No. 22-638

In The

Supreme Court of the United States

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 REHEARING

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PETITION FOR REHEARING

Petitioners Mary La Riccia and Travis Horn petition for rehearing of This Court's March 6, 2023 Order denying their petition for a writ of certiorari.

REASONS FOR GRANTING REHEARING

I. The issue presented is wide-reaching and a case of first impression.

a. Statistics of Americans living with mental disabilities.

The National Institute of Health reports that nearly 20% of adults in the U.S. live with a mental illness,[1] and the Centers for Disease Control and Prevention presents that just under 11% of U.S. adults suffer from a cognitive disability.[2] The percentage of children with a disability in the United States increased from 3.9% to 4.3% from 2008 and 2019, with the most common type of disability among children 5 years and older in 2019 being cognitive difficulty.[3] 2022 estimates by the Centers for Disease Control and Prevention indicated that roughly 17% of children age 3 through 17 years have one or more developmental disabilities, which includes conditions caused by an

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[1] https://www.nimh.nih.gov/health/statistics/mental-illness.

[2] https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html#:~:text=10.9%20percent%20of%20U.S.%20adults,or%20have%20serious%20difficulty%20hearing.

[3] https://www.census.gov/library/publications/2021/acs/acsbr-006.html.

impairment in learning, language, or behavior areas.[4] According to 2022 census numbers, this equates to approximately 80 million adults and as many as 12.5 million children in the U.S. living with psychiatric, cognitive or developmental disabilities, which adds up to over 25% of the total population.[5] This is almost four times the number of people affected by President Biden's student loan forgiveness.[6] The Epic MyChart system contains over 250 million patient charts, representing patients from all 50 states.[7] It is used by every major hospital system in this country, making it very likely that all of the over 90 million mentally disabled individuals in the U.S. are included in the Epic MyChart system. Therefore, the application of the ADA to the Epic MyChart system, and, specifically, to the MyChart patient portal, has the potential to adversely affect literally every one of these individuals.

b. No court has addressed the application of the ADA to the MyChart patient portal.

The MyChart patient portal ("MyChart") was created in 2005 and only became available for widespread use in 2007.[8] This is a full decade and a half after the

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[4] https://www.cdc.gov/ncbddd/developmentaldisabilities/about.html.

[5] https://www.census.gov/quickfacts/fact/table/US/PST045222.

[6] https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/03/by-the-numbers-millions-of-americans-student-loan-costs-will-rise-dramatically-under-republican-officials-plans/.

[7] https://www.mychart.org/About.

[8] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5820458/.

ADA was enacted, and neither the original text of the Act nor congress's subsequent amendments address communications systems such as MyChart. To date, no court has ever issued a decision regarding the appropriate application of Title III to MyChart. The need for a decision on this issue is made even more critical, as MyChart has become the preferred method of many health care providers for communicating with their patients. CCF, in particular, has made it much easier and more time effective for patients to contact their providers over MyChart than on the phone. In addition, CCF has recently begun charging for the use of MyChart and now bills the patient, or their insurance company, for messages the patient sends their providers, making MyChart no longer a free communication tool, but a paid service offered by the hospital. Many disabled individuals receive their health insurance through Medicaid, which means that the messages sent by these disabled individuals will be paid for with taxpayer money. Therefore, it is vital that it be established whether the messages a mentally disabled patient sends their doctor over MyChart, particularly messages discussing or relating to the mental health issues underlying the patient's disability, are considered to be a product of the patient's disability under Title III.

II. The Sixth Circuit's decision misinterprets the ADA to the direct detriment of those it was enacted to protect.

a. The Sixth Circuit's decision inappropriately applies employment restrictions set forth under Title I to a claim involving a place of public accommodation brought under Title III.

The separation of Title I and Title III is apparent by the simple fact that they are written as separate Titles, and bolstered by the fact that violations of these two titles are enforced by the Equal Employment Opportunity Commission and the Civil Rights Division of the U.S. Department of Justice, respectively, which are separate and distinct federal agencies.

The Sixth Circuit accepted the argument that the termination of Ms. La Riccia's doctor-patient relationship and the subsequent denial of care were not discriminatory because CCF's policy appears facially neutral, but this argument is taken directly from Title I, as explained by the EEOC:

"Must an employer withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity?

No. An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or

destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability."[9]

This entire argument is dependent on an employee's conduct being "job-related" and the employee violating a policy that is "consistent with business necessity," neither of which are included in or relevant to Title III. CCF has also made no showing whatsoever that Ms. La Riccia has perpetrated or threatened any violence toward anyone, nor that she has stolen or destroyed any property.

The Sixth Circuit also accepted the argument that Ms. La Riccia's removal from medical care was not discriminatory, in part, because her care was allegedly transitioned to another physician. This argument, however, is also taken directly from the provisions of Title I:

"The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation.(76) This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship."[10]

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[9] https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#other.

[10] ID

There is no comparable provision under Title III. There are also no qualifications to be met for receiving health care, as there are with employment, and the only essential function required of a medical patient is that they be in need of the care and treatment they are seeking.

b. The Sixth Circuit's decision erroneously holds that a referral to a physician who is unqualified to provide the required care constitutes a reasonable accommodation under Title III.

The Sixth Circuit accepted that the denial of care to Ms. La Riccia is not discriminatory because she is only barred from receiving care from Dr. Neil Cherian and is free to receive care from "other physicians," but the only alternative physician suggested is Dr. Julia Bucklan, whose office staff stated on a recorded phone call that was presented to the Sixth Circuit that Dr. Bucklan does not have the training required to provide treatment for Ms. La Riccia's conditions. The reassignment of an employee to a lower-level position is a far cry from forcing a medical patient to receive care from an unqualified provider, and applying this standard to Title III is not only discriminatory, but potentially lethal to patients.

c. The Sixth Circuit's decision ignores the statutory definition of "direct threat" as established under Title III.

The Sixth Circuit accepted that various events that occurred after Ms. La Riccia was removed from care, including a number of communications sent to Dr. Cherian by a third party, legal correspondence sent to Dr. Cherian by the Petitioners, and a 13-minute phone conversation between Dr. Cherian and Ms. La Riccia, constitute a direct threat, but failed to illustrate any actual threat contained therein. The term "direct threat" is not open to subjective interpretation, but statutorily defined by both 42 U.S.C. § 12182(3) and 28 C.F.R. § 36.104 as "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." None of the events cited meet this definition and, even if a legitimate threat did exist, there is no evidence that any effort was made to mitigate said threat prior to removing Ms. La Riccia from care.

d. The Sixth Circuit's decision ignores the statutory definition of "undue burden" as established under Title III.

The Sixth Circuit accepted the argument that it would be unfair to force Dr. Cherian to treat Ms. La Riccia because third parties feel that she was rude to him during their communications over MyChart, and because she shared personal details about her life and marriage with him. It cannot be overlooked, however,

that: (a) Dr. Cherian initiated the MyChart conversations for the express purpose of addressing Ms. La Riccia's mental health as what he claimed was an integral part of her treatment, and did not raise significant objection to any of the comments presented by CCF; (b) Dr. Cherian did not terminate Ms. La Riccia as his patient, but continued the doctor-patient relationship and the MyChart communications until they were both interrupted by third parties; and (c) the term "undue burden" is also not open to subjective interpretation, but statutorily defined by 28 C.F.R. § 36.104 as "significant difficulty or expense." The statute goes on to list the factors to be considered in determining an undue burden, all of which speak of monetary costs and the effect an accommodation would have on the operation of a business, and makes no reference to any party's personal feelings. Furthermore, as Ms. La Riccia's removal from Dr. Cherian's care was discriminatory, her return to his care does not constitute an accommodation, but the legally prescribed remedy for this offense. 28 C.F.R. § 36.302(b)(2) clearly states that "A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition." Dr. Cherian's subspecialty of otoneurology was only created in the early 1990's after Ms. La Riccia's condition was officially recognized and named. It is indisputable that he specializes in treating exactly the conditions with which he himself has diagnosed her. Therefore, the denial of his care is a violation of this code and, as such, is to be considered under Title III as a discriminatory act in

and of itself, regardless of her actions or the surrounding circumstances.

e. The Sixth Circuit's decision ignores the statutory definition of "disability" as established under Title III.

The U.S. District Court's dismissal of the Petitioners' original Complaint was predicated on the assertion that the federal court did not have jurisdiction over the Complaint because Ms. La Riccia's physical condition does not qualify her as an individual with a disability and, therefore, no federal question was presented. Ms. La Riccia's disability, however, is psychological, not physical, and is substantiated by an official document from the U.S. Social Security Administration, which firmly and unequivocally fulfils the requirements of 42 U.S.C. § 12102(1). Furthermore, 28 C.F.R. § 36.101(b) clearly states Congress' intentions with regard to both the ADA's original enactment and their amendments to it: "**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." (Boldfaced in original) The District Court's warped misrepresentation of Ms. La Riccia's disability goes directly against both the actual text of Title III and Congress's stated intended purpose in its enactment, and should alone have been sufficient for the Sixth Circuit to reverse the District's decision.

III. The Sixth Circuit's decision conflicts with a new decision from the 8th District Court of Appeals.

The 6th Circuit accepted the argument that CCF's denial of care to Ms. La Riccia was not discriminatory because CCF, specifically Dr. Cherian's immediate superior, determined that the content of her MyChart communications with Dr. Cherian was "inappropriate." However, on March 23rd, 2023, the Court of Appeals for the 8th District of Ohio held that expert testimony was required to determine whether or not Ms. La Riccia was responsible for the content of the messages in question (*Horn v. Cherian*, 2023-Ohio-931, ¶39), accepting the arguments that many patients engage in casual conversation with their doctor over MyChart, and that it would be impossible for a layman to know what would be inappropriate for MyChart or what behavior could get them removed from care unless they were given this information by their doctor or

another hospital administrator, as Dr. Cherian's counsel argued both in his appellee brief and during oral argument before the court. CCF can make no showing that Dr. Cherian ever gave Ms. La Riccia any such warning. CCF has cited three messages in which they claim Dr. Cherian did tell her that the content of her messages was inappropriate, but we have shown that these comments were made with regard to specific messages from Ms. La Riccia, and that Dr. Cherian willingly continued both the doctor-patient relationship and the MyChart communications following each of the cited statements. Moreover, we have shown by Dr. Cherian's own words that he not only initiated the communications for the specific purpose of addressing Ms. La Riccia's mental health as part of her treatment, but actively encouraged and participated in them.

The 8th District's decision carries particular weight, despite being a state court, because of the 6th Circuit's decision in *Galivan*, where the court held that Ohio Civ. R. 10(D)(2) does not apply to claims brought in the federal court. *Gallivan v. United States*, No. 18-3874 (6th Cir. 2019). Because of this, the 6th Circuit never considered whether or not Ms. La Riccia was able to determine if her messages were appropriate, nor whether she was aware that she could face any adverse action because of them. By the 8th District's decision, unless CCF can show that Dr. Cherian told Ms. La Riccia that the content of her messages was inappropriate for MyChart, that her messages to him over MyChart were visible to anyone other than him, or that she could be removed from care because of the

content of her MyChart messages, she can not be held liable, much less punished, for them, and especially not by the denial of heath care.

IV. This case involves a situation where there is only one qualified physician physically available to the patient.

Dr. Cherian is not simply a neurologist, he is an otoneurologist, which is a very important distinction. He is certified not only in neurology, but in otology, as well, and is one of approximately twelve physicians currently practicing in the U.S. who bears these credentials. He is also currently the only physician practicing not only at CCF, but in the entire state of Ohio who bears these credentials, which is corroborated by both the recorded phone call with Dr. Bucklan's office and CCF's own website. This makes him solely and uniquely qualified to treat Ms. La Riccia. Ms. La Riccia's conditions are otoneurological, which means they involve and affect both her brain and the balance centers of the inner ears, and their treatment requires expertise in otology as well as neurology. Every other specialist she has consulted with, both at CCF and elsewhere, has referred her either to Dr. Cherian specifically or to otoneurology in general. CCF is not denying Ms. La Riccia access to care and treatment from one physician of many, as they claim. Because Dr. Cherian is CCF's only practicing otoneurologist, CCF is, in fact denying her access to their entire otoneurological department, as well as the only otoneurologist in the entire state. The Sixth Circuit's opinion that

Ms. La Riccia has not been harmed because she may still see other physicians completely fails to take into account the fact that none of the other physicians are qualified to treat her.

CONCLUSION

Mary La Riccia has been denied medical treatment from the only available specialist for over two years because third parties at the hospital found the content of only Ms. La Riccia's side of the psychotherapeutic conversations initiated by the specialist to be "inappropriate." This sets an incredibly dangerous precedent that allows for psychiatrically, cognitively and developmentally disabled individuals to be denied access to the goods and services of places of public accommodation, including health care, directly because of the way their disabilities affect their communications and behavior. Furthermore, CCF is not merely a place of public accommodation, but the number two ranked hospital system in the world, and receives a substantial amount of federal funding specifically to treat individuals with disabilities. The prevention of the dismissive and abusive treatment Ms. La Riccia has received from CCF is the precise reason Congress enacted the ADA, and decisions like the Sixth Circuit's are exactly why they amended it. The Sixth Circuit's decision effectively negates Title III of the ADA in its entirety. It represents a serious threat to each and every man, woman and child living with a mental disability in this country and must not be allowed to

stand. Though This Court has issued many decisions regarding discrimination, these decisions overwhelmingly address racial and/or gender issues. There are precious few decisions by This Court concerning the interpretation of the ADA, and even fewer specifically pertaining to Title III, which allows the lower courts to misinterpret and misapply this statute to the direct detriment of those it was enacted to protect. For all these reasons, and the reasons set forth in the original petition, This Court should rehear the petition, grant a writ of certiorari, and reverse the Sixth Circuit's decision.

Respectfully submitted,

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CERTIFICATE OF PETITIONERS

We, the petitioners, hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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