

# 19-4136

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United States Court of Appeals for the Second Circuit

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T.W.,

*Plaintiff-Appellee,*

-v.-

NEW YORK STATE BOARD OF LAW EXAMINERS, DIANE BOSSE, JOHN  
J. MCALARY, BRYAN WILLIAMS, ROBERT MCMILLEN, E. LEO  
MILONAS, MICHAEL COLODNER,

*Defendants-Appellants.*

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*On Appeal from the United States District Court  
for the Eastern District of New York*

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**BRIEF OF AMICI CURIAE IN SUPPORT OF  
PLAINTIFF-APPELLEE T.W.'s PETITION FOR A REHEARING OR  
REHEARING *EN BANC***

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are a diverse array of thirty-six state and national civil rights organizations and organizations that advocate for and/or represent groups of individuals that would be impacted by this court's ruling. *Amici* are interested in ensuring that civil rights laws are broadly enforced. All *amici* are concerned that the Court's holding in this case could erode the civil rights of those they advocate for.

**The Autistic Self Advocacy Network (“ASAN”)** is a national 501(c)(3) nonprofit run by and for autistic people. that advocates for the full self-determination of all people with disabilities. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or cognitive disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities, promoting supported decision-making and other methods that help people understand and make decisions, and educating the public about the access needs of autistic people and others with mental disabilities, including cognitive access needs and reasonable accommodations.

ASAN takes a strong interest in cases that affect the right of autistic individuals to live lives of their own choosing and to be free from discrimination

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<sup>1</sup> Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No one other than *amici* and their members made monetary contributions to its preparation or submission.

based on disability or other protected factors. Moreover, ASAN has an interest in ensuring that all parts of federally funded state instrumentalities are accessible to individuals with intellectual and developmental disabilities.

**The American Civil Liberties Union (“ACLU”)** is a nationwide, nonprofit nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. With more than three million members, activists, and supporters, the ACLU fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

**A Better Balance (“ABB”)** is a national legal advocacy organization using the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Through legislative advocacy, direct legal services and strategic litigation, and public education, our expert legal team combats discrimination against pregnant workers and caregivers and advances supportive policies like paid sick time, paid family and medical leave, fair scheduling, and accessible, quality childcare and eldercare. When we value the work of providing care, which has long been marginalized due to sexism and racism, our communities and our nation are healthier and stronger. As a

core component of our work, ABB advocates for and enforces the rights of individuals with disabilities in the workplace under federal civil rights laws.

**Association for Higher Education and Disability (“AHEAD”)** is a national nonprofit association representing over 4,000 members who are actively engaged in service provision, consultation and training, and policy development to create just and equitable higher education experiences for disabled individuals on college campuses throughout the country. AHEAD promotes disability accessibility across the field of higher education and beyond by developing and sharing relevant knowledge; strategically engaging in actions that enhance higher educational professionals' effectiveness; and advocating on behalf of its membership, their institutions, their work, and those they serve, ensuring full, effective participation by individuals with disabilities in every aspect of the postsecondary experience. AHEAD affirms that the enforcement of federal and state disability rights laws is fundamental to full participation in education and advancement for disabled people.

**The Association of Late Deafened Adults (“ALDA”)** is a nationwide nonprofit membership organization incorporated in Illinois, comprised largely of people who lost some or all of their hearing after having acquired spoken language. As part of its mission to empower its members, ALDA has actively invoked federal and state

disability-rights laws to expand access to public life, and is therefore opposed to decisions that can eliminate any of those available legal tools.

**The Autistic Women and Nonbinary Network (“AWN”)** is a national nonprofit organization, run by and for autistic people who experience gender-based discrimination, oppression, and violence. AWN focuses on challenging societal ideas about the value of disabled people’s lives and participation in society, and providing a supportive and affirming community for autistic people experiencing marginalization due to gender, sexual orientation, and race. AWN’s advocacy activities include collaboration on research studies on reproductive health care, diagnostic access, and gender-based disparities; publishing resources focused on autism and race, and autism and gender, including autistic transgender people; hosting educational and community-building programs for autistic youth and adults; and raising public consciousness of prejudice, discrimination, oppression, and violence affecting autistic and other disabled people.

**The Center for Public Representation (“CPR”)** is a public interest law firm that has assisted people with disabilities for more than 40 years. CPR uses legal strategies, systemic reform initiatives, and policy advocacy to enforce civil rights, expand opportunities for inclusion and full community participation, and empower people with disabilities to exercise choice in all aspects of their lives. CPR is both a statewide and a national legal backup center that provides assistance

and support to public and private attorneys representing people with disabilities in Massachusetts and to the federally funded protection and advocacy programs in each of the States. CPR has litigated systemic cases on behalf of persons with disabilities in more than 20 states and submitted amici briefs to the United States Supreme Court and many courts of appeals in order to enforce the constitutional and statutory rights of persons with disabilities, including the right to be free from discrimination under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and other laws.

**Civil Rights Education and Enforcement Center (“CREEC”)** is a nonprofit membership organization whose goal is to ensure that everyone can fully and independently participate in our nation’s civic life without discrimination based on race, gender, disability, religion, national origin, age, sexual orientation, or gender identity.

**Communication First** is a national, disability-led nonprofit organization based in Washington, DC, dedicated to protecting the human, civil, and communication rights and advancing the interests of the estimated 5 million people in the United States who cannot rely on speech to be heard and understood due to disability or other condition. Part of Communication First's mission is to reduce barriers and expand equitable access and opportunity for our historically

marginalized population in all aspects of community and society, including the judicial system.

**Connecticut Legal Rights Project (“CLRP”)** is a statewide legal services organization whose clients are low-income people with psychiatric disabilities. CLRP was created by a federal court order and consent decree in 1989 to serve psychiatric inpatients in state facilities and provide them with their constitutional right to access to the courts. CLRP also provides legal representation to low-income people with psychiatric disabilities who reside in the community. CLRP’s representation includes assisting its clients with housing, treatment rights, civil rights, benefits, employment and public accommodations.

**Council of Parent Attorneys and Advocates (“COPAA”)** is a national not-for-profit organization for parents of students with disabilities, their attorneys and advocates. COPAA supports individuals with disabilities, their parents and advocates, in efforts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (“Section 1983”), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”) and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. (“ADA”). COPAA brings to the Court the unique perspective of people with disabilities, advocates, and attorneys for students with disabilities. COPAA has often filed as *amicus curiae* in

the United States Supreme Court, including *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); and *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009), and in numerous cases in the United States Courts of Appeal.

**The Deaf and Hard of Hearing Bar Association (“DHHBA”)** is a 501(c)(3) nonprofit organization comprised of deaf, hard of hearing, late-deafened, and deafblind attorneys, judges, law school graduates, law students, and legal professionals. DHHBA is a member-focused organization that advocates for the equal opportunity of its members and promotes the advancement of deaf and hard of hearing legal professionals.

**Disability Rights Advocates (“DRA”)** is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. With offices in New York City and Berkeley, California, DRA strives to protect and advance the civil rights of people with all types of disabilities. DRA represented the plaintiff in *Enyart v. National Conference of Bar Examiners, Inc.*, 630 F.3d 1153 (9th Cir. 2011), which required the National Conference to permit a blind law school graduate to use assistive technology to take the Multistate Bar Exam and the Multistate Professional Responsibility Exam.

**Disability Rights Connecticut (“DRCT”)** is an independent non-profit organization that has been designated as Connecticut’s protection and advocacy system. Conn. Gen. Stat. § 46a-10a. DRCT’s mission is to advocate for the human, civil, and legal rights of people with disabilities in Connecticut. As the protection and advocacy system for the State of Connecticut, DRCT provides free legal services to advocate and protect the rights of people with disabilities throughout the state of Connecticut. DRCT has extensive experience successfully representing individuals with disabilities on a wide range of disability rights issues including disability discrimination.

**The Disability Rights Education & Defense Fund (“DREDF”)**, based in Berkeley, California, is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

**The Disability Rights Legal Center (“DRLC”)** is a non-profit legal organization founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice,

insensitivity, and lack of legal protection in their endeavors to achieve fundamental dignity and respect. DRLC assists people with disabilities in attaining the benefits, protections, and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and other state and federal laws. Its mission is to champion the rights of people with disabilities through education, advocacy, and litigation. DRLC believes it is imperative for people with disabilities to receive reasonable accommodations and modifications of policies and procedures in high stakes testing. Our clients routinely continue to face unreasonable barriers in higher education, resulting in delay or loss of important human capital throughout our country.

**Disability Rights New York (“DRNY”)** is the federally authorized Protection & Advocacy System for people with disabilities in New York. DRNY has an interest in pursuing legal remedies for individuals with disabilities who face discrimination. DRNY provides free legal services to advance and protect the rights of people with disabilities throughout New York State, including impact litigation to achieve systemic reform. DRNY provides these services to over 4,000 individuals per year under federally-funded mandates established by Congress to protect and advocate for the rights, safety, and autonomy of people with disabilities. DRNY’s work in the area disability discrimination includes successful systemic litigation.

**Disability Rights Vermont (“DRVT”)** is the federally authorized Protection & Advocacy System for people with disabilities in Vermont. DRVT has an interest in pursuing legal remedies for individuals with disabilities who face discrimination. DRVT provides free legal services to advance and protect the rights of people with disabilities throughout Vermont, including impact litigation to achieve systemic reform. DRVT provides these services to hundreds of individuals per year under federally-funded mandates established by Congress to protect and advocate for the rights, safety, and autonomy of people with disabilities. DRVT’s work in the area of disability discrimination includes successful systemic litigation against entities receiving federal funding.

**Hearing Loss Legal Fund (“HLLF”)** is a non-profit organization that seeks to preserve the legal rights of the Deaf and hard of hearing community. HLLF will be providing legal funding for specific legal needs of the Deaf and Hard of Hearing community that are not provided by the other non-profit organizations that serve this community. It will also provide legal education and advocacy to the D/HH community across the United States. Furthermore, HLLF may support, encourage and/or partner with educational and legal institutions into doing legal studies and law review articles to advance the knowledge and education of the legal rights of the Deaf and Hard of Hard of Hearing.

**Housing Works, Inc.** is one of the nation's largest community-based HIV/AIDS service organizations, providing comprehensive services to homeless and low-income New Yorkers living with HIV/AIDS or at-risk of infection, including housing, job training, legal assistance, and comprehensive healthcare. Housing Works' mission is to end the dual crises of homelessness and AIDS through relentless advocacy, the provision of lifesaving services, and entrepreneurial businesses that sustain our efforts. Housing Works *inter alia* provides free legal services to its clients, the vast majority of whom live with disabilities, and has litigated several landmark cases under state and federal disability statutes, including the Rehabilitation Act.

**The Judge David L. Bazelon Center for Mental Health Law**, founded in 1972 as the Mental Health Law Project, is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life, including education, employment, professional licensing, health care, community living, housing, voting, parental and family rights, and other areas. The Americans with Disabilities Act and Section 504 of the Rehabilitation Act are the foundation for most of the Center's legal advocacy.

**Lawyers For Children (“LFC”)** is a not-for-profit legal corporation dedicated to protecting the rights of individual children in New York City and compelling system-wide child welfare reform. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 court proceedings involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation. This year, our attorney-social worker teams will represent children and youth in close to 3,000 judicial proceedings in New York City Family Courts and Supreme Court. In addition, LFC publishes guidebooks and other materials for children and legal practitioners, conducts professional training sessions, and works to reform systems affecting vulnerable children through legislative advocacy, policy level collaboration with City and State agencies, and class action litigation – including actions under section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

**Legal Services NYC (“LSNYC”)** is the largest provider in the U.S. of civil legal services to low-income families and individuals. Through its eighteen community-based offices and numerous outreach sites located throughout each of the city’s five boroughs, LSNYC provides expert legal assistance in priority areas including housing, civil rights, disability, government benefits and family law. LSNYC represents numerous clients with disabilities who seek to vindicate

their rights under federal civil rights laws against both governmental and private defendants.

**Mobilization for Justice, Inc. (“MFJ”)**, formerly MFY Legal Services, envisions a society in which no one is denied justice because they cannot afford an attorney. To make this vision a reality, for over 50 years MFJ has been providing free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform, and policy advocacy. We were in the vanguard in 1983 when we first established units dedicated to serving people with mental health disabilities. Our advocates assist people with mental health disabilities with housing, consumer, public benefits, and other legal problems. MFJ has decades of experience litigating on behalf of people with disabilities, including mental health disabilities, both individually and in class actions. Based on that experience with the New York Unified Court System (UCS), we issued a report, *Barriers to Justice: An Analysis of the ADA Liaison Program in New York City Courts*, on serious flaws in the UCS program that is supposed to provide reasonable accommodations to individuals with disabilities when they come to court as litigants, witnesses, or attorneys. The overarching goal of our work in this area is to ensure that courts provide equal access to justice for people with disabilities. This

work could be significantly hindered by the decision of the U.S. Court of Appeals for the Second Circuit in *T.W. v. New York Board of Law Examiners, et al.*

**Morgan and Morgan Disability Rights Unit** provides legal representation to individuals who are deaf or disabled to effectuate empowerment and equality in their communities.

**The National Association of the Deaf (“NAD”)**, founded in 1880 by deaf and hard of hearing leaders, is the oldest national civil rights organization in the United States. The NAD is a nonprofit that has as its mission to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing people in this country. The NAD is supported by affiliated state organizations in 49 states and D.C. as well as affiliated nonprofits serving various demographics within the deaf and hard of hearing community. Led by deaf and hard of hearing people on its Board and staff leadership, the NAD is dedicated to ensuring equal access in every aspect of life: health care and mental health services, education, employment, entertainment, personal autonomy, voting rights, access to professional services, legal and court access, technology, and telecommunications.

**The National Center for Law and Economic Justice (“NCLEJ”)** advances economic justice for low-income communities across the country through impact litigation, policy advocacy, and support of grassroots organizing. NCLEJ regularly brings enforcement actions under Section 504 of the Rehabilitation Act and Title II

of the Americans with Disabilities Act to ensure people with disabilities have meaningful access to and an equal opportunity to participate in programs, services, and benefits provided by government entities.

**The National Council on Independent Living (“NCIL”)** is the longest-running national cross-disability, grassroots organization run by and for people with disabilities. NCIL works to advance independent living and the rights of people with disabilities. NCIL’s members include individuals with disabilities, Centers for Independent Living, Statewide Independent Living Councils, and other disability rights advocacy organizations. Members of NCIL’s leadership helped draft the Americans with Disabilities Act and NCIL has advocated and will continue to advocate for courts to enforce that law’s intent (as well as its progenitor, the Rehabilitation Act) of providing full and equal opportunities for people with disabilities to pursue their chosen vocation, including those in the legal profession.

**The National Disability Rights Network (“NDRN”)** is the non-profit membership organization for the federally mandated Protection and Advocacy (“P&A”) and Client Assistance Program (“CAP”) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American

Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The **National Disabled Law Students Association (“NDLSA”)** is a nationwide nonprofit that supports the unique needs of disabled law students before, during, and after their legal education. NDLSA fosters disability community and affinity through advocacy, peer network facilitation, and disability diversity education. NDLSA works to abolish disability stigma and facilitate access to accommodations necessary for meaningful inclusion in the legal profession. Specifically, the denial of access and failure to provide accommodations for the bar exam are barriers to entering the legal profession. To that end, NDLSA engages in individual and systematic advocacy to ensure disabled bar exam applicants are afforded equal access to the exam through fair and equitable accommodations procedures.

**National Employment Lawyers Association New York (“NELA NY”)** is the New York affiliate of the National Employment Lawyers Association (“NELA”), a national bar association dedicated to the vindication of the rights of individual employees. NELA/NY has more than 300 members and is one of NELA's largest

affiliates. NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation. Our members advance these goals by providing legal representation to employees who have been victims of discrimination and retaliation. NELA/NY has filed numerous amicus briefs in various courts in cases that raise important questions of anti-discrimination law. The organization's aim has been to highlight the practical effects of legal decisions on the lives of working people. This case is important to the organization's goals because untoward expansion of sovereign immunity means limitations on the rights of working people to pursue claims against the State and State entities, including claims under the Rehabilitation Act.

**The National Women's Law Center ("NWLC")** is a nonprofit legal organization dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons to be free from sex discrimination. Since its founding in 1972, the Center has focused on issues of key importance to women and their families, including education, reproductive rights and health, income security, child care and workplace justice, with particular attention to the needs of low-income women and girls and those who face multiple and intersecting forms of discrimination. The Center has participated as counsel or amicus curiae in a range of cases before the Supreme Court, federal Courts of Appeals, federal district courts and state courts to secure equal opportunity in all aspects of society. The

Center seeks to ensure that all individuals, including disabled women and girls, enjoy the full protection against discrimination as promised by our laws.

**New York Association of Psychiatric Rehabilitation Services, Inc.** (“**NYAPRS**”) is a statewide coalition of people who use and/or provide recovery oriented community based mental health services. We value difference and promote cultural competence in all aspects of our work. NYAPRS is dedicated to improving services and social conditions for people with psychiatric disabilities or diagnoses, and those with trauma-related conditions by promoting their recovery, rehabilitation and rights so that all people can participate freely in the opportunities of society.

**The New York Civil Liberties Union (“NYCLU”)** is the New York State affiliate of the ACLU. The NYCLU is a non-partisan, non-profit membership organization with over 160,000 members. The NYCLU’s mission is to defend and promote civil liberties and civil rights. The NYCLU works to ensure that the core values and principles of liberty, equality, and integration are more fully and consistently realized in the lives of all New Yorkers. In pursuit of these principles, the NYCLU fights for the dignity of all people through litigation and legislative policy advocacy, with particular attention to the pervasive and persistent harms of disability discrimination.

**Syracuse University College of Law Disability Law and Policy Program** (“**DLPP**”) is the most extensive disability law program in the United States actively

recruiting and supporting students with and without disabilities who wish to pursue a career in disability law, including many as lawyers in New York State.

**Washington Civil & Disability Advocate (“WACDA”)** is a Seattle based disability rights and civil rights nonprofit organization. WACDA is guided by the simple but powerful proposition that all lives have equal dignity and worth. As a result, the organization is committed to providing legal services to people with disabilities regardless of ability to pay. WACDA is committed to an “all of the above” approach to increasing accessibility and inclusion in Washington state and beyond. In addition to systemic accessibility focused litigation, WACDA assists with disability education and awareness efforts, including informing the disability community on disability rights and effective self advocacy. WACDA also provides targeted legislative and community advocacy in order to help inform the business community and elected officials on disability best practices and the majority opinions of the disability community on important policy issues.

### **RULE 26.1 STATEMENT**

No *amicus curiae* has a parent corporation and no corporation or publicly held entity owns 10% or more of the stock of any *amicus curiae*.

## ARGUMENT

This case concerns a question of exceptional importance that warrants consideration by this Court: whether a state agency can escape liability under certain federal civil rights laws that apply to an “instrumentality of a State or of a local government” that receives federal funds simply because of the way that agency is structured. The panel’s holding has far-reaching implications not just for litigants with disabilities, but for all litigants who come to court to enforce their civil rights under federal statutes that are covered by the Civil Rights Restoration Act (“CRRA”).

### **I. THE PANEL’S DECISION CONTRAVENES CONGRESS’S MANDATE THAT FOUR FEDERAL CIVIL RIGHTS LAWS BE APPLIED AS BROADLY AS POSSIBLE.**

The Civil Rights Restoration Act requires that four civil rights laws governing State programs that receive federal funds—including Section 504—apply to “all of the operations of” a “department, agency, special purpose district, or other instrumentality of a State or local government” that receives federal funds. Pub. L. 100-259, 102 STAT. 28 (1988); *see, e.g.*, 29 U.S.C. § 794(b) (Rehabilitation Act). Congress specifically enacted the CRRA to overturn the Supreme Court’s holding in *Grove City College v. Bell*, 465 U.S. 555 (1984). In that case, Grove City College had refused to submit an Assurance that it would comply with Title IX’s provisions requiring nondiscrimination on the basis of sex, despite its enrollment of a large

number of students receiving federal tuition grants. *Grove City*, 465 U.S. at 559–60.<sup>2</sup> The Court held that Title IX applied to the college’s financial aid program because it received these funds, but that the remainder of the institution’s lack of federal funding meant that it was *not* required to follow Title IX. *Grove City*, 465 U.S. at 570–74.

By enacting the CRRA, Congress explicitly rejected *Grove City’s* holding, which narrowed civil rights protections. Prior to the CRRA, *Grove City* left university athletics programs outside the scope of Title IX. *See Bennett v. West Texas State University*, 799 F.2d 155, 156 (5th Cir. 1986) (affirming dismissal of sex discrimination claim because university athletics program did not receive federal financial assistance); *see also* Karen Czapanskiy, *Grove City College v. Bell: Touchdown Or Touchback?*, 43 MD. L. REV. 379, 382 (1984) (“If title IX enforcement is restricted to programs that receive traceable or specific federal funding, sex discrimination in an athletic program cannot be barred because few athletic programs are funded by federal grants earmarked or specifically intended for their use.”). Discrimination by a high school’s National Honor Society’s chapter was exempted from federal civil rights law because the National Honor Society’s chapter was not a program that received federal funding. *Pfeifer v. Marion Center*

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<sup>2</sup> The fact pattern in *Grove City* notably bears a resemblance to the present case, as both involved determining whether an entity was liable under a civil rights law conditioned on the receipt of federal funds when the funds were received through grants and/or subsidies paid to prospective (or current) consumers of the entity’s services.

*Area Sch. Dist.*, 700 F. Supp. 269, 272 (W.D. Pa. 1988). *Grove City* also led to the dropping or suspension of at least 674 complaints in the Department of Education under the four civil rights statutes impacted by the decision. S. Rep. No. 100-64, 100th Cong. 1st Sess. at 11 (1987).

Congress expressly abrogated *Grove City* and its progeny with its passage of the CRRA. *See* S. Rep. No. 100-64 at 2–4. In repudiating this restrictive view of Title IX’s reach, Congress sought to “restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those [civil rights] laws as previously administered.” Pub. L. 100-259 Sec. 2(2), 102 Stat. 28 (1988); S. Rep. No. 100-64 at 2–4.

The panel’s holding in *T.W.* conflicts with the CRRA’s mandate to restore broad application of these civil rights statutes. By incorrectly determining that only the subunit within the Unified Court System (“UCS”) directly receiving federal funding is covered by Section 504, *T.W.*, No. 19-4136, slip op. at 22, the panel decision has the potential to return the legal standard for laws covered by the CRRA to a variation on *Grove City*, in which courts will be required to determine whether a specific “program or activity” within a state governmental entity receives federal funding as a prerequisite to enforcing federal civil rights laws covered by the CRRA.

A return to a *Grove City*-like standard for these civil rights laws would have far-reaching implications. Any other sub-agency, function, or court within the UCS

that does not itself receive federal funding could take the position that it is not subject to Section 504 or any other federal civil rights statutes covered by the CRRA. Congress enacted CRRA to ensure that the scope of “program and activity” was interpreted as broadly as possible for four specific civil rights laws, as it amended not only Section 504 but also Title VI, Title IX, and the Age Discrimination Act of 1975. Pub. L. 100-259 Sec. 2(1); *see, e.g., Maloney v. SSA*, 517 F.3d 70, 75 (2d Cir. 2008) (noting that these statutes are interpreted together). Yet the panel’s decision holds that Section 504 applies only to lower state courts in New York—the Courts of Original Jurisdiction—and does not apply to the Court of Appeals and the Appellate Divisions as well as the Board of Law Examiners. *T.W. v. Bd. of Law Examiners*, 19-4136, slip op. at 3–4 (2d Cir. Apr. 28, 2021). Thus, if a deaf attorney litigating a criminal appeal were denied a sign language proceedings interpreter by the Court of Appeals, that attorney may now have no remedy under Section 504. Similarly, a *pro se* party with limited English proficiency would not have a remedy under Title VI if denied interpreting or translation services by the Court of Appeals or the Appellate Division because of their race or national origin. Thus, the panel’s decision contradicts the CRRA and places the Court of Appeals, the Appellate Divisions, and the Board of Law Examiners outside the protections of multiple critically important federal civil rights laws.

## **II. THE PANEL DECISION ALLOWS STATES TO EVADE FOUR KEY CIVIL RIGHTS LAWS THROUGH ADMINISTRATIVE MANEUVERS.**

Because the ruling makes coverage under Section 504 contingent upon the governmental subunit being contained within one component of the UCS receiving federal funding, it becomes possible for governmental entities to evade civil rights liability simply by restructuring an agency or program. In fact, this is exactly what the UCS itself appears to have done. In *Bartlett v. New York State Board of Law Examiners*, the Second Circuit held that the Board *was* a recipient of federal funding under a system where the Board directly accepted money from state entities that received federal funds, which it used to fund vouchers for bar applicants with disabilities, 156 F.3d 321, 330 (2d Cir. 1998). The Board changed its policy in 2011 so that only the applicants themselves were reimbursed. *T.W.*, No. 19-4136, slip op. at 15.<sup>3</sup> Agencies wishing to shield specific programs from liability under the federal civil rights laws covered by the CRRA could similarly restructure so that federal financial assistance is directed to separate sub-agencies.

This panel decision is precisely the issue Congress sought to rectify when it enacted the CRRA. Congress amended the Act multiple times to account for new

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<sup>3</sup> In addition to evading liability, such restructuring could disproportionately harm people with disabilities, people of color, or other economically disadvantaged groups that are less likely to be able to advance payment.

civil rights laws since its passage, and each time it concluded that the Act covered “*all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government [emphasis added].*” Pub. L. 100-259 at Sec. 4(2), 5(3), 6. In the Senate Report accompanying the CRRA, Congress repeatedly stated that ensuring that these civil rights laws covered the broadest possible spectrum of federal agencies, departments, and instrumentalities was *necessary* for these laws to be effective at rectifying discrimination. *See, e.g.,* S. Rep. No. 100-64 at 2, 5 (“... to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs ... It was understood at the outset that the task of eliminating discrimination ... could only be accomplished if the civil rights statutes were given the broadest interpretation...”). Moreover, Congress intended that the scope of all four of these statutes be interpreted consistently. *Id.* at 2–3, 6–7 (comparing the statutes which require the receipt of federal funds). By limiting the reach of the CRRA, the panel’s decision contravenes Congressional intent and effectively rewards state entities that undertake accounting maneuvers or administrative reorganizations to escape civil rights liability.

Additionally, by determining that the Unified Court System as a whole is *not* covered by Section 504, the panel’s holding may require courts to decide on a case-by-case basis which specific portions of a State program or instrumentality receive

federal funding before applying civil rights laws covered by the CRRA. The holding could, therefore, inject a level of uncertainty and confusion into these determinations of civil rights law coverage that not intended by Congress and was likely not intended by the panel. The Senate Report for the CRRA noted that *Grove City*'s ruling caused similar issues from its outset and considered the outcome "absurd." S. Rep. No. 100-64 at 11 ("Complaints are not investigated because the alleged discrimination took place in a building not constructed or renovated with federal assistance. When complaints are investigated, the whole process takes longer because the federal government has to search for federal money connected with a specific program. . . ."); Czapanskiy, 43 MD. L. REV. at 387-388. The panel's holding could return these civil rights laws to their former state of confusion.

### **CONCLUSION**

Because this case concerns an issue of exceptional importance and the panel decision is contrary to Circuit precedent and federal statute, Amici urge that this Court grant a panel rehearing or rehearing *en banc* to determine whether only one of three subunits of the Unified Court System is subject to the requirements of Section 504 or whether, as the CRRA requires, all three subunits of the Unified Court System are subject to the requirements of Section 504 because the UCS has received federal money.

For the foregoing reasons, as well as those presented by Plaintiffs-Appellees, the Court should grant the petition.

Respectfully Submitted,

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Dated: 5/18/2021