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Meaningful Access and Disability Discrimination: The Role of Social Science and Other Empirical Evidence

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MEANINGFUL ACCESS AND DISABILITY DISCRIMINATION: THE ROLE OF SOCIAL SCIENCE AND OTHER EMPIRICAL EVIDENCE

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ABSTRACT

In cases alleging disability discrimination in the provision of state and local government services, courts frequently hold that plaintiffs' claims depend on the question whether, despite the disadvantage that government actions impose, the plaintiffs nevertheless receive meaningful access to the government services. Whether people with disabilities actually have meaningful access is in reality a factual question, one on which social science and other empirically supported facts should matter. But courts frequently ignore evidence about the nature and level of access that people with disabilities have to government programs when decisions regarding those programs are being challenged. This essay catalogues judicial decisions that bypass, or conversely, engage in the empirical inquiry. The essay considers several types of cases, including those concerning limits on government medical assistance, an issue of particular salience in the current political climate. The essay draws the conclusion that the better reasoned decisions are those that take social science and other relevant evidence seriously in determining whether meaningful access is afforded.

INTRODUCTION

Judicial decisions frequently invoke the idea of meaningful access in cases alleging disability discrimination in the provision of public services. Courts hold that disability discrimination laws guarantee persons with disabilities meaningful access to government programs and benefits, and that denial of meaningful access violates those laws.[1] Conversely, if disabled persons' access to the services is unequal but still "meaningful," courts often deny that the government has discriminated on the basis of disability.[2]

In *Alexander v. Choate*,[3] the Supreme Court ruled that a budget cut limiting the number of hospital days covered under a state Medicaid program did not violate section 504 of the Rehabilitation Act of 1973[4] despite the adverse impact it had on Medicaid-eligible individuals with disabilities, who disproportionately needed longer hospital stays.[5] The Court said that the state's Medicaid program provided meaningful access despite the limit, so there was no actionable disability discrimination.[6] Though it is the leading case, *Choate* is not an isolated one. Many influential court decisions under Section 504 and Title II of the Americans with

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[1] *See infra* text accompanying notes 47-67.
[2] *See infra* text accompanying notes 22-46.
[3] 469 U.S. 287 (1985).
[4] 29 U.S.C. § 794 (2012).
[5] *See Choate*, 469 U.S. at 290-91.
[6] *Id*. at 302-03.

Disabilities Act (ADA)[7] interpret the meaningful-access standard so as to uphold governmental decisions to refuse to modify a variety of public programs, saying that public agencies need not go further to accommodate people with disabilities than to provide whatever services they already offer.[8] Other decisions apply more demanding approaches to meaningful access and require extensive modifications in public programs to accommodate people with disabilities.[9]

Whether a person or class of persons has meaningful access to a government service is fundamentally an empirical question. How great a negative effect does a government decision have to have on people with disabilities in order to deny meaningful access? For a class-based claim like that in *Choate* challenging cutbacks in government benefits, a number of social research questions would be relevant: How many persons with disabilities are affected, how many experience a complete denial of services, how many suffer partial denials of services or the need to make do with inappropriate services that nevertheless confer some benefit, what losses do the complete and partial denials of services cause, what substitute services are offered, and how effective are the substitutes in comparison to the beneficiaries' needs?[10] Similar information ought to be provided regarding people without disabilities if the gist of the claim is that the decision affecting the benefit has a disparate negative impact.[11] For individual claims of

[7] 42 U.S.C. §§ 12131-12165 (2012). For the purposes of the present discussion, it may be assumed that the duties imposed by Section 504 and ADA Title II are the same. *See* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1101-02 (1995) (comparing Section 504 and ADA Title II).

[8] *See* cases cited *infra* notes 22-46. Meaningful access ideas have formed the basis for denial of claims under other legal provisions as well. *See* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982) (interpreting federal special education law to require no more than meaningful access to education for child with disability); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding dramatically unequal per-pupil funding for different school districts against equal protection challenge, noting that all students had access to education).

[9] *See* cases cited *infra* notes 47-67.

[10] This does not answer the question whether, in the absence of class-based proof of negative impact, the specific individuals who are negatively affected would still have valid claims. It would appear that a given individual with a disability could show that the failure to modify the challenged rule denies that person meaningful access to a public service, and so that person's case could proceed and would be analyzed in the same manner as the individual cases discussed in the text. There may be some basis for caution on this point, however, for in *Olmstead v. L.C.*, 571 U.S. 581, 603-07 (1999), the Supreme Court allowed a potential partial defense based on the difficulty of providing community services to all similarly situated persons at once in a case in which two individuals claimed that the failure to provide community-based services to them violated the ADA's mandate that public services be provided in the least restrictive setting appropriate to the needs of the persons served.

[11] Though this information may be needed for a disparate impact claim, as a general matter Section 504 and the ADA do not require plaintiffs to show that there is a person or class of persons without a disability that has been treated better than the person or persons with a disability. *Olmstead*, 571 U.S. at 598 & n. 10 ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA."); N.M. Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (10th Cir. 1982) ("We find no language in the statute or regulations suggesting that proof of disparate treatment is essential to establishing a Section 504 infraction in connection with the educational rights of handicapped children."). In the context of an individual employment discrimination claim, the Supreme Court has described the reasonable accommodation duty as a form of preference needed to achieve equality. US Airways v. Barnett, 535 U.S. 391, 397-98 (2002). *See generally* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1137-39, 1151-52, 1175-78 & n.289 (2010) (discussing accommodations as preferences and considering different perspectives on issue in extant scholarship). The law of disparate impact disability discrimination remains underdeveloped, something two prominent scholars pointed out almost a dozen years ago, Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 879-93 (2006), and some authorities suggest that questions of meaningful access are more important to the success of disability discrimination claims than those of

discrimination, the questions might be somewhat less sociological in nature, but they too are empirical and involve social facts: What other resources are available, how effective are they for the person with the disability, what losses result from failure to have effective services, and how beneficial is the access for an individual who does not have a disability?

Nevertheless, courts making determinations about meaningful access often ignore even basic and readily found data on the impact of government policies when the policies are challenged as discriminatory. Judges decide cases with little knowledge about the effects of government actions being upheld, even though a meaningful meaningful-access standard would appear to mandate obtaining and applying that information. For example, if the hospitals in *Alexander v. Choate* routinely kept the patients after the coverage periods were up and bore the costs themselves, the access to Medicaid for people with disabilities would look far more meaningful than if the hospitals discharged patients with disabilities in need of care out onto the street at the end of the coverage period.[12]

There is real salience at the present time to the problem of actions by state and local governments that impose harm on people with disabilities and the legal bases for challenges to those actions. Threatened cuts in the federal support for the Medicaid program are likely to cause states to make drastic cuts in eligibility and service coverage, changes that will disproportionately harm people with disabilities.[13] Other state and local programs that are critical for people with disabling conditions are vulnerable in the current political climate.[14] The success of legal challenges based on Section 504 and the ADA may well depend on judicial determinations of whether people with disabilities retain meaningful access to the services they need despite slashes in support.

A number of thoughtful commentators have considered issues of meaningful access in relation to discrimination against persons with disabilities. Professors Francis and Silvers acknowledge that

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disparate impact doctrine, *see* Crowder v. Kitagawa, 681 F.3d 1480, (9th Cir. 1996) ("Rather than attempt to classify a type of discrimination as either 'deliberate' or 'disparate impact,' the Court [in *Alexander v. Choate*, 469 U.S. 287, 302 (1985)] determined it more useful to assess whether disabled persons were denied 'meaningful access' to state-provided services."); P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 2d 1098, 1113 (C.D. Cal. 2015) (same). Apart from disparate impact cases' application of the meaningful access idea, however, the content of the ban on disparate impact disability discrimination is beyond the scope of this essay.

[12] *See* Leslie Pickering Francis & Anita Silvers, *Debilitating* Alexander v. Choate: *"Meaningful Access" to Health Care for Persons with Disabilities*, 35 FORDHAM URB. L.J. 447, 453 (2008) (noting *Choate*'s failure to consider actual impact of restriction on in-patient days).

[13] *See infra* text accompanying notes 68-76.

[14] *See, e.g.*, Andrew Taylor, *Trump's Budget Proposals Will Include Deep Cuts to Food Stamp Programs*, TIME, May 21, 2017, http://time.com/4787733/trump-budget-cuts-food-stamps/. The high rate of poverty among persons with disabilities, *see How Is Poverty Status Related to Disability*, UNIV. OF CAL.-DAVIS CTR. FOR POVERTY RES., https://poverty.ucdavis.edu/faq/how-poverty-status-related-disability (last visited June 7, 2017) ("In 2014, . . . [p]overty rates by disability status for those ages 18 to 64 were 12% for those without a disability, 29% for those with a disability."), means that many cutbacks in antipoverty programs will disproportionately harm people with disabilities; in addition, state programs that specifically benefit people with disabilities or classes of people with disabilities are also on the chopping block, *see* Gregory Wallace, *Proposed Budget Cuts for 2017 Include AIDS, AmeriCorps Programs*, CNN, Mar. 30, 2017, http://www.cnn.com/2017/03/29/politics/donald-trump-budget-cuts/index.html ("Many of the proposed cuts are to grant programs, meaning that if enacted, states, universities and non-profit organizations could find themselves seeking additional funds on their own or cutting programs to make up the difference.").

Supreme Court case law suggests that meaningful access exists even though disparate impacts may disadvantage some recipients of government health services, but they argue that the law as properly understood requires fair equality of opportunity.[15] In work discussing Medicaid managed care initiatives, Professor Crossley suggests that proper interpretation of the meaningful-access standard in that context calls for overturning some service limits that managed care programs might impose on beneficiaries when those limits disadvantage people with disabilities.[16] She would rely on commitments to provide access that the relevant state government agencies make in their applications for waiver of ordinary Medicaid requirements; she concludes that any reneging on those commitments denies meaningful access.[17] Professor Bagenstos considers various restrictive decisions of the courts regarding government services for people with disabilities to be applications of an access-content distinction, by which courts require modifications to allow access to programs and services, but are reluctant to alter the content of what is offered once formal rights to participate in a program are obtained.[18] He suggests moving past a traditional discrimination framework in advocating for greater modifications of public and private services to accommodate people with disabilities.[19] All of these discussions, though they draw on social science research in any number of respects, leave to the side whether empirical evidence can give meaning to the application of the "meaningful access" standard itself. Hence the need to address that question.[20]

I submit that when would-be beneficiaries challenge limits to and exclusions from public programs on grounds of disability discrimination, courts considering meaningful access should defer to triers of fact, that is, judges or juries as appropriate under the applicable law, and triers

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[15] Francis & Silvers, *supra* note 12, at 447, 460, 466.

[16] Mary Crossley, *Giving Meaning to "Meaningful Access" in Medicaid Managed Care*, 102 KY. L.J. 255, 257 (2014).

[17] *Id*. at 278-80.

[18] Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 46-48 (2004); *see* Jessica L. Roberts, *Health Law as Disability Rights Law*, 97 MINN. L. REV. 1963, 2003 n.193 (2013) ("Bagenstos identifies *Choate* as the advent of the "access/content" distinction he explores in much of his work on disability rights law.").

[19] Bagenstos, *supra* note 18, at 54-70 (2004).

[20] Other authorities also discuss meaningful access in connection with disability discrimination claims. *E.g.*, Mary R. Anderlik & Wendy J. Wilkinson, *The Americans with Disability Act and Managed Care*, 37 HOUS. L. REV. 1163, 1220 (2000) ("Using the *Choate* 'criteria,' plaintiffs should prevail in disparate impact cases where they can show that effective treatment for conditions affecting persons with disabilities (or particular disabilities) is not possible within the challenged constraints, that is, that they are being denied meaningful access, while the impact on the general, able-bodied population is minimal or nonexistent."); Wendy F. Hensel & Leslie E. Wolf, *Playing God: Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*, 63 FLA. L. REV. 719, 745 (2011) ("Protocols that categorically exclude individuals with specific disabilities from receiving medical care in the event of a pandemic clearly do not meet the 'meaningful access' standard articulated in *Choate*."). An extensive student commentary catalogues various approaches courts have taken to meaningful access in health care and analogous areas and suggests there should be at least some access for all in Medicaid managed care programs under a "readily accessible" standard. Alexander Abbe, Comment, *"Meaningful Access" to Health Care and the Remedies Available to Medicaid Managed Care Recipients Under the ADA and the Rehabilitation Act*, 147 U. PA. L. REV. 1161, 1198 (1999); *see also* Spenser G. Benge, Note, *Section 1557 of the Affordable Care Act: An Effective Means of Combatting Health Insurers' Discrimination Against Individuals with HIV/AIDS*?, 13 IND. HEALTH L. REV. 193 (2016) (discussing whether insurers' practices with respect to coverage of treatment for HIV infections deny meaningful access so as to constitute discrimination under Patient Protection and Affordable Care Act standards).

of fact should heed social science evidence about the actual impacts of the government decisions on access to services.[21]

Part I of this essay will analyze cases in which courts reject disability discrimination challenges to actions by state and local government on the basis of reasoning that the actions did not deny the plaintiffs meaningful access, but in which the courts did not make a meaningful empirical inquiry as to the access that the plaintiffs actually had. Part II discusses contrasting cases in which courts made a deep investigation into the true effect on the level of access that the state and local government decisions afforded. Part III discusses how courts have treated restrictions on programs providing medical assistance, an issue of special importance for people with disabilities in the present political situation.

I. A NEED FOR EMPIRICAL EVIDENCE: THREE CASES

Three cases are representative of those in which courts reject claims of denial of meaningful access to public services or benefits. In each of these, there should have been a role for empirical information as to how meaningful the access was.

Wright v. Giuliani is a prominent class action case in which homeless individuals with HIV infections or AIDS sought emergency housing that would accommodate needs arising from their conditions, such as storage for medication and refrigerated food facilities for those who had to take food with medication.[22] The district court denied a preliminary injunction and the Second Circuit affirmed, citing *Choate* and the meaningful-access standard.[23] As the Second Circuit noted, a doctrinal dispute existed over whether the plaintiffs' claim was for reasonable accommodations in an existing program to permit them meaningful access when people without disabilities had access, or whether they were seeking a new benefit not provided to others.[24] In questioning the likelihood of plaintiffs' success on the merits, the court stressed the absence of record evidence about the adequacy of emergency housing afforded persons without disabilities, evidence that the court said would help define the nature of the right being asserted and would also be relevant to whether the requested remedy would constitute a fundamental alteration.[25]

The Second Circuit's emphasis on the lack of evidence points up the close relationship between the empirical and the doctrinal in resolving questions of meaningful access. If meaningful access

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[21] This is not to deny that normative issues also exist. How much of a harm may be imposed, or conversely, how much of a benefit should be conferred, are questions about the depth of the commitment of society, through enactments such as the ADA, to equality for persons with disabilities. But at least if the measure of the harm or benefit is measured, the normative questions can be brought into relief and made ready for determination. An interesting parallel to the role of empirical inquiry in statutory disability discrimination cases may apply to the role of social science evidence in constitutional cases, as with the study by Kenneth and Mamie Phipps Clark and other materials cited in *Brown v. Board of Education*, 347 U.S. 483, 494 & n.11 (1954), and the controversy whether the Court should have relied on the materials. For a compact discussion of the issue in *Brown*, see KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 678 (15th ed. 2004).

[22] 230 F.3d 543, 545 (2d Cir. 2000) (describing needs and requested accommodations).

[23] *Id*. at 547-48. Though the lower court denied the preliminary injunction motion, it also denied the defendants' motion to dismiss, and permitted plaintiffs to replead with respect to their class certification motion. Wright v. Giuliani, No. 99 Civ. 10091, 2000 WL 777940, at *11 (S.D.N.Y. June 14, 2000).

[24] 230 F.3d at 547.

[25] *Id*. at 548-49.

is simply a code word for "no new benefits for people with disabilities," then the adequacy of the benefits currently afforded those without disabilities becomes profoundly important. But there seemed to be no dispute in the *Wright* case that people without disabilities were being afforded emergency housing, however poor it might have been in relation to their needs. The gist of the plaintiffs' claims was that housing was afforded them but it did not meet their needs at all, due to the specific and pressing necessity for medicine and food storage that individuals without disabilities did not have. Here the real evidentiary deficiency was facts about the prevalence of those needs and whether they were in reality critical to the population of people with HIV infections. Access to housing in which critical medical needs cannot be met is not meaningful access to housing, and information on the nature of the needs and the depth of the inadequacy of the service being offered is crucial on that issue.

A second illustrative case is *Louis v. New York City Housing Authority*, an individual action involving a different kind of housing assistance, in which a mother and her children alleged that she needed reasonable accommodations to enable her to obtain housing under the Section 8 rental voucher program.[26] She stated that she was mentally ill and had experienced a stroke and seizures, and that her son had a lung disease requiring monitors, ventilators, and other medical equipment.[27] She sought an emergency transfer to different housing, alleging that her landlord sexually harassed her, then evicted her.[28] She said that the defendant's offer of vouchers for renting a new apartment did not provide her meaningful access to housing that could handle her son's medical apparatus, and she requested more direct assistance.[29] Ultimately, she lost Section 8 eligibility and was homeless at the time of the decision.[30]

The district court dismissed the ADA accommodations claim after citing *Choate* and its meaningful access language. It said that the benefits of the Section 8 program, which provides vouchers for rent in privately owned apartments to people who qualify, did not include provision of housing or making modifications in private housing.[31] Tellingly, the court was willing to assume "that some assistance with locating accessible housing may in certain circumstances be necessary to allow individuals with disabilities to overcome obstacles to meaningful participation in the Section 8 program."[32] It nevertheless said that the plaintiffs failed to allege what obstacles related to their disabilities prevented them from locating housing or specifying what accommodations would have afforded them an equal opportunity to obtain housing. It appears that evidence on the nature of the housing market, that is, on the character of the units available at the rent levels and under the regulatory constraints of the Section 8 program, could have led the court to conclude that the Section 8 program failed to provide meaningful access to those with disabilities because of the program's lack of accommodation to the failure of the housing market to respond to their needs. That evidence may have led the court to determine that a modest modification, perhaps in the form of personal assistance in finding housing or relaxing

[26] 152 F. Supp. 3d 143 (S.D.N.Y. 2016). The Section 8 program is provided for under the Housing Act of 1937, as amended, 42 U.S.C.A. § 1437a (West 2017).
[27] *Louis*, 152 F. Supp. 3d at 147.
[28] *Id*.
[29] *Id*. at 148.
[30] *Id*.
[31] *Id*. at 153. The court cited other grounds in dismissing the claim, including statute of limitations, *id*. at 149, and insufficient allegations as to the disability of the mother, *id*. at 150.
[32] *Id*. at 155.

some of the restrictions on which housing could be covered, would be needed to achieve meaningful access for the plaintiff.

A third case, *Jones v. City of Monroe*, affirmed the denial of a preliminary injunction requested by an individual with multiple sclerosis seeking an all-day on-street parking space near her workplace.[33] The plaintiff could walk using a cane for only short distances and typically used a wheelchair for mobility.[34] Free all-day parking was available two blocks from the workplace, but that was too far for her to travel.[35] Free one-hour parking with designated spaces for those with disabilities was closer, but did not meet her needs to be at work all day.[36] The court upheld the finding of a lack of likelihood of success on the ADA claim, citing *Choate* and saying that the benefit afforded by the city was one-hour parking adjacent to downtown businesses for their patrons and longer term parking farther from the businesses for others, including the businesses' employees.[37] Arguing that the plaintiff was afforded meaningful access to free downtown parking at specific locations, the court said that she had no right to free downtown parking allowing her access to the destination of her choice.[38] The court also said that forcing the city to stop enforcing the one-hour limit on the spaces near the plaintiff's office would be a fundamental alteration, because the parking ordinance was otherwise valid.[39]

The dissent relied on factual material that the majority neglected: There were 110 of the one-hour spaces, so apparently the effect on the downtown businesses of dedicating one space for all-day parking by the plaintiff was miniscule.[40] Data on whether the removal of the one space would actually harm merchants who depend on turnover of parking spaces and the ready availability of spaces near businesses would have established the point beyond any doubt. Evidence on what other comparable cities have done to accommodate persons who need all-day parking near specific locations would also have been helpful. The dissent commented that the closest all-day space with a restriction for exclusive use by those with disabilities was 592 feet from the plaintiff's building, too far for her to manage.[41] The majority, it seems, did not consider this fact relevant. Other facts, including whether there might be availability of a space somewhere not so far but not interfering with merchants' needs, would also be pertinent. The city provided huge amounts of free parking, but attention to empirical evidence could have established that that the plaintiff lacked any meaningful access to it, and would likely have established as well that access could be provided with modifications that would inflict no perceptible harm on anyone.

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[33] 341 F.3d 474 (6th Cir.2003), *abrogated in part not relevant,* Anderson v. City of Blue Ash, 798 F.3d 338, 357 n.1 (6th Cir. 2015).
[34] *Id*. at 475.
[35] *Id*.
[36] *Id*.
[37] *Id*. at 477-78.
[38] *Id*. at 479.
[39] *Id*. at 480. It is difficult to reconcile this statement with the reality that any Title II claim for reasonable modification of existing rules will entail the cessation of enforcement of otherwise valid laws. *See, e.g.,* Dadian v. Vill. of Wilmette, 269 F.3d 831 (7th Cir.2001) (requiring waiver of rule against driveways that open directly on street front).
[40] *Jones*, 341 F.3d at 482 (Cole, J., dissenting).
[41] *Id*.

These are far from the only examples. Other instances in which courts have denied ADA Title II or Section 504 claims include one challenging a lifetime cap on mental health coverage under a federal employee benefit program,[42] cases challenging the failure to provide services needed by diabetic children at a neighborhood public school[43] and a city-run summer camp,[44] a case challenging a policy of providing non-credit-bearing academic intervention classes at school at times when they conflicted with credit-bearing courses that students with disabilities needed in order to graduate on time,[45] and others.[46] In each of these cases, there was a lack of useful empirical information on just how meaningful any access to the services actually was.

II. USING SOCIAL EVIDENCE: SOME CONTRASTING CASES

In contrast, a number of judicial opinions rely on social science data and other empirical evidence in finding a lack of meaningful access to government services and benefits. Several of these cases illustrate the point.

National Federation of the Blind v. Lamone affirmed a ruling that Maryland denied meaningful access to absentee voting by affording only paper ballots that needed to be marked by hand, in violation of the ADA and Section 504; the court further affirmed the lower court's determination that providing an online absentee ballot-marking tool that was accessible to blind people was a

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[42] Moderno v. King, 82 F.3d 1059 (D.C. Cir. 1996) (in Section 504 challenge, upholding lifetime cap of $75,000 for mental health benefits under government employee benefit plan applicable to Foreign Service, saying that meaningful access standard was met). Cases of this type may return if the protections in the Patient Protection and Affordable Care Act are repealed. *See infra* text accompanying notes 68-70 (discussing potential new limits on medical assistance programs).

[43] R.K. v. Board of Educ. of Scott Cty., No. 5:09–CV–344–JMH, 2014 WL 4277482 (E.D. Ky. Aug. 28, 2014) (granting summary judgment against student with diabetes placed by school district in non-neighborhood school because neighborhood school to which student otherwise would have been assigned lacked full-time nurse, despite argument that non-medical personnel at neighborhood school could have been trained to monitor student and assist with insulin injections; holding that student failed to create jury question whether school's actions met test of reasonable accommodation, reasoning that meaningful access to education was afforded), *aff'd*, 637 F. App'x 922 (6th Cir. 2016).

[44] Medina v. City of Cape Coral, 72 F. Supp. 3d 1274 (M.D. Fla. 2014).

[45] B.C. v. Mount Vernon City Sch. Dist., No. 11 CV 1411, 2014 WL 4468082 (S.D.N.Y. Aug. 28, 2014), *aff'd*, 660 F. App'x 93 (2d Cir. 2016). The court of appeals did consider statistical evidence regarding the plaintiffs' proposed class, and concluded that the evidence regarding students with disabilities eligible under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1482 (West 2017), did not sufficiently relate to the claims asserted on behalf of the class of children covered by Section 504 and the ADA. B.C. v. Mount Vernon City Sch. Dist., 837 F.3d 152 (2d Cir. 2016). The court did not discuss the U.S. Department of Education regulation providing that all students considered children with disabilities for purposes of the Individuals with Disabilities Education Act are covered by Section 504. *See* 34 C.F.R. § 300.104.3(*l*) (2017) ("Qualified handicapped person means: . . . With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act").

[46] *See, e.g.*, S.P. v. Fairview Sch. Dist., No. CIV.A. 13-96E, 2014 WL 4924885 (W.D. Pa. Sept. 30, 2014) (in case of former student subject to incapacitating migraine headaches that prevented his regular attendance at school, sua sponte granting school district summary judgment on claim that school district violated student's right to education with non-disabled peers, determining that existing accommodations, including availability of Refocus Room at school and enrollment in cyber courses at home, met standards of Section 504 in light of inability of student to attend school on frequent occasions when headaches occurred); *see also* cases cited *infra* notes 77-81, 90 (discussing claims concerning medical assistance and related topics).

reasonable modification.[47] The Board of Elections had developed the online marking tool and used it for a limited number of voters in the 2012 election, but did not vote by the necessary supermajority to certify its use in accordance with state law requirements.[48]

The district court held a three-day bench trial and received extensive empirical evidence. The Fourth Circuit summarized the proceedings:

> The district court found that "the evidence demonstrated specific difficulties that some disabled voters have experienced while voting," and that "under the current absentee ballot voting program, individuals with disabilities such as those of the Plaintiffs cannot vote privately and independently." The district court credited the results of a University of Baltimore usability study that concluded the tool was "highly accessible for disabled voters," though the district court acknowledged that two individuals testified that they had difficulty accessing and using the tool during a public demonstration period. The district court found the tool "compatible with reasonably up-to-date computer and screen access software," "designed in accordance with the Web Content Accessibility Guidelines," and "compatible with refreshable Braille displays."
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> With respect to the security risks posed by the online ballot marking tool, the district court credited expert testimony that the tool "exhibited software independence, meaning a change to the voting software used for an election cannot cause an undetectable change to the outcome of an election" and that "there were no additional risks that did not exist in other methods already available to Maryland voters." The district court found that the tool was "not without some security risks" including that "malware could enable [a] third party to observe a voter's selections" and that "a voter's selections could be captured if a third party infiltrated the Board's server during the time a voter's selections and/or the printable ballot were being transmitted." Additionally, "[t]here was no evidence at trial that the online ballot marking tool had been tested against intentional attempts to infiltrate or hack into the Board's server or the tool."[49]

The court had to resolve the question whether to evaluate meaningful access with regard to voting processes as a whole or with regard to absentee voting, ultimately reasoning first that *Choate* cautioned against defining public programs so as to overlook problems with achieving access to public services, and second that since anyone may vote absentee without providing a justification, absentee voting is the relevant program.[50] The court relied on ADA regulations requiring equal opportunities to participate and noted that voters without disabilities may mark their absentee ballots without assistance and with complete privacy, something blind voters may

[47] 813 F.3d 494 (4th Cir. 2016).
[48] *Id*. at 499-500.
[49] *Id*. at 501-02 (page citations to record on appeal omitted).
[50] *Id*. at 504 (noting *Choate*'s citation with approval of government's statement, "The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." Alexander v. Choate, 469 U.S. 287, 301 n.21 (1985)).

not do without an accommodation like the one requested.[51] But for the historical and social impact evidence on the obstacles to voting for people who are blind and the technical evidence on the effectiveness of the proposed accommodation, the outcome of the case might well have differed.[52]

A second case that contrasts with the set of authorities that did not use social science evidence is *California Foundation for Independent Living Centers v. City of Sacramento*, in which the district court ruled that a municipal airport denied meaningful access to persons using wheelchairs due to its gate counter design and the failure to have an adequate evacuation plan.[53] The opinion featured an extensive discussion of the admissibility of evidence submitted in support of cross-motions for partial summary judgment, both lay and expert testimony.[54] In all but one aspect of the evacuation plan, the challenged operations were found to deny meaningful access, with the court relying extensively on the empirical evidence about customer interactions at the counters and the deficiencies in the plans for evacuation in case of emergency.[55]

In a direct contrast to the *Jones v. City of Monroe* case cited above, a third case, *Bassilios v. City of Torrance*, ruled that the failure to provide a disability-designated street parking place adjacent to the apartment of the plaintiff, a person with cerebral palsy whose walking abilities were severely limited, denied her meaningful access to city services.[56] The court cited specific evidence about distances from alternative parking places and the difficulty of traveling from them to the apartment on foot, including stairs, steep slopes, and difficult terrain.[57] The court also cited evidence that the city had not designated any street parking spaces in residential areas from 1999 to 2015 and that there were no such places in the entire city.[58] Although the city was willing to establish a 20-minute parking restriction between 8:00 a.m. and 6:00 p.m. on Monday through Saturday for the space in front of the apartment and to exempt the plaintiff or others with disabled parking placards from the 20-minute limit, the space was frequently occupied by cars without the placard, and could be occupied without restriction in the hours not covered by the restriction.[59] Notably, the empirical evidence included not only the physical and historical facts about the parking situation, but also the simple mathematical calculation that under the current regime the parking space had no restrictions about 70% of the time.[60] The court pointed out the absence of evidence supporting the city's assertions that the existing restrictions on the space would meet the plaintiff's needs.[61]

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[51] *Id*. at 506.
[52] A case similar to *Lamone* found a denial of meaningful access but went on to hold that the requested accommodation constituted a fundamental alteration, relying on facts regarding Ohio voting system certification that differed from those relating to Maryland. Hindel v. Husted, No.: 2:15-cv-3061, 2016 WL 2735935 (S.D. Ohio May 11, 2016).
[53] No. 2:12-CV-03056-KJM-GGH, 2015 WL 6744659 (E.D. Cal. Nov. 4, 2015).
[54] *Id*. at *2-*6.
[55] *Id*. at *14-*15 (counters), *18 (evacuation plan).
[56] No. CV 14-03059-AB, 2015 WL 10570160 (C.D. Cal. Dec. 4, 2015).
[57] *Id*. at *2
[58] *Id*.
[59] *Id*.
[60] *Id*. at *12.
[61] *Id*.

Other cases in which the courts were sensitive to empirical evidence and the social impact of challenged practices include disputes over the closing of a public rehabilitation center,[62] the failure to provide needed social services to persons with HIV infection,[63] another voting accessibility case,[64] an additional disaster planning case, [65] a case concerning telephone communications,[66] and a case concerning access to education for a child with behavioral disabilities.[67]

The bottom line is that numerous courts and cases have approached meaningful access solely as a matter of legal interpretation or judicial assumption and have predictably concluded that meaningful access was offered. But a fair number of other courts, likely encouraged by alert advocates, have embraced social science and other empirical evidence about what constitutes meaningful access under the facts of the cases before them. In the cases identified here, those courts have gone on to find that the government policies being challenged denied meaningful access to services or benefits.

III. The Special Case of Limits on Medical Assistance Programs

An issue of particular concern is the use of empirical evidence in cases challenging government denials of one or another form of medical assistance. This subject is of acute importance at the present time. First, it is the situation that bears the closest analogy to *Alexander v. Choate*, in which the Supreme Court, without considering factual inquiry, rejected a challenge to a Medicaid cutback stating that meaningful access to services was being afforded. Second, it is a situation that is highly likely to arise in the near future. Congress is considering abolishing the traditional open-ended cost sharing between the federal government and the states and replacing that arrangement with block grants capped at existing levels of federal Medicaid expenditures, subject only to increases for state population growth and the overall rate of inflation.[68] Since Medicaid-covered costs increase at a greater rate than other costs of living, and the numbers of those in need in a state may increase more quickly than the general population, the likely effect is a proportional decrease in federal support, which the states will need to make up for either by

[62] Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004).
[63] Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003).
[64] Disabled in Action v. Bd. of Elections, 752 F.3d 189 (2d Cir. 2014).
[65] Brooklyn Ctr. for Independence of the Disabled v. Bloomberg, 980 F. Supp. 2d 588 (S.D.N.Y. 2013).
[66] Henning v. Cty. of Santa Clara, No. 15-cv-05171, 2017 WL 1036729, at *7 (N.D. Cal. Mar. 17, 2017).
[67] A.G. v. Paradise Valley Unified Sch. Dist. No. 69, 815 F.3d 1195, 1206 (9th Cir. 2016) (stating that expert testimony supported claim that student needed accommodations "to have meaningful access to her education").
[68] Sara Kliff, *Donald Trump's Plan to Cut Medicaid Spending, Explained*, VOX (Jan. 23, 2017), https://www.vox.com/policy-and-politics/2016/11/29/13778622/price-trump-medicaid-block-grants

increasing their own spending or by cutting costs.[69] Cost-cutting could include dropping groups of currently eligible individuals or reducing services, or both.[70]

These steps would uniquely harm people with disabilities, who spend comparatively larger amounts[71] of their comparatively smaller incomes[72] on medical care. Accordingly, the state actions may be vulnerable to ADA disparate impact or reasonable modification challenges. There are also ongoing debates about whether the ADA provides the basis to challenge existing state restrictions on Medicaid benefits, including limits on home and community based services, constraints found in managed care arrangements, conditions imposed on Medicaid coverage expansion, and other features of government medical assistance programs that disadvantage persons with disabilities.[73] People with disabilities making the challenges will need to respond to the argument that they nonetheless enjoy meaningful access to the medical assistance services.

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[69] *See id*.; *see also* Haeyoun Park, *In One Chart: Trump Plans to Cut Medicaid After Promising Not To*, N.Y. TIMES, May 24, 2017, https://www.nytimes.com/interactive/2017/05/24/us/politics/trump-medicaid-budget-cuts.html?rref=collection%2Fnewseventcollection%2Fahca-american-health-care-act-repeal-obamacare&action=click&contentCollection=politics&region=stream&module=stream_unit&version=latest&contentPlacement=8&pgtype=collection&_r=0 ("Mr. Trump is proposing to cut $610 billion from Medicaid benefits. This could come on top of more than $800 billion in cuts to Medicaid sought in the health care overhaul bill passed by the House on May 4.").

[70] *See* Kliff, *supra* note *68*. Past experience in times of budget crisis supports this prediction. *See* David Orentlicher, *Medicaid at 50: No Longer Limited to the "Deserving" Poor?*, 15 Yale J. Health Pol'y, L. & Ethics 185, 193 (2015) ("[F]iscal pressures led thirty-eight states to reduce or restrict Medicaid eligibility between 2002 and 2005. States also have responded to fiscal pressures by reducing benefits and decreasing payments to physicians who provide care to Medicaid recipients.").

[71] *See* Sophie Mitra et al., *Extra Costs of Living With a Disability: A Systematized Review and Agenda for Research*, DISABILITY AND HEALTH J. (forthcoming) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967775 (visited July 10, 2017)

[72] Carmen DeNavas-Walt et al., *Income, Poverty, and Health Insurance Coverage in the United States*, U.S. CENSUS BUREAU CURRENT POPULATION REPORTS 9 (2011), https://www.census.gov/prod/2011pubs/p60-239.pdf. ("In 2010, 9.5 percent of householders (8.8 million) aged 18 to 64 reported having a disability. The median income of these households was $25,550 in 2010, compared with a median of $58,736 for households with a householder that did not report a disability.").

[73] *Compare* Steimel v. Wernert, 823 F.3d 901 (7th Cir. 2016) (reversing summary judgment for defendants in case challenging restrictions on Medicaid home and community based services), *with* Amundson v. Wis. Dep't of Health Servs., 721 F.3d 871 (affirming dismissal of action challenging cuts to group home services funded by Medicaid on basis of ADA and Section 504). *See generally* sources cited *supra* note 15-16, 20 (discussing controversies over application of ADA to potentially discriminatory features of public programs, including those offering medical care). For a description of the Medicaid program in general and its relation to community based services in particular, see Sara Rosenbaum et al., Olmstead v. L.C.: *Implications for Medicaid and Other Publicly Funded Health Services*, 12 HEALTH MATRIX 93, 124-30 (2002) (also discussing fundamental alteration defenses). The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), provided strong incentives for states to expand coverage of Medicaid to those who do not meet the categorical standards of disability, age, or being or having dependent children, and not only those who are poor but also the near-poor. *See generally* Nicole Huberfeld & Jessica L. Roberts, *Medicaid Expansion as Completion of the Great Society*, 2014 ILLINOIS L. REV. SLIP OPS. 1, 3 (describing expansion and declaring that "Medicaid is now universal."). For discussion of how the anti-discrimination provision of the Affordable Care Act, if it is not repealed, may provide protection against harmful restrictions on private insurance, see Valarie K. Blake, *Restoring Civil Rights to the Disabled in Health Insurance*, 96 NEB. L. REV. (forthcoming 2017) (manuscript at 36-42); Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity*, 55 HOW. L.J. 855, 870-84 (2012); Benge, *supra* note 20.

The success of the response hinges on their ability to show that, as a matter of fact, they do not. Some basic realities are established: The population covered by Medicaid has a higher incidence of disability than the population served by private insurance, and although persons with disabilities constitute 15% of the Medicaid population, they account for 42% of expenditures.[74] About half of the national population of people with disabilities depends on public health insurance programs such as Medicaid and Medicare.[75] It remains open for dispute whether and how courts will use these and other facts.[76]

As is true for disputes involving other state and local government services, extant cases include those in which courts appear to have ignored or not been presented with social science data relevant to meaningful access, and those in which the court received and applied the evidence. As with the other cases, courts that take social science and other empirical evidence seriously tend to find a lack of meaningful access from the arrangements being challenged.

A major category of cases comprises those that challenge the adequacy of plans to provide home services or other less restrictive options to persons who are in nursing homes or state institutions by reason of their disability, or who are at risk of institutionalization. *Arc of Washington State Inc. v. Braddock* is a key example.[77] As that case indicates, home and community based services may be funded under Medicaid options often referred to as "Medicaid waiver," but the number of funded slots is typically limited under state plans. These waiver services, nevertheless, may be crucial in permitting a person with disability-related needs to live in a community setting rather than a nursing home or state institution. As the Supreme Court established in *Olmstead v. L.C ex rel. Zimring*, offering government services only when a recipient is in an institutional setting violates Title II of the ADA, which requires states to provide services in the most integrated setting appropriate to the needs of persons with disabilities.[78]

In *Arc of Washington State*, the plaintiffs argued that maintaining the current cap on the number of waiver slots violated the ADA, because anyone who did not receive a waiver slot could obtain needed medical and other services only if placed in an institutional arrangement. They asked the court to order state officials to request federal authorities to increase the number of slots. The court looked to the increase in the number of openings and the amounts spent on home and community based services over twenty years and declared that the state's commitment to deinstitutionalization appeared genuine. That was enough, in the court's view, to satisfy ADA

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[74] Kaiser Comm'n on Medicaid and the Uninsured, *People with Disabilities and Medicaid Managed Care: Key Issues to Consider* 2 (Feb. 2012), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8278.pdf (discussed in Crossley, *supra* note 16, at 258 n.23).

[75] Nancy A. Miller et al., *The Relation Between Health Insurance and Health Care Disparities Among Adults with Disabilities*, AM. J. OF PUB. HEALTH, Mar. 1, 2014, at e85, http://ajph.aphapublications.org/doi/full/10.2105/AJPH.2013.301478 ("Adults with disabilities are much more likely to have public, relative to private, coverage—50.5% public and 43% private coverage nationally in 2010 (some individuals have both public and private coverage)") (cited in Blake, *supra* note 73, manuscript at 10 n.45).

[76] One valuable effect of the Affordable Care Act, if it survives, is that information about health differences among disadvantaged groups will, over time, become much more readily available. *See* Elizabeth Pendo, *Collecting New Data on Disability Health Inequities*, HASTINGS CTR. REP., Mar.-Apr. 2016, at 7 ("Prior to the ACA standards, inconsistent or incomplete data limited our ability to track the status of health and health care within or for disadvantaged populations.").

[77] 427 F.3d 615, 621-22 (9th Cir. 2005).

[78] 527 U.S. 581 (1999).

Title II as interpreted by *Olmstead*, which said that a state would not be subject to remedial action if it "were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace."[79]

The court thus avoided even asking whether individuals with disabilities were afforded meaningful access to services or benefits, and instead approached the issue simply as whether the requested relief was a fundamental alteration; even on that question the court relied solely on the growth of the community-based program and the inference that Washington's intentions were pure. The state's intentions should have been beside the point,[80] and the relevant questions were really the empirical ones of how great a need remained unmet (the question of meaningful access for persons with disabilities) and how difficult it would be for the state to enlarge the program (the question of fundamental alteration). The court did not look to social science or any empirical evidence at all on either question. The same court applied a similar approach in a case concerning payment levels for services in California's program.[81]

Other cases have taken a more fact-focused approach and looked to the reality of the unmet needs for services. In *Frederick L. v. Department of Public Welfare*, the court of appeals reversed a judgment in favor of Pennsylvania in a class action suit alleging failure to provide adequate services to permit placement of institutionalized individuals into community settings.[82] In that case, the lower court had found that the requested relief constituted a fundamental alteration, relying in part on the immediate costs of more community placements. The court of appeals noted that the view had to be longer term,[83] but significantly, it rejected the plaintiff's challenge to the extensive, evidence-based analysis of costs that the lower court undertook.[84] Instead, it relied on the fact – essentially a political fact – that the state had no comprehensive plan for placing individuals in less restrictive settings.[85] This fact was in evidence at the trial, but it was the court of appeals' approach to the issues that singled it out as decisive.

Makin ex rel. Russell v. Hawaii is another noteworthy decision stressing the need for social and individual fact development in an ADA-based claim for medical assistance services in community settings.[86] There the court found material questions of fact about what would constitute reasonable modifications and whether the modifications would fundamentally alter the state's program.[87] It left open for evidentiary development whether meaningful access was currently being provided, and noted that reasonable accommodations may be needed to assure

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[79] *Olmstead*, 527 U.S. at 605-06.
[80] *See* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1440-45 (2015) (noting absence of intent or animus requirement for ADA Title II and Section 504 claims).
[81] Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005) (affirming summary judgment against plaintiffs on ADA and Section 504 claim based on failure to pursue maximum Medicaid waiver amount so as to stimulate greater provider participation).
[82] 364 F.3d 487 (3d Cir. 2004).
[83] *Id*. at 495 ("We . . . hold that if the District Court's opinion is read as focusing only on immediate costs, as Appellants contend, it would be inconsistent with *Olmstead* and the governing statutes.").
[84] *Id*. at 499.
[85] *Id*. at 500.
[86] 114 F. Supp. 2d 1017 (D. Haw. 1999).
[87] *Id*. at 1035.

that people with disabilities have meaningful access.[88] Other cases have relied on social or individual facts in upholding claims for services delivered in non-institutional settings.[89]

Cases where restrictions on medical assistance have been challenged under the ADA and Section 504 are not limited to deinstitutionalization and home and community based services claims. There are any number of cases in which courts have upheld existing medical assistance arrangements, saying that they afforded meaningful access or were otherwise not contrary to disability non-discrimination mandates.[90] There are also a significant number of cases where the courts made the opposite determination or said that the claims hinged on additional factual development.[91] It is not always true that greater development and use of social facts will compel a finding that meaningful access has been denied, but in general, the cases that are more sensitive to social and individual facts about how difficult it is to obtain needed services tend to find violations of the ADA and Section 504. In any instance, if the question is one of meaningful access, the inquiry itself has to be meaningful.

CONCLUSION

It is hard to avoid the conclusion that the more persuasive judicial decisions are those that take evidence of meaningful access – or its denial – seriously. Access to housing, access to parking, access to private absentee voting, access to airport counters, access to medical services all are meaningful or not depending on facts about the environment and facts about disabling conditions of the persons making claims of discrimination. The analysis furnished here does not challenge *Alexander v. Choate*'s interpretation of the disability discrimination laws so as to require plaintiffs, at least in cases challenging broad-based policies regarding government benefits and services, to show a denial of meaningful access. But the cases discussed demonstrate that social and other facts are of profound importance in evaluating the issue of denial of meaningful access, and that just results require more extensive and more careful examination of the social science by finders of facts in disputes of this type.

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[88] *Id*. at 1036.

[89] *See, e.g.*, M.R. v. Dreyfus, 697 F.3d 706 (9th Cir. 2012) (overturning denial of preliminary injunction and remanding in a case challenging a state regulation reducing the amount of in-home personal care services provided through Medicaid).

[90] *E.g.*, Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999) (overturning injunction in class action challenging failure of city to include safety-monitoring services to Medicaid recipients who were individuals with disabilities; holding that state is not obligated to provide benefits to particular group when it does not provide the benefits to any group; stating, "The ADA requires only that a particular service provided to some not be denied to disabled people"); Lincoln CERPAC v. Health and Hosps. Corp., 147 F.3d 165, 168 (2d Cir.1998) (affirming dismissal of Rehabilitation Act and ADA claims brought by disabled children who were transferred from one rehabilitation center to another with fewer services because "the disabilities statutes do not guarantee any particular level of medical care for disabled persons, nor [do they] assure maintenance of service previously provided").

[91] *E.g.*, Fisher v. Okla. Health Care Auth., 335 F.3d 1175 (10th Cir. 2003) (overturning grant of summary judgment to state agency in plaintiffs' challenge to policy ending unlimited provision of medically necessary prescription benefits for people with disabilities receiving community-based Medicaid services and at risk of institutionalization while state continued to provide similar benefits to persons who had been institutionalized); Lovell v. Chandler, 303 F.3d 1039 (9th Cir. 2002) (upholding damages award in challenge to changes in eligibility for state health insurance); *see* Pashby v. Delia, 709 F.3d 307 (4th Cir. 2012) (overturning preliminary injunction but otherwise permitting action to proceed based on allegations that new rule restricting provision of Medicaid–covered personal care services violated ADA Title II and Section 504).