No. 20-1374

In The
Supreme Court of the United States

CVS PHARMACY, INC., ET AL.,

Petitioners,

v.

JOHN DOE, ONE, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND CATO INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Section 504 of the Rehabilitation Act, and by extension the Patient Protection and Affordable Care Act, provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Consumer advocates often complain about the high cost of medical care—including prescription drugs. Relying only on drugs' variable cost, critics claim that Americans pay too much for medicine. These advocates, however, also protest any attempt at controlling drug prices.

High-risk individuals account for most of an insurer's costs. For prescription-drug plans, high-risk individuals use specialty drugs that can cost hundreds of thousands of dollars per year. These drugs treat conditions from asthma to AIDS. Prescription benefits managers have successfully reduced costs by negotiating lower prices for specialty drugs from some pharmacies. These deals help keep prices low for all Americans.

But this efficiency attracts the plaintiffs' bar. After several years scouring the Patient Protection and Affordable Care Act (ACA), creative plaintiffs' attorneys sued CVS for allegedly discriminating on the basis of disability by requiring patients who receive specialty drugs to pay more when filling prescriptions with other pharmacies. They argue that the ACA—by incorporating Section 504 of the Rehabilitation Act of 1973's remedies provision—permits such disparate-impact claims.

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free

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[*] No party's counsel authored any part of this brief. No person or entity, other than *amici* and their counsel, paid for the brief's preparation or submission. All parties consented to *amici*'s filing this brief.

markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore limited constitutional government—the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in cases raising disparate-impact issues under federal law. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771 (3d Cir. 2001).

The Ninth Circuit's decision ignores Section 504's plain language, which recognizes no disparate-impact claims. Like other statutes whose remedy provisions the ACA incorporates, Section 504 does not allow these claims. Recognizing disparate-impact claims amounts to judicial policymaking. Federal judges should not decide these important issues.

Affirming will lead to increased costs for almost every American business that offers prescription-drug coverage for its employees. These increased costs will force companies to either cut their employees' pay or drop prescription-drug coverage. The Court can avoid these real-world effects by giving the statute's language its most natural meaning. So this Court should adopt the Sixth Circuit's reasoning in *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235 (6th Cir. 2019) and hold that plaintiffs cannot bring disparate-impact claims under Section 504.

SUMMARY OF ARGUMENT

I.A. Other nondiscrimination statutes support a plain-language reading of Section 504. Even under the nondiscrimination statute with the closest—yet broader—remedy provision, plaintiffs cannot sue for disparate impacts. Statutes allowing disparate-impact claims differ substantially from Section 504. They contain crucial language, missing here, that lends itself to disparate-impact claims.

B. The Court has shunned recognizing implied causes of actions. This reluctance is grounded in important separation-of-powers principles. When a court creates a cause of action, it exercises legislative—rather than judicial—power. The Court should not shrink from its fidelity to the Constitution's careful separation of powers by implying a cause of action here.

II. The breadth of potential disparate-impact claims under Section 504 is stunning. Almost every medical provider, college, and university could face such claims. So too could most K-12 schools and the millions of companies that received federal assistance during the COVID-19 pandemic. In fact, most of the American economy could face disparate-impact claims if the Court affirms. If Congress had desired that, it would have enacted such a law. But it chose instead to limit Section 504's remedies provision. The Court should not invite an avalanche of Section 504 claims that go far beyond what Congress intended by implying a cause of action for disparate impacts.

ARGUMENT

The ACA provides a cause of action for discrimination "on the ground prohibited under" several nondiscrimination statutes. 42 U.S.C. § 18116(a). This language shows that the ACA does not create a new cause of action. As used in the ACA, "ground" means "[t]he basis on which anything rests." *Webster's New International Dictionary* 1106 (2d ed. 1949). This shows that the ACA incorporates the discrimination bars in those individual statutes. *See* Pet. App. 9a-11a. It does not combine those nondiscrimination statutes. Nor does it bar a different type of discrimination.

So although Respondents sued under the ACA, this case turns on Section 504. If Section 504 allows disparate-impact claims, then plaintiffs can assert those claims in an ACA suit alleging disability discrimination. But if Section 504 bars disparate-impact claims, so too does the ACA. The Sixth Circuit correctly decided this question: Section 504 does not provide for disparate-impact claims. *See Doe*, 926 F.3d at 241-43.

I. SECTION 504 DOES NOT PERMIT DISPARATE-IMPACT CLAIMS.

Section 504 provides that "[n]o otherwise qualified individual with a disability * * * 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." 29 U.S.C. § 794(a) (emphasis added). The Ninth Circuit held that this language permits a disparate-impact claim for "practices that are not intended to discriminate" but still have a "disproportionately

adverse effect on" a protected group—here, the disabled. *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (defining disparate impact). But for both statutory and constitutional reasons, the Ninth Circuit erred in construing Section 504.

A. Comparison With Other Statutes Supports This Plain-Language Interpretation.

1. Comparing Section 504 to other nondiscrimination statutes shows why the Ninth Circuit's analysis makes no sense. Section 504, "was patterned after Title VI," *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 509 (1983), which prohibits a person's "be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination" because of membership in a protected class. 42 U.S.C. § 2000d. And this Court has held that disparate-impact claims are barred under Title VI. *Sandoval*, 532 U.S. at 280-81.

Section 504's language is even clearer than Title VI's language in limiting available claims. While Section 504 uses the word "solely," 29 U.S.C. § 794(a), Title VI does not, 42 U.S.C. § 2000d. This shows that Congress wanted to provide fewer causes of action under Section 504 than under Title VI. It makes no sense to recognize disparate-impact claims under the narrower statute when the broader statute bars such claims.

Similarly, the Age Discrimination Act provides that "no person * * * shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102. Because the statute

lacks "otherwise adversely affects" language, the Fifth Circuit held that it "does not prohibit policies that have a disparate impact." *Kamps v. Baylor Univ.*, 592 F. App'x 282, 285-86 (5th Cir. 2014); *accord Doe*, 926 F.3d at 240.

Even those statutes with language slightly broader than Title VI, the Age Discrimination Act, and Section 504 do not permit disparate-impact claims. The Immigration Reform and Control Act of 1986 bars "a pattern or practice of discriminatory activity." 8 U.S.C. § 1324b(d)(2). When signing the bill, President Ronald Reagan said that it barred disparate-impact claims like those available under Title VII. *See* Statement on Signing the Immigration Reform and Control Act of 1986, 1 Pres. Papers 1522, 1523 (Nov. 6, 1986).

Three administrations, spanning both political parties, have issued regulations interpreting the IRCA's discrimination bar. *See* 28 C.F.R. § 44.200 (promulgated Dec. 19, 2016); *Unfair Immigration-Related Employment Practices*, 58 Fed. Reg. 59,947 (Nov. 12, 1993); *Unfair Immigration-Related Employment Practices*, 52 Fed. Reg. 37,402 (Oct. 6, 1987). All three required intentional discrimination—disparate impacts were not enough. *E.g.* 28 C.F.R. § 44.200(a)(1).

There is thus a continuum of language that Congress uses when disallowing disparate-impact claims. At the far end is Section 504—which includes the "solely" modifier to bar disparate-impact claims. Then comes Title VI's and the Age Discrimination Act's language. The IRCA's language comes closest to allowing disparate-impact claims. But none of these statutes allow a disparate-impact remedy.

2. True, the Court has recognized that *other* nondiscrimination statutes permit disparate-impact claims. But each of those statutes uses different language that lends itself to disparate-impact claims.

- Title VII makes it illegal "to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee" for specific reasons. 42 U.S.C. § 2000e-2(a)(2) (emphasis added). The Court has held that the "otherwise discriminate" language naturally includes disparate-impact claims. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971).
- The Age Discrimination in Employment Act similarly bars "limit[ing], segregat[ing], or classify[ing] employees in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added). Again, Congress employed the "otherwise adversely affect" language to signal that plaintiffs may bring disparate-impact claims under the ADEA. *See Smith v. City of Jackson*, 544 U.S. 228, 235-36 (2005).
- The Fair Housing Act makes it illegal "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person" for certain reasons. 42 U.S.C. § 3604(a) (emphasis added). The Court held that "the phrase 'otherwise make unavailable'" manifests Congress's desire to recognize disparate-impact liability

under the FHA. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534 (2015).

- States and localities violate Section 2 of the Voting Rights Act when, "*based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision *are not equally open* to participation by members of a class of citizens." 52 U.S.C. § 10301(b) (emphases added). Because Congress told courts to look at the totality of circumstances to decide whether elections treat groups equally, it meant to allow disparate-impact claims. *See Chisom v. Roemer*, 501 U.S. 380, 394 (1991).

  Similarly, States and localities violate Section 5 of the Voting Rights Act when a voting qualification "has the purpose of or *will have the effect of* diminishing the ability [to vote] of any citizens of the United States on account of race or color." 52 U.S.C. § 10304(b) (emphasis added). This too allows disparate-impact claims. *Shelby Cnty. v. Holder*, 570 U.S. 529, 539 (2013). So both sections of the Voting Rights Act that allow disparate-impact claims explicitly recognize the cause of action. This too shows that Congress knows how to create a disparate-impact claim when it desires that result.

- The Americans with Disabilities Act (ADA) defines discrimination to include using "standards, criteria, or methods of administration * * * that *have the effect of* discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3)(A) (emphasis added). This

> statutory language closely mirrors the Court's definition of disparate-impact claims. *See Ricci*, 557 U.S. at 577. So it makes sense that the Court has held that people can bring disparate-impact claims under the ADA. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

3. Section 504 lacks any similar language supporting disparate-impact claims. Rather, Congress chose to use language even more restrictive than Title VI—which bars disparate-impact claims. This use of more restrictive language shows that Congress did not authorize disparate-impact claims.

There is a close relationship between the ADA and Section 504. *See Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002). Despite this close relationship, Congress decided to explicitly allow for disparate-impact claims under the ADA while using language that forecloses them in Section 504. Not recognizing this difference in statutory language violates the presumption-of-consistent-usage and related-statutes canons of construction. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170-73, 252-55 (2012).

The Fifth Circuit's discussion of the Equal Educational Opportunities Act showcases the presumption-of-consistent-usage canon in the disparate-impact context. Part of the statute bars "discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff." 20 U.S.C. § 1703(d). Another part requires an "educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." *Id.* § 1703(f).

Because Section 1703(d) uses the term "discrimination * * * on the basis of," the court held that it bars disparate-impact claims. *See Castaneda v. Pickard*, 648 F.2d 989, 1000-01 (5th Cir. June 1981). But because Section 1703(f) omits the word "'discrimination' whose legal definition has been understood to incorporate an intent requirement," the court held that plaintiffs could bring a disparate-impact claim under Section 1703(f). *Id.* at 1007-08; *accord Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 139-40 (3d Cir. 2017).

The same is true with the ADA and Section 504. The ADA uses the phrase "have the effect of" to modify the word "discrimination." 42 U.S.C. § 12112(b)(3)(A). Yet Section 504 employs the phrase "solely by reason of her or his disability" to modify the word "discrimination." 29 U.S.C. § 794(a). The use of different language in the two statutes shows Congress wanted to provide for a disparate-impact claim under the ADA but not under Section 504.

Thus, other nondiscrimination statutes—both those that recognize disparate-impact claims and those that do not—show that the Ninth Circuit misconstrued Section 504. The Sixth Circuit got it right in *Doe* by looking to other statutes' language. Because Section 504 is closest to those that bar disparate-impact claims, this Court should hold that the District Court properly dismissed Respondents' disparate-impact claim.

B. The Court Should Not Imply A New Cause Of Action.

1. The Constitution vests "All legislative Powers" with Congress. U.S. Const. art. I, § 1; *see Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-

76 (2018). The Judiciary, on the other hand, exercises judicial power. U.S. Const. art. III, § 1. The crucial distinction between the legislative and the judicial power disappears when courts imply causes of action that Congress did not create.

For around four decades last century, the Court allowed courts to "provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). The Court assumed that if a plaintiff deserved a remedy, it was the courts' job to create one—even without congressional action. *See Bell v. Hood*, 327 U.S. 678, 684 (1946) (citations omitted).

Beginning in the late-1970s, the Court gradually moved away from the fiction that courts could act as legislators. A statute's remedial purpose became no longer a good enough reason to expand a statute's plain language. *See SEC v. Sloan*, 436 U.S. 103, 116 (1978). In other words, courts could not try to improve the statutes that Congress passed. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

At the beginning of this century, the Court finally put a nail in the implied-cause-of-action coffin. Explaining that earlier cases implying causes of action under federal statutes occurred under an "*ancien regime*," the Court in *Sandoval* "swor[e] off" the practice of implying causes of action. 532 U.S. at 287.

After *Sandoval*, the Court expounded on why it abandoned the practice of implying causes of action. When implying causes of action, courts "extend[their] authority to embrace a dispute Congress has not assigned [them] to resolve." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 164 (2008) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746 (1979)

(Powell, J., dissenting)). This violates separation-of-powers principles by expanding courts' jurisdiction beyond Article III's bounds. *See id.* at 164-65 (citation omitted). So "[t]he decision to extend the cause of action is for Congress, not" courts. *Id.* at 165.

More recently, the Court explained that when deciding whether a statute creates a cause of action, "the question is one of statutory intent." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (citation omitted). "It is logical [] to assume that Congress will be explicit if it intends to create a private cause of action." *Id.* at 1856. In other words, it makes no sense for Congress to explicitly create some causes of action while leaving others for courts to imply. Congress knows how to create causes of action when it wants to. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). Judicial creation of causes of action ignores this reality.

So when courts consider creating "implied cause[s] of action under a federal statute, separation-of-powers principles" must "be central to the analysis." *Abbasi*, 137 S. Ct. at 1857. The Constitution does not give courts the power to create new causes of action. *See id.* at 1858. This is why, now, the Court charts a "far more cautious course before finding implied causes of action." *Id.* at 1855.

The Court also addressed implied causes of action in *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). As the Court said, the Constitution gives Congress the legislative power while giving courts the judicial power. *Id.* at 741 (citation omitted). "For this reason, finding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers." *Id.* at 742 (citing *Bd. of Governors of Fed.*

Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986)).

It is also wrong to analogize to state common-law practice. There is no general federal common law. *Hernandez*, 140 S. Ct. at 742; *see also Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1334 (2020) (Alito, J., dissenting) (lamenting analysis resembling what a common-law court would use). Yet there is general state common law. *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). General common-law courts craft appropriate remedies. State courts therefore don't face the same problems as federal courts because they have some lawmaking authority. *See Hernandez*, 140 S. Ct. at 742.

Just last term, two justices wrote separately to emphasize that "the power to create a cause of action is in every meaningful sense the power to enact a new law that assigns new rights and new legally enforceable duties. And our Constitution generally assigns that power to Congress." *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1942 (2021) (Gorsuch, J., concurring). Congress knows how to act when it wishes. For example, Congress saw a need to provide new rights to torture victims so it passed the Torture Victim Protection Act. *See id.* at 1937 (majority) (citation omitted). Courts' intervention was unnecessary. So this Court should continue its practice of not implying causes of action that Congress did not create.

2. Congress chose not to recognize disparate-impact claims under Section 504. It decided to model Section 504 after Title VI, which does not permit disparate-impact claims, rather than Title VII, the ADEA, the FHA, the Voting Rights Act, or the ADA,

which do. So Congress made a policy decision to bar disparate-impact claims.

This policy choice arose from the complex legislative process. Congress sought to "stamp out" disability discrimination. *See Dimension*, 474 U.S. at 374. But because some congressmen likely "differ[ed] sharply on the means for effectuating that intent, the final language of" Section 504 "reflect[s] hard-fought compromises." *See id.* Thus Congress "enact[ed] a provision that * * * prohibits specified conduct" but did "not wish to pursue the provision's purpose" by permitting disparate-impact claims. *See Hernandez*, 140 S. Ct. at 742.

Yet the Ninth Circuit disapproved of that policy decision and tried to "fix" Section 504, reading into it a disparate-impact cause of action that Congress rejected. As an Article III court, members of the Ninth Circuit panel could not morph "into policymakers choosing what the law should be." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (emphasis removed). Rather, they were constrained "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This Court should not make the same mistake and legislate from the bench by creating a disparate-impact claim under Section 504.

But Congress's policy decision also stands up to scrutiny. After all, "many neutral (and well-intentioned) policies disparately affect the disabled—the point of such laws most often is to ease the burden of having a disability." *Doe*, 926 F.3d at 242. Allowing disparate-impact claims would "lead to a wholly unwieldy administrative and adjudicative burden." *Id.* (quoting *Alexander v. Choate*, 469 U.S. 287, 298 (1985)). Congress's policy decision was therefore rational and courts may not second-guess it.

Section 504's language is simple. It provides a straightforward claim for those subject to discrimination solely because of a disability. But it does not create a cause of action to challenge nondiscriminatory policies whose burdens may incidentally fall more heavily on the disabled. The Court should reverse the Ninth Circuit's contrary holding.

II. CREATING A DISPARATE-IMPACT CAUSE OF ACTION UNDER SECTION 504 WOULD BE COSTLY.

A. It is hard to overstate the disastrous and costly effects of recognizing disparate-impact claims under Section 504. The statute covers *any* entity that receives federal financial assistance. This Court should not impose such high costs without Congress's express authorization. *Cf. Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) ("major national policy decisions must be made by Congress and the President" (citation omitted)).

Respondents claim that CVS must comply with Section 504 because it receives Medicare reimbursements—even though those funds are not at issue. *See* J.A. 100. Under this theory, plaintiffs can sue over 99% of medical providers using Section 504. *See* Nancy Ochieng et al., *How Many Physicians Have Opted-Out of the Medicare Program?* (Oct. 22, 2020), https://tinyurl.com/nb9sufc4.

Again, Respondents' theory is that it is irrelevant whether a patient personally paid for services received. So long as Medicare paid the doctor to see one patient, she must comply with Section 504 for all of her patients. This theory expands the statute far beyond what its text can bear.

Permitting disparate-impact claims under Section 504 would cause great upheaval in the medical field. To limit their liability, doctors, hospitals, and others might refuse to accept Medicare. Today, our medical professionals are spread thin because of the COVID-19 pandemic. Increased strain on the industry, with fewer Medicare providers, could cause it to crack in already struggling rural areas. *Cf.* Megan Cerullo, *COVID-19 is pushing struggling rural hospitals to the brink* (Feb. 18, 2021), https://tinyurl.com/n7ehceu4 (discussing rural healthcare crisis).

But even with a narrower interpretation of the federal-financial-assistance requirement, plaintiffs can sue under many prescription-drug plans. Over seven million Americans participate in federally subsidized employer-sponsored plans. *See* Kaiser Family Found., *An Overview of the Medicare Part D Prescription Drug Benefit* (Oct. 14, 2020), https://tinyurl.com/n3tpj5wc. These plan participants can sue their employers under the ACA even if their doctors decline federal funds.

Allowing disparate-impact claims would change the calculus for companies deciding whether to offer such plans. The increased risk of suits for unintentional conduct will lead to prescription-drug plans for fewer companies' employees. This benefits only the plaintiffs' bar.

The effect on our economy would be profound. Recently, America's healthcare spending has skyrocketed. In 2019, U.S. healthcare spending exceeded $3.8 trillion—17% of gross domestic product. *See* Ctrs. for Medicare & Medicaid Servs., *National Health Expenditures 2019 Highlights*, https://tinyurl.com/46pxehn5. The Court should not

upend this sector of the economy by straining to interpret Section 504.

B. Although this case applies Section 504 in the medical context, other sectors will face large costs if plaintiffs can bring disparate-impact claims under Section 504. Section 504's scope is probably at its apex today. Over the past seventeen months, the Small Business Administration has distributed over $800 billion in Paycheck Protection Program funds. Thomas Wade, *Tracker: Paycheck Protection Program Loans* (June 1, 2021), https://tinyurl.com/2z224cc7. At least one court has held that PPP recipients must comply with Section 504. *See Beverly R. on behalf of E.R. v. Mt. Carmel Acad. of New Orleans, Inc.*, No. 20-cv-2924, 2021 WL 1109494, *7 (E.D. La. Mar. 23, 2021); *see* Philip J. Catanzano et al., *The CARES Act and Independent Schools: Compliance with Federal Laws After Taking Federal Loans* (Apr. 21, 2020), https://tinyurl.com/49tkjr6m.

The SBA has given over 11,800,000 PPP loans. Wade, *supra*. Under the Ninth Circuit's rule, companies from large plaintiffs' law firms to local pastry stores face potential disparate-impact liability. *See* Caroline Spiezio & Tina Bellon, *Prominent plaintiffs' firms sought government bailout to stay afloat* (July 9, 2020), https://tinyurl.com/m2ptysdf; Danielle Miller, *Mesa small business credits PPP to staying afloat during the COVID-19 pandemic* (Feb. 24, 2021), https://tinyurl.com/56d92nrv.

It is impossible to know exactly how many companies otherwise not covered by Section 504 must now comply with it because they accepted PPP loans. But it is reasonable to assume that many of the over 11,800,000 PPP loans went to businesses that otherwise do not receive federal assistance. Although

these companies agreed to comply with nondiscrimination laws, they did not foresee having to dodge disparate-impact claims drummed up by the plaintiffs' bar. Yet that is what will happen if the Court affirms.

C. Colleges and universities that receive federal assistance must comply with Section 504. *See* 29 U.S.C. § 794(b)(2)(A). There are almost four thousand American colleges and universities. Josh Moody, *A Guide to the Changing Number of U.S. Universities*, U.S. News & World Report (Feb. 15, 2019), https://tinyurl.com/49y9waz4. Yet fewer than two dozen decline federal funds. *See* Dean Clancy, *A List of Colleges That Don't Take Federal Money* (Aug. 10, 2020), https://tinyurl.com/2272duz2. If this Court affirms, almost all colleges and universities could thus be sued under a disparate-impact theory.

Allowing disparate-impact claims against colleges and universities will lead to fewer opportunities for all students, including those with a disability. Two examples prove the point. Assume that a school-affiliated hospital is at the top of a steep hill. Harnessing the high-quality doctors at the hospital, a college builds the student medical center next to the hospital. Under Respondents' theory, if dorms are at the bottom of the hill, students with mobility issues could sue the college alleging that the college's placement of the medical center has a disproportionately negative effect on students with mobility problems. The Sixth Circuit's correct construction of Section 504 bars those disparate-impact claims.

Or assume a statistics course teaches how to count cards in the game of blackjack. Students could sue and argue that this practice has a disparate impact

on students addicted to gambling. Given the proclivity to gamble, the students do not take the course. Under the Ninth Circuit's interpretation of Section 504, there is no limit to the possible suits against colleges and universities.

This too affects a large chunk of the economy. In the 2017-18 school year, colleges and universities accounted for $604 billion—or about 3% of GDP. *See* Natl. Cen. For Educ. Statistics, *Postsecondary Institution Expenses* (May 2020), https://tinyurl.com/b2ymzt7u. Either spending will have to increase or educational opportunities will suffer if the Ninth Circuit's decision stands.

D. Most K-12 schools also must comply with Section 504. *See* 29 U.S.C. § 794(b)(2)(B). And this is where a lot of Section 504 litigation occurs. Schools' compliance with Section 504 achieves laudable goals like ensuring that children receive a free and appropriate education. But allowing disparate-impact claims will impose increased costs on struggling schools.

Unfortunately, educational achievement gaps, including gaps between those with and without learning disabilities, are real. *See* 20 U.S.C. § 6301 (subchapter meant to "close educational achievement gaps"); *see generally* Allison Gilmour et al., *Are Students With Disabilities Accessing the Curriculum? A Meta-Analysis of the Reading Achievement Gap Between Students With and Without Disabilities*, 85 J. EXCEPTIONAL CHILDREN 329 (2019). Some commentators have theorized that this shows discrimination. *See* Sarah Albertson, Comment, *The Achievement Gap and Disparate Impact Discrimination in Washington Schools*, 36 SEATTLE U. L. REV. 1919, 1925 (2013).

Affirming would therefore allow disparate-impact claims against schools because of existing educational gaps. To avoid this liability, schools might be forced to eliminate nondiscriminatory practices such as tests and letter grades. And even were the educational gap to close, the absolute value of education likely would drop for disabled students. This would be a big cost to allowing disparate-impact claims under Section 504.

School athletic programs must also comply with Section 504. *See*, *e.g.*, *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 460, 463 (6th Cir. 1997) (*en banc*). In *McPherson*, a plaintiff who suffered from ADHD challenged a rule that barred students from participating in sports for more than eight semesters. The Sixth Circuit held that the rule did not violate Section 504. *Id.* at 463. But under the Ninth Circuit's rule, the Sixth Circuit may have reached a different outcome had the plaintiff brought a disparate-impact claim; the rule arguably had a disparate impact on students with ADHD because they must repeat grades more often. So schools would bear substantial costs by creating and implementing procedures to create exceptions to rules for the very students Section 504 protects.

America spends more on K-12 public education than it spends on post-secondary education. In the 2017 school year, schools spent $739 billion—over 3% of GDP. *See* Natl. Cen. For Educ. Statistics, *Public School Expenditures* (Apr. 2020), https://tinyurl.com/23wsmyrb. During these trying times, schools are fighting to balance their budgets. A decision making them vulnerable to disparate-impact claims under Section 504 is the last thing they need.

* * *

This case therefore has ramifications far beyond the ACA. Because the ACA incorporates Section 504, recognizing claims like Respondents' will open the courts to a flood of Section 504 suits against other entities. This Court should shut the gate and bar these suits Congress did not authorize.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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