DEF. FUND (Nov. 1, 2021), <https://dredf.org/2021/11/03/letter-to-the-board-of-directors-of-cvs-health> [<https://perma.cc/36SA-XZJ4>].

disability rights laws.²³⁹ Ultimately, they reached an agreement with CVS, and CVS withdrew the case from the Supreme Court docket one month before it was set for oral argument.²⁴⁰

Public statements offer some insights into the conversations between CVS and the disability community. Maria Town of AAPD characterized the agreement as involving a change of venue (“the disability community asked CVS to find a different regulatory or policy venue other than the Supreme Court”) and a commitment to work collaboratively to address CVS’s “concerns.”²⁴¹ CVS’s public statement was similar: “We’ve agreed to pursue policy solutions in collaboration with the disability community to help protect access to affordable health plan programs that apply equally to all members Any further legal proceedings will take place in district court when the case is remanded.”²⁴² Ultimately, then, it appears that the disability community successfully educated CVS about the stakes involved (to CVS and to disabled people) in pursuing an appeal that could inflict widespread harm on the disability community. And for its willingness to listen and change course, CVS gained some good press.²⁴³ In a joint press release of CVS and a number of disability advocacy groups, Judith Heumann stated that CVS had “engaged in an honest dialogue with disability community representatives and listened carefully to our concerns about what was at stake for disabled people with the question

239. *See id.* (arguing that “[t]he brief filed by CVS attacks the very foundation of disability rights law,” by asserting an argument that “is not necessary to address the facts of the case,” but would have “far reaching implications setting back more than 40 years of hard-fought-for civil rights of people with disabilities”; demanding “an immediate meeting with the company’s Board of Directors board to explain our deeply held concerns” and signaling that “CVS cannot position itself without consequence as the corporate entity that sought to turn back the clock for disability rights”). *See also* Susan Mizner, Arlene B. Mayerson, & Aaron Madrid Aksoz, *CVS Wants the Supreme Court to Gut Non-Discrimination Protections for People with Disabilities. It Could Set Us Back Decades*, ACLU (Oct. 29, 2021), <https://www.aclu.org/news/disability-rights/cvs-wants-the-supreme-court-to-gut-non-discrimination-protections-for-people-with-disabilities-it-could-set-us-back-decades> [<https://perma.cc/CDQ6-H67X>].

240. Roppolo, *supra* note 214.

241. *Id.*

242. *Id.*

243. *See id.*; *Groups Applaud CVS for Withdrawing U.S. Supreme Court Petition That Threatened the Rights of Individuals with Disabilities*, ACLU R.I. (Nov. 11, 2021, 9:30 AM), <https://www.riaclu.org/en/news/groups-applaud-cvs-withdrawing-us-supreme-court-petition-threatened-rights-individuals> [<https://perma.cc/3GAG-CPG4>].

before the Supreme Court.²⁴⁴ Heumann went on to reference the disability community's "partnership" with CVS and to "thank CVS Health for its commitment to preserving disability rights."²⁴⁵

To be sure, *CVS Pharmacy* was not the first instance in which disability rights lawyers and activists (many of whom identify as disabled themselves) negotiated directly with named parties in an effort to prevent a court from making bad law, but this strategy has become increasingly popular in the last decade and will likely continue.

B. Changing the Question: Remembering City and County of San Francisco v. Sheehan

Had the disability community failed in its efforts to get *CVS Pharmacy* off the Court's docket, what other options might have been available? In this Section we depart briefly from the most recent Supreme Court Terms to recall what happened in the 2015 case *City and County of San Francisco v. Sheehan*.²⁴⁶ Disability advocates did not prevent the Supreme Court from hearing the case, but they did succeed in shaping the legal arguments that the parties made available to the justices.²⁴⁷ This strategy may be increasingly important in the years to come.

In brief, *City and County of San Francisco v. Sheehan* involved whether Title II of the ADA²⁴⁸ applies to police arrests and detentions.²⁴⁹ That is, in the context of arrests and detention, must police officers make reasonable modifications for disabled arrestees? The question arose from a tragic encounter: Theresa Sheehan, who resided in a group

244. Press Release, Am. Assoc. of People with Disabilities, CVS Health Partners with Disability Community in Commitment to Affordable and Equitable Access to Health Care (Nov. 10, 2021), <https://www.aapd.com/press-releases/cvs-health-partners-with-disability-community> [<https://perma.cc/VUW8-Y45Z>].

245. *Id.*; see also Roppolo, *supra* note 214; Michelle Diament, *CVS Drops Supreme Court Case Over Disability Community Concerns*, DISABILITY SCOOP (Nov. 12, 2021), <https://www.disabilitycoop.com/2021/11/12/cvs-drops-supreme-court-case-over-disability-community-concerns/29593> [<https://perma.cc/Z8MY-HQHS>]; *The Arc Celebrates CVS Health Commitment With Disability Leaders to Affordable and Equitable Access to Health Care*, THE ARC (Nov. 11, 2021), <https://thearc.org/blog/the-arc-celebrates-cvs-commitment-health-care> [<https://perma.cc/YZ2C-DZJK>].

246. 575 U.S. 600 (2015).

247. See, e.g., Brief for ACLU et. al as Amici Curiae in Support of Respondent, City & Cnty. of S.F., Cal. v. Sheehan, 575 U.S. 600 (2015) (No. 13-1412), 2015 WL 721233.

248. Title II references nondiscrimination on the basis of disability in State and local government services. 42 U.S.C. §§ 12131(1), 12132.

249. See *Sheehan*, 575 U.S. at 600–02, 608.

home for people with significant mental health issues, came into contact with police during a mental health crisis, after an onsite social worker requested assistance getting Sheehan to the hospital for treatment²⁵⁰; when Sheehan brandished a knife while in her room, two responding officers shot Sheehan five times.²⁵¹ Sheehan survived and sued the County and City of San Francisco for violating her rights under the ADA.²⁵² The district court granted the defendants' motion for summary judgment, but the Ninth Circuit vacated the part of the judgment that applied to Sheehan's ADA claim.²⁵³ Considering this question for the first time, the Ninth Circuit held that Title II *does* apply to arrests and that there was "a triable issue whether the officers failed to reasonably accommodate Sheehan's disability when they forced their way back into her room without taking her mental illness into account or employing generally accepted police practices for peaceably resolving a confrontation with a person with mental illness."²⁵⁴ The Supreme Court granted certiorari to consider the ADA question, as well as another question related to the application of the Fourth Amendment.²⁵⁵

In the time between the filing of the petition and the merits briefs, advocates from the disability community pressed the City of San Francisco to withdraw its appeal and thereby leave the Ninth's Circuit interpretation of Title II in place.²⁵⁶ In 2015 (as now), the stakes of a contrary legal holding were high: if the Supreme Court interpreted Title II not to apply to police arrests, the disproportionate number of disabled people of color subjected to police violence would lose a

250. Pursuant to CA Code 5150, the social worker sought a temporary mental health hold for Sheehan in order for her to receive a psychiatric evaluation and get the mental health supports to assist her while in crisis. *Id.* at 602–04.

251. *Id.* at 604–06.

252. Sheehan also alleged violations of her rights under the Fourth Amendment, as well as under state law (raising tort and statutory claims). *Id.* at 606.

253. *Sheehan v. City & Cnty. of S.F., Cal.*, 743 F.3d 1211, 1234 (9th Cir. 2014), *aff'g in part, vacating in part*, *Sheehan v. City & Cnty. of S.F., Cal.*, No. C 09-03889 CRB, 2011 WL 1748419 (N.D. Cal. May 6, 2011) (holding that the district court properly granted summary judgment regarding the Fourth Amendment claim but erred by granting summary judgment on Sheehan's ADA claim).

254. *Id.* at 1217, 1232.

255. *Sheehan*, 575 U.S. at 602.

256. *Advocates Protest San Francisco's Potential Threat to the ADA*, DISABILITY RTS. EDUC. & DEF. FUND (Jan. 8, 2015), <https://dredf.org/2015/01/09/advocates-protest-san-franciscos-potential-threat-ada> [<https://perma.cc/42YA-R8R6>].

potentially valuable tool for remedying injuries suffered at the hands of police, and police departments would have a lower incentive to consider how their practices might affect people with disabilities.²⁵⁷ This issue had become highly salient in San Francisco, thanks in part to a series of articles in a local San Francisco newspaper in 2014²⁵⁸ highlighting that over half of those killed by San Francisco police between 2005 and 2013 were mentally ill.²⁵⁹

Emblematic of the disability community's strategy (seeking to convince the City to drop its appeal to the Supreme Court) is a January 8, 2015, public letter that that a number of disability organizations sent to the San Francisco Mayor and City Attorney.²⁶⁰ The letter characterized the ADA as "the most comprehensive civil rights law for individuals with disabilities" and accused the City of putting that law "at risk."²⁶¹ The letter also reminded city leaders of San Francisco's prior "leadership in disability rights," including "Mayor Moscone's support of the 1977 Section 504 sit-in that led to the implementation of the Rehabilitation Act," "the Department of Public Health's commitment to persons with HIV," and the City's "ongoing efforts to enhance accessibility in museums and other tourist destinations."²⁶² The *Sheehan* appeal could cause "irreparabl[e]" damage to San Francisco's reputation as "a model of disability-friendly policies and politics."²⁶³ The letter went on to emphasize the harm that would flow to people with psychiatric disabilities should the City prevail before the Supreme Court: such an interpretation of the ADA "would leave people with psychiatric disabilities without the ability to require law enforcement to be reasonably responsive to their needs" and would "suggest[] that people with psychiatric disabilities have lesser rights

257. See generally Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401 (2021).

258. Alex Emslie & Rachel Bale, *More Than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED NEWS (Sept. 30, 2014), <https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill> [<https://perma.cc/EU6T-VBUM>].

259. *Id.* ("[A] KQED review of 51 San Francisco officer-involved shootings between 2005 and 2013 found that 58 percent—or 11 people—of the 19 individuals killed by police had a mental illness that was a contributing factor in the incident.").

260. Letter from Disability Rts. Educ. & Def. Fund to Mayor Edwin Lee, Disability Rts. Educ. & Def. Fund (Jan. 8, 2015), <https://dredf.org/2015/01/09/advocates-protest-san-franciscos-potential-threat-ada> [<https://perma.cc/2P4H-ZS88>].

261. *Id.*

262. *Id.*

263. *Id.*

under the ADA.”²⁶⁴ Last but not least, the letter invoked the nation’s ongoing reckoning with police violence, especially in regards to people with disabilities.²⁶⁵

Ultimately, the City did not withdraw its appeal, but it did significantly revise the arguments it presented to the Court.²⁶⁶ Although the City’s original petition asked the Court to decide whether Title II applied to arrests and detention, the City changed (and significantly narrowed) the question before the Court in its merit briefs and during oral argument. Ultimately, the City argued that Sheehan was not “qualified” for an accommodation under Title II of the ADA because she “pose[d] a direct threat to the health or safety of others.”²⁶⁷ This argument amounted to an affirmative defense—one that assumed for the purpose of argument that Title II *did* apply to arrests and detention, but disputed that this particular plaintiff fell within the law’s protection.²⁶⁸

264. *Id.*

265. *Id.*; see also Letter from People with Disabilities Found. to Mayor Edwin Lee, People With Disabilities Found. (Jan. 23, 2015), <http://www.pwdf.org/wp-content/uploads/2015/01/Hererra-Letter.sb-1-23-15-430-pm.pdf> [<https://perma.cc/7WTA-JQXT>] (arguing for requiring police to consider disability when responding to crisis intervention calls); Susan Mizner, *There is No Police Exception to the Americans with Disabilities Act*, ACLU NEWS & COMMENTARY (Jan. 8, 2015), <https://www.aclu.org/news/speakeasy/there-no-police-exception-americans-disabilities-act> [<https://perma.cc/H9VB-79RY>] (providing examples of how failure to consider disabilities can be deadly in police interactions); Rachael Bale & Alex Emslie, *Disability Advocates: Appeal Over S.F. Police Shooting Puts ADA at Risk*, KQED (Jan. 9, 2015), <https://www.kqed.org/news/10401336/disability-advocates-appeal-over-s-f-police-shooting-puts-ada-at-risk> [<https://perma.cc/GNC3-KHZL>] (discussing the changes the San Francisco Police Department made in the years following Sheehan’s shooting); Joyce Chediak, *Disabled and Civil Rights Groups Raise Alarm Over Supreme Court Case on Police Shootings*, WORKERS WORLD (Feb. 10, 2015), <https://www.workers.org/2015/02/18308> [<https://perma.cc/H6CG-X5KK>] (emphasizing that at least half of the people who are killed in police shootings each year suffer from mental health disabilities).

266. *Compare* Petition for Writ of Certiorari at iii, City & Cnty. of San Francisco, 575 U.S. 600 (2015) (No. 13-1412) [hereinafter *Sheehan* Petition for Cert], with Petitioner’s Brief at iii, City & Cnty. of San Francisco, 575 U.S. 600 (No. 13-1412) (2015) [hereinafter *Sheehan* Merit Brief].

267. *Sheehan* Petition for Cert, *supra* note 266, at i; *Sheehan* Merit Brief, *supra* note 266, at 17 (citing 42 U.S.C. § 12132).

268. *Sheehan* Merit Brief, *supra* note 266, at 19–20; Oral Argument at 10:37, *Sheehan*, 575 U.S. 600 (13-1412)

At least one member of the Court, Justice Scalia, did not take kindly to this “bait-and-switch.”²⁶⁹ During oral argument, counsel for the City and County of San Francisco faced pointed questions about the change in strategy, as well as the suggestion that perhaps the Court should “appoint somebody else to argue the point” that the petitioners had originally asked the Court to resolve.²⁷⁰ Ultimately, the Court dismissed the ADA question as “improvidently granted”: “in the absence of adversarial briefing,” it would not be prudent for the Court to decide this important question.²⁷¹

C. *Courting Public Opinion in Health and Hospital Corporation of Marion County, Indiana v. Talevski*

In some instances, of course, efforts like those in *CVS Pharmacy* and *Sheehan* will not convince a petitioner to change course. An example from the current Term is *Talevski*, summarized in Part II above.²⁷² To date, the disability community has made extensive efforts to attempt to persuade Health and Hospital Corporation to withdraw its appeal to the Supreme Court, but has not succeeded.²⁷³ Advocates may, however,

https://www.supremecourt.gov/oral_arguments/audio/2014/13-1412
[<https://perma.cc/6GW2-4VLJ>] [hereinafter *Sheehan* Oral Argument].

269. *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 620 (2015) (Scalia, J., concurring in part and dissenting in part).

270. *Sheehan* Oral Argument, *supra* note 268, at 0:13; *see also* Lyle Denniston, *Argument Analysis: Can a Really Rough Start Be Overcome?*, SCOTUSBLOG (Mar. 23, 2015, 3:07 PM), <https://www.scotusblog.com/2015/03/argument-analysis-can-a-really-rough-start-be-overcome> [<https://perma.cc/J5SJ-T8N2>] (analyzing the Court’s predicament and Justice Scalia’s criticism of hearing a case that “changed markedly” from the original cert. petition the Court granted); Mark Joseph Stern, *Don’t Answer That! San Francisco Takes Back a Question That Could Have Been Disastrous for the Mentally Ill*, SLATE (May 18, 2015, 3:45 PM), <https://slate.com/news-and-politics/2015/05/sheehan-case-of-police-shooting-mentally-ill-woman-san-francisco-saved-the-ada.html> [<https://perma.cc/G83Z-QUBD>] (noting that the Court “had no business answering” a question San Francisco would not ask).

271. *Sheehan*, 575 U.S. at 610.

272. *See supra* Section II.C.

273. *See* Michelle Diamant, *Supreme Court Case Could Sharply Limit Disability Rights*, DISABILITY SCOOP (Oct. 10, 2022) <https://www.disabilityscoop.com/2022/10/10/supreme-court-case-could-sharply-limit-disability-rights/30070> [<https://perma.cc/2V2U-Q5NP>] (detailing how over 13,000 individuals have contacted HHC to request that it withdraw the matter); Brief of Indiana Disability Rights as Amici Curiae in Support of Respondent at 2, *Talevski v. Health & Hosp. Corp. of Marion Cnty.*, 6 F.4th 713 (7th Cir. 2022), *cert. granted*, No. 21-806 (U.S. argued

have made inroads with the public, via a strategy that attempts to recruit citizens into their campaign.

Efforts by the Bazelon Center are instructive.²⁷⁴ Their calls to action have included information about how to contact elected representatives, as well how to contact Health and Hospital Corporation directly to request that it withdraw its cert petition.²⁷⁵ The Bazelon Center has also offered powerful and clear statements about the case's "extremely high" stakes.²⁷⁶ As one circulation explained:

If people are not able to sue state and local governments to enforce these rights, state and local governments will have little to no accountability if they fail to deliver these important protections and services, or if they fail to deliver them in a nondiscriminatory manner. Only the federal government will be able to investigate wrongdoing, and the only remedy available to the federal government - in most instances of wrongdoing - is to withhold funding from the state. These lifeline programs need more, not less funding.²⁷⁷

The circulation went on to identify the "numerous socio-economic and historically marginalized communities at risk, including those who identify as: Disabled, Black, Indigenous, People of Color, working

Nov. 8, 2022) [hereinafter IDR Amicus Brief] (describing the potential effect a ruling in this case would have on eighty-eight million people); *Take Action to Stop a SCOTUS Case That Will Undermine Medicaid & Safety Net Programs!*, HOOSIER ACTION, <https://hoosieraction.org/scotus> [<https://perma.cc/R98H-KECW>] (urging people to contact HHC and request that HHC withdraw the case); *Qaddoura Calls on HHC to Withdraw Lawsuit*, IND. SENATE DEMOCRATS (Oct. 14, 2022) <https://indianasenatedemocrats.org/qaddoura-calls-on-hhc-to-withdraw-lawsuit> [<https://perma.cc/76ZC-REPY>] (reporting that Indiana Legislators called for HHC to withdraw its lawsuit).

274. See Brief of the Judge David L. Bazelon Center for Mental Health Law, The Arc of the United States, American Association of People with Disabilities, Disability Rights Education & Defense Fund, Center for Public Representation & Compassion & Choices as *Amici Curiae* at 2, *Talevski*, No. 21-806 [hereinafter Bazelon Amicus Brief] (urging the Court to affirm the Seventh Circuit's holding); *Talevski v. Health & Hospital Corporation of Marion County Explained*, BAZELON CTR., <https://www.bazelon.org/wp-content/uploads/2022/09/Talevski-v.-HHC-Fact-Sheet-1.pdf> [<https://perma.cc/3U7F-YWNY>] (providing information on ways to put pressure on HHC to withdraw its appeal).

275. For example, the Bazelon Center provided links to information on the Board of Trustees, upcoming meetings, and other organizing resources. BAZELON CTR., *supra* note 274.

276. *Id.*

277. *Id.*

class, low-income, elderly, children, families in the foster care system, needy families, people experiencing homelessness, and more.”²⁷⁸

In a similar vein, DREDF and allied national and local groups circulated an open letter to the Mayor of Indianapolis, the Marion County Commissioners, and the City-County Council of Indianapolis and Marion County calling on them convene an emergency public meeting regarding the need for the Health and Hospital Corporation (“HHC”) to withdraw its appeal.²⁷⁹ “Recent Supreme Court decisions have taught us that, with this Supreme Court, ‘everything is on the table,’” the letter explained; “[t]his case is no exception.”²⁸⁰ The Arc of Indiana also authored an op-ed emphasizing, in plain language, the vast number of programs and populations that the case might affect:

A ruling in this case is likely to strip away the legal rights and protections of vulnerable citizens, including people with disabilities who rely on these programs to live full and active lives The implications of this case reach far beyond Talevski and nursing home standards of care. Safety net programs — such as Medicaid, the Supplemental Nutrition Assistance Program (SNAP), the Children’s Health Insurance Program (CHIP) and Temporary Assistance to Needy Families (TANF) — have been a lifeline for millions of people, especially people with disabilities. One in [four] adults in Indiana has a disability, and these numbers are increasing rapidly due to growing populations of older adults and people with disabilities. A negative ruling will leave them without any legal recourse if they face mistreatment or abuse or their benefits are taken away or denied.²⁸¹

278. *Id.*

279. *Sign on Letter Calling for HHC to Withdraw Talevski SCOTUS Petition*, MOBILIZE, <https://www.mobilize.us/ourrevolution/event/488791> [https://perma.cc/QMF9-YF8M].

280. *Id.*

281. Kim Dodson, *Treatment of Patient at Indiana Nursing Home at Center of U.S. Supreme Court Case*, INDYSTAR (Oct. 1, 2022, 5:02 AM), <https://www.indystar.com/story/opinion/2022/10/01/us-supreme-court-indiana-nursing-home-lawsuit/69523486007> [https://perma.cc/M5A4-G2R2].

Such efforts have helped secure national media coverage²⁸² (albeit not at the level of a case like *Dobbs*) and excellent local coverage.²⁸³ Despite this attention, however, HHC has not withdrawn its appeal and the case remains before the Court and is pending decision at the time of this writing.²⁸⁴

CONCLUSION

There is perhaps no better way to conclude this Article on “the disability docket” than to note the Court’s own signals about what comes next: the Court recently granted certiorari in another case that broadly challenges the scope and protections of the ADA and that also invites further developments of the Court’s standing doctrine in the realm of civil rights enforcement. In *Laufer v. Acheson Hotels, LLC*,²⁸⁵ the petitioners raise the question of whether an ADA “tester” has Article III standing to challenge a place of public accommodation’s failure to provide disability accessibility information on its website, if that tester lacks any intention of visiting that place of public accommodation.²⁸⁶

282. See Ian Millhiser, *The Nightmarish Supreme Court Case That Could Gut Medicaid, Explained*, VOX (Nov. 2, 2022, 8:30 AM), <https://www.vox.com/policy-and-politics/2022/11/3/23435346/supreme-court-medicare-health-hospital-corporation-indiana-talevski> [<https://perma.cc/X6CN-U9QQ>] (warning the nation of the implications of the case should HHC prevail); Eleanor Laise, *Supreme Court Weighs 83 Million Medicaid Enrollees’ Access to the Courts*, MKT. WATCH (Nov. 9, 2022, 10:05 AM), <https://www.marketwatch.com/story/supreme-court-weighs-83-million-medicare-enrollees-access-to-the-courts-11668006336> [<https://perma.cc/D74H-RLTR>] (reporting nationally, post-oral argument, on what is at risk in this case); Sara Luterman, *Supreme Court Case Altering Medicaid Is ‘an Assault’ on Older Adults and People with Disabilities, Advocates Warn*, 19TH (Nov. 10, 2022, 5:32 PM), <https://19thnews.org/2022/11/supreme-court-marion-county-talevski-medicare> [<https://perma.cc/EH7F-94EF>] (discussing the justices’ skepticism of the defendant’s interpretation of Section 1983); Diamant, *supra* note 273 (platforming the warnings of disability rights advocates regarding *Talevski*).

283. See, e.g., Tony Cook & Johnny Magdaleno, *Marion County Agency Wants SCOTUS to Strip Protections for Millions of Vulnerable Americans*, INDY STAR (Oct. 6, 2022) <https://www.indystar.com/story/news/2022/10/06/scotus-nursing-home-case-could-threaten-medicare-protections/69521691007> [<https://perma.cc/W4NF-DYSE>]; Diamant, *supra* note 273.

284. Petition for Writ of Certiorari at i–ii, *Health & Hosp. Corp. of Marion Cnty v. Talevski*, 142 S. Ct. 2673 (2022) (No. 21-806); Brief for the Petitioner at 1, *Talevski*, No. 21-806 (U.S. argued Nov. 8, 2022).

285. 50 F.4th 259 (1st Cir. 2022), *cert. granted*, 143 S. Ct. 1053 (2023).

286. *Id.* at 263.

In an unusual posture, Laufer, in her opposition brief, agrees that the Court should grant the petition, noting that “there is now a significant conflict among the . . . Circuits which impacts enforcement of not only the ADA, but civil rights in general.”²⁸⁷

To briefly review the facts of this case, Laufer is disabled, with impaired vision and limited use of her hands; she uses a wheelchair or cane to ambulate.²⁸⁸ For these reasons, she has a number of accessibility needs with respect to hotels, including accessible parking, passageways that fit her wheelchair, lowered surfaces, and bathroom grab bars.²⁸⁹ Searching the Acheson Hotels website for information pertinent to her needs, Laufer found that the site did not identify accessible rooms, did not provide an option for booking an accessible room, and did not give her sufficient information to determine whether the rooms and features of the hotel were accessible to her.²⁹⁰

Laufer sued, alleging discrimination under Title III of the ADA and arguing that Acheson Hotels’ failure to include accessibility information on its website “deprives her of ‘the ability to make a meaningful choice’” and causes her to “suffer ‘humiliation and frustration at being treated like a second class citizen, being denied equal access and benefits to . . . accommodations and services.’”²⁹¹ Acheson Hotels moved to dismiss, arguing that, because Laufer never intended to book a room at its hotel, she lacked standing to bring her suit.²⁹² The district court dismissed the case on standing grounds,²⁹³ but the First Circuit reversed.²⁹⁴

287. Brief in Opposition at 7, *Acheson*, No. 22-429 (U.S. Mar. 27, 2023), https://www.supremecourt.gov/DocketPDF/22/22-429/255566/20230224153233408_22-429%20Brief%20in%20Opposition.pdf [<https://perma.cc/ZY8H-FQ6T>] [hereinafter *Acheson* Brief in Opposition].

288. *Acheson*, 50 F.4th at 263.

289. *Id.*

290. *Id.* at 263–64. Laufer also tried to access sufficient information through third party booking websites, but still could not find it. *Id.*

291. Laufer v. Acheson Hotels, LLC, No. 2:20-CV-00344-GZS, 2021 WL 1993555, at *2 (D. Me. May 18, 2021), *rev'd and remanded*, 50 F.4th 259 (1st Cir. 2022), *cert. granted*, No. 22-429 (U.S. Mar. 27, 2023).

292. *Acheson*, 50 F.4th at 265.

293. *Id.*

294. *Id.* at 274–75 (finding that “Laufer suffered a concrete injury in fact” and that her “feelings of frustration, humiliation, and second-class citizenry are indeed ‘downstream consequences’ and ‘adverse effects’ of the informational injury she experienced”).

The petition to the Supreme Court encapsulates a narrative that has become central to public understandings of disability civil rights laws. Although Congress designed the ADA with private enforcement in mind,²⁹⁵ the citizens who do this enforcement work are sometimes portrayed as self-interested vigilantes who prey especially on small businesses.²⁹⁶ This is precisely the framing of petitioner Acheson Hotels' brief to the Court.²⁹⁷ In Acheson Hotels' telling, Laufer is part of "[a] cottage industry . . . in which uninjured plaintiffs lob ADA lawsuits of questionable merit, while using the threat of attorney's fees to extract settlement payments." Acheson Hotels also suggests that the most notable results of such efforts have not been to vindicate the ADA's purposes, but rather to "burden[] small businesses, clog[] the

295. See Jasmine Harris & Karen Tani, *Debunking Disability Enforcement Myths*, REGUL. REV. (Oct. 5, 2021), <https://www.theregreview.org/2021/10/25/harris-tani-debunking-disability-enforcement-myths> [<https://perma.cc/S78F-KQDS>] (explaining how the ADA encourages private enforcement and debunking common misperceptions). Notably, the ADA has also been interpreted to mean that "a person with a disability" need not "engage in a futile gesture if the person has actual notice that a person or organization covered by Title III of the Act or this part does not intend to comply with its provisions." 28 C.F.R. § 36.501.

296. See, e.g., Lauren Markham, *The Man Who Filed More Than 180 Disability Lawsuits: Is It Profiteering—or Justice?*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html> [<https://perma.cc/Q4WJ-JNM7>]; Amy Yee, *U.S. Businesses Get Hit with Record Numbers of Disability Lawsuits*, BLOOMBERG (Apr. 14, 2022, 8:48 AM), <https://www.bloomberg.com/news/articles/2022-04-14/u-s-small-businesses-get-hit-with-record-numbers-of-disability-lawsuits#xj4y7vzkg> [<https://perma.cc/GFT4-A84S>]; *What's a "Drive-by Lawsuit"?*, CBS NEWS (Dec. 4, 2016, 7:04 PM), <https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper> [<https://perma.cc/DB9W-KPV5>].

297. In the words of petitioner's brief, it is "the Attorney General" who "has authority to investigate alleged violations, undertake compliance reviews, and file suit to enforce the ADA and its implementing regulations," but Laufer "has decided to take matters into her own hands." The brief goes on to note that "Laufer has filed over 600 federal lawsuits against hotel owners and operators, alleging that their websites are insufficiently clear about whether the hotels are accessible to persons with disabilities." The brief also alleges unfair targeting on Laufer's part: "Laufer's lawsuits typically target small hotels and bed-and-breakfasts," who feel "forced to settle" rather than pay the full costs of litigating the case and potentially a fee award. Petition for a Writ of Certiorari at 3–4, *Acheson Hotels, LLC v. Laufer*, No. 22-429 (U.S. Mar. 27, 2023). [hereinafter *Acheson Cert Petition*].

judicial system, and undermine[] the Executive Branch’s exclusive authority to enforce federal law.”²⁹⁸

Laufer, for her part, characterizes “testers” such as herself as simply bringing to light longstanding discriminatory practices of public accommodations, as well as a class of businesses that has affirmatively chosen to wait to be sued rather than comply with the clear mandates of a now decades-old law.²⁹⁹ Laufer also notes that without “testers,” the ADA would go radically underenforced, because of the law’s lack of allowance for damage awards.³⁰⁰

At the time of this writing, the grant of certiorari in this case is a recent development and the disability community is just beginning to mobilize in response. If the cases above are instructive, we can expect significant legal and grassroots advocacy in opposition to the petitioners’ arguments, but also strong support and mobilization from the business community for the respondent.³⁰¹

298. *Acheson* Cert Petition *supra* note 297, at 5; *see also* Harris & Tani, *Debunking Disability Enforcement Myths*, *supra* note 295.

299. *Acheson* Brief in Opposition, *supra* note 287, at 7 (noting that “very few [of the entities making arguments in support of the Petitioner’s] have ever complied with the ADA voluntarily,” instead waiting to be sued and coming into compliance “only on a lawsuit-by-lawsuit basis”). The arguments that the petitioner advances in this case—“portraying ADA plaintiffs as a nuisance”—are also part of this business model, Laufer alleges. *Id.*

300. *Id.* at 8 (“Although tens of millions of disabled Americans visit places of public accommodation or attempt to book rooms at hotels and all suffer the same discriminatory barriers, the ADA does not provide for any award of damages. It is for this reason that the ADA is enforced by only a small handful of plaintiff advocates.”).

301. *See* Brief of *Amici Curiae* Restaurant Law Center et. al. in Support of Petitioner, *Acheson Hotels, LLC v. Laufer*, No. 22-429 (U.S. Mar. 27, 2023), https://www.supremecourt.gov/DocketPDF/22/22-429/249490/20221208141935477_Acheson%20Brief%20of%20Amici%20RLC%20et%20al.pdf [https://perma.cc/GP6A-ER82]; Brief of Retail Litigation Center, Inc. and National Retail Federation as *Amici Curiae* Supporting Petitioner, *Acheson*, No. 22-429 (U.S. Mar. 27, 2023), https://www.supremecourt.gov/DocketPDF/22/22-429/249474/20221208131136325_Acheson%20Hotels%20LLC%20v.%20Laufer%20RLC%20and%20NRF%20Amicus%20Brief%20FILE.pdf [https://perma.cc/2SGS-KRES]; Brief of the Chamber of Commerce of the United States of America et. al. as *Amici Curiae* in Support of Petitioner, *Acheson*, 143 S. Ct. 1053 (No. 22-429), https://www.supremecourt.gov/DocketPDF/22/22-429/249479/20221208133532834_Laufer%20Amicus%20final.pdf [https://perma.cc/RNL5-6AV5]; Brief *Amicus Curiae* on Behalf of DRI Center for

What awaits to be seen is whether the broader public will take note, following the lessons we have tried to impart in this Article. As we have demonstrated, the “disability docket” matters for disabled people seeking access, inclusion, and remedies for harm, but it also has wider implications. Even a brisk and selective review of the Supreme Court’s recent output shows how central the concept of disability is to the current legal landscape, including the way the law distributes resources, conceives of equality (and harm), and structures social relationships. How might this landscape have been different had the disability lens been a more prominent part of our evaluative and analytical toolkit in previous decades? And how might the landscape change if scholars, lawyers, litigants, and public commentators (outside of the disability space) are willing to apply this lens in the future?

Law and Public Policy in Support of Petitioner, *Acheson*, No. 22-429 (U.S. Mar. 27, 2023), https://www.supremecourt.gov/DocketPDF/22/22-429/249542/20221208174247206_43179%20pdf%20Spencer.pdf [https://perma.cc/3ATC-VZPB].