22-180

No. 22-____

In the Supreme Court of the United States

MATTHEW STANEK, SANDRA STANEK, AND BOGDAN STANEK,

Petitioners,

v.

ST. CHARLES COMMUNITY UNIT SCHOOL DISTRICT NO. 303, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title III of the Americans with Disabilities Act prohibits public accommodations from discriminating against individuals on the basis of disability. § 12182 (a). This appeal arose from the District Court's grant of sanctions and dismissal of the entire suit with prejudice. However, the epicenter is concerning the due process right of the disabled to accessible depositions, their right to equal access to the court and equal protections of laws. Unlike the Tenth and Third Circuit, the Seventh and Fifth Circuits added a limitation to the plain meaning of "service establishment" that appears nowhere in ADA. On appeal, petitioners challenged the denial of a protective order that was essential to preserve asserted privileges under the First and Fifth Amendments, but the Seventh Circuit applied the collateral bar rule holding that a party who disobeys a judicial order may not challenge the validity of the original order. Here, however, there was no citation of contempt under either Federal Rule 37 or 42 and the due process concerns and safeguards associated with criminal contempt were not met. Petitioners are calling into question the jurisdiction of the courts below to issue such orders, and the constitutionality of Federal Rules and ADA as they came in direct conflict with the U.S. Constitution and with decisions of the Supreme Court. The Questions Presented Are:

1. Whether a law office is subject to the non-discrimination requirements of the Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 et seq., (the "ADA") when it conducts a deposition of "any" qualified individual with a disability under the statute;

2. Whether the earlier statute, Federal Rule 26 that covers a more generalized spectrum and broad universe of potential litigants, trumps a later statute of Title III of ADA that covers a narrow, precise, and specific subject and protects a particularized group of litigants.

3. Whether appellate courts can impose the collateral bar rule on appeal from the sanction with dismissal under Federal Rule 37(b)(2)(A)(v) without an order of civil or criminal contempt and prohibit a party from challenging the validity of the discovery order and whether such order could withstand constitutional challenges of the First, Fifth, Seventh, and Eighth Amendment rights;

4. Whether Magistrate's discovery order was transparently invalid and whether petitioners should be permitted to defend the Rule 37 sanction on these and other grounds stated in this petition.

PARTIES TO THE PROCEEDINGS

Petitioners

- Petitioner Matthew Stanek was the plaintiff in the United States District Court for the Northern District of Illinois Eastern District (the "District Court") and appellant in the Seventh Circuit Court of Appeals.
- Petitioners Bogdan and Sandra Stanek are Matthew's parents, and they were the plaintiffs in the District Court and appellants in the court of appeals proceedings. In this petition, Sandra and Bogdan Stanek will address themselves as "Parents" and Matthew Stanek will address himself as a "Matthew" and all three together will be addressed as "Petitioners."

Respondents

- Board of Education of St. Charles Community Unit School District No. 303, St. Charles Community Unit School District No. 303, Dr. Donald Schlomann, Kimberly Zupec, Dr. John Knewitz, Beth Jones, Korie Bowers, Dr. Kathryn Zimmer, Shannon Von Essen, Justin Dohm, Bethany Herrera, and Cyndi Sulak were the defendants in the district court proceedings and appellees in the court of appeals proceedings.

LIST OF PROCEEDINGS

DIRECT CASE HISTORY

United States Court of Appeals, Seventh Circuit\

No. 20-3513

Stanek v. St. Charles Community Unit School District No. 303, et al.

Judgment entered: February 14, 2022 (affirming sanctions and dismissal of plaintiffs' claims)

Rehearing en banc denied: March 17, 2022

U.S. District Court, Northern District of Illinois

No. 13-cv-01031

Stanek v. St. Charles Community Unit School District No. 303, et al.

Judgment entered: Nov. 24, 2021 (order granting a motion for sanctions and dismissing the case with prejudice)

RELATED CASE HISTORY

United States Court of Appeals, Seventh Circuit

783 F.3d 634 (7th Cir. 2015)

No. 20-3513

Stanek v. St. Charles Cmty. Unit Sch. Dist.

Judgment entered: April 9, 2015 (vacated the dismissal and remanded for further proceedings)

U.S. District Court, Northern District of Illinois

No. 1:20-cv-03535

State of Illinois v. CSL Plasma, Inc., and CSL Behring, LLC

Case filed June 17, 2020, related to this case within the meaning of this Court's Rule 14.1(b)(iii)

Case outcome pending, no final judgment entered

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

STATUTORY PROVISIONS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

JUDICIAL RULES

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

PETITION FOR A WRIT OF CERTIORARI

Matthew Stanek, Sandra Stanek, and Bogdan Stanek petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is unreported, but reproduced at App.1a. The Seventh Circuit's denial of petitioner's motion for reconsideration and rehearing *en banc* is reproduced at App.25a. The opinion of the District Court for the Northern District of Illinois is reproduced at App.9a.

JURISDICTION

The Court of Appeals entered judgment on February 14, 2022. App.1a. The court denied a timely petition for rehearing *en banc* on March 17, 2022. App.25a. On June 22, 2022, this Court extended the time for filing this petition to August 22, 2022 in order to comply with the rules of court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves interpretation of Title III of ADA and several statutory and constitutional provisions. *See* App.27a.

INTRODUCTION AND STATEMENT OF THE CASE

The two federal statutes have lived quite peacefully next to each other for over thirty years, until the courts below needlessly disrupted this harmony and declared war on ADA. Without any attempt to reconcile the statutory scheme, the Courts below have held that Federal Rules trump Title III of ADA in the context of a deposition. Accordingly, they ruled that a deposition is not a service or a benefit of any sort and a plaintiff's request for an auxiliary aid in connection with his oral deposition "is a discovery dispute" unrelated to a law office or any services connected with that facility. Consequently, the court refused to adopt a qualification standard of ADA for accommodations, requiring disabled litigants to demonstrate that a deposition is dangerous to their health. Petitioners believe that such a meaningless criterion deprives all litigants with disabilities from eligibility for protections under the Rule 26, resulting in irrational classification and exclusion of disabled people from minimal benefits, serving no Government interest.

Twenty years after this Court resolved a circuit split between the Seventh and Ninth circuit in *PGA*

Tour v. Martin, 121 S.Ct. 1879, 1889 (2001) two new teams have formed creating another circuit split: On one side, there is the Fifth and Seventh Circuit who held that service establishments such as law offices and plasma donation centers are not public accommodations because they don't receive compensation from the disabled in exchange for services that they furnish and on the other side is the Third and Tenth Circuit who held that payment or direction of payment is irrelevant because plasma donation centers "assist or benefit" disabled individuals. Thus, this petition presents a clear and acknowledged conflict among the federal courts of appeals that is significant and substantially important because the Courts determined the qualification standard for the request for accommodations by disabled at places of public accommodations such as the law office.

The Petitioners are civil rights activists, members of a nonprofit organization "Autism Movement" established in 2011 in the State of Illinois, who have used litigations for the past ten years to enforce anti-discrimination statutes and advocate for the rights of disabled. Thus, this Court is also presented with civil libertarians' nightmare, a classic confrontation between three of the most cherished policies of our civilization—freedom of speech, the right to petition the Government for a redress of grievances, and equal access to court encased in the armor of the First and Fifth Amendments, pitted against the right of the defendants to discovery and reinforced in this case by a denial of protective order, which is the real cause of the battle. Petitioners allege that the denial of the protective order was completely groundless, and the sanction with dismissal was intended solely and exclusively to

suppress petitioners' exercise of the First and Fifth Amendment rights.

1. Factual Background and Proceedings Below

Petitioner Matthew Stanek is an individual with Autism which substantially impacts his verbal and nonverbal communication and social interaction. Dockets 235 at 5-6; 444, Exh.1 at 1. Sandra and Bogdan are his parents, Docket 235 at 3. The Defendants and the courts below concede that Matthew has a disability within the meaning of ADA. 42 U.S.C. § 12102 and 28 C.F.R. § 36.105. Docket 447 at 4.

In 2013, Matthew and his parents, sued Defendants alleging that defendants denied Matthew equal access to Honors and Advanced Placement classes and failed to provide accommodations listed in his IEP in these classes in violation of the IDEA, ADA, Rehabilitation Act, and various constitutional provisions. Docket 235 at 19-28. In reversing the district court's dismissal of plaintiffs' original amended complaint, the Seventh Circuit ruled that Matthew had properly stated claims for discrimination and allowed Sandra and Bogdan to proceed with most of their claims under those statutes including retaliation. Stanek I, 783 F.3d at 640-44.

On August 13, 2019, the district court referred the matter to a magistrate for the purpose of supervising discovery proceedings. Doc. 275, 276, 277; 28 U.S.C. § 636(b).

A. Matthew's First Request for Accommodations and Appointment of Counsel Under the Title III of ADA and Rehabilitation Act

Matthew made the first unsuccessful request for modification of his oral deposition to the district court on January 15, 2020. Docket 328. The district court denied the motion because Title II of ADA and Rehabilitation Act do not apply to the federal courts but instructed that Matthew could move for a protective order under the Federal Rules 26 regarding his deposition. Docket 331 at 1-2.

B. First Motion for a Protective Order Under the Rule 26(C)(1)

a). Request for a Deposition by a Written Question Under Federal Rule 31

On January 21, 2020, Matthew filed his motion for a protective order to have his deposition taken by written questions under Federal Rule 31. Dockets 332, 332. Matthew argued that his autism and depressive disorder hindered his communication abilities and that he established a good cause under Rule 26(c)(1) to preclude his oral deposition because it would result in psychological harm, humiliation, and prejudice due to his disabilities.

b). Request for Modification of Oral Deposition under Title III of ADA 42 2 U.S.C. § 12182(b)(2)(A)(ii)

Also, in his First Motion for a Protective Order Matthew requested for a modification of his oral deposition under Title III of ADA, asking not to be excused

from an oral deposition but to be accommodated by "written material" specifically, by written questions in order to ensure effective communication, both receptively and expressively as required by Title III." Docket 332 at 9, 11, footnote 15. He argued that without modifications of his oral deposition, he is being discriminated and defendants are "compromising his ability to provide competent testimony" *Id* at 11,12. Defendants made various arguments in opposing the motion. They argued that Title III of ADA does not apply to depositions, it does not protect the adversary, that Matthew is not deaf, that ADA does not require accommodations and deposition is governed by the Federal Rules, that any modification is a fundamental alteration of a deposition. Docket 342 at 3-6, 10-11. The Magistrate agreed in every aspect with defendants and ruled that Matthew's request for accommodations is a discovery dispute governed by standards of Federal Rules 26, not Title III of ADA, citing the Seventh Circuit in *Shott*, 527 Fed. Appx. at 564. *Id* at 4,5. Accordingly, he ruled that Title III does not apply to depositions, that Matthew failed to show that a deposition would be "dangerous to his health," and the evidence he provided was "stale and outdated" to demonstrate the "good cause" requirement under Rule 26(c)(1). Docket 376 at 9. However, the Magistrate imposed several conditions on his deposition, including; splitting it into two 3.5-hour sessions over two days, and allowing Matthew to bring his emotional support dog as an accommodation for his anxiety. *Id* at 9.

On March 29, 2020, Matthew moved for reconsideration [377] which was denied [382]. Matthew filed objections [383-1], and on May 26, 2020, the district court overruled his objections. Docket 395.

From at least March 16, 2020, to June 16, 2020, the whole Country was on a lockdown due to the pandemic and during this time no civil case depositions were held in person.

On June 10, 2020, defendants served a notice of deposition to take a place on June 24, 25, 2020 and on June 15, plaintiffs notified them that Sandra was attending her mother's funeral out of the Country. Docket 419 at 4,5.

On July 17, 2020, Matthew filed the Petition for Writ of Mandamus, which was summarily denied on August 5, 2020. Docket 408.

C. Matthew's Second Motion for a Protective Order [Docket 423, 424]

On September 10, 2020, Matthew requested from the defense counsel an auxiliary aid, written material, under the Title III of ADA and Defendants refused. Matthew stated that he would be filing a protective order, and on September 18, District defendants filed an emergency motion to compel Matthew to appear for his September 21-22 deposition. Docket 418. On September 19, 2020, the Magistrate granted the motion stating that there is "no meaningful difference" from his prior requests. Docket 422 at 3 & n.5).

On the same day, Matthew filed his Second Motion for a Protective Order under the Rule 26 asking to protect him from undue burden, the embarrassment and oppression. Dockets 423, 424 at 4. He explained that this time he was not asking to be excused from an oral deposition, rather he was requesting an Auxiliary Aid, Written Material under the Title III of ADA. Also, he asked to suspend his deposition for the

time necessary to obtain an order and until he is evaluated by a psychiatrist scheduled on September 28, 2020, because his symptoms of both disorders had worsened. *Id* at 5,6. Yet, the Seventh Circuit in its opinion stated: "Matthew also argues on appeal that a medical condition, anxiety, prevented him from attending the final scheduled deposition. But he gave this excuse for the first time only after the District defendants moved for sanctions." App.7a. Matthew also invoked the privilege of the First Amendment and stated that he is protecting his and public interest, and defense counsel is threatening him with the dismissal of the case and using intimidation to prevent him from speaking freely about his and the rights of disabled under ADA. Docket 424 at 6. Furthermore, Matthew stated, that there is good cause to grant the motion because he is acting as a private attorney general, and he has undisputable right to protect the ADA and to enforce the statute at the place of public accommodation such as a law office. *Id.*

Finally, Matthew stated that he was entitled to be protected because there was an undue burden since defendants already admitted to existence of discriminatory policy and treatment of him in their Motion for Summary Judgment where they made the official pronouncements of such a discriminatory policy stating:

"Those statutes do not afford a student the right to participate in AP or honors course or to have extended time on assessments. Such accommodations would fundamentally alter the nature of the educational program, something not required under 504 or the ADA." Docket 249, at 9.

On September 21, all three petitioners filed an emergency motion to quash the deposition notice,

arguing that defendants provided insufficient two business days' deposition notice. Docket 425 at1.

At 8:23 am, and at 9:54 am, the magistrate judge denied plaintiffs' motions. (Dockets 426-428).

Petitioners had 3 hours to preserve their right to appeal, and at 12:49 pm, just 11 minutes prior to the start of the deposition, the Petitioners collectively filed objections to the Magistrate's orders and findings based on the ground that Matthew's deposition is being conducted in bad faith and in a manner that unreasonably annoys, embarrasses, and oppresses him. Docket 429 at 4-8.

On September 23, 2020, the district court overruled plaintiffs' objections for reasons set forth in its prior orders. Docket 430 and on November 24, 2020, after briefing, it granted the school defendants' motion for discovery sanctions under Federal Rule of Civil Procedure 37(b)(2)(A)(v) and dismissed plaintiffs' case with prejudice and denied all pending motions as moot. App.9a.

On December 23, 2020, all three Petitioners filed a timely pro se notice of appeal. Dockets 448, 449. They argued in the separate briefs that the District Court abused its discretion by dismissing plaintiffs' case with prejudice because Matthew's failure to comply with the magistrate's order was not willful or in bad faith, but due to his inability. Matthew App. Br. at 38, 39. Parents also stated that they did not refuse to comply with any court orders, are not responsible for Matthew's failure to attend, and are therefore not properly subject to discovery sanctions. Sandra App. Br. At 8. Also, petitioners contended that the Rule

37 sanction with dismissal was infringing on plaintiffs' constitutional rights. *Id* at 27-38.

On February 14, 2022, the Seventh Circuit ignored constitutional issues and affirmed the district court's ruling and held the district court did not abuse its discretion in imposing the sanction with dismissal with respect to all three plaintiffs and that sanction under rule 37 for disobedience of the Magistrate order rendered their challenges to discovery orders unappealable. App.2a, 6a-7a.

On February 28, 2022, Petitioners timely filed Petition for Rehearing en banc and the petition was denied on March 17, 2022. App.25a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES BOTH AN INTRA-CIRCUIT AND INTERCIRCUIT SPLIT

A. There Is a Circuit Split Among the Third, Tenth, and the Fifth and Seventh Circuit Courts of Appeals

Relying on the *Shott v. Vedder Price, P.C.*, 527 Fed. Appx. 562, 563 (7th Cir. 2013) the district court in the instant case, ruled that the deposition is not a service, benefit, privilege, or advantage. App.18a. Instead, the Court concluded that a plaintiff's request for accommodations in connection with a deposition "is a discovery dispute." unrelated to [law] office or to any services connected with that facility properly resolved under the standards of the Federal Rule 26(c) and not through a claim under the ADA. *Id.*

Citing *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), the courts below agree that "a Title III would forbid a legal office from excluding disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do," yet in their view, disabled litigant is not treated differently than nondisabled when the law office denies him effective communication in a deposition proceeding conducted at the law office. Docket 375 at 4,5. This raises serious constitutional concerns, and it splits the Seventh Circuit internally, another factor that counsels in favor of certiorari review.

Similarly, the Fifth Circuit held that plasma donation centers are not public accommodations subject to the non-discrimination requirements of Title III of ADA and "CSL Plasma does not provide any "service" to customers" because individuals do not pay the center for its services and "does not provide any detectable benefit for donors." *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325 (5th Cir. 2018) This difference in direction of payment, it reasoned, "bars them from qualifying as service establishments." *Id.*

Contrary to the Fifth Circuit in *Silguero*, the Tenth Circuit in *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d at 1231–34. 828 F.3d and the Third Circuit in *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 176-78 (3d Cir. 2019) held that plasma centers are service establishments covered by the ADA because they "assist or benefit those who wish to provide plasma for medical use—whether for altruistic reasons or for pecuniary gain—by supplying the trained personnel and medical equipment necessary to accomplish that goal." *Levorsen,* 828 F.3d 1227, 1234 (10th Cir. 2016) They concluded that a service is

provided "regardless of whether [establishments] provide or accept compensation as part of that process." *Id* at 1233–34.

II. THE DECISIONS OF THE SEVENTH AND THE FIFTH CIRCUIT CONFLICT WITH THIS COURT'S ON POINT PRECEDENT–*PGA TOUR V. MARTIN* (2001)

A. Title III of ADA Equally Protects Disabled Clients and Adversaries of the Law Office–Plaintiff Is a Member of the Class Protected Under the Title III

Both, the Seventh Circuit in *Shott,* 527 Fed. Appx. 562, 563 (7th Cir. 2013) and the Fifth Circuit *in Silguero,* 907 F.3d 323, 325 (5th Cir. 2018) held that Title III cannot be read to include any "individual" denied a privilege or benefit offered by a place of public accommodation. However, the courts were not faced with a statutory puzzle. Most of these issues were argued and settled in 2001 by this court in Martin when it decided that Title III protects not simply "clients" or "customers," but all disabled individuals *See PGA Tour v. Martin,* (2001) 532 U.S. 661, 678-79 [121 S.Ct. 1879, 149 L.Ed.2d 904]. (Title III's broad general rule contains no express clients or customers' limitation).

In addressing whether Title III applies to the law office when it conducts depositions, the courts below adopted defendants' argument that places of public accommodation can be bifurcated into public and private zones, one where ADA applies and the other where it does not.

The same bifurcation arguments were presented by PGA and rejected by this Court in Martin which

noted that no statutory basis exists for such discrimination. "Title III does not restrict its coverage to members of the public; it provides that '[n]o individual shall be discriminated against' and "[t]he fact that entry to a part of a public accommodation may be limited" or that "users of a facility are highly selected does not mean that the facility cannot be a public accommodation." *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997-998 (9th Cir. 2000), *aff'd*, 543 U.S. 661 (2001).

The courts below posit that members of the public attending an opera or symphony are protected, but individuals such as blind tenor Andrea Bocelli and violinist Itzhak Perlman—both disabled who excel in their professions—can be discriminated against on the basis of disability at auditions or performances because they need accommodations to access the performance area.

In alternative, according to the Seventh Circuit's reasoning, the members of the public who come to the law office seeking legal service would be protected, but if they invited Mr. Bocelli or Mr. Perlman for a deposition proceeding to their office for a deposition, they would permit the law office to discriminate and withhold anti-discrimination protection from these individuals with a disability who want to participate and benefit from their deposition.

Likewise, the Seventh and the Fifth Circuit would withhold anti-discrimination protection from Mr. Bocelli if he was their adversary but not from Mr. Perlman if he was their client. One can assume that in 2022 this kind of scenario is implausible. Or should we say at least impossible for Mr. Bocelli, Mr. Perlman, and Mr. Martin, but not for an average disabled American like Mr. Stanek.

In a way, there is not much of a difference between Casey Martin and Matthew Stanek; one is a professional golfer and celebrity, and the other just an average American citizen; however, they are both disabled under ADA; and they both asked for modifications, not to change the fundamental rules of the game; but only to be allowed to participate in the game.

However, there is one crucial difference between the two. While Casey Martin was afforded a fair trial where he could make an argument before an impartial tribunal, Matthew was denied that fundamental right from the start. As a self-represented party, he struggled in finding the right legal theory to protect him at the law office against discrimination. When he got it right on the third strike, he was told it is "too little, too late" to get into the game.

Thus, this time it is not a game of golf that is in jeopardy. It is the constitutional right of fifty million average disabled Americans: their right not only to be heard at a meaningful time and in a meaningful manner, but to be heard at all and their right of equal access to the court.

III. BOTH, THE LAW OFFICES AND PLASMA CENTERS OPERATE A "PLACE OF PUBLIC ACCOMMODATION" AND THEREFORE ARE SUBJECT TO TITLE III OF ADA

A. Deposition Is Out of a Court Proceeding, Service or Activity, Benefit or Privilege, Which Falls Within the Plain Statutory Language of ADA

There can be little question that participation in the deposition is a "privilege" or "service" offered at a law office. 42 U.S.C. § 12181(7)(F). The district court stated that "Matthew would lose the benefit of an oral examination, during which a witness can, for example, ask for clarification of a question." *See* Docket 447 at 4 but held that Title III does not apply to depositions.

Perhaps, one may not ordinarily think of a deposition or plasma donation as "activity' in which disabled participate or from which they may benefit. Neither may one ordinarily think of an arrest as an "activity" in which the arrestee "participat[es]" or from which the arrestee may "benefi[t]" yet the Supreme Court in Sheehan held that it was. *City and County of San Francisco v. Sheehan*, 575 U.S. (2015). *See Yeskey*, 524 U.S. at 210. (prisons [] "theoretically 'benefit' . . . prisoners").

Indeed, deposition questioning at a law office is very much like an interrogation at a police station. *Seremeth v. Bd. of Cty. Comm'rs Frederick Cty.*, 673 F.3d 333, 335 (4th Cir. 2012). Deposition "provides a clear benefit of an opportunity" "to provide information" that can be used to prove a party's case, *Calloway v. Boro of Glassboro Department of Police*, 89 F.Supp.2d 543, 555-6 (D.N.J. 2000), even though their partici-

pation is often mandatory. *Pennsylvania. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998).

In the analogous context from the *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 132 (2005) ("apply to every facet of the business and operations and Title II of ADA in *Ashby v. Warrick Cnty. Sch. Corp.*, 908 F.3d 225, 231-2 (7th Cir. 2018), "the question whether a particular event is a service, program, or activity of public [accommodation] turns on what the public [accommodation] itself is doing, providing, or making available."

The law office scheduled Matthew's deposition at their establishment by sending him a notice of deposition to appear on the certain day and time. "All [the] matters, such as planning, notification, [arranging court reporter and videographer] were handled by the [law office]" *Id.* It had complete control over the particular "activity" or "event" *Id* at 229-30. Deposition was law office's "own" activity. *Id.* Thus, the law office was "the sponsor and host of the [deposition] events" *Id* at 234. Providing the opportunity to be deposed in person is unquestionably something the law office does and makes available to both clients and adversaries.

B. The Fifth and the Seventh Circuit's Decision is Wrong, the Third and Tenth Circuits Got It Right.

Accordingly, the proper inquiry is not whether a plaintiff is paying for a service, or being paid for a service, rather it is whether a person receives some type of benefit or privilege or participates in activity. The relevant "privilege" may relate to a deposition proceeding, donation of plasma, or any other activity

offered by establishment within the twelve categories. As the Third Circuit correctly put it, the constant that unifies service establishments is not direction or type of payment, nor the receipt of a non-monetary ultimate benefit . . . *Matheis*, 936 F.3d at 177–78.

The bottom line is that customer payment to the establishment (or existence of payment at all) is not a necessary feature of the examples listed in the statute. A legal establishment can accept payment for service from its clients; can be paid by others (as are legal-aid lawyers); can be not paid at all (as in pro bono work); or can be paid on contingency, with the rest of the proceeds paid out to its client. A bank can accept payment for its services; can offer banking for no charge (because it profits in other ways from the money invested); or can pay its customers for depositing their money. Those differences in payment arrangements do not affect the character of the service offered. *See Id* at 177.

The Seventh and Fifth Circuits added a limitation to the plain meaning of "service establishment" that appears nowhere in ADA. Such scenarios create a loophole for evading Title III's protections and amounts to "a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 132 (2005)

This Court rejected PGA's argument and the Seventh Circuit's argument in Olinger for a good reason. Accepting their argument that Title III does not apply in some areas of public accommodation while it does in others, and not to "all" individuals with disabilities who qualify would grant it free rein to discriminate inside the public accommodation not

only on the basis of any disability, but also on the basis of race or religion. This Court simply cannot allow this, not after Martin, Spector, and Yeskey, not after thirty years of ADA. Courts should not "bend over backwards" to find reasons not to call an establishment that serves the public a "service establishment." *Levorsen*, 828 F.3d at 1231-2.

Without a clear guidance from this Court, establishments will engage in precisely the discrimination based on overbroad stereotypes and prejudice that led Congress to enact ADA in the first place.

This case presents an ideal vehicle for resolving these important statutory and constitutional questions because fifty million disabled Americans cannot wait for another Mr. Martin or Mr. Bocelli for this court to grant a writ of certiorari. Disabled Americans need this Honorary Court's attention urgently to protect them from invidious discrimination and to reset the Seventh and the Fifth Circuit's course on this important question.

C. Interpretation of Title III of ADA by the Seventh and Fifth Circuit Renders the Title III of ADA Unconstitutional on Its Face

First, there was no reasonable ground for purpose of Title III accommodations for separating disabled litigants into two classes, the paying client and non-paying adversary, or treat them differently as the District Court did. App.18a. The right which is fundamental to due process must be accorded irrespective of ability to pay. Such is the teaching of *Boddie v. Connecticut*, (1971) 401 U.S. 371, 377 [91 S.Ct. 780, 28 L.Ed.2d 113]. Also, there was no rational reason for

separating litigants with communication impairment into a disabled with hearing impairment and one with Autism with a communication impairment for the purpose of effective communication. Docket 382 at 10. "Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances."

Also, while nondisabled have to show undue burden or inconvenience to be excused from an oral deposition and deposed by a written question under the Rule 31, Matthew and disabled have to show much greater burden-demonstrate that deposition is dangerous to their health. Docket 447 at 5. ["N]o greater burdens should be laid upon one than are laid upon others in the same calling and condition." *Barbier v. Connolly*, 113 U.S. 27 (1885).

D. Providing Written Question Does Not Fundamentally Change Oral Deposition

One of the auxiliary aids and services listed under ADA includes "written material and exchange of written notes and other effective methods, service and actions." 28 C.F.R. § 36.303. Written questions are written material. Also, the Fed. R. of Civ. Proc. 26(c) explicitly allow deposition procedures to be modified. Contrary to the Defendants' arguments, providing written questions ahead of the Plaintiff's oral examination would not fundamentally alter the oral deposition because this accommodation allows Matthew to participate in both auditory and oral part of his deposition.

"As the Magistrate Judge acknowledged, "a deposition on written questions is not like a take-home exam: it would still require Matthew to listen to the written questions be read to him by an officer and

would still require Matthew to provide oral answers.'" [447-5].

Even more, the defense attorney would still be the one asking verbal questions, Matthew would still be responding orally, deposition's officer would still swear him in, record his oral testimony under oath; and prepare, certify, and deliver the deposition transcript in accordance with the Federal Rules 30. Moreover, the counsel would still be able to personally follow up with his cross examination because the Court already accommodated Matthew with breaking up the seven hours of a deposition over two days. Finally, defendants would still be able to test his credibility and impeach him like any other witness if he provided an inconsistent statement during the trial. Fed. R. Evid. 613(b). The only difference is that he would be provided with effective communication and equal opportunity to participate in or benefit from a deposition. *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (handicapped individual must be provided with meaningful access to the benefit that the grantee offers). 42 U.S.C. § 12182(a). 42 U.S.C. § 12182(b)(2)(A)(iii), (ii) (i) and 28 C.F.R. § 36.303(a); 42 U.S.C. §§ 12182(b)(1)(A)(i) and (ii) (iii); 28 C.F.R. §§ 36.202(a) and (b); 36.302. It would also ensure that Matthew's constitutional rights are not violated.

As the Martin Court concluded, the purpose of any rule cannot be mere tradition. Supreme Court Official Transcript, *PGA Tour, Inc. v. Martin*, No. 00-24, 2001 WL 41011, at *20 (2001). If no rule of deposition, regardless of its purpose, can be modified to permit participation by people with disabilities, then—ironically—the law office becomes the only establish-

ment in America permitted to construct barriers to access that are unrelated to performance.

Moreover, the operative principle, is that an accommodation does not fundamentally alter the activity if the alteration comports with how the same activity is conducted in other contexts. *See Id*; *Alboniga v. Sch. Bd. of Broward Cty.*, 87 F.Supp.3d 1319, 1338 (S.D. Fla. 2015) (reasoning that a school board could not claim that allowing a service animal in the building fundamentally altered its activities when it had previously allowed a service animal on site without significant disruption)"

Likewise, providing written material such as a written question ahead of an oral deposition can hardly be considered modification for a person with disability where the Court prescribes a discovery method of deposition by a Written Question to non-disabled litigants when there is a good cause. *See* Fed. R. Civ. P. 31(a)(1)(2). Also, *see* Fed. R. Civ. P 30(b)(6) notice must among others set forth with reasonable particularity the matters for examination. *Kallis v. Colgate-Palmolive*, 231 F.3d 1049, 1057 (7th Cir. 2000). Defendants argued that written questions will somehow provide an unfair advantage to the disabled litigant, but this Court rejected this anti-preference interpretation of ADA, noting that such argument "fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." *US Airways, Inc. v. Barnett*, 535 U.S. at 397, 122 S.Ct. 1516.

IV. FEDERAL RULES MAY NOT BE EMPLOYED TO TRUMP ADA

Petitioners do no dispute that the Federal civil litigation, including pretrial matters such as depositions and other discovery, are governed by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 1.

Rather, petitioners believe that Title III protects the disabled at places of public accommodations such as the law office in the context of a deposition, and there is a good cause to protect a litigant with a communication impairment like Matthew in his oral deposition from annoyance, embarrassment, oppression, or undue burden Fed. R. Civ. P. 26(c)(1).

"Under the applicable rules of statutory construction, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct.182, 188, 84 L.Ed.181 (1930).

The courts below ignored this guidance and employed the federal rules to violate or diminish the rights under Title III of ADA and invalidated the federal statute, declaring that Federal Rules trump ADA in the establishment that is specifically listed as one of the 12 places of public accommodations. 42 U.S.C. § 12181(7)(F))

Furthermore, "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of an enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974). The District Court's narrow interpretation of ADA and application of the Federal Rules violate or diminish sub-

stantive rights of all disabled including Matthew's. Such enlargement of the rights of the federal statute that Congress enacted only to regulate procedure is unconstitutional because the right to be heard meaningfully, equal access to court and to petition government for grievances are constitutional rights protected by the Fifth and the First Amendment, existing prior to the adoption of the Federal Rules of Civil Procedure and rights beyond the congressional mandate of the Rules Enabling Act, which provides that the federal rules are only to regulate procedure and "shall not abridge, enlarge, or modify any substantive rights" 28 U.S.C. § 2072(c). *See Smith v. Christian*, 763 F.2d 1322 (11th Cir. 1985)

A. Federal Rule 26's Qualification Standard Imposed by the District Court Denies Matthew and the Disabled Due Process and Equal Protections of Law

Federal Rule 26 itself has one main and express purpose: to protect litigants from prejudice, harassment or undue burden, however neither of these objectives is advanced by the qualification standard imposed by the Court. The question whether a deposition is dangerous to one's health is entirely unrelated to whether a disabled litigant is entitled to accommodations or court's protections in a deposition. When such a qualification standard is applied to disabled litigants as Matthew it becomes obvious that the disabled are automatically deprived of protections because even a completely blind or deaf litigant cannot demonstrate that deposition is dangerous to their health to be adequately accommodated and protected from prejudice or discrimination. The criteria are being implemented in a way that tends to screen out all or most individ-

uals with disabilities from the protections of the Federal Rule 26. As the district court interpreted the statute, Rule 26 unambiguously divides litigants into two discrete groups that are accorded radically disparate treatment; thus, this Court should determine whether the classification drawn by the statute is consistent with the Fifth Amendment.

Accordingly, the Courts below have imposed eligibility criteria under the Rule 26 that denies Matthew and the disabled due process, equal protections of law and equal access to court based on disability. Giving preference to a nondisabled class "while denying the same protections to disabled litigants, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause" *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442-43 (1982). Moreover, a federal law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. *Id.* Thus, Rules 26, 30, 31 are invalid simply because they abridge Matthew's right to be heard meaningfully, equal access to court and a fair trial.

V. THE COURT ERRED WHEN IT PRECLUDED THE PLAINTIFFS FROM CHALLENGING THE VALIDITY OF THE MAGISTRATE'S AND THE DISTRICT COURT'S ORDERS UNDERLYING THE SANCTION.

A. Seventh Circuit Had No Jurisdiction to Apply Collateral Bar Rule Because There Was no Order of Contempt Either Under Federal Rule 37 or 42.

Seventh Circuit cited *Maness v. Meyers*, 419 U.S. 449, 458 (1975) for the proposition that petitioners are prohibited from challenging discovery orders underlying sanction. *See* App.6a-7a. However, Petitioners had not been found guilty of contempt under Fed. Rule Crim. Proc. 42(b) or under the Federal Rule of Civil Procedure 37. *See* App.6a, 11a. One of the seven listed consequences listed in 37(b)(2) is section "(vii) treating as contempt of court the failure to obey any order." Despite these seven choices, the trial court dismissed this case under the Federal Rule 37(b)(2)(A)(v) not ever referring to section (vii). *Id.* The appellate court on review had no authority to evaluate the substance of the contempt when there is no charge of any contempt. "[J]udicial sanctions [under Rule 37] never have been considered criminal" *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 833 (1994). Thus, applying collateral bar rule here was a plain error by the Seventh Circuit because it had no jurisdiction to do so.

B. Petitioners Were Denied Procedural Due Process and Equal Protections of Law

Furthermore, if this Court finds that the Seventh Circuit had jurisdiction to characterize the sanction

under the Rule 37(b)(2)(A)(v) as a criminal contempt, the petitioners were denied constitutional due process because [c]"riminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Bagwell*, 512 U.S. 821, 826 (1994)). Thus, Petitioners were denied a mandatory notice of criminal contempt, hearing, assistance of counsel, jury trial, right to proof beyond a reasonable doubt as constitutionally required. *United States v. Mine Workers,* 330 U.S. 258, 297-98, 67 S.Ct. 677, 91 L.Ed. 884 (1947)

Also, the court failed to "exercise the least possible power adequate to accomplish the desired end." *See Shillitani v. United States*, 384 U.S. 364, 368-70, 86 S.Ct. 1531, 1534-35, 16 L.Ed.2d 622 (1966) in violation of the Eighth Amendment.

Moreover, the circumstances of this case fall within several warranted exceptions to the collateral bar rule. As in Manes, compliance with the Magistrate's order could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released and the challenge may well be moot because the harm Matthew sought to avoid—violation of his Fifth, First and the Seventh Amendment right would have already occurred. *Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 449, 121 L.Ed.2d 313 (1992) Federal courts have "no authority to give opinions upon moot questions." *Id* "Physical property can be retrieved; words, once uttered, cannot." *In re Grand Jury Proceedings*, 142 F.3d 1416, 1422 (11th Cir. 1998) "A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be

held in contempt, and then appeal the contempt order." *Id.*

Also *see Marrese v. American Academy of Orthopedic Surgeons*, 726 F.2d 1150, 1158 (7th Cir. 1984), *rev'd on other grounds*, 470 U.S. 373 (1985) citing *United States v. Ryan*, 402 U.S. 530, 532-33, 91 S.Ct. 1580, 1581-82, 29 L.Ed.2d 85 (1971) and other cases, *Hanley v. James McHugh Construction Company*, 419 F.2d 955, 957 (7th Cir. 1969) ("We hold that we need not limit our review to the criminal contempt order itself, but may test the validity of the underlying discovery order." citing *Union Tool Co. v. Wilson*, 259 U.S. 107, 111, 42 S.Ct. 427, 66 L.Ed. 848 (1922) (" the fact that a remedial order was entered in a contempt proceeding is not in itself a reason why it should not be subject to correction by an appellate court")

C. Obeying The Magistrate's Order Required the Irretrievable Surrender of the Constitutional Rights

The panel failed to disclose any circumstances where the Petitioners could have done something that would allow them to fulfil their obligations under Rule 37 without forfeiting their statutory and constitutional rights. First, objecting to Magistrate's Orders [423, 427,428] was the only possible way to respectfully preserve a right and points for appeal. In their motion to compel, Defendants wrote that "Matthew stated that he would only be present for the deposition if th[e] Court denies his motion for a protective order." Docket 418 at 6. This shows that Matthew was never intending to disobey the district's court's order, rather he was trusting the District Judge's "ultimate authority to issue an appropriate order" and to make an informed,

final determination." *Thomas v. Arn*, 474 U.S. 141, 153 (1985). This Court in Thomas was clear that failure to timely object deprives the party of an appeal. *Id.* Fed. R. Civ. P. 72(a)

The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues.

And since "[a] fair trial in a fair tribunal is a basic requirement of due process,' . . .motions for [protective orders and objections to Magistrate's order] raise constitutional issues both relevant and essential." *See Holt v. Virginia*, 381 U.S. 131, 136 (1965)

Petitioners were deprived of their rights under the Due Process Clause of the Fifth Amendment for doing no more than exercising the constitutional right to escape the probability of a constitutionally unfair trial. *Id* at 137. Unlike in Walker, petitioners timely sought "orderly judicial review" of the Magistrate order and thus consistently with due process could not be sanctioned with dismissal for seeking review. *Walker v. City of Birmingham*, 388 U.S. 307, 318 (1967). Also, the "right to defy an unconstitutional statute is basic in our scheme." *Id* at 336 citing cases. Clearly, there were no adequate and effective remedies and the timely access to the appellate court was not available and a timely decision was not forthcoming prior to the time for compliance. *Id* at 315 n. 6, 87 S.Ct. at 1829 n. 6.

D. The Courts Below Failed to Comply with the Federal Rule 5.1

Congress with Rule 5.1 imposes on a federal court obligation to certify a constitutional challenge to the United States Attorney General and to ensure that

the Attorney General is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation and before the court nullifies the statute. However, the Courts below failed to comply with the Federal Rule 5.1. Perhaps the Courts believe that no harm was done since Matthew was given the opportunity to defend the statute. However, the Congress charged the Department of Justice with implementing Title III of ADA by promulgating regulations, issuing technical assistance, and bringing lawsuits in federal court to enforce the statute. 42 U.S.C. §§ 12186(b)-(c), 12188(b), 12206. The U.S. Attorney General was not given that opportunity.

It is not fair to the fifty million disabled to leave the defense of the federal statute like ADA in the hands of one pro se disabled litigant, and it is not fair to leave such an important decision to one single district judge as the Seventh Circuit permitted. *Jones v. Barnes*, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting) ("There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property.)

"Courts have no more discretion to disregard the Rule's mandate through the exercise of supervisory power than they do to disregard constitutional or statutory provisions through the exercise of such power." *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988).

E. Matthew Stanek Was Unable to Attend His Deposition Due to His Severe Depressive Episode and Panic Attacks

The record shows that objections to the Magistrate findings were filed just a few minutes prior to the start of the deposition. By this time, Matthew was mentally and physically drained to the point of collapsing. Petitioners offered competent, credible evidence of his inability to attend his deposition. On September 18, 2020, Matthew was diagnosed with depressive episode and panic attacks by his family doctor who referred him for further evaluation and excused him from attending on September 21 and 22, noticed deposition until he sees the psychiatrist. Matthew was prescribed medication which caused him severe side effects and caused him to become more depressed. Matthew's App. Br. Ex. 5, 6. The courts below argue that Matthew knew that he was going to be deposed for months and should have asked for a note earlier. However disabled people cannot predict six months earlier that they will have another depressive episode or a nervous breakdown.

F. Magistrate Had No Jurisdiction to Invalidate the Federal Statute-An Article III Judge Has to Make Final Decisions on Questions of Constitutional Proportions.

"The plaintiff[s] alternatively, might be able to show that [they] were not bound to obey the [order] because the court that entered it was without jurisdiction." *See United States v. Mine Workers*, 330 U.S. 258, 291-294 (1947). *Martin v. Wilks*, 490 U.S. 755, 789-90 (1989).

"An order entered by a court clearly without jurisdiction over the contemnors or the subject matter is not

protected by the collateral bar rule. *Matter of Providence Journal Co.*, 820 F.2d 1342, 1347 (1st Cir. 1986)

The Magistrate judge had no authority to nullify a statute enacted by Congress and to refuse to apply the statute without a District Judge ruling on objections.

Also, Matthew argued in the courts below that he was "just asking for an injunctive relief. Docket 377, thus his Motions for Protective Orders should had been treated as "dispositive" motion within the meaning of Rule 72(b) invoking "Article III" powers since it was a type of injunctive relief. *LLC v. BPP Retail Props., LLC*, 951 F.3d 41, 43 (1st Cir. 2020)

VI. RULE 37 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO PETITIONERS AND OFFENDS THE FIRST, FIFTH, SEVENTH, AND THE EIGHTH AMENDMENT OF U.S. CONSTITUTION.

A. Bogdan and Sandra Stanek Never Violated an Order "to Provide or Permit Discovery" Within the Meaning of Rule 37(B)(2), and the District Court Lacked Authority to Dismiss the Action as to Them.

To justify a sanction of dismissal, Rule 37 requires: "(1) an order compelling discovery, (2) a willful violation of that order, and (3) prejudice to the other party." *Schoffstall*, 223 F.3d at 823. Also *see Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207-08, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) where this Court held that "Rule 37 is the exclusive mechanism for dismissal of complaint due to singular issue of noncompliance

with order requiring production of discovery." These requirements were not met as to Parents who were neither managing agents nor a party under Rule 37 which failed to obey an order to provide or permit discovery. Rather, Parents were sanctioned for being closely associated with a person who failed to attend his compelled deposition. *See Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 178-79 (1951):

> "Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. Those short-cuts may at times seem to serve noble aims; but we depreciate ourselves by indulging in them. When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension." *Id.*

Sandra stated in her Appellant brief at 9 and the Plaintiffs' response to the motion for sanctions that Parents" could not force Matthew to attend his deposition" [444 at 15].

VII. MAGISTRATE'S ORDER WAS TRANSPARENTLY INVALID AND UNCONSTITUTIONAL PRIOR RESTRAINT ON PURE SPEECH

A. Petitioners Were Prevented from Engaging in Petitioning Activity and in Exercising Their First Amendment Right to Free Speech and Assembly

The Seventh Circuit cited Manes but overlooked that the Fifth Amendment self-incrimination exception is just one provision of the Constitution, and other rights must also be strongly enforced. Petitioners are civil rights activists who use litigation to advocate for the rights of disabled. They were punished merely for peacefully expressing unpopular views. As this Court stated:

> "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power."

Cox v. Louisiana, 379 U.S. 536, 557 (1965)

"A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the [First and Fifth] Amendment." *Id.* Petitioners' freedoms of speech and assembly, secured to them by the First Amendment, were denied because the courts below used sanctions under the Rule 37 as "a device for the suppression of the communication of

ideas and permit[tted] the [judge[to act as a censor." *Id.* Rule 37(b)(2) authorizes the district court to impose such sanctions as are "just" . . . that makes, Rule 37 unconstitutionally vague in its overly broad scope.

This Court has "recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights" *NLRB*, 536 U.S., at 524, 122 S.Ct. 2390. It has "also considered the right to petition when interpreting federal law." *Id* at 525. These "principles were then extended to situations where groups "use *courts* to advocate their causes and points of view" *Id.* This Court "made explicit that "the right to petition extends to all departments of the Government," and that "[t]he right of access to the courts is . . . but one aspect of the right of petition." *Id*

Clearly, the petitioners were communicating ideas by pure speech and even if the District Judge's opinion is in conflict with these interests, or he believes that Title III of ADA does not protect the disabled in the context of a deposition, he should have allowed motivated citizens "airing of disputed facts" and to "promote evolution of the law by supporting the development of legal theories." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397-98 (2011). "These and other benefits may not accrue if one class of knowledgeable and motivated citizens is prevented from engaging in petitioning activity. *Id.* The government may not misuse its role with applying the law to distort this deliberative process. When a disabled litigant "seeks to participate, as a citizen, in the process of deliberative democracy, either through speech or petition, "it is necessary to regard [him] as the member of the general public he seeks to be." *Id*

citing *Pickering*, at 574, 88 S.Ct. 1731. Matthew clearly invoked protections of the First and Fifth Amendment in his motions for a protective order Docket 424 at 6,7. Defendants filed emergency motion to compel when there was no irreparable prejudice to them, the only reason was to intimidate and prevent the petition. *See* Sandra App. Br. at 13-15 citing cases.

Thus, the Magistrate's order unduly restricted valuable public information, having an impact analogous to the judicial censorship order that had a practical effect of prior restraint in violation of the First Amendment. Restraints on First and Fifth Amendment represent an unusual class of orders because they are presumptively unconstitutional. *Nebraska Press Assoc.*, 427 U.S. at 558, 96 S.Ct. at 2802; *Crowell v. Benson*, 285 U.S. 22 (1932).

B. The Constitutional Right of Due Process Entitles a Litigant an Opportunity to Be Heard at A Meaningful Time and in a Meaningful Manner

Furthermore, denying Matthew and disabled litigants an auxiliary aid in their deposition, which can be the only one means of expression of their thoughts and ideas was denial of a free speech, due process and equal protection of laws. Thus, the harm posed by denial of the protective order was substantial and serious and no alternative means of protecting the countervailing interest that intrude less directly on the First and Fifth amendment rights was available. The only alternative was granting adequate accommodations that would permit a disabled petitioner not only to be heard, but to be heard at a meaningful time and in a meaningful manner. *Boddie v. Connecticut*,

(1971) 401 U.S. 371, 377 [91 S.Ct. 780, 28 L.Ed.2d 113]. That opportunity "must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. at pp. 268-269.

Due Process Clause imposes a greater burden on the government to justify its policies. Inaccessible deposition proceeding is subject to stricter review. *Tennessee v. Lane*, 541 U.S. at 532, 124 S.Ct. 1978, 158 L.Ed.2d 820. In Lane and *United States v. Kras*, 409 U.S. 434 (1973), this Court agreed that a due process right of access to the courts exists when fundamental interests are present. *Id.*, at 445.

Petitioners were "entitled to speak as they please on matters vital to them; . . . Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly. . . ." *Wood v. Georgia*, 370 U.S. at 389, 82 S.Ct. at 1372.

Hence, the contempt power should not be permitted to silence the civil rights activists and each of the factors above should lead to conclusion that Petitioners are entitled to have the Court consider the merits of the discovery order, before deciding whether to terminate their claims.

"A system or procedure that deprives persons of their claims in a random manner, as is apparently true of [Rule 26 and 37], necessarily presents an unjustifiably high risk that meritorious claims will be terminated" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-35 (1982).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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