No. 20-1374

In the Supreme Court of the United States

CVS PHARMACY, INC.; CAREMARK, L.L.C.; CAREMARK CALIFORNIA SPECIALTY PHARMACY, L.L.C.;
PETITIONERS,

v.

JOHN DOE, ONE; JOHN DOE, TWO; JOHN DOE, THREE; JOHN DOE, FOUR; JOHN DOE, FIVE; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED;
RESPONDENTS.

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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

The circuits are fractured 4-1 over whether the Rehabilitation Act, and by extension the Affordable Care Act, create a disparate-impact cause of action for disability discrimination. The courts that recognize disparate-impact claims are further split over whether such claims encompass challenges to facially neutral terms and conditions of health insurance plans. Both questions are squarely presented and outcome-determinative. The Ninth Circuit staked out an extreme new position in that entrenched battle, holding that disparate-impact claims are available to invalidate facially neutral health and pharmacy benefit

plans that purportedly fail to satisfy the unique medical needs of individuals with disabilities.

This holding poses "a direct and existential threat to the continued viability of prescription drug coverage." PCMA Br. 18. If courts can declare core, facially neutral elements of benefit plans unlawful because of their effects on any number of disabilities, the design of the healthcare system would be imperiled—at great cost to millions of patients. *Amici* representing hundreds of thousands of businesses point to "enormous economic burdens" from the decision below that alone warrant certiorari. Chamber Br. 18; *see* AHIP Br. 23; PCMA Br. 13-14.

Respondents' objections to review are meritless. Respondents use misleading semantics, suggesting that this case involves a "denial of meaningful access" claim that differs from disparate-impact claims. But denial of meaningful access is an element of every disparate-impact claim under *Alexander v. Choate*, 469 U.S. 287, 301 (1985). Denial of meaningful access is the degree of adverse effect that plaintiffs must show, assuming such claims even exist under the Rehabilitation Act. Respondents' other arguments amount to stalling tactics. But this Court's immediate intervention is essential to avoid disrupting basic features of the healthcare system.

I. Both Circuit Splits Warrant Review

1. The circuits are divided 4-1 over the first question presented: whether section 504 of the Rehabilitation Act, 29 U.S.C. § 794, creates a disparate-impact cause of action. The Sixth Circuit held no. *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 241 (6th Cir. 2019) (Sutton, J.). The Second, Seventh, Ninth, and Tenth Circuits instead allow plaintiffs to allege disparate impacts

under section 504. Pet. 18-19.[1] Indeed, the Sixth Circuit rejected the claim that the Ninth Circuit endorsed, in cases brought by the same plaintiffs' lawyers on behalf of identically situated HIV-AIDS patients who made carbon-copy allegations. *Compare* No. 18-5897 (6th Cir.), Dkt. 23, at 6-10, *with* Pet.App.25a-29a. The Sixth Circuit, the federal government, commentators, and *amici* all acknowledge this conflict. Pet. 16, 20; Chamber Br. 8; WLF Br. 7.

a. Respondents (at 14-15) claim that the Sixth Circuit "merely" addressed disparate-impact claims that "adversely affect the disabled," while the Ninth Circuit and other courts endorsed a "denial of meaningful access" claim. But there is no daylight between the two. A disparate-impact theory alleges that a facially neutral policy adversely impacts individuals with disabilities. *Choate* held that if the Rehabilitation Act even authorizes such claims, the only "disparate impacts § 504 might make actionable," 469 U.S. at 299, must rise to the level of a denial of "meaningful access to the benefit that the grantee offers," *id.* at 301. The meaningful-access standard thus marks the threshold level of harm that any plaintiff must clear to assert a disparate-impact claim under *Choate*.

Respondents' contention that *BlueCross* did not involve a meaningful-access claim is also disingenuous. As respondents' counsel's briefing in the Sixth and Ninth Circuits explained, denial of meaningful access is part of the "standard" courts "appl[y]" in deciding whether a disparate-impact claim survives a motion to dismiss. No. 19-

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[1] Respondents (at 13-14) assert that 11 circuits "agree" that unintentional discrimination may violate the Rehabilitation Act. But if CVS undercounted circuits, that would underscore why further percolation is unnecessary. Regardless, many circuits have assumed without deciding that the statute allows disparate-impact claims. *BlueCross*, 926 F.3d at 242-43 (discussing cases).

15074 (9th Cir.), Dkt. 79, at 6; *see* No. 18-5897 (6th Cir.), Dkt. 23, at 19, 26 (arguing that insurer's "outwardly neutral practice" caused "disproportionately harmful impacts" to HIV-AIDS patients and "thereby denied meaningful access to this benefit" (quotations omitted)).

In sum, the Sixth Circuit holds that the Rehabilitation Act categorically does not authorize disparate-impact claims, even if plaintiffs clear the meaningful-access threshold. Because the Ninth Circuit below endorsed the very claim the Sixth Circuit repudiated, in the same factual setting, the split is undeniable.

b. Respondents (at 15-16) dismiss the Sixth Circuit's *BlueCross* decision by claiming it departs from other decisions within the Sixth Circuit. None of their cases undermines *BlueCross*'s categorical rule that the Rehabilitation Act "does not prohibit disparate-impact discrimination." 926 F.3d at 241.

Respondents cite only one post-*BlueCross* decision, *Waskul v. Washtenaw County Community Mental Health*, 979 F.3d 426 (6th Cir. 2020), which is irrelevant because it involved intentional disability discrimination, not disparate impact. *Waskul* concerned implementing regulations for the Americans with Disabilities Act ("ADA") and the Rehabilitation Act that prohibit "unjustified institutional isolation of persons with disabilities." *Id.* at 459-60. *Bedford v. Michigan*, 722 F. App'x 515, 516 (6th Cir. 2018) (cited at Opp. 17) likewise involved intentional discrimination.

Two of respondents' other cases do not even arise under the Rehabilitation Act. *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 902, 913 (6th Cir. 2004), held that a city violated ADA mandatory-access requirements by failing to install curb cuts on public sidewalks. *Monette v. Electronic Data Systems Corp.*, 90

F.3d 1173 (6th Cir. 1996), also arose under the ADA, and did not cite *Choate*'s "meaningful access" standard "with approval," *contra* Opp. 16, instead fleetingly citing *Choate* in a footnote, 90 F.3d at 1178 n.5.

Respondents' two remaining cases involve disparate-impact liability, but do not show an intra-circuit split over the viability of disparate-impact claims. Respondents (at 16) call *Jones v. City of Monroe*, 341 F.3d 474 (6th Cir. 2003), their "[m]ost notabl[e]" case. But *Jones* rejected a Rehabilitation Act disparate-impact claim on the merits, thus bypassing the availability of such claims writ large. *Id.* at 478. And *Cook v. Hairston*, 1991 WL 253302 (6th Cir. 1991), was nonprecedential and cannot create intra-circuit confusion. In sum, *BlueCross* unambiguously closed the door in the Sixth Circuit to disparate-impact claims under the Rehabilitation Act. 926 F.3d at 241-43.

c. Respondents (at 19) contend that any split is too "lopsided" and recent to warrant review. That objection would disqualify much of the Court's recent docket. *E.g.*, *Brown v. Davenport*, No. 20-826 (5-1 split); *Mahanoy Area Sch. Dist. v. B.L.*, No. 20-255 (6-1 split); *Babcock v. Saul*, No. 20-480 (4-1 split). Respondents' objection is especially baseless because the Court routinely grants review when two circuits part ways on the same facts and create conflicting obligations for the same defendants. *See* Pet. 21; *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794. That situation is especially intolerable here because insurers and benefit managers cannot readily create different plans for different circuits.

2. The circuits are also split 4-1 over the second question presented: whether, if the Rehabilitation Act allows disparate-impact claims, those claims extend to the facially neutral terms and conditions of health and pharmacy benefit plans. Pet. 21-25; Chamber Br. 8-10.

Respondents (at 22-23) try to drive an illusory wedge between the Rehabilitation Act and the ACA, saying that the issue here is whether section 1557 of the ACA applies, not the Rehabilitation Act, and that pre-ACA cases underlying the split are irrelevant. But the Ninth Circuit held that the Rehabilitation Act provides the governing standard for disability-discrimination claims under the ACA. Pet.App.11a; *accord* Pet.App.35a. Before and after the ACA, the question is the same: whether a disparate-impact cause of action encompasses claims arising from the facially neutral terms of health and pharmacy benefit plans.

Respondents' observation (at 23) that the ACA "prohibit[s] discrimination by health insurers" and others "with respect to the terms and conditions of health plans" assumes the conclusion that disparate impact is a prohibited form of disability discrimination. The ACA expanded the pool of entities subject to the Rehabilitation Act. But that does not mean the ACA allows plaintiffs to attack facially neutral benefit plans for purportedly failing to provide "various aspects of pharmaceutical care" that plaintiffs "deem critical to their health." Pet.App.13a. *Choate* rejected a similar claim under the Rehabilitation Act. 469 U.S. at 303. The ACA expands those obligations to a broader range of entities, but incorporates the Rehabilitation Act's *substantive* antidiscrimination standard without modification. Pet.App.11a.

Finally, respondents (at 2, 24, 37) suggest this case does not implicate disparate-impact liability because CVS purportedly intentionally discriminates by "prov[iding] two separate and unequal prescription drug benefits: one for those with disabilities, and one for everyone else." False. As respondents told the Ninth Circuit, their claim "challenge[s] a policy 'neutral on its face' that applies to both disabled and non-disabled individuals." No. 19-

15074, Dkt. 79, at 13; *accord* Pet.App.15a, 41a. In sum, this case cleanly presents two outcome-determinative splits.

II. The Court Should Resolve These Important, Recurring Questions Now

1. The Ninth Circuit's decision poses an "existential threat to the continued viability of prescription drug coverage" that independently warrants immediate review. PCMA Br. 18. Respondents do not dispute the singular burdens of allowing disparate-impact claims. Pet. 29-30; WLF Br. 14-20. Nor do respondents contest that the Ninth Circuit's "unprecedented expansion of disparate impact liability" threatens to let plaintiffs rewrite the terms of countless health plans that purportedly fail to offer "'effective treatment' to members with disabilities." AHIP Br. 6.

The decision below endangers all health and pharmacy benefit plans that offer any benefit that some subset of enrollees finds less accessible by virtue of a disability. *Id.* Thus, "the decision will upend the way benefit packages are designed and priced," and "will turn topsy-turvy critical tools … that health insurance providers use to promote safety and quality." *Id.* at 3. Such litigation risks "increas[ing] health care costs," hampering "patient choice," harming "patient care," *id.* at 3-4, and "upend[ing] the U.S. healthcare system," PCMA Br. 2.

Insurers and pharmacy benefit managers would face an administrative nightmare in trying to ascertain how every plan term might affect every possible class of people with disabilities. Chamber Br. 17-18. Courts are unequipped to wade through various beneficiaries' preferences and concerns. Yet the Ninth Circuit would appoint courts as policymakers-in-chief over one of the nation's most complex endeavors. *Id.* at 18-22.

Respondents (at 34) downplay the impact of the Ninth Circuit's decision, asserting that existing settlements with major health insurers allow HIV-AIDS patients "to opt out of mail order-only delivery" of specialty medications. That ignores the real problem: the Ninth Circuit's ruling invites suits by plaintiffs with other disabilities seeking exemptions from countless plan terms and conditions. Such a cascade of litigation would "threaten the basic operation of U.S. healthcare markets—not just in the Ninth Circuit, but around the country," since "*every* facially neutral health-benefits policy affects differently situated beneficiaries differently depending on those beneficiaries' underlying health conditions." Chamber Br. 2, 13-15; *accord* PCMA Br. 12-14. In any event, respondents provide no details about the settlements they mention; if anything, the pressure to settle will intensify, thus exacerbating the far-reaching effects of the Ninth Circuit's ruling.

Respondents' other response (at 34-35) is to deny that the decision below "impose[s] any new legal obligations on health insurers or employers." Elsewhere, respondents acknowledge that the Ninth Circuit was the first to allow plaintiffs' disparate-impact claim "under the ACA," Opp. 13, and respondents' counsel characterized the decision as a watershed that removed a huge obstacle to imposing liability, Consumer Watchdog, *Mail Order Rx Is Not For Everyone*, Rage for Justice Report, <tinyurl.com/p8t2urkm>. Respondents say *Choate* produced no parade of horribles, but *Choate* left disparate-impact liability an open question and rejected the kind of unworkable claim the Ninth Circuit recognized. Besides, the universe of defendants exploded only recently, with the ACA's extension of the Rehabilitation Act to myriad new healthcare settings. WLF Br. 19-20.

2. Respondents identify no actual obstacles to review, instead urging delay. First, respondents (at 19-20) propose further percolation, but the split creates an immediate problem: two circuits have diverged on the same theory of liability asserted by the same lawyers on behalf of identically situated plaintiffs, with rippling effects for the entire healthcare industry.

Second, respondents (at 20-22) object to the interlocutory posture and say the Court should await further proceedings. But this Court routinely grants review where, as here, the court of appeals issued a dispositive ruling on a threshold legal issue, vacated the grant of a motion to dismiss, and remanded to the trial court for additional proceedings. *E.g.*, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168 (2021); *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 140 S. Ct. 1589, 1594 (2020); *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1848 (2019); *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519-20 (2019).

Here, no further proceedings would aid this Court's consideration of whether the text of the Rehabilitation Act and ACA authorizes disparate-impact claims. Nor does it matter whether CVS prevails on alternative grounds in the district court. *See* Opp. 21. The Ninth Circuit's errant disparate-impact opinion still would remain in force, and "[t]he disruptive potential of the Ninth Circuit's decision with respect to the operation of U.S. healthcare markets is incalculable." Chamber Br. 17.

Third, respondents (at 29-33) oppose review because they could supposedly pursue other theories of discrimination and may not need their disparate-impact claim. But respondents appealed the district court's dismissal of their disparate-impact claim, presumably because they think this theory of liability is significant. And respondents' counsel hailed the decision below for removing "a

really big hurdle" that prompted other courts to dismiss identical suits. Rage for Justice Report, *supra*.

Regardless, respondents have no "reasonable possibility" of proceeding under failure-to-accommodate or proxy-discrimination theories. Opp. 30. The Ninth Circuit already held that respondents failed to assert (and thus forfeited) their failure-to-accommodate claim in district court. Pet.App.16a. Respondents' proxy-discrimination claim is likewise forfeited because it surfaced for the first time in their Ninth Circuit reply brief. No. 19-15074 (9th Cir.), Dkt. 79, at 14-15. In all events, respondents' prospects of prevailing on alternate theories on remand is no reason to keep the Ninth Circuit's radical disparate-impact ruling intact.

Fourth, respondents (at 24-29) urge delay because the federal government might promulgate new ACA regulations. But federal agencies cannot supply a missing disparate-impact cause of action; only Congress can. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). There is no reason to await tea leaves about the government's position on the questions presented. The government's longstanding position is that imposing disparate-impact liability based on the differential effect of facially neutral health plan terms would usher in judicial second-guessing of every discretionary decision about how plans allocate benefits. Br. of United States, *Modderno v. King*, No. 94-5400 (D.C. Cir. Jan. 12, 1996), 1995 WL 17204324, at *9-10.

Anyway, the proposed regulations are irrelevant. HHS's plans to interpret sex discrimination under section 1557 of the ACA consistent with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Opp. 25), have nothing to do with the availability of disparate-impact claims based on disability. Respondents mischaracterize other plans. Far from preparing an overhaul of the "scope" of section

1557's "application to health insurers," Opp. 25, the Administration intends to "reconsider[]" some unspecified implementing regulations on an uncertain timetable, Joint Status Rep., *New York v. HHS*, No. 20-cv-5583 (S.D.N.Y.), Dkt. 142, at 2.

Finally, respondents argue (at 25-29) that pending but stayed litigation may affect who is subject to discrimination claims under section 1557 of the ACA. But respondents claim that even under the narrower rule currently subject to challenge, CVS should be liable. And if that rule falls, an even broader range of entities would face disparate-impact liability. In short, that litigation is speculative, irrelevant to the questions presented, and no barrier to review.

On the other hand, the costs of delay are untenable. Absent this Court's intervention, the Ninth Circuit's disparate-impact holding will invite plaintiffs to target health and pharmacy benefit plans across America. Respondents' counsel has portrayed the Ninth Circuit's decision as a landmark from "a really important court" that overcame "a really big hurdle for us" after similar disparate-impact claims "ke[pt] getting dismissed" elsewhere. Rage for Justice Report, *supra*. Other Ninth Circuit plaintiffs are already using the decision below to bolster claims that their health plans provide insufficient treatment options for hearing loss. *See E.S. v. Regence BlueShield*, No. 17-cv-1609 (W.D. Wash.), Dkt. 38, at 1, 11, 19; *Schmitt v. Kaiser Found. Health Plan of Wash.*, No. 17-cv-1611 (W.D. Wash.), Dkt. 75. This Court should stem the tide now.

III. The Decision Below is Wrong

The Ninth Circuit's reasoning on both questions presented defies the statutory text and *Choate*'s instruction that the Rehabilitation Act does not create a substantive

right to "adequate health care" for individuals with disabilities. 469 U.S. at 303; Pet. 25-26; WLF Br. 7-9; Chamber Br. 4-8.

Respondents (at 35) observe that the Rehabilitation Act prohibits discrimination "solely by reason of" disability. But that point hurts respondents; "solely by reason of" rules out liability for facially neutral policies enacted for nondiscriminatory reasons. Pet. 26.

Respondents protest (at 36-37) that their claim for disability discrimination is not governed by Title VI of the Civil Rights Act, which does not provide disparate-impact claims. That misses the point: both statutes use nearly identical language to describe the type of discrimination they do prohibit, and the ordinary meaning of that language excludes disparate-impact liability. Pet. 26-27.

Respondents (at 35-36) suggest that section 504 of the Rehabilitation Act means something different and more expansive in the ACA context. But the Ninth Circuit rejected that argument below, instead holding that the ACA incorporates the Rehabilitation Act's substantive antidiscrimination standard. Pet.App.9a-11a. Then the Ninth Circuit broke ranks and held that facially neutral benefits policies can trigger disparate-impact liability if they do not account for various beneficiaries' unique medical needs. That ruling is indefensible and threatens "severe economic consequences" that warrant immediate review. Chamber Br. 10.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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