

# Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act

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## INTRODUCTION

For about a quarter of the huge number of people behind bars in the United States at any given time, the government’s justification for incarceration is not punishment for crime.<sup>1</sup> Rather, our federal, state, and local governments lock up hundreds of thousands of people at a time—millions over the course of a year<sup>2</sup>—to ensure their appearance at a pending criminal or

<sup>1</sup> The most recent data published by the U.S. Bureau of Justice Statistics—in the middle of the COVID-19 pandemic, which significantly slowed new incarceration—tallied 1,691,600 people in jail and prison (1,215,800 in prison, 549,100 in jail). RICH KLUCKOW & ZHEN ZENG, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 – STATISTICAL TABLES (Mar. 2022), <https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf> [<https://perma.cc/CNG4-KLKJ>]. Of the individuals in jail (which excludes jail-equivalents in states with consolidated prison/jail systems), nearly 70% (380,700) were unconvicted, “awaiting court action on a current charge or held in jail for other reasons.” ZHEN ZENG & TODD D. MINTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2020—STATISTICAL TABLES (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/ji20st.pdf> [<https://perma.cc/9K9S-C4WA>]. Thousands more immigrants are incarcerated awaiting immigration adjudication or deportation (although more precise data are scarce). See Donald Kerwin with Daniela Alulema & Siqi Tu, *Piecing Together the US Immigrant Detention Puzzle One Night at a Time: An Analysis of All Persons in DHS-ICE Custody on September 22, 2012*, 3 J. ON MIGRATION & HUM. SEC. 330, 330 (2015) (about half of detained immigrants in 2012 had pending removal cases). We took data disclosed in response to FOIA litigation, ACLU Immigrants’ Rights Project v. U.S. Immigr. & Customs Enf’t, 1:19-cv-07058-GBD (S.D.N.Y.), and tallied the divide on Mar. 15, 2020; of 36,794 detained immigrants, over 60% were awaiting their removal proceedings. Data posted at Resources, Margo Schlanger, Univ. Mich. L. (2022), <https://www.law.umich.edu/facultyhome/margoschlanger/Pages/Resources.aspx> [<https://perma.cc/5GCB-L6QB>].

<sup>2</sup> RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY, VERA INSTITUTE OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 46 (2015).

immigration proceeding. This type of pretrial incarceration—a term we use to cover both pretrial criminal detention and immigration detention prior to finalization of a removal order—can be very harmful. It disrupts the work and family lives of those detained,<sup>3</sup> harms their health,<sup>4</sup> interferes with their defense,<sup>5</sup> and imposes pressure on them to forego their trial rights and accede to the government’s charges in an effort to abbreviate time behind bars.<sup>6</sup> For people with disabilities, however, pretrial incarceration is often even worse; it can utterly destabilize their physical and mental health and devastate their ability to participate in their proceedings. Set aside whether that would be a justifiable imposition if pretrial incarceration were truly necessary for the criminal or immigration systems to process their cases or if it truly served public safety. We demonstrate in this article that existing antidiscrimination law demands alternatives to pretrial incarceration, when it is demonstrably unnecessary and undermines the equal access of people with disabilities to the criminal or immigration processes that purport to justify it. The argument is somewhat novel but founded firmly on existing law: the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973, their regulations, and well-developed, interpretive case law.

We proceed as follows: In Part I, we explain how people in pretrial incarceration are disadvantaged in their access to justice because of their disabilities. In Part II, we establish that the criminal and immigration legal systems are covered by the Rehabilitation Act and the ADA, which mandate that people with disabilities receive “meaningful access”<sup>7</sup> to government operations, including when providing such access requires reasonable modifications of ordinarily applicable policies and procedures. We set out the statutory, regulatory, and case law parameters for determining whether a proposed modification to defendant practices constitutes a “reasonable modification” required by statute, or a “fundamental alteration” not so required.

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<sup>3</sup> *Id.*; see also Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 CRIM. JUST. POL. REV. 1015, 1017–18 (2019); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356–57 (2013); Samantha Artiga & Barbara Lyons, *Family Consequences of Detention/Deportation Effects on Finances, Health, and Well-Being*, KAISER FAM. FOUND. (Sept. 18, 2018), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/family-consequences-of-detention-deportation-effects-on-finances-health-and-well-being/> [https://perma.cc/2RGK-66MG].

<sup>4</sup> See Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2151–52 (2017); U.S. Comm’n on C.R., *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* 32–36 (2015); Andrew P. Wilmer, Steffie Woolhandler, J. Wesley Boyd, Karen E. Lasser, Danny McCormick, David H. Bor & David U. Himmelstein, MD., *Health and Health Care of U.S. Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666 (2009); Joanne Csete, *Consequences of Injustice: Pre-Trial Detention and Health*, 6 INT’L J. OF PRISONER HEALTH 3 (2010).

<sup>5</sup> See Johanna Kalb, *Gideon Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101, 121–28 (2018); Wiseman, *supra* note 3, at 1355; Marouf, *supra* note 4, at 2150–51.

<sup>6</sup> Petersen, *supra* note 3, at 1017–18 (2019); Wiseman, *supra* note 3, at 1356; Marouf, *supra* note 4, at 2151, 2151 n.57.

<sup>7</sup> *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

And we analyze the issue of causation, explaining what it means for deprivations to be “by reason of . . . disability.” Part III applies the law, demonstrating that providing alternatives to pretrial incarceration would constitute a reasonable modification to, not a fundamental alteration of, the underlying criminal/immigration processing systems. It also analyzes the differences between our proposals and two quite different disability-related interventions—competency restoration and the appointment of counsel. Part IV examines several specific counterarguments that government defendants might offer. For individuals facing state criminal charges, we suggest that *Younger* abstention poses no obstacle to ADA/Rehabilitation Act enforcement under our theory. For individuals in immigration detention, we rebut, seriatim, several counterarguments: we show that our proffered interpretation of the Rehabilitation Act is consistent with so-called “mandatory detention” Immigration and Nationality Act (INA) provisions and we address several INA jurisdiction-stripping provisions.

This is all very lawyerly. But we want to begin by emphasizing the human stakes for persons such as John Doe, a client of one of the authors.<sup>8</sup> Mr. Doe is an asylum seeker from El Salvador. Like many trauma survivors, he self-medicated with alcohol to deal with his pain, and like many poor people of color in the United States, he came into contact with law enforcement and was arrested on a criminal charge. After a 65-day stint in criminal custody, he was transferred to immigration detention. ICE continued to incarcerate him for four years. During this time, his immigration case repeatedly bounced back and forth between the dockets of several immigration judges and the Board of Immigration Appeals, which remanded his case on three separate occasions for various legal errors.<sup>9</sup>

These four years changed Mr. Doe. He entered ICE custody with undiagnosed post-traumatic stress disorder. His mental health so deteriorated during his years of incarceration that he ultimately developed major depressive disorder with psychotic features.<sup>10</sup> Initially, Mr. Doe was able to work over the phone and in person with his immigration attorney to answer questions about his past and prepare a declaration. But eventually he could manage to communicate regarding traumatic events only in writing.<sup>11</sup> At times, he became unable to communicate at all.<sup>12</sup> He also attempted suicide on at least three occasions while in ICE custody.<sup>13</sup> A psychological evaluator determined that Mr. Doe had reached the very “edge of his capacity to emotionally cope with his current situation.”<sup>14</sup>

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<sup>8</sup> Mr. Doe uses a pseudonym to protect his privacy. Temporary Restraining Order, *Doe v. Barr*, No. 1:20-cv-02263-RMI (N.D. Cal. Apr. 27, 2020), 2020 WL 1984266 [hereinafter *Doe v. Barr TRO*]; Preliminary Injunction Order, *Doe v. Barr*, No. 20-cv-02263-RMI (N.D. Cal. July 6, 2020), 2020 WL 3639649 [hereinafter *Doe v. Barr PI Order*].

<sup>9</sup> *Doe v. Barr TRO*, at \*2; *Doe v. Barr PI Order*, at \*3.

<sup>10</sup> *Doe v. Barr TRO*, at \*3; *Doe v. Barr PI Order*, at \*4.

<sup>11</sup> Records are on file with the authors.

<sup>12</sup> *Doe v. Barr TRO*, at \*3.

<sup>13</sup> *Id.*; *Doe v. Barr PI Order*, at \*4.

<sup>14</sup> *Doe v. Barr TRO*, at \*3; *Doe v. Barr PI Order*, at \*10.

ICE’s incarceration of Mr. Doe not only jeopardized his well-being, it also threatened his ability to vindicate his immigration rights. On April 6, 2020, Mr. Doe filed a motion for a temporary restraining order, seeking his release from immigration custody in part as a reasonable accommodation under Section 504 of the Rehabilitation Act. Around one month later, a federal district court ordered his release from custody.<sup>15</sup> The district court never ruled on the Rehabilitation Act claim, but once Mr. Doe left detention and received appropriate treatment in a therapeutic setting, his mental health improved, and he was again able to work with his attorney on his immigration case. In August 2021, Mr. Doe finally won relief at his fourth immigration court hearing, ending his years-long immigration proceedings.<sup>16</sup>

John Doe is one of the lucky ones, because he had a lawyer, because he was released, and because—having been released—he was better able to vindicate his immigration rights and beat deportation. When pretrial incarceration undermines the ability of people with disabilities to participate in their criminal or immigration trials, their disabilities can cause grievous long-term disadvantage—often imprisonment or deportation. We write this article with the certainty that there are many people like Mr. Doe who have been and will continue to be unlawfully deported or imprisoned, absent the intervention of disability law. The argument we outline below offers a path for people with disabilities and legal practitioners to seek release from incarceration in order to obtain equality of opportunity in their judicial proceedings.<sup>17</sup>

## I. HOW PRETRIAL INCARCERATION UNDERMINES EQUAL COURT ACCESS FOR PEOPLE WITH DISABILITIES

Some brief background on the types of institutions in which pretrial incarceration takes place may be useful context for the argument. In state criminal systems, people facing charges may be incarcerated pending granting of bond or, if they don’t receive or can’t make their bond, pending trial. They are usually held in city and county jails, but a few states with unified jail/prison systems<sup>18</sup> incarcerate them in state facilities.<sup>19</sup> Analogous defendants in the federal criminal system are housed in either federal jails<sup>20</sup> or in

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<sup>15</sup> Doe v. Barr TRO, at \*1, \*14.

<sup>16</sup> Records on file with the authors.

<sup>17</sup> Because we are analyzing equal access to the program of criminal/immigration adjudication, our argument does not apply to post-judgment incarceration. Disability antidiscrimination law certainly covers non-pretrial incarceration, and there may be viable decarcerative arguments in particular circumstances, but they are not our topic here.

<sup>18</sup> Six states have unified systems: Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. See NAT’L INST. CORR., STATE STATISTICS INFORMATION, <https://nicic.gov/projects/state-statistics-information> [<https://perma.cc/L4FS-M8GS>]. For background, see NAT’L INST. CORR., A REVIEW OF THE JAIL FUNCTION WITHIN STATE UNIFIED CORRECTIONS SYSTEMS (Sept. 1997), <https://nicic.gov/sites/default/files/014024.pdf> [<https://perma.cc/4GUM-C4CF>].

<sup>19</sup> See sources cited *supra* note 1.

<sup>20</sup> Federal jails are denoted “Metropolitan Correctional Centers,” “Metropolitan Detention Centers,” or “Federal Detention Centers.” See U.S. DEPT’ OF JUST., BUREAU OF PRIS-

city or county jails under a federal contract.<sup>21</sup> During immigration court proceedings, the federal government may detain people it seeks to deport in federal contract facilities devoted in part or entirely to immigration detention or in city or county jails under federal contract.<sup>22</sup> Some are there because they cannot make or are not granted bond; others are deemed statutorily ineligible for bond because of their criminal history.<sup>23</sup>

Pretrial incarceration obstructs court access for people with disabilities in a variety of ways beyond the experience of non-disabled people. Incarceration can interfere with detained people's physical access to court buildings. And even though lawyers are particularly important for people with disabilities, incarceration undermines their efforts to locate and retain an attorney, as well as their communication with lawyers they manage to retain and with court officials. For the large majority forced to move forward without an attorney, incarceration places often insurmountable obstacles to locating and speaking with potential witnesses, obtaining evidence, and conducting legal research. Equally important, incarceration can exacerbate people's disabilities, separating them from necessary treatment and undermining their disability-related coping strategies, rendering them too sick or injured to manage their court cases, cooperate with their counsel, or participate in their hearings. In the worst-case scenario, it can kill them, which obviously has the corollary effect of depriving them of the opportunity to fight their cases.

These kinds of effects are run-of-the-mill consequences of carceral conditions for people with disabilities. Across the United States, the agencies operating jails, prisons, and immigration detention centers frequently fail to implement basic disability accessibility measures.<sup>24</sup> Securing equipment needed for safety, mobility, and communication—hearing aids, eyeglasses, canes, special shoes, crutches, wheelchairs, etc.—often requires aggressive advocacy and is never guaranteed.<sup>25</sup> Incarcerated people are regularly denied

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ONS, PROGRAM STATEMENT 7331.04: PRETRIAL INMATES 3 (2003), [https://www.bop.gov/policy/progstat/7331\\_004.pdf](https://www.bop.gov/policy/progstat/7331_004.pdf) [<https://perma.cc/QYR7-MRQU>].

<sup>21</sup> *Defendant and Prisoner Custody and Detention*, U.S. MARSHALS SERV. (June 30, 2022), <https://www.usmarshals.gov/prisoner/detention.htm> [<https://perma.cc/9EJZ-PJCK>].

<sup>22</sup> See *Detention Facilities*, U.S. IMMIGR. & CUSTOMS ENF'T (2022), <https://www.ice.gov/detention-facilities> [<https://perma.cc/V8YB-XVXS>].

<sup>23</sup> See *infra* Section III.D.

<sup>24</sup> See, e.g., Rachel Seevers, *Making Hard Time Harder: Programmatic Accommodations for Inmates with Disabilities Under the Americans with Disabilities Act*, DISABILITY RIGHTS WASH. (June 22, 2016), <https://www.disabilityrightswa.org/making-hard-time-harder-programmatic-accommodations-inmates-disabilities-americans-disabilities-act/print/> [<https://perma.cc/98ZT-MDZ7>].

<sup>25</sup> For examples of prison/jail denials of mobility aids, see Complaint, *Cardew v. N.Y. Dep't of Corr. and Cmty. Supervision*, No. 6:21-cv-06557 (W.D.N.Y. 2021), <http://clearinghouse.net/doc/112486> [<https://perma.cc/KMY4-MVNX>] (class action lawsuit against New York Department of Corrections for denying mobility aids and providing broken and unusable shared wheelchairs); Complaint, *Terrill v. Oregon*, No. 6:21-cv-00588-AA (D. Or. 2021), <http://clearinghouse.net/doc/112037> [<https://perma.cc/Y459-AYMX>] (class action lawsuit against Oregon Department of Corrections for denying durable medical equipment to persons with disabilities who lack funds to pay for the device); DISABILITY RTS. CAL., REPORT ON THE INSPECTION OF THE SACRAMENTO COUNTY JAIL (CONDUCTED APRIL 13–14, 2015)

access to needed medication. The conditions of custody also make it more challenging for people with disabilities to self-accommodate. Zoe Brennan-Krohn, staff attorney at the ACLU Disability Rights Project, explains that many people with disabilities need stability and control over their own routines to self-accommodate and live fully with their disabilities.<sup>26</sup> The lack of adequate accommodations and treatment can be devastatingly destructive. Each of this article's authors knows this from up-close observation, and the interviews, reports, and other written sources cited in this section confirm those experiences.

There are infinite permutations in how pretrial incarceration undermines equal access to court proceedings for people with disabilities. Below, we overview some frequent consequences of incarceration on the lives of people with physical disabilities, visual and auditory disabilities, intellectual and psychiatric disabilities, and people with chronic illnesses.

### A. Physical Disabilities

Incarceration disadvantages people with physical disabilities in their judicial proceedings in many ways. Perhaps most common is that it limits their ability to meet with counsel or attend court hearings. Corene Kendrick, Deputy Director of the ACLU National Prison Project, recounts a situation when the single accessible vehicle at one facility broke down; correctional officers directed defendants with ambulatory disabilities to either find a way to get into an inaccessible vehicle or delay their court hearings.<sup>27</sup> Similarly, ICE both denied any ambulatory aids to Emanuel Thiersaint, a detained immigrant with an amputated leg, and refused to help him get in and out of inaccessible vans and airplanes the government used to transport him between detention facilities and court hearings.<sup>28</sup> Another form of disadvantage accrues when the inaccessible features of carceral environments<sup>29</sup> injure people with physical disabilities; obviously this is problematic in itself, but it also

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19 (Oct. 15, 2015), <https://www.disabilityrightsca.org/system/files/file-attachments/702701.pdf> [<https://perma.cc/9S37-UEX6>] (jail-issued wheelchairs lack brakes); DISABILITY RIGHTS CALIFORNIA, REPORT ON INSPECTION OF THE SANTA BARBARA COUNTY JAIL (Conducted Apr. 2, 2015), <https://www.disabilityrightsca.org/publications/report-on-inspection-of-the-santa-barbara-county-jail> [<https://perma.cc/N2VQ-H2MW>] (jail-issued wheelchair has faulty brakes); Order Granting Plaintiffs' Motion, *Armstrong v. Schwarzenegger*, 261 F.R.D. 173, No. 94-cv-2307 CW (N.D. Cal. 2009), *aff'd in part, vacated in part*, 622 F.3d 1058 (9th Cir. 2010) (California department of corrections found to confiscate medically prescribed assistive devices).

<sup>26</sup> Zoom Interview by Roxana Moussavian with Zoe Brennan-Krohn, Staff Att'y at Disability Rts. Program, Am. C.L. Union (Jan. 26, 2022).

<sup>27</sup> Zoom Interview by Roxana Moussavian with Corene Kendrick, Deputy Dir., Nat'l Prison Project, Am. C.L. Union (Jan. 7, 2021).

<sup>28</sup> Complaint, *Emanuel Thiersaint v. DHS*, No. 1:18-cv-12406-PBS (D. Mass 2018), at 1, 8–18.

<sup>29</sup> See, e.g., JAMELIA MORGAN, AM. C.L. UNION, CAGED IN: THE DEVASTATING HARMS OF SOLITARY CONFINEMENT ON PRISONERS WITH PHYSICAL DISABILITIES (2017), [https://www.aclu.org/sites/default/files/field\\_document/010916-aclu-solitarydisabilityreport-single.pdf](https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf) [<https://perma.cc/XL26-5U8J>].

limits their ability to meet with counsel or attend court hearings. Mr. Thiersaint was injured on multiple occasions by ICE's refusal to provide assistance; at least once, he was forced to soil himself.<sup>30</sup> The trauma of his discrimination compromised Mr. Thiersaint's ability to think about his immigration case, much less communicate with an attorney about exactly what was happening to him. It was not until after he was released from ICE incarceration and received years of quality medical and mental health care that he was able to tell his lawyer (one of the authors) the details of all that ICE had forced him to endure. Similarly, another one of an author's clients had limited mobility and suffered from a urinary infection in immigration detention. Ultimately, he spent several weeks in a hospital where he had no access to a telephone for attorney calls and could not receive visitors of any kind. The government also rescheduled a court hearing during the period of the client's hospitalization, prolonging the duration of his incarceration.

In addition, the incomplete accommodations that are sometimes offered can themselves be extremely unequal. Consider, for example, the case of Manuel Amaya Portillo,<sup>31</sup> who came to the United States seeking asylum based on the persecution and harms he faced in Honduras due to his physical disabilities.<sup>32</sup> Mr. Portillo was born with a congenital condition that stunted his height and the formation of his legs and hands. Because he was incarcerated, the first step of his asylum process took place over the telephone, which meant that the asylum officer could not see the ways in which his disabilities make him a target for persecution; the officer therefore deemed his request for asylum not credible. ICE continued to incarcerate Mr. Portillo under imminent threat of deportation for months, until lawyers, including attorneys with the American Civil Liberties Union, successfully intervened. Mr. Portillo's legal team advocated for him to appear before immigration officials over a video call, to make it possible for immigration officials to see the reality of his congenital condition.<sup>33</sup> Ultimately, in response to the request, immigration officials decided to find him credible without an additional interview, stopping Mr. Portillo's imminent deportation. Mr. Portillo's story is far from unique. Even represented individuals in pretrial incarceration may be sharply disadvantaged by it, because of their disability. And Mr. Portillo's pre-representation loss underscores the even greater disadvantage to incarcerated persons with physical disabilities who are forced to manage their own proceedings without help from advocates.

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<sup>30</sup> Complaint, *supra* note 28, at 11.

<sup>31</sup> Letter from Rachel L. Chappell, Att'y, Rozas & Rozas LLC, Eunice Cho, Senior Staff Att'y, Am. C.L. Union Nat'l Prison Project, & Katie Schwartzmann, Director, Am. C.L. Union La., to Deportation Officer Robert Gentry, Immigr. & Customs Enf't (Jan. 8, 2020), [https://www.laaclu.org/sites/default/files/field\\_documents/2020-01-08\\_amaya\\_letter.pdf](https://www.laaclu.org/sites/default/files/field_documents/2020-01-08_amaya_letter.pdf) [<https://perma.cc/BN24-BRLJ>].

<sup>32</sup> *Id.*; Zoom Interview by Roxana Moussavian with Eunice Cho, Senior Staff Att'y at Nat'l Prison Project, Am. C.L. Union (Jan. 7, 2021).

<sup>33</sup> Zoom Interview with Eunice Cho, *supra* note 32.



### B. *Chronic Illnesses*

The lack of adequate medical care provided by carceral facilities can be especially dangerous for people with chronic illnesses that require regular medical treatment. Deteriorating health often makes it far harder for individuals in pretrial incarceration to focus on or participate in their criminal or immigration cases. If worse comes to worst, their death is the ultimate bar to meaningful access to their court proceedings.<sup>34</sup>

This set of issues may affect many people, because the prevalence of chronic illness among incarcerated people is very high. In one key survey, the Department of Justice found that nearly 45% of people incarcerated in jail reported having been diagnosed with a (listed) chronic illness and 14% with a serious infectious disease, compared to 27% and 5% in non-incarcerated population:<sup>35</sup>

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<sup>34</sup> See, e.g., Michael Barajas, *When Asthma in Jail Becomes a Death Sentence*, TEXAS OBSERVER (Sept. 2, 2020), <https://www.texasobserver.org/when-asthma-in-jail-becomes-a-death-sentence/> [<https://perma.cc/FVT4-36FZ>].

<sup>35</sup> LAURA M. MARUSCHAK, MARCUS BERZOFKY & JENNIFER UNANGST, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., *MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES 2011–12* (2015), <https://bjs.ojp.gov/content/pub/pdf/mpsfj1112.pdf> [<https://perma.cc/E8AV-N4HA>]. Non-incarcerated population estimates were standardized to match the jail population by sex, age, race, and Hispanic origin. See also Margo Schlanger, *Prisoners with Disabilities*, in 4 *REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE* 295 (Erik Luna ed., 2017).

TABLE 1: SELF-REPORTED CHRONIC ILLNESSES IN JAIL COMPARED TO NON-INCARCERATED POPULATIONS (DOJ, 2016)

	Jail (%)	Non-incarcerated (%)
<b>Ever had a chronic condition</b>	<b>44.7</b>	<b>26.9</b>
Cancer	3.6	
High blood pressure/hypertension	26.3	13.9
Stroke-related problems	2.3	0.5
Diabetes/high blood sugar	7.2	4.5
Heart-related problems	10.4	1.9
Kidney-related problems	6.7	
Arthritis/rheumatism	12.9	
Asthma	20.1	11.4
Cirrhosis of the liver	1.7	0.1
<b>Ever had an infectious disease</b>	<b>14.3</b>	<b>4.6</b>
Tuberculosis	2.5	0.4
Hepatitis	6.5	0.9
Hepatitis B	1.7	
Hepatitis C	5.6	
STDs	6.1	3.5
HIV/AIDS	1.3	0.3

The consequences of medical neglect can be extremely dangerous. For example, an unfortunate body of case law demonstrates the difficulties faced by incarcerated people with diabetes, who may experience life-threatening symptoms and even die as a result of medical neglect in jail or prison.<sup>36</sup> Similarly, asthma someone keeps under control on the outside can become life threatening during a jail or prison stint,<sup>37</sup> because incarceration is accompanied by indoor allergens, exposure to infection, and poor access to on-de-

<sup>36</sup> For a sampling of cases in which plaintiffs with diabetes alleged or proved grave deterioration because of medical neglect behind bars, see *Chapman v. Santini*, 805 F. App'x 548 (10th Cir. 2020); *Anders v. Bucks Cnty.*, 2014 WL 1924114, at \*22 (E.D. Pa. 2014); *Ortiz v. City of Chicago*, 656 F.3d 523, 532 (7th Cir. 2011); *Phillips v. Roane Cnty.*, 534 F.3d 531, 541 (6th Cir. 2008); *Flowers v. Bennett*, 123 F. Supp. 2d 595, 601 (N.D. Ala. 2000); *Roberson v. Bradshaw*, 198 F.3d 645, 646–47 (8th Cir. 1999); *Weyant v. Okst*, 101 F.3d 845, 849–50 (2d Cir. 1996).

<sup>37</sup> See, e.g., *Adams v. Poag*, 61 F.3d 1537, 1539–41 (11th Cir. 1995) (describing how a “lifelong asthma sufferer” died of acute respiratory failure within a month of being incarcerated in a state prison); *Hagan v. Cal. Forensic Med. Grp.*, No. 07-cv-1095 LKK/DAD, 2009 WL 728465, at \*1–2 (E.D. Cal. 2009) (explaining how an inmate died “from complications relating to severe asthma shortly after being transferred” from a county jail to state prison).

mand devices like inhalers.<sup>38</sup> Immigration detention, too, creates risks to people with chronic illnesses because of those illnesses.<sup>39</sup> The ongoing COVID-19 pandemic underscores the point, for all kinds of incarceration. Comorbidities combined with dangerous incarcerative conditions have led to raging disease in carceral facilities. While COVID-19 infection rates and mortality in carceral facilities did not approach the devastating levels seen in nursing homes,<sup>40</sup> both have been far higher than in the community: infections among incarcerated people have been over five times the nonimprisoned rate; mortality rates have been triple the nonimprisoned rate.<sup>41</sup> Not every illness raises the claim this article explores. But where pretrial incarceration exacerbates chronic illness and concomitantly interferes with access to criminal or immigration proceedings, release is not merely humane but may be required by the ADA and Rehabilitation Act's guarantee of meaningful access to government programs.

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<sup>38</sup> Dale L. Morse, Morris A. Gordon, Thomas Matte & Gordon Eadie, *An Outbreak of Histoplasmosis in a Prison*, 122 AM. J. EPIDEMIOLOGY 253 (1985); Charles W. Hoge, Mary R. Reichler, Edward A. Dominguez, John C. Bremer, Timothy D. Mastro, Katherine A. Hendricks, Daniel M. Musher, John A. Elliott, Richard R. Facklam & Robert F. Breiman, *An Epidemic of Pneumococcal Disease in an Overcrowded, Inadequately Ventilated Jail*, 331 NEW ENG. J. MED. 643 (1994); *Hernandez v. Cnty. of Monterey*, 110 F. Supp. 3d 929, 951–52, 952 nn.169–70 (N.D. Cal. 2015) (describing the “significant evidence” provided by the plaintiffs that “inmates suffering from hypertension and asthma did not get their community prescriptions timely continued”); *Olson v. Sherburne Cnty.*, No. 07-cv-4757JNE/JJG, 2009 WL 1766619, at \*3 (D. Minn. June 22, 2009) (explaining how an inmate went into “respiratory failure triggered by allergens in his jail cell and inability to receive timely medical care”).

<sup>39</sup> See, e.g., *Temporary Restraining Order, Vargas v. Jennings*, No. 20-cv-5785-PJH, 2020 WL 5074312, at \*1 (N.D. Cal. Aug. 23, 2020) (describing how a non-citizen from Mexico fell into a diabetic coma after roughly four months in immigration custody). See generally AM. C.L. UNION, DET. WATCH NETWORK & NAT'L IMMIGRANT JUST. CTR., *FATAL NEGLIGENCE: HOW ICE IGNORES DEATHS IN DETENTION* (2016), [https://www.aclu.org/sites/default/files/field\\_document/fatal\\_neglect\\_acludwnnjc.pdf](https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnjc.pdf) [<https://perma.cc/Q9CT-EKZ2>].

<sup>40</sup> In the United States, nursing home residents have been forty-five times more likely to die of COVID-19 than the general population. See *COVID-19 Nursing Home Data*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Nov. 28, 2021), <https://data.cms.gov/covid-19/covid-19-nursing-home-data> [<https://perma.cc/5WSP-E7C8>] (reporting 140,794 total COVID-19 deaths among nursing home residents); *Total Number of Residents in Certified Nursing Facilities*, KAISER FAM. FOUND. (2022), <https://www.kff.org/other/state-indicator/number-of-nursing-facility-residents/> [<https://perma.cc/8K4J-FDSX>] (1,290,177 residents in certified nursing facilities in the U.S. in 2020) and *COVID Data Tracker Weekly Review*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html#more-info> [<https://perma.cc/R4JC-CMAQ>] (790,766 total COVID-19 deaths in the United States), *QuickFacts*, U.S. CENSUS BUREAU (2021), <https://www.census.gov/quickfacts/fact/table/US#> [<https://perma.cc/7DDX-FL76>] (estimating U.S. population at 328,239,523 as of July 1, 2019). As of November 25, 2020, “deaths in long-term care facilities account[ed] for 40% of all COVID-19 deaths” nationwide. Priya Chidambaram, Rachel Garfield & Tricia Neuman, *COVID-19 Has Claimed the Lives of 100,000 Long-Term Care Residents and Staff*, KFF (Nov. 25, 2020), <https://www.kff.org/policy-watch/covid-19-has-claimed-the-lives-of-100000-long-term-care-residents-and-staff/> [<https://perma.cc/6EQ6-EY8B>].

<sup>41</sup> See Brendan Saloner, Kalind Parish, & Julie A. Ward, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602 (2020) (making both findings; mortality figures are after adjusting for age and sex distributions).

### C. Intellectual and Developmental Disabilities

For people with intellectual and developmental disabilities, pretrial incarceration may undermine equal access to court proceedings by disrupting their lives in ways they cannot manage. Carceral environments run on a set of inflexible rules that incarcerated people cannot control or change. The ability to comprehend or follow those rules is especially challenging for people with cognitive disabilities and they can impede their ability to access their court proceedings.<sup>42</sup> Disability rights attorney Pilar Gonzalez Morales reports, for example, that she has numerous clients with intellectual disabilities who have had trouble understanding the jail or detention facility's schedule of times that phones are available for clients to call their attorneys.<sup>43</sup>

People with developmental disabilities often have specific sensory needs that go unmet in a carceral environment. Gonzalez Morales recalls a specific client with autism whom a jail frequently punished for not standing up for a daily stand-up count, during which every detained person was required to recite his name and inmate number. The client found compliance very difficult: sometimes he was distracted by his (disability-related) need to compulsively and repeatedly wash his hands; sometimes various sensory distractions frustrated him; sometimes he would be rehearsing something in his mind at count time and was unable to put it aside and follow orders. His noncompliance often led to physical confrontations by jail guards, who did not understand that touching him was still more triggering, because of his autism. Gonzalez Morales recounts how it was difficult for her to focus on legal issues in the client's case because his incarceration created a whole set of emergency situations. She also explains that it was hard to do what the client wanted, because the client was constantly in a state of trauma response that compromised his ability to articulate his longer-term needs. The client was put into isolation several times as a result of these conflicts, where she could not reach him due to restricted phone access and rules prohibiting in-person visits, even by attorneys.<sup>44</sup>

### D. Psychiatric Disabilities

For people with psychiatric disabilities, the way incarceration undermines court access is a little different. The most basic issue is that, for people with mental illness, pretrial incarceration may subvert its own purpose (facilitating court proceedings) by worsening their mental health to the point that

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<sup>42</sup> Chiara Eisner, *Prison Is Even Worse When You Have a Disability Like Autism*, MARSHALL PROJECT (Nov. 2, 2020), <https://www.themarshallproject.org/2020/11/02/prison-is-even-worse-when-you-have-a-disability-like-autism> [https://perma.cc/5P9S-YLCZ].

<sup>43</sup> Telephone Interview by Roxana Moussavian with Pilar Gonzalez Morales, Dir. of Accessibility Project, Civil Rights Education and Enforcement Center (Dec. 2, 2021).

<sup>44</sup> *Id.* Along similar lines, consider the case of Reginald Latson, described in detail in Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J. F. 916 (2021), <https://www.yalelawjournal.org/forum/reckoning-with-race-and-disability> [https://perma.cc/EVP6-SZH4].

they are no longer able to participate equally in their own criminal or immigration defense.

Common conditions of incarceration exacerbate mental health conditions.<sup>45</sup> For example, studies demonstrate that exacerbation of psychotic symptoms is predicted by prior exposure to increased noise and light levels.<sup>46</sup> Other studies show that factors known to disrupt normal sleep patterns, such as jet lag or shift work, are associated with increased severity of psychotic symptoms;<sup>47</sup> sleep disruption is common in detention. These non-incarceration studies offer a scientific foundation for the common observation by lawyers—including the authors—that clients can grow increasingly unable to work with counsel and access court proceedings due to incarceration’s exacerbation of their mental illness.<sup>48</sup> Multiple individuals with schizophrenia-spectrum disorders have reported to one of the authors that their lived experiences while incarcerated are consistent with these studies. Clients reported increased psychotic symptoms, such as hallucinations or extreme paranoia, when they were unable to sleep for days on end due to a jail’s chronic noise or policies mandating that lights remain on twenty-three to twenty-four hours a day. Clients who are survivors of sexual violence were retraumatized by the invasive nature of mandatory pat searches. As some clients became increasingly symptomatic, they reported both increasingly intense and new

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<sup>45</sup> Xavier Becerra, *The California Department of Justice’s Review of Immigration Detention in California*, CAL. DEP’T OF JUST., OFF. ATT’Y GEN. (Feb. 2019), <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf> [<https://perma.cc/HYR9-3L5V>]; Staff of Subcomm. on C.R. & C.L, Comm. on Oversight & Reform, 116th Cong., *THE TRUMP ADMINISTRATION’S MISTREATMENT OF DETAINED IMMIGRANTS: DEATHS AND DEFICIENT MEDICAL CARE BY FOR-PROFIT DETENTION CONTRACTORS* (2020), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf> [<https://perma.cc/V6NT-E4RY>]; CARLTON I. MANN, U.S. DEP’T OF HOMELAND SEC. *MANAGEMENT OF MENTAL HEALTH CASES IN IMMIGRATION DETENTION* (OIG-11-62) (2011), [https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG\\_11-62\\_Mar11.pdf](https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_11-62_Mar11.pdf) [<https://perma.cc/G24L-SCFX>]; JOHN ROTH, U.S. DEP’T OF HOMELAND SEC., *ICE STILL STRUGGLES TO HIRE AND RETAIN STAFF FOR MENTAL HEALTH CASES IN IMMIGRATION DETENTION* (OIG-16-113-VR) (2016), <https://trac.syr.edu/immigration/library/P12191.pdf> [<https://perma.cc/73RY-44PX>]; JOHN V. KELLY, U.S. DEP’T OF HOMELAND SEC. *CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES* (OIG-19-47) (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> [<https://perma.cc/AVA8-G7AT>]; Jackie Gonzalez, Bianca Sierra Wolff & Richard Diaz, *Immigrant Detention in California: Opportunities for Accountability*, DISABILITY RTS. CAL. (Aug. 10, 2021), [https://www.disabilityrightsca.org/system/files/file-attachments/Detention\\_Conditions\\_Report.pdf](https://www.disabilityrightsca.org/system/files/file-attachments/Detention_Conditions_Report.pdf) [<https://perma.cc/ME9N-RTCH>]; REBECCA GAMBLER, U.S. GOV’T ACCOUNTABILITY OFF., *GAO-20-596, IMMIGRATION DETENTION: ICE SHOULD ENHANCE ITS USE OF FACILITY OVERSIGHT DATA AND MANAGEMENT OF DETAINEE COMPLAINTS* (2020).

<sup>46</sup> Rui Wang, Weichen Wang, Min S. H. Aung, Dror Ben-Zeev, Rachel Brian, Andrew T. Campbell, Tanzeem Choudhury, Marta Hauser, John Kane, Emily A. Scherer & Megan Walsh, *Predicting Symptom Trajectories of Schizophrenia using Mobile Sensing*, 1 *PROCEEDINGS ACM ON INTERACTIVE, MOBILE, WEARABLE & UBIQUITOUS TECHS.* 1–24 (2013).

<sup>47</sup> Gregory Katz, *Jet Lag and Psychotic Disorders*, 13 *CURRENT PSYCHIATRY REPS.* 187–192 (2011).

<sup>48</sup> See, e.g., Complaint, Doe v. Barr, No. 3:20-cv-2263 (N.D. Cal. 2020), 2020 WL 2733928, at \*1; Complaint, Domingo v. Barr, No. 3:20-cv-06089 (N.D. Cal. 2020), 2020 WL 5798238, at \*1.

delusions. These harmful impacts of carceral environments increase with time; at least four studies of immigration detention in the United States and Australia have found that a lengthening duration of incarceration is associated with increased severity of mental health symptoms.<sup>49</sup>

In addition to the stressors of the detention environment, inadequate medical and mental health care behind bars can cause severe harm to detained peoples' mental health. The inadequacy of care in pretrial incarceration is widely reported,<sup>50</sup> and extended periods of untreated psychotic symptoms are associated with increased risk for treatment-resistant symptoms, more frequent and longer subsequent psychotic episodes, and poorer long-term functional outcomes.<sup>51</sup> Warning signs for psychiatric illnesses are often missed.<sup>52</sup> Each of the authors knows of many individuals with schizophrenia-spectrum disorder who have become actively psychotic while incarcerated.

In some circumstances, more robust mental health care may prevent decompensation in custody. But all too often, such care is either not on offer or insufficient. On the outside, additional modalities of care, medications, and family or community supports can change that result.

One of the authors has personally seen incarcerated clients' mental decompensation limit their access to court proceedings. Several clients initially able to answer basic questions about their past later had trouble recounting those same memories. And several clients previously able to answer questions over the phone in their first weeks of incarceration later avoided communicating with counsel or others about their lives. As described in the Introduction, Mr. Doe, who had post-traumatic stress disorder, ultimately found that he needed to communicate about the details of his past only in writing. For several others with schizophrenia-spectrum disorder, months of incarceration left them able to communicate only about their delusions, not their actual experiences. A successful outcome in these clients' cases de-

<sup>49</sup> Janette P. Green & Kathy Eagar, *The Health of People in Australian Immigration Detention Centres*, 192 *MED. J. OF AUSTRALIA* 65 (2010); Allen S. Keller, Barry Rosenfeld, Chau Trinh-Shevrin, Chris Meserve, Emily Sachs, Jonathan A. Leviss, Elizabeth Singer, Hawthorne Smith, John Wilkinson, Glen Kim, Kathleen Allden & Douglas Ford, *Mental Health of Detained Asylum Seekers*, 362 *LANCET* 1721 (2003); Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momartin, Bushra Alzuhairi & Ina Susljik, *Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees*, 188 *BRITISH J. PSYCHIATRY* 58 (2018); Peter Young & Michael S. Gordon, *Mental Health Screening in Immigration Detention: A Fresh Look at Australian Government Data*, 24 *AUSTRALASIAN PSYCHIATRY* 19 (2016).

<sup>50</sup> See, e.g., Andrea Craig Armstrong, *Prison Medical Deaths and Qualified Immunity*, 112 *J. CRIM. L. & CRIMINOLOGY* 79 (2022); KELLY, *supra* note 45; *CODE RED The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, HUMAN RIGHTS WATCH (June 20, 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration> [<https://perma.cc/T8SA-TA65>].

<sup>51</sup> Robin Emsley, Bonginkosi Chiliza & Laila Asmal, *The Evidence for Illness Progression after Relapse in Schizophrenia*, 148 *SCHIZOPHRENIA RSCH* 117 (2013).

<sup>52</sup> See, e.g., Molly Grassini, Sophie Terp, Briah Fischer, Sameer Ahmed, Madeline Ross, Niels Frenzen, Elizabeth Burner & Parveen Parmar, *Analysis of Deaths Among Individuals in Immigration and Customs Enforcement (ICE) Detention, 2011-2018*, *JAMA NETWORK OPEN*, July 2021, at 1-11, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2781682> [<https://perma.cc/QX9P-39H2>].

pending on a written declaration or oral testimony of their stories. But despite multiple attempts, no such evidence could be prepared, because incarceration had so severely exacerbated their disabilities. In one case, the immigration judge cited the absence of testimony in denying relief that might otherwise have been available.<sup>53</sup> The same author has questioned whether her clients were able to make legal decisions conveying their true preferences, given how gravely pretrial incarceration had undermined their ability to think and communicate.

Finally, incarcerated people with mental illness are disproportionately assigned to extended solitary confinement, which is widely documented to cause physical and mental decompensation, and even lead to suicide.<sup>54</sup> Death by suicide is the starkest example of how a lack of disability accommodations can curtail the legal rights of individuals with disabilities in court.

### E. Visual and Auditory Disabilities

Finally, incarcerated people who have visual and/or auditory disabilities face the already-described disadvantages, as well as others, in their court proceedings. Incarceration takes people away from the spaces in which they have implemented individualized methods to enable their own independence. So as with detained people with mobility impairments, incarceration can create obstacles for people with visual impairments to gain access to physical spaces important to protecting their legal rights, such as interview and hearing rooms and law libraries. Incarceration also limits the ability of blind and low-vision people to communicate with their attorneys.<sup>55</sup> Written communication may be particularly challenging for people who are blind or

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<sup>53</sup> Court transcript on file with authors.

<sup>54</sup> See Complaint, *Youngers v. Mgmt. & Training Corp.*, No. 20-cv-00465 (D. N.M. 2020); *Complaint for Violations of Civil, Constitutional, and Disability Rights of Chuong Woong Ahn A# 042-028-791, at Mesa Verde ICE Processing Facility*, DISABILITY RTS. CAL. (Feb. 25, 2020), [https://www.disabilityrightscal.org/system/files/file-attachments/2021-02-25\\_Ahn\\_Complaint.pdf](https://www.disabilityrightscal.org/system/files/file-attachments/2021-02-25_Ahn_Complaint.pdf) [<https://perma.cc/23YF-7DZL>]; Jose Olivares, *ICE Review of Immigrant's Suicide Finds Falsified Documents, Neglect, And Improper Confinement*, INTERCEPT (Oct. 23, 2021), <https://theintercept.com/2021/10/23/ice-review-neglect-stewart-suicide-corecivic/> [<https://perma.cc/A3PN-SK8J>]; Aaron J. Fischer, Rebecca Cervenak & Kim Swain, *Suicides In San Diego County Jail*, DISABILITY RTS. CAL. (Apr. 2018), <https://www.disabilityrightscal.org/system/files/file-attachments/SDsuicideReport.pdf> [<https://perma.cc/79PZ-ZAEY>]; MORGAN, *supra* note 29; Kayley Bebbler, *Cruel But Not Unusual: Solitary Confinement in Washington's County Jails*, DISABILITY RTS. WASH. (Nov. 2016), [https://www.disabilityrightswa.org/wp-content/uploads/2017/12/CruelButNotUnusual\\_November2016.pdf](https://www.disabilityrightswa.org/wp-content/uploads/2017/12/CruelButNotUnusual_November2016.pdf) [<https://perma.cc/2GRM-9Y6W>]; Vega v. Davis, 572 F. App'x 611 (10th Cir. 2014); Cunningham v. Fed. Bureau of Prisons, 709 F. App'x 886 (10th Cir. 2017); Parveen Parmar, Madeline Ross, Sophie Terp, Naomi Kearn, Briah Fischer, Molly Grassini, Sameer Ahmed, Niels Frenzen & Elizabeth Burner, *Mapping Factors Associated with Deaths in Immigration Detention in the United States, 2011-2018: A Thematic Analysis*, 2 LANCET REG'L HEALTH - AMS. 100040 (2021); Sophie Terp, Sameer Ahmed, Elizabeth Burner, Madeline Ross, Molly Grassini, Briah Fischer & Parveen Parmar, *Deaths in Immigration and Customs Enforcement (ICE) Detention: FY 2018-2020*, 8 AIMS PUB. HEALTH 81 (2021).

<sup>55</sup> Zoom Interview by Roxana Moussavian with Eve Hill, Partner, Brown Goldstein & Levy (Jan. 11, 2022).

low-vision, but the accommodations typically made available—assignment of another detainee to “scribe”—undermine privacy and therefore court-access equality. For detained people who are deaf or hard of hearing, the absence of auxiliary aids and services such as hearing aids, amplifiers, video phones, and sign language interpreters can render attorney communication and court proceedings mostly or entirely inaccessible. Moreover, jail authorities typically disallow detained people with these kinds of needs to solve their own problems; they cannot bring in their own interpreters or use their own equipment. Thus they are far worse off in their court proceedings than if they were not incarcerated.

Interviews with disability rights lawyers concretizes each of these general points. For example, attorneys Eve Hill and Michael Nunez have represented blind people in jail. Hill and Nunez have both found that carceral environments generally lack the electronic communications and screen reader technologies many of their blind and low-vision clients rely on, eliminating or limiting client access to the print documents so crucial to legal cases—retainer agreements, complaints, answers, etc.<sup>56</sup> Both have also found that even in facilities where screen reader technologies are provided, they are not made available in confidential settings, so blind people who use those technologies are unable to communicate privately with their counsel. Where assistive technology or other electronic communications are out of reach, an attorney may try to substitute Braille or large print documents. But, Nunez explains, these steps help only for some: people who know Braille or who have sufficient vision for large print. This covers only a small portion of the blind or low vision population; knowledge of Braille is rare,<sup>57</sup> and even people who can read large print for a limited time may get headaches or otherwise be unable to read long legal documents.<sup>58</sup> Hill has used audio CDs to communicate with blind clients when facilities have CD players and permit clients to use them.<sup>59</sup> For most incarcerated people who are blind or low-vision, the usual accommodation their jails offer is to have a sighted officer or other detained person read documents aloud. This obviously eliminates the disabled individual’s privacy and often provides only poor-quality access, depending on the care and qualifications of readers not trained to read legal documents.<sup>60</sup> Blind people’s inability to communicate fully with their attorneys and to access legal documents makes them less likely to reach a positive outcome in their case, compared with their prospects with the avenues of communication available outside of custody. Both Nunez and Hill describe hearing from blind and low-vision people who were unrepresented that they

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<sup>56</sup> *Id.*, Zoom Interview by Roxana Moussavian with Michael Nunez, Senior Counsel, Rosen Bien Galvan & Grunfeld LLP (Jan. 27, 2022) [hereinafter Nunez Interview].

<sup>57</sup> There are no reliable statistics on Braille literacy for blind people, though many sources estimate a rate of 10%. See Rebecca M. Sheffield, France M. D’Andrea, Valerie Morash & Sarah Chatfield, *How Many Braille Readers? Policy, Politics, and Perception*, 116 J. VISUAL IMPAIRMENT & BLINDNESS 14 (2022).

<sup>58</sup> Nunez Interview, *supra* note 56.

<sup>59</sup> Zoom Interview with Eve Hill, *supra* note 55.

<sup>60</sup> *Id.*



missed deadlines for asserting their rights and defending themselves in court because of communication challenges caused by incarceration.<sup>61</sup>

People who are deaf or hard of hearing and incarcerated are likewise disadvantaged in court proceedings because of their disability. Carceral environments routinely deprive people of adequate hearing aids, ensuring incarcerated people lack the aids for court proceedings.<sup>62</sup> In a typical example, after a client of one of the authors repeatedly told an immigration judge that he needed a hearing aid for court and that medical professionals in detention had denied him such an aid, the judge simply stated that the client's medical care in detention was not the judge's responsibility.<sup>63</sup> This client was also drastically limited in communications with his attorney because telephone calls were nearly impossible for him without a hearing aid. Other clients need but lack access to captioned telephones.<sup>64</sup> While some hard-of-hearing people may be better able to communicate with their lawyers if meetings are in person, telephonic communication is vitally important, particularly given the often remote locations of incarcerating facilities. And when individuals who are deaf or hard of hearing are held in solitary confinement, it is still more difficult for them to communicate with attorneys because they are so often denied legal visits and access to telephones.<sup>65</sup>

For detained people who use sign language to communicate, the situation is even worse. Claudia Center, the Legal Director of the Disability Rights Education & Defense Fund, reports that many jails and detention facilities frequently lack video communication technology or sign language interpreters;<sup>66</sup> carceral facilities across the country continue to refuse to offer

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<sup>61</sup> *Id.*; Nunez Interview, *supra* note 56.

<sup>62</sup> TALILA A. LEWIS, #DEAFINPRISON CAMPAIGN FACT SHEET (2018), <https://behearddc.org/wp-content/uploads/2018/11/DeafInPrison-Fact-Sheet-.pdf> [<https://perma.cc/NS2H-6LT2>]; Rebecca Vallas, *The Mass Incarceration of People With Disabilities in America's Jails and Prisons*, DISABLED BEHIND BARS (July 18, 2016), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/> [<https://perma.cc/XN4Q-23MJ>].

<sup>63</sup> Immigration court transcript on file with the authors.

<sup>64</sup> Zoom Interview by Roxana Moussavian with Claudia Center, Legal Dir., Disability Rts. Educ. & Def. Fund (Jan. 10, 2022).

<sup>65</sup> Telephone Interview with Pilar Gonzalez Morales, *supra* note 43; Order, *supra* note 25 (California department of corrections found to place people with disabilities in administrative segregation due to a lack of accessible housing); LEWIS, *supra* note 62; Talila A. Lewis, *HEARD Publishes Second Report on Abuse of Deaf Prisoners in Florida*, HELPING EDUC. TO ADVANCE THE RTS. OF THE DEAF (May 23, 2014), <https://behearddc.org/heard-publishes-second-report-on-abuse-of-deaf-prisoners-in-florida/> [<https://perma.cc/W259-4UK2>]; James Ridgeway & Jean Casella, *Deaf Prisoners in Florida Face Abuse and Solitary Confinement*, SOLITARY WATCH (May 21, 2013), <http://solitarywatch.com/2013/05/21/deaf-prisoners-in-florida-face-brutality-and-solitary-confinement> [<https://perma.cc/5NSD-MM7V>].

<sup>66</sup> Zoom Interview with Claudia Center, *supra* note 64; Order, *supra* note 25 (California department of corrections found to deny sign language interpreters to people who need them); Complaint, *Zemedagegehu v. Arthur*, No. 1:15-cv-00057-JCCS-MSN (E.D. Va. 2015), 2015 WL 1930539 (Deaf Ethiopian-born American citizen sues Virginia Department of Corrections for denying him an ASL interpreter); *Yeh v. U.S. Bureau of Prisons*, No. 3:18-CV-943, 2000 WL 1505661 (M.D. Pa. Mar. 30, 2020) (request for videophone denied); U.S. DEP'T OF JUST., JUSTICE DEPARTMENT REACHES AGREEMENT WITH THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS TO PROVIDE EFFECTIVE COMMUNICATION TO INMATES

videophones or video interpretation until they are sued.<sup>67</sup> Without videophones, individuals who use sign language cannot talk to their lawyers except in person. Even facilities that have videophones sometimes drastically limit access. Disability rights attorney Rosa Lee Bichell tells of a deaf client who had access to the technology only on rare occasions during his year in custody, and only outside of business hours.<sup>68</sup> Lacking videophones or remote or in-person interpretation, facilities instead assign officers and other detained people to serve as communication aides for people with hearing impairments, regardless of whether the aides have any qualifications, training, or knowledge of sign language.<sup>69</sup> It's this kind of arrangement that led to one incarcerated deaf immigrant to inadvertently ratify her own deportation when an ICE officer presented a form for her signature without communicating that the contents of the form stated that she was voluntarily consenting to her deportation.<sup>70</sup> All of these kinds of situations mean, as with individuals with physical disabilities in pretrial incarceration, blind/low-vision and deaf/low-hearing individuals are often deprived of meaningful access to their criminal and immigration proceedings because of their disabilities.

In short, for all types of disabilities, the conditions of pretrial incarceration can and often do create obstacles to meaningful and equal participation in the very purpose of that detention—court proceedings. The disability rights statutes require reasonable modifications to avoid such discrimination.

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WITH HEARING DISABILITIES (Mar. 29, 2018), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-south-carolina-department-corrections-provide-effective> [<https://perma.cc/YM92-4F3M>] (unfiled lawsuit in which plaintiffs alleged a failure to provide them with sign language interpreters and other auxiliary aids and services).

<sup>67</sup> For examples of such lawsuits, see *Rogers v. Colorado Dep't of Corr.*, No. 1:16-cv-02733-STV-NRN, 2019 WL 1558081 (D. Colo. 2019) (summary available at *Case: Rogers v. Colorado Department of Corrections*, C.R. LITIG. CLEARINGHOUSE, <http://clearinghouse.net/case/16222> [<https://perma.cc/78L8-CEEE>]); *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202 (4th Cir. 2017); Settlement Agreement, *Smith v. Reinke*, No. 12-cv-0030-BLW (D. Idaho 2014), 2014 WL 2203896 (summary of case available at *Case: Smith v. Reinke*, C.R. LITIG. CLEARINGHOUSE, <http://clearinghouse.net/case/17035> [<https://perma.cc/5GFM-MHZQ>]); Settlement Agreement, *Disability Rts. Fla. v. Jones*, No. 4:16-cv-47-RH-CAS (N.D. Fla. 2017) (summary of case available at *Case: Disability Rights Florida v. Jones*, C.R. LITIG. CLEARINGHOUSE, <http://clearinghouse.net/case/16480> [<https://perma.cc/FWG3-8RFK>]); *Complaint, Coen v. Georgia Dep't of Corr.*, No. 5:16-cv-00353-MTT (M.D. Ga. 2019) (summary of case available at *Case: Coen v. Georgia Department of Corrections*, C.R. LITIG. CLEARINGHOUSE, <http://clearinghouse.net/case/17001> [<https://perma.cc/9ZQ6-Q23J>]).

<sup>68</sup> Zoom Interview by Roxana Moussavian with Rosa Lee Bichell, Staff Att'y, Disability Rts. Advocs. (Jan. 7, 2022).

<sup>69</sup> See Lewis, *supra* note 65.

<sup>70</sup> Zoom Interview with Rosa Lee Bichell, *supra* note 68.

II. THE REHABILITATION ACT AND THE ADA SOMETIMES REQUIRE  
ALTERNATIVES TO DETENTION AS A REASONABLE  
MODIFICATION OF GOVERNMENT PRACTICE:  
APPLICABLE STANDARDS

As the Introduction and Part I begin to lay out, this article argues that pretrial incarceration of individuals with disabilities sometimes deprives them—because of their disabilities—of meaningful access to the criminal or immigration hearing that underlies their incarceration. Here, we set out the statutory framework under which a person with a disability who makes a showing to that effect can ask for an alternative to detention as a reasonable modification to ordinary government operations that have (or threaten to) put them behind bars. Denial of such a modification, in these circumstances, amounts to unlawful disability discrimination, unless release would actually threaten public safety. To be clear, it is not our claim that *no* person with a disability can lawfully be subjected to pretrial incarceration. The argument is more limited: where the conditions of pretrial incarceration specially undermine people with disabilities’ access to legal proceedings and changes to those conditions will not adequately improve access, disability antidiscrimination law insists on alternatives to detention as a reasonable modification, absent individualized public safety risk that cannot otherwise be addressed.

An aside: There has been a good deal of deinstitutionalization litigation under the quite different ADA theory endorsed by *Olmstead v. L.C.*<sup>71</sup> There, the Supreme Court interpreted the ADA’s antidiscrimination promise to limit the extent to which states may insist on providing disability-related services in isolated institutions rather than in community settings. The court explained,

First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.<sup>72</sup>

Accordingly, the ADA disallows state insistence that “[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.”<sup>73</sup> *Olm-*

<sup>71</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

<sup>72</sup> *Id.* at 600, 601.

<sup>73</sup> *Id.* at 600, 601.

*stead*-type arguments seem entirely applicable to some incarceration of some people with disabilities—for example, when the state puts individuals seeking mental health services in jail (without criminal charge or sentence).<sup>74</sup> Our argument applies to a different kind of incarceration, nominally auxiliary to a criminal or immigration proceeding.

### A. Sources of Law and What They Cover

With overlapping coverage, Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA both prohibit disability discrimination in the operation of government programs. The Rehabilitation Act of 1973<sup>75</sup> provides, in relevant part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.<sup>76</sup>

And ADA Title II<sup>77</sup> similarly states:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.<sup>78</sup>

Between the two statutes, every American governmental entity is covered. Federal agency activity, while not included under ADA Title II, is covered by the Rehabilitation Act.<sup>79</sup> The Rehabilitation Act also covers most state and local criminal programs, because they receive federal financial assistance.<sup>80</sup> ADA Title II also covers all non-federal government operations—its definition of “public entity” includes state and local government agencies without respect to federal support.<sup>81</sup> While their coverage is different, the

<sup>74</sup> See, e.g., First Report of the Court Monitor, *United States v. Mississippi*, 3:16-cv-00622, at 14, 15, 17, 21, 36 (S.D. Miss. Mar. 4, 2022), <https://clearinghouse.net/doc/130690/> [<https://perma.cc/UM44-XJUP>] (identifying problem of individuals waiting in jail for admission to psychiatric hospitals).

<sup>75</sup> 29 U.S.C. §§ 794 et seq.

<sup>76</sup> 29 U.S.C. § 794(a).

<sup>77</sup> 42 U.S.C. §§ 12131–12165.

<sup>78</sup> 42 U.S.C. § 12132.

<sup>79</sup> 29 U.S.C. § 794(a).

<sup>80</sup> See 29 U.S.C. § 794(b)(1)(A) (defining “program or activity” as “a department, agency, special purpose district, or other instrumentality of a State or of a local government”).

<sup>81</sup> 42 U.S.C. § 12131(1).

substantive requirements of these two statutes are generally the same.<sup>82</sup> We address each separately for clarity, but as will be seen, the analysis is nearly identical.

The government programs and activities relevant here are those criminal or immigration proceedings to which pretrial incarceration is ancillary. As Part I developed, it is frequently the case that when people with disabilities are subjected to pretrial incarceration, they lose meaningful access to their criminal or immigration proceedings because of their disability.

There is no question that the ADA and Rehabilitation Act protect individuals with disabilities from discrimination in a variety of contexts—including in programs within both immigration and criminal systems. The statutory texts are extremely broad: the Rehabilitation Act, as already quoted, covers federally conducted or assisted “program[s] or activit[ies],” and the ADA covers “services, programs, or activities of a public entity.” As the Justice Department explained in promulgating the lead Rehabilitation Act regulation (the model for other agencies’ regulations), “a federally conducted program or activity is, in simple terms, anything a Federal agency does.”<sup>83</sup>

Non-regulation governmental sources agree. For example, in a June 2016 publication titled Component Self-Evaluation and Planning Reference Guide, whose purpose was to “assist DHS Components in their efforts to strengthen compliance with Section 504 of the Rehabilitation Act of 1973,” DHS wrote:

There are two major categories of federally conducted programs or activities covered by Section 504: those involving general public contact as part of ongoing agency operations and those directly administered by the agency for program beneficiaries and participants. . . . Activities in the second category include programs that provide federal services or benefits. Examples include immigration and naturalization benefits, federal disaster services,

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<sup>82</sup> See, e.g., *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1260 n.2 (D.C. Cir. 2008) (quoting *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999)) (“Further, the courts have tended to construe section 504 *in pari materia* with Title II of the ADA, 42 U.S.C. § 12132, reasoning that these statutory provisions are ‘similar in substance’ . . . and consequently ‘cases interpreting either are applicable and interchangeable.’”); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 908 (6th Cir. 2004); *Washington v. Indiana High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 845 n.6 (7th Cir. 1999); *Weixel v. Bd. of Educ. of New York*, 287 F.3d 138, 146 n.6 (2d Cir. 2002); *Rodriguez v. City of New York*, 197 F.3d 611, 618 (“Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem.”); *Cercpac v. Health & Hosps. Corp.*, 147 F.3d 165, 167 (2d Cir. 1998); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

<sup>83</sup> Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs, 49 Fed. Reg. 35,725 (Sept. 11, 1984) (codified at 28 C.F.R. § 39). The ADA requires the Department of Justice (DOJ) to promulgate regulations implementing Title II, 42 U.S.C. § 12134, and it is these regulations that contain the specific prohibitions and requirements of Title II. With a few exceptions, Title II provides that the regulations must be consistent with the Department of Justice Section 504 “coordination regulations.” 42 U.S.C. § 12134(b).

airport security screening, federal building security screening, protective security at major events, customs activities, border protection activities, and enforcement of immigration laws and *operation of immigration detention facilities*.<sup>84</sup>

Likewise, consistent case law construes “the ADA’s broad language [as] bring[ing] within its scope ‘anything a public entity does.’”<sup>85</sup> Defendants sometimes claim an exemption from the disability antidiscrimination laws because of the nature of their activities. These claims generally fail. More specifically, both executive and judicial sources demonstrate that there is no exemption from the general antidiscrimination rules for programs related to criminal law/detention, immigration, or court processing.

The ADA made the Department of Justice the statute’s lead implementing agency, responsible for issuing regulations,<sup>86</sup> “coordinat[ing] the compliance activities of Federal agencies with respect to State and local government components,” and implementing compliance work involving “[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions.”<sup>87</sup> Not only are DOJ regulations entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>88</sup> DOJ’s interpretation of its own regulations also merits particular weight.<sup>89</sup> And DOJ has explained that Title II requires that “state and local government criminal justice entities . . . must ensure that people with mental health disabilities or I/DD [intellectual and developmental disabilities] are treated equally in the criminal justice system.”<sup>90</sup> A DOJ guidance document states that Title II covers “the services, programs, and activities of . . . law enforcement, corrections, and justice system entities,” including, among others: “assessing individuals for diversion programs, conducting arraignment, setting

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<sup>84</sup> MEGAN H. MACK, U.S. DEP’T OF HOMELAND SEC., GUIDE 065-01-001-01, COMPONENT SELF-EVALUATION & PLANNING REFERENCE GUIDE (2016), <https://www.dhs.gov/sites/default/files/publications/disability-guide-component-self-evaluation.pdf> [<https://perma.cc/2JS9-MQY4>] (emphasis added).

<sup>85</sup> *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (quoting *Yeskey v. Pennsylvania Dep’t of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997), *aff’d*, 524 U.S. 206 (1998)); see also *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998) (“the phrase ‘services, programs, or activities’ encompasses virtually everything that a public entity does.”); *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997) (stating that the phrase “programs, services, or activities” is “a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context”), *superseded on other grounds*, *Zervos v. Verizon New York*, 252 F.3d 163, 171 n.7 (2d Cir. 2001).

<sup>86</sup> 42 U.S.C. § 12134(a).

<sup>87</sup> 28 C.F.R. § 35.190 (2021).

<sup>88</sup> 467 U.S. 837 (1984).

<sup>89</sup> In the classic formulation, such interpretations are “controlling unless plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Note that the Supreme Court cautioned in *Kisor v. Wilkie* that *Auer* deference covers only “reasonable agency reading[s] of a genuinely ambiguous rule,” and only where “the character and context of the agency interpretation entitles it to controlling weight.” 139 S. Ct. 2400, 2404 (2019).

<sup>90</sup> U.S. DEP’T OF JUST., C.R. DIV., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017), <https://www.ada.gov/cjta.html>. [<https://perma.cc/5VMK-KGMV>]

bail or conditions of release, taking testimony, sentencing, providing notices of rights, determining whether to revoke probation or parole, or making service referrals, whether by prosecutors and public defense attorneys, courts, juvenile justice systems, pre-trial services, or probation and parole services”; “parole and release programs,” and “detentions.”<sup>91</sup> It offers as an example of ADA implementation that some jurisdictions have “[r]equired court staff to explore reasonable modifications to allow qualified individuals with these disabilities to participate in diversion and probation programs and specialty courts.”<sup>92</sup>

Still more definitive, the Supreme Court rejected criminal system exceptionalism in a 1998 ADA Title II case, *Penn. Dep’t of Corrections v. Yeskey*.<sup>93</sup> In a unanimous opinion by Justice Scalia, the Supreme Court comprehensively denied a prison system’s effort to restrict antidiscrimination coverage to voluntary programs, or those that provide desired “benefits,” holding that Title II of the ADA unambiguously covers state prisoners’ access to prison programs, such as recreational activities, medical services, and educational and vocational offerings. Circuit courts have repeatedly confirmed *Yeskey*’s holding.<sup>94</sup>

As the DOJ guidance quoted above suggests, court proceedings are covered by the statutes as well. In *Tennessee v. Lane*, the Supreme Court, among other holdings, upheld Title II’s application to safeguard access to justice for a paraplegic criminal defendant required to appear in an inaccessible courtroom.<sup>95</sup> The Court noted that Congress enacted the statute in part to prophylactically serve several access-to-courts constitutional rights, among them the “right to be present at all stages of the trial where [a defendant’s] absence might frustrate the fairness of the proceedings” and “meaningful opportunity to be heard” in judicial proceedings.<sup>96</sup> Courts of Appeals have repeatedly recognized this right.<sup>97</sup>

Nor is there any immigration exclusion from the Rehabilitation Act or ADA Title II. Courts have found Rehabilitation Act coverage, for example, in cases about appointment of immigration counsel as a reasonable accom-

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; see also 28 C.F.R. § 35.152 (setting out specific rules for jails, prisons, and detention centers).

<sup>93</sup> 524 U.S. 206, 210–11 (1998).

<sup>94</sup> See, e.g., *Wright v. New York State Dep’t of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016) (“Both the ADA and the RA undoubtedly apply to state prisons and their prisoners.”); *Key v. Grayson*, 179 F.3d 996, 997 (6th Cir. 1999) (“it is now established that the ADA and the Rehabilitation Act apply to prisoners . . .”). For discussion, see SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW: CASES AND MATERIALS* 308–29 (3d ed. 2021).

<sup>95</sup> 541 U.S. 509, 523 (2004).

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., *McCauley v. Georgia* 466 F. App’x 832, 837 (11th Cir. 2012) (recognizing plaintiff’s right to seek access to the courts); *Bedford v. Michigan*, 722 F. App’x 515, 519 (6th Cir. 2018) (recognizing application of *Lane* to class of cases implicating access to justice); *Crawford v. Hinds Cnty. Bd. of Supervisors*, 1 F.4th 371, 374 (5th Cir. 2021) (finding person with disability who had twice been unable to complete jury service had standing to sue).

modation,<sup>98</sup> about immigration detention conditions,<sup>99</sup> and—most similar to the argument made here—about immigration proceedings for people detained during the COVID-19 pandemic.<sup>100</sup>

In short, like other people with disabilities, people with disabilities in both criminal and immigration pretrial incarceration can bring lawsuits under the ADA or the Rehabilitation Act if they can show that they are: (1) disabled within the meaning of the statutes;<sup>101</sup> (2) “qualified” to participate in the relevant program; and (3) “excluded from,” “denied the benefits of,” or otherwise “subjected to discrimination”<sup>102</sup> relating to a governmental program, (4) “by reason of . . . disability” (“solely by reason” under the Rehabilitation Act). As explained in the accompanying footnote, the first of these requirements is not controversial. The following sections address requirements (2)–(4) in turn: Section II.B addresses items (2) and (3), which are intertwined, both with each other and also with the antidiscrimination requirement that governments agree to “reasonable modifications” (but not to “fundamental alterations”) to policies and practices that would otherwise exclude people with disabilities. Section II.C examines (4).

## B. *Qualified Individual/Reasonable Modification/Fundamental Alteration*

### 1. *The Standard: Meaningful Access*

The foundational case explaining what kinds of exclusions from programs/services/activities constitute unlawful discrimination is *Alexander v. Choate*,<sup>103</sup> a unanimous 1985 Supreme Court opinion by Justice Marshall. In *Choate*, the Court rejected plaintiffs’ argument that the state violated the Rehabilitation Act by reducing how many days of inpatient care Medicaid would cover. The Court first emphasized that discriminatory animus against

<sup>98</sup> *Franco-Gonzalez v. Holder*, No. 2:10-cv-02211-DMG, 2013 WL 8115423, at \*1 (C.D. Cal. Apr. 23, 2013).

<sup>99</sup> *Moran v. U.S. Dep’t of Homeland Sec.*, No. 20-cv-0696-DOC-JDE, 2020 WL 6083445, at \*6 (C.D. Cal. Aug. 21, 2020).

<sup>100</sup> See *Fraihat v. U.S. Immigr. & Customs Enf’t*, 445 F. Supp. 3d 709, 747–48 (C.D. Cal. 2020) (finding that Section 504 covered immigration proceedings and noting no counterargument from ICE), *rev’d on alternate grounds*, 16 F.4th 613, 650 (9th Cir. 2021) (reversing based on assessment of evidence, not disagreement with the liability theory).

<sup>101</sup> Under both the ADA and the Rehabilitation Act, a person has a disability if: (i) a physical or mental impairment substantially limits one or more of his or her major life activities; (ii) he or she has a record of such an impairment; or (iii) he or she is regarded as having such an impairment. 29 U.S.C. § 705(20)(B); 42 U.S.C. §§ 12102(1)–(2). Particularly relevant here, “mental” impairments are expressly included if they substantially limit major life activities. The ADA regulations on the definition of disability, 28 C.F.R. § 35.104(1)(i), are quite capacious. Moreover, in the ADA Amendments Act of 2008, Congress clarified and broadened the definition. Under the Amendments Act, an impairment constitutes a disability even if it: (1) only substantially limits one major life activity; or (2) is episodic or in remission, if it would substantially limit at least one major life activity if active. ADA Amendments Act of 2008, Pub. L. No. 110-325 Sec. 3, 122 Stat. 3553, 3556.

<sup>102</sup> 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

<sup>103</sup> 469 U.S. 287 (1984).



people with disabilities was not a prerequisite to Rehabilitation Act liability: “much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.”<sup>104</sup> At the same time, the Court held, the statute required a showing of more than disproportionate effects caused by facially neutral policies. *Choate* announced the “meaningful access” standard: that “otherwise qualified” people with disabilities must be granted reasonable modifications so that they are “provided with meaningful access” to the program in question.<sup>105</sup> Moreover, the Court explained that “the question of who is ‘otherwise qualified’ and what actions constitute ‘discrimination’ under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs.”<sup>106</sup>

So what is meaningful access? *Choate* pointed with approval to a Rehabilitation Act regulation that “meaningful access” does not mean merely some or minimal access but rather protects equal opportunity: While “aids, benefits, and services . . . are not required to produce the identical result or level of achievement for handicapped<sup>[107]</sup> and nonhandicapped persons, [they] must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement.”<sup>108</sup>

Other federal departments’ Rehabilitation Act regulations include similar language. After quoting or paraphrasing the Rehabilitation Act’s statutory text, they endorse an “equal opportunity” standard with only slight variations in phrasing. For example:

- “A recipient may not discriminate on the basis of handicap in the following ways directly or through contractual, licensing, or other arrangements under any program receiving Federal financial assistance . . . (ii) Deny a qualified handicapped person an equal opportunity to achieve the same benefits that others achieve in the program or activity receiving Federal financial assistance.”<sup>109</sup> (DOJ Rehabilitation Act regulation on federally assisted programs)

<sup>104</sup> *Id.* at 296–97.

<sup>105</sup> *Id.* at 300–01.

<sup>106</sup> *Choate*, 469 U.S. at 299 n.19.

<sup>107</sup> Many disability statutes and regulations, including those cited here, use the outdated term “handicap,” which is synonymous with “disability.” This article uses the term “disability” throughout but leaves in “handicap” when directly quoting law or regulation.

<sup>108</sup> *Choate*, 469 U.S. at 305 (quoting the Department of Health Education and Welfare’s Rehabilitation Act federally-assisted regulation, 45 C.F.R. § 84.4(b)(2)). In *Traynor v. Turnage*, the Court noted the deference owed the HEW regulation, stating: “We have previously recognized that the regulations promulgated by the Department of Health, Education, and Welfare (later the Department of Health and Human Services) to implement the Rehabilitation Act ‘were drafted with the oversight and approval of Congress,’ and therefore constitute ‘an important source of guidance on the meaning of § 504.’” 485 U.S. 535, 550 n.10 (1988) (citations omitted).

<sup>109</sup> 28 C.F.R. § 42.503(b)(1).

- “The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap— . . . (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.”<sup>110</sup> (DOJ Rehabilitation Act regulation on federally conducted programs)
- “The Department, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability . . . (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.”<sup>111</sup> (Department of Homeland Security Rehabilitation Act regulation on federally conducted programs)

Leaning variously on *Choate* or the regulations, subsequent court of appeals case law reaches the “meaningful access” standard,<sup>112</sup> holding that the “meaningful access standard . . . ensure[s] an equal opportunity.”<sup>113</sup>

*Choate*’s “meaningful access” approach governs the Rehabilitation Act, of course. Congress then expressly adopted the same rules when it enacted the ADA, defining “qualified individual with a disability” as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”<sup>114</sup> In turn, the Title II ADA regulations incorporate the rest of *Choate*’s language, stating: “A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making

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<sup>110</sup> 28 C.F.R. § 39.130(b)(1).

<sup>111</sup> 6 C.F.R. § 15.30(b)(1). There is no DHS federally assisted regulation.

<sup>112</sup> See, e.g., *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (denying summary judgment on the “meaningful access” issue because there was a genuine issue of material fact as to whether the defendant “denied [the plaintiff] an equal opportunity to gain the same benefit from medical school as his nondisabled peers by refusing to provide his requested accommodations.”); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999) (applying a “meaningful access” standard to a Rehabilitation Act claim brought by a hearing-impaired prisoner denied an interpreter during internal disciplinary proceedings, and affirming summary judgment for the prisoner because “although he ha[d] been provided some form of those benefits, he ha[d] not received the full benefits solely because of his disability.”); *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 343 (11th Cir. 2012) (the “proper inquiry” under the Rehabilitation Act to determine if a hospital had provided “necessary” auxiliary aids to a hearing-impaired patient was whether the proffered aids “gave that patient an equal opportunity to benefit from the hospital’s treatment.”).

<sup>113</sup> *Argenyi*, 703 F.3d at 449.

<sup>114</sup> 42 U.S.C. § 12131(2). Reasonable modification is thus ADA Title II’s (and Title III’s) equivalent of the more familiar “reasonable accommodation” requirement in Title I of the ADA, which addresses employment discrimination. See 42 U.S.C. §§ 12111(8)–(9).

the modifications would fundamentally alter the nature of the service, program, or activity.”<sup>115</sup>

As under the Rehabilitation Act, “meaningful access” under the ADA has been interpreted to mean substantially equal access. Like the Rehabilitation Act regulations just quoted, the ADA Title II regulation states:

A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability— . . . (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.<sup>116</sup>

And case law again endorses that meaningful access means equal access.<sup>117</sup>

Thus, under both the Rehabilitation Act and ADA Title II, liability attaches for disability discrimination based not on discriminatory intent but on failure, intentional or not, to provide individuals with disabilities an opportunity equal to that afforded nondisabled people to participate in or benefit from government programs, where—as the next section explains, equality could be accomplished by a reasonable modification to the rules or practices governing the service, program, or activity.

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<sup>115</sup> 28 C.F.R. § 35.130(b)(7)(i). The separate requirement of program accessibility has a similar defense that no “fundamental alteration in the nature of a service, program, or activity or . . . undue financial and administrative burdens” are required. 28 C.F.R. § 35.150(a)(3). Just as “reasonable modification” is the analog to Title I’s “reasonable accommodation” requirement, “fundamental alteration” and “undue burden” are the analogs of Title I’s “undue hardship.”

<sup>116</sup> 28 C.F.R. § 35.130(b)(1).

<sup>117</sup> *See, e.g.*, *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013) (holding, based on analogous communications-related provision, that “Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but *equally* accessible to people with communication disabilities . . . insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs”) (emphasis in original); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (same, under ADA Title III); *Profita v. Regents of the Univ. of Colorado*, 709 F. App’x 917, 920 (10th Cir. 2017) (explaining that a reasonable accommodation must provide meaningful access “by permitting a qualified individual with a disability to ‘obtain the same benefits made available to nondisabled individuals’” (quoting *Taylor v. Colo. Dep’t of Health Care Policy & Fin.*, 811 F.3d 1230, 1236 (10th Cir. 2016)); *Doran v. 7-Eleven*, 524 F.3d 1034, 1041 n.4 (9th Cir. 2008) (“[T]he ADA . . . outlaws discrimination based on disability ‘in the full and equal enjoyment of the goods, services, [and] facilities’ made available at places of public accommodation . . . and does not limit its antidiscrimination mandate to barriers that completely prohibit access.”); *Keller v. Chippewa Cnty., Michigan Bd. of Commissioners*, 860 F. App’x 381, 387 (6th Cir. 2021), *cert. denied sub nom. Keller v. Chippewa Cnty. Bd. of Commissioners*, 142 S. Ct. 761 (2022) (“[T]he simple fact that [the plaintiff] successfully used [the toilet and sink] does not necessarily mean that he had meaningful access. Other courts have recognized that a plaintiff who succeeds in using a prison restroom only through an excessive or painful effort may have a valid ADA claim.”).

## 2. *The Standard: Reasonable Modification/Fundamental Alteration*

If governmental rules or practices would otherwise deprive people with disabilities of meaningful (that is, equal) access to programs, services, or activities, the Rehabilitation Act and ADA require “reasonable modification.” Again, it was *Choate* that set the point at which “a refusal to modify an existing program might become unreasonable and discriminatory,” and found that such refusals violated the statute unless the requested modification would amount to a “fundamental alteration in the nature of a program,” rather than a “reasonable modification[ ] the statute or regulations required.”<sup>118</sup> We address in Section III.A the specific argument that release from detention falls on the “fundamental alteration” side of the line; here, we present the case law more generally.

We note that, in litigation procedure, the reasonable modification showing is part of the plaintiffs’ case in chief, whereas it is the defendants’ burden to assert and prove the “fundamental alteration” defense. The plaintiffs can make their showing of reasonableness by pointing to the general practicability of the requested modification—its (low enough) cost, workability, and the like. It is for defendants to plead and prove that notwithstanding practicalities, the requested modification is out of bounds in the specific case.<sup>119</sup>

As the Supreme Court explained in *PGA Tour, Inc. v. Martin*, a case interpreting ADA Title III (whose statutory text codifies the *Choate* reasonable modification/fundamental alteration divide), a modification is considered fundamental only if it alters a program’s “essential aspect[s].”<sup>120</sup> In addition, parallel regulations that implemented the pre-*Choate* precedent of *Southeast Community College v. Davis*,<sup>121</sup> also require each federal agency to

<sup>118</sup> *Alexander v. Choate*, 469 U.S. 287, 300–01 (1984).

<sup>119</sup> *See Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997):

The plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, reasonable in the run of cases. While the defendant may introduce evidence indicating that the plaintiff’s requested modification is not reasonable in the run of cases, the plaintiff bears the ultimate burden of proof on the issue. If the plaintiff meets this burden, the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation. The type of evidence that satisfies this burden focuses on the specifics of the plaintiff’s or defendant’s circumstances and not on the general nature of the accommodation. Under the statutory framework, such evidence is relevant only to a fundamental alteration defense and not relevant to the plaintiff’s burden to show that the requested modification is reasonable in the run of cases.

Johnson was a Title III case, but courts have followed its lead in Title II cases as well. *See, e.g.*, *Bailey v. Bd. of Commissioners of Louisiana Stadium & Exposition Dist.*, 484 F. Supp. 3d 346, 426–27 (E.D. La. 2020), *aff’d sub nom. Bailey v. France*, 852 F. App’x 852 (5th Cir. 2021); *Nat’l Fed’n of the Blind, Inc. v. Lamone*, 438 F. Supp. 3d 510, 528 (D. Md. 2020); *Belancio v. Kansas Dep’t of Health & Env’t*, No. 17-cv-1180, 2018 WL 4538451, at \*8 n.38 (D. Kan. Sept. 21, 2018).

<sup>120</sup> 532 U.S. 661, 682–91 (2001).

<sup>121</sup> 442 U.S. 397 (1979).

ensure that each of its “program[s] or activit[ies] . . . when viewed in its entirety, is readily accessible to and usable by” individuals with a disability, but not “to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.”<sup>122</sup>

Within these limits, a failure to implement a reasonable modification needed by a person with a disability constitutes a type of discrimination.<sup>123</sup> Fact-intensive analysis determines whether the particular change to a policy or practice an individual with a disability seeks is a reasonable modification, which the government is required to undertake, or rather a fundamental alteration, which it is not. Some examples of modifications courts have deemed required under the Rehabilitation Act and/or the ADA include:

- In *PGA Tour, Inc. v. Martin*, the Supreme Court held that a professional golfer’s use of a golf cart during tournaments would not constitute a fundamental alteration and therefore had to be allowed.<sup>124</sup>
- In *American Council of the Blind v. Paulsen*, the D.C. Circuit required introduction of features to make currency accessible to blind people or those with low-vision. The court held that omitting this reasonable modification would deprive plaintiffs of “meaningful access” to a benefit available to the general public—the ability to engage in economic activity—in violation of the Rehabilitation Act.<sup>125</sup>
- In *Franco-Gonzalez v. Holder*, the District Court for the Central District of California held that the Rehabilitation Act required the federal government to ensure legal representation for all detained noncitizens facing removal proceedings whose psychiatric disabilities rendered them incompetent to represent themselves in removal or custody hearings, because otherwise plaintiffs would be unable to meaningfully participate in those hearings.<sup>126</sup>

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<sup>122</sup> 28 C.F.R. § 39.150(a) *see also* 6 C.F.R. § 15.50(a). In *Olmstead v. L.C.* ex rel. *Zimring*, a plurality opinion by Justice Ginsburg unpacked the “undue hardship” part of the test:

the “undue hardship” inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient’s overall budget, but a “case-by-case analysis weighing factors that include: (1) the overall size of the recipient’s program with respect to number of employees, number and type of facilities, and size of budget; (2) the type of the recipient’s operation, including the composition and structure of the recipient’s workforce; and (3) the nature and cost of the accommodation needed.”

527 U.S. 581, 606 n.16 (1999) (plurality opinion of Ginsburg, J.).

<sup>123</sup> *Tennessee v. Lane*, 541 U.S. 509, 531–32 (2004).

<sup>124</sup> 532 U.S. at 690–91.

<sup>125</sup> *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1274 (D.C. Cir. 2008).

<sup>126</sup> *Franco-Gonzalez v. Holder*, 10-cv-02211-DMG, 2013 WL 3674492, at \*4–6 (C.D. Cal. Apr. 23, 2013). For more information on the *Franco-Gonzalez* litigation, which included numerous pertinent district court opinions, see *Franco-Gonzalez v. Holder*, C.R. LITIG. CLEARINGHOUSE, <http://clearinghouse.net/case/12744/> [<https://perma.cc/R5GW-L2KV>].

- In *Henrietta D. v. Giuliani* and *Henrietta D. v. Bloomberg*, a district court held, and the Second Circuit affirmed,<sup>127</sup> that “intensive case management and low case manager-to-client ratios” and other similar reasonable modifications were required to ensure people with HIV had meaningful access to the same benefits and services others received. Both the district court and the court of appeals expressly rejected the claim that these management modifications constituted “additional benefits, or better benefits, than the non-disabled receive, which the law does not compel.” Rather, they were reasonable modifications “required to ensure meaningful access to the same benefits and services” as non-disabled people received.<sup>128</sup>
- In *Baughman v. Walt Disney World Co.*, the Ninth Circuit held that (absent a demonstration of a safety problem) Walt Disney could be required by the ADA’s Title III to grant a waiver of its rule barring guest use of a Segway; reasonable modifications include steps “to provide [non-disabled and] disabled guests with a like experience.”<sup>129</sup>
- In *Armstrong v. Davis*, the Ninth Circuit found that the State of California had deprived a class of disabled prisoner plaintiffs of meaningful access to parole processes, and affirmed in pertinent part an injunction mandating reasonable modifications to existing practice. The injunction included provisions, for example, that required the state to “redraft its policies to ensure that prisoners and parolees are . . . ‘able to participate, to the best of their abilities, in any parole proceeding’”; and “to create and maintain a system for tracking disabled prisoners and parolees, and provide them with accommodations at parole and parole revocation proceedings.”<sup>130</sup>
- In *Giebel v. M & B Assocs.*, the Ninth Circuit found that the plaintiff—whose AIDS rendered him unable to work and therefore financially ineligible to be defendant’s tenant—was entitled to waiver of the rule against co-signers; relying in part on Rehabilitation Act case law, the court found the waiver to constitute a reasonable accommodation under the Fair Housing Amendments Act.<sup>131</sup>
- In *Pashby v. Delia*, the Fourth Circuit held that the fundamental alteration defense did not bar requiring continuation of in-home services after a change in state Medicaid requirements put class members at risk of institutionalization.<sup>132</sup>

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<sup>127</sup> *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 212 (E.D.N.Y. 2000), *aff’d sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

<sup>128</sup> *Henrietta D.*, 119 F. Supp. 2d at 212; *see also Henrietta D.*, 331 F.3d at 282–83.

<sup>129</sup> 685 F.3d 1131, 1135 (9th Cir. 2012).

<sup>130</sup> 275 F.3d 849, 859 (9th Cir. 2001).

<sup>131</sup> 343 F.3d 1143, 1159 (9th Cir. 2003).

<sup>132</sup> 709 F.3d 307 (4th Cir. 2013).

In each example, the court found both that the modification was needed to deliver equal access to the program in question, and that the modification's change to defendant practices was not profound enough to defeat the ADA/Rehabilitation Act claim. As the list makes clear, there are many different forms of reasonable modifications. Moreover, modifications need not simply waive disqualifications to count as reasonable—they frequently provide preferential treatment or other *advantages* to people with disabilities. The Supreme Court explained in an ADA Title I (employment) case that an argument to the contrary

fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.<sup>133</sup>

In addition, while courts have occasionally emphasized the ADA and Rehabilitation Act's reference to "benefits," the Supreme Court has made clear that the statutes do not apply only to chosen or beneficial government programs. The Court rejected the "benefits" argument in *Yeskey*, emphasizing that the statutory "benefits" language is coupled with a more general textual reference to "exclu[sion] from participation" and in any event should be understood broadly:

Petitioners contend that the phrase "benefits of the services, programs, or activities of a public entity," creates an ambiguity, because state prisons do not provide prisoners with "benefits" of "programs, services, or activities" as those terms are ordinarily understood. We disagree. Modern prisons provide inmates with many recreational "activities," medical "services," and educational and vocational "programs," all of which at least theoretically "benefit" the prisoners (and any of which disabled prisoners could be "excluded from participation in").<sup>134</sup>

### 3. *What Is the Program?*

Whether a modification is considered reasonable or, instead, fundamental because it alters a program or benefit's "essential aspect[s]," turns

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<sup>133</sup> *US Airways v. Barnett*, 535 U.S. 391, 397 (2002) (emphasis in original).

<sup>134</sup> *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (citations omitted).

analytically on how the program or benefit in question is identified. Parties frequently contest the level of generality at which this identification should occur.<sup>135</sup> That is not the issue here, though. Rather, the question likely to arise is whether it is appropriate to identify the program at issue as the criminal/immigration proceedings, or whether, a claim for an alternative to detention must necessarily proceed by demonstrating discrimination (including deprivations of meaningful access) in existing bail or other non-detention gatekeeping practices themselves. There is no doubt that bail and other alternatives-to-detention programs *do* constitute programs to which the ADA and Rehabilitation Act guarantee meaningful access. Recall the DOJ guidance document quoted above, which explicitly says just that—that Title II covers programs “assessing individuals for diversion programs, conducting arraignment, setting bail or conditions of release.”<sup>136</sup> When people with disabilities are discriminated against in the operations of bail and diversionary programs, that is surely a Title II or Rehabilitation Act violation. But it is wrong to think that either the ADA or the Rehabilitation Act allows only that framing.

As an analogy, consider the (more frequently litigated) arenas of educational or employment accommodation. Claimants in these areas often proceed on claims that some test or job requirement is being administered in a discriminatory matter—for example, that a test must be provided in a format accessible to participants who are blind or deaf. But where the test cannot be made fair, they and/or other claimants *also* bring claims that they are entitled to a waiver of the test or requirement in order to allow their meaningful access to the opportunity at stake.<sup>137</sup> So here, government agencies are required *both* to avoid discrimination in—including by providing meaningful access to—all their alternatives-to-detention programs *and* to avoid discrimination in their criminal/immigration proceedings, including by waiving existing alternatives-to-detention limits for people with disabilities if detention is obstructing or would obstruct equal access to the underlying proceedings.

Again building from *Choate*, case law addresses this “what is the program” issue by distinguishing between access to existing government programs—which is required—and new or expanded benefits, which are not.

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<sup>135</sup> Too low a level of generality would nullify the antidiscrimination laws. *See Alexander v. Choate*, 469 U.S. 287, 301, 301 n.21 (1985) (“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; to assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made”; “Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is ‘collapsed’ into one’s definition of what is the relevant benefit.”). But too high a generality is, the Court warned in the same case, unduly “amorphous.” *See id.* at 303. *See generally* Samuel R. Bagenstos, *The Future of Disability Law*, 14 *YALE L.J.* 1, 47–48 (2004).

<sup>136</sup> U.S. DEPT OF JUST., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017), <https://www.ada.gov/cjta.html> [<https://perma.cc/4K7Z-X8XF>].

<sup>137</sup> For an example of such a claim, see *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106 (D. Mass. 1997), in which Boston University students with disabilities sought testing and coursework accommodations *and* waivers of certain degree requirements.



For example, in *Franco-Gonzalez v. Holder*, plaintiffs' claim was related to the one described in this article: those plaintiffs successfully sought a reasonable modification to DHS and DOJ practices—legal representation in immigration proceedings, where this article addresses alternatives to detention—in order to remove access barriers to those hearings for detained immigrants with mental disabilities. DHS and DOJ argued that granting plaintiffs' request “would do much more than remove a barrier to access; it would expand the scope of benefits provided to aliens in immigration court.”<sup>138</sup> The district court's analysis rejecting the government's approach was dead on:

[T]hose who are in full possession of their faculties already have the ability to participate in immigration proceedings or, at least, have the wherewithal to obtain access. . . . Thus, the provision of a Qualified Representative is merely the means by which Plaintiffs may exercise the same benefits as other non-disabled individuals, and not the benefit itself.

Defendants mischaracterize the nature of the benefit Plaintiffs seek. Plaintiffs here seek only to meaningfully participate in their removal proceedings. The opportunity to “examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government” is available to all individuals in immigration proceedings, but is beyond Plaintiffs' reach as a result of their mental incompetency. 8 U.S.C. § 1229a(b)(4)(B). Thus, the provision of a Qualified Representative is merely the means by which Plaintiffs may exercise the same benefits as other non-disabled individuals, and not the benefit itself. . . . Aspiring to a system that allows the mentally incompetent to similarly participate in the removal proceedings against them is not tantamount to “creating an entirely new system of benefits in immigration.”<sup>139</sup>

Similarly, a district court in *Fraihat v. ICE* held that “the programmatic ‘benefit’ in this context is shared by all class members and is best understood as participation in the removal process.”<sup>140</sup>

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<sup>138</sup> *Franco-Gonzalez v. Holder*, No. 10-cv-02211-DMG, 2013 WL 3674492, at \*7 (C.D. Cal. Apr. 23, 2013). The current federal administration has eliminated this kind of non-statutory use of the word “alien,” which many people find offensive. Joel Rose, *Immigration Agencies Ordered Not To Use Term ‘Illegal Alien’ Under New Biden Policy*, NPR (Apr. 19, 2020 2:51 PM), <https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-police> [<https://perma.cc/T3EX-SJSM>]. We use the terms “immigrant” or “non-citizen” except when directly quoting a statute or regulation.

<sup>139</sup> *Franco-Gonzalez*, 2013 WL 3674492, at \*7–8.

<sup>140</sup> *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 748 (C.D. Cal. 2020), *rev'd*, 16 F.4th 613 (9th Cir. 2021). The Ninth Circuit neither affirmed nor reversed this approach. Although the court of appeals rejected the district court's liability finding in *Fraihat*, that rejection was based on evidentiary insufficiency, because “even assuming ‘participation in the removal process’ could fit within the statutory term ‘benefit,’ plaintiffs have not shown they were deprived of the ability to participate in their immigration proceedings.” *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 650 (9th Cir. 2021).

As in both of these cases, the program or benefit at issue in this article is the criminal or immigration proceeding. The reasonable modification claim seeks an alternative to pretrial incarceration where necessary to avoid the access obstacles faced by an incarcerated plaintiff with disabilities. The modification is all the more appropriate because pretrial incarceration is supposed to be in service of criminal/immigration proceedings, but is, in fact, undermining the fairness of those proceedings.

### C. Causation

As stated previously, the argument this article presents is limited. Indeed, it may be analytically helpful to disavow several other claims. This article is *not* arguing that pretrial incarceration of people with disabilities always violates the ADA and/or the Rehabilitation Act, even if (as will often be true) the experience and impact of incarceration is worsened by an incarcerated person's disability. Nor is the article proposing a remedy of release from any form of incarceration when its conditions of confinement fail to accommodate disability or otherwise discriminate on account of disability (such a remedy may be appropriate in some circumstances, but is not our topic). This article's argument is limited to pretrial incarceration—pretrial detention related to criminal or immigration proceedings—where the impact of incarceration and its conditions is to deprive a person with a disability of meaningful access to those criminal or immigration proceedings, because of disability.

Causation is thus central to the analysis: has pretrial incarceration caused a deprivation of meaningful access? But what kind of causation is required? Recall that both the ADA and the Rehabilitation Act expressly require causation. The Rehabilitation Act covers program exclusion/denial/discrimination “solely by reason of . . . disability,”<sup>141</sup> and the ADA uses similar causal language of “by reason of such disability.”<sup>142</sup>

The ADA's causation requirement is relatively straightforward, in theory if not necessarily in application: in *Bostock v. Clayton County*, the Supreme Court recently explained that “by reason of” (like “on account of” and “because of”)

incorporates the ‘simple’ and ‘traditional’ standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened ‘but for’ the purported cause. In other words, a but-for test directs us to change one potential cause at a time and see if the outcome changes. If it does, we have found a but-for cause.”<sup>143</sup>

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<sup>141</sup> 29 U.S.C. § 794(a).

<sup>142</sup> 42 U.S.C. § 12132.

<sup>143</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (citations omitted).

The Court emphasized that but-for cause “can be a sweeping standard” because “[o]ften, events have multiple but-for causes.”<sup>144</sup>

In the Rehabilitation Act, however, Congress used the word “solely.”<sup>145</sup> In the decision just quoted, *Bostock*, the Court suggested that a statutory requirement of sole causation constitutes “a more parsimonious approach,” “indicat[ing] that actions taken ‘because’ of the confluence of multiple factors do not violate the law.”<sup>146</sup> Courts have struggled to give content to the idea of sole causation, but some principles have emerged: First, the word “solely” does not require a discriminatory motive, animus, or ill-will. Second, “solely” cannot eviscerate the statute’s reach. In a bankruptcy case, for example, the Supreme Court explained both requirements:

[W]hen the statute refers to failure to pay a debt as the sole cause of cancellation (“solely because”), it cannot reasonably be understood to include, among the other causes whose presence can preclude application of the prohibition, the governmental unit’s *motive* in effecting the cancellation. Such a reading would deprive § 525 of all force. It is hard to imagine a situation in which a governmental unit would not have some further motive behind the cancellation—assuring the financial solvency of the licensed entity, or punishing lawlessness, or even (quite simply) making itself financially whole. Section 525 means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation—the act or event that triggers the agency’s decision to cancel, whatever the agency’s ultimate motive in pulling the trigger may be.<sup>147</sup>

These principles dictate the same result here: whatever “solely” means in intentional discrimination cases under the Rehabilitation Act, the statutory causation requirement does not eliminate the type of reasonable modification liability authoritatively approved in *Choate*, in which an individual seeks a softening of a generally applicable rule in order to assure meaningful access to a government program.<sup>148</sup> In any such case, after all, the govern-

<sup>144</sup> *Id.*

<sup>145</sup> Moreover, in the Rehabilitation Act Amendments of 1992, Congress stated that employment discrimination claims under Section 504 should use “the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201–12204 and 12210), as such sections relate to employment.” Pub. L. No. 102-569, § 502, 106 Stats 4344, 4424, and 4428 (amending Section 504), was intended to eliminate any disadvantageous differences between Section 504 and the other statutes cited—including, presumably, any higher causal standard. *See* 138 Cong. Rec. S16610 (Oct. 5, 1992) (remarks by Sen. Dole that amendment integrates disability policy into the philosophy and goals of the ADA); 138 Cong. Rec. S16610 (Oct. 5, 1992) (remarks by Sen. Harkin reciting that ADA standards are applicable, including “because of” language). But the 1992 change applies only to employment claims, not other Section 504 claims such as this article’s topic.

<sup>146</sup> *Bostock*, 140 S. Ct. at 1739 (citing 11 U.S.C. § 525; 16 U.S.C. § 511).

<sup>147</sup> *F.C.C. v. NextWave Pers. Commc’ns*, 537 U.S. 293, 301–02 (2003).

<sup>148</sup> *See, e.g., Franco-Gonzalez v. Holder*, No. 10-cv-02211-DMG, 2013 WL 3674492, at \*4–6 (C.D. Cal. Apr. 23, 2013). As this opinion explains, the federal government argued that

ment's refusal to accommodate the plaintiff's disability could be said to serve its interest in uniformity, or in avoiding the costs of accommodation. To deem such concomitant interests liability-vitiating "causes" would contradict the statute and Supreme Court precedent. Instead, the right interpretation of the statute's causation language is that it requires attention to "rules . . . that hurt [people with disabilities] *by reason of their handicap*, rather than that hurt them solely by virtue of what they have in common with other people."<sup>149</sup>

### III. APPLICATION OF LAW TO FACT

#### A. Reasonable Modification, Not Fundamental Alteration

Section II.B.2, above, set out the "reasonable modification"/"fundamental alteration" dichotomy and its case law. Here, we apply the standard, demonstrating that release from pretrial incarceration constitutes a reasonable modification rather than a fundamental alteration of the criminal/immigration proceedings, when such incarceration prevents meaningful participation in a criminal or immigration case and in-custody conditions modifications cannot correct the problem.

A preliminary point: allowing someone to defend their criminal or immigration case from the community is less expensive than detention.<sup>150</sup> But even if that were not the case, budgetary concerns are relevant to ADA/Rehabilitation Act adjudication, but "financial constraints alone cannot sustain a fundamental alteration defense."<sup>151</sup>

Rather, following the lead of *PGA Tour, Inc. v. Martin*, in which the Supreme Court modeled application of the "fundamental alteration" defense, the appropriate focus is on the purpose of the affected program.<sup>152</sup> In the *Martin* case, the Court carefully assessed the purpose of the challenged rule and the affected program using intensive fact analysis<sup>153</sup> and concluded that the ADA required the sponsor of professional golf events to jettison its rule

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the plaintiffs—detained immigrants with mental disabilities were "not denied access [to their removal proceedings] 'solely by reason' of their disability because the Government does not intend to prevent them from full participation in their removal proceedings." The district court rejected this argument as irreconcilable with *Alexander v. Choate's* "meaningful access" theory of Rehabilitation Act liability.

<sup>149</sup> *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003) (quoting *Good Shepherd Manor Found., Inc. v. City of Mومence*, 323 F.3d 557, 561 (7th Cir. 2003)).

<sup>150</sup> See *The Price of Jails*, VERA INST. (May 2015), <https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration> [<https://perma.cc/K5GS-N6M6>]. Detention is more expensive than release even if the would-be detained person is placed in subject to supervision in the community. See U.S. GOV'T ACCOUNTABILITY OFF., ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 18 (2014), <https://www.gao.gov/assets/gao-15-26.pdf> [<https://perma.cc/H7SQ-SC58>] (finding that alternatives to detention cost \$10.55 a day compared to \$158 for detention for people in the immigration system).

<sup>151</sup> *Pashby v. Delia*, 709 F.3d 307, 324 (4th Cir. 2013) (collecting cases).

<sup>152</sup> *PGA Tour v. Martin*, 532 U.S. 661, 682–91 (2001).

<sup>153</sup> *Id.* at 682–91.

disallowing player use of a golf cart, because the “walking rule” was not “such an essential aspect of the game of golf that [alteration] would be unacceptable even if it affected all competitors equally,” and because eliminating the rule for a player with a disability did not “give a disabled player . . . an advantage over others and, for that reason, fundamentally alter the character of the competition.”<sup>154</sup>

A similarly careful evaluation of the purpose of pretrial incarceration and court proceedings, criminal or immigration, demonstrates that release, perhaps with an alternative supervision method, is far from a “fundamental alteration” of the relevant program—court proceedings. The purpose of the proceedings is to determine guilt or innocence in a criminal context, and whether or not someone will be removed from the United States in an immigration one. Pretrial incarceration is not essential to the proceedings or the purpose. The most important fact supporting this conclusion is that for both criminal and immigration pretrial incarceration, a vast number of people go through their proceedings while free and living in their communities. Even among felony defendants, for example, the last data available (from 2007) suggests that only a minority are subjected to pretrial detention.<sup>155</sup> (Given the past decade’s reforms,<sup>156</sup> that minority is likely smaller now.) Misdemeanor defendants, who constitute a large majority of arrestees, are still more unlikely to be detained prior to conviction or acquittal.<sup>157</sup> And for immigration detention, at any given time, the non-detained docket significantly overshadows the detained docket.<sup>158</sup> Indeed, for many individuals, the

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<sup>154</sup> *Id.* at 682–83.

<sup>155</sup> For statistics on pretrial criminal detention of felony defendants, see, for example, THOMAS H. COHEN, PH.D & BRIAN A. REAVES, PH.D, BUREAU OF JUST. STATS., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (2007), <https://bjs.ojp.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/M9EX-EV24>] (“From 1990 to 2004, an estimated 62% of State court felony defendants in the 75 largest counties were released prior to the disposition of their case.”). They also constitute the majority of people in jail at any given point.

<sup>156</sup> For an overview of the state of bail reform, see generally Beatrix Lockwood & Anneliese Griffin, *The State of Bail Reform*, MARSHALL PROJECT (Oct. 30, 2020), <https://www.themarshallproject.org/2020/10/30/the-state-of-bail-reform> [<https://perma.cc/RWW6-MEJE>].

<sup>157</sup> See, e.g., Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 732–33 (2017) (summarizing available data based on the authors’ calculations: “[i]n New York City, . . . 14% of misdemeanor defendants remain in jail during the entire pretrial period . . .”). Misdemeanant defendants make up the vast majority of people in the criminal legal system, though a minority of those in jail. See COURT STATS. PROJECT, NAT’L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2018 DATA 13 (2020), [https://www.courtstatistics.org/\\_\\_data/assets/pdf\\_file/0014/40820/2018-Digest.pdf](https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf) [<https://perma.cc/AW55-VQLU>] (misdemeanor cases constituted over three-quarters of the criminal docket in the 32 state courts where data were available); MINTON & ZENG, *supra* note 1, at 11 tbl. 6 (at midyear 2020, about 77% of local jail inmates were held pursuant to felony charges; 17% pursuant to misdemeanor charges; 6% pursuant to civil infractions or unknown charges).

<sup>158</sup> U.S. DEPT OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 4 (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> [<https://perma.cc/FJC5-NH9P>] (noting that there were more than 3 million cases on the non-detained

incarcerating authorities themselves have already determined that release would be appropriate (and *a fortiori*, entirely consistent with the “essential aspect[s]” of court proceedings). These are individuals who are granted bond but cannot pay it.<sup>159</sup> It would be odd to find that releasing someone from incarceration pursuant to the ADA or the Rehabilitation Act alters an essential aspect of pretrial incarceration when it simply moves them into an existing enormous set of people facing criminal or immigration proceedings from the community.

In both criminal and immigration contexts, pretrial incarceration is justified as furthering one or both of two purposes: ensuring that defendants/respondents attend their proceedings and safeguarding public safety.<sup>160</sup> Begin with the first justification, ensuing attendance. Other tools—tools that do not undermine the meaningful and equal access of people with disabilities to their proceedings—can serve that same end. Non-detention methods of ensuring presence are extremely common. Among the methods used with many thousands of criminal defendants are release on recognizance, bail, electronic monitoring of various types, and pretrial check-ins (in person, via phone, or via text). The experience of states and the federal government demonstrates these processes can be effective in getting defendants to their

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docket in fiscal year 2019, a far higher number than those detained and in immigration proceedings).

<sup>159</sup> See, e.g., Will Dobbie, Crystal Yang & Jacob Goldin, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 202 (2018) (reporting, in a study focusing on Miami and Philadelphia, that less than 50% of defendants managed to post bail even when it was set at \$5000 or less); MARY T. PHILLIPS, N.Y.C. CRIM. JUST. AGENCY, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 51 tbl. 7 (2012), <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf> [<https://perma.cc/T8KV-LCD9>] (reporting that in New York City, only 26% of defendants who received bail under \$500 posted bail at arraignment, while only 7% made bail that was set at \$5,000). For information on ICE immigration bonds and how many detained noncitizens cannot pay them, see ACLU ANALYTICS & IMMIGRANTS’ RIGHTS PROJECT, DISCRETIONARY DETENTION BY THE NUMBERS (2018), <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/discretionary-detention> [<https://perma.cc/4RY7-TA4H>]; ACLU ANALYTICS, IMMIGRATION BOND ANALYSIS: METHODOLOGY (2018), <https://www.aclu.org/report/immigration-bond-analysis-methodology> [<https://perma.cc/V4X2-C4X5>].

<sup>160</sup> On criminal detention, see *Bell v. Wolfish*, 441 U.S. 520, 534 (1979) (recognizing that the “Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, [and] confinement of such persons pending trial is a legitimate means of furthering that interest”); *United States v. Salerno*, 481 U.S. 739, 751 (1987) (upholding pretrial detention “[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community”). Contrast this with post-adjudication incarceration, where the purpose is punishment. On immigration detention, see *Demore v. Kim*, 538 U.S. 510, 515 (2003) (crediting “the Government’s two principal justifications for mandatory detention [of “criminal aliens”]: (1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminal aliens”); *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (“Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings” to allow “immigration officials time to determine an alien’s status without running the risk of the alien’s either absconding or engaging in criminal activity before a final decision can be made”).

criminal court proceedings.<sup>161</sup> Similarly, the federal government has ample tools at its disposal short of detention to ensure immigration proceeding attendance by non-detained people. These include release on recognizance, parole, bond, periodic check-ins, and electronic monitoring.<sup>162</sup> Without necessarily endorsing all of these options (ankle monitors and invasive check-ins in particular may be very onerous for people with disabilities), we note that they are in very wide use;<sup>163</sup> millions of people appear for immigration proceedings without being detained.<sup>164</sup> And (as developed in Section IV.C, below), this is true even for many individuals covered by the Immigration and Nationality Act's so-called "mandatory detention" provisions.

Sometimes, a further purpose of pretrial incarceration is to safeguard public safety. (As already explained, pretrial incarceration often does not actually even purport to serve public safety, because it occurs after an incarcerated individual has been deemed appropriate for release, when he or she cannot afford bond.) Where the proffered justification for pretrial incarceration of a particular person with a disability is, indeed, safety-based, if he demonstrates that his incarceration is excluding him from meaningful access to his criminal or immigration proceedings because of his disability, the ADA and Rehabilitation Act demand that the government be put to its proof on any assertion of a "fundamental alteration" defense.<sup>165</sup> And if the

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<sup>161</sup> MICHAEL R. JONES, PRETRIAL JUST. INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION (2013), [https://www.nm.courts.gov/wp-content/uploads/2020/11/Unsecured\\_Bonds\\_The\\_As\\_Effective\\_and\\_Most\\_Efficient\\_Pretrial\\_Release\\_Option\\_Jones\\_2013.pdf](https://www.nm.courts.gov/wp-content/uploads/2020/11/Unsecured_Bonds_The_As_Effective_and_Most_Efficient_Pretrial_Release_Option_Jones_2013.pdf) [<https://perma.cc/57F8-ANXU>] (finding that unsecured bonds are as effective as secured bonds); Karla Dhungana Sainju, Stephanie Fahy, Katherine Baggaley, Ashley Baker, Tamar Minassian & Vanessa Filippelli, *Electronic Monitoring for Pretrial Release: Assessing the Impact*, 82 FED. PROB. 3, 9 (2018) (finding that "the use of [electronic monitoring] may have some positive impacts such as increasing the likelihood of returning to court"); ROSS HATTON & JESSICA SMITH, UNIV. OF N.C. SCH. OF GOV'T, RESEARCH ON THE EFFECTIVENESS OF PRETRIAL SUPPORT AND SUPERVISION SERVICES: A GUIDE FOR PRETRIAL SERVICES PROGRAMS (2021) (finding that existing literature on alternatives to pretrial detention suggests pretrial court date reminder systems, electronic monitoring, and supervised release can reduce failure to appear rates). *See also, e.g.*, N.J. REV. STAT. § 2A:162-15 (2014) (implementing New Jersey Criminal Justice Reform Act to primarily rely on pretrial release to assure a criminal defendant's appearance in court).

<sup>162</sup> For details on ICE's "alternatives to detention," see *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, (July 8, 2022), <https://www.ice.gov/detain/detention-management> [<https://perma.cc/T8M9-M8CU>].

<sup>163</sup> *See Immigration Detention Quick Facts: Immigration Detention Primer*, TRAC IMMIGRATION (2021), <https://trac.syr.edu/immigration/quickfacts/> [<https://perma.cc/LRB2-WJSP>] (164,391 people were monitored in ICE's various alternatives to detention programs as of Jan. 15, 2022).

<sup>164</sup> *See FACT CHECK: Asylum Seekers Regularly Attend Immigration Court Hearings*, HUMAN RIGHTS FIRST (Jan. 25, 2019), <https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings> [<https://perma.cc/T5SE-73DT>].

<sup>165</sup> *See supra* note 121 and accompanying text; *cf.* *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (interpreting ADA Title I "reasonable accommodation" provision: plaintiff "need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases," "[o]nce the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances"); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th

government wants to defend the exclusion as necessary for public safety (so that alteration would constitute a “fundamental alteration,” its demonstration would necessarily turn on individual circumstances and evidence, unlike so many bond determinations that rest on generalizations purporting to suggest dangerousness.<sup>166</sup>

Moreover, the requirement that the government make an individualized showing of dangerousness is even sharper if an incarcerating authority has chosen to subject a person with a disability to pretrial incarceration *because of* that disability—if, for example, a bond schedule or bond decider weighs mental illness against bond on the stereotyped assumption that people with mental illness are dangerous, or particularly likely to abscond. Such a discriminatory practice constitutes its own violation of the ADA/Rehabilitation Act unless the jurisdiction succeeds in proving up the existence of a “direct threat”—a “determin[ation that] an individual poses a direct threat to the health or safety of others, [founded on] an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.”<sup>167</sup>

### B. Existing Programs Are Not Adequate Substitutes

Release is not the only possible response to the damaging interaction of pretrial incarceration and disability. States and the federal government have long provided two other interventions for (some) individuals with psychiatric and intellectual disabilities—provision of counsel, and treatment to restore competency—to address potential unfairness of the ongoing court proceedings. Neither covers the ground we’ve described and, therefore, neither crowds out our theory.

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Cir. 1997) (applying similar analysis to ADA Title III’s fundamental alteration defense, and commenting “fundamental alteration is merely a particular type of undue hardship. Consequently, while the scope of the affirmative defense under Title III is more narrow than that provided by Title I, the type of proof—that is, proof focusing on the specific circumstances rather than on reasonableness in general—is the same.”).

<sup>166</sup> See, e.g., Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 866–71 (2016).

<sup>167</sup> 28 C.F.R. § 35.139; see also *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 n.16 (1987) (interpreting the Rehabilitation Act to disallow a teacher’s firing unless she “pose[d] a significant risk of communicating an infectious disease to others in the workplace [and a] reasonable accommodation will not eliminate that risk”); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002) (“The direct threat defense must be ‘based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.’”); *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (“[T]he risk assessment must be based on medical or other objective evidence.”); see generally Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DEN. U. L. REV. 56, 69 (2012); Samuel R. Bagenstos, *The Americans with Disabilities Act As Risk Regulation*, 101 COLUM. L. REV. 1479, 1490–1513 (2001).



### 1. Counsel

Many, but far from all, people detained pretrial have counsel. For criminal defendants, the (eventually) counseled percentage must be fairly high—after all, criminal defendants may not be sentenced to a term of incarceration, including a suspended term, without criminal counsel.<sup>168</sup> But many months may pass prior to appointment.<sup>169</sup> The proportion is far lower in immigration detention,<sup>170</sup> where the government has a much more limited obligation to fund representation.<sup>171</sup> But where detained people have counsel, or if access to counsel were broadened, could legal representation substitute for the alternatives-to-detention modification proposed here? Our answer is no. Counsel are surely important, for all the reasons stated in the foundational cases guaranteeing counsel rights for criminal defendants.<sup>172</sup> But for access to criminal or immigration proceedings to be meaningful/equal, those in such proceedings need to be able to themselves participate, by testifying, identifying witnesses and evidence, assisting their counsel, and making decisions about their case—all abilities that decay under the stresses that prompted this article. If detention thus renders access unequal, our claim remains even for counseled clients.

In the immigration setting, the 2011 Board of Immigration Appeals decision *Matter of MAM* requires immigration judges to be alert to the possibility of mental incompetency, and where they see it, to provide “safeguards.”<sup>173</sup>

Examples of appropriate safeguards include, but are not limited to, refusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist the respondent and provide the court with information; docketing or managing the case to facilitate the respondent’s ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian in the proceedings; continuance of the case for good cause shown; closing the hearing to the public; waiving the respondent’s appearance; actively aiding in the development of the record, includ-

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<sup>168</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Alabama v. Shelton*, 535 U.S. 654 (2002).

<sup>169</sup> See, e.g., DIANE DEPIETROPAOLO-PRICE, ACLU, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA’S SUMMARY COURTS (2016), <https://www.aclu.org/report/summary-injustice-exposes-south-carolina-courts-convict-and-jail-many-defendants-without> [<https://perma.cc/CKQ3-KDHF>].

<sup>170</sup> See, e.g., Marouf, *supra* note 4, at 2150 (“In removal proceedings overall, forty-five percent of immigrants are unrepresented; but a 2007 study found that eighty-four percent of detainees did not have attorneys.”).

<sup>171</sup> See *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (requiring provision of legal representation to detained immigrants in California, Arizona, and Washington, if their mental disabilities render them unable to represent themselves).

<sup>172</sup> See sources cited *supra* note 168.

<sup>173</sup> *Matter of M-A-M*, 25 I&N Dec. 474 (B.I.A. 2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3711.pdf> [<https://perma.cc/AY4E-6H52>].

ing the examination and cross-examination of witnesses; and reserving appeal rights for the respondent.<sup>174</sup>

The literature demonstrating the inadequacy of *Matter of MAM* safeguards in mitigating incompetency is voluminous and persuasive.<sup>175</sup> But even if immigration court safeguards were protecting the due process rights of people with competency limitations, that goal is different from what the Rehabilitation Act promises. While the Rehabilitation Act covers all people with disabilities, *Matter of MAM* safeguards are available only to the subset who lack a “rational and factual understanding of the nature and object of the proceedings” and cannot “consult with the attorney or representative.” Even then, *Matter of MAM* promises only minimal access in immigration court, not an equal opportunity to benefit from immigration proceedings. The Rehabilitation Act guarantees more.

## 2. Restoration of Competency

Every state, and the federal government, has a system in place to evaluate and seek to “restore” competency of any criminal defendant thought to be incompetent to stand trial—that is, under *Dusky v. United States*, who lacks “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him.”<sup>176</sup> (No such restoration process is used in immigration proceedings.<sup>177</sup>)

In practice, competency restoration systems are vastly under-resourced, and experts have cataloged the systems’ many failings.<sup>178</sup> Individuals who spend months in hospitals receiving support to restore their competency may ultimately return from those hospitals with little change to their ability to understand the proceedings against them or work with their counsel. But even where competency restoration systems are functional and succeed in

<sup>174</sup> *Id.* at 483.

<sup>175</sup> See, e.g., Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 961–64 (2014); Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J. 1023 (2016).

<sup>176</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

<sup>177</sup> See Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 787, 790 (2017).

<sup>178</sup> See, e.g., Lisa Callahan & Debra A. Pinals, *Challenges to Reforming the Competence to Stand Trial and Competence Restoration System*, 71 PSYCHIATRIC SERVS. 691 (2020); Debra A. Pinals & Lisa Callahan, *Evaluation and Restoration of Competence to Stand Trial: Intercepting the Forensic System Using the Sequential Intercept Model*, 71 PSYCHIATRIC SERVS. 698 (2020); Reena Kapoor, *Commentary: Jail-Based Competency Restoration*, 39 J. AM. ACAD. OF PSYCHIATRY & THE LAW 311 (2011). See also, e.g., *Disability L. Ctr. v. Utah*, 180 F. Supp. 3d 998 (D. Utah 2016); *Trueblood v. Washington State Dep’t of Social & Health Servs.*, No. 14-cv-1178-MJP, 2017 WL 4700326 (W.D. Wash. Oct. 19, 2017); *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2002). For litigation summaries of these three complex cases, see, respectively, <http://clearinghouse.net/case/16833/> [<https://perma.cc/5GWF-TS58>]; <http://clearinghouse.net/case/18576/> [<https://perma.cc/9F6T-XGLU>]; <http://clearinghouse.net/case/15314/> [<https://perma.cc/RU9G-7CPW>].

some degree of competency improvement, they safeguard the constitutional minima—due process rights of criminal defendants—not the antidiscrimination rights created by the Rehabilitation Act and ADA Title II.<sup>179</sup> The antidiscrimination statutes are not coincident with the constitutional law they implement; rather, as the Supreme Court has explained, they are broader, acting prophylactically to prevent, deter, and remedy constitutional violations.<sup>180</sup> And as established above, “meaningful access” does not mean “minimal access,” but rather equal opportunity—a more plaintiff-friendly standard than *Dusky* and its progeny require.

#### IV. SPECIAL CONSIDERATIONS

The ADA/Rehabilitation Act anti-discrimination rights<sup>181</sup> we’ve been writing about could be implemented in any number of ways. In many jurisdic-

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<sup>179</sup> See Mary Elizabeth Wood, Katherine M. Lawson, Jaime L. Anderson, Dominique I. Kinney, Stephen Nitch & David M. Glassmire, *Reasonable Accommodations for Meeting the Unique Needs of Defendants with Intellectual Disability*, 47 J. AM. ACAD. PSYCHIATRY L. 310, 311, 313–19 (2019) (urging implementation of ADA reasonable modifications to criminal court systems to supplement competency restoration).

<sup>180</sup> *Tennessee v. Lane*, 541 U.S. 509 (2004).

<sup>181</sup> The federal government is not covered by the ADA, but the Rehabilitation Act is sufficient. There is no damages cause of action against the federal government under the Rehabilitation Act. See *Lane v. Peña*, 518 U.S. 187 (1996). But prospective relief can be enforced under an implied cause of action or by way of an Administrative Procedures Act, or in habeas. For a convincing analysis of this issue, see *Mendez v. Gearan*, 947 F. Supp. 1364 (N.D. Cal. 1996). For opinions endorsing the existence of an implied cause of action, see, e.g., *Nat’l Ass’n of the Deaf v. Trump*, 486 F. Supp. 3d 45 (D.D.C. 2020); *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51 (D.D.C. 2006), *aff’d and remanded sub nom. Am. Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008); *Avila v. FCI Berlin*, No. 19-cv-104, 2020 WL 4506727 (D.N.H. Apr. 7, 2020), *report and recommendation adopted*, 2020 WL 4504902 (Aug. 4, 2020); *Gray v. Licon-Vitale*, No. 3:19-cv-1291, 2020 WL 1532307 (D. Conn. Mar. 31, 2020); *Yeh v. U.S. Bureau of Prisons*, No. 3:18-cv-943, 2019 WL 3564697 (M.D. Pa. Aug. 6, 2019); *Collins v. Pigos*, No. 1:12-cv-232, 2013 WL 943119 (M.D. Pa. Mar. 11, 2013); *Deron Sch. of N.J., Inc. v. U.S. Dep’t of Agric.*, No. 09-cv-3477, 2012 WL 1079068 (D.N.J. Mar. 30, 2012); *Hawk v. Fed. Bureau of Prisons*, No. 1:18-cv-1768, 2019 WL 4439705 (M.D. Pa. Aug. 30, 2019), *report and recommendation adopted*, 2019 WL 4439883 (Sept. 16, 2019); *Washington v. Fed. Bureau of Prisons*, No. 5:16-cv-03913, 2019 WL 2125246 (D.S.C. Jan. 3, 2019), *report and recommendation adopted*, 2019 WL 1349516 (Mar. 26, 2019); *Hopper v. Fed. Bureau of Prisons*, No. 5:18-cv-01223, 2018 WL 3750553 (D.S.C. July 5, 2018), *report and recommendation adopted*, 2018 WL 3744981 (Aug. 7, 2018); *McRaniels v. U.S. Dep’t of Veterans Affs.*, No. 15-cv-802, 2017 WL 2259622 (W.D. Wis. May 19, 2017); *Payne v. U.S. Marshals Serv.*, No. 15-cv-5970, 2018 WL 3496094 (N.D. Ill. July 20, 2018); *Houck v. USA*, No. 17-cv-474, 2017 WL 2733905 (S.D. Ill. June 22, 2017); *Keller v. Walton*, No. 16-CV-565, 2016 WL 4720459 (S.D. Ill. Sept. 9, 2016); *Arkansas Adapt v. Johnson*, 149 F.3d 1186 (8th Cir. 1998); *Wood v. Smith*, No. 2:17-cv-137, 2018 WL 1613799 (E.D. Ark. Mar. 12, 2018), *report and recommendation adopted*, 2018 WL 1610878 (Apr. 3, 2018); *Am. Council of the Blind v. Astrue*, No. 05-cv-04696, 2008 WL 1858928 (N.D. Cal. Apr. 23, 2008); *Mendez v. Gearan*, 947 F. Supp. 1364 (N.D. Cal. 1996); *Davis v. Astrue*, No. 06-cv-6108, 2011 WL 3651064 (N.D. Cal. Aug. 18, 2011); *Gray v. Golden Gate Nat’l Recreational Area*, No. 08-cv-00722, 2012 WL 13140460 (N.D. Cal. July 3, 2012); *Doe v. Astrue*, No. 09-cv-00980, 2009 WL 2566720 (N.D. Cal. Aug. 18, 2009); *Galvez-Letona v. Kirkpatrick*, 54 F. Supp. 2d 1218 (D. Utah 1999), *aff’d on other grounds*, 3 F. App’x 829 (10th Cir. 2001); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010); *Johnson v. United States*, No. 3:18-cv-2178, 2021 WL 256811 (S.D. Cal. Jan. 25,

dictions, prosecutors and/or jailers have authority to release criminal defendants in appropriate circumstances. When executive officials have this kind of authority, they should—and indeed must, to comply with federal law—exercise it to vindicate the antidiscrimination rights of people with disabilities in their custody. So a first step in cases raising the fact patterns here examined is for the person whose access to court proceedings is being undermined by the interaction of incarceration and disability to—through his or her lawyer, if there is one—raise the issue with the executive official responsible for incarceration, explain the situation, and seek administrative release. Which officials have appropriate authority, and the procedural avenues to reach them, will vary by incarcerating jurisdiction. For example, detained noncitizens in immigration proceedings might raise their Rehabilitation Act right to release in a written letter to their local ICE Field Office Director, or as part of a motion for release on bond submitted to an Executive Office of Immigration Review immigration judge. In the authors’ experiences, government officials often lack any background in disability rights, and are often unwilling to vary their normal procedures notwithstanding their reasonable modification responsibilities. So self-advocates and lawyers must be ready to explain thoroughly why and how the official at hand must act to prevent disability discrimination. If that doesn’t work, other venues could include the proceedings for which pretrial incarceration is being used, or in a federal court ADA/Rehabilitation Act enforcement action brought as a habeas petition, or—if it’s possible to navigate the Prison Litigation Reform Act obstacles discussed below—as an injunctive case.<sup>182</sup>

We cannot deal comprehensively with the hurdles to be managed for each procedural avenue, but we do address three groups of considerations in this Part. First, we lay out the obstacles posed by the Prison Litigation Reform Act and some potential paths through them; then, we address what we

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2021); *Wenrich v. Empowered Mgmt. Sols. LLC*, No. 17-cv-00639, 2019 WL 3550835 (D. Colo. Aug. 3, 2019). For opinions endorsing an APA cause of action, see, e.g., *Cousins v. Sec’y of the U.S. Dep’t of Transp.*, 880 F.2d 603, 605 (1st Cir. 1989) (en banc); *Clark v. Skinner*, 937 F.2d 123, 126 (4th Cir. 1991); *Moya v. U.S. Dep’t of Homeland Sec.*, 975 F.3d 120, 128 (2d Cir. 2020) (“Nor does the statute reflect Congress’s intent to imply a private right of action against executive agencies as regulators”; “[T]he APA provides an express cause of action for plaintiffs who wish to sue an executive agency for violating the Rehabilitation Act”); *Kinneary v. City of New York*, 358 F. Supp. 2d 356, 359 (S.D.N.Y. 2005); *Wilson v. Seattle Hous. Auth.*, No. 09-cv-226-MJP, 2010 WL 1633323, at \*5 (W.D. Wash. Apr. 22, 2010) (“HUD argues more convincingly . . . that Plaintiffs can only sue for Rehabilitation Act relief under the Administrative Procedures Act (APA).”); *SAI v. Dep’t of Homeland Sec.*, 149 F. Supp. 3d 99, 115 (D.D.C. 2015); *Pereira v. U.S. Dep’t of Just.*, No. 16-cv-2599-NRB, 2016 WL 2745850, at \*19 (S.D.N.Y. May 11, 2016); *Mathis v. GEO Grp., Inc.*, No. 2:08-cv-00021, 2009 WL 10736631, at \*7 (E.D.N.C. Nov. 9, 2009) (“Notably, the APA may provide for judicial review of the BOP’s alleged action and thereby undercut the need to imply a private right of action against the BOP under section 504.”).

<sup>182</sup> See *Barnes v. Gorman*, 536 U.S. 181, 184–85 (2002) (“Section 202 of the ADA prohibits discrimination against the disabled by public entities; § 504 of the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding, including private organizations, 29 U.S.C. § 794(b)(3). Both provisions are enforceable through private causes of action.”).

think is the non-issue of *Younger* abstention, and, finally, we survey the bevy of statutory complications in the Immigration and Nationality Act.

*A. State and Federal Criminal Incarceration: The Prison Litigation Reform Act*<sup>183</sup>

Anyone bringing a federal civil case involving criminal (not immigration)<sup>184</sup> incarceration needs to worry about the 1996 Prison Litigation Reform Act,<sup>185</sup> a statute that limits access to courts for incarcerated people and constrains the remedies available in the cases they do manage to bring.<sup>186</sup>

1. *Exhaustion of administrative remedies.*

The PLRA requires incarcerated people bringing federal lawsuits to first pursue internal jail/prison grievance systems. It states: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”<sup>187</sup> Although the Supreme Court has been clear that exhaustion is *not* required when no remedy at all is available via the grievance system,<sup>188</sup> there is no exemption from the requirement just because the *preferred* remedy is unavailable.<sup>189</sup> Moreover, the Supreme Court has held that the PLRA imposes not just a ripeness-type timing rule but a procedural bar—exhaustion must be not merely complete but “proper,” following all jail-imposed rules, such as time limits, use of specified forms, etc.<sup>190</sup> The PLRA exhaustion requirement has functioned to narrow access to courts because following the (often unclear, internally contradictory, or onerous) rules can be ex-

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<sup>183</sup> We lean heavily in this subsection on JOHN BOSTON, *THE PLRA HANDBOOK: LAW AND PRACTICE UNDER THE PRISON LITIGATION REFORM ACT* (2022).

<sup>184</sup> *See, e.g.,* *Agyeman v. I.N.S.*, 296 F.3d 871, 887 (9th Cir. 2002) (immigration detainees not covered by the PLRA); *LaFontant v. I.N.S.*, 135 F.3d 158, 165 (D.C. Cir. 1998) (same); *Ojo v. I.N.S.*, 106 F.3d 680, 683 (5th Cir. 1997) (same); *Cohen v. Clemens*, 321 Fed. Appx. 739, 743 (10th Cir. 2009) (same).

<sup>185</sup> Prison Litigation Reform Act, Pub. L. No. 104–134, §§ 801–810, 110 Stat. 1321, 1321–66 to –77 (1996) (codified as amended at 11 U.S.C. § 523 (2012); 18 U.S.C. §§ 3624, 3626 (2012); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2012); 42 U.S.C. §§ 1997a–c, e–f, h (2012)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321.

<sup>186</sup> For in-depth examination of the PLRA’s impact on damage actions, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). For in-depth examination of the PLRA’s impact on injunctive litigation, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006). For statistics on the statute’s impact, see Margo Schlanger, *Trends in Prisoner Litigation, As the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015), and an update posted as Margo Schlanger, *Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics, 1970–2021* (April 16, 2022), <https://ssrn.com/abstract=4085142> [<https://perma.cc/KP39-685C>].

<sup>187</sup> 42 U.S.C. § 1997e(a).

<sup>188</sup> *See* *Ross v. Blake*, 578 U.S. 632, 642–46 (2016).

<sup>189</sup> *See* *Booth v. Churner*, 532 U.S. 731 (2001).

<sup>190</sup> *See* *Woodford v. Ngo*, 548 U.S. 81 (2006).

tremely difficult, particularly for incarcerated people with communications or intellectual disabilities or with mental illness.

One approach to PLRA exhaustion is to avoid it—that is, to choose procedural vehicles for ADA/Rehabilitation Act enforcement that lie outside of the PLRA exhaustion requirement. For example, assertion of ADA/Rehabilitation Act rights in criminal/bond proceedings is not an “action brought with respect to prison conditions.”<sup>191</sup> Habeas actions may well also be excluded<sup>192</sup> because they are subject to their own exhaustion requirements (beyond the ambit of this article), and because courts have interpreted the exhaustion provision’s reach with reference to the PLRA’s prospective relief provisions, which cover “any civil action with respect to prison conditions,”<sup>193</sup> and define that term expressly to exclude “habeas corpus proceedings challenging the fact or duration of confinement in prison.”<sup>194</sup> Finally, because only cases brought by “prisoner[s]” are covered, claims in cases brought by an incarcerated person’s family or guardian, or by an organization (such as one of the federally-funded disability-focused Protection and Advocacy organizations) need not have exhausted grievance systems prior to filing.<sup>195</sup>

There’s also a more general argument that exhaustion does not apply because a case hinging on denial of equal access to criminal proceedings is not one “brought with respect to prison conditions.” In *Porter v. Nussle*, the Court rejected lower court precedent that the exhaustion provision’s reference to “action[s] . . . brought with respect to prison conditions” did not limit single-incident or excessive force cases; it held that the exhaustion requirement covers conditions suits, “whether they involve general circum-

<sup>191</sup> See, e.g., *United States v. Hashimi*, 621 F. Supp. 2d 76, 84–85 (S.D.N.Y. 2008) (finding that a motion by a detainee in a government-initiated criminal case is not an “action” covered by PLRA exhaustion); *United States v. Savage*, 2012 WL 5866059, at \*3 (E.D. Pa. Nov. 16, 2012) (no exhaustion required for motions that “affect[ ] Defendant’s ability to prepare his defense”).

<sup>192</sup> See *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 634 (2d Cir. 2001), and cases cited; *Baez v. Moniz*, 460 F. Supp.3d 78, 82–83 (D. Mass. 2020) (holding PLRA exhaustion inapplicable to habeas proceeding seeking release based on prison conditions); *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 437 n.19 (D. Conn. 2020) (same). Note, however, that in some but not all circuits, habeas is disallowed as a vehicle for conditions-related challenges. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862–63 (“We have left open the question whether [detainees] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus.”); *Hallinan v. Scarantino*, 466 F. Supp. 3d 587, 601–02 (E.D.N.C. 2020) (collecting lower court cases on both sides of the question). Whether the challenge described here would count as too “conditions-related” for habeas is unclear. If habeas is available, as stated in text, the PLRA by its terms does not apply to “habeas corpus proceedings challenging the fact or duration of confinement in prison.” In our view, the challenge described, if brought under habeas, aligns with this description and therefore should be exempt from the PLRA. But—in the context of COVID claims brought in the past several years—courts are, again, all over the map. Compare, e.g., *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, with, e.g., *Alvarez v. Larose*, 456 F. Supp. 3d 861, 866 (S.D. Cal. 2020) (holding PLRA applicable to Eighth Amendment habeas case seeking release based on COVID-risk).

<sup>193</sup> 18 U.S.C. § 3626(a)(1)(A).

<sup>194</sup> 18 U.S.C. § 3626(g)(2).

<sup>195</sup> See, e.g., *Rivera-Rodriguez v. Pereira-Castillo*, No. 04-cv-1389, 2005 WL 290160, at \*5–6 (D.P.R. Jan. 31, 2005) (prisoner’s guardian); *Ala. Disabilities Advoc. Program v. Wood*, 584 F. Supp. 2d 1314, 1316 (M.D. Ala. 2008) (state Protection and Advocacy organization).

stances or particular episodes, and whether they allege excessive force or some other wrong.”<sup>196</sup> In so doing, the *Porter* Court pointed to *Preiser v. Rodriguez*, which, it explained, “described [the] two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement.”<sup>197</sup> Because claims asserting this article’s theory challenge “the fact or duration of confinement,” the *Preiser* divide might exclude them from PLRA exhaustion coverage.<sup>198</sup>

## 2. Prisoner Release Orders

As mentioned above, the PLRA limits prospective remedies in “any civil action with respect to prison conditions.” This is defined as “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.”<sup>199</sup> (“Prison” is further defined to include pretrial detention.<sup>200</sup>)

The prospective relief limits, which require provisions to be closely tailored and necessary to correct the federal law violation,<sup>201</sup> merely reflect general equitable principles, but their codification has clearly made courts more attentive to those ideals of restraint.<sup>202</sup> More drastically, the PLRA applies the same requirements to consent judgments, which otherwise can include whatever provisions the parties chose to agree to, as long as they had a visible relationship to the complaint.<sup>203</sup> More importantly, the statute makes it something between difficult and impossible to obtain a “prisoner release or-

<sup>196</sup> 534 U.S. 516, 532 (2002).

<sup>197</sup> *Id.*

<sup>198</sup> It’s for this reason that false arrest and wrongful conviction cases are not covered by PLRA exhaustion. *See, e.g., Cantu v. Bexar Cnty.*, No. SA-17-CA-306, 2018 WL 1419345 (W.D. Tex. Mar. 22, 2018), and other cases cited by JOHN BOSTON, *THE PLRA HANDBOOK: LAW AND PRACTICE UNDER THE PRISON LITIGATION REFORM ACT* 117 n.205 (2022). On the other hand, some courts have been more aggressive in their interpretation of the PLRA’s coverage. *See, e.g., United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (holding that statutorily required collection of DNA is a prison condition); *Martin v. Iowa*, 752 F.3d 725, 727 (8th Cir. 2014) (holding challenge to lack of in-person parole interviews must be exhausted since it was a “civil action with respect to prison conditions,” citing the definition from 18 U.S.C. § 3626(g), governing another part of the PLRA).

<sup>199</sup> 18 U.S.C. § 3626(g)(2).

<sup>200</sup> 18 U.S.C. § 3626(g)(5).

<sup>201</sup> 18 U.S.C. § 3626(a)(1).

<sup>202</sup> *See, e.g., Georgia Advoc. Off. v. Jackson*, 4 F.4th 1200, 1209 (11th Cir. 2021), *vacated on other grounds*, 33 F.4th 1325 (11th Cir. 2022) (stating “the PLRA supercharges some of the traditional equitable principles of injunctive relief”).

<sup>203</sup> *See Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986) (stating consent decree terms must only “spring from and serve to resolve a dispute within the court’s subject-matter jurisdiction, . . . com[e] within the general scope of the case made by the pleadings, . . . further the objectives of the law upon which the complaint was based,” (citations and internal quotation marks omitted)).

der”<sup>204</sup>—that is, an order “that directs the release from or nonadmission of prisoners to a prison.”<sup>205</sup> Such an order can be granted only if “(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders,” and only after a three-judge court finds (by clear and convincing evidence) that “(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right.”<sup>206</sup> Defendants may appeal any prisoner release order, as of right, directly to the U.S. Supreme Court.<sup>207</sup>

If the PLRA’s limits on prisoner release orders apply to the kind of remedy urged here—an order directing that a person with a disability not be incarcerated because that incarceration undermines equal access to a court proceeding—those limits might well pose an insurmountable barrier. But, as with exhaustion, there are occasions when the release order provisions should not apply. As with exhaustion, the statute does not cover immigration detention. And, again, even as to criminal detention, the prisoner release order provisions simply have no application to criminal proceedings (including bond/bail hearings).<sup>208</sup> (Their application to habeas cases is currently highly contested.)

When the PLRA covers a particular action, an order releasing prisoners from incarceration whose purpose is to limit population is certainly constrained. But some courts have held that orders serving other purposes are not. For example, an order banning the housing of juveniles in a jail for more than 15 days, entered because the jail’s conditions were unacceptable for children, has been held not to be a prisoner release order.<sup>209</sup> Likewise, an order directing transfer of a quadriplegic prisoner to a civilian medical facility when the court concluded his care was so inadequate in prison that he would die if left there.<sup>210</sup> The district court explained that, when Congress limited entry of a prisoner release order to cases in which “crowding is the primary cause of the violation of a Federal right,” it signaled that orders implement-

<sup>204</sup> 18 U.S.C. § 3626(a)(3); *See Brown v. Plata*, 563 U.S. 493 (2011).

<sup>205</sup> 18 U.S.C. § 3626(g)(4).

<sup>206</sup> 18 U.S.C. § 3626(a)(3).

<sup>207</sup> *Id.*

<sup>208</sup> *See supra* note 192.

<sup>209</sup> *Doe v. Younger*, No. 91-cv-187, Op. and Order at 10–12 (E.D. Ky., Sept. 4, 1996), <https://clearinghouse.net/doc/105408/> [<https://perma.cc/8P4-97X2>].

<sup>210</sup> *Reaves v. Dep’t of Corr.*, 404 F. Supp. 3d 520, 522–23 (D. Mass. 2019) (noting that the order called for transfer, not release; that it involved only a single prisoner; and that it was not primarily intended to relieve crowding), *appeal dismissed as moot*, No. 19-2089 (1st Cir., Dec. 14, 2021). *See also Plata v. Brown*, 427 F. Supp. 3d 1211, 1222 (N.D. Cal. 2013) (“Defendants conceded that an order to transfer any single inmate out of a prison to correct the violation of a constitutional right caused by something other than crowding—for example, because transfer was necessary for the inmate to obtain appropriate medical care—would not be a ‘prisoner release order.’”).



ing other constitutional rights and entirely unrelated to crowding were not covered by this PLRA provision.<sup>211</sup>

### B. *State Criminal Cases: Younger Abstention*

The Supreme Court held in *Younger v. Harris* that when a party in federal court is simultaneously defending a state criminal prosecution, federal courts “should not act to restrain [the state] criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”<sup>212</sup> But such “*Younger* abstention” does not cover the theory presented here. In *Pugh v. Rainwater*, the Fifth Circuit explained that *Younger* abstention does not bar federal court adjudication of “procedural rights” if the plaintiff “seeks to challenge an aspect of the criminal justice system which adversely affects him but which cannot be vindicated in the state court trial.” “Where . . . the relief sought is not ‘against any pending or future court proceedings as such,’ *Younger* is inapplicable.”<sup>213</sup> Thus, *Younger* dictates abstention when a state court defendant challenges the merits of his criminal prosecution in federal court—for example, attempting to suppress the evidence presented in state court based on an unconstitutional search and seizure—but abstention is inappropriate where a federal case challenges “an aspect of the criminal justice system which adversely affects” him but is unrelated to the merits of the prosecution itself.<sup>214</sup>

The Supreme Court endorsed this approach in its review of *Pugh v. Rainwater*, re-captioned *Gerstein v. Pugh*, warning against over-abstention. Affirming an injunction ordering the state to provide “timely judicial determination of probable cause as a prerequisite to detention,”<sup>215</sup> the Court noted that *Younger* abstention was not appropriate because “[t]he injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution,” and because “[t]he order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.”<sup>216</sup>

More generally, the Court has made clear that “a federal court’s ‘obligation’ to hear and decide a case is ‘virtually unflagging.’”<sup>217</sup> The Courts of Appeals have similarly emphasized that “*Younger* abstention remains an ex-

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<sup>211</sup> *Reaves*, 404 F. Supp. 3d at 523. Schlanger has similarly argued in prior work that court orders whose purpose is protection, not population reduction—for example, orders “diverting classes of vulnerable persons from incarceration”—are not PLRA prisoner release orders. See Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 1, 27–28 (2016).

<sup>212</sup> 401 U.S. 37, 43–44 (1971).

<sup>213</sup> *Id.* at 781–82.

<sup>214</sup> *Pugh*, 483 F.2d at 782.

<sup>215</sup> *Gerstein v. Pugh*, 420 U.S. 126 (1975).

<sup>216</sup> *Id.* at 108 n.9.

<sup>217</sup> *Sprint Commc’ns v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

traordinary and narrow exception to the general rule.”<sup>218</sup> In recent years, many federal courts have rejected *Younger* abstention arguments to entertain challenges to state court bail procedures, holding that abstention is incorrect just as in *Gerstein*.<sup>219</sup> Even in individual cases, federal courts have granted review and relief relating to unlawful bail proceedings. For example, the Ninth Circuit recently explained that habeas relief was warranted in one such case and that “*Younger* abstention is not appropriate in this case because the issues raised in the bail appeal are distinct from the underlying criminal prosecution and would not interfere with it. Regardless of how the bail issue is resolved, the prosecution will move forward unimpeded.”<sup>220</sup>

In addition, case law emphasizes that *Younger* itself calls for abstention only “when the moving party has an adequate remedy at law *and* will not suffer irreparable injury if denied equitable relief.”<sup>221</sup> The absence of a state court forum or the inability of that state court forum to grant relief before irreparable harm occurs both dictate non-abstention.<sup>222</sup>

While these precedents are currently under attack,<sup>223</sup> while they stand, they compel non-abstention in the circumstances here. A federal lawsuit could seek to vindicate the ADA rights in question in one of two ways. An injunctive case could seek reform of bail procedures to grant reasonable modifications where required by the ADA/Rehabilitation Act; such a lawsuit escapes abstention by following in the footsteps of *Gerstein* and the recent bail-procedure-modification cases. Or, a habeas case could seek release mandated by the ADA/Rehabilitation Act, if the state proceedings declined either to consider or grant such release. Such a case likewise escapes abstention on demonstration of the absence of an adequate state remedy at law and/or the presence of irreparable harm.

<sup>218</sup> *Cook v. Harding*, 879 F.3d 1035, 1038 (9th Cir. 2018) (quoting *Nationwide Biweekly Admin. v. Owen*, 873 F.3d 716, 727 (9th Cir. 2017) (internal quotation marks omitted)).

<sup>219</sup> See *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018); *O'Donnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018); *Arevalo v. Hennessy*, 882 F.3d 763 (9th Cir. 2018); *Parga v. Bd. of Cnty. Commissioners of Cnty. of Tulsa*, No. 18-cv-0298, 2019 WL 1231675 (N.D. Okla. Mar. 15, 2019); *Booth v. Galveston Cnty.*, 352 F. Supp. 3d 718 (S.D. Tex. 2019); *Caliste v. Cantrell*, No. 17-6197, 2017 WL 3686579 (E.D. La. Aug. 25, 2017), *aff'd* 937 F.3d 525 (5th Cir. 2019); *Little v. Frederick*, No. 17-cv-00724, 2017 WL 8161160 (W.D. La. Dec. 6, 2017), adopted in relevant part, 2018 WL 1221119 (Mar. 8, 2018); *Welchen v. Cnty. of Sacramento*, No. 16-cv-00185, 2016 WL 5930563 (E.D. Cal. Oct. 11, 2016); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015).

<sup>220</sup> *Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018); see also *Atkins v. Michigan*, 644 F.2d 543, 549 (6th Cir. 1981) (“The issue of whether the right to bail has been denied is collateral to and independent of the merits of the case pending against the detainee. . .”).

<sup>221</sup> *Younger v. Harris*, 401 U.S. 37, 43–44 (1971) (emphasis added).

<sup>222</sup> See, e.g., *Arevalo*, 882 F.3d at 766–67; *Page v. King*, 932 F.3d 898, 903–04 (9th Cir. 2019).

<sup>223</sup> See *Daves v. Dallas Cnty., Texas*, 22 F.4th 522, 547–48 (5th Cir. 2022) (en banc) (remanding bail class action for plenary consideration of *Younger* abstention notwithstanding the rejection of an analogous claim for abstention in *O'Donnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018), and retaining en banc jurisdiction, noting “After the remand, the en banc court will take a fresh look at *Younger*, at which time we will have authority to re-evaluate our own precedent.”).

### C. Immigration Cases

#### 1. Mandatory Detention

A limited number of cases, involving immigration detention of noncitizens subject to so-called statutory “mandatory detention,” present the possibility that our interpretation of the Rehabilitation Act could conflict with (later-in-time) provisions of the Immigration and Nationality Act.<sup>224</sup> The Supreme Court has repeatedly emphasized that “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”<sup>225</sup> Presented with two statutes, courts should harmonize them, “regard[ing] each as effective”—unless Congress’s intention to repeal is “clear and manifest,” or the two laws are “irreconcilable.”<sup>226</sup>

The INA’s “mandatory detention” provision directs the federal government to “take into custody any alien who [meets certain criteria related to criminal history] when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.”<sup>227</sup> Further, it limits subsequent release of such individuals to circumstances related to witness protection.

However, assuming in a given case that the mandatory detention statute is constitutional—and numerous courts have upheld as-applied challenges under the Due Process Clause, when detention has become prolonged<sup>228</sup>—an interpretation of the INA consistent with the understanding here offered of the Rehabilitation Act is readily available. The government has long and consistently implemented the statute with the understanding that it does not override agency discretion to avoid detention for humanitarian reasons. In a detailed declaration,<sup>229</sup> one former official canvassed the policies and parameters ICE has used to channel such discretion,<sup>230</sup> and summarized: “Even

<sup>224</sup> See 8 U.S.C. § 1226(c).

<sup>225</sup> *FCC v. NextWave Personal Commc’ns Inc.*, 537 U.S. 293, 304 (2003) (internal quotation marks omitted). See also, e.g., *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020).

<sup>226</sup> *Morton v. Mancari*, 417 U.S. 535, 550–51 (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

<sup>227</sup> 8 U.S.C. § 1226(c).

<sup>228</sup> See, e.g., *German Santos v. Warden, Pike Cnty. Corr. Facility*, 965 F.3d 203 (3d Cir. 2020).

<sup>229</sup> Declaration of Andrew Lorenzen-Strait, *Fraihat v. U.S. Immigration and Customs Enforcement*, Case 5:19-cv-01546-JGB-SHK Document 81-14, 92 (Mar. 24, 2020), <https://www.splcenter.org/sites/default/files/documents/declarations.pdf> [<https://perma.cc/328M-4LTY>].

<sup>230</sup> Para. 4, n.1 of the Declaration cited, as examples, *Detention Reform*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/detention-reform#tab1> [<https://perma.cc/U4A8-74F7>] (last updated July 24, 2018) (referencing use of risk classification assessment tools that “require[ ] ICE officers to determine whether there is any special vulnerability that may impact custody and classification determinations”); ICE ENF’T AND REMOVAL OPERATIONS, DIRECTIVE 11071.1: ASSESSMENT AND ACCOMMODATIONS FOR DETAINEES WITH DISABILITIES

individuals held under [§ 1226(c)] were released pursuant to ICE’s guidelines and policies, particularly where the nature of their illness could impose substantial health care costs or the humanitarian equities mitigating against detention were particularly compelling.”<sup>231</sup> Concretizing this government understanding, in case after case, ICE has released noncitizens facing serious medical risks due to immigration detention, deeming those releases lawful even though those individuals were covered by 8 U.S.C. § 1226(c).<sup>232</sup>

The government has only recently offered much analysis in support of its flexible interpretation of 1226(c).<sup>233</sup> While at least two district courts have found that interpretation contrary to law, focusing on the statutory use of the word “shall,”<sup>234</sup> the Sixth Circuit has disagreed.<sup>235</sup> It seems to us that flexibility is correct under either or both of two theories: First, “custody” for purposes of this provision of the INA is arguably not limited to detention,<sup>236</sup> but also includes “other forms of physical restraint”<sup>237</sup> such as travel restrictions or electronic monitoring,<sup>238</sup> typically imposed on the noncitizens released

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9 (Dec. 15, 2016), <https://www.aila.org/infonet/ice-er-directive-detainees-with-disabilities> [<https://perma.cc/M4S4-274Y>] (providing for release as an option for detainees with disabilities); DORIS MEISSNER, IMMIGR. AND NATURALIZATION SERVS., EXERCISING PROSECUTORIAL DISCRETION 11 (Nov. 17, 2000), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf> [<https://perma.cc/VE54-2DNH>] (citing “aliens with a serious health concern” as a trigger for the favorable exercise of discretion).

<sup>231</sup> Declaration of Andrew Lorenzen-Strait, *supra* note 229, para. 11.

<sup>232</sup> See Br. of American Immigr. Council as Amicus Curiae in Supp. of Pet’rs-Appellees, *Hope v. Warden York Cnty. Prison*, No. 20-1784 (3d Cir. 2020) (describing such cases), [https://www.americanimmigrationcouncil.org/sites/default/files/amicus\\_briefs/hope\\_et\\_al\\_v\\_doll\\_et\\_al\\_amicus\\_brief.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/amicus_briefs/hope_et_al_v_doll_et_al_amicus_brief.pdf) [<https://perma.cc/LE9H-92C2>].

<sup>233</sup> The most sustained defense of which we are aware appears in briefs filed in support of the Biden Administration’s prioritization policy, in *Texas v. United States*, No. 6:21-cv-00016; see in particular Defs.’ Mem. of P. & A. in Opp’n to Pls.’ Mot. for Prelim. Inj., Doc. 42, at 22–24 (May 18, 2021), <https://clearinghouse.net/doc/130692/> [<https://perma.cc/DC2L-BKGY>], and Defs.’ Post-Trial Mem. of Law, Doc. 223, at 8–19 (Mar. 18, 2022), <https://clearinghouse.net/doc/130691/> [<https://perma.cc/K4G2-8N3Q>].

<sup>234</sup> See *Texas v. United States*, 555 F. Supp. 3d 351 (S.D. Tex. 2021), *stay granted*, 14 F.4th 332 (5th Cir. 2021), *stay vacated*, 24 F.4th 407 (5th Cir. 2021), *appeal dismissed*, No. 21-40618, 2022 WL 517281 (Feb. 11, 2022); *Arizona v. Biden*, No. 3:21-cv-314, 2022 WL 839672 (S.D. Ohio, Mar. 22, 2022), *stay granted*, 31 F.4th 469 (6th Cir. 2022).

<sup>235</sup> See *Arizona v. Biden*, 31 F.4th 469, 480 (6th Cir. 2022).

<sup>236</sup> See *Matter of Aguilar-Aquino*, 24 I. & N. Dec. 747 (B.I.A. 2009), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3634.pdf> [<https://perma.cc/QA79-5GWC>] (“[W]e recognize that both a person who has been released on parole and one who remains incarcerated can be considered to be in “custody.” On the other hand, the term “detain” generally refers to actual physical restraint or confinement within a given space.”). The Board found that 8 U.S.C. § 1226(a) did not intend any such distinction, looking at its legislative history. But the legislative history of section 1226(c) has no similar hints.

<sup>237</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830, 850 (2018).

<sup>238</sup> Textually, section 8 U.S.C. 1226(c)’s use of “custody” contrasts with references elsewhere in the INA to “detain” or “detention.” See, e.g., INA § 225(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii) (if an immigration “officer determines at the time” of an initial interview with an alien seeking to enter the United States “that [the] alien has a credible fear of persecution . . . , the alien shall be detained”); INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (“Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”). INA § 236(a), 8 U.S.C. § 1226(a) (“On a warrant issued by the

from detention notwithstanding their apparent coverage by § 1226(c). Second, the Supreme Court has emphasized that “[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes,” and underscored more generally “the deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands.”<sup>239</sup> To do otherwise with respect to immigration detention would present grave implementation difficulties to the executive agencies forced to detain individuals they have strong reason to prefer to leave at liberty, given limited incarcerative and prosecutorial capacity. The Sixth Circuit focused on this second issue, and also pointed out that § 1226(c)’s “shall” cannot plausibly be read as absolute, given § 1231(a)(2)’s even stronger dictate with respect to a different group of noncitizens that “[u]nder no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible.”<sup>240</sup> Whichever the theory in support of the flexible interpretation that has guided federal practice since enactment of § 1226(c), plenty of room remains for the Rehabilitation Act theory described here. Indeed, it would constitute disability discrimination to allow flexibility for policy reasons but bar similar flexibility when required by the Rehabilitation Act theory.

## 2. *Jurisdictional Limits*

Four provisions of the Immigration and Nationality Act (INA) potentially pose jurisdictional obstacles to the approach just laid out for people in immigration detention. We argue that, under established jurisprudence, none of the four apply to the claim contemplated in this article. This subpart takes them in turn.

### i. 8 U.S.C. §§ 1252(b)(9) (“the Zipper Clause”) and 1252(a)(5)

In 8 U.S.C. § 1252(b)(9), the INA channels claims “arising from any action taken or proceeding brought to remove” noncitizens into immigration proceedings before an immigration judge, with appeal to the Board of Immigration Appeals and then review the court of appeals. When it applies, the clause forecloses petitions for habeas corpus and other lawsuits in the district court; the Supreme Court has dubbed it a “zipper clause,”<sup>241</sup> intended by

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Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. . . .”). Structurally, the interpretation offered here preserves a distinction between 8 U.S.C. § 1226(a), which allows release on bond or without conditions, and 8 U.S.C. § 1226(c), which insists that (absent a humanitarian situation) ICE maintain “custody”—meaning, according to *Jennings*, that non-incarceration is allowed only if there are significant restraints on physical liberty. Likewise, our interpretation maintains the difference between section 1226(c) and section 1226A, which more clearly references incarceration, disallowing release under various circumstances and requiring that “detention pursuant to this subsection shall terminate” only if a noncitizen is deemed non-removable.

<sup>239</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–61 (2005).

<sup>240</sup> *Arizona v. Biden*, 31 F.4th 469, 481 (6th Cir. 2022).

<sup>241</sup> *See INS v. St. Cyr*, 533 U.S. 289, 313 (2001).

Congress “to ‘consolidate judicial review of immigration proceedings into one action in the court of appeals.’”<sup>242</sup> Even so, the Supreme Court explained in *Jennings v. Rodriguez* that the provision has no application in a case in which the noncitizens “are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined.”<sup>243</sup> In *Jennings*, six members of the (fractured) Court held that the provision simply does not cover challenges to ongoing detention (for example, claims that detention had grown so prolonged as to violate the Due Process Clause). The three-Justice plurality decision, by Justice Alito, explained that an unduly broad reading of the words “arising from”—under which § 1252(b)(9) would bar every claim with any relation to removal—would improperly “make claims of prolonged detention effectively unreviewable,” and cause “extreme” and “staggering results” “no sensible person could have intended.”<sup>244</sup> The plurality wrote, similarly, that “cramming judicial review of” a claim “based on allegedly inhumane conditions of confinement” into “the review of final removal orders would be absurd.”<sup>245</sup> Justice Breyer, writing for the three dissenters, argued more comprehensively that only direct challenges to orders of removal were covered.<sup>246</sup> Both before and since *Jennings*, the courts of appeals have implemented a simple detention/removal distinction: the zipper clause is about challenges to removal, not to ongoing detention.<sup>247</sup> Thus habeas claims at-

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<sup>242</sup> See *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020) (quoting and citing *Sz. Cyr*, 533 U.S. at 313).

<sup>243</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 839–41. See also *S. Poverty Law Ctr. v. U.S. Dep’t of Homeland Sec.*, No. 18-cv-760, 2020 WL 3265533, at \*14–18 (D.D.C. June 17, 2020), *appeal dismissed sub nom.* *S. Poverty L. Ctr. v. U.S. Dep’t of Homeland Sec.*, No. 20–5257, 2021 WL 1438297 (D.C. Cir. Apr. 14, 2021); *Malam v. Adducci*, No. 20-cv-10829, 2020 WL 1672662, at \*5 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020).

<sup>246</sup> True, concurring in part and in the judgment, Justice Thomas (joined by Justice Gorsuch) disagreed, resting weight on the fact that detention decisions both “congressionally authorized” and “meant to ensure that an alien can be removed.” The concurrence concluded that the jurisdictional bar “covers an alien’s challenge to the fact of his detention (an action taken in pursuit of the lawful objective of removal)” though not “claims about inhumane treatment, assaults, or negligently inflicted injuries suffered during detention (actions that go beyond the Government’s lawful pursuit of its removal objective).” *Jennings v. Rodriguez*, 138 S. Ct. 830, 855 (2018) (Thomas, J., concurring in the judgment). It is not clear to us which side of this line describes the claim presented in this article—but in any event, six justices rejected this approach, both in 2018 in *Jennings* itself and the next year, in *Nielsen v. Preap*, 139 S. Ct. 954 (2019) (in which all the justices repeated their prior takes).

<sup>247</sup> See, e.g., *Gonzalez v. U.S. Immigr. & Customs Enf’t*, 975 F.3d 788, 810 (9th Cir. 2020); *Tazu v. Att’y Gen. United States*, 975 F.3d 292, 299 (3d Cir. 2020); *Aguilar v. U.S. Immigr. & Customs Enf’t Div. of Dep’t of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007) (reading “arising from” “to exclude claims that are independent of, or wholly collateral to, the removal process” and identifying “challenges to the legality of detention” as squarely outside § 1252(b)(9)’s scope); *Hernandez v. Gonzales*, 424 F.3d 42, 42–43 (1st Cir. 2005) (holding that detention claims are independent of removal proceedings and, thus, not barred by section 1252(b)(9)).

tacking immigration detention decisions as unduly prolonged<sup>248</sup> are, in fact, commonplace.<sup>249</sup>

Here, the Rehabilitation Act claim is that, due to the impacts of immigration detention, people with disabilities cannot meaningfully participate in bond proceedings. Under *Jennings's* analysis, § 1252(b)(9) poses no obstacle; the claim falls clearly on the detention side of the line. Admittedly, challenges that rest on the right of disabled people in immigration detention to meaningfully access their removal proceedings have a causal connection to the underlying removal proceeding. Still, what is unlawful is the detention, under its actual conditions, and that illegality does not turn on whether the noncitizen wins or loses the removal case;<sup>250</sup> the relief sought neither forecloses nor dictates any immigration relief or protection.

Thus, the removal process claim that is the subject of this article is unlike *J.E.F.M. v. Lynch*,<sup>251</sup> in which the Ninth Circuit ruled that a juvenile's claims to an attorney in removal proceedings "arose from" removal proceedings and were barred from habeas review by § 1252(b)(9). Unlike our theory, *J.E.F.M.'s* claim had nothing to do with detention. Interpreting § 1252(b)(9) to exempt detention challenges makes sense because, the *Jennings* opinions suggest, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one," allowing claims that would otherwise escape Article III judicial review to be brought separately. As the Third Circuit has explained, relying heavily on *Jennings*, "[t]he point of the provision is to channel claims into a single petition for review, not to bar claims that do not fit within that process." The Third Circuit framed the test as whether the claim is one that must be asserted "now or never:" whether the noncitizen "seek[s] relief that courts cannot meaningfully provide alongside review of a final order of removal."<sup>252</sup> The claim here fits this analysis to a T: without access to a collateral proceeding, as through an injunctive or habeas action, a person in pre-order immigration detention cannot obtain meaningful review of the Reha-

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<sup>248</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>249</sup> See, e.g., *Anariba v. Dir. Hudson Cnty. Corr. Ctr.*, 17 F.4th 434 (3d Cir. 2021).

<sup>250</sup> Thus the theory is unlike challenges to conditions of confinement noncitizens have offered to undermine the validity of their removal orders; such challenges are "inextricably linked to the order of removal," *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (internal quotation marks and citation omitted), and constitute "attempt[s] to reverse the agency's decisions." *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 75 (D.D.C. 2018). See also *So. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec.*, No. 18-cv-760, 2020 WL 3265533, at \*17–18 (D.D.C. June 17, 2020), *appeal dismissed sub nom.* *So. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec.*, No. 20-5257, 2021 WL 1438297 (D.C. Cir. Apr. 14, 2021); *P.L. v. U.S. Immigr. & Customs Enf't*, No. 1:19-cv-01336, 2019 WL 2568648, at \*3 (S.D.N.Y. June 21, 2019).

<sup>251</sup> 837 F.3d 1026 (9th Cir. 2016).

<sup>252</sup> *Id.* at 184. See also *Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007) (explaining that § 1252(b)(9) does not reach "claims that are independent of, or wholly collateral to, the removal process," like "claims that cannot effectively be handled through the available administrative process"); *Gicharu v. Carr*, 983 F.3d 13, 16 (1st Cir. 2020) (same).

bilitation Act claim we describe; waiting until a petition for review would prolong the period discriminatory detention by months or even years.<sup>253</sup>

Similarly, 8 U.S.C. § 1252(a)(5) poses no bar. Under this “exclusive means of review” provision, “a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e).” But it is evident from the text and established in case law that (a)(5) does “not preclude habeas review over challenges to detention that are *independent of challenges to removal orders*.”<sup>254</sup> Here, the relief contemplated is unrelated to any immigration outcome. Determining whether a challenge is independent “will turn on the substance of the relief that a plaintiff is seeking.”<sup>255</sup>

ii. 8 U.S.C. § 1252(g)

A second INA provision, 8 U.S.C. § 1252(g), strips district court jurisdiction over “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to *commence proceedings, adjudicate cases, or execute removal orders* against any alien under this chapter.”<sup>256</sup> The Supreme Court has made clear that italicized words mean what they say:

We did not interpret this language to sweep in any claim that can technically be said to “arise from” the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves.<sup>257</sup>

Decisions to use pre-order detention do not “commence proceedings,” “adjudicate cases” or “execute removal orders,” so § 1252(g) has no application.

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<sup>253</sup> If a disabled noncitizen was deprived of meaningful access to his immigration proceedings because of his disability, and lost his claim for protection or relief for that reason, he might, however, be able to seek review of that *immigration* claim in a PFR, alleging a Rehabilitation Act violation. Of course this could not cure unlawful detention, because such detention already took place.

<sup>254</sup> See *Singh v. Gonzales*, 499 F.3d 969, 978 (9th Cir. 2007); see also *Gbotoe v. Jennings*, No. 17-cv-06819-WHA, 2017 WL 6039713, \*2–4 (N.D. Cal. Dec. 6, 2017).

<sup>255</sup> *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (quoting *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011)). The analysis in *Southern Poverty Law Center v. United States Dep’t of Homeland Security*, No. 18-cv-760, 2022 WL 1801150, at \*6 (D.D.C. June 2, 2022), is slightly different—and slightly worse for our argument. There, the district court barred Fifth Amendment access-to-counsel claims that, it said, revolved entirely around the conditions’ effects on Fifth Amendment rights as to removal proceedings, but allowed access-to-counsel claims related to bond or non-immigration proceedings.

<sup>256</sup> (emphasis added).

<sup>257</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999)).



*iii. 8 U.S.C. § 1252(f)*

A final INA provision, 8 U.S.C. § 1252(f), deprives any court “(other than the Supreme Court)” of “jurisdiction or authority to enjoin or restrain the operation of the provisions of Part IV of this subchapter, . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” The Supreme Court has noted that this language “prohibits federal courts from granting classwide injunctive relief . . . , but specifies that this ban does not extend to individual cases.”<sup>258</sup> Moreover, it may not prohibit classwide declaratory relief.<sup>259</sup>

### CONCLUSION

When pretrial incarceration discriminates against individuals with disabilities, unequally undermining their access to their criminal or immigration cases without a persuasive public safety need, federal antidiscrimination law requires their release. The precise argument we have made is novel, but it rests solidly on existing statutory and regulatory provisions, and their judicial elaboration. We have, ourselves, worked several times with people in pretrial incarceration to raise the argument, with good (though not precedential) results. We conclude with our hope that many more legal practitioners—including individuals representing themselves—will use and build on our argument to mitigate the injury unnecessary pretrial incarceration is, right now, causing thousands of people with disabilities, harming their health and livelihoods and their access to the legal processes that purport to justify their incarceration.

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<sup>258</sup> *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 481–82.

<sup>259</sup> See *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 n.2 (2022); *id.* at 2077–78 (2022) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

