No. 20-1374

In the Supreme Court of the United States

CVS PHARMACY, INC., ET AL.,

Petitioners,

V.

JOHN DOE, ONE, ET AL.,

Respondents.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community. The Chamber previously filed a brief in support of the petition for certiorari in this case.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person—other than *amicus curiae*, its members, or its counsel—made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Rehabilitation Act of 1973 against the backdrop of routine facial discrimination on the basis of disability. Congress sought to create a remedy for such facial discrimination, and section 504(a) of the Rehabilitation Act—prohibiting discrimination against a person with a disability "solely by reason of her or his disability," 29 U.S.C. § 794(a)—provides that remedy.

Section 504(a) of the Rehabilitation Act does not contemplate a remedy for facially neutral classifications that impose incidental, disparate burdens on people with disabilities. The plain language of the statute proscribes only those practices that discriminate "*solely* by reason of" disability. *Id.* (emphasis added). Where, as here, a plaintiff with a disability claims to have suffered injury by reason of some *other* classification, section 504(a) provides no remedy—even if the plaintiff can show that such classification tends to work a disparate impact on persons with disabilities. That conclusion is compelled not only by the plain language of section 504(a), but also by comparison of section 504(a) with other federal antidiscrimination statutes that *do* offer remedies for disparate-impact claims. Congress knows how to provide remedies for disparate-impact claims. It chose not to do so in section 504(a).

The Chamber opposes discrimination on the basis of disability. But respondents' disparate-impact theory of the Rehabilitation Act, and the Ninth Circuit's endorsement of that theory, threatens a wide array of practices—such as the common insurance practices at issue here—that do not discriminate on

the basis of disability. Respondents' position would undermine the legislative policy choices embedded in existing disability law, force courts to make arbitrary policy decisions on their own, and impose severe economic burdens on American society.

Unlike the Rehabilitation Act, the Americans with Disabilities Act of 1990 (ADA) establishes a comprehensive scheme that is tailored to remedy disparate burdens experienced by people with disabilities in certain instances. But, as the Ninth Circuit acknowledged below, the ADA provides no remedy here. Indeed, the ADA's legislative history shows that this case presents exactly the kind of scenario in which Congress did not want to provide a remedy for disparate-impact claims. Recognition of disparate-impact claims under section 504(a) of the Rehabilitation Act would give litigants an end run around the ADA's limits, thereby vitiating the careful policy balance that Congress struck in the ADA. Moreover, the spare language of section 504(a)—in contrast to the ADA's comprehensive scheme—does not provide any guidance to courts in navigating the intractable policy difficulties that are presented by such disparate-impact claims.

This case, arising in the healthcare-benefits context, is an apt example of those difficulties. The district court below properly recognized that respondents' claim, if allowed to proceed, would threaten the basic operation of U.S. healthcare markets and turn the federal courts into the Nation's healthcare policymakers. That is because nearly every facially neutral health-benefit policy affects differently situated beneficiaries differently depending on those beneficiaries' underlying health conditions. Under the free-ranging disparate-impact

regime sought by respondents, it would be all but impossible for governments, employers, insurers, and healthcare providers to craft healthcare offerings without encountering significant litigation risk.

This Court has long recognized that danger. It explained over 35 years ago in *Alexander v. Choate* that the recognition of disparate-impact claims with respect to healthcare services would be "virtually unworkable," and would impose "a wholly unwieldy administrative and adjudicative burden" on insurers and courts alike. 469 U.S. 287, 298, 308 (1985). The *Choate* Court nevertheless left open the question whether section 504(a) of the Rehabilitation Act offers a remedy for disparate-impact claims more generally. This Court should now hold what the *Choate* Court—which did not grapple with statutory text—should have held: that the plain language of section 504(a) precludes disparate-impact claims.

The Ninth Circuit's judgment should be reversed.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 504(a) PRECLUDES DISPARATE-IMPACT CLAIMS

The resolution of the question presented begins, and should end, with the text of section 504(a) of the Rehabilitation Act. Under section 504(a), "[n]o otherwise qualified individual with a disability in the United States . . . shall, *solely by reason of her or his disability*, be excluded from . . . 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 Affordable Care Act incorporates that guarantee of nondiscrimination by

reference, providing in parallel language that "an individual shall not, on the ground prohibited under . . . [section 504 of the Rehabilitation Act], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a).

These provisions prohibit recipients of federal funds from discriminating against individuals with disabilities "solely by reason of . . . disability." 29 U.S.C. § 794(a). A federal funding recipient that withholds benefits or otherwise discriminates solely on the basis of a person's disability is subject to liability under section 504(a) of the Rehabilitation Act (and, by extension, under the Affordable Care Act). In that sense, section 504(a) reaches beyond instances of "affirmative animus," and proscribes facial discrimination against people with disabilities on the sole basis of disability—even where such facial discrimination is rooted in "thoughtlessness and indifference" or "apathetic attitudes." *Alexander v. Choate*, 469 U.S. 287, 295-96 (1985). Such attitudes were pervasive when the Rehabilitation Act was enacted in 1973, and they remain all too common today. *See, e.g.*, *id.* at 295-96; *J.S., III ex rel. J.S. Jr. v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979, 987-89 (11th Cir. 2017) (per curiam).

Yet section 504(a) does *not* reach claims, such as the claim presented by respondents in this case, in which a plaintiff alleges that a facially neutral practice has interacted with other factors to impose an undue burden on persons with disabilities. That much is clear from the statutory language itself, which provides a remedy only for those injuries that arise through discrimination "solely by reason of . . .

disability." 29 U.S.C. § 794(a). It is further made clear by this Court's recognition in other cases that similar language precludes disparate-impact claims. And it is made yet more clear by a comparison with statutes that *do* provide a right of action to plaintiffs who suffer disparate burdens due to facially neutral practices or policies. Congress is well acquainted with statutory language that provides for disparate-impact liability. Its choice not to include such language in section 504(a) should be honored.

A. Disparate-Impact Claimants Do Not Suffer Discrimination "Solely By Reason Of . . . Disability"

As this Court has explained, disparate-impact claims target "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 334-36 & n.15 (1977). Thus, disparate-impact cases necessarily deal with "facially neutral" practices—that is, practices in which the defendant has not acted on the basis of an invidious classification but has rather acted on some *other* basis that nevertheless redounds to the detriment of a protected class. *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (noting that, in age-discrimination "disparate-impact cases . . . the allegedly 'otherwise prohibited' activity *is not based on age*" (emphasis added)). Because the conduct complained of in disparate-impact cases is facially neutral—i.e., not based on an invidious classification—the effect complained of in a disparate-impact case cannot be said to have occurred "*solely* by

reason of" an invidious classification or protected characteristic.

The facts of this case well illustrate the point. This case concerns a facially neutral pharmacy benefit management practice: petitioners, who manage pharmacy benefits for numerous employer-sponsored healthcare plans, offer plans that make prescriptions for certain "specialty medications" available to beneficiaries at "in-network" rates only if those prescriptions are filled by mail order or picked up at a CVS pharmacy. Pet. App. 26a. Beneficiaries who want to fill a prescription for a specialty medication at another, "out-of-network" pharmacy must pay higher out-of-pocket costs. *Id.* Prescriptions for non-specialty medications, meanwhile, may be filled at in-network rates at a wider variety of pharmacies. *Id.* at 15a. But whether a medication is a "specialty medication" does not depend on disability: specialty medications include a wide range of prescription drugs that treat a wide range of conditions experienced by persons with—and without—disabilities. *Id.* at 26a, 37a.

Respondents are a class of individuals living with HIV/AIDS. *Id.* at 6a. They are beneficiaries of the pharmacy benefit management services administered by petitioners, and they all have prescriptions for specialty medications to treat HIV/AIDS. *Id.* at 8a. Respondents assert—and the Ninth Circuit agreed—that they have presented a cognizable discrimination claim under section 504(a) because they have alleged that, in filling their specialty prescriptions, they are unable to access the same pharmacies that they would be able to access if they were filling non-specialty prescriptions. In other words, they allege that they are "prevent[ed] . . . from obtaining the same quality

of pharmaceutical care that non-HIV/AIDS patients may obtain in filling non-specialty prescriptions, thereby denying them meaningful access to their prescription drug benefit." *Id.* at 15a.

The plain language of section 504(a)—which demands proof of discrimination "solely by reason of . . . disability"—defeats this claim. The reason that respondents allegedly lack access to the "same quality of pharmaceutical care" as certain other beneficiaries is that respondents have prescriptions for specialty medications, not non-specialty medications. Pet. App. 15a. Because the classification of certain drugs as "specialty medications" does not turn on disability, respondents have not suffered discrimination "solely by reason of . . . disability." 29 U.S.C. § 794(a). It is true that respondents have alleged that various facets of their disability aggravate the burden they suffer because of that classification; in that sense, their disability is a contributing cause to the injury they have claimed. *See* Pet. App. 15a (discussing how the "unique pharmaceutical needs" of HIV/AIDS patients are better met by out-of-network pharmacies). But their disability cannot be described as the "*sole*[ ] . . . reason" for the discrimination they claim to have suffered. 29 U.S.C. § 794(a). An intervening, facially neutral policy (the distinction between specialty and non-specialty drugs) is a reason—indeed, the principal reason—for that alleged discrimination. Because such intervening, facially neutral policies are indispensable features of disparate-impact claims, *see, e.g.*, *Smith,* 544 U.S. at 239, disparate-impact claims cannot be sustained under the plain language of section 504(a).

Thus, it is no surprise that this Court has held in other contexts that similar statutory and regulatory

language targeting discrimination "solely" on the basis of a prohibited classification forecloses relief for disparate-impact claims. *See Anderson v. Edwards*, 514 U.S. 143, 151 (1995); *Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511, 516 (1987). In *Wimberly*, this Court addressed a provision of the Federal Unemployment Tax Act prohibiting states from denying unemployment benefits to any person "solely on the basis of pregnancy or termination of pregnancy." 26 U.S.C. § 3304(a)(12). There, the Court explained that the statute simply "prohibit[s] States from singling out pregnancy for unfavorable treatment." 479 U.S. at 516. Where "a State adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group, the neutral application of that rule cannot readily be characterized as a decision made 'solely on the basis of pregnancy.'" *Id.* at 517. So too here. Because petitioners have adopted a facially neutral policy that distinguishes between specialty drugs and other drugs, the neutral application of that policy to an array of individuals (persons with and without disabilities) cannot be characterized as having given rise to discrimination "solely by reason of . . . disability." 29 U.S.C. § 794(a).

Notably, the *Wimberly* Court relied in part on this Court's construction of section 504(a) in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). It recognized that in *Davis* the Court had "construed language similar to that in § 3304(a)(12) as prohibiting disadvantageous treatment." *Wimberly*, 479 U.S. at 517. The *Wimberly* Court, following the *Davis* Court, zeroed in on the key language of section 504—"solely by reason of . . . [disability]"—as indicating that the statute targeted claims of

intentional discrimination on the basis of disability. *Id.* at 517-18. *Wimberly* extended that reasoning only slightly by recognizing that the "solely by reason of" language included in section 504(a), like the "solely on the basis of" language in 26 U.S.C. § 3304(a)(12), rules out disparate-impact claims that reach beyond intentional discrimination. 479 U.S. at 517. Holding that section 504(a) categorically precludes disparate-impact claims merely requires this Court to reaffirm what it already recognized in *Wimberly*: the plain language of section 504(a) cannot be reconciled with disparate-impact theories of liability.

B. Section 504(a) Differs Markedly From Statutes That Permit Disparate-Impact Claims

What section 504 *doesn't* say is equally telling. Section 504(a) says nothing about discriminatory *effects* or *impacts*. The absence of any such language is significant, since Congress consistently places such effects-oriented language in statutes that offer remedies for disparate-impact claims.

For example, the classic disparate-impact nondiscrimination statute, section 703(a)(2) of Title VII of the Civil Rights Act, proscribes employment practices that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(2) (emphasis added). In *Griggs v. Duke Power Co.*, decided just two years before the passage of the Rehabilitation Act, this Court held that Congress styled this portion of Title VII so as to "proscribe[ ] not only overt discrimination but also practices that are fair in form, but discriminatory in

operation." 401 U.S. 424, 431 (1971); *see also Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 531 (2015) (explaining the *Griggs* Court's reliance on the text of section 703(a)(2) of Title VII). Because "Congress directed the thrust of [§ 703(a)(2)] to the *consequences* of employment practices, not simply the motivation," the *Griggs* Court held that Title VII properly encompassed disparate-impact claims. *Inclusive Communities Project*, 576 U.S. at 531 (emphasis added) (quoting *Griggs*, 401 U.S. at 432).

Likewise, in *Smith*, the Court recognized that the Age Discrimination in Employment Act of 1967 (ADEA) "authorize[s] recovery in 'disparate-impact' cases comparable to *Griggs*." 544 U.S. at 232. Justice Stevens's plurality opinion laid particular emphasis (literally) on the point that the ADEA used statutory language "identical," *id.* at 236, to that employed in Title VII to prohibit any employment actions that "'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' . . . age." *Id.* at 235 (citation omitted); *see* 29 U.S.C. § 623(a)(2). Because the text of the ADEA, like the text of Title VII, "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer," it embodies a deliberate choice to permit disparate-impact claims. *Smith,* 544 U.S. at 236.

More recently, in *Inclusive Communities Project*, this Court built on *Griggs* and *Smith* in holding that the Fair Housing Act allows for disparate-impact theories of liability. As the Court noted, "[t]ogether, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to

encompass disparate-impact claims when their text *refers to the consequences of actions* and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Inclusive Communities Project*, 576 U.S. at 533 (emphasis added). Because the Fair Housing Act makes it unlawful to "refuse to sell or rent . . . *or otherwise make unavailable or deny*, a dwelling to any person because of" certain characteristics, 42 U.S.C. § 3604(a) (emphasis added), this Court explained that the statutory text "refers to the consequences of an action rather than the actor's intent." *Inclusive Communities Project*, 576 U.S. at 534. "This results-oriented language counsels in favor of recognizing disparate-impact liability." *Id.* (citing *Smith*, 544 U.S. at 236).

Again, such language is conspicuously absent from the text of section 504(a). When statutory language is absent in one statute, despite its inclusion in analogous statutes, "Congress' silence . . . speaks volumes." *United States v. Shabani*, 513 U.S. 10, 14 (1994). If Congress had wanted to include disparate-impact claims within the scope of section 504(a) of the Rehabilitation Act, it certainly knew how to do so: Title VII, the ADEA, and the Fair Housing Act were all enacted just a few years before the enactment of the Rehabilitation Act. Rather than adopting similar results-oriented language in section 504(a), however, Congress narrowly channeled the liability standard under section 504(a) to address only those claims arising from acts of discrimination "solely by reason of . . . disability." 29 U.S.C. § 794(a). A statute providing for disparate-impact liability in this area would have been drafted differently.

This Court need not speculate as to how Congress might have phrased a disability antidiscrimination statute that encompassed disparate-impact claims. Such a statute—the ADA—already exists, and it looms large in the background of this case. As discussed further below, the ADA sets forth an elaborate disparate-impact scheme with respect to discrimination on the basis of disability, and it does so in ways that only further highlight the absence of any disparate-impact standard in section 504(a) of the Rehabilitation Act. Permitting respondents' disparate-impact claim to proceed under the aegis of the Rehabilitation Act would thoroughly undermine the carefully constructed disparate-impact regime that Congress enacted in the ADA.

II. ALLOWING DISPARATE-IMPACT CLAIMS UNDER SECTION 504(a) WOULD UNDERMINE DISABILITY LAW AND DISRUPT HEALTHCARE MARKETS

For the reasons discussed above, recognition of disparate-impact claims under section 504(a) would contravene that statute's plain language. Equally concerning are the myriad collateral consequences that would accompany a system of disparate-impact liability under the Rehabilitation Act. Two of those consequences are particularly troubling. First, the availability of disparate-impact claims under the Rehabilitation Act would encourage a migration of discrimination claims away from the comprehensive statutory framework set forth in the ADA, and toward a free-form, judicially crafted framework under the Rehabilitation Act. And, second, the recognition of disparate-impact claims under the Rehabilitation Act would deeply upset U.S. healthcare markets—

affecting the Nation's health insurers, employers, and healthcare consumers—by making common health-insurance practices effectively unworkable.

A. The ADA Provides A Legislatively Tailored Disparate-Impact Scheme

Seventeen years after it enacted the Rehabilitation Act, Congress passed the ADA—a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589 (1999) (quoting 42 U.S.C. § 12101(b)(1)). Unlike the Rehabilitation Act, the ADA sets forth an elaborate system of disparate-impact liability in certain instances, and it does so in statutory language that mirrors language found in Title VII, the ADEA, and the Fair Housing Act.

Thus, Title I and Title III of the ADA—applicable in cases involving employment and public accommodations, respectively—expressly prohibit the use of "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); *accord id.* § 12182(b)(1)(D)(i). As this Court has recognized, that statutory language makes "disparate-impact claims . . . cognizable under the ADA." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). The use of that results-oriented language in the ADA further underscores the distinct absence of such results-oriented language in the Rehabilitation Act.

Importantly, the ADA does not indiscriminately impose liability in all situations where a plaintiff can point to a facially neutral policy or practice that particularly burdens persons with disabilities. The

detailed, results-oriented statutory language featured in Title I (employment) and Title III (public accommodations) is not reproduced in Title II (public services), which reaches only acts of discrimination "by reason of . . . disability." 42 U.S.C. § 12132.

Even where Congress generally provided for disparate-impact claims in Title I and Title III, it calibrated the scope of liability through the express provision of defenses and various situation-specific limitations. Title I, for example, recognizes that employers may defend facially neutral (but effectively discriminatory) practices on the ground that such practices are "job-related and consistent with business necessity." *Id.* § 12113(a). Likewise, Congress specifically provided that employers may not use employment tests or other selection criteria on the basis of "an individual's uncorrected vision" unless they can show that such tests are "job-related for the position in question and consistent with business necessity." *Id.* § 12113(c). And in Title III, Congress included a slew of situation-specific provisos that recognize that public accommodations need not rework their policies or procedures where such change would "fundamentally alter the nature of [the] goods, services, facilities, privileges, advantages, or accommodations" on offer, or otherwise impose an "undue burden." *Id.* § 12182(b)(2)(A)(ii)-(iii); *see also id.* § 12182(b)(2)(A)(iv)-(v). Finally, Title I and Title III provide defenses or exemptions to "religious organizations or entities controlled by religious organizations, including places of worship." *Id.* § 12187; *see also id.* § 12113(d).

In all, while the ADA provides for disparate-impact liability in a wide range of cases, it also includes a large number of limitations on, and

exceptions to, disparate-impact liability. That balance reflects the sum of Congress's considered policy judgments in its effort to craft a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Olmstead*, 527 U.S. at 589 (quoting 42 U.S.C. § 12101(b)(1)).

B. Allowing Disparate-Impact Claims Under Section 504(a) Vitiates The Policy Balance Struck In The ADA

Imposition of a disparate-impact standard of liability under section 504(a) would upset the ADA's comprehensive design. Many of the careful legislative policy choices that are embedded in the ADA would become all but irrelevant.

This is a case in point: as the lower courts correctly recognized, respondents have no claim for discrimination under the ADA because health-benefit plans are not public accommodations, and nothing in the ADA requires a health-plan provider to "vary the terms of its plan depending on whether or not [an] employee [i]s disabled." Pet. App. 47a (quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000)); *see also* Pet. App. 17a-18a, 45a-46a. That determination was consistent with a wealth of circuit-court precedents and with the legislative history of the ADA. As the Senate committee report accompanying the ADA explained, "employee benefit plans should not be found to be in violation of this legislation under impact analysis simply because they do not address the special needs of every person with a disability, e.g., additional sick leave or medical coverage." S. Rep. No. 101-116, at 85

(1989). Congress considered this precise situation in crafting the ADA and declined to impose liability.

Respondents' disparate-impact theory of section 504(a) would thus allow respondents to circumvent the ADA's limitations. And because the spare text of section 504(a) contains none of the nuance that characterizes the ADA's detailed liability provisions, respondents' theory would introduce the specter of disparate-impact liability in countless situations where the ADA does not. Moreover, because the language of section 504(a) is so concise, it gives precious little guidance as to *how* disparate-impact claims in such situations would proceed, and what showing (if any) a defendant might make in order to defeat a prima facie disparate-impact case.

The Ninth Circuit's attempt to grapple with these problems in its decision below does not offer a promising template. Its decision instructs that respondents' claims should proceed so that, on remand, the district court may consider whether petitioners' prescription drug benefit program "prevents [respondents] from receiving effective treatment for HIV/AIDS." Pet. App. 16a. Nothing in the Ninth Circuit's opinion, however, offers any means of channeling this inquiry: on its face, the decision arguably compels the district court to undertake an apparently freewheeling examination of the "effective[ness]" of the benefits offered by petitioners. *Id.* How is a federal court supposed to undertake such an inquiry? Likewise, how are private actors supposed to predict courts' decisions with respect to such complex questions?

Section 504(d)—which specifically provides that the "standards used to determine whether this section has been violated in a complaint *alleging employment*

discrimination under this section shall be the same standards applied under title I of [the ADA]," 29 U.S.C. § 794(d) (emphasis added)—also contradicts the theory that section 504(a) implicitly provides for disparate-impact liability. By amending the Rehabilitation Act, and making it congruent with the ADA *only* with respect to employment-discrimination claims, Congress ensured that the scope of liability under the Rehabilitation Act would remain distinct from the scope of liability under the ADA with respect to all other claims. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232-33 (2011) (explaining that Congress's provision for two well-known grounds for products liability, and its exclusion of another common category of products-liability claims, reflected "deliberate choice, not inadvertence" (citation omitted); *cf. Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (noting that the "negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted").[2]

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[2] There is no consensus among the lower courts as to whether section 504(d) supersedes the "solely by reason of" causation standard set out in section 504(a) in the context of employment-discrimination claims. Some courts treat any claim arising under the ADA in the employment context as necessarily presenting a claim under the Rehabilitation Act. *See, e.g.*, *Allmond v. Akal Sec., Inc.*, 558 F.3d 1312, 1316 & n.3 (11th Cir. 2009), *cert. denied*, 558 U.S. 1147 (2010); *Cummings v. Norton*, 393 F.3d 1186, 1190 n.2 (10th Cir. 2005); *Oliveras-Sifre v. Puerto Rico Dep't of Health*, 214 F.3d 23, 25 n.2 (1st Cir. 2000). Others hold that a Rehabilitation Act claimant alleging employment discrimination must still show that such discrimination is "solely by reason of . . . disability." *See Conners v. Wilkie*, 984 F.3d 1255,

Section 504(d) thus once again underscores that, as a general matter, the Rehabilitation Act and the ADA do different things: section 504(a) targets disparate treatment on the basis of disability, while the ADA provides a more "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Olmstead*, 527 U.S. at 589 (quoting 42 U.S.C. § 12101(b)(1)). Reading section 504(a) as generally not encompassing disparate-impact claims is the only means of giving independent effect to the entirety of section 504 (including section 504(d)), and it is the only way of reading section 504 so as not to negate the policy choices that Congress made in the ADA.

C. Respondents' Claim Threatens The Operation Of Healthcare Markets

Setting aside the disruptive effects for disability law, respondents' disparate-impact theory promises even greater disruption for the Nation's healthcare markets. Most immediately, that theory will do considerable damage to America's pharmacy benefit management plans. Hundreds of millions of Americans receive their prescription drug coverage through such plans, and respondents' disparate-impact claim—if endorsed by this Court—would significantly alter the economics of those plans,

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1260 (7th Cir. 2021); *Soledad v. United States Dep't of Treasury*, 304 F.3d 500, 504-05 (5th Cir. 2002); *Burns v. City of Columbus, Dep't of Pub. Safety, Div. of Police*, 91 F.3d 836, 840-42 (6th Cir. 1996) (quoting 29 U.S.C. § 794(a)). Because petitioners do not employ respondents, the meaning of section 504(d) is not before this Court. Nevertheless, the special employment-discrimination rule in section 504(d) only further undermines respondents' argument that section 504(a) generally establishes disparate-impact liability.

driving up prescription drug costs for employers and plan beneficiaries alike. Worse still, recognition of disparate-impact liability under the Rehabilitation Act (and, by extension, the Affordable Care Act) would open the door to many other disparate-impact claims that would create uncertainty and would interfere with healthcare markets more broadly.

1. Over ninety percent of Americans with health-insurance coverage receive prescription drug benefits through a pharmacy benefit manager (PBM). *See* Joanna Shepherd, *Pharmacy Benefit Managers, Rebates, and Drug Prices: Conflicts of Interest in the Market for Prescription Drugs*, 38 Yale L. & Pol'y Rev. 360, 364 (2020). PBMs are widely employed by private-sector entities (such as employers or health insurers) to act as "middlemen among the drug plan, pharmacies, and drug manufacturers." *Id.* They are also widely used to manage prescription drug coverage through Medicare and Medicaid. *See, e.g.*, U.S. Government Accountability Office, *Medicare Part D: Use of Pharmacy Benefit Managers and Efforts to Manage Drug Expenditures and Utilization* 14 (July 2019), https://www.gao.gov/assets/gao-19-498.pdf (noting PBMs' role in "pharmacy network development" and "rebate and other price concession negotiations" in Medicare Part D benefit plans).

PBMs are commonly used because they control the cost of expensive pharmaceuticals. By making "bulk purchases of drugs . . . for millions of customers," PBMs can "wrest an array of discounts, rebates and fees from drug manufacturers." Milt Freudenheim, *Employers Unite in Effort to Curb Prescription Costs*, N.Y. Times (Feb. 3, 2005), https://nyti.ms/330zbmt. One important means of cost control is "selective contracting"—that is, "exclusive arrangements with

retail pharmacies that promise to steer insured individuals to in-network pharmacies." Joanna Shepherd, *Selective Contracting in Prescription Drugs: The Benefits of Pharmacy Networks*, 15 Minn. J.L. Sci. & Tech. 1027, 1028-29 (2014).

These network arrangements reduce the price paid for prescription drugs by benefit plans and consumers. *See id.* at 1051; *see also, e.g.*, Patricia M. Danzon & Mark V. Pauly, *Health Insurance and the Growth in Pharmaceutical Expenditures*, 45 J.L. & Econ. 587, 603 (2002) (estimating that "selective pharmacy networks," in combination with "formularies of preferred drugs," "reduce the cost of [prescription-drug] coverage by about 20-30 percent"); Trevor J. Royce et al., *Impact of Pharmacy Benefit Managers on Oncology Practices and Patients*, 16 JCO Oncology Practice 276, 277 (2020), https://ascopubs.org/doi/pdf/10.1200/JOP.19.00606 (noting that "health plans that use PBM-preferred pharmacy networks have demonstrated lower pharmacy costs"). These savings are especially important in the increasingly costly realm of specialty drugs. *Cf.* Sharona Hoffman & Isaac D. Buck, *Specialty Drugs and the Health Care Cost Crisis*, 55 Wake Forest L. Rev. 55, 64 (2020) (noting that "specialty drugs" accounted for 41 percent of prescription-drug costs in 2018).

Respondents' disparate-impact claim attacks the basic structure of these selective contracting arrangements. Under respondents' theory, any plaintiff with a disability may raise a claim that the use of exclusive pharmacy networks is discriminatory so long as she pleads that she is unable to obtain the "same quality of pharmaceutical care" as other beneficiaries in light of her "unique pharmaceutical

needs." Pet. App. 14a-15a. The trouble is that many medical conditions potentially implicate "unique pharmaceutical needs," and many medical conditions are susceptible to potential classification as disabilities. *See, e.g.*, *Desmond v. Mukasey*, 530 F.3d 944, 956-58 (D.C. Cir. 2008) (sleeplessness); *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (epilepsy); *Gordon v. District of Columbia*, 480 F. Supp. 2d 112, 117 (D.D.C. 2007) (arthritis); *Harding v. Cianbro Corp.*, 436 F. Supp. 2d 153, 178 (D. Me. 2006) (fibromyalgia); *Hiller v. Runyon*, 95 F. Supp. 2d 1016, 1021 (S.D. Iowa 2000) (testicular cancer); *Walders v. Garrett*, 765 F. Supp. 303, 308-09 (E.D. Va. 1991) (chronic fatigue immune dysfunction syndrome), *aff'd*, 956 F.2d 1163 (4th Cir. 1992).

Disparate-impact litigation over the "unique pharmaceutical needs" of various individuals with different medical conditions would make selective contracting arrangements entirely unworkable. Plan managers cannot waive network exclusivity for every class of beneficiaries who claim to have unique pharmaceutical needs without undermining the economic model on which those arrangements rest. Pharmacies "compete aggressively" to be included in exclusive networks by "offering price discounts for filling prescriptions," but only because inclusion in an exclusive network offers the prospect of "significant sales." Shepherd, 15 Minn. J. L. Sci. & Tech. at 1029. The more exclusive the network, the "steeper [the] price discounts." *Id.* at 1030. A liability rule that required plan administrators or benefit managers to create exceptions to exclusivity for beneficiaries with disabilities simply would not offer the incentives that drive pharmaceutical price discounting. The unintended effect of respondents' preferred rule—

geared at reducing the prices paid by respondents for their specialty drugs—would be to help drive up the cost of specialty drugs for everyone, no matter their health conditions.

2. Adoption of disparate-impact liability rules under section 504(a) also promises to severely disrupt healthcare markets more generally. The district court noted below that the "logical extension of Plaintiffs' discrimination challenge could threaten the basic structure of Health Maintenance Organizations ('HMOs') and Preferred Provider Organization insurance plans ('PPOs')." Pet. App. 42a. Decades before PBMs used selective contracting, HMOs began to "form exclusive arrangements with physicians, hospitals, and other health care providers to whom the HMO w[ould] steer patients." Shepherd, 38 Yale L. & Pol'y Rev. at 365. "A substantial body of empirical research has shown that selective contracting by managed care plans such as HMOs has lowered the prices that both insurers and patients pay for health care." *Id.*; *see also, e.g.*, Glenn A. Melnick et al., *The Effects of Market Structure and Bargaining Position on Hospital Prices*, 11 J. Health Econ. 217, 231-32 (1992) (discussing the policy implications of selective contracting and its effects on hospital prices).

As the district court recognized, if "enrollees could avail themselves of out-of-network providers at in-network rates by contending that in-network care is inferior for any particular disability, then the basis of the HMO/PPO model would be undermined." Pet. App. 43a. So long as plaintiffs could plausibly allege that they had "unique [medical] needs" by virtue of a disability, and that the limitations of the insurer's provider network prevented plaintiffs from receiving

the "same quality of [medical] care that [non-disabled] patients" could obtain from the insurer's network providers, their case would be indistinguishable from the case presented here. Pet. App. 14a-15a.

These policy consequences are extremely serious, but they are only the most predictable ways in which disparate-impact claims under the Rehabilitation Act and the Affordable Care Act might transform the delivery of healthcare in the United States. Because respondents' disparate-impact theory would force myriad participants in the Nation's healthcare markets to make decisions "always . . . in the way most favorable, or least disadvantageous," to persons with disabilities, *Alexander v. Choate*, 469 U.S. 287, 308 (1985), and because so many medical conditions are classified as disabilities, respondents' theory would turn the federal courts into the day-to-day overseers of those markets. The radical consequences of disparate-impact liability—and the increased healthcare costs associated with that liability—would be felt by employers, healthcare professionals, and patients alike. Surely this is not what Congress had in mind when it enacted the Rehabilitation Act and later incorporated it into the Affordable Care Act.

3. This Court's decision in *Choate* anticipated the "virtually unworkable" policy consequences of a disparate-impact regime in this area, which is why it declined to read disparate-impact liability into section 504. *Choate*, 469 U.S. at 308. Instead, *Choate* tried to strike a balance by "assum[ing] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact" on persons with disabilities, while firmly "reject[ing] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504." *Id.* at 299. The

Court's reasoning parsed the Rehabilitation Act's legislative history, *see id.* at 295-99, but it notably omitted any discussion of the plain language of section 504(a), and it offered no rationale rooted in statutory text that would explain why certain "disparate-impact showings" would state a claim for relief under the Rehabilitation Act while others would not. Indeed, nothing in the text of section 504(a) gives any reason to believe that Congress meant to distinguish between various categories of disparate-impact claims in this manner. That is because, as explained above, the text of section 504(a) simply cannot sustain *any* disparate-impact claim: when Congress limited Rehabilitation Act liability to acts of discrimination arising "solely by reason of . . . disability," 29 U.S.C. § 794(a), it chose statutory language that precluded challenges to policies and practices that draw facially neutral distinctions. *See supra* at 6-10. The only way to avoid the "virtually unworkable" policy consequences warned of in *Choate*—consistent with the text of section 504(a)—is to recognize that disparate-impact claims are not cognizable under section 504(a).

The *Choate* Court observed that there are important policy reasons why disability law should "rectify the harms resulting from action that discriminate[s] by effect as well as by design." 469 U.S. at 297. But Congress addressed those policy concerns as it saw fit when it enacted the ADA just five years after this Court issued its decision in *Choate*. The ADA set forth a comprehensive antidiscrimination charter that precisely addressed those situations in which the disparate effects of facially neutral policies and practices may be remedied by federal law. The availability of

disparate-impact claims under the Rehabilitation Act would significantly undermine the ADA's "comprehensive" framework. 42 U.S.C. § 12101(b)(1). "With thirty years of hindsight," it has become clear that even "entertaining the idea of disparate-impact liability" under the broad language of section 504(a) "invites fruitless challenges to legitimate, and utterly nondiscriminatory, distinctions." *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 242 (6th Cir. 2019) (Sutton, J.).

* * *

The Rehabilitation Act was, and remains, an important landmark in the course of this country's continuing effort to redress discrimination on the basis of disability. But engrafting a disparate-impact framework onto the language of section 504(a) would do significant harm to disability law by thwarting the policy choices that Congress made in the ADA, and would throw healthcare markets into disarray. The plain language of section 504(a) does not remotely require these results; indeed, it forbids them. This Court should give effect to the statute that Congress wrote and leave to Congress the job of crafting policy choices in this important area.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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