Disabling Disability Rights

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Abstract

The recent sea change in the composition of the federal judiciary has sparked robust debate on topics such as abortion and gun rights. But little attention has been paid to how these judges have set back civil rights for a large, but often ignored, class of individuals—people with physical and mental health disabilities. President Donald J. Trump's judicial appointees have routinely sided with employers, businesses, and states to oppose enforcement of disability rights. They have ignored the letter and purpose of the law to enable the execution of individuals with intellectual disabilities, undermine regulatory enforcement, elevate religious and personal liberties over disability-rights claims, restrict the ability of public health officials to protect those most at risk from a deadly pandemic, and limit damages for disability-based discrimination.

This essay identifies a hostile trend toward disability justice based on a survey of decisions authored or joined by judges appointed by President Trump that interpret the Americans with Disabilities Act, Rehabilitation Act, and Individuals with Disabilities Education Act. Of the hundreds of decisions considered, this essay focuses on four Supreme Court and sixteen circuit court decisions that have most undermined the rights of individuals with disabilities. This essay analyzes the lasting impact of these decisions on disability rights and suggests ways to minimize their long-term repercussions on disability justice.

Introduction

When campaigning for president in November 2015, Donald Trump belittled people with disabilities by rigidly waving his arms to imitate journalist Serge Kovaleski's congenital joint condition, arthrogryposis.[1] Trump mocked Kovaleski for exposing as false Trump's claim that in Jersey City, New Jersey, on September 11, 2001, "thousands of people were cheering as that building was coming down."[2]

Trump's personal disdain for individuals with disabilities soon manifested in his administration's policies. His administration set back disability rights in many ways, from opposing the Affordable Care Act, to repeatedly attempting to reduce funding and eligibility for Social Security Disability Insurance, to gutting Department of Justice enforcement of civil rights laws, to undermining the rights of students with disabilities.[3] Many of these executive branch insults can be reversed by succeeding administrations, but Trump's remaking of the federal judiciary cannot. Because federal judges have lifetime appointments,[4] the harm to disability justice through the overhaul of the judicial branch will extend far beyond one presidency.

In just four years, Trump appointed to lifetime positions one-

1 *See* Ruth Colker, *The Power of Insults*, 100 B.U. L. Rev. 1, 6–7 (2020).

2 *See* Glenn Kessler, *Trump's Outrageous Claim That 'Thousands' of New Jersey Muslims Celebrated the 9/11 Attacks*, Wash. Post: Fact Checker (Nov. 22, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/; *see also* Serge F. Kovaleski & Fredrick Kunkle, *Northern New Jersey Draws Probers' Eyes*, Wash. Post (Sept. 18, 2001), https://www.washingtonpost.com/archive/politics/2001/09/18/northern-new-jersey-draws-probers-eyes/40f82ea4-e015-4d6e-a87e-93aa433fafdc/.

3 *See* Samuel R. Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. Rev. F. 26, 29 (2020); Jacqueline Alemany, *The Cuts to a Major Disability Program in Trump's Budget*, CBS News (June 1, 2017), https://www.cbsnews.com/news/the-cuts-to-a-major-disability-program-within-trumps-budget/; Aimee Picchi, *Social Security: Here's What Trump's Proposed Budget Could Mean for Your Benefits*, USA Today (Feb. 12, 2020), https://www.usatoday.com/story/money/2020/02/12/social-security-trump-budget-aims-cuts-disabled-workers-program/4738795002/; Michael Hiltzik, *Trump's Budget Proposal Shreds Social Security and Medicaid Benefits*, Los Angeles Times (Feb. 10, 2020), https://www.latimes.com/business/story/2020-02-10/trump-budget-shreds-the-federal.

4 Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962) (discussing lifetime tenure of federal judges and quoting U.S. Const. Art. III). "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." *Id.*

third of the Supreme Court justices and more than one-quarter of federal trial and appellate judges.[5] Most of these judges were selected for their socially conservative and anti-regulatory values to signal they would restrain enforcement of civil rights.[6] They have not disappointed their proponents.[7] Their decisions have denied individuals with disabilities remedies for discrimination and endangered their lives and livelihoods.

This essay analyzes how these judges have set back civil rights for individuals with disabilities. Part I provides a brief summary of disability law for context. Part II describes how Trump, with the assistance of Senate Majority Leader Mitch McConnell, stocked the federal bench with judges who applied a regressive, anti-remedial approach to employment discrimination claims, requests for public accommodations, and enforcement of other disability rights.

Part III examines how recently appointed judges have begun to disable disability rights. This Part surveys decisions authored or joined by judges appointed between January 2017 and January 2021 that interpret the Americans with Disabilities Act, Rehabilitation Act, and Individuals with Disabilities Education Act. It also examines Supreme Court decisions that impact the constitutional rights of individuals with disabilities. Of the hundreds of decisions considered, this essay focuses on four Supreme Court and sixteen circuit court decisions that have most undermined the rights of individuals with disabilities. This essay reveals how Trump appointees have routinely sided with defendants on significant issues of disability law. The analysis of these decisions focuses on five problematic trends that threaten progress in disability justice: (1) using selective narratives to justify abandoning precedent (2) failing to defer to federal civil rights regulations; (3) relying on narrow forms of textualism to weaken disability rights; (4) elevating religious liberty over disability rights; and (5) limiting damages for disability-based discrimination.

Lastly, Part IV proposes two ways disability rights advocates can lessen the impact of the current judicial trend. First, the role of

5 John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, Pew Rsch. Ctr. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

6 Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. Times (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html; Josh Gerstein & Kyle Cheney, *Trump Judges are on a Tear*, Politico (Sept. 12, 2022), https://www.politico.com/news/2022/09/12/trump-judges-mar-a-lago-courts-00056071.

7 *See* discussion *infra* Part III.

executive and legislative branch politics cannot be overstated. Attaining significant statutory reform to expand enforcement of disability rights in the current partisan era is unlikely. However, progress through executive orders and regulations is more promising, especially under progressive administrations. Second, because many newly appointed judges are hostile to regulatory deference and civil rights, attorneys must be mindful of which judges sit in each district and circuit court. Since most states have laws that prohibit some disability-based discrimination, some of which provide more remedies or less onerous administrative procedures than federal courts and agencies do, attorneys should consider whether pursuing state law claims may yield better results. By sharing litigation strategies and outcomes, disability rights attorneys can help navigate one another through the obstacle paths of the post-Trump judiciary.

I. Statutory Prohibition of Disability-Based Discrimination

Disability justice, like all civil rights, has ebbed and flowed in American history. The passage of the Rehabilitation Act in 1973 marked the beginning of a federal statutory prohibition of disability-based discrimination.[8] Two years later, Congress addressed many unmet concerns of students with disabilities with the passage of the Individuals with Disabilities Education Act ("IDEA").[9] The IDEA requires public schools to provide children with disabilities with a free, appropriate public education in the least restrictive environment determined by their individual needs.[10] Then in 1990, Congress significantly expanded the civil rights of individuals with disabilities with the passage of the Americans with Disabilities Act ("ADA").[11] The ADA prohibits disability-based employment discrimination by employers of at least fifteen employees; requires state and local governments to provide individuals with disabilities an equal opportunity to benefit from their programs, services, and activities; and mandates accessible public accommodations.[12]

8 The Rehabilitation Act prohibits disability-based discrimination in programs conducted by federal agencies, in programs that receive federal funding, in federal employment, and in the employment practices of federal contractors. 29 U.S.C. §§ 793, 794 (2018).

9 Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (2010) (initially titled the Education for all Handicapped Children Act of 1975).

10 20 U.S.C. § 1400(d)(1)(A) (2010).

11 42 U.S.C. §§ 12101–12213 (2006).

12 *Id.*

With the passage of the ADA, Congress appeared to create a clear mandate against and remedies for disability-based discrimination.[13] But the promise of the ADA was tempered by court decisions that narrowly interpreted it. The Supreme Court diluted the ADA by rejecting the Equal Employment Opportunities Commission ("EEOC") regulations that determined which employees stated a claim under the ADA.[14] As a result, the very plaintiffs the ADA was designed to protect found their claims cut short by dismissals and summary judgment orders.[15]

To restore the rights imperiled by these court decisions, Congress amended the ADA in 2008 to make it easier for a plaintiff with a disability to prove standing.[16] Initially, plaintiffs fared better after the ADA was amended,[17] but some scholars accurately feared that

13 42 U.S.C. § 12101(b) (2006). The purpose of the Americans with Disabilities Act of 1990 was:
(1) [T]to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.
Id.

14 *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 480, 482 (1999) (quoting 29 C.F.R. § 1630, app. § 1630.2(j) (1998)). The Court rejected the EEOC regulations that explicitly stated that the "determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Id.*

15 *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 108, 125–26 (1999) ("My investigation of the cases in which courts of appeals have affirmed summary judgment decisions in favor of defendant-employers suggests that courts may be too quick to take cases from juries as well as too willing to render judgments in favor of defendants in ADA cases."); Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 J. Gender Race & Just. 595, 616 (2005) (arguing that federal court hostility toward plaintiffs' Title claims are driving lawyers away from filing cases); Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 Hofstra L. Rev. 1267, 1317 (2006) (concluding that the promise of the ADA to provide remedies for individuals with disabilities "has largely proven untrue").

16 ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat 3553 (codified at 42 U.S.C. §§ 12101–12213 (Supp. V 2011)).

17 *See* Elizabeth F. Emens, *Getting It: The ADA After Thirty Years*, 71 Syracuse L.

courts would still narrowly interpret the law.[18] For example, in 2021, Judge Eli Richardson,[19] a newly appointed federal district court judge, dismissed the ADA claims of a salesperson who sought transfer to a day shift after she experienced post-traumatic stress disorder resulting from a car accident.[20] Despite evidence that the plaintiff informed her employer of her symptoms, saw a licensed clinical social worker to treat her symptoms, and was prescribed medication for her condition, Judge Richardson held that she did not have a disability sufficient to state an ADA claim.[21] Although such a narrow reading of "disability" was initially common under the original ADA, Congress amended the Act in 2008 to prevent exactly this type of decision that too restrictively defines disability.[22] As discussed below, the statutory analysis employed by many Trump judicial appointees has thwarted the very purpose of civil rights statutes like the ADA: to discourage and remedy discrimination.

II. Trump's Nomination of Ultraconservative Federal Judges

Much attention has been paid to Trump's Supreme Court appointments.[23] But his appointment of more than one-quarter of federal trial and appellate judges may be similarly catastrophic to the millions of Americans with disabilities.[24]

Rev. 637, 641 (2021); Barbara Hoffman, *The Law of Intended Consequences: Did the Americans with Disabilities Act Amendments Act Make It Easier for Cancer Survivors to Prove Disability Status?*, 68 N.Y.U. Ann. Surv. Am. L. 843, 881–82 (2013).

18 *See* Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 Geo. J. on Poverty L. & Pol'y 383, 392, 409, 411 (2019).

19 Trump nominated Judge Eli Richardson on January 8, 2018. *See Richardson, Eli Jeremy*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/richardson-eli-jeremy.

20 Swanton v. Wyndham Vacation Resorts, Inc., No. 3:20-CV-00480, 2021 WL 5744708, at *2 (M.D. Tenn. Dec. 1, 2021).

21 *Id.* at *14–15.

22 29 C.F.R. § 1630.1(c)(4) (2012). *See also* Hoffman, *supra* note 17, at 878.

23 Isaac Chotiner, *How Trump Transformed the Supreme Court*, New Yorker (Nov. 11, 2021), https://www.newyorker.com/news/q-and-a/how-trump-transformed-the-supreme-court; Joan Biskupic, *Trump's Appointees are Turning the Supreme Court to the Right with Different Tactics*, CNN (July 26, 2021), https://www.cnn.com/2021/07/26/politics/trump-kavanaugh-gorsuch-barrett-supreme-court/index.html; Robert Barnes, *Tumultuous Path to Sixth Conservative Justice Puts Supreme Court in the Middle of Political Fray*, Wash. Post (Sept. 26, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-conservative-majority/2020/09/26/a7c423ce-ff7e-11ea-8d05-9beaaa91c71f_story.html.

24 *See* Ruiz et al., *supra* note 6; *see also* Centers for Disease Control, *Disability Inclusion*,

To populate the federal bench, Trump, with the assistance of Senator Mitch McConnell, mined the ranks of the Federalist Society, conservative political activists, staff of state and federal Republican administrations, and Republican party donors.[25] Indeed, longtime Federalist Society executive vice president Leonard Leo took an active role in leading "an immensely influential but largely unseen network of conservative organizations, donors and lawyers" to fill "the federal courts with scores of judges who are committed to the narrow interpretation of the Constitution that they believe the founders intended."[26] This attempt to reshape the judiciary was not limited to federal trial and appellate judges. Trump also signed an executive order[27] that enabled politically appointed agency heads to install partisan administrative law judges ("ALJs") who could be more likely to deny disability benefits than ALJs selected for their professional qualifications.[28]

In just four years, Trump appointed three Supreme Court justices, fifty-four court of appeals judges, and 174 district court judges,[29] more than any other modern one-term president. Representing twenty-eight percent of the active federal judges as of January 13, 2021, his appointments were less racially diverse than the judges appointed by the three previous presidents[30] and more antagonistic to civil rights.[31] Some of Trump's appointees first demonstrated hostility to disability rights as

https://www.cdc.gov/ncbddd/disabilityandhealth/disability-inclusion.html. Approximately one in four adults—61 million people—have a disability. *Id.*

25 Ruiz et al., *supra* note 6.

26 Eric Lipton & Jeremy W. Peters, *In Gorsuch, Conservative Activists Sees Test Case for Reshaping the Judiciary*, N.Y. Times (Mar. 18, 2017), https://www.nytimes.com/2017/03/18/us/politics/neil-gorsuch-supreme-court-conservatives.html; *see* Jonaki Mehta & Courtney Dorning, *All Things Considered*, NPR (June 21, 2022), https://www.npr.org/2022/06/21/1106424756/one-mans-outsized-role-in-shaping-the-supreme-court (Leonard Leo, "more than any other single person outside of government, is responsible for the transformation of the federal judiciary and the Supreme Court into the conservative-dominated institution that it is today.").

27 Exec. Order 13843, 83 Fed. Reg. 32755 (July 12, 2018).

28 Lisa Needham, *The Trump Administration Made Another Move to Install Judges Eager to Deny Disability Benefits*, Rewire News Group (July 30, 2018), https://rewirenewsgroup.com/article/2018/07/30/the-trump-administration-made-another-move-to-install-judges-eager-to-deny-disability-benefits/.

29 Gramlich, *supra* note 5.

30 *Id.* (only sixteen percent of judges appointed by President Trump were non-white, compared with twenty-five percent for President Clinton, eighteen percent for President George W. Bush, and thirty-six percent for President Obama).

31 *See id.*; *see also* Lena Zwarensteyn, *Trump's Takeover of the Courts*, 16 U. St. Thomas L.J. 146, 149–150, 160 (2020).

practicing attorneys. For example, before he was appointed to the Ninth Circuit, Judge Ryan Nelson[32] filed an amicus curiae brief on behalf of seven states that argued states should not be liable to private litigants for failing to make public buildings accessible.[33] Specifically, Nelson argued that Tennessee did not have to make public courthouses accessible to individuals who used wheelchairs.[34] Such an extreme reading of the ADA was rejected by the Ninth Circuit and the Supreme Court.[35]

Only one-third of Trump's appellate nominees were sufficiently uncontroversial to win the support of at least sixty senators.[36] Ten of Trump's nominees were rated "not qualified" by the American Bar Association.[37] Yet eight of these attorneys were confirmed by the Senate and now have lifetime appointments.[38] Thus, Trump placed more "not qualified" judges on the federal bench than any president in the past thirty years.[39] Unsurprisingly, Trump's appointees have issued rulings considerably to the right of other judges, even those appointed by other Republican presidents.[40]

Professors Kenneth Manning and Robert Carp have built a database of and evaluated more than 100,000 federal district court opinions.[41] Using the broad categories of "liberal" and "conservative,"

32 Trump nominated Judge Ryan Nelson on May 15, 2018. *See Nelson, Ryan Douglas*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/nelson-ryan-douglas.

33 Brief for Alabama et al. as Amici Curiae Supporting Respondents, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667), 2003 WL 22176110 at *2.

34 *Id.* at *2, *12–13, 2003 WL 22176110.

35 Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (affirming Ninth Circuit's holding that Title II of the ADA is a valid exercise of congressional authority to enforce the Fourteenth Amendment).

36 *See* Ruiz et al., *supra* note 6.

37 *ABA Ratings During the Trump Administration*, Ballotpedia, https://ballotpedia.org/ABA_ratings_during_the_Trump_administration.

38 *Id.* L. Steven Grasz, who serves on the Eighth Circuit, was rated "[u]nanimously not qualified." *Id.* Jonathan Kobes, who serves on the Eighth Circuit, was rated "[s]ubstantial majority not qualified." *Id.* Lawrence VanDyke, who serves on the Ninth Circuit, was rated "[s]ubstantial majority not qualified." *Id.* Charles Goodwin, who serves on the Western District of Oklahoma, was rated "[m]ajority not qualified." *Id.* Holly Lou Teeter, who serves on the District of Kansas, was rated "[s]ubstantial majority not qualified." *Id.* Justin Walker, who serves on the Western District of Kentucky, was rated "[s]ubstantial majority not qualified." *Id.*

39 *ABA Ratings of Presidential Federal Judicial Nominees*, Ballotpedia, https://ballotpedia.org/ABA_ratings_of_presidential_federal_judicial_nominees.

40 Kenneth L. Manning et. al., *The Decision-Making Ideology of Federal Judges Appointed by President Trump*, *in* Judicial Process in America (12th ed., forthcoming) (manuscript at 5–12) (UMass Dartmouth working paper available at SSRN https://ssrn.com/abstract=3716378 or http://dx.doi.org/10.2139/ssrn.3716378).

41 Robert A. Carp & Kenneth L. Manning, *US District Court Database*, Univ. of Mass.

they concluded that trial judges appointed by Trump are more conservative than judges appointed by other Republican presidents and are "sharply more conservatives than the appointees of the five most recent Democratic administrations."[42] These differences were more striking in areas of civil rights and civil liberties: only 25% of Trump's appointees issued liberal opinions, compared with those of George W. Bush (33%), George H. W. Bush (33.7%) and Ronald Reagan (32.7%).[43] Similarly, Trump's appointees issued far more conservative decisions than judges appointed in the past half century in cases involving disability rights.

The seismic impact of federal judicial appointments cannot be overstated. As Justices Breyer, Sotomayor, and Kagan lamented, Trump's judicial appointees have been unrestrained by the absence of change in either law, facts, or social attitudes to eradicate long-standing rights; "[a]ll that has changed is" the composition of the federal courts.[44]

The Supreme Court's rejection of reproductive rights, which it had recognized for half a century,[45] calls into question whether the rights of people with disabilities will face the Court's emerging unfettered chopping block. Even more disturbing than the majority's opinion in *Dobbs* is Justice Thomas's concurrence, arguing that substantive due process is limited only to those interests expressly delineated in the Constitution.[46] Of course, the Constitution makes no mention of people with physical or mental differences. Yet, after making substantial gains following a long history of discrimination,[47] individuals with disabilities may now endure a diminishing of their statutory and constitutional rights by the current federal judiciary.

Dartmouth Coll. of Arts & Scis., https://www.umassd.edu/cas/polisci/resources/us-district-court-database/.

42 Manning et al., *supra* note 40, at 6–7. Manning and Carp coded 34.2% of the decisions by Trump's appointees as liberal, compared with 36% of Reagan's appointees, 37% of George H.W. Bush's and George W. Bush's appointees, 51% of Carter's appointees, 45% of Clinton's appointees, and 49% of Obama's appointees. *Id.* at 5–6.

43 *Id.* at 8.

44 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2320 (2022) (Kagan, J., dissenting).

45 *Id.* at 2317.

46 *Id.* at 2300–04 (Thomas, J., concurring).

47 *See, e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 454 (1985) (Stevens, J., concurring).

III. How Trump Appointees Have Disabled Disability Rights

In response to a 2018 federal judge's order enjoining the Trump Administration from denying asylum to migrants who crossed the southern border illegally,[48] Trump lashed out at the "Obama judge"[49] who issued the opinion. Chief Justice John Roberts responded, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[50] Though Roberts's characterization of the federal judiciary was once accurate, to paraphrase the Washington Post's Editorial Board, the five most conservative members of the Supreme Court and many other judges nominated by Trump "did not get the memo."[51] Many of the appointees have met expectations that they would narrowly interpret civil rights like disability rights.[52]

The following analysis of judicial opinions is based on a survey of decisions authored or joined by judges appointed between January 2017 and January 2021 that interpreted the Americans with Disabilities Act, Rehabilitation Act, and Individuals with Disabilities Education Act. Also discussed are Supreme Court decisions that affected the constitutional rights of individuals with disabilities. A comprehensive survey of the decisions by the 174 district court judges appointed by Trump[53] that impacted disability rights is beyond the scope of this essay.[54] Instead, this Part discusses significant—and primarily appellate court—decisions that illustrate how these appointments have turned the tide of disability justice to create a more favorable environment for defendants. These decisions exemplify five general trends: (1) using selective narratives to justify abandoning precedents; (2) failing to defer to federal civil rights regulations; (3) elevating religious liberty over disability rights; (4)

48 East Bay Sanctuary Covenant v. Donald Trump, 354 F. Supp. 3d 1094 (N.D. Cal. 2018).

49 Jon Tigar was nominated to the Northern District of California by President Obama. *See* Tigar, Jon Steven, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/tigar-jon-steven.

50 Editorial Board, *John Roberts Said There Are No Trump Judges or Obama Judges. Clarence Thomas Didn't Get the Memo*, Wash. Post (June 28, 2019), https://www.washingtonpost.com/opinions/john-roberts-said-there-are-no-trump-judges-or-obama-judges-clarence-thomas-didnt-get-the-memo/2019/06/28/00ec5db0-99c6-11e9-8d0a-5edd7e2025b1_story.html.

51 *Id.*

52 *See* section III (specifically notes 55 to 221 for references).

53 Gramlich, *supra* note 5.

54 *See* Manning et al., *supra* note 40, at 8.

relying on narrow forms of textualism to weaken disability rights; and (5) limiting damages for disability-based discrimination.

A. *Using Selective Narratives to Undermine the Rights of Individuals with Intellectual and Mental Health Disabilities*

Few decisions impose such lasting individual harm as those upholding a death sentence. In 2002, the Supreme Court recognized, in *Atkins v. Virginia*, that because intellectual disabilities impact "reasoning, judgment, and control of [] impulses," individuals with intellectual disabilities "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[55] Accordingly, in a 6–3 decision, the Court held that the Eighth Amendment prohibited the execution of individuals with intellectual disabilities who had been convicted of capital crimes.[56] In doing so, the Court recognized two crucial points. First, as society began to better recognize how intellectual disabilities affect culpability, a significant number of states ceased executing individuals with intellectual disabilities who were convicted of capital crimes.[57] The Court noted that "the consistency of the direction of change" was even more significant than the number of states that modified their sentencing laws and practices.[58] Second, an individual's "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" makes it unlikely that they will be deterred from criminal activity by the possibility of a death sentence.[59] Thus, the Court concluded that subjecting a person with intellectual disabilities to capital "punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take'" such an individual's life.[60]

But once Trump Administration officials reinstated executions of federal prisoners on death row,[61] the Court denied a stay of execution to Alfred Bourgeois, a man convicted of murder whose IQ of between

55 Atkins v. Virginia, 536 U.S. 304, 306 (2002) (reversing death penalty for a man with an IQ of 59 who was convicted of capital murder).
56 *Id.* at 321.
57 *Id.* at 314–16.
58 *Id.* at 315.
59 *Id.* at 320.
60 *Id.* at 321.
61 Christina Carrega, *Feds Execute 10th Death Row Inmate of 2020*, CNN (Dec. 11, 2020), https://www.cnn.com/2020/12/11/politics/alfred-bourgeois-execution/index.html.

seventy and seventy-five evidenced he was intellectually disabled.[62] In the eighteen years between *Atkins* and *Bourgeois*, the law did not change; but eight new Justices joined the Court.[63] All three of Trump's Supreme Court nominees joined the decision to permit Bourgeois' execution.[64] Just hours after the Supreme Court rejected his appeal, federal authorities in Indiana executed Bourgeois by lethal injection.[65]

How did the Court avoid the *Atkins* precedent? First, in denying certiorari, the Court prevented Bourgeois from briefing a "serious" question of interpreting the Federal Death Penalty Act, a "question that is likely to recur," thus possibly "permitting the illegal execution of people with intellectual disabilities."[66] Second, the Court accepted the version of disputed evidence of Bourgeois' disability that supported the death penalty,[67] instead of considering literally life-saving expert medical evidence.[68] As a result, the Eighth Amendment rights of individuals with intellectual disabilities who are convicted of capital crimes may now be imperiled. Those individuals with moderate intellectual disabilities, especially, may face execution despite their limited ability to understand or control their actions.

B. Failing to Defer to Regulations that Remedy Disability Discrimination

Disability rights statutes like the ADA, Rehabilitation Act, and IDEA authorize federal agencies such as the Department of Justice, Department of Labor, and Department of Education to issue regulations to enforce the laws.[69] Conservative jurists have a long history of denying

62 Bourgeois v. Watson, 141 S. Ct. 507 (2020) (Sotomayor, J., dissenting).

63 Only Justice Clarence Thomas participated in both decisions. *Id.*; Atkins v. Virginia, 536 U.S. 304 (2002).

64 Bourgeois v. Watson, 592 U.S. ____ (2020) (Sotomayor, J., dissenting).

65 Elizabeth Bruenig, *The Man I Saw Them Kill*, Opinion, N.Y. Times (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/opinion/federal-executions-trump-alfred-bourgeois.html.

66 592 U.S. at ____ (Sotomayor, J., dissenting). *See generally* 18 U.S.C. § 3596(c) (the Federal Death Penalty Act (FDPA) provides that "[a] sentence of death shall not be carried out upon a person who is mentally retarded.").

67 The Court ignored the District Court's finding that Bourgeois was intellectually disabled based on "currently prevailing diagnostic standards" and instead relied on the Seventh Circuit's "inexpert analysis" that "[b]oth this Court and the medical community have since squarely rejected." 141 S. Ct. at 507–08.

68 *Id.*

69 The regulations "create a robust administrative process in which federal agencies investigate and attempt to resolve, through informal means, claims alleging disability discrimination." United States v. Sec'y Fla. Agency for Health Care Admin., 21 F.4th 730, 741 (11th Cir. 2021). *See also* Bragdon v. Abbott, 524 U.S. 624,

deference to regulations authorized by Congress to interpret disability rights.[70] This practice, cloaked in the guise of textualism,[71] ignores substantial evidence that "Congress intended that policy choices implicated by implementation of the ADA be made by administrative agencies, rather than by courts."[72] Given the swift pace of societal and technological changes, "it is often 'unreasonable and impracticable' for Congress to do anything" other than authorize administrative agencies to promulgate regulations to apply statutes to "our increasingly complex society."[73] Congress has neither the expertise nor resources "to regulate sensibly," and thus relies on experts in federal agencies to write regulations reflective of current conditions.[74] But conservative jurists who have no expertise in the concerns of some plaintiffs are quick to ignore agency regulations when those regulations fail to support their desired outcome.[75]

The Trump Administration pivoted from its initial attempt to dismantle the regulatory state—asserting that "staffing agencies was 'totally unnecessary'"—to "requiring agencies to identify two regulations to repeal for each new regulation proposed."[76] For example, it delayed regulations governing how airlines should handle lost wheelchairs and scooters, mobility equipment essential for safe travel.[77] New administrations, though, can repeal or modify regulations as long as they comply with the rulemaking process and other legal requirements of the Administrative Procedure Act.[78] Accordingly, the lasting harm

631–32 (1998); Petit v. U.S. Dep't of Educ., 675 F.3d 769, 775 (D.C. Cir. 2012).

70 *See* Bertrall L. Ross II, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 U. Chi. Legal F. 223, 275–80 (2014) (discussing how the Supreme Court avoided *Chevron* deference in interpreting the ADA in Bragdon v. Abbott, 524 U.S. 624 (1998) and Sutton v. United Air Lines, 527 U.S. 471 (1999)).

71 *See infra* notes 185 to 203 for a discussion of how judges used textualism to interpret statutory and regulatory language with little regard for the purpose of the law.

72 Rebecca Hanner White, *Deference and Disability Discrimination*, 99 Mich. L. Rev. 532, 586 (2000).

73 West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting) (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) and Mistretta v. United States, 388 U.S. 361, 372 (1989)).

74 *Id.*

75 *Id.* at 2643 (Justice Kagan warned that in striking down EPA regulations, "the Court substitutes its own ideas about policymaking for Congress's.").

76 Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 Admin. L. Rev. 353, 363–34 (2021); *see* Exec. Order No. 13,711, 82 Fed. Reg. 9,339, 9,339 (Feb. 3, 2017).

77 *See* Noll, supra note 76, at 382–83.

78 Maeve P. Carey, Cong. Rsch. Serv., IN10611, Can a New Administration Undo a

caused by Trump's attack on the regulatory state rests mainly in his judicial appointments.

Justice Kavanaugh has long led the charge to deny deference to federal regulations. He has advocated for ignoring duly authorized regulations' interpretation of "a specific statutory term or phrase."[79] Instead, he confidently submitted, "courts should determine whether the agency's interpretation is the best reading of the statutory text. Judges are trained to do that, and it can be done in a neutral and impartial manner in most cases."[80] Deriding the large number of independent federal agencies as not "wise," he posited "there is reason to doubt whether the elaborate system of numerous independent agencies makes full sense today, at least as to the rulemaking and enforcement activities at certain agencies, as opposed to their adjudicatory functions."[81]

Accordingly, Justice Kavanaugh has a lengthy history of discounting claims by individuals with disabilities. As the National Women's Law Center cautioned, "[h]is narrow reading of antidiscrimination protections[,] ... kneejerk deference to employer's asserted rationales, and his willful disregard for the real-world consequences of challenging discrimination in the workplace have led him to side against employees time and time again."[82] For example, while serving on the District of Columbia Circuit, Kavanaugh consistently ruled for employers in Title I and Rehabilitation Act cases.[83] Similarly, Kavanaugh failed to protect the rights of students with disabilities to a free and appropriate education.[84] And in 2007, he reversed a

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Previous Administration's Regulations? (2016).

79 Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2154 (2016) (reviewing Robert A. Katzmann, Judging Statutes).

80 *Id.*

81 Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1472 (2009).

82 Nat'l Women's L. Ctr., The Record of Brett M. Kavanaugh on Critical Legal Rights for Women Confirms Trump's Promises – and Worst Fears 13 (2018), https://nwlc.org/resource/nwlc-report-on-the-record-of-brett-kavanaugh/.

83 *See, e.g.*, Stewart v. St. Elizabeths Hosp., 589 F.3d 1305, 1308 (D.C. Cir. 2010) (affirming summary judgment for employer of hearing impaired employee because employee failed to tell employer she had a mental health disability); Baloch v. Kempthorne, 550 F.3d 1191, 1200 (D.C. Cir. 2008) (concluding that "good institutional administration" justified employers' alleged discrimination against employee); Johnson v. Interstate Mgmt. Co., LLC, 849 F.3d 1093, 1096–1100 (D.C. Cir. 2017) (ruling employer did not fire employee in retaliation for filing OSHA and ADA claims, with scant discussion of the substantial evidence employee proffered).

84 As the former co-chair of the Federalist Society's "School Choice Practice Group," Justice Kavanaugh has long advocated for has long advocated for public

lower court's order requiring the District of Columbia to provide compensatory education to a teenaged student with learning disabilities who was incarcerated in Maryland.[85] The Maryland facility was accused of violating a settlement agreement by denying access to the school district's education provider to teach the student.[86] Kavanaugh refused to enforce the lower court's reading of the settlement agreement, and thus denied the student a free and appropriate education, specifically citing that the Maryland facility was entitled to deny access to the teacher solely because of security concerns.[87]

Other recently appointed judges have also declined to defer to regulatory authority when that authority remedies disability discrimination. Judges appointed by President Trump have rejected regulations authorized by the EEOC,[88] Department of Justice ("DOJ"),[89] and Centers for Disease Control ("CDC").[90]

1. Employment Regulations

Despite unequivocal congressional authorization of the EEOC to issue regulations to implement the employment provisions of the ADA[91] and Rehabilitation Act,[92] some judges have adopted Justice Kavanaugh's position that judges are "trained" to "determine whether the agency's interpretation is the best reading of the statutory text."[93] Thus, they refused to defer to EEOC expertise to address disability-based

funding for private schools, which would undermine the purpose of the IDEA to ensure that students who are educated with public funds receive appropriate accommodations. *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to Be Circuit Judge for the District of Columbia Circuit Before the Committee on the Judiciary*, 108th Cong. 72–73 (2004). *See also* Carson ex rel. O.C. v. Makin, 142 S. Ct. 1987, 1998 (2022).

85 Hester v. District of Columbia, 505 F.3d 1283, 1284–85 (D.C. Cir. 2007).

86 *Id*.

87 *Id*. at 1287.

88 *See* notes 91 to 103 for discussion of cases that interpret EEOC regulations.

89 *See* notes 129 to 144 for discussion of cases that interpret CDC regulations; Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1178 (M.D. Fla. 2022) (invalidating facemask requirements on public transportation) (need a citation here that supports that this decision came from a Trump Judge).

90 Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1276 (11th Cir.), *vacated*, 21 F.4th 775 (11th Cir. 2021) (denying deference to regulations on website accessibility); 28 C.F.R. § 36.303(c)(1)(ii)).

91 42 U.S.C. § 12116 (authorizing the EEOC to promulgate regulations implementing Title I of the ADA).

92 29 U.S.C. § 793(d).

93 Kavanaugh, *supra* note 79.

employment discrimination. For example, as a Tenth Circuit judge, Justice Gorsuch disregarded EEOC regulations that explained when medical leave was an appropriate accommodation under the ADA.[94] He ruled that the Kansas State University's inflexible limit of no more than six months of medical leave did not violate the Rehabilitation Act,[95] even though the EEOC does not restrict medical leaves to six months.[96] The ADA requires reasonable accommodations for employment discrimination, such as medical leave, to be individually tailored.[97]

Similarly, Judges Joel Carson[98] and Allison Eid[99] dissented from a Tenth Circuit ruling that correctly held that an adverse employment action is not an element of a failure-to-accommodate claim under Title I of the ADA.[100] The majority ruled that "the incorporation of an adverse-employment-action requirement into an ADA failure-to-accommodate claim is squarely at odds with, among other things, our own precedent; the views of the EEOC—the agency responsible for administering the ADA; and the regularly followed practices of all of our sister circuits."[101] The dissent argued that the EEOC guidance "does not carry the force of law and is not entitled to any special deference."[102] According to the dissent's interpretation of the ADA, plaintiffs who claim they were denied a reasonable accommodation under the ADA must also prove that they endured an adverse employment action because of their disability.[103] This interpretation would deny many employees with a disability their day in court.

94 Hwang v. Kan. State Univ., 753 F.3d 1159, 1162–63 (10th Cir. 2014) ("In the first place, the EEOC manual commands our deference only to the extent its reasoning actually proves persuasive.").

95 *Id.* at 1161–62, 1164. ("The Rehabilitation Act seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disabled persons to work—not to turn employers into safety net providers for those who cannot work.").

96 "[T]he ADA allows an *indeterminate* amount of leave, barring undue hardship, as a reasonable accommodation." 29 C.F.R. § 825.702 (2023) (emphasis added).

97 *See, e.g.*, Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000).

98 *See Carson, Joel McElroy III*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/carson-joel-mcelroy-iii.

99 *See Eid, Allison Hartwell*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/eid-allison-hartwell.

100 Exby-Stolley v. Bd. of Cnty. Comm'rs, 979 F.3d 784, 785, 822 (10th Cir. 2020), *cert. denied sub nom.* Bd. of Cnty. Commissioners of Weld Cnty., Colorado v. Exby-Stolley, 141 S. Ct. 2858 (2021) (citing 42 U.S.C. §§ 12111–12117).

101 *Id.* at 791.

102 *Id.* at 829–830 (quoting Pack v. Kmart Corp., 166 F.3d 1300, 1305 n.5 (10th Cir. 1999)).

103 *Id.* at 827 (McHugh, J., dissenting).

2. Public Accommodation Regulations

Shortly after the ADA was passed, the DOJ issued regulations implementing Title III to require public accommodations to ensure effective communication with patrons with disabilities.[104] Once commercial websites became integral to the economy—and to individuals with disabilities' access to economic activity[105]—the DOJ expanded the regulatory illustrations to include "screen reader software[;] . . . accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision."[106]

Accordingly, Juan Carlos Gil, a visually impaired customer of Winn-Dixie, a large grocery store chain, asserted that he was unable to order groceries on Winn-Dixie's website because it was incompatible with software that accommodated visual impairments.[107] The district court entered judgment for Gil, holding that Winn-Dixie violated his rights under Title III of the ADA.[108] Finding that Winn-Dixie's website is "heavily integrated" with Winn-Dixie's physical stores because it "operates as a gateway to the physical store locations," the district court held that it denied visually impaired customers "full and equal enjoyment" of the grocery chain.[109] Declining to "decide whether Winn-Dixie's website is a public accommodation in and of itself," the court determined that Winn-Dixie's shopping experience (the integral relationship of the website with the physical store) must be accessible.[110]

But in an opinion by Judge Elizabeth Branch, the Eleventh

104 28 C.F.R. § 36.303(a)–(b) (2023) (providing a non-exclusive list of auxiliary aids and services to illustrate how public accommodation could provide accessible communication with patrons).

105 *See* Kasey Kaplan, *Why Every Business Needs a Website*, Forbes (Feb. 3, 2020), https://www.forbes.com/sites/theyec/2020/02/03/why-every-business-needs-a-website/?sh=3e23fc706e75; *see also Introduction to Web Accessibility*, Web Accessibility Initiative, https://www.w3.org/WAI/fundamentals/accessibility-intro/#:~:text=Web%20accessibility%20means%20that%20websites, contribute%20to%20the%20Web, (updated Mar. 31, 2022).

106 28 C.F.R. § 36.303(b)(2)) (2023).

107 Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340, 1342–45 (S.D. Fla. 2017), *vacated and remanded*, 993 F.3d 1266, 1270 (11th Cir. 2021), *opinion vacated on reh'g*, 21 F.4th 775 (11th Cir. 2021), and *appeal dismissed and remanded*, 21 F.4th 775 (11th Cir. 2021).

108 *Id.*

109 *Id.* at 1349.

110 *Id.* "Where a website is heavily integrated with physical store locations and operates as a gateway to the physical store locations, courts have found that the website is a service of a public accommodation and is covered by the ADA." *Id.* at 1348.

Circuit narrowly read the ADA to exempt retail websites of physical stores as places of accommodation.[111] Writing as though Gil's experience from 2000 to 2015 at Winn-Dixie took place when the internet barely existed,[112] Judge Branch vacated and remanded the trial court's decision.[113] Consistent with reasoning typical of Federalist Society judges, Judge Branch concluded that because the ADA—first written in 1990 and amended in 2008—did not explicitly list websites as places of public accommodation, modern-day consumers had no statutory right to accessible websites.[114] She noted that the ADA provided "an expansive list of physical locations which are 'public accommodations,' including, as is relevant here, a 'grocery store.' . . . Notably, however, the list does not include websites."[115] Thus, she concluded that because the ADA did not expressly list "intangible places or spaces, such as websites" as illustrations of public accommodations, "public accommodations are limited to actual, physical places."[116]

And instead of limiting her opinion to the facts of the case, Judge Branch swept *all* websites under her decision, concluding "that websites are not a place of public accommodation under Title III of the ADA."[117] By limiting the ADA's reach to the illustrations of physical structures known to Congress at the time of the ADA's passage,[118] Judge Branch's reasoning resulted in an opinion that, as the First Circuit has stated, has "severely frustrate[d] Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."[119] Finally, although she conceded that Winn-Dixie's website was "inaccessible

111 Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1276–77 (11th Cir.), *opinion vacated on reh'g*, 21 F.4th 775 (11th Cir. 2021). *See* Branch, Elizabeth Lee, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/branch-elizabeth-lee.

112 *See* 993 F.3d at 1270.

113 *Id.* at 1284.

114 *Id.* at 1274, 1277.

115 *Id.* at 1276 (citing 42 U.S.C. § 12181(7)).

116 *Id.* at 1277.

117 *Id.*

118 *Id.* DOJ regulations require that a public accommodation, such as a grocery store, "shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.303(c)(1) (2022). As Judge Jill Pryor notes in her dissent, "[a]n auxiliary aid, like a website compatible with screen-reading software, was necessary to ensure effective communication between Gil and Winn-Dixie's physical stores." 993 F.3d 1266, 1284, 1298 (Pryor, J., dissenting).

119 Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 20 (1st Cir. 1994).

by individuals who are visually disabled," she reasoned that since Gil could shop in a physical store, the website did not impose "an intangible barrier" to his purchasing groceries.[120]

Similarly, other Trump appointees have refused to enforce the ADA to enhance the accessibility of websites.[121] Moreover, even though the circuits are split as to whether Title III of the ADA covers non-physical places like websites,[122] the Trump Administration stopped any executive effort to make websites accessible by withdrawing altogether ADA regulations proposed by the Obama Administration to improve website accessibility.[123]

3. Public Health Regulations

The COVID-19 pandemic posed particular challenges to individuals with disabilities, as they were at least three times more likely to die of COVID-19 than were people without disabilities.[124] The pandemic forced many individuals with disabilities to determine whether physically attending work, entering commercial establishments, or using public transportation was worth the risk of exposure to a deadly

120 993 F.3d at 1279.

121 *See, e.g.*, Harty v. W. Point Realty, Inc., 28 F.4th 435, 443 (2d Cir. 2022) (opinion by Trump appointee Richard Sullivan ruling against plaintiff because he did not prove he intended to stay at the hotel that had an inaccessible website); Laufer v. Mann Hosp., L.L.C., 996 F.3d 269, 272 (5th Cir. 2021) (opinion by Trump appointee Stuart Duncan denying standing to plaintiff who could not find an ADA accessible hotel room on defendant's website because she sought information for future travel, and thus "[did] not show enough of a concrete interest in" the defendant's hotel to confer standing).

122 The First, Second, Seventh and Ninth Circuits have required websites to be accessible, even without a nexus to a physical space. *See* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999); and Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905–06 (9th Cir. 2019) (holding that "the ADA applies to Domino's website and app" because it "connect[s] customers to the goods and services of Domino's physical restaurants"). In contrast, the Sixth and Eleventh Circuits have held that Title III's language excludes non-physical places such as websites. *See* Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995); Gil v. Winn-Dixie Stores, Inc., 993 F.3d at 1272–73 (11th Cir.), *vacated*, 21 F.4th 775 (11th Cir. Dec. 28, 2021).

123 *See* Minh N. Vu, *DOJ Nixes All Pending ADA Rulemakings, Including Website Access Rules*, Seyfarth Shaw LLP (Dec. 22, 2017) https://www.adatitleiii.com/2017/12/doj-nixes-all-pending-ada-rulemakings-including-website-access-rules/.

124 *See* Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 Cornell L. Rev. 1927, 2000 (2022).

contagion.[125] Like all Americans, individuals with disabilities relied on public health authorities to keep them safe.

But in a broad rejection of federal authority to protect public health, Judge Kathryn Mizelle[126] invalidated federal regulations that required masks on public transportation during the pandemic.[127] Pursuant to one of President Biden's first executive orders,[128] the CDC published a rule requiring masks on public transportation.[129] Given the urgent need to "preserve human life; maintain a safe and operating transportation system; [and] mitigate the further introduction, transmission, and spread of COVID-19, . . . "[130] the CDC issued the rule without waiting for the lengthy comment period required by the Administrative Procedure Act.[131]

Judge Mizelle echoed conservative dogma to strike down the mask rule for multiple reasons. First, she reasoned that the CDC's purpose "to issue regulations that 'in [its] judgment are necessary' to prevent the spread of communicable disease"[132] *must* be limited *only* to "inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles."[133] Judge Mizelle inexplicably translated this non-exclusive list—that "[f]or purposes of carrying out and enforcing such regulations, the [CDC] *may* provide

125 Barbara Hoffman, *Accommodating Disabilities in the Post-COVID-19 Workplace*, 11 Ind. J. L. & Soc. Equal. 51, 53 (2023).

126 Judge Kathryn Mizelle was nominated by Trump on September 8, 2020. *See* https://www.fjc.gov/history/judges/mizelle-kathryn-kimball.

127 Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d at 1166.

128 Executive Order 13998, Promoting COVID-19 Safety in Domestic and International Travel, 86 Fed. Reg. 7205 (Jan. 21, 2021).

129 Health Freedom Def. Fund, Inc., 599 F. Supp. 3d at 1157.

130 Requirement for Persons To Wear Masks While on Conveyances and at Transportation Hubs, 86 FR 8025-01, 8026 (Feb. 1, 2021).

131 Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d at 1154; 5 U.S.C. § 553(b)–(c).

132 "The [CDC], with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the [CDC] *may* provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a) (emphasis added).

133 Health Freedom Def. Fund, Inc., 599 F. Supp. 3d at 1157.

for such inspection"[134]—into a list so exclusive that the CDC would be hamstrung to take medically-relevant actions to protect public health.[135] After reasoning that the mask rule was "not inspection, fumigation, disinfection, destruction, or pest extermination,"[136] unsurprisingly, she then concluded that requiring travelers to wear a face mask in public was not a "sanitation" measure.[137]

Second, Judge Mizelle rejected the CDC's *Chevron* argument that a court should consider regulatory guidance where an agency of experts is authorized to issue regulations to carry out statutory provisions.[138] She determined that the CDC's regulations drafted by health experts were somehow due no deference at all.[139]

Finally, Judge Mizelle determined that a fast-spreading deadly pandemic did not justify the CDC to issue its rule without waiting for a lengthy public comment period.[140] She spurned the CDC's proof that "the public health emergency caused by COVID-19" was just that: an emergency.[141] Yet, by the date of her opinion, nearly one million Americans had died from COVID-19[142] and millions more suffered long-term health consequences.[143] Although the Biden Administration appealed her ruling, its argument will be heard by the Eleventh Circuit, where six of its eleven active judges were Trump appointees.[144]

134 42 U.S.C. § 264(a) (emphasis added).

135 Health Freedom Def. Fund, Inc., 599 F. Supp. 3d at 1156–57 (emphasis added).

136 *Id.* at 1157.

137 *Id.* at 1157–59, 1161.

138 Health Freedom Def. Fund, Inc., 599 F. Supp. 3d at 1163–64.

139 *Id.* at 1164.

140 *Id.* at 1168. The Administrative Procedures Act requires a notice and comment period prior to the enactment of most regulations. 5 U.S.C. § 553 (b)–(c).

141 Health Freedom Def. Fund, Inc., 599 F. Supp. 3d at 1168–71.

142 The CDC estimated that at least 991,174 Americans died from COVID-19 between March 2020 and April 2022. Centers for Disease Control, Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory. *Trends in United States COVID-19 Hospitalizations, Deaths, Emergency Department (ED) Visits, and Test Positivity by Geographic Area*, Ctrs. for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths.

143 Long COVID "may progress like other post-infection fatigue syndromes into Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS), a disabling and uncurable disease." Katherine A. McNamara & Penney Mason Stanch, *Accommodating Workers with Disabilities in the Post-Covid World*, 18 J. of Occupational and Env't Hygiene 149, 149–53 (2021).

144 Judges Kevin Newsom, Elizabeth Branch, Britt Grant, Robert Luck, Barbara Lagoa, and Andrew Brasher were appointed by Trump to the United States Court of Appeals for the Eleventh Circuit. Eleventh Circuit Judges, United States Court of Appeals for the Eleventh Circuit, https://www.ca11.uscourts.gov/eleventh-circuit-judges (last visited July 9, 2023).

Judge Mizelle's opinion, as well as her qualifications to be a federal judge, have been roundly criticized.[145] Although the American Bar Association recommends that federal judicial appointees have at least twelve years of experience practicing law, she was nominated only eight years after she had passed the bar, had worked only ten months in a law firm, and had served three years in the Trump Administration.[146] The Senate approved her nomination to be a trial judge along party lines, even though she never tried a case as lead or co-counsel.[147] Yet, Mizelle was bolstered by political connections and her clerkship for Justice Clarence Thomas.[148]

C. Elevating Personal and Religious Liberties over Disability Rights

Claims of personal and religious exemptions from civil rights and public health laws surged during the Trump Administration and the COVID-19 pandemic. When statutory rights of individuals with disabilities even modestly impacted religious[149] or personal autonomy

145 *See, e.g.*, Debra Cassens Weiss, *Federal Judicial Nominee Lacks Enough Experience, ABA Says in Letter Explaining 'Not Qualified' Rating*, ABA Journal (Sept. 10, 2020), https://www.abajournal.com/news/article/federal-judicial-nominee-lacks-enough-experience-aba-says-in-letter-explaining-not-qualified-rating; Ruth Marcus, *Opinion, Another Activist Trump Judge Strikes, This Time at the Mask Mandate*, Wash. Post (Apr. 19, 2022), https://www.washingtonpost.com/opinions/2022/04/19/masks-airplanes-judge-mizelle-legal-blunder/; John Kruzel, *Judge's 'Textualist' Ruling on Airline Mask Mandate Sparks Backlash*, The Hill (Apr. 20, 2022), https://thehill.com/regulation/court-battles/3273602-judges-textualist-ruling-on-airline-mask-mandate-sparks-backlash/.

146 Rachel Treisman, *What to Know About Judge Kathryn Mizelle, Who Struck Down the Travel Mask Mandate*, Nat'l Pub. Radio (Apr. 19, 2022), https://www.npr.org/2022/04/19/1093566982/florida-mask-mandate-judge-kathryn-mizelle.

147 *Id.* (In a letter to the leaders of the Senate Judiciary Committee, the head of the ABA Standing Committee on the Federal Judiciary reported that a majority of his group had deemed that Mizelle did "not meet the requisite minimum standard of experience necessary to perform the responsibilities required by the high office of a federal trial judge"); Veronica Stracqualursi, *Who is Judge Kathryn Kimball Mizelle, the Federal Judge Who Blocked Biden's Travel Mask Mandate?*, CNN POLITICS (Apr. 20, 2022), https://www.cnn.com/2022/04/19/politics/who-is-judge-kathryn-kimball-mizelle-biden-mask-mandate/index.html.

148 *See* Stracqualursi, *supra* note 147; Heather Murphy & Charlie Savage, *Who Helped End the Travel Mask Mandate in the United States?*, N.Y. Times (Apr. 26, 2022), https://www.nytimes.com/2022/04/26/travel/who-helped-end-the-travel-mask-mandate-in-the-united-states.html.

149 Some Trump appointees cloak themselves in the sanctimonious rhetoric of religious morality with one hand and undermine the dignity and rights of people with disabilities with the other. For example, Justice Amy Coney Barrett attempted

liberties, Trump appointees were quick to side with parties who asserted liberty arguments.[150]

1. Personal Liberties

The COVID-19 pandemic highlighted the burgeoning tension between public safety measures and personal liberties. When faced with claims by "litigants who argued that their right to personal autonomy and religious freedom outweighed the public interest to curb a deadly pandemic," Trump appointees often protected individual interests over the common good. Despite a death rate so significant that U.S. life expectancy at birth plunged to its lowest level since 1996,[151] these newly appointed judges enjoined federal[152] and state[153] regulations requiring

to shield herself from critique that she would not enforce the rights of individuals with disabilities by pointing to her own child who has Down syndrome. Barrett proclaimed that having a child with Down syndrome was "the thing in my life that has helped me to grow the most." Margaret Talbot, *Amy Coney Barrett's Long Game*, The New Yorker, Feb. 7, 2022 at 24–25. But Barrett's family life is no more proof she would apply disability rights laws in a broad way to further Congressional intent than is Justice Thomas's family life proof that he would uphold the liberty interests in marriage. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (upholding the right to marry as "one of the vital personal rights essential to the orderly pursuit of happiness by free men").

150 Hoffman, *supra* note 125 at 108–12.

151 Centers for Disease Control and Prevention, *Life Expectancy in the U.S. Dropped for the Second Year in a Row in 2021*,(Aug. 31, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/20220831.htm.

152 *See, e.g.*, Missouri v. Biden, 571 F. Supp. 3d 1079, 1104 (E.D. Mo. 2021), *vacated and remanded*, No. 21-3725, 2022 WL 1093036 (8th Cir. Apr. 11, 2022), *cert. denied*, 214 L. Ed. 2d 18, 143 S. Ct. 94 (2022), *granting stay of injunction pending appeal*, Biden v. Missouri, 142 S. Ct. 647, 655 (2022) (opinion by Judge Matthew Schelp, who was nominated by President Trump on January 3, 2020); Louisiana v. Becerra, 571 F. Supp. 3d 516, 544 (W.D. La. Nov. 30, 2021) (opinion by Judge Terry Doughty, who was nominated by President Trump on August 3, 2017), *modified*, Louisiana v. Becerra, 20 F.4th 260 (5th Cir. 2021); BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab., 17 F.4th 604, 609 (5th Cir. 2021) (enjoining enforcement of federal mask mandate for employees of businesses with more than 100 employees) (opinion by Judge Kurt Englehardt, who was nominated by President Trump on January 8, 2018). Judges Joan Larsen and John Bush were nominated by President Trump on May 8, 2017. Adam Liptak, *Trump to Announce Slate of Conservative Federal Court Nominees*, N.Y. Times (May 7, 2017), https://www.nytimes.com/2017/05/07/us/politics/trump-lower-court-nominees-conservatives.html. See *also*, In re McP No. 165, Occupational Safety & Health Admin., 21 F.4th 264, 267, 267–92 (6th Cir. 2021) (Larsen, J., and Bush, J., dissenting).

153 Georgia v. Biden, 574 F. Supp. 3d 1337, 1357 (S.D. Ga. 2021), *aff'd in part, vacated*

vaccinations and masks.

For example, like many Republican elected officials, Texas Governor Greg Abbott signed an executive order that banned local school districts from implementing universal mask policies on school property.[154] Despite the deadly risk posed by exposure to COVID-19 to individuals with disabilities,[155] Trump appointees upheld Abbott's anti-mask order, thus imperiling students and staff with disabilities.[156]

The district court had enjoined Abbott's order as violating the ADA and Rehabilitation Act because it forced students with disabilities to forego in-person learning altogether or assume "unnecessarily greater health and safety risks than their nondisabled peers."[157] But Judge Cory T. Wilson[158] authored the Fifth Circuit opinion that stayed the district court's order.[159] Judge Wilson ignored uncontroverted medical evidence that students with disabilities would suffer harm if masking were not mandated by claiming that other safety measures such as "distancing, voluntary masking, class spacing, plexiglass, and vaccinations" would protect them.[160] Employing blame-the-victim reasoning, Judge Wilson maintained that any harm the plaintiffs suffered was "self-inflicted"

in part sub nom., Georgia v. President of the United States, 46 F.4th 1283 (11th Cir. 2022) (opinion by Judge Stan Baker, who was nominated by President Trump on Sept. 7, 2017).

154 E.T. v. Paxton, 41 F.4th 709, 713 (5th Cir. 2022) (opinion by Judge Andrew Oldham, who was nominated by President Trump on February 5, 2018).

155 COVID-19 causes a higher risk of serious illness or death for people with disabilities such as cancer; chronic kidney, liver, and lung disease; dementia; diabetes; Down syndrome; cardiac disease; HIV; immunocompromised state; mental health conditions; obesity resulting from a physiological condition; sickle cell disease; cerebrovascular disease; and tuberculosis. Centers for Disease Control and Prevention, *People with Certain Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (updated May 11, 2023).

156 E.T. v. Paxton, 41 F.4th at 722.

157 E.T. v. Morath, 571 F. Supp. 3d 639, 659 (W.D. Tex. 2021), *vacated and remanded sub nom.*, E.T. v. Paxton, 41 F.4th 709 (5th Cir. 2022). The opinion was authored by Judge Lee Yeakel, a George W. Bush appointee. *See* Federal Judicial Center, *Federal Judicial History*, https://www.fjc.gov/history/judges/yeakel-earl-leroy-iii (last visited June 26, 2023).

158 Trump nominated Judge Cory Wilson on May 4, 2020. *See* Federal Judicial Center, *Wilson, Cory Todd*, https://www.fjc.gov/history/judges/wilson-cory-todd (last visited June 26, 2023). Trump nominated Judge Andrew Oldham, who joined in the opinion, on February 5, 2018. *See* Federal Judicial Center, *Oldham, Andrew Stephen*, https://www.fjc.gov/history/judges/oldham-andrew-stephen (last visited June 26, 2023).

159 E.T. v. Paxton, 19 F.4th at 763.

160 *Id.* at 766, 770.

because Texas did not "bar plaintiffs' physical access to school."[161] Thus, the Fifth Circuit held that the plaintiffs were unlikely to succeed on the merits of their ADA and Rehabilitation Act claims because "vaccines, voluntary masking, and other possible accommodations" were adequate and plaintiffs "are not entitled to their preferred accommodation."[162] As a result, students and school employees had to choose between endangering their health and foregoing education and employment.

Doubling down on Judge Wilson's restrictive interpretation of the ADA, another Trump appointee, Judge Andrew Oldham, authored the Fifth Circuit opinion that legitimized opposition to mask mandates by vacating the district court's injunction of Abbott's order.[163] Not content to limit his review to the rights of students with disabilities, Judge Oldham suggested that no individual with a disability was entitled to a public accommodation that required others to wear a mask, mocking such accommodations as a "demand [for] court-created mask-mandate bubbles."[164] He spurned what he mischaracterized as the plaintiffs' claim to "require federal courts to enforce mobile mask mandates that go where plaintiffs go and require everyone around them to wear masks."[165] Like Judge Wilson, Judge Oldham discounted as "speculative" the students with disabilities' medical evidence[166] of the serious health risk COVID-19 posed to them.[167] Moreover, he contorted the previously established standard that a public entity "is not required to acquiesce to [the plaintiffs'] choice of accommodations merely because [they] requested them[,]"[168] into one that allows a court to completely ignore the plaintiffs' evidence of what accommodations would make the public service "readily accessible to and usable by individuals with disabilities[.]"[169]

161 *Id.* at 766 n.2.

162 *Id.* at 767–68.

163 E.T. v. Paxton, 41 F.4th 709, 722 (5th Cir. 2022).

164 *Id.* at 721.

165 *Id.* at 722.

166 As the dissent noted, "the district court, based on essentially uncontradicted evidence, entered detailed findings of fact. The plaintiffs produced evidence from their personal physicians attesting to plaintiffs' severe disabilities and giving their strong opinions that, because of their disabilities, they should not attend classes where students and staff they were near were not wearing masks." *Id.* at 723 (W. Eugene Davis, J., dissenting).

167 *Id.* at 716.

168 Cadena v. El Paso Cnty., 946 F.3d 717, 725 (5th Cir. 2020) (establishing the previous standard).

169 42 U.S.C. § 12111(9)(A); E.T. v. Paxton, 41 F.4th at 717 ("It's well settled that *defendants*—not plaintiffs—get to choose between reasonable accommodation(s),

2. Religious Liberties

Similarly, courts weakened disability justice when confronted with religious liberty claims. For example, in an opinion authored by Chief Justice Roberts and joined by Justices Gorsuch, Kavanaugh, and Barrett, the Supreme Court held in *Carson v. Makin* that Maine could not deny to religious schools the tuition assistance payments it provided to nonsectarian private schools.[170] Because many rural districts in Maine did not offer public secondary schools, Maine provided tuition assistance for some parents to send their children to the school of their choice, including religious schools.[171]

Private schools have only minimal obligations to accommodate students with disabilities and protect them from discrimination. Under the Rehabilitation Act, private schools that receive federal funds[172] must make only "minor adjustments"[173] to their programs for students with disabilities; they need not provide reasonable accommodations.[174] Under the IDEA, private school students have the right to be evaluated to determine if they are eligible for special education services, but those services must be provided by a public school.[175] Finally, Title III of the ADA applies to private schools,[176] but exempts religious schools.[177] Yet, nearly one in ten American children attend private secondary schools, the majority of whom attend religious schools.[178] By opening the door

and plaintiffs' preferences between reasonable accommodation(s) are irrelevant.").

170 Carson ex rel. O. C. v. Makin, 142 S. Ct. 1987, 1998 (2022) ("Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment.").

171 *Id.* at 1991, 1993–94.

172 "[M]any private schools receive federal funds, either directly or indirectly." Lynn M. Daggett, *"Minor Adjustments" and Other Not-So-Minor Obligations: Section 504, Private Religious K-12 Schools, and Students with Disabilities*, 52 U. Louisville L. Rev. 301, 303 (2014).

173 A "minor adjustment is less than a reasonable accommodation. Minor indicates a minimal burden and adjustment implies a small correction." *Id.* at 321 (quoting Hunt v. St. Peter Sch., 963 F. Supp. 843, 852 (W.D. Mo. 1997)).

174 34 C.F.R. § 104.39.

175 20 U.S.C. §§ 1412(E), 1413 (a public school may pay a private school to provide special education services).

176 42 U.S.C. § 12181(7)(J); 28 C.F.R. §§ 36.102(a)(3), 36.2014.

177 Title III exempts "religious organizations or entities controlled by religious organizations." 42 U.S.C.A. § 12187.

178 In fall 2019, 4.7 million K-12 students—nine percent of all K-12 students—were enrolled in private schools; three out of four K-12 students in private schools attended religious schools. Nat'l Ctr for Educ. Stats., *Private School Enrollment*, U.S. Dep't of Educ. (May 2022), https://nces.ed.gov/programs/coe/indicator/cgc.

to public financial support for religious activities,[179] *Carson* potentially allows private entities, such as religious secondary schools, to receive public funds, yet evade accommodating students with disabilities.

Ninth Circuit Judge Ryan Nelson—joined by three other Trump appointees (Mark Bennett, Briget Bade, and Daniel Collins)—teed up another case for the Supreme Court to expand religious rights at the expense of individuals with disabilities.[180] The Trump judges dissented from an opinion that required a religious school to accommodate a teacher by providing her medical leave for chemotherapy to treat her cancer.[181] The dissenters challenged the Supreme Court to improperly exempt all employees of religious schools from ADA protection.[182] Unsurprisingly, the Supreme Court took the opportunity to expand religious rights at the expense of other rights.[183] Justices Gorsuch and Kavanaugh joined the majority's opinion that tore a gaping hole in the ADA by declaring the religious school teacher was a "minister" of the Catholic faith, and thus unprotected by the ADA, even though she taught primarily secular subjects.[184]

See also, Daggett, *supra* note 172 at 303.

179 Justice Sotomayor expressed "growing concern for where this Court will lead us next." Carson ex rel. O. C. v. Makin, 142 S. Ct. at 2014 (Sotomayor, J., dissenting). She cautioned in her dissent: "If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens." *Id.* at 2014 (Sotomayor, J., dissenting).

180 *See* Biel v. St. James Sch., 926 F.3d 1238, 1240 (9th Cir. 2019). Judge Mark Bennett was nominated by Trump on February 15, 2018. *See* Federal Judicial Center, *Federal Judicial History*, https://www.fjc.gov/history/judges/bennett-mark-jeremy (last visited June 26, 2023). Judge Bridget Bade was nominated by Trump on January 23, 2019. *See* Federal Judicial Center, *Federal Judicial History*, https://www.fjc.gov/history/judges/bade-bridget-shelton (last visited June 26, 2023). Judge Daniel Collins was nominated by Trump on February 6, 2019. *See* Federal Judicial Center, *Federal Judicial History*, https://www.fjc.gov/history/judges/collins-daniel-paul (last visited June 26, 2023).

181 Biel, 926 F.3d at 1240, 1244.

182 *Id.* at 1244.

183 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

184 *Id.* at 2072 (2020) (Sotomayor, J., dissenting). The "ministerial exception" relied upon by the majority refers to the doctrine that "the First Amendment categorically bars certain antidiscrimination suits by religious leaders against their religious employers." *Id.* at 2073 (Sotomayor, J., dissenting) (citing Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 140, 188–190 (2012)). When the exception applies, a religious employer's discrimination against a religious employee is protected by the First Amendment, "even when the discrimination is wholly unrelated to the employer's religious beliefs or practices." *Id.*

D. Relying on Narrow Forms of Textualism to Weaken Disability Rights Laws

Some Trump appointees surgically and opportunistically employed textualism to narrow the reach of disability-rights statutes. But as Justice Kagan posited: "The current Court is textualist only when being so suits it."[185] It issues "get-out-of-text-free cards . . . [to] [p]revent agencies from doing important work, even though that is what Congress directed."[186]

Judge Mizelle's literal reading of the word *sanitation*[187] to reject face mask regulations is one example of textualism run amok. And no one can take comfort in knowing that some textual reasoning is expressed in dissents, as the various opinions issued in *Dobbs*[188] demonstrate that jurists who are determined to rein in civil liberties may one day reach those targets in majority opinions. For example, Eleventh Circuit judges Elizabeth Branch[189] and Kevin Newsom[190] dissented to opinions that held that the federal government could sue Florida under Title II of the ADA for failing to provide children with disabilities appropriate care because it provided services only in institutional settings and not in-home care.[191] The Eleventh Circuit rightly recognized that Congress intentionally "created a system of federal enforcement" in the Rehabilitation Act and the ADA by choosing "to designate the 'remedies, procedures, and rights'" of other civil rights legislation to enforce disability rights.[192]

In her dissent, Judge Branch asserted that, despite unequivocal statutory language and congressional intent, the United States could

185 W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2625 (2022) (Kagan, J., dissenting).

186 *Id.* at 2625.

187 *See* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1157–59 (M.D. Fl. 2022).

188 Justice Thomas signaled that "in future cases" the Court should abandon "substantive due process precedents to reject the fabrication of" civil rights. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

189 Judge Elizabeth Branch was nominated by President Trump on January 8, 2018. *See* Federal Judicial Center, *Federal Judicial History*, https://www.fjc.gov/history/judges/branch-elizabeth-lee (last visited June 26, 2023).

190 Judge Kevin Newsom was nominated by President Trump on May 8, 2017. *See* Federal Judicial Center, *Federal Judicial History*, https://www.fjc.gov/history/judges/newsom-kevin-christopher (last visited June 26, 2023).

191 *See* United States v. Florida, 938 F.3d 1221 (11th Cir. 2019); *see also* United States v. Sec'y Fla. Agency for Health Care Admin., 21 F.4th 730 (11th Cir. 2021).

192 United States v. Florida, 938 F.3d at 1250.

not enforce the Rehabilitation Act to protect children with disabilities from segregated state-sponsored institutional living conditions.[193] Judge Branch opined that "[b]ecause the United States is not a 'person alleging discrimination' under Title II of the" ADA, the Attorney General of the United States had no standing to enforce Title II.[194] As she did in *Gil v. Winn-Dixie*,[195] Judge Branch relied on textualism to justify her conclusion that Congress failed to explain that the Attorney General had the same standing under Title II that it had under Title I and Title III of the ADA to enforce its right to prohibit disability-based discrimination.[196]

Judge Newsom, joined by Judge Branch, then dissented to the Eleventh Circuit's decision to deny Florida's request for a rehearing.[197] He laid bare his disdain for federal enforcement of civil rights statutes against noncomplying states, accusing the majority of creating "a nonexistent cause of action" that "vests the federal government with sweeping enforcement authority" that "upends the delicate federal-state balance."[198]

As the majority pointed out, Judge Newsom's reasoning is supported by neither the text nor the intent of the ADA.[199] First, Judge Newsom erred in concluding that the "Attorney General cannot sue because he is not a 'person' for purposes of the ADA."[200] Because the Rehabilitation Act incorporate the remedies of other civil rights statutes that provide the United States standing, "it is clear that the Attorney General can sue on behalf of the aggrieved person, rather than as the person."[201] Second, Judge Newsom erroneously asserted that the Attorney General may sue Florida to protect "medically-fragile children under Title II . . . only when the state or state agency receives federal funding and agrees as a condition of the funding to refrain from engaging in disability discrimination."[202] Yet, "Title II contains no reference to

193 The Department of Justice determined, after a six-month investigation, that Florida violated Title II of the "ADA and its implementing regulations, by 'unnecessarily institutionalizing hundreds of children with disabilities in nursing facilities.'" *Id.* at 1224.

194 *Id.* at 1250 (Branch, J., dissenting).

195 *See supra* notes 107 to 120 (discussing the case of Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1284 (11th Cir.), *vacated*, 21 F.4th 775 (11th Cir. 2021)).

196 United States v. Florida, 938 F.3d at 1253.

197 United States v. Sec'y Fla. Agency for Health Care Admin., 21 F.4th 730 (11th Cir. 2021).

198 *Id.* at 748 (Newsom, J., dissenting).

199 *Id.* at 733.

200 *Id.* at 733–34.

201 *Id.* at 738.

202 *Id.* at 733.

federal funding, and, as Judge Newsom concedes, its implied private right of action is not limited to federally-funded defendants."[203]

E. Limiting Damages for Disability-based Discrimination

In 1978 amendments to the Rehabilitation Act, Congress directed that the "remedies, procedures, and rights" available under Title VI "shall be available to any person" who proves a violation of the Rehabilitation Act.[204] The ADA incorporates nearly the exact same language to provide remedies to prevailing plaintiffs.[205] This language "authorizes private citizens"[206] to sue for monetary damages. The ADA and Rehabilitation Act provide compensatory damages for intentional discrimination and punitive damages for intentional discrimination with "malice or with reckless indifference."[207]

But discrimination against individuals with disabilities often imposes non-economic harm, too. Like race-based discrimination, disability-based discrimination can cause "humiliation, frustration, and embarrassment."[208] As Justice Stephen Breyer has noted, "intentional discrimination based on . . . disability is particularly likely to cause emotional suffering."[209] Comparing the impact of disability-based discrimination with the impact of race-based discrimination, Justice Breyer recognized that "Congress' antidiscrimination laws seek 'the vindication of human dignity and not mere economics.'"[210]

Nonetheless, in a mechanical analysis of the Rehabilitation Act,[211] without regard for the human impact of disability-based

203 *Id.* at 734.

204 29 U.S.C.S § 794a(a)(2) (LEXIS through Pub. L. No. 117-285 (excluding Pub. L. No. 117-263).

205 42 U.S.C. § 12117(a).

206 Tennessee v. Lane, 541 U.S. 509, 517 (2004).

207 42 U.S.C.S § 1981a(a)(2), (b)(1) (LEXIS through Pub. L. No. 117-285 (excluding Pub. L. No. 117-263)).

208 As Justice Goldberg observed in holding that the Civil Rights Act of 1964 prohibited racial segregation by a motel: "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring).

209 Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1580 (Breyer, J., dissenting) reh'g denied, 142 S. Ct. 2853 (2022) (Mem.).

210 *Id.* at 1579. (Breyer, J., dissenting) (quoting Heart of Atlanta, 379 U.S. at 291) (Goldberg, J., concurring)).

211 The Rehabilitation Act prohibits disability-based discrimination by recipients of federal funds. 29 U.S.C.A §§ 793–794 (Westlaw through Pub. L. No. 117-262).

discrimination, the Supreme Court ruled that emotional damages were not available to plaintiffs who proved they were harmed by intentional discrimination.[212] In an opinion by Chief Justice Roberts, joined by all three Trump-appointees, the Court affirmed the Fifth Circuit's dismissal of a lawsuit filed by Jane Cummings, a blind and deaf physical therapy client who sought emotional damages under the Rehabilitation Act from her physical therapy provider for failing to provide a sign language interpreter to enable her to communicate with her therapist.[213]

Chief Justice Roberts reasoned that although injunctive and monetary relief were available under the Rehabilitation Act, emotional damages were not, because (pursuant to the Spendings Clause) recipients of federal funds were not put on notice that they could be subject to emotional damages.[214] In his concurrence, Justice Kavanaugh, joined by Justice Gorsuch, rejected Chief Justice Roberts' and the dissenters' contract-law analogy that recipients of federal funds were not put on notice that emotional damages were a remedy for disability discrimination.[215] Justice Kavanaugh, in a typically restrictive reading of a civil rights statute, opined that "Congress, not this Court, should extend those implied causes of action and expand available remedies."[216]

In his dissent, Justice Breyer explained that Congress clearly intended that remedies under the Rehabilitation Act include emotional damages because the purpose of the Rehabilitation Act, like other civil rights statutes, is "to eradicate invidious discrimination. That purpose is clearly nonpecuniary. . . . Often, emotional injury is the primary (sometimes the only) harm caused by discrimination, with pecuniary injury at most secondary."[217] Justice Breyer reasoned that federal funding recipients are "aware that intentional invidious discrimination is particularly likely to cause emotional suffering" and "that damages for emotional suffering are available for breaches of contract . . . where the breach 'was particularly likely to result in serious emotional disturbance.'"[218]

The Supreme Court's abandonment of emotional damages for intentional violations of the Rehabilitation Act[219] leaves many victims of

212 Cummings, 142 S. Ct. at 1576.
213 *Id.* at 1568–69, 1576.
214 *Id.* at 1576 (Breyer, J., dissenting).
215 *Id.*
216 *Id.* at 1576–77.
217 *Id.* at 1579.
218 *Id.* at 1581 (Breyer, J., dissenting) (quoting 3 S. Williston, Law of Contracts § 1340, p. 2396 (1920)).
219 *See, e.g.*, Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 17 (1st Cir. 2006) (emphasis

intentional disability-based discrimination without the very remedies to the discrimination that the Act was designed to discourage. In many disability cases, like that brought by Jane Cummings for being denied a way to communicate with her physical therapist, emotional damages are the only relevant remedy, as the plaintiff has not suffered a measurable financial loss.[220] By surgically removing emotional damages as a remedy for disability-based discrimination, the Supreme Court has undermined the private right of action authorized by civil rights statutes such as the Rehabilitation Act and the ADA, leaving victims of discrimination scant effective federal remedy to compensate them for their harm.[221]

IV. How Disability Rights Advocates Can Lessen the Impact of Decisions by Trump's Judicial Appointees

As the needs of individuals with disabilities are multifaceted, so too must be effective solutions to disability justice in the post-Trump judiciary. Societal changes are essential to better meet the diverse concerns of individuals with disabilities and to discourage discrimination.[222] But without legal remedies, societal changes will fall

added) (quoting Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 126–27 (1st Cir. 2006)) ("We have previously held that under Title II [of the ADA], non-economic damages are only available when there is evidence 'of economic harm *or animus toward the disabled*.'"; Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 580–81 (2d Cir. 2003) (affirming district court's award of compensatory damages for emotional pain and suffering under Title II of the ADA); Johnson v. City of Saline, 151 F.3d 564, 573 (6th Cir. 1998) (recognizing that the Rehabilitation Act permits compensatory damages for intentional discrimination); Reed v. Columbia St. Mary's Hosp., 782 F.3d 331, 337 (7th Cir. 2015) (recognizing that the Rehabilitation Act permits compensatory damages for intentional discrimination); Mark H. v. Lemahieu, 513 F.3d 922, 930 (9th Cir. 2008) (recognizing that the Rehabilitation Act permits compensatory damages for intentional discrimination); Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1192 (11th Cir. 2007) ("[N]on-economic compensatory damages are indeed available for intentional violations of the RA."); Swogger v. Erie Sch. Dist., 517 F. Supp. 3d 414, 425 (W.D. Pa. 2021) ("Title II of the ADA and Section 504 of the RA allow plaintiffs to recover damages for emotional harm where there is evidence of intentional discrimination.").

220 Cummings, 142 S. Ct. at 1579 (Breyer, J., dissenting). *See also* Leading Case, *Affordable Care Act & Rehabilitation Act – Spending Clause – Remedies – Emotional Distress* – Cummings v. Premier Rehab Keller, P.L.L.C., 136 Harv. L. Rev. 440, 447 (2022) ("Discrimination is a harm that Congress and juries have consistently understood as creating emotional distress that can and often does get remedied as part of compensatory damages.").

221 *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75–76 (1992) (recognizing that damages are a necessary remedy for Title IX violations).

222 *See, e.g.*, Robyn M. Powell, *Beyond Disability Rights: A Way Forward After the 2020*

short. Legal remedies to "discrimination in employment, government services, and other spheres of public life" must "include negotiation, mediation, arbitration, administrative remedies, litigation, and the use of national ombudsmen or equal rights commissions."[223] These remedies are at the mercy of how state and federal agencies[224] and judges enforce statutes and regulations. Thus, ensuring enforcement of disability rights will require both political and litigation solutions.

A. Political Solutions

Executive and legislative policies greatly shape disability justice. Without regulatory and statutory reform, private and public enforcement of disability rights laws will remain limited. The paucity of remedies available under the ADA, IDEA, and Rehabilitation Act have made it difficult to enforce these laws privately.[225] Without the potential for "compensation, individuals with disabilities may be hesitant to go through the difficulties, delay, and expense of pursuing litigation."[226] Additionally, although the ADA permits the award of attorney's fees to

Election, 15 St. Louis U. J. Health L. & Pol'y 391, 445–46 (2022) (noting that disability justice advocates caution that addressing the needs of individuals with disabilities requires systemic changes to society in addition to law and policy reforms); Katie Eyer, *Claiming Disability*, 101 B.U. L. Rev. 547, 618 (2021) (asserting that encouraging people with disabilities to "claim" their disabilities "has the potential to be transformational by challenging stereotypes on a large scale and disrupting long-standing conceptions linking disability inextricably to limitation"); Emens, *supra* note 17, at 679; Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. Mich. J.L. Reform 305, 387 (2001) (discussing the importance of "the self-images of adults and children with disabilities, as they come to see themselves as talented human beings who have much to contribute to society").

223 Herr, *supra* note 222, at 305, 387 (noting that anti-discrimination laws "are not panaceas").

224 After the Trump Administration drastically reduced enforcement of disability rights, the Biden Administration has taken steps to increase enforcement. *See* Powell, *supra* note 222, at 447.

225 *See, e.g.*, Cummings, 142 S. Ct. at 1576 (emotional damages not available for disability-based discrimination); J.M. v. Francis Howell Sch. Dist., 850 F.3d 944, 950 (8th Cir. 2017) ("While the IDEA allows attorney's fees and costs . . . 20 U.S.C. § 1415(i)(3)(B), compensatory and punitive damages are not available.").

226 Eve Hill & Peter Blanck, *Future of Disability Rights Advocacy and "The Right to Live in the World,"* 15 Tex. J. on C.L. & C.R. 1, 21 (2009).

the prevailing party,[227] the standard for receiving fees is quite high.[228] Plaintiffs' attorneys would have more resources to pursue private enforcement if statutory and regulatory reforms modified the definition of "prevailing party" to include a party "whose legal action is a catalyst to the defendant's change in behavior."[229]

But statutory and regulatory reform is neither a panacea nor without risks. The civil rights of individuals with disabilities once had bipartisan support.[230] Now, however, many scholars doubt that the ADA could pass in today's hyper-partisan world.[231] Exposing civil rights laws to amendments risks weakening their impact. For example, in 2018, House Republicans, with support from all but nineteen Republican representatives, passed the farcically named "The ADA Education and Reform Act," which opponents characterized as having the potential to gut the enforcement provisions of the ADA.[232] It took a coalition of Democratic representatives, disability rights groups, and unions to prevent the draconian House bill from becoming law.[233] The

227 42 U.S.C. § 12205 ("In any action or administrative proceeding . . . the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs . . . .").

228 *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 604–05 (2001) (limiting attorney's fees in a housing disability case to a "prevailing party" who achieves an "alteration of the legal relationship of the parties"). Thus, attorney's fees may not be awarded solely because the defendant voluntarily changes its conduct. *Id.*

229 *Id.* at 22.

230 In 1990, the ADA passed the House 377–28 and the Senate 91–6. *H.R. 620 (115th): ADA Education and Reform Act of 2017*, Gov Track 2017, https://www.govtrack.us/congress/bills/115/hr620 (last visited March 3, 2023); *See* Laura Rothstein, *Would the ADA Pass Today?: Disability Rights in an Age of Partisan Polarization*, 12 St. Louis U. J. Health L. & Pol'y 271, 271, 279, 304 (2019) (quoting Lennard Davis, Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights 8 (2015)) ("The ADA is an excellent example of a bipartisanship no longer extant but made possible when a Republican president, George H.W. Bush, worked together with a Democratic House and Senate. . . . All these political leaders believed that disability was an issue both parties could agree on.").

231 *See, e.g.*, Rothstein, *supra* note 230 at 279; Bagenstos, *supra* note 3, at 29–30, 34 (2020) (advocating that "[o]nly by redoubling the efforts of disability rights as a social movement can we make further progress in achieving the goal of disability equality").

232 Mike DeBonis, *House Passes Changes to Americans with Disabilities Act Over Activities' Objections*, Wash. Post (Feb. 15, 2018), https://www.washingtonpost.com/powerpost/house-passes-changes-to-americans-with-disabilities-act-over-activists-objections/2018/02/15/c812c9ea-125b-11e8-9065-e55346f6de81_story.html.

233 *See* Madeleine M. Plasencia, *Disabling Fascism: A Struggle for the Last Laugh in Trump's*

intransigence of those determined to rein in disability rights—laid bare by supporters of the ADA Education and Reform Act—foreshadows the ongoing effort necessary just to preserve the rights and remedies that remain today.[234] Thus, the odds of statutory reform to expand the rights of and remedies for individuals with disabilities remain poor for the foreseeable future.

Expanding and protecting disability rights through executive actions such as executive orders and regulatory reform, however, depends on the policy of each new administration. For example, President Biden issued an administrative order mandating the reexamination of proposed Department of Housing and Urban Development regulations that could have raised the standard for proving disability discrimination under the Fair Housing Act.[235] He also increased Department of Justice enforcement of the ADA, which had lagged under the Trump Administration,[236] and issued an executive order which included expanding voting access for individuals with disabilities.[237] Biden's Department of Health and Human Services issued an interim regulation that required facilities that provide health care to Medicare and Medicaid beneficiaries to ensure that their staff, unless exempt for medical or religious reasons, are fully vaccinated against COVID-19, which would protect individuals with disabilities from avoidable exposure to COVID-19.[238] Of course, even when progressive administrations expand regulatory protections for people with disabilities, some judges will decline to defer to regulations, even those supported by clear congressional intent.

America, 23 Harv. Latinx L. Rev. 287, 298–300 (2020).

234 The ADA Education and Reform Act of 2017 passed the House 225–192 (213 Republicans and 12 Democrats voted for the bill; 173 Democrats and only 19 Republicans voted against it). *ADA Education and Reform Act of 2017*, Gov Track 2017, https://www.govtrack.us/congress/bills/115/hr620 (last visited March 3, 2023).

235 86 Fed. Reg, 7487, Jan. 29, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/?eType=EmailBlastContent&eId=a684e210-528f-4e49-a6a5-8047c284b374.

236 *See* Perkins Coie, *Recent DOJ Settlements Show Step Up in Web Accessibility Enforcement by Biden Administration*, (Jan. 27, 2022), https://www.jdsupra.com/legalnews/recent-doj-settlements-show-step-up-in-8723386/.

237 Exec. Order 14019, Promoting Access to Voting, 86 Fed. Reg. 13623 (Mar. 7, 2021).

238 *See* Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555, 61560 (Nov. 5, 2021).

B. Litigation Solutions

The likelihood of being assigned a Trump appointee in federal court varies from circuit to circuit[239] and district to district.[240] And certainly not every Trump appointee routinely rules against plaintiffs with disabilities.[241] But in jurisdictions with a significant percentage of Trump appointees, plaintiffs' attorneys should consider pursuing a state law claim. Some states have laws that prohibit some disability-based discrimination, many of which are modeled on the ADA.[242] Some states cover employers with fewer than fifteen employees, and thus cover

239 For example, Trump placed no judges on the First Circuit and only two judges on the Tenth Circuit (Joel Carson and Allison Eid). *Federal Judges Nominated by Donald Trump*, Ballotpedia, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump (last visited June 26, 2023). However, Trump placed ten of twenty-nine judges on the Ninth Circuit (Lawrence VanDyke, Danielle Forrest, Daniel Bress, Kenneth Kiyul Lee, Daniel Collins, Patrick Bumatay, Bridget Bade, Eric Miller, Ryan Nelson, and Mark Bennett). *See id.* https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump.

240 For example, Trump placed no judges on federal courts in eight states (Massachusetts, Montana, Nevada, New Hampshire, New Jersey, South Dakota, Vermont, and Washington). *See id.* But Trump placed eighteen on federal trial courts in Texas (Sean Jordan, Michael Truncale, Jeremy Kernodle, J. Campbell Barker, Drew Tipton, Charles Eskridge, Jeff Brown, David Morales, Fernando Rodriguez, Ada Brown, Brantley Starr, Mark Pittman, James Wesley Hendrix, Matthew Kacsmaryk, Karen Gren Scholer, Jason Pulliam, Alan Albright, and David Counts) and fifteen on federal trial courts in Pennsylvania (Christy Wiegand, John Gallagher, Karen Marston, John Younge, Joshua Wolson, Chad Kenney, Jennifer Philpott Wilson, Scott Hardy, Peter Phipps, William Shaw Stickman, Stephanie Haines, Robert Colville, Susan Baxter, J. Nicholas Ranjan, and Marilyn Horan). *See id.*

241 *See, e.g.*, Schirnhofer v. Premier Comp Sols., LLC, 832 F. App'x 121 (3d Cir. 2020) (Judge Paul Matey affirmed a grant of attorney's fees to a plaintiff who partially prevailed in a Title I case); *see also Paul Matey*, Ballotpedia, https://ballotpedia.org/Paul_Matey; Gibbs v. City of Pittsburgh, 989 F.3d 226 (3d Cir. 2021) (Judge Stephanos Bibas reversed trial court's dismissal of police candidate's Title I claim that he was not hired because two police psychologists said that his ADHD suggested he should not be hired); *see also Stephanos Bibas*, Ballotpedia, https://ballotpedia.org/Stephanos_Bibas; Doe v. Law Sch. Admission Council, Inc., 791 F. App'x 316, 316 (3d Cir. 2019) (Judge Stephanos Bibas reversed dismissal of pro se plaintiff's Title III claim for accommodations on the LSAT, noting that "[w]hen a party sues without a lawyer's help, we must construe her pleadings liberally"); Darby v. Childvine, Inc., 964 F.3d 440, 446 (6th Cir. 2020) (Judge Chad Readler, joined by Judge Eric Griffin and Judge Amul Thapar, reversed and remanded dismissal of a Title I claim and ruled that "gene mutation and abnormal cell growth, though not cancerous, qualify as a disability under the ADA").

242 *Disability Discrimination Laws by State*, Bloomberg Law (Dec. 20, 2021), https://pro.bloomberglaw.com/brief/disability-discrimination-laws-by-state/.

more employees than does the ADA.[243] In contrast, a few states cover only public employers.[244] Moreover, some states have more protections than do federal courts and agencies[245] and offer remedies greater than federal law.[246]

The disability rights bar is a community of supportive and dedicated advocates who are accustomed to partnering not only with other attorneys, but also with experts in related fields such as medicine, social work, and rehabilitation.[247] Attorneys rely on these experts to help prove a plaintiff's standing as a person with a disability, propose reasonable accommodations, and rebut a defendant's medical, technological, and other evidence. For example, the Burton Blatt Institute[248] coordinates the work of "scholars, lawyers, policymakers, social science researchers, advocates, community members with and without disabilities, and providers of funding at the national and international levels," to promote disability justice.[249] This work enhances the public's perception of individuals with disabilities, which can help reduce discrimination and increase political power. Such collaborations promote research and education so attorneys can make wise choices in choosing forums and formulating arguments. By sharing litigation strategy and outcomes, disability rights attorneys can help navigate one another through the obstacle-filled paths of the post-Trump judiciary.

243 *Id; The ADA: Your Employment Rights as an Individual with a Disability*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability#:~:text=The%20part%20of%20the%20ADA%20enforced%20by%20the%20EEOC%20outlaws,employees%20after%20July%2026%2C%201994.

244 Bloomberg Law, *supra* note 242. For example, Alabama prohibits discrimination only by governmental agencies and public employers. Ala. Code § 21-7-8.

245 Hill & Blanck, *supra* note 226, at 1, 24–25.

246 *Id*. at 22.

247 *See* Randye Retkin et al., Poverty, Health and Law: Readings and Cases for Medical-Legal Partnership 395, 397 (Elizabeth T. Tyler et al. eds., 2011).

248 The Burton Blatt Institute is a "university-wide institute at Syracuse University dedicated to advancing the civic, economic, and social participation of people with disabilities worldwide through a global network of research, education, community development, and advocacy." Hill & Blanck, *supra* note 226, at 3. *See also* The Nat'l Council on Disability, https://ncd.gov/about (last visited June 26, 2023) (operating as an independent federal agency that advises "the President, Congress, and other federal agencies regarding policies, programs, practices, and procedures that affect people with disabilities.").

249 *See* Hill & Blanck, *supra* note 226, at 4–20 (discussing how the Executive Department can address disability-discrimination in employment, housing, education, and access to "goods, services, and technology").

Conclusion

This essay considers just one aspect of the rights of individuals with disability—the lasting impact of Trump's judicial appointees on enforcement of laws like the ADA, Rehabilitation Act, and IDEA. Fair and effective interpretation of these statutes is a central square in the quilt of disability justice. Yet the pro-employer, pro-business, and anti-regulation tilt of Trump's judicial appointees have placed disability rights in the crosshairs.

Disability rights are human rights. But like all civil rights, they have been recently imperiled by partisan policies.[250] Given that federal judges have lifetime appointments, disability rights may be affected by the "stench"[251] of rulings by Trump's judicial appointees for a generation. Civil rights are imperiled in "the era of stare indecisis."[252] Until a new generation of judicial appointees moderate the federal bench, individuals with disabilities will require vigilant, concerted advocacy to defend their rights.

250 The analogies to abortion rights are obvious. Many anti-abortion jurists disingenuously claim that society will treat the living as humanely as it should treat a fetus, but those fetuses who grow into children and adults with disabilities need legal remedies when societies fail them. *See* Michele L. Norris, *Opinion: The GOP Roars About Abortion. Then They Abandon the Children.*, Wash. Post (May 3, 2022), https://www.washingtonpost.com/opinions/2022/05/03/children-women-roe-leak/ (noting that states with the most restrictive abortion laws spend the least on health and economic benefits for children and adults).

251 Justice Sonia Sotomayor, in responding to Mississippi Solicitor General Scott Stewart's unsupported claim that denying the right to abortion would imperil other civil rights, cautioned: "Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?" Dobbs v. Jackson Women's Health Org., 142 U.S. 2228 (2022).

252 Dana Milbank, *Opinion: Et tu, Alito? Murder of Stare Decisis Creates Legal Circus Maximus*, Wash. Post (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/supreme-court-stare-decisis-precedent-dead/.