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22-638

No. _____

In The
Supreme Court of the United States

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

MARY LA RICCIA and TRAVIS HORN,

Petitioners,

v.

THE CLEVELAND CLINIC FOUNDATION,
EMAD ESTEMALIK, ALICIA RICHARDSON,
ANDRE MACHADO, HUBERT FERNANDEZ,
and RAJ SINDWANI,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the restrictions placed on employees under Title I of the ADA be applied to an individual seeking medical care and treatment under Title III?
2. Are the tone, nature and content of a mentally disabled individuals' digital communications with their physician regarding their disability produced and/or affected by their disability?
3. Does Ohio law permit an individual's doctor-patient relationship to be terminated by third parties?

STATEMENT OF RELATED CASES

La Riccia, et al. v. Cleveland Clinic Foundation, et al.,
No. 1:21 CV 1291, U.S. District Court for the Northern
District of Ohio, Judgement entered Oct. 15, 2021.

La Riccia, et al. v. Cleveland Clinic Foundation, et al.,
No. 21-3990, U.S. Court of Appeals for the Sixth Cir-
cuit, Judgement entered August 24, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Mary La Riccia and Travis Horn respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and has not yet been printed in the Federal Appendix, but can be found at No. 21-3990 – Document 40, 6th Cir., 8/24/2022. The opinion of the district court has not yet been assigned a federal ID but can be found by its Westlaw ID, 2021 WL 4819878. It can also be found at No. 1:2021cv01291 – Document 37, N.D. Ohio, 10/15/2021.

JURISDICTION

The judgment of the appeals court was entered on August 24, 2022. A timely petition for rehearing en banc was filed on 9/6/2022, but no decision was issued. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS

42 U.S.C. Section 12182

Section 12182, Title 42 of the United States Code provides:

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or

class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(3) Specific construction

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations

of such entity where such individual poses a direct threat to the health or safety of others. The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

42 U.S.C. Section 12203

Section 12203, Title 42 of the United States Code provides:

(b) **Interference, coercion, or intimidation**

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

28 C.F.R. Part 36

Part 36, Title 28 of the Codified Federal Rules provides:

§ 36.206

(b) **No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided**

or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

(C) Illustrations of conduct prohibited by this section include, but are not limited to:

- (1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part;
- (2) Threatening, intimidating, or interfering with an individual with a disability who is seeking to obtain or use the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation;
- (3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or
- (4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

§ 36.302

(b) *Specialties* –

(1) *General.* A public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring

public accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

(2) *Illustration – medical specialties.* A health care provider may refer an individual with a disability to another provider, if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services. A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition, but is not required to treat the individual for a different condition. (Italicized in original)

§ 36.101

Purpose and broad coverage.

(a) **Purpose.** The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181–12189), **as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008))**, which prohibits discrimination on the basis of disability by **covered** public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the

accessibility standards established by this part.

(b) Broad coverage. The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of "disability" under this part should not demand extensive analysis. (Boldface in original)

§ 36.104

Definitions.

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services, as provided in § 36.208. (Italicized in original)

O.R.C. Chapter 4112

Section 4112.02, Chapter 4112 of the Ohio Revised Code provides:

It shall be an unlawful discriminatory practice:

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

O.R.C. Chapter 1701

Section 1701.03, Chapter 1701 of the Ohio Revised Code provides:

(D) No corporation formed for the purpose of providing a combination of the professional services, as defined in section 1785.01 of the Revised Code, of optometrists authorized under Chapter 4725. Of the Revised Code, chiropractors authorized under Chapter 4734. Of the Revised Code to practice chiropractic or acupuncture, psychologists authorized under Chapter 4732. Of the Revised Code, registered or licensed practical nurses authorized under Chapter 4723. Of the Revised Code, pharmacists authorized under Chapter 4729. Of the Revised Code, physical therapists authorized

under sections 4755.40 to 4755.56 of the Revised Code, occupational therapists authorized under sections 4755.04 to 4755.13 of the Revised Code, mechanotherapists authorized under section 4731.151 of the Revised Code, doctors of medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery authorized under Chapter 4731. Of the Revised Code, and licensed professional clinical counselors, licensed professional counselors, independent social workers, social workers, independent marriage and family therapists, or marriage and family therapists authorized under Chapter 4757. Of the Revised Code shall control the professional clinical judgment exercised within accepted and prevailing standards of practice of a licensed, certificated, or otherwise legally authorized optometrist, chiropractor, chiropractor practicing acupuncture through the state chiropractic board, psychologist, nurse, pharmacist, physical therapist, occupational therapist, mechanotherapist, doctor of medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery, licensed professional clinical counselor, licensed professional counselor, independent social worker, social worker, independent marriage and family therapist, or marriage and family therapist in rendering care, treatment, or professional advice to an individual patient.

Amendment XIV to the United States Constitution

The Fourteenth Amendment provides:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mary La Riccia (Ms. La Riccia) was found mentally disabled by the Social Security Administration in 1996. In late 2019, she began suffering from a rare neurological condition called Mal de Debarquement Syndrome (MdDS), which was formally identified as a condition in 1987 and is recognized by both the National Organization for Rare Diseases and the National Institute of Health's Genetic and Rare Diseases Information Center. The diagnosis, care and treatment of MdDS requires the expertise of an incredibly rare subspecialty of neurology called otoneurology, which specifically addresses conditions involving the connection between the brain and the balance centers of the ears and was

created by the neurologists who formally identified MdDS specifically to treat it and other related conditions.

In April, 2020, after seeking treatment from several different specialties, Ms. La Riccia established a doctor-patient relationship with Dr. Neil Cherian (Dr. Cherian), the only practicing otoneurologist in the northern half of Ohio and one of only two in the state, who diagnosed her with MdDS and believed she also suffered from several other related conditions. Dr. Cherian recognized the symptoms and effects of Ms. La Riccia's mental illness and told her, in writing, that her physical conditions would not improve unless she addressed her mental health issues and past traumas. He then went on to discuss various aspects of her mental health with her, including a past kidnapping and sexual assault she had endured, for the next six months over Cleveland Clinic Foundation's (CCF) electronic records system, known as MyChart.

In October, 2020, the messages between Ms. La Riccia and Dr. Cherian were discovered by a nurse, who reported the communications to their superior, Emad Estemalik (Estemalik). Estemalik proceeded to terminate Ms. La Riccia's doctor-patient relationship with Dr. Cherian on the sole grounds that her messages to Dr. Cherian were inappropriate to have been sent over MyChart. In July, 2021, Ms. La Riccia and her husband, Travis Horn (Mr. Horn) brought suit in the United States District Court for the Northern District of Ohio, which was dismissed on October 15, 2021, on the court's sole finding that Ms. La Riccia is not

mentally disabled because she has Mal de Debarquement Syndrome. On October 27, 2021, Ms. La Riccia and Mr. Horn filed an appeal with the United States Court of Appeals for the Sixth Circuit. On August 24, 2021, the circuit court affirmed the district court's judgment. On September 6, 2021, Ms. La Riccia and Mr. Horn filed a petition for rehearing en banc, but no decision was issued.

REASONS FOR GRANTING THE PETITION

A. The district and circuit courts' decisions conflict with Title III of the ADA.

CCF's core defenses are: (1) The ADA allows an employee to be terminated, even if their offense is the product of a disability, if it is justifiable by business necessity; and (2) The ADA allows that an employee may be moved to a lesser position as an accommodation if it can be justified by business necessity. Both of these provisions are established under Title I, and cannot be reasonably applied to a claim regarding medical care under 42 U.S.C. § 12182 of Title III. CCF also cites what they call a "threatening" letter, and several other events, but all of the events cited occurred after the termination of Ms. La Riccia's doctor-patient relationship and, therefore, cannot be considered as causal. In addition, none of the events cited meet the statutorily established definition of a "direct threat" under both 42 U.S.C. § 12182 and 28 C.F.R. § 36.104 of Title III. Furthermore, as Dr. Cherian is the only practicing

otoneurologist available to Ms. La Riccia, CCF denying her access to his care is a discriminatory act under 28 C.F.R. § 36.302 of Title III.

B. The district and circuit courts' decisions conflict with Title V of the ADA.

Both courts dismissed Ms. La Riccia's claim under Title V on the finding that she cannot claim retaliation because she had not filed a complaint against CCF with a state agency prior to the termination of her doctor-patient relationship. Both courts fail to consider the fact that Dr. Cherian initiated the communications between himself and Ms. La Riccia for the specific purpose of addressing her mental health as part of her treatment, which qualifies these communications as a reasonable accommodation provided by Dr. Cherian under Title III. CCF's punitive actions against Ms. La Riccia because of her utilization of this accommodation is considered a discriminatory act under 42 U.S.C. § 12203 of Title V.

C. The district and circuit courts' decisions conflict with This Court's previous decisions.

Both courts have accepted that Ms. La Riccia's claim that CCF has denied her the full enjoyment of the services they provide because of her disability should be dismissed because the courts do not believe that her allegations are true, where This Court has held that, upon a motion to dismiss, the court must

accept the plaintiff's allegations as true as interpret the facts of the case in the light most favorable to the plaintiff. *Bell Atlantic Corp. v. Twombly*, 550 US 544 – Supreme Court 2007. This Court has also held that a complaint cannot be dismissed for failure to present a claim unless it involves things sufficiently fantastical to be impossible, such as time travel and little green men. *Ashcroft v. Iqbal*, 556 US 662 – Supreme Court 2009.

Both courts have accepted CCF's assertion that Ms. La Riccia was not terminated from care because of her disability, but because of behavior they deemed inappropriate despite the fact that this behavior was a product of her disability, where The Court has held that the symptoms and effects of an illness cannot be distinguished from the illness itself, particularly for punitive purposes. *School Bd. of Nassau Cty. v. Arline*, 480 US 273 – Supreme Court 1987.

Both courts have accepted CCF's assertion that their policy of punishing individuals for "inappropriate" behavior whether or not the behavior is the product of a disability cannot be discriminatory because it is facially neutral, where This Court has held that a protected trait does not have to be the sole, or even motivating factor behind an act or policy for that act or policy to be discriminatory, and that a facially neutral policy can have a discriminatory impact regardless of its intent. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 – Supreme Court 2020.

Both courts have accepted that simple communications meet the requirements of a direct threat, where This Court has held that even treating an HIV-positive patient does not pose a direct threat because it can be mitigated by accommodation. *Bragdon v. Abbott*, 524 US 624 – Supreme Court 1998.

Both courts have accepted CCF's assertion that providing a referral to a physician of a different specialty who practices in a different location, and who does not provide the care and treatment Ms. La Riccia requires, meets the standard of a reasonable accommodation under Title III, where This Court has held that a reasonable accommodation must be effective in addressing the needs of the disabled individual. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516 (2002).

This Court has held that only they have the right to reverse or contradict their decisions. *Bosse v. Oklahoma*, 137 S. Ct. 1 – Supreme Court 2016.

D. The district and circuit courts' decisions conflict with Ohio law.

CCF asserts that they may lawfully punish a disabled individual for behavior that is the product of their disability based solely on the claim that they would punish a non disabled individual for the same behavior. This cannot be said to be within the legislative purpose behind the language of O.R.C. 4112.02(G). Further, both the district and circuit courts accepted CCF's third-party termination of my doctor-patient

relationship as lawful in direct defiance of O.R.C. 1701.03(D), which is supported by precedent. *Hammonds v. Aetna Casualty & Surety Company*, 237 F. Supp. 96 – Dist. Court, ND Ohio 1965.

E. The question is important.

Allowing a hospital to deny an individual medical care because they find the products of that individual's mental illness offensive puts all mentally disabled individuals at risk and directly opposes the legislative purpose behind the enactment of the ADA.

F. The question is an issue of first impression.

Title III of the ADA has never been considered with regard to the MyChart system, which was created in 2005 and implemented by CCF in 2007, and is utilized by an unknown number of mentally disabled individuals. This case also involves a circumstance where there is only one physician available to treat a patient, and the third-party termination of a contractual doctor-patient relationship, both of which are such exceedingly rare occurrences that they have not been addressed by This Court.

G. The district and circuit courts' decisions violate the Fourteenth Amendment.

Both courts have denied Ms. La Riccia and Mr. Horn their constitutional rights to due process by denying them the jury trial they have demanded, and

denied them the equal protection of the law by issuing decisions that defy the law.

CONCLUSION

The opinions of the district and circuit courts lie in direct opposition to every applicable state and federal statute, and multiple opinions held by This Court, and must not be allowed to stand. Therefore, the petition should be granted.

Respectfully submitted,

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