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No. 22-638

Supreme Court, U.S.
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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

**Emergency Application To Justice Kavanaugh
For Writ Of Injunction**

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**To The Honorable Brett Kavanaugh, Associate Justice of the Supreme Court, and
Circuit Justice For The Sixth Circuit:**

Pursuant to Supreme Court Rules 20 and 22, and 28 U.S.C. § 1651, Applicants respectfully request an immediate, emergency writ of injunction to restrain the Cleveland Clinic Foundation, both organizationally and by and through its employees, agents and representatives, from denying Mary La Riccia access to specialty medical care in direct opposition to 42 U.S.C. § 12182 and 28 C.F.R. Part 36, and to bar any employee, agent or representative of the Cleveland Clinic Foundation from accessing or sharing any part of Ms. La Riccia's medical records without Ms. La Riccia's express prior consent, until such time as this Court has issued its final decision in this matter.

DECISIONS BELOW

The circuit court's order denying Applicants' requested injunctive relief can be found at No. 21-3990 – Document 23-2, 6th Cir., 01/04/2022.

JURISDICTION

The judgement of the appeals court was entered on August 24, 2022. A timely filed petition for rehearing en banc was denied on 12/5/2022. A timely filed petition for certiorari was denied on 3/6/2023, a petition for rehearing was timely filed on 3/31/2023 in accordance with Rule 44. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the public accommodations provisions set forth under both 42 U.S.C. § 12182 and 28 C.F.R. Part 36, as well as the Equal Protection Clause provided under the Fourteenth Amendment.

FACTUAL AND PROCEDURAL BACKGROUND

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 state of Ohio, who diagnosed her with MdDS, PPPD and vestibular migraine, and believed she also suffers from several other related conditions. Dr. Cherian recognized the symptoms and effects of

Ms. La Riccia's mental illness and how they were impeding and interfering with her ability to recover and therefore, 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, 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 erroneous 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, 2022, the circuit court inappropriately affirmed the district court's judgement. On September 6, 2022, Ms. La Riccia and Mr. Horn filed a petition for rehearing en banc, which was denied on December 5, 2023, 11 days after they had filed a petition for certiorari before this Court. The petition for certiorari

was denied on March 6, 2023 and a petition for rehearing was filed on March 31, 2023.

ARGUMENT

The standard for issuing an injunction under the All Writs Act, 28 U.S.C. § 1651(a), mirrors the four-part test for deciding whether a preliminary injunction should issue:

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 US 7 - Supreme Court 2008. Each of these factors favors immediate injunctive relief.

I. Applicants should have a strong likelihood of success according to the text of Title III and this Court’s previous decisions.

a. The defenses accepted by the Sixth Circuit are not applicable to this case.

The Sixth Circuit accepted that CCF’s actions were not discriminatory because CCF claimed that they would punish anyone who sent inappropriate messages over MyChart, regardless of disability, and because they claimed to have referred Ms. La Riccia to another doctor. These defenses are based on the principle that it is acceptable to discipline a disabled employee for conduct that is the product

of their disability if a nondisabled employee would be punished for the same conduct, which is predicated on the conduct in question being both “job-related” and “relating to business necessity”, and the concept of “reassignment to a vacant position” as a reasonable accommodation, respectively. Both of these defenses are offered under the employment provisions of Title I and are, by their very nature, inapplicable to claims involving places of public accommodation brought under Title III, and particularly to claims involving medical care.

CCF's defenses are also factually inaccurate. CCF's claim that their policy is facially neutral is untrue, as Dr. Cherian was not only an active and equal participant, both in quantity and content, to the communications deemed objectionable by CCF, but the fiduciary in the doctor-patient relationship, yet only Ms. La Riccia has been punished as a result of these messages, while Dr. Cherian has remained employed by CCF without interruption since she was removed from his care in October, 2020. Furthermore, the termination letter sent to Ms. La Riccia by CCF directed her to the emergency department for care until she could find herself a new doctor. This is what the Sixth Circuit has accepted as a reasonable accommodation. The physician referral cited by CCF was offered begrudgingly, and only after the Applicants' repeated insistence that the emergency room can not provide specialty medical care. This “referral” did not occur until over a month after Ms. La Riccia was removed from Dr. Cherian's care, during which time, she was in the midst of an acute vestibular crisis and experiencing severe vertigo, nausea and vomiting, etc. Moreover, the office of the physician she was referred to stated

unequivocally on a recorded phone call, which was presented to both the district and circuit courts, that that physician is unqualified to administer care for her conditions and that she needs to see Dr. Cherian because he is the only one at CCF who is qualified to treat her. Ms. La Riccia has also been referred either to Dr. Cherian directly, or to an otoneurologist in general, by every other specialist she has seen both at CCF and elsewhere, because her conditions are complex and none of these specialists were comfortable attempting to treat her.

b. Title III prohibits discrimination on the basis of disability.

42 U.S.C. § 12182(a) states that “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.” CCF states that Ms. La Riccia was removed from care because the content of the MyChart messages she sent to her physician was considered “inappropriate”. They completely ignore, however, the fact that the physician to whom she sent the messages in question had directed her to send them for the specific purpose of addressing her underlying mental health issues. Applicants maintain that, because these messages were initiated and perpetuated for the specific purpose of addressing Ms. La Riccia’s mental disability, the messages are, therefore, a direct product of her disability, by which, CCF’s actions clearly violate this statute. The 6th Circuit’s decision fails to address this question.

c. Title III prohibits the denial of specialty medical care to an individual with a disability.

28 C.F.R. § 36.302(b)(2) states “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 credentials show that he is certified in both neurology and otology, and it is indisputable that he specializes in treating conditions involving both neurology and otology, including the specific conditions for which Ms. La Riccia sought treatment from him. Therefore, the act of denying Ms. La Riccia, an individual with a disability, access to Dr. Cherian for the treatment of conditions that not only fall within his specialty, but form the basis of it, is to be considered a discriminatory act under Title III.

d. The Sixth Circuit’s decision conflicts with multiple decisions made by this Court.

The Sixth Circuit 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 based on the district court’s erroneous conclusions regarding the legitimacy of her allegations, where this Court has held that, upon a motion to dismiss, the court must accept the plaintiff’s allegations as true and 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 can not 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.

The Sixth Circuit 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 this Court has held that the symptoms and effects of an illness can not be distinguished from the illness itself, particularly for punitive purposes. *School Bd. Of Nassau Cty. V. Arline*, 480 US 273 – Supreme Court 1987.

The Sixth Circuit accepted CCF's assertion that their policy of punishing individuals for "inappropriate" behavior whether or not the behavior is the product of a disability can not 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.

The Sixth Circuit 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.

The Sixth Circuit 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. Yet, the Sixth Circuit ignored all of these decisions when presented them.

II. Applicants have suffered, and continue to suffer, irreparable harm.

Ms. La Riccia has been denied access to the only practicing otoneurologist in the state for over 2 years, and the only justification is that third parties at CCF objected to the way her mental disability manifested during written conversations initiated by said otoneurologist to address her mental health. The Sixth Circuit agreed that she has suffered irreparable harm by this denial of medical care, but opined that there is no evidence that receiving treatment would alleviate her suffering. CCF argued that there is no definitive cure for MdDS and, therefore, there is no reason to treat her. These arguments are not only preposterous, but extremely dangerous. There are a vast number of serious health conditions that are largely incurable, including cancer, HIV, diabetes, Alzheimer's and Parkinson's disease. Yet, hundreds of millions of patients receive treatment for these conditions every day, primarily to manage the severity of their symptoms. By the Sixth Circuit's faulty logic, all of these individuals should be denied treatment because

treatment will not cure them, which can not be said to be lawful, moral or even rational.

Even if it were true that there is no cure for MdDS, this is not Ms. La Riccia's only condition. Dr. Cherian also diagnosed her with two other related otoneurological conditions and believed there may even be more at play, but, unfortunately, she was removed from his care before he could perform testing to confirm these additional diagnoses. Further, contrary to the arguments presented by CCF and accepted by the Sixth Circuit, Dr. Cherian assured Ms. La Riccia that there are, in fact, a number of treatments that could be employed to mitigate or alleviate her symptoms, including various medications and vestibular rehabilitation therapy, neither of which can be properly administered without the supervision of a trained otoneurologist. There is also an optokinetic treatment developed and still being researched at Mt. Sinai Hospital in New York, which has shown significant promise in lessening or completely reversing the effects of MdDS. At the time Ms. La Riccia was removed from his care, Dr. Cherian was planning an attempt to recreate the Mt. Sinai treatment with her, along with the assistance of one of his colleagues in CCF's audiology department. Had Ms. La Riccia been allowed access to these treatments over the last two years, there is a virtual certainty that her symptoms would have been relieved, in full or in part, today. This is the literal definition of irreparable harm.

Ms. La Riccia suffers from severe and near constant dizziness, vertigo, imbalance and an enhanced and/or altered sensation of gravity on a daily basis, and

often experiences feelings of rocking, bobbing and swaying as if on a boat on choppy seas, which leaves her feeling seasick even when just laying in bed. She also suffers visual and auditory dysfunction, which, if left unchecked, could result in irreversible damage, as well as many other frightening and debilitating symptoms. She has experienced both a worsening of her symptoms and the emergence of new symptoms since being removed from care, and is in desperate need of immediate medical evaluation and treatment. She has been largely bedridden since shortly after the onset of her condition, is unable to care for herself or perform basic tasks, and requires assistance for even the most basic of functions, such as eating and using the toilet. And she can not travel to another state to receive otoneurological care because a) MdDS is motion triggered and motion affected, which means that long trips may trigger a worsening of symptoms that could be permanent; and b) the cost of any out of state care would not be covered by her health insurance, and would constitute an incredible financial burden on Applicants, as well as being logistically unreasonable. Ms. La Riccia has also been unable to receive a Covid-19 vaccination throughout this global pandemic, where public health officials, including CCF themselves, are literally begging people to get them, because there is no way for her to know how it could affect her symptoms without consulting a trained otoneurologist. Applicants made a direct request, through CCF's counsel, for an accommodation whereby Ms. La Riccia may be given the information necessary to determine the risks involved with her receiving the vaccine, but received no response, which poses a significant risk to both Applicants' health.

In addition to Ms. La Riccia's physical suffering, both Applicants have also been forced to endure the psychological effects of the fact that her conversations with Dr. Cherian, which contain many intensely private and sensitive details about them and their life, are available on MyChart to be accessed and read by every employee at any hospital or medical center in the world that uses the Epic MyChart system. This has had a significant adverse effect on Mr. Horn, who is also a patient of CCF, but has been especially detrimental to Ms. La Riccia's already suffering mental health, as they can never know if any providers they see or may see in the future have read these messages, which the Applicants believed to be privileged and private between Ms. La Riccia and Dr. Cherian, and has greatly damaged both of their trust in the medical system as a whole. Upon a formal complaint by the Applicants, HHS issued a letter to CCF warning that, if Ms. La Riccia's allegations were substantiated, then CCF's handling of her records would constitute a HIPAA violation, and also provided CCF with additional training and instructional materials, yet, CCF has refused to secure these messages, without explanation, despite repeated requests by the Applicants that the personal information contained therein be protected.

III. The balance of equities clearly weighs in favor of the Petitioners.

Ms. La Riccia and Mr. Horn have been forced to endure the effects of Ms. La Riccia being denied access to medical care and treatment for her complex otoneurological conditions for over two years. The Respondents, on the other hand, have not, and will not, endure any harm whatsoever from simply allowing Ms. La

Riccia to receive the care she requires, and the only harm they have cited is the offense they took to the content of what Ms. La Riccia believed were private communications with her physician. There is no risk of Ms. La Riccia sending any further messages over MyChart which CCF may find “inappropriate”, as she is no longer able to send any messages to any physician at CCF, having been stripped of this ability by CCF following her removal from care. Furthermore, even if her ability to communicate over MyChart were to be restored, she is now well aware that the messages sent and received there are neither private nor secured, and, having endured all that she has because of her communications with Dr. Cherian, would have no desire to utilize MyChart for anything other than brief and specific medical questions, as it is intended. Therefore, it is completely unreasonable to continue to deny her the care she needs based on an assumption that she will continue to engage in psychotherapeutic conversations over MyChart.

IV. This case represents a tremendous public interest.

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, and the Centers for Disease Control and Prevention presents that just under 11% of U.S. adults suffer from a cognitive disability. The percentage of children with a disability in the United States increased from 3.9% to 4.3% from 2008 to 2019, with the most common type of disability among children 5 years and older in 2019 being cognitive difficulty. 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 impairment in learning, language, or behavior areas. 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. This is almost four times the number of people affected by President Biden's student loan forgiveness. The Epic MyChart system contains over 250 million patient charts, representing patients from all 50 states. 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 this 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. This is a full decade and a half after the ADA was enacted in 1990, and neither the original text of the Act nor the 2008 amendments address communication systems such as the patient portal. To date, no court has ever issued a decision regarding the appropriate application of the public accommodation provisions of the ADA to MyChart or similar systems, which, as stated above, likely are or will be utilized by every mentally disabled individual in the U.S at some point. 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, which makes 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 CCF could be actively discriminating against mentally disabled individuals for the content of messages that were paid for with taxpayer money. CCF also receives substantial federal funding under the express agreement that they will not discriminate.

CONCLUSION

The denial of medical care is never acceptable as a punishment, from the most vile and heinous of criminal offenders to prisoners of war. Even our Constitution, the most powerful authority in the land, supports this basic tenet of our society. Yet, Ms. La Riccia has suffered the denial of medical care for over two years because third parties objected to something her doctor directed her to do as a part of his treatment plan. Further, as the messages in question arose from and pertained to Ms. La Riccia's mental health issues, they must be considered a product of her long-standing mental disability. This makes CCF's actions a direct violation of Title III. CCF is not denying Ms. La Riccia access to one physician out of

many, as the Sixth Circuit accepted, but the only trained and practicing otoneurologist that she is physically able to access. Even if CCF had legitimate grounds to deny Ms. La Riccia access to Dr. Cherian's care, they must provide a reasonable accommodation that will allow her to continue to receive the otoneurological care that she needs, and that is available to every other CCF patient. For over two years, they have not only failed, but stalwartly refused to provide such an accommodation, and the courts have stood by and done nothing. This same injunctive relief was requested in the district and circuit courts. Applicants even showed the courts that Ms. La Riccia attempted to accommodate Dr. Cherian by offering more than once to communicate with him through a surrogate if he found her messages troublesome in any way, which he refused. Applicants also showed that she explained to Dr. Cherian, in writing, that her mental health issues dispose her to emotional outbursts and explicitly asked him to provide her with "a set of rules to follow", which he stated was not necessary. In fact, every argument presented before the district and circuit courts was supported by irrefutable evidence, yet, both courts denied the requested relief without any showing of actual consideration. The district denied the request, along with all other pending motions, with no direct address, as part of its order dismissing the complaint, which it justified by the assertion that Ms. La Riccia's physical condition does not qualify her as disabled, despite being presented certification from SSA of her **mental** disability. And the circuit essentially dismissed the request on the presumption that there was no likelihood of success, but this presumption, like their

final order, failed to consider whether the conduct cited against Ms. La Riccia was a product of her disability, which should have been their immediate concern after establishing that she is, in fact, unquestionably disabled.

42 U.S.C. § 12188(a)(1) states that “The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter”. 42 U.S.C. § 2000a-3(a) states “Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved”. Applicants have satisfied all the elements necessary to succeed on a request for injunctive relief, and every statement made herein is substantiated by evidence available on the district and circuit court dockets under No. 1:2021cv01291, N.D. Ohio, 2021., and No. 21-3990, 6th Cir.,2022., respectively. Because of the urgency of this request, the evidence associated with these filings has not been attached here, but can be produced upon request.

For all the reasons above, this application should be granted.

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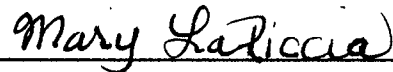
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CERTIFICATE OF SERVICE

We certify that, on this 7th day of April, 2023, a copy of the foregoing document was sent to the respondent's counsel on record by mail in accordance with Rule 29.




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