No. 24-714

IN THE

Supreme Court of the United States

T. W.,

Petitioner,

v.

NEW YORK STATE BOARD
OF LAW EXAMINERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* FIFTEEN ORGANIZATIONS THAT ADVOCATE FOR INDIVIDUALS WITH DISABILITIES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are fifteen organizations that share a commitment to broad enforcement of hard-won, federal civil rights laws in support of full participation by all in society. Almost all advocate for and/or represent individuals with disabilities who will be impacted by the decision below, and are recognized for their expertise regarding disability civil rights laws.

Lead *amicus curiae*, Disability Rights New York ("DRNY"), is a not-for-profit corporation founded in 1989 that has been designated by New York as the State's Protection and Advocacy ("P&A") System and Client Assistance Program ("CAP") since 2013. *See* NY CLS Exec § 558(b). DRNY is part of a nationwide network of disability advocacy and legal services organizations mandated by federal law to protect and advocate for individuals with disabilities.[2] Pursuant to its federal

1. No party or counsel for a party authored this brief in whole or in part, and no one other than *amici*, their members, or their counsel funded the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amici's* intent to file this brief.

2. *See* National Disability Rights Network, https://www.ndrn.org/about/ (explaining the P&A/CAP network); *see also* Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15041-15045; Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801-10807; Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e; Assistive Technology for Individuals with Disabilities Act, 29 U.S.C. §§ 3001-3058; Section 112 of the Rehabilitation Act, 29 U.S.C. § 732 (collectively, statutes mandating the P&A/CAP network).

mandates, DRNY devotes considerable resources to ensuring full access for people with disabilities to inclusive educational programs, financial entitlements, healthcare, accessible housing, transportation and productive employment opportunities, as well as seeking to prevent the abuse and neglect of people with disabilities.

Relevant to this case, DRNY routinely assists people with disabilities seeking expungement and related remedies to address ongoing harm originating from illegal disability discrimination. DRNY also regularly assists examinees with disabilities who have been denied testing accommodations for the New York State bar exam. Because of DRNY's authority to protect and advocate for the legal and human rights of persons with disabilities, and its long history of doing so, DRNY can provide a unique and necessary perspective to assist the Court in this matter.

All *amici curiae* are listed in the Appendix hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, in recognition of the persistent, "unfair and unnecessary discrimination and prejudice" against people with disabilities, and the lack of "legal recourse to redress such discrimination." *See* 42 U.S.C. §§ 12101(a)(3)-(4), (8). In enacting this landmark legislation to ensure that these individuals have "the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous," Congress emphasized the enforcement of "the standards established in" the statute.

See 42 U.S.C. §§ 12101(a)(8), (b)(2)-(3). "[T]o assure" the ADA's goals of "equality of opportunity" and "full participation" (42 U.S.C. § 12101(a)(7)), state entities must provide qualified individuals with disabilities their needed, reasonable accommodations (*see* 42 U.S.C. §§ 12112(a), (b)(5)(A) (prohibiting discrimination against employees with disabilities, including by not making "reasonable accommodations"), 12131(2), 12132 (prohibiting public entities from discriminating, including by failing to make "reasonable modifications")).

State-entity denials of reasonable accommodations, and other illegal state-entity discrimination, often have devastating effects for people with disabilities, sometimes for the rest of their lives.[3] These effects originate with a state entity's past illegal acts of discrimination, but frequently are the direct result of the entity's present-day actions in defiance of federal law. These present-day acts include: maintaining and/or refusing to disavow inaccurate and unjustly prejudicial records (*e.g.*, school transcripts, personnel files, examination records); and failing or refusing to act as a positive or neutral reference for a discriminated-against individual.

In denying Petitioner T.W.'s claim for *Ex parte Young* relief against state officials and members of the New York State Board of Law Examiners (collectively, "BOLE"), the

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3. *Cf.* Sally Lindsay *et al.*, *It Is Time to Address Ableism in Academia: A Systematic Review of the Experiences and Impact of Ableism among Faculty and Staff*, 2 DISABILITIES 178, 185, 199 (Apr. 7, 2022), file:///C:/Users/bacla/Downloads/disabilities-02-00014.pdf (lack of accommodations can result in a lack of opportunities, job loss, poor job performance, and physical and psychological harm).

decision below eliminated in the Second Circuit an entire category of remedies: prospective injunctive relief to address ongoing harm that is a present-day manifestation of a state official's prior unlawful conduct. Such relief is vitally important to people who, like T.W., are today suffering harm that is the direct result of continuing state-entity acts in defiance of federal law. Individuals with disabilities need this relief in a variety of contexts, including education, employment, and professional or trade licensing.

These remedies are also needed to avoid the forced disclosure of an individual's disability. Without expungement or correction of negative records that manifest illegal disability discrimination, a person with disabilities will be asked about the record—often by someone who can affect the person's future and livelihood. They will feel compelled to explain that, in fact, the record reflects discrimination, rather than lack of aptitude, skills or knowledge, or poor job performance. In so explaining, they will inevitably reveal that they have a disability. Many are justifiably reluctant to reveal their disabilities to others unless absolutely necessary to do so, given the still pervasive bias and prejudice against individuals with disabilities.

Finally, the decision below is particularly detrimental to prospective attorneys with disabilities in the Second Circuit, given the practical realities of the bar exam accommodation timeline and process. A bar exam applicant with disabilities already faces many hurdles to becoming a licensed attorney: the arduous process of applying for bar-exam accommodations; the risk of having their request for accommodations denied mere weeks before the exam; the short time frame to successfully

appeal such denial to the state entity administering the exam; and the insufficient time to get a court order for accommodations prior to the exam date. The decision below adds to this list the likelihood that, should the individual with disabilities take the examination and fail without their needed accommodations, they will be left with a record of bar exam failure for the rest of their life—even though such record is inaccurate and a manifestation of illegal disability discrimination. The decision will thus deter people with disabilities from seeking bar admission in New York, the "jurisdiction with the largest number of bar candidates,"[4] as well as in Connecticut and Vermont, likely lowering the already shamefully low number of U.S. attorneys with disabilities.

Federal courts have a duty to correct and eliminate the harmful and unjust present effects of past illegal discrimination. *See Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate [such] discriminatory effects. . . ."). The *Ex parte Young* doctrine gives federal courts the power to do so with respect to state entities through equitable remedies such as expungement and ordering positive or neutral references. Granting certiorari is needed to ensure that people with disabilities can continue to get relief from harm caused by ongoing state misconduct in defiance of federal law—relief the *Ex parte Young* doctrine is designed to provide.

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4. Julianne Hill, *New York will adopt NextGen bar exam, considers surprising shifts in state-law tests*, A.B.A. J. (Jan. 9, 2025), https://www.abajournal.com/web/article/new-york-to-adopt-nextgen-bar-exam-considers-shifts-in-state-law-tests?utm_source=sfmc&utm_medium=email&utm_campaign=weekly_email&promo=&RefId=&utm_id=958892&sfmc_id=393310852.

ARGUMENT

I. The Decision Below Eliminates an Entire Category of Prospective Injunctive Relief Important to People with Disabilities to Remedy Present-Day Harm by State Entities

The Second Circuit's erroneous decision will eliminate an entire category of injunctive relief commonly sought by people with disabilities who have been discriminated against by state entities, and who are forced to live with the harmful, present-day manifestations of that discrimination. Expungement or correction of records tainted by discrimination, as well as orders requiring state officials to provide positive or at least neutral references for the people illegally discriminated against, are examples of important relief that, per the decision below, will no longer be available in the Second Circuit.

These remedies do not implicate the Eleventh Amendment—they are not aimed at compensating individuals with disabilities for past harms caused by state entities. *See Milliken v. Bradley*, 433 U.S. 267, 289-90 & n.21 (1977) (relief not aimed at "presently compensating victims for conduct and consequences completed in the past" is permissible under *Ex parte Young*). They are non-monetary, entirely prospective forms of relief which further *Ex parte Young*'s purpose "to vindicate the federal interest in assuring the supremacy of [federal] law." *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring) (cleaned up).

A. Expungement or Correction of Records

People with disabilities frequently seek to expunge or correct records that presently embody past acts of illegal discrimination against them. These records contain negative and inaccurate information that unjustly causes people with disabilities tremendous harm. The records are often the progeny of illegal refusals to provide federally-mandated accommodations, but can also result from other types of state-entity discrimination. Examples of such records include academic transcripts with poor or failing grades that were the direct result of accommodation denials; personnel files documenting illegal job termination or demotion, or supposed poor job performance, also the result of denials of accommodations and/or of irrational prejudice; and records of standardized tests or other examinations with low or failing scores caused by the failure to accommodate.

Courts have regularly permitted people with disabilities to seek expungement or correction of records under the *Ex parte Young* doctrine. *See*, *e.g.*, *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 478-79, 496 (4th Cir. 2005) (in Title II case, student with disabilities could seek expungement of "F" on her transcript which "hamper[ed] her employment prospects."); *Shepard v. Irving*, 77 Fed. Appx. 615, 616-17, 620 (4th Cir. 2003) (in Title II case, permitting state university student to seek expungement of record of failing grade and plagiarism which prevented her from graduating on time, leading to job loss); *cf. Woodle v. Kohler Co.*, 2006 U.S. Dist. LEXIS 89116 at **3-6 (E.D. Ark. Dec. 5, 2006) (after plaintiff's layoff, ordering removal of "all adverse information" from his "employment file based upon either his disability or perceived disability.").

The equitable remedy of expungement is properly granted with respect to information that "(1) is inaccurate, (2) was acquired by fatally flawed procedures, or (3) . . . is prejudicial without serving any proper purpose. . . ." *Chastain v. Kelley*, 510 F.2d 1232, 1236 (D.C. Cir. 1975). Records tainted by illegal disability discrimination often satisfy all three grounds: they are inaccurate because they document discrimination rather than reality; they are often acquired by failing to provide legally-required accommodations; and they are unjustly prejudicial.

When an organization keeps a record without correcting, deleting, or otherwise disavowing it, that entity is representing to the world that the record is accurate and relevant. *See Croushorn v. Board of Trustees*, 518 F. Supp. 9, 36 n.36 (M.D. Tenn. 1980) ("[M]aterials contained in personnel files have an aura of factualness and relevance," and with time "such writings per se command an even greater respect. . . ."). This "aura" is bolstered when a *state* entity keeps the record. But records obtained under discriminatory conditions, or otherwise reflecting acts of illegal discrimination, are inaccurate precisely *because of* such discrimination.

For example, when an examination is administered to an individual with a disability without their needed, reasonable testing accommodations,[5] the examination

5. "An accommodation can be as simple as extra time, the problems being read to someone who is blind, or testing in a wheelchair-accessible room—anything that makes the test accessible to a person with a disability without substantially modifying its contents and format or compromising the integrity of the test." Haley Moss, *Extra Time Is a Virtue: How Standardized Testing Accommodations after College Throw Students with*

results will not *accurately* reflect the individual's aptitude, knowledge, or skills, or whatever information about the individual the examination seeks to measure. Instead, the record of such an exam will showcase that the individual has a disability and was illegally denied accommodations. Expungement or correction of such a record is necessary to prevent others from relying on this inaccurate record to conclude that the individual lacks what it takes for the job, educational program, or the like.

Such a record is also "prejudicial without serving any proper purpose." *See Chastain*, 510 F.2d at 1236. There is no legitimate purpose in a state "maintaining and reporting records" that reflect "discriminatory conditions." *See* CA2 Joint Appendix ("CAJA") 34 (T.W.'s complaint).[6] On the contrary, their expungement under *Ex parte Young* would further the doctrine's supremacy-of-federal-law purpose. *See Carten v. Kent State Univ.*, 282 F.3d 391, 396-97 (6th Cir. 2002) (in ADA case where plaintiff sought *Ex parte Young* relief, finding that "the federal interests in interpreting federal law" and in "vindicat[ing] anti-discrimination guarantees" outweigh "state sovereignty interests in avoiding such suits.").

Disabilities under the Bus, 13 Alb. Gov't L. Rev. 201, 208 (May 28, 2020), https://www.albanygovernmentlawreview.org/article/24020-extra-time-is-a-virtue-how-standardized-testing-accommodations-after-college-throw-students-with-disabilities-under-the-bus.

6. It bears emphasis that the *merits* of T.W.'s claims are not at issue in this petition, which is about the Second Circuit's *categorical* elimination of expungement and related remedies under *Ex parte Young*. *See Verizon Md. Inc. v. PSC*, 535 U.S. 635, 646 (2002) ("[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim.").

In this case, T.W. seeks to end BOLE's maintenance of the records of two bar exam failures and/or BOLE's refusal to acknowledge that "the failures were the result of discriminatory test administration." *See* CAJA 29 (¶ 72), 34 (¶ c.). BOLE's denials of accommodations resulted in bar exam records reflecting T.W.'s disabilities, rather than her aptitude to practice law. But BOLE's maintenance of inaccurate, illegally-obtained records and refusal to disavow same—records that, on their face, *incorrectly* represent to the world a lack of competence to practice law—cause T.W. present-day harm that can be remedied by *Ex parte Young* relief.[7]

Expungement or correction can provide people with disabilities who are unjustly saddled with discriminatory records a clean (or cleaner) slate, placing them on a more equal footing with others seeking the same opportunities. *Cf. Soule v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 40-41, 48-49 (2d Cir. 2023) (correction of athletic records would redress "loss of publicly recognized titles and placements in specific races"; "no injunction could change the way past races were run," but the loss of titles and placements were "effects that [would] persist even after their high school athletic careers have ended."). These remedies thus further the ADA's purpose of "ensuring that people with disabilities are given the same opportunities and are able to enjoy the same benefits as other Americans." *Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003).

7. Expungement and related remedies are often inexpensive and easy to implement. *See, e.g.*, Stephanie Francis Ward, *Man Who Was Told He Failed Bar Exam Actually Passed, and He Blames Software*, A.B.A. J. (Jan. 26, 2021), https://www.abajournal.com/news/article/man-who-was-told-he-failed-bar-exam-actually-passed-and-he-blames-software (BOLE's correction and disavowal of bar exam failure).

Expungement would allow T.W. to truthfully answer to prospective employers, clients, and others who may inquire, that she never failed the bar exam, just as expungement of criminal records allows a wrongfully convicted individual to truthfully answer that they have never been arrested or convicted. *See*, *e.g.*, *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 (D.C. Cir. 2004) (expungement of a minor's arrest record and "declaration deeming her allegedly unlawful arrest a 'detention'" would relieve the minor "of the burden of having to respond affirmatively to the familiar question, 'Ever been arrested?' on application, employment and security forms.").

B. Orders to Provide Positive or Neutral References

Another commonly sought form of prospective injunctive relief that the decision below would disallow as "aimed exclusively" at "*past violation*" of federal law (*see* Pet.App. 40a (emphasis in original)) is an order that an official provide a positive or neutral reference for the individual discriminated against. *See*, *e.g.*, *Hudson v. Chertoff*, 484 F. Supp. 2d 1268, 1269, 1274 (S.D. Fla. 2007) (in discrimination case brought under the Rehabilitation Act, enjoining provision of "information regarding the reason for plaintiff's separation from service to any prospective employer" other than "dates of service and" position, and "any negative employment information concerning" plaintiff); *Croushorn*, 518 F. Supp. at 15, 43 (enjoining university dean "from making any reference or allusion to" plaintiff's discrimination claims "when answering any employment inquiries"). An order to provide a positive or at least neutral reference is purely

prospective in nature and remediates the present-day harmful effects of a termination, resignation, expulsion, or withdrawal caused by illegal discrimination.

II. The Varied Contexts Where Prospective Injunctive Relief Important to People with Disabilities Will Be Foreclosed by the Decision Below

Below are examples of the contexts where the above-described remedies have been important to, and commonly sought by, people with disabilities. In these contexts, DRNY, as well as other disability rights organizations and private counsel, have frequently negotiated confidential settlement agreements that include such remedies as terms, often eliminating the need for judicial intervention. During negotiations, the parties have until recently assumed the availability of these *Ex parte Young* remedies. Their elimination in the Second Circuit by the decision below will negatively impact the ability to negotiate satisfactory settlement agreements on behalf of individuals with disabilities going forward.

A. Education

Disability discrimination in education warranting such remedies is unfortunately common. In the context of institutions that receive funding from the United States Department of Education, the Department's Office for Civil Rights ("OCR") regularly seeks and obtains such remedies on behalf of students with disabilities via resolution agreements with these institutions. *See*, *e.g.*, Resolution Agreement, OCR Complaint Number 05-23-2190, Purdue University Global, https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/05232190-b.

pdf (agreement to allow student to retake quizzes with her needed accommodation, and to update her transcript to reflect the new quiz grades).

Due to OCR's limited resources and scope of jurisdiction, it is unable to help all of the many people with disabilities who need these remedies.[8] Many people who would otherwise file an OCR complaint seek help from advocates such as DRNY, and from private attorneys.[9] Because many of the institutions that discriminate against students are state entities, such institutions would assert sovereign immunity if a student were to seek this relief in the Second Circuit.

DRNY regularly assists students with disabilities, including those whose requests for reasonable accommodations have been denied or ignored. DRNY has witnessed the negative impacts of a failed test, bad grade, or other negative mark on its clients—all resulting from earlier failures to provide accommodations or other discrimination. A failing grade can impact a student's merit scholarship or their ability to graduate in their major; can lead to academic probation; and can limit an individual's future academic and career options. *See Flint v. Dennison*, 488 F.3d 816, 824 (9th Cir. 2007) ("When a

8. *See* Jonaki Mehta, *As discrimination complaints soar, parents of disabled students wait for help*, NPR (July 5, 2024), https://www.npr.org/2024/07/05/nx-s1-4993770/discrimination-complaints-students-with-disabilities-schools (in 2023, OCR received "a record number of complaints" involving discrimination; OCR is "overwhelmed with the volume of complaints" and "thousands" of cases are "lagging in the system.").

9. *See id.*

student's record contains negative information derived from allegedly" illegal school actions, "that information may jeopardize the student's future employment or college career.").

Among the resolutions that DRNY has advocated for on behalf of its student clients are grade changes or expungement of particular grades from the student's transcript after illegal discrimination. As an example, DRNY negotiated a grade change for a university student after the student's professor failed to provide reasonable accommodations for the student's disability-caused absences—this despite the student having in place accommodations allowing for such absences and for the provision of alternate class work in the event of absences. The professor had improperly reduced the student's grade due to such absences. A lower grade in this class would have affected the student's ability to renew merit scholarships. Through DRNY advocacy, the university changed the student's grade and confirmed that disability-related absences would not impact the student in the future. Without the availability of *Ex parte Young* remedies, a public entity in the Second Circuit in a similar scenario would have a reduced incentive to reach a similar out-of-court resolution. Thus, DRNY may no longer be able to negotiate such relief for its student clients as a result of the decision below.

B. Employment

DRNY regularly assists individuals who were denied reasonable accommodations in the workplace and were wrongfully terminated from their employment. DRNY advocates on behalf of employees with disabilities for

remedies such as converting an employment termination to a resignation, and providing a positive or neutral job reference. Indeed, on behalf of a former state employee, DRNY negotiated a confidential settlement agreement modifying the employee's personnel records to indicate that she resigned from the state entity instead of being terminated by it.

Often an individual with disabilities whose employer has discriminated against them, including by firing them, quite understandably will not want to return to working for that employer. Because a termination will make it far less likely that the individual will get hired elsewhere, it is crucial that such an individual's termination be expunged (*e.g.*, by having the employer convert the termination to a resignation), and that the former employer provide a positive or neutral job reference.

Most prospective employers will ask job applicants why an individual left their former employment. *Cf. Croushorn*, 518 F. Supp. at 36 & n.36, 43 (in case awarding expungement and neutral reference relief, plaintiff had "reasonably fear[ed] that the derogatory materials in his [former employer's] files [would] interfere with [his] career plans," and plaintiff had consequently refused to permit prospective employers to view such files, "kill[ing] several job possibilities."). DRNY can attest that, for an employee with disabilities who has been discriminated against by their employer, termination from employment without a positive or neutral reference can make it extremely difficult to procure another job. *Cf. Gilster v. Primebank*, 884 F. Supp. 2d 811, 867-68 (N.D. Iowa 2012*), rev'd on other grounds*, 747 F.3d 1007 (8th Cir. 2014) (district court *sua sponte* ordered neutral letter of reference

because defendant's firing of plaintiff in retaliation for her reporting sexual harassment "prevented her from securing a new job with comparable pay and benefits").

With these remedies, a former employee with disabilities can present an accurate employment record to prospective employers, and avoid being unjustly denied future employment opportunities due to an employment record tainted by illegal discrimination. No one will ask the employee why they were fired and why they have no references. Instead, the employee can truthfully represent that they left their prior employment on good or neutral terms, and can offer a reference confirming the same. The decision below threatens such relief, including in the confidential settlement agreements regularly negotiated by DRNY and other advocates.

C. Licensing, Certification, or Credentialing

State entities often administer important examinations or are in charge of overseeing other requirements for obtaining professional or trade licenses, certifications or credentials. People with disabilities who have been wrongfully denied their needed accommodations in this context are also saddled with negative and inaccurate records that can severely hamper their future educational and/or employment opportunities. T.W.'s case is an example.

III. *Ex parte Young* Remedies Are Needed to Avoid Harmful Forced Disclosure of Disabilities

The *Ex parte Young* remedies discussed above are important to prevent forced disclosure of an individual's

disability to people who can affect the individual's future and livelihood. If a record of a low grade, job termination, or failure of a professional licensing examination follows a person with disabilities during their education and/or career, they likely will be asked about it. The individual will feel compelled to explain that the record reflects disability discrimination, rather than a lack of aptitude, discipline or other personal deficiency. This explanation will necessarily include disclosure of the individual's disability. *Cf. Doe v. United States*, 964 F. Supp. 1429, 1430, 1434 (S.D. Cal. 1997) (in case brought to expunge criminal arrest record, noting the likelihood that prospective employers would ask plaintiff "about his leaving" his prior employer "and the circumstances surrounding his termination. At that point, [plaintiff] would be forced to disclose the fact that he has an arrest record.").

The decision whether to disclose one's disability is "highly personal," and is based on circumstances, need, and weighing the particular risks versus benefits of disclosure.[10] A person with a disability may choose to disclose at any time, but they are not required to disclose unless they need to request an accommodation or seek other legal protections. *Cf.* 42 U.S.C. § 12112(d)(2)(A)-(B) (a prospective employer may not ask a job applicant whether they have a disability, but may ask about their ability "to perform job-related functions"). While an individual with a disability may need accommodations on, for example, a timed standardized test, they will not necessarily need accommodations in the classroom or

10. *See* Haley Moss, *How I disclose my disability during a job search*, Fast Company (Feb. 24, 2020), https://www.fastcompany.com/90466861/how-i-disclose-my-disability-during-a-job-search.

the workplace, and thus may not need to disclose their disability in those settings.[11]

Individuals with disabilities have legitimate concerns that making their disability known may lead to misconceptions, negativity, and skepticism about their ability to handle educational opportunities, job duties, and other responsibilities. *See* 42 U.S.C. §§ 12101(a)(3), (5)-(6), (8) (discrimination against people with disabilities "persists," "including outright intentional exclusion," "relegation to lesser . . . jobs" and to "an inferior status," and "unfair and unnecessary . . . prejudice"); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) (being identified as a person with disabilities against plaintiff's will is harmful "because of justifiable and reasonable concern" regarding "how people who can affect his future and his livelihood, and whose judgment may be informed by the information, will perceive him"; such fear "is based in reality").[12] Indeed, in 2023, 34

11. *See* Moss, *supra* note 10 (Whether to disclose "'depends context to context, even for the same person . . . ,'" and, for the author, "would change depending on who I talked to, and why my disability mattered in the particular conversation."); Holly Pearson *et al.*, *Problematizing Disability Disclosure in Higher Education: Shifting Towards a Liberating Humanizing Intersectional Framework*, 39 Disability Studies Quarterly (Winter 2019), https://dsq-sds.org/index.php/dsq/article/view/6001/5187 ("Disability disclosure . . . 'require[es] decisions about who should know, why they should know, how to inform, what to disclose, and when to inform. . . .'").

12. *See also* Lindsay, *supra* note 3 at 198 ("[T]he decision to disclose" is often "difficult, with many choosing not to disclose for fear of job insecurity and discrimination," and "[f]ear of stigma. . . ."); Pearson, *supra* note 11 ("[T]here are numerous

percent of people with disabilities reported experiencing discrimination and harassment at work.[13] Concerns about disclosing one's disability are particularly valid in the legal profession, where discriminatory attitudes about disability are rife.[14]

If the negative record that would otherwise trigger inquiries has been expunged, then the need to disclose one's disability in order to explain that record will also have been eliminated. Preventing the need to disclose one's disability is yet another reason why the expungement remedy eliminated by the decision below is so important to people with disabilities.

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reasons to not disclose, such as embarrassment, shame, stigmatization, institutional culture, negative experiences with peers . . . [and] fear of discrimination. . . ."). Moreover, even if a person discloses their disability, they may not be believed or their disability may not be accepted as a valid explanation for the negative record.

13. Soeren Palumbo *et al.*, *Supporting the Diverse Identities of Employees with Disabilities*, Boston Consulting Group (Feb. 7, 2024), https://www.bcg.com/publications/2024/supporting-the-diverse-identities-of-employees-with-disabilities.

14. *See* Chasity Bailey, *Disability and the Legal Profession*, A.B.A. (Sept. 8, 2020), https://www.americanbar.org/groups/diversity/disabilityrights/initiatives_awards/ada30/bailey-ada/ (our "society does not consider people with disabilities as capable of doing legal work."; the attorney author describes being "constantly confronted with" discriminatory "preconceptions"); Moss, *supra* note 10 ("many lawyers see disability as a sign of weakness").

IV. The Practical Realities of the Bar Exam Accommodation Timeline and Process Make the Unavailability of Post-Accommodation-Denial Expungement and Correction of Bar Exam Records All the More Detrimental to People with Disabilities

State entities responsible for administering bar exams commonly deny requests for reasonable exam accommodations.[15] Without post-exam expungement or correction remedies to address the aftermath of bar exam failures, bar examinees with disabilities who seek to avoid the harms flowing from illegal accommodation denial are left solely with pre-exam temporary restraining orders ("TRO") or preliminary injunctions ("PI") that order exam accommodations. But because state entities typically set timelines for applying for bar exam accommodations that allow little time to challenge an accommodation denial in federal court prior to the exam date, obtaining pre-exam relief is unrealistic for many bar examinees with disabilities. When pre-existing hurdles to obtaining needed exam accommodations are also considered, it becomes apparent just how detrimental the decision below is to prospective attorneys with disabilities in the Second Circuit.

Having regularly assisted New York State bar examinees with disabilities who have been denied exam

15. *See generally* Stephanie Francis Ward, *Bar examinees have little success with accommodation requests and say the process is stressful*, A.B.A. J. (June 30, 2022), https://www.abajournal.com/web/article/bar-examinees-have-little-success-with-accommodation-requests-and-say-the-process-is-stressful (discussing challenges faced by applicants with disabilities seeking bar exam accommodations).

accommodations, DRNY can attest to the impact of the very short time frame available to compel BOLE to provide accommodations. Per BOLE's own rules, applicants are not permitted to submit their request for accommodations earlier than six months before the exam date, while BOLE can wait until 20 days prior to the exam date to notify the applicant of its accommodation denial. *See* 22 CRR-NY 6000.7(c)(2)(i), (d). After denial, an applicant has two weeks to appeal the decision to BOLE,[16] but BOLE can wait until the day before the exam before notifying "the applicant of its decision" regarding the appeal. *See* 22 CRR-NY 6000.7(e). This timeline—typical of those for

16. Appealing the denial decision to the entity administering the exam is itself a time-consuming process, often requiring submission of additional documentation. *See*, *e.g.*, *Nonstandard Testing Accommodations for the Bar Exam*, Mass.gov (2025), https://www.mass.gov/guides/nonstandard-testing-accommodations-for-the-bar-exam (in Mass., "[r]equests for reconsideration must include additional . . . information/documentation"); *General Instructions For Requesting Test Accommodations* at 3, https://courts.ms.gov/bar/baradmissions/documents/Request%20for%20Test%20Accommodations-General%20Instructions.docx (in Miss., the "request for reconsideration must contain new and material information and/or documentation not [previously] submitted"); *Missouri Board of Law Examiners General Instructions for Requesting Test Accommodations* at 6, https://www.mble.org/getpdfform.action?id=1419 (in Mo., "[a]ll requests for reconsideration must . . . be supplemented with documentation not previously provided"). For an appeal to BOLE, an applicant typically prepares a comprehensive personal statement, and provides additional support letters from medical providers, law school staff, prior teachers and professors, and others who understand the individual's need for accommodations. When representing an appealing applicant, DRNY may provide a letter of support explaining why the denial is discriminatory.

many state bar exams[17]—can leave a bar examinee with only hours to go into federal court to obtain a TRO or PI ordering accommodations.[18]

Because pre-bar-exam relief is difficult to obtain, and because the decision below would deny post-bar-exam relief otherwise available under the *Ex parte Young* doctrine, the practical effect of the decision is to further deter people with disabilities from taking the bar exam in New York, Connecticut and Vermont—as well as in any state located in a circuit which may choose to follow the decision. A bar exam applicant with disabilities already faces many hurdles: the arduous process of applying for

17. For state bar exams providing a timeline on their websites, the deadline for notifying the applicant of denial of their accommodation request varies from 21 to 42 days prior to the exam date. *See*, *e.g.*, *Test Accommodation Guidelines for Arizona Bar Examination* at 2 (June 11, 2024), https://www.azbaradmissions.org/getpdfform.action?id=251 (in Az., "at least three weeks prior to the examination"); *Instructions for Filing Petition for Non-Standard Testing Conditions on the Connecticut Bar Examination*, https://www.jud.ct.gov/cbec/instrucNST.htm (in Conn. (2d Cir.), for the February exam, determination letters available by the first week of February; for the July exam, by the first week of July); Mass.gov, *supra* note 16 (in Mass., for "[a]pplicants who have been approved for accommodations," a "confirmation letter approximately four to six weeks before the exam.").

18. Obtaining a pre-exam TRO or PI in the best of circumstances is no easy task. While studying for the bar exam, an applicant must secure (and usually pay for) counsel, and assist in laying out their case in sufficient detail to meet the heightened burden of a TRO or PI without the benefit of full discovery.

accommodations,[19] the risk of having their request for accommodations denied mere weeks before the exam,[20] the short time frame to successfully appeal such denial to the state entity,[21] and the insufficient time to get a court order for accommodations. The decision below adds to this list the likelihood that, should the individual with disabilities take the examination without their needed accommodations and fail, they will be left with a record of exam failure for the rest of their life—even though such failure is inaccurate and a manifestation of illegal disability discrimination.

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19. The accommodation application process is time-consuming, expensive, and difficult. Bailey, *supra* note 14 (describing "the avalanche of documentation that was required"); Ward, *supra* note 15 (neuropsychological evaluation reports cost thousands of dollars and are usually not covered by insurance). The process entails gathering extensive educational and medical records, evaluations, and employment and family history. *See* New York State Board of Law Examiners, *Testing Accommodation Handbook* at 15-33 (Jan. 2024), https://www.nybarexam.org/Docs/NTAHandBook.pdf. Individuals with disabilities sometimes begin the application process "months or years in advance to secure the necessary supporting documentation. . . ." Haley Moss, *Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law Graduates*, 28 Am. U. J. Gender Soc. Pol'y & L. 537, 565 (2020), https://digitalcommons.wcl.american.edu/jgspl/vol28/iss4/2/.

20. After the decision below, Second Circuit bar examiners will be incentivized to wait until as close as possible to the exam date before notifying examinees of accommodation denials, making pre-exam injunctive relief even less realistic.

21. *See, e.g.*, *Instructions for Filing Petition for Standard Testing Conditions on the Connecticut Bar Examination*, *supra* note 17 (10 days after denial to appeal).

Knowing that the decision below leaves bar examiners in the Second Circuit completely unfettered by federal law as they consider accommodation requests, it would be rational for a prospective attorney with disabilities to seek admission elsewhere, or nowhere.[22] The end result: a likely lowering of the already shamefully low number of practicing attorneys with disabilities.[23]

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22. Indeed, the decision below, which also held that Title II of the ADA did not validly abrogate state sovereign immunity (*see* Pet.App. 11a-32a), is already causing warranted anxiety among prospective bar applicants with disabilities. At a recent event about navigating bar exam accommodations hosted by *amicus* National Disabled Legal Professionals Association, an anonymous attendee submitted the following question: "How do you convince jurisdictions to grant accommodations if they say all consideration of requests are only available as a 'courtesy,' . . . since 'Title II does not apply in the professional licensing context . . . ?'"

23. Over 28 percent of U.S. adults have a disability (*Disability Impacts All of Us*, Centers for Disease Control and Prevention (July 15, 2024), https://www.cdc.gov/disability-and-health/articles-documents/disability-impacts-all-of-us-infographic.html), but only 1.99 percent of lawyers at law firms do (*2023 Report on Diversity in U.S. Law Firms* at 6, NALP (Jan. 2024), https://www.nalp.org/uploads/Research/2023NALPReportonDiversityFinal.pdf) .

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX — LIST OF *AMICI CURIAE*

Association on Higher Education And Disability ("AHEAD") is the leading professional membership association for individuals committed to equity for persons with disabilities in higher education.

CommunicationFIRST is a national, disability-led nonprofit organization dedicated to protecting and advancing the rights and interests of the estimated five million people in the United States who cannot rely on speech alone to be heard and understood.

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys, and advocates, which provides resources, training, and information to assist in safeguarding the civil rights guaranteed to those individuals under applicable federal laws.

Deaf Equality is a non-profit legal services organization advocating for Deaf, DeafBlind, DeafDisabled, Hard of Hearing, and Late Deafened individuals across the United States and worldwide.

As the federally mandated P&A System for individuals with disabilities in Connecticut, **Disability Rights Connecticut** ("DRCT") is a private non-profit organization dedicated to advocacy for the human, civil, and legal rights of people with disabilities throughout the State of Connecticut.

The **Disability Rights Legal Center** ("DRLC") is the nation's oldest non-profit, public interest disability

law center and remains a leader in championing the civil rights of people with disabilities as well as those affected by cancer.

Lead *amicus* **Disability Rights New York** is described in the Interest of the *Amici Curiae* section *supra*.

As the federally authorized P&A System for people with disabilities in Vermont, **Disability Rights Vermont** ("DRVT") pursues legal remedies for individuals with disabilities who face discrimination, and provides free legal services to advance and protect the rights, safety, opportunities, and autonomy of people with disabilities throughout Vermont, including via impact litigation to achieve systemic reform.

The **Hearing Loss Legal Fund** is a nonprofit organization that seeks to protect the rights of the Deaf and hard of hearing and provides legal education and advocacy to the Deaf and hard of hearing community.

The **National Association of the Deaf** ("NAD"), a non-profit founded in 1880 by deaf and hard of hearing leaders, is the oldest national civil rights organization in the United States with a mission to preserve, protect, and promote the civil, human, and linguistic rights of more than 48 million deaf and hard of hearing people in the United States.

The **National Disabled Legal Professionals Association** is a national association of disabled lawyers,

judges, policy experts, legislators, academics, and other legal workers, professionals, and organizers.

The **National Federation of the Blind** is the oldest and largest nationwide organization of blind persons and is a non-profit corporation committed to the complete integration of the blind into society on a basis of equality.

Established in 1976, **New York Lawyers for the Public Interest** has long fought for the civil rights of people with disabilities, including by ensuring equal opportunity for students with disabilities, as evidenced by our participation in *Bartlett v. New York State Board of Law Examiners*, which rose to the United States Supreme Court in 1999, and continues to this day by assisting students in appealing denials of applications for reasonable accommodations in the higher education and licensing exam contexts.

Tzedek Association is a Jewish humanitarian organization that advocates for commonsense criminal justice reform among other important issues, and championed the First Step Act, an initiative started by Tzedek.

Washington Civil & Disability Advocate ("WACDA") is a nonprofit disability rights organization in Seattle, WA, that is focused on Americans with Disabilities Act compliance.