No. 20-1374

IN THE

Supreme Court of the United States

CVS PHARMACY, INC., CAREMARK, L.L.C., AND CAREMARK CALIFORNIA SPECIALTY PHARMACY, L.L.C.,

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 FOR RESPONDENTS

GERALD S. FLANAGAN
Counsel of Record
DANIEL L. STERNBERG
BENJAMIN R. POWELL
CONSUMER WATCHDOG
6330 San Vicente Blvd.
Suite 250
Los Angeles, CA 90048
(310) 392-0522
jerry@consumerwatchdog.org

ALAN M. MANSFIELD
WHATLEY KALLAS LLP
16870 W. Bernardo Drive
Suite 400
San Diego, CA 92127

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009

HENRY C. QUILLEN
WHATLEY KALLAS LLP
159 Middle Street
Suite 2C
Portsmouth, NH 03801

October 2021

QUESTION PRESENTED

Whether the language of Section 504 of the Rehabilitation Act, as incorporated in Section 1557 of the Affordable Care Act, provides a "disparate-impact" cause of action for plaintiffs claiming they have been denied meaningful access to the benefits of a federally funded program solely by reason of their disability.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authorities

INTRODUCTION

Section 1557 of the Affordable Care Act (ACA) and Section 504 of the Rehabilitation Act protect individuals with disabilities against being excluded from participation in or denied benefits of federally assisted health programs (Section 1557) and federally funded activities generally (Section 504). Section 504's effect-focused language, as long construed by federal agencies and courts, and as understood by this Court in *Alexander v. Choate*, 469 U.S. 287 (1985), prohibits both intentional discrimination and practices that have the effect of denying meaningful access to program benefits because of disability. In Section 1557, Congress adopted that established meaning when it used the same words to prohibit disability discrimination. The court below therefore held that Respondents stated a claim under Section 1557 by alleging that CVS's requirement of mail-order delivery of HIV drugs denies HIV-positive individuals meaningful access to pharmacy benefits available to others.

CVS's arguments that Sections 504 and 1557 cover only intentional discrimination contradict plain statutory language, decades of administrative and judicial precedent, and congressional action repeatedly using the statutory language at issue to proscribe exclusionary *effects* as well as discriminatory *intent*. CVS's radical rewrite of the statutes would move the law back decades to a time when indifference and neglect excluded individuals with disabilities from full participation in society.

STATEMENT OF THE CASE

A. The Statutes

Enacted in 2010, Section 1557(a) of the ACA, 42 U.S.C. § 18116(a), provides that "an individual shall not … be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any health program receiving federal financial assistance "on the ground prohibited by" four prior civil rights statutes: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; the Age Discrimination Act of 1975, 42 U.S.C. § 6101; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Those statutes address discrimination on the grounds of, respectively, race, sex, age, and disability.

Section 504, which addresses the prohibited ground of exclusion at issue here, provides that "[n]o otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" that receives federal funding or is conducted by a federal agency. 29 U.S.C. § 794(a). Section 504 is enforceable through a private right of action. *See* 29 U.S.C. § 794a(a)(2), (b); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002). Section 1557 of the ACA, in turn, is enforceable through the same mechanisms as Section 504. 42 U.S.C. § 18116(a).

Section 1557 thus incorporates Section 504 in a carefully defined way. It provides its own statement of the prohibited effects on an individual—"being excluded from participation in, being denied the benefits of, or being subjected to discrimination under" a health program—while incorporating the prohibited

ground for exclusion set forth in Section 504 (disability) and the remedies available under Section 504, including private rights of action. Section 1557's protection of individuals with disabilities reflects a central premise of the ACA: prohibiting health-plan benefit designs that, while facially neutral, "have the effect" of limiting access to health insurance and medical care because of an individual's disability or pre-existing medical condition. *See, e.g.,* 42 U.S.C. § 18031(c)(1)(A).

B. Factual Background

Respondents are individuals living with the disability of infection with HIV, the virus that causes AIDS. HIV-positive individuals have historically faced discrimination throughout the healthcare system, and Section 1557 is one of "[s]everal key provisions of the ACA" that "removed these barriers." Jennifer Kates & Lindsey Dawson, *Insurance Coverage Changes for People with HIV Under the ACA*, Kaiser Family Foundation (Feb. 14, 2017), https://tinyurl.com/3vw4kj7b.

Individuals living with HIV require antiretroviral medications daily for life, and the use of those medications requires constant monitoring and quick transition to new ones as the virus develops resistance. Joanna V. Theiss, *It May Be Here to Stay But Is It Working*, 12 J. Health & Biomedical L. 109, 115 (2016); *HIV Drug Resistance*, World Health Organization (Nov. 18, 2020), https://tinyurl.com/5a59rjhv. Pharmacists play a critical role in ensuring stable access to medications to treat HIV and providing counseling for people living with HIV. Jason J. Scafer et al., *ASHP Guidelines on Pharmacist Involvement in HIV Care*, 73 Am. J. Health Sys. Pharm. 426 (2016).

Respondents are enrolled in employer-sponsored health plans, under which CVS administers prescription-drug benefits covering medications that treat HIV. Pet.App.6a; JA 4–5. CVS's "specialty medication" program (the "Program"), however, provides separate and unequal prescription-drug benefits for people who require HIV medications. Medications in the Program may be obtained only through the mail or by drop-shipment to a CVS-branded pharmacy, without the ability to speak with a pharmacist about the medication. Medications outside the Program may be obtained at any of the 68,000 pharmacies in CVS's network (most of which are not CVS-branded), with in-person access to a pharmacist. The list of "specialty medications" subject to the Program is essentially a list of medications used to treat disabilities. JA 49 n.8, 50–82.

Before CVS unilaterally enrolled Respondents in the Program, they could access the same prescription-drug benefit as other enrollees. Pet.App.7a. Respondents could obtain HIV medications from any network pharmacy, including non-CVS-branded pharmacies, where pharmacists "could make adjustments to their medication to avoid dangerous drug interactions or remedy potential side effects." Pet.App.5a. Now, Respondents are denied *all* access to pharmacists for HIV medication and must instead speak with poorly trained call-center representatives, who have no knowledge of Respondents' medical histories. JA 20, 24–26, 30–31, 33, 45, 47. The pharmacists at CVS-branded pharmacies where drop-shipments are received lack access to Respondents' medical histories and the full range of their medications. JA 39–40.

Respondents do not "just assert" that "in-network pharmacies do[] not serve their medical needs." Pet.

Br. 42. They claim that they are denied meaningful access to the prescription-drug benefit CVS offers to individuals without disabilities. The accommodation Respondents seek is *not* preferential access to HIV medications. Nor do Respondents seek "out-of-network services at in-network prices." *Id.* at 12–13. Respondents only seek meaningful access to the broader prescription-drug benefits available to other enrollees. JA 7–10, 14–15, 20–23, 36, 128. Before suing, Respondents sought an accommodation allowing them to opt out of the Program and restoring access to the prescription-drug benefits and network pharmacies available to other enrollees. Those requests were denied. Pet.App.8a.

Far from threatening the structure of HMO and PPO plans, the accommodation Respondents seek is reasonable. They request no "fundamental alteration in the nature of [the] program." *Choate*, 469 U.S. at 300. Respondents seek only to undo the Program's disability-based restrictions, which deny meaningful access to prescription-drug benefits. If Respondents ultimately prevail, CVS will not need to provide individuals with HIV a new prescription-drug benefit—only access to the same benefits available to nondisabled CVS enrollees.[1]

Respondents do not seek to end mail-order delivery of medication as an option for patients. That option may help patients with limited mobility. The harm to

---

[1] CVS characterizes this as a "damages" action, Pet. Br. 9, but it mainly seeks injunctive relief. Respondents do not contend compensatory damages are available absent proof of intent (including deliberate indifference). *See Barber ex rel. Barber v. Colo. Dep't of Rev.*, 562 F.3d 1222, 1228 (10th Cir. 2009); *cf. Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992).

Respondents results from the *mandatory* nature of the Program for individuals with HIV. Mail order may be appropriate for some patients some of the time, but mandating one-size-fits-all mail-order delivery of HIV medications contradicts the standard of care and puts lives at risk. JA 47–48; Adiel Kaplan et al., *Millions of Americans receive drugs by mail. But are they safe?,* NBC News (Dec. 8, 2020), https://tinyurl.com/4cxy8ssu; Pet.App.14a. For these reasons, the Departments of Defense and Veterans Affairs *do not* "deliver drugs by mail, *just like* CVS," Pet. Br. 44 (emphasis added); rather, mail-order delivery of medications by Veterans Affairs is *optional*, and intended for "nonurgent, maintenance prescription medications." U.S. Dep't of Veterans Affairs, *Pharmacy Benefits*, https://tinyurl.com/j5cy8y6d. Mail-order delivery is also optional under Medicare Part D. *Can I get my prescriptions delivered with Medicare?,* Medicare.org, https://tinyurl.com/wxdvv8uh.

Most other major health insurance companies in the United States now allow members to opt out of mandatory, mail-order-only delivery of HIV medications.[2] Requiring the same protection here would hardly "upend the economic scaffolding on which our healthcare system rests." Pet. Br. 41. It is CVS's denial of meaningful access to disabled customers that is out of step with the American healthcare system.

---

[2] *See*, *e.g.*, *United Healthcare Allows Opt-Out of Mail-Order HIV Meds*, Poz.com (Sept. 11, 2014), https://tinyurl.com/29nes6sw; *Anthem, Inc. Health Plans Expand Access to HIV/AIDS Specialty Medications*, Consumer Watchdog, https://tinyurl.com/anr8pazc.

C. Decision Below

Applying a standard derived from this Court's construction of Section 504 in *Choate*, 469 U.S. at 304–06, the court of appeals ruled that Respondents had stated a claim that CVS's Program violates Section 1557 by denying meaningful access to program benefits because of disability. Pet.App.15a. The court found that Respondents' complaint "adequately alleged that they were denied meaningful access to their prescription-drug benefit, including medically appropriate dispensing of their medications and access to necessary counseling" and thus that Respondents "cannot receive effective treatment under the Program because of their disability." Pet.App.14a. The court of appeals did not address Respondents' alternative argument that, by explicitly treating individuals differently depending on whether they require HIV medications, the Program facially reflects disparate treatment because of disability.

SUMMARY OF ARGUMENT

The words of Section 504 and Section 1557 describe prohibited effects on protected individuals, not motives for discriminatory acts. The statutes protect individuals with disabilities from *being* excluded, denied benefits, or subjected to discrimination because of disability. This Court has long read such language to prohibit discriminatory *effects* as well as intentional discrimination. The context in which Congress used those words—disability discrimination—confirms this meaning because such discrimination far more often takes the form of thoughtless exclusionary practices than discriminatory animus. CVS's contrary interpretation wrongly reads language of *causation*—Section

504's prohibition of exclusion "by reason of" disability—as if it referred to *motive*.

When Congress enacted Section 504, the public meaning of its language included both discriminatory effects and discriminatory intent, as contemporaneous judicial and administrative construction of that language confirm. This Court's subsequent limitation of the reach of similar language in Title VI of the Civil Rights Act of 1964 did not reflect the Court's construction of that statute's words, but its reading of legislative history and constitutional considerations specific to Title VI and irrelevant to Section 504.

Thus, shortly after it had limited Title VI, this Court announced in *Choate* that that limitation does not apply to Section 504. *Choate* read Section 504, consistent with its language, not to outlaw *all* actions that have disparate impacts on individuals with disabilities, but to reach facially neutral practices that deny individuals with disabilities *meaningful access* to federally funded programs. The lower courts uniformly followed *Choate*'s reading until 2019. Meanwhile, Congress signified its approval both by broadening Section 504 without limiting *Choate* and by incorporating similar language into Title II of the Americans with Disabilities Act (ADA). The responsible federal agencies continued to read Section 504 to reach exclusionary effects and extended that reading to Title II, as did the courts.

When Congress used the same language to incorporate Section 504's requirements into the ACA in 2010, it did so against the backdrop of over 35 years of congressional, judicial, and administrative action establishing that this language reaches beyond intentional discrimination to protect against exclusionary

effects (subject to *Choate*'s limits). Congress's reuse of language that had an authoritative judicial and administrative construction presumptively carried forward that construction. Under each presidential administration since 2010, the agencies responsible for implementing Section 1557 have recognized that, like Section 504, it is not limited to intentional discrimination.

CVS itself acknowledges that its reading of Sections 1557 and 504 to reach only intentional discrimination is erroneous when it concedes that those sections also require that individuals with disabilities receive reasonable accommodations modifying facially neutral practices that would otherwise unlawfully deny equal access. CVS's position that no facially neutral policy or practice can violate the law seemingly threatens accommodation claims—a consequence CVS agrees cannot be correct.

CVS's alarmist policy arguments cannot support the countertextual limits it would impose on the statute. The *Choate* standard does not impose unbounded liability whenever a practice has different effects on disabled and nondisabled individuals; it requires proof that the practice denies individuals with disabilities meaningful access to a benefit that can be provided through reasonable accommodation. CVS's examples of what it regards as absurd or extreme applications of the *Choate* standard either ignore the standard's limits or reflect its uncontroversial, reasonable application. CVS's policy arguments reveal the extent to which its erroneous reading of the statute would return the nation to an era when individuals with disabilities were routinely excluded from access to public life by barriers reflecting indifference rather than intentional discrimination.

ARGUMENT

I. The plain language of Sections 1557 and 504 reaches practices that effectively deny meaningful access to individuals with disabilities.

The issue in this case is not, as CVS and its *amici* hypothesize, whether Section 1557 and Section 504 impose *unlimited* disparate-impact liability. The question is whether the statutes embody the limited disparate-impact standard described in *Choate*. "As always," determining that issue "begin[s] with the text of the statute." *Limtiaco v. Camacho*, 549 U.S. 484, 488 (2007). Because "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment," the Court must "orient [itself] to the time of the statute's adoption … and begin by examining the key statutory terms." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738–39 (2020). The Court must determine what the operative language—Section 1557's provision that an individual "shall not" be subjected to specified effects on the ground prohibited by Section 504—meant when Congress enacted Section 1557 in 2010. At that time, the ordinary public meaning of being "excluded from participation in, … denied the benefits of, or … subjected to discrimination under" a federally funded program included suffering those adverse *effects* because of disability—regardless of whether the discrimination was intentional. The same was true when Congress enacted Section 504 itself.

A. The statutes address effects, not motives.

The statutory language focuses not on actions of wrongdoers, but on adverse effects experienced by individuals with disabilities. The subject of Section 504

is an "otherwise qualified individual," 29 U.S.C. § 794(a), and the subject of Section 1557 is "an individual," 42 U.S.C. § 18116(a). Neither Section 1557 nor Section 504 is phrased as a prohibition on someone doing something to someone else, let alone doing it with a specified state of mind. The relevant words of Section 1557 do not even mention those whose programs or activities are subject to its requirements; it describes only the programs and activities themselves—those receiving "Federal financial assistance," including ACA subsidies and credits. Likewise, Section 504 mentions only two classes of entities (executive-branch agencies and the Postal Service) whose activities are subject to its restrictions. Otherwise, it describes programs and activities (those receiving "Federal financial assistance") in which individuals with disabilities are entitled to protection.

Moreover, both Section 1557 and Section 504 explicitly grant individuals with disabilities protection against suffering specific ill effects: *being excluded*, *being denied benefits*, *being subjected to discrimination*. The passive construction emphasizes the statutes' concern with individuals who suffer prohibited effects, not entities that perform prohibited acts. The statutes reflect the principle of English usage counseling use of the passive voice "[w]hen the actor is unimportant. … [and] the focus of the passage is on the [person] being acted on," Bryan A. Garner, *Garner's Modern English Usage* 676 (2016), and when "the receiver of the action is more important than the doer," *Merriam-Webster Dictionary of English Usage* 739 (1989). CVS's contrary argument rewrites the statute to insert a nonexistent reference to a wrongful actor. Pet. Br. 13 ("Section 504's language focuses on the funding recipient's reason for the differential treatment, by looking

to whether an individual with a disability was 'excluded,' 'denied … benefits,' or 'subjected to discrimination' *by a federal-funding recipient* 'solely by reason of' disability.") (emphasis added).

Where, as in Sections 1557 and 504, "the [statutory] text focuses on the *effects* of the action … rather than the motivation for the action," the language prohibits practices that have adverse effects because of a person's protected characteristics, not just actions reflecting intentional discrimination based on those characteristics. *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (plurality); *see Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971) (holding unanimously that unintentional discrimination is actionable when Congress has "directed the thrust of the Act to the *consequences* of … practices, not simply the motivation") (emphasis added). "[A]ntidiscrimination 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." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015).

Smith and *Griggs* held that statutory language prohibiting actions that would "deprive an[] individual of … opportunities or otherwise adversely affect his status" because of protected characteristics imposed liability for practices that were not intentionally discriminatory but had adverse effects on protected employees. *See Smith*, 544 U.S. at 235–36 (discussing *Griggs*). In *Inclusive Communities*, the statutory language reached beyond intentional discrimination because it prohibited both discriminatory refusals to sell or rent housing and actions that would "make unavail-

able or deny[] a dwelling to any person because of" protected attributes. 576 U.S. at 534. Although the statutes at issue in these cases otherwise focused on the conduct and intent of defendants, the Court found these provisions sufficiently "result-oriented" to "shift … emphasis from an actor's intent to the consequences of his actions." *Id.* at 535.

The effects Sections 1557 and 504 address—being excluded from a program or denied its benefits—are similar to those in *Griggs*, *Smith*, and *Inclusive Communities*: being deprived of opportunities or having housing made unavailable. The language of Sections 1557 and 504, however, is distinct in containing no reference to an actor's intent and focusing *exclusively* on prohibited effects on protected individuals. In this respect, Sections 1557 and 504 are *more* result-oriented than the statutes in *Griggs*, *Smith*, and *Inclusive Communities*.

CVS wrongly asserts that the catch-all word "discrimination" "underscores that section 504 is motive-focused." Pet. Br. 15. This Court's own usage, however, confirms that "discrimination" can be both "intentional" and "unintentional." *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 583 (2009). Moreover, CVS's reading, founded on the active verb "discriminate," ignores the statute's passive construction.[3] But even under CVS's proffered definitions, to "be subjected to discrimination" because of disability means to experience

[3] A statute using the active verb "discriminate" also outlaws discriminatory effects when its text so indicates—for example, by defining "discriminate" to include taking actions that "adversely affect" protected individuals or "have the effect" of discriminating, as does Title I of the ADA. *See* 42 U.S.C. § 12112(a)–(b).

practices under which one's disability "make[s] a difference" that is unfavorable "as compared with others." *See Bostock*, 140 S. Ct. at 1740 (quoting *Webster's New International Dictionary* 745 (2d ed. 1954)). Being subjected to discrimination because of disability, then, means receiving treatment "worse than [that experienced by] others who are similarly situated" except as to disability. *Id*. An individual may experience such effects regardless of the intent of the person who imposed them.

CVS's approach of using a restrictive reading of "discrimination" to limit the meaning of "to be excluded … or denied … benefits" defies multiple canons of construction. First, it effectively adds "intentional" before "discrimination," violating the principle that courts should not "supply words … that have been omitted." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). Second, CVS reads "excluded" and "denied" out of the statute, contrary to the rule that courts should give meaning to every word in a statute. *See id*. at 174–79. Because exclusion and denial of benefits need not reflect anyone's motive, Section 504 prohibits any feature of a program that excludes or denies access to disabled people, even if "discrimination" means "intentional discrimination." Third, CVS ignores that a concluding catch-all term should be read in light of what came before. *See id*. at 199–213. The statute's references to being excluded from participation or denied benefits because of disability—concepts that do not imply intent—inform the construction of the term "discrimination" that follows, and indicate a similar broad meaning. Protecting disabled people against intentional discrimination but not exclusionary practices would fall far short of the guarantees contained in the statute's

plain language, explicitly aimed at eliminating the "various forms of discrimination" that "individuals continually encounter" in myriad settings including "health care." 29 U.S.C. § 701(a)(5).

B. The statutes' context and other textual provisions reinforce their focus on exclusionary effects.

The context in which Section 504 and Section 1557 use their result-oriented language is critical to their proper construction. *See Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 632 n.13 (1984) ("[L]anguage as broad as that of § 504 cannot be read in isolation from its history and purposes."); *see also* Scalia & Garner 167–68 ("Context is the primary determinant of meaning."). Both statutes proscribe exclusion, denial of benefits, and discrimination because of *disability*. An individual can be excluded from a program or activity or denied its benefits solely because of a disability in the complete absence of any intent to discriminate, as a result of facially neutral acts, practices, or conditions.

To take an obvious example, doorsteps typically do not reflect an invidious intention to single out individuals with disabilities for disparate treatment, and persons with and without disabilities confront the same steps. But if the steps lead to the office where beneficiaries of a program must apply to participate, and there is no other access, persons who use wheelchairs are excluded from participation in the program and denied its benefits solely by reason of disability. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017) (describing absence of wheelchair ramps as discrimination). If the same office has a neutral policy of excluding all dogs, for reasons having nothing to do with any invidious discriminatory intent, individuals with

visual impairments who use guide dogs may be excluded from the program and denied its benefits solely because of disability. *See id.* at 758 (holding unanimously that a child prohibited from bringing a service dog to school could sue to enforce Section 504's "equal access requirements" without exhausting administrative remedies under the Individuals with Disabilities Education Act).

This Court recognized the importance of this context in *Choate*. There, the Court acknowledged the broad recognition by Congress, federal agencies, courts, and commentators that, while disability discrimination sometimes reflects invidious intent, *see* 469 U.S. at 295 n.12, it is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference," and is "primarily the result of apathetic attitudes rather than affirmative animus," *id.* at 295, 296. Accordingly, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296–97. The Court mentioned as examples not only architectural barriers, which "were clearly not erected with the aim or intent of excluding the handicapped," but also "the 'discriminatory effect of job qualification … procedures,' and the denial of 'special educational assistance' for handicapped children." *Id.* at 297 (citations omitted).

Explicit text later added to Section 504 confirms *Choate*'s understanding of the statute's aims and the necessity of giving full scope to its effects-oriented language to achieve them. For example, subsection (c), added in 1988, provides that "[s]mall providers" of government-funded services "are not required by subsection (a) to make significant structural alterations

to their existing facilities for the purpose of assuring program accessibility." 29 U.S.C. § 794(c). That provision leaves no doubt that, absent an exception, the statutory prohibition on exclusion of individuals with disabilities covers structural barriers that, intentionally or not, prevent "program accessibility."

Similarly, subsection (d), added in 1992 after enactment of the ADA, provides that in employment discrimination claims under Section 504, "[t]he standards used to determine whether *this section* has been violated … shall be the standards applied under" specified provisions of the ADA. 29 U.S.C. § 794(d) (emphasis added). Those provisions include sections of ADA Title I addressing workplace policies that have the effect of discrimination on the basis of disability, and that describe various reasonable accommodations of individuals with disabilities. *See*, *e.g.*, 42 U.S.C. §§ 12112(b), 12111(9). This Court has held that the plain language of these ADA provisions allows disparate-impact claims. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

By clarifying that these ADA provisions also apply to determining whether *Section 504* has been violated, Section 504(d) expressly recognizes that Section 504(a) outlaws facially neutral acts, practices, and conditions that have the effect of excluding otherwise qualified individuals because of disability, if reasonable modifications would allow access. Section 504(d) makes explicit that Section 504's broad language encompasses the prohibition of discriminatory effects that, in the employment context, is elaborated on in Title I of the ADA.

C. The statutes must be read to further their evident purposes.

Limiting Section 504's scope to intentional discrimination also violates the presumption against ineffectiveness: "A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia & Garner 63. The stated purposes of the Rehabilitation Act include "empower[ing] individuals with disabilities" and fostering their "inclusion" and "integration" in society by ensuring that they receive "equal opportunity" to participate. 29 U.S.C. § 701(b)(1), (a)(6). CVS tells the Court not to worry about imposing a narrow construction on Section 504 because prohibiting intentional discrimination will still protect disabled people from being targeted for abuse. Pet. Br. 22. But a vast gulf separates abuse (and other forms of intentional discrimination CVS cites) and an equal opportunity for disabled people to be independent and included in society. Not even CVS claims that a limited prohibition of intentional discrimination will do much to advance the latter.

D. Section 504's causation language does not limit it to intentional discrimination.

1. "By reason of" refers to cause, not motive.

CVS's effort to read a requirement of intentional discrimination into the statutes relies largely on the phrase "by reason of … disability" in Section 504. Isolating the word "reason" from that phrase, CVS argues that dictionary definitions suggest that the word refers to the *motive* of someone responsible for an exclusionary act. But "this Court's precedents and longstanding principles of statutory interpretation

teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again." *Bostock*, 140 S. Ct. at 1827 (Kavanaugh, J., dissenting). Here, CVS overlooks that the statute does not refer to actions taken for a prohibited "reason"; it uses the idiom "by reason of" to describe the relationship between *effects*—being excluded, denied benefits, or subjected to discrimination—and their *cause*—disability.

Cause and motive are not the same. This Court has repeatedly recognized that "by reason of" refers to *causation* and is synonymous with "because of." *See*, *e.g.*, *Bostock*, 140 S. Ct. at 1739; *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009); *Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 652–55 (2008); *see also Black's Law Dictionary* 1518 (11th ed. 2019) (defining "reason" as "a ground or cause that explains or accounts for something <weakened by reason of chronic illness>"); *Webster's New International Dictionary* 2074, 242 (2d ed. 1950) (defining "by reason of" as "[o]n account of; because of," and "because of" as "[b]y reason of; on account of").

When a statute refers to the cause of a person's volitional *act*, the cause may be the person's motive. Thus, this Court held that in a disparate-treatment claim under an Age Discrimination in Employment Act (ADEA) provision prohibiting "an employer" from taking adverse employment actions against an individual "because of such individual's age," 29 U.S.C. § 623(a)(1), establishing the cause of the employer's adverse action means showing "that age was the 'reason' that the employer decided to act." *Gross*, 557 U.S. at 176; s*ee also Inclusive Cmtys.*, 576 U.S. at 560–62

(Alito, J., dissenting) (stressing statutory language that "linked an action and a reason for the action").

Gross's outcome turned on specific language in the ADEA's disparate-treatment provision. *See* 557 U.S. at 176. The language of Sections 1557 and 504 is very different: Rather than prohibiting a person from taking adverse action because of someone's protected characteristic, Sections 1557 and 504 provide that no person shall suffer specific injuries because of that person's disability. That causal relationship does not depend on the intent of a wrongdoer. If, for example, an otherwise qualified person with a vision disability is excluded from a program *because* she cannot read the application, her exclusion is "by reason of" the disability, regardless of whether anyone intended that result. Disability is the only "reason" for her exclusion.

The ADEA, at issue in both *Gross* and *Smith*, illustrates the point. While *Gross* held that "because of … age" referred to an employer's motive in the paragraph of the statute authorizing disparate-treatment claims based on the employer's adverse actions, 29 U.S.C. § 623(a)(1), *Smith* held that the next paragraph, which prohibits employment practices that deprive an employee of opportunities or "adversely affect" him "because of such individual's age," 29 U.S.C. § 623(a)(2), provides for disparate-impact liability. Under that provision, where "the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer," *Smith*, 544 U.S. at 236, the requirement that the prohibited effect be "because of" age means that the challenged practice must "adversely affect[] the employee because of that employee's age," *id.* at 236 n.6, not that the employer must have *acted* because of the employee's age.

Likewise, what must occur "by reason" of disability under Section 504 is not the defendant's action, but a challenged practice's "harmful effect … on the handicapped." *Good Shepherd Manor Fed'n, Inc. v. City of Momence*, 323 F.3d 557, 561 (7th Cir. 2003). For example, if a city unreasonably refuses to waive a requirement that all houses have narrow doorways, plaintiffs who use wheelchairs "would be under no obligation to prove that the rule was motivated by an animus toward handicapped people." *Id*. at 561–62.

2. "Solely" does not imply intent.

Section 504's requirement that adverse effects occur *solely* by reason of disability does not limit Sections 504 and 1557 to intentional discrimination. Section 1557 does not even include "solely," but protects individuals against specified effects on the "ground" prohibited by the statutes it references, including disability. As to Section 504 itself, "solely" adds nothing to CVS's claim that "by reason of" refers to motivation rather than causation. "Solely" does not imply intent, but denotes exclusivity: "'Solely' means 'alone.'" *Husted*, 138 S. Ct. at 1842. "Solely by reason of" requires not intent, but "sole causation." *Id*. at 1843.[4]

---

[4] *Wimberly v. Labor & Industrial Relations Commission of Mo.*, 479 U.S. 511 (1987), relied on by CVS, is not to the contrary. There, the Court construed different language prohibiting denial of unemployment compensation "solely on the *basis* of pregnancy," *id*. at 516 (emphasis added), to refer to "the basis for the State's decision, not the claimant's reason for leaving her job." *Id*. The petitioner did not claim disparate impact or denial of meaningful access, so the Court had no occasion to construe sole-causation language in these contexts. Nor did *Wimberly* say anything to undermine *Choate*'s reading of Section 504 as requiring meaningful access.

The sole-causation requirement does not determine whether the statute requires intent or also includes unintended effects resulting from disability; it applies either way. It may be *more* problematic for intentional-discrimination claims than effect-based claims, given that mixed motives are pervasive in human actions, as Senator Case observed in the debates over enactment of the Civil Rights Act of 1964. 110 Cong. Rec. 13837–38 (1964) ("If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."); *see Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981) ("It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown.").

By contrast, sole causation is apparent when a single barrier—a doorstep, a phone system inaccessible to the deaf, or, as here, a requirement that affects Respondents solely because of HIV status—prevents meaningful access to a benefit available to others. If an otherwise qualified individual's exclusion results from a practice that operates to exclude her only because of disability, the exclusion is attributable solely to disability. *See, e.g.*, *Furgess v. Pa. Dep't of Corr.*, 933 F.3d 285, 291 (3d Cir. 2019); *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005); *Rothschild v. Grottenthaler*, 907 F.2d 286, 291 (2d Cir. 1990). Section 504's use of the word "solely" by no means suggests that it is limited to intentional discrimination.

II. Congress adopted the settled construction of Section 504 in enacting Section 1557.

Even if the statutory words were unclear, the history of their use and reuse by Congress would resolve any ambiguity. By the time Congress adopted the operative words in the ACA in 2010—and long before—the words had an established "public meaning," *Bostock*, 140 S. Ct. at 1738, extending beyond intentional discrimination to cover exclusionary effects.

A. The history of Section 504's adoption and administrative implementation confirms its application to exclusionary effects.

When it adopted Section 504, Congress borrowed part of its language from Title VI, which forbids racial exclusion and discrimination in federally funded programs. Section 504 expressed its prohibition in Title VI's words: No person "shall … be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a federally funded program on the prohibited ground. 42 U.S.C. § 2000d. As this Court explained in *Choate*, when Section 504 was enacted, Title VI had been construed by regulations issued by dozens of federal agencies, modeled on standards drafted by the Justice Department, "in which Title VI was interpreted to bar programs with a discriminatory *impact*." 469 U.S. at 294–95 n.11 (emphasis added). "Thus, when Congress in 1973 adopted virtually the same language for § 504 that had been used in Title VI, Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination." *Id.* A statute "perpetuating wording" that has received "a uniform interpretation by … the responsible agency" is "presumed to

carry forward that interpretation." Scalia & Garner 322; *see, e.g.*, *Inclusive Cmtys.*, 576 U.S. at 536–37; *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

Only four months after Section 504's enactment, this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974), confirmed that the public meaning of the statutory terms reached exclusionary effects. *Lau* held that failing to provide non-English-speaking Chinese-American schoolchildren with supplemental English instruction violated Title VI because it had the effect of excluding them from participation in federally funded educational programs on the ground of national origin. *Id.* at 567–69. Both the majority and the concurring Justices approvingly cited federal regulations prohibiting actions with adverse effects "even though no purposeful design is present." *Id.* at 568 (majority); *id.* at 571 (Stewart, J., concurring in the result) (finding that the regulations "reasonably and consistently interpreted" Title VI).

Shortly thereafter, Congress amended the Rehabilitation Act to clarify the breadth of its definition of "handicapped," but did not amend Section 504 to limit it to intentional discrimination. *See* Pub. L. No. 93-516, § 111(a), 88 Stat. 1617 (1974). Rather, the amendments' legislative history expressed the expectation that implementing regulations of the Department of Health, Education and Welfare (HEW) elaborating on the obligations imposed by Section 504 would shortly follow. *See* S. Rep. No. 93-1297, 1974 U.S.C.C.A.N. 6373, 6391. Finalization of those regulations was not completed until June 1977, but they reflected the same view of the scope of the statutory prohibition as the Title VI regulations that had informed Congress's enactment of Section 504. HEW emphasized that:

> There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity.

HEW, *Final Rule, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 42 Fed. Reg. 22676 (1977). HEW concluded that the statute's broad language authorized prohibition of practices "that have the effect of subjecting handicapped persons to discrimination on the basis of handicap." *Id.* at 22679.

Regulations HEW promulgated the next year to coordinate government-wide implementation of Section 504 similarly recognized that "section 504, like other nondiscrimination statutes, prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating." HEW, *Final Rule: Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973*, 43 Fed. Reg. 2132, 2134 (1978). The 1978 regulations, like the 1977 ones, were replete with prohibitions on providing individuals with disabilities with services that are "not as effective in affording equal opportunity" and engaging in practices that have the "effect" of discriminating against or excluding such individuals. *Id.* at 2138. The regulations further required that each federal agency that provides federal funding must promulgate regulations consistent with HEW's to implement Section 504. *Id.* at 2137–38.

Later in 1978, Congress amended Section 504 again to extend its prohibitions to federal agencies themselves and to codify the HEW regulations' requirement that each federal agency promulgate implementing regulations, as well as to create a private right of action for violations by adopting the remedial provisions of Title VI. Pub. L. No. 95-602, §§ 119–120, 92 Stat. 2955 (amending 29 U.S.C. § 794 and adding § 794a). Congress took no action to limit the effect-based language of Section 504 when it acknowledged, and codified in part, the HEW regulations.

B. CVS's reliance on Title VI is misplaced.

CVS takes a different view of Section 504's reuse of the verbs used in Title VI. Because this Court *later* construed Title VI to reach only intentional discrimination, CVS argues that the same words in Section 504 must receive the same limiting construction. CVS's argument ignores that this Court's limitation of Title VI *was not based on its language*, but on constitutional considerations expressed in its distinctive legislative history, which are wholly inapplicable to Section 504.

Notably, when this Court initially examined Title VI's application to discriminatory effects, it concluded unanimously that a disparate-impact claim was actionable. *Lau*, 414 U.S. at 566. Subsequently, a majority of the Court held in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that Title VI extends no further than the *constitutional* proscription against intentional race discrimination. *Id.* at 284–87 (lead opinion of Powell, J.); *id.* at 328–36 (Brennan, J., concurring in the judgment in part and dissenting in part). That conclusion was not based on

Title VI's text, which Justice Powell described as "majestic in its sweep." *Id.* at 284 (lead opinion). Rather, it rested on Title VI's "voluminous legislative history," *id.*, which, in five Justices' eyes, "reveal[ed] a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution," *id.*; *accord id.* at 328–36 (Brennan, J.).

Five years later, in *Guardians Ass'n v. Civil Service Commission of City of New York*, 463 U.S. 582 (1983), another majority adhered to the *Bakke* majority's conclusion that Title VI reaches only unconstitutional racial discrimination, and hence concluded that, like the Fourteenth Amendment, it prohibits only intentional discrimination. *None* of the majority Justices grounded their reading in the statute's language; rather, Justice Powell again invoked legislative history, while the others rested on *stare decisis*. *See id.* at 610–11 (Powell, J., concurring in the judgment); *id.* at 612 (Rehnquist, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 642 (Stevens, J., dissenting).

In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court reiterated that, under *Guardians* and *Bakke*, it must be "taken as given," *id.* at 279, that "Title VI itself directly reach[es] only instances of intentional discrimination." *Id.* at 281 (quoting *Choate*, 469 U.S. at 293). *Sandoval*, like *Guardians* and *Bakke*, made no attempt to ground that construction in statutory language. *Sandoval* accepted the construction based exclusively on *stare decisis* and deemed it irrelevant that the construction rested on an interpretive method—reliance *solely* on legislative history rather than stat-

utory text or administrative construction—that *Sandoval* did not endorse. *Id.* at 281 & n.1; *cf. id.* at 303–10 (Stevens, J., dissenting).

That *stare decisis* binds the Court to give an atextual reading to Title VI does not, however, mean it must abandon sound principles of statutory interpretation to give the same construction to Section 504, absent any indication that Congress relied on that reading when enacting Section 504. *Sandoval* itself made precisely this point. *Id.* at 288. And Congress could not have relied on the *Bakke-Guardians* construction of Title VI when it enacted Section 504 years earlier. Rather, as explained above, the authoritative constructions that existed when Section 504 was enacted demonstrate that the public meaning of the language was to prohibit exclusionary effects attributable to disability regardless of motive.

The reasons later given for the narrow construction of Title VI are wholly inapplicable to Section 504. The *Bakke* opinion relied nearly exclusively on floor statements linking Title VI to the constitutional prohibition of race discrimination, but there are no such statements concerning Section 504. It would be nonsensical to suggest that Congress intended to limit Section 504's scope to the Constitution's, because the Constitution does not explicitly address disability discrimination and, when Section 504 was enacted, had not been authoritatively held to provide *any* specific protection against it. *Cf. City of Cleburne, Tex. v.*

Cleburne Living Ctr., 473 U.S. 432, 440–48 (1985) (applying rational-basis scrutiny to disability).[5] Whatever constitutional limits Congress may have intended to impose on Title VI, there is no basis for reading similar limits into Section 504.

For similar reasons, Section 504's scope is unaffected by *Sandoval*'s holding that there is no private right of action to enforce federal regulations that go further than Title VI in prohibiting racially discriminatory effects. As *Sandoval* recognized, the regulations that construe Section 504 to prohibit exclusionary effects are regulations of the type that *are* enforceable through a statutory right of action, as they "construe the statute itself" by "clarifying what sorts of disparate impacts upon the handicapped [are] covered by § 504." 532 U.S. at 284–85. Moreover, there is no doubt that Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a(a)(2), provides a private right of action for all violations of Section 504, *see Barnes*, 536 U.S. at 185, regardless of whether the same type of conduct would violate Title VI, *see Darrone*, 465 U.S. at 635.

C. The administrative construction of Section 504 confirms its broad scope.

Following HEW's initial issuance of Section 504 regulations, and Congress's amendment of the statute to require implementing regulations by other agencies as well, "[a]t least 24 federal agencies" adopted regulations providing that Section 504 prohibits actions

---

[5] In addition, constitutional constraints on race-conscious remedies for unintended racial disparities, *see Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016), do not limit accommodation of individuals with disabilities.

with exclusionary effects on individuals with disabilities as well as intentional discrimination. *Choate*, 469 U.S. at 297 n.17 (listing regulations as of 1985).

Those regulations remain in force. For example, regulations of the Department of Justice (which has now been assigned the principal rulemaking role under Section 504) continue to prohibit methods of administering federally funded programs "that have the *effect* of subjecting qualified handicapped persons to discrimination on the basis of handicap" or that have the "*effect* of defeating or substantially impairing the accomplishment of the objectives of the recipient's program with respect to handicapped persons." 28 C.F.R. § 41.51(b)(3) (emphasis added). Like HEW's original 1978 regulations, the DOJ regulations still prohibit recipients of federal funds from using facilities that are "unusable by" or "have the effect of excluding" individuals with disabilities, *id.* §§ 41.56, 41.51(b)(4)(i). The Department of Health and Human Services, HEW's successor, likewise continues to maintain these regulatory requirements, *see* 45 C.F.R. Part 84, as do other federal agencies.

These longstanding regulations reflect agency construction of the statute itself, as *Sandoval* recognized, 532 U.S. at 284–85, and as HEW explicitly stated in the 1978 regulations, 43 Fed. Reg. at 2134. Even if Section 504's language were ambiguous, the regulations would be entitled to *Chevron* deference unless the statute's language unambiguously foreclosed their reading. *See Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and in the judgment) ("This is an absolutely classic case for deference to agency interpretation.") (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)); *see also Sch. Bd. of Nassau Cty., Fla. v.*

Arline, 480 U.S. 273, 279 (1987) (stating that the regulations "provide an important source of guidance on the meaning of § 504") (internal quotation marks omitted).

Far from unambiguously foreclosing the agency construction, Section 504's text strongly supports its application to practices that have exclusionary effects, as explained above. Because the agencies' longstanding construction is the *best* reading, it necessarily is "a 'reasonable interpretation' of the enacted text." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011). That "natural" reading falls "well within the bounds of reasonable interpretation," and is "entitled to deference under *Chevron*." *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 454 (1999).

D. Courts have consistently read Section 504 to reach practices that deny meaningful access.

This reading is reinforced not only by consistent administrative construction, but also by decisions of this Court and the courts of appeals. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), this Court held that Section 504 does not require "affirmative action" that goes beyond reasonable accommodation. *See id.* at 407–12. The Court recognized, however, that the statute reaches "requirements and practices [that] arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program," and that in such circumstances "refusal to modify an existing program might become unreasonable and discriminatory." *Id.* at 412–13. The Court read the statute to confer authority on federal agencies to identify "those instances where a refusal

to accommodate the needs of a disabled person amounts to discrimination against the handicapped." *Id.* at 413. *Davis* makes clear, therefore, that as applied to disability, the concept of discrimination is contextual.

After *Davis*, the courts of appeals addressed the circumstances in which Section 504 reaches exclusionary effects of practices that do not reflect intentional discrimination, and by the mid-1980s "[a]ll the Courts of Appeals that ha[d] addressed the issue ha[d] agreed that, at least under some circumstances, § 504 reaches disparate impact discrimination." *Choate*, 469 U.S. at 297 n.17.

This Court addressed the issue in *Choate*, which involved a claim that a state Medicaid limit on hospital stays violated Section 504 because it disproportionately affected individuals with disabilities. Characterizing the claim as one of "disparate impact," the Court held it insufficient on its facts. The Court declined, however, to hold that "proof of discriminatory animus is always required to establish a violation of § 504." *Id.* at 292. The Court rejected the argument that its construction of Title VI in *Bakke* and *Guardians* applied to Section 504, *id.* at 293–95; rather, it stated, *Guardians*' "conclusion that, in response to factors peculiar to Title VI, *Bakke* locked in a certain construction of Title VI would not seem to have any obvious or direct applicability to § 504." *Id.* at 294 n.11. *Choate* further explained that the enacting Congress would have been aware of the then-prevailing view that the language it borrowed from Title VI *did* reach "programs with a discriminatory impact." *Id.* And, most critically, *Choate* emphasized that the statutory context and design were inconsistent with a reading under which Section 504 "could not rectify the harms resulting from action

that discriminated by effect as well as by design." *Id.* at 297.

At the same time, while assuming that Section 504 "reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped," the Court rejected a reading that would outlaw all practices that affect individuals with disabilities differently from others, which would go beyond "manageable bounds." *Id.* at 299. The Court reasoned that "[a]ny interpretation of § 504 … must be responsive" to both "the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." *Id.*

The bounds *Choate* established are in keeping with the statute's linguistic focus on prohibiting practices that have the effect of *excluding* and *denying benefits* to individuals with disabilities. Citing *Davis*'s teaching that Section 504 does not require a recipient of federal funds to make a "fundamental alteration in the nature of a program" to benefit disabled individuals but does require *reasonable* "modifications to accommodate the handicapped," *id.* at 300, the Court stated that the proper "balance … requires that an otherwise qualified handicapped individual *must be provided with meaningful* access to the benefit that the grantee offers." *Id.* at 301 (emphasis added). The Court held that the claims before it failed to allege a violation of that standard because the challenged requirement did not deny disabled individuals meaningful access to the benefits offered to others, and the state was not required to alter the program merely to make it more beneficial to individuals with disabilities. *Id.* at 302–09.

The next year, in *Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986), the Court reiterated that Section 504 requires that individuals with disabilities receive "meaningful access" to federally funded programs. *See id.* at 624 (plurality); *id.* at 655 n.8 (White, J., dissenting). A plurality of the Court there struck down regulations it saw as going beyond the meaningful-access requirement to prescribe a standard of treatment for infants with disabilities, but there was no disagreement among the Justices that *Choate*'s meaningful-access standard properly construed Section 504's anti-discrimination mandate.

In the thirty years following *Choate*, the courts of appeals uniformly adopted its "meaningful access" standard as the proper reading of Section 504, and recognized that disparate-impact claims are cognizable to the extent they assert that a defendant's practices have the effect of denying individuals with disabilities meaningful access to a program or its benefits.[6] The courts of appeals also widely recognized that a related form of exclusion, distinct from disparate treatment, also violates Section 504: failure to grant a reasonable accommodation to an individual with a disability

---

[6] *See, e.g.*, *Ruskai v. Pistole*, 775 F.3d 61, 78 (1st Cir. 2014); *Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009); *CG v. Pa. Dep't of Educ.*, 734 F.3d 229, 235–37 (3d Cir. 2013); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 504 & n.5 (4th Cir. 2016); *Brennan v. Stewart*, 834 F.2d 1248, 1261 (5th Cir. 1988); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901 (6th Cir. 2004); *McWright v. Alexander*, 982 F.2d 222, 228–29 (7th Cir. 1992); *Norcross v. Sneed*, 755 F.2d 113, 117 n.4 (8th Cir. 1985); *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 859–60 (10th Cir. 2003); *Berg v. Fla. Dep't of Labor & Empl. Sec., Div. of Vocational Rehab.*, 163 F.3d 1251, 1254 (11th Cir. 1998); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008).

when that person would otherwise be excluded from or denied benefits of a federally funded program.[7] This Court likewise has recognized that Section 504 requires reasonable accommodation. *See Fry*, 137 S. Ct. at 749; *Arline*, 480 U.S. at 287.

A disparate-impact claim differs from a reasonable-accommodation claim by focusing on systemic effects on individuals with disabilities rather than on a defendant's failure to grant a requested accommodation to a specific individual, which may violate the statute regardless of whether a practice affects other persons with disabilities. *Cinnamon Hills Youth Crisis Ctr., Inc. v. St. George City*, 685 F.3d 917, 923 (10th Cir. 2012) (Gorsuch, J.). The premise of both, however, is that even facially neutral practices violate Section 504 if they result in a denial of access that could be avoided by a reasonable policy modification. *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 738–39 (9th Cir. 2021); *Nunes v. Mass. Dep't of Corr.*, 766 F.3d 136, 145 n.7 (1st Cir. 2014).

Not until 2019 did any court of appeals depart from the consensus that Section 504 reaches practices that have the effect of denying meaningful access. *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235 (6th Cir. 2019). The Sixth Circuit's opinion in *BlueCross*, which remains an outlier in the decades of precedent

---

[7] *See, e.g., Henrietta D. v. Bloomberg*, 331 F.3d 261, 273–75 (2d Cir. 2003); *Juvelis v. Snider*, 68 F.3d 648, 653 (3d Cir. 1995); *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005); *Wis. Cmty. Servs. v. City of Milwaukee*, 465 F.3d 737, 747 (7th Cir. 2006); *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097–98 (9th Cir. 2010); *United States v. Bd. of Trs. for Univ. of Ala.*, 908 F.2d 740, 748–49 (11th Cir. 1990).

construing Section 504, does exactly what *Choate* instructed lower courts not to do: make "too facile an assimilation of Title VI law to § 504." 469 U.S. at 293 n.7. Like CVS, *BlueCross* wrongly assumes that Section 504 must conform to the *Bakke-Guardians-Sandoval* understanding of Title VI because the statutes use similar language, without acknowledging that Title VI was understood to reach disparate impacts when Congress enacted Section 504, or that the subsequent limitation of Title VI was on non-textual grounds. 926 F.3d at 242; Pet. Br. 28–30.

E. Congress repeatedly signified approval of an effect-focused reading of Section 504.

Faced with the implementing agencies' consistent view that Section 504 reaches beyond intentional discrimination, and the consensus of courts before and after *Choate*, Congress repeatedly acted in ways that unambiguously reflect approval of those views. In 1988, in legislation abrogating *Grove City College v. Bell*, 465 U.S. 555 (1985), Congress amended Section 504 to clarify that its prohibitions extend to the entirety of a program that receives federal funding. Civil Rights Restoration Act, Pub. L. No. 100-259, § 4, 102 Stat. 28, 29–30 (1988) (adding 29 U.S.C. § 794(b)). If Congress had also disagreed with *Choate* and the many decisions adopting its standard, "it could have easily overruled those as well, but it did not do so." *Bostock*, 140 S. Ct. at 1777 (Alito, J., dissenting). Instead, even as it expanded Section 504's reach, Congress left unaltered the provisions construed by responsible agencies and courts to outlaw exclusionary effects. Indeed, as explained above, Congress included

a small-provider exception to accessibility requirements, whose premise was that the statute otherwise prohibited unintended adverse effects on persons with disabilities.

Congress amended Section 504 again in 1992, and again did nothing to negate the administrative and judicial view that the statute reaches actions with the effect of denying meaningful access because of disability. Pub. L. No. 102-569, 106 Stat. 4344 (1992). Rather, the major substantive change made by those amendments was the addition of the language conforming standards for deciding employment discrimination claims under Section 504 to those of Title I of the ADA—a change that presupposed Section 504 reaches more than intentional discrimination. All told, Congress revisited Section 504 seven times between *Choate* and the enactment of Section 1557 of the ACA in 2010, and never took any action to disturb the administrative and judicial consensus that Section 504 reaches discriminatory effects.[8]

Meanwhile, in enacting the ADA in 1990, Congress affirmatively endorsed the prevailing construction of Section 504 by adopting its operative language in Title II, applicable to discriminatory practices of state and local governments. Title II's antidiscrimination provision states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

---

[8] *See* 29 U.S.C. § 794 Credit(s). Unlike in *Inclusive Communities*, where the dissenters would have rejected congressional ratification arguments, *see* 576 U.S. at 568–69 (Alito, J., dissenting), there was no disagreement among the branches over the scope of Section 504 or the *Choate* standard at the time of these actions.

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II's use of Section 504's effect-oriented, passive-voice protection reflected Congress's incorporation of *Choate*'s meaningful-access standard, and the consistent administrative construction of Section 504, into Title II. *See* H.R. Rep. No. 101-485, at 61 (1990); S. Rep. No. 101-116, at 44 (1989).[9] Section 12132, unlike Section 504, omits "solely" from its causation standard, but, as explained above, the causation standard does not determine whether the statute reaches discriminatory effects. *See supra* 22. The principal effect of omitting "solely" is to allow mixed-motive disparate-treatment claims while leaving disparate-impact and failure-to-accommodate claims largely unaffected.

The Attorney General, who has rulemaking authority under Title II, *see* 42 U.S.C. § 12114(a), accordingly promulgated regulations construing Title II, like Section 504, to "prohibit[] both blatantly exclusionary policies or practices and policies or practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander v. Choate*." 56 Fed. Reg. 35694, 35704 (1991). The Attorney General repeated *Choate*'s observation that the statute's promise to eliminate barriers, provide access,

---

[9] Congress's use of different language to reach discriminatory effects in Titles I and III of the ADA reflects its adaptation of the pre-existing employment-discrimination and public-accommodation statutes it used as models for those titles, not an intention to limit the scope of the Section 504 language it used as the basis of Title II.

and eliminate discriminatory effects "would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id*. (quoting *Choate*, 469 U.S. at 297). By 2010, each of the courts of appeals had recognized that Title II incorporates *Choate*'s meaningful-access standard.[10] This Court, too, recognized that Congress took a "comprehensive view of the concept of discrimination" in Title II. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999).

F. Congress adopted the meaningful-access standard in Section 1557.

When Congress enacted the ACA in 2010, it had the benefit of over three decades of administrative and judicial construction of what it means to be excluded, denied benefits, or subjected to discrimination by reason of disability, under two statutes using those terms. In Section 1557 of the ACA, Congress deliberately chose the language it had used before to describe what the new statute prohibited. Congress did not merely incorporate Section 504 and other anti-discrimination statutes by reference, but re-enacted their

---

[10] *See Theriault v. Flynn*, 162 F.3d 46, 48 (1st Cir. 1998); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir. 2003); *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995); *A Helping Hand, LLC v. Balt. Cty.*, 515 F.3d 356, 362 (4th Cir. 2008); *Frame v. City of Arlington*, 616 F.3d 476, 484 (5th Cir. 2010); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 908 (6th Cir. 2004); *Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 847 (7th Cir. 1999); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999); *Crowder v. Kitigawa*, 81 F.3d 1480, 1483 (9th Cir. 1996); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 859-860 (10th Cir. 2003); *L.C. by Zimring v. Olmstead*, 138 F.3d 893, 901 (11th Cir. 1998); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1260 n.2 (D.C. Cir. 2008).

operative prohibitory language—"an individual shall not … be excluded from participation …, be denied … benefits …, or be subjected to discrimination." 42 U.S.C. § 18116(a). Under both Section 504 and Title II of the ADA, these words had a settled meaning as applied to disability that included denial of meaningful access as well as intentional discrimination. Reenactment of statutory language presumptively carries forward such a settled public meaning. Scalia & Garner 322.

That canon rests on the view that "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Moreover, "when a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning" because the terminology has "acquired" that public legal meaning. Scalia & Garner 323, 324.

Here, Congress's reuse of language with an established meaning as applied to disability discrimination "is convincing support for the conclusion that Congress accepted and ratified the [then-]unanimous holdings of the Courts of Appeals" (and this Court). *Inclusive Cmtys.*, 576 U.S. at 536. Even if CVS were correct that this reading did not reflect the original meaning of Section 504, it is unequivocally the meaning the words had in 2010 when Congress used them to prohibit exclusion from healthcare programs on grounds of disability.

The settled meaning of those words as applied to disability discrimination makes it unnecessary to consider here how Section 1557 applies to the grounds of discrimination addressed by Title VI given the different construction this Court imposed on that statute in *Bakke* and *Guardians*. Likewise, to the extent the meaning of being excluded, denied benefits or subjected to discrimination on the grounds addressed by the other two statutes referenced in Section 1557—Title IX (sex) and the Age Discrimination Act (age)—may have been unsettled in 2010, Section 1557 may not have carried forward any particular construction of those statutes, and this case presents no occasion for delving into whether the Court's legislative-history-based construction of Title VI applies to them as well. In light of the nature of disability discrimination, the long-established construction of the language used to address it in Section 504, and Congress's repeated use of that language to prohibit exclusionary effects attributable to disability, there is nothing at all anomalous in the possibility that Section 1557, and Section 504, might have a broader sweep than those statutes.

The administrative construction of Section 1557 confirms that its scope, with respect to disability, is not limited to intentional discrimination. Section 1557 assigns regulatory authority to the Secretary of Health and Human Services. 42 U.S.C. § 18116(c). The Secretary's regulations, as promulgated in 2016 and amended in 2020, incorporate requirements that healthcare programs provide "effective" communications to persons with disabilities, that their buildings, facilities, information and communications be made "accessible to" individuals with disabilities, and that they make "reasonable modifications to … policies, practices, or procedures when such modifications are

necessary to avoid discrimination on the basis of disability." 45 C.F.R. §§ 92.102–.105. Those requirements are incompatible with a construction of Section 1557 limited to intentional disability discrimination. Moreover, under both the Obama and Trump Administrations, the Secretary acknowledged that a right of action for disparate impact on the basis of disability is available under Section 1557. 81 Fed. Reg. 31375, 31440 (2016); 85 Fed. Reg. 37160, 37195 (2020). The Secretary has also stated that "the underlying Section 504 regulations," which recognize that the statute prohibits exclusionary effects, are now "more broadly applicable under Section 1557" to entities covered by the newer law. 85 Fed. Reg. at 37176.

III. CVS's reading of the statutes contradicts itself.

Tellingly, CVS's contention that Sections 1557 and 504 do not prohibit actions with exclusionary effects on individuals with disabilities absent intentional discrimination contradicts itself. Even while contending that the statutes do not permit claims based on the *Choate* standard, CVS concedes that they still require that federally assisted programs provide reasonable accommodations to allow equal access by an individual with a disability. Pet. Br. 23.

CVS's position ignores the statutory foundation of the accommodation requirement. The premise of that requirement is that the statutory prohibition on exclusion is violated when an individual is denied equal access that could be afforded with a reasonable accommodation, regardless of whether the exclusionary practice reflects disparate treatment. "A claim for reasonable accommodation … does not require the plain-

tiff to prove that the challenged policy intended to discriminate." *Cinnamon Hills*, 685 F.3d at 922 (Gorsuch, J.). The violation is the denial of access, intended or not, that a reasonable accommodation would remedy. Thus, the requirement of accommodation—which CVS acknowledges—reflects the reading of the statutes CVS rejects.

CVS suggests that the statutes' use of the word "individual" excludes systemic challenges to denials of meaningful access and allows only individual failure-to-accommodate claims. CVS's argument misconstrues the meaning and effect of "individual." The word limits the statute's protection to natural persons, in contradistinction to "person," which includes corporations and other artificial persons. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454–55 (2012). It also means that a defendant cannot defend the exclusion of one individual by arguing that it has not excluded people with disabilities *as a class*. *See Bostock*, 140 S. Ct. at 1740–41. But the statutes also prohibit exclusion of *multiple* individuals. A practice that adversely affects a class violates the statutes' command that "an individual shall not be" excluded, U.S.C. § 18116(a), whenever it excludes any member of the class. If there were any doubt, the Dictionary Act's admonition that "words importing the singular include and apply to several persons, parties, or things," 1 U.S.C. § 1, eliminates it.

IV. CVS's policy arguments are meritless.

CVS's insistence that neither Section 504 nor Section 1557 outlaws anything but intentional discrimination rests significantly on policy arguments. Those arguments reflect a fundamental misunderstanding of the nature and consequences of the limited form of

"disparate impact" liability available under *Choate*'s meaningful-access standard.

CVS argues that the statutes cannot be read to incorporate "boundless" disparate-impact liability because nearly everything affects individuals with disabilities differently in some way. Pet. Br. 43. *Choate*, however, already "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504," and stressed that the statute reaches no further than "unjustifiable disparate impact," *id.* at 299, which the Court equated with a failure to provide "meaningful access to the benefit that the grantee offers," *id.* at 301. CVS's assertion that "opening the door to disparate-impact liability" will result in a "struggle to identify what guardrails, if any, to impose on an otherwise boundless theory," Pet. Br. 45, ignores that this Court identified the guardrails a generation ago and that courts have successfully applied them for 36 years.

CVS's further assertion that health benefit plans inevitably have disparate impacts on disabled individuals ignores not only *Choate*, but also the ACA's explicit prohibitions on exclusionary health-plan designs, as well as this Court's limitation of the question presented in this case. *Choate* held that a health benefit plan did not violate Section 504 just because its limitations fell more heavily on individuals with disabilities with greater medical needs than others. *See* 469 U.S. at 306. At the same time, *Choate* indicated that practices that have the effect of denying individuals with disabilities meaningful access to plan benefits available to others—such as the pharmacy benefits here—may violate Section 504. CVS provides no reason to think that denying individuals with disabil-

ities meaningful access to benefits, or equal opportunity to enjoy them, is an inherent aspect of health benefit plans. Indeed, multiple ACA provisions aim to prevent benefit designs that deny access to individuals with disabilities and other preexisting conditions. *See, e.g.*, 42 U.S.C. §§ 18022(b)(4)(B)–(C); 300gg–300gg-8. In any event, this Court specifically declined to consider "whether [disparate-impact] claims extend to the facially neutral terms and conditions of health insurance plans," Pet. I (second question presented), when it limited its grant of certiorari to CVS's first question presented. The argument that health benefit plans have distinctive features that make disparate-impact liability inappropriate attempts to smuggle that excluded question back into the case.

Moreover, CVS's repeated assertions that allowing claims against health plans under the *Choate* standard would enable anyone to "sue to access out-of-network services at in-network prices," Pet. Br. 13, make no sense. Respondents do not seek out-of-network pharmacy benefits, and they recognize that *Choate* does not require CVS to make fundamental alterations to its benefits if it has not defined those benefits "in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." 469 U.S. at 301. Respondents merely seek meaningful access to the *in-network* pharmacy benefits that are available to individuals without the disability of HIV infection.

Nor would a raft of "unjustified litigation" and intrusive remedies result from interpreting Sections 504 and 1557 as they have always been interpreted. *See* Pet. Br. 13. Typically, the remedy for a systemic practice that effectively excludes individuals because of

disability is to require its modification to accommodate disabilities, if reasonable accommodations are available, while leaving its application to the non-disabled unaltered—similar to the remedies available for the failure-to-accommodate claims CVS concedes the statutes allow.

CVS's own examples illustrate the point. CVS suggests it would be absurd to hold that a religious university's no-beard policy might violate Section 504 because of its effect on men with pseudofolliculitis barbae, a painful, chronic inflammatory condition triggered by shaving in individuals with certain hair characteristics (most commonly, some African Americans). Recognizing that a no-beard policy allowing no exception for pseudofolliculitis could violate Section 504, however, would only require the policy to be modified to accommodate individuals who demonstrate that their disability prevents shaving. Brigham Young University's no-beard policy, for example, expressly permits such an accommodation, *see Beard Waiver*, BYU Health Center, https://tinyurl.com/d8juz7d4, as do no-beard policies of other entities such as police departments, *see, e.g.*, *Antrum v. Wash. Metro. Areas Transit Auth.*, 710 F. Supp. 2d 112 (D.D.C. 2010). By contrast, if beards could not be reasonably accommodated (as where they would prevent firefighters from wearing respirators), Section 504 would not require an exception. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1127 (11th Cir. 1993).

CVS's hypothetical involving a preschool that refuses to accommodate dietary needs of a child with anemia similarly fails to recognize that there are

many ways to accommodate such needs without unreasonably burdening a school.[11] Section 504 does not entitle students to demand specific preferred foods merely because they believe they "would be better off" with them, Pet. Br. 44, but it does require consideration of how students with disability-related dietary needs can reasonably be provided meaningful access to federally funded programs.

CVS's insomniac barista example (Pet. Br. 45), by contrast, illustrates the type of accommodation that Section 504 does not require: one that would prevent a funding recipient from carrying out its function. *See Choate*, 469 U.S. at 300. An individual who cannot "perform 'the essential functions' of the job in question" need not be accommodated. *Arline*, 480 U.S. at 287 n.17. CVS does not seriously contend Section 504 would require accommodation in its example but asserts that the mere possibility of a *meritless* claim requires reading the statute restrictively. The statute's language and history, however, do not suggest that Congress intended to allow unjustified adverse impacts on persons with disabilities because it feared meritless claims. Rather, as explained above, Congress's 1992 amendment of Section 504 leaves no doubt that it contemplated accommodation claims notwithstanding the self-evident possibility that someone might make a meritless bid for accommodation. Indeed, CVS's own proffered reading of the statute,

---

[11] CVS's anemic-preschooler and beard-policy hypotheticals are crafted to suggest potential religious freedom issues, but *reasonable* accommodations would not likely violate anyone's religious beliefs in either case. In any event, conceivable conflicts with religious exercise in some applications are no reason to read a statute restrictively where such concerns are not present. *Bostock*, 140 S. Ct. at 1753–54.

which purports to allow claims seeking individual accommodations, would also open the door to such claims.[12]

CVS's assertion that *Choate*'s meaningful-access standard unduly burdens the federal government is likewise meritless. In the cases CVS cites (at 44), the government has not contested that Section 504 prohibits practices that effectively deny individuals with disabilities meaningful access to federal programs. CVS's citations illustrate that the meaningful-access standard protects the federal government, like other entities subject to Section 504, against claims challenging "every disparate effect a federal policy creates." Pet. Br. 45. In *Ruskai v. Pistole*, for example, the First Circuit pointed out that under *Choate*, "government conduct that affects a group that includes a disproportionate number of persons with a disability"—like the security screening practices at issue there—is "outside section 504's target" if it is not "connected to any denial of access" to a program. 775 F.3d at 79.

Another of CVS's citations illustrates circumstances where a federal program fails *Choate*'s meaningful-access standard: As the D.C. Circuit has held,

---

[12] CVS asserts that "coronavirus aid has ballooned the pool of potentially covered federal-funding recipients," Pet. Br. 45, but the Congressional Research Service has concluded that "the potential applicability of federal civil rights requirements" to recipients of CARES Act funds "may be somewhat limited" because of the short duration of the assistance. Congressional Research Service, *Applicability of Federal Civil Rights Laws to CARES Act Loans* (May 1, 2020), https://tinyurl.com/3nu878ct. Moreover, the Small Business Administration has been lending funds to employers too small to be covered by Title I of the ADA for decades with no untoward effect.

the design of U.S. currency provides no meaningful access to visually impaired individuals who cannot distinguish its denominations, despite the ready availability of accommodations that are not unduly burdensome. *See Am. Council of the Blind v. Paulson*, 525 F.3d. at 1267. The Treasury is complying with that decision by distributing currency readers and currency-reading cell-phone applications and pursuing currency redesigns incorporating accessible features to the extent permitted by law. U.S. Dep't of Treasury, Bureau of Engraving and Printing, *Resources: Meaningful Access Program*, https://tinyurl.com/ymnyzd4z. The case demonstrates the remedial flexibilities Section 504 allows, as the Treasury has been permitted to pursue accessibility redesign together with other planned currency changes, with no deadline. *See Am. Council of the Blind v. Mnuchin*, 977 F.3d 1 (D.C. Cir. 2020). Far from suggesting that the *Choate* standard has extreme consequences, the example shows how it provides a practical means of addressing circumstances where, through "thoughtlessness and indifference," *Paulson*, 525 F.3d at 1260, individuals with disabilities have been excluded from full participation in economic activity.

Together, CVS's examples reveal how far its reading would go to dismantle protections individuals with disabilities have received under Section 504 over the last half-century. CVS would deny even the simple accommodations required in its beard-policy and preschool examples and allow perpetuation of broad-scale exclusionary practices such as inaccessible currency design. In ways large and small, CVS would revive "thoughtlessness," "indifference" and "benign neglect" of the needs of individuals with disabilities. *Choate*, 469 U.S. at 717.

CVS's assertion that reading Sections 1557 and 504 to prohibit such exclusionary effects would exceed limits on Spending Clause legislation is unfounded. In light of the statutes' plain text, their administrative construction, and a large body of precedent including *Choate*, recipients of federal funds have been "on notice" for decades that they may have to alter practices that have the effect of denying individuals with disabilities meaningful access. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005). The judicial consensus that damages are available under Section 504 only for intentional violations, *see supra* n.1, underscores the absence of any significant Spending Clause issue.

Although Section 504 has provided at least some disparate-impact causes of action since 1973, and the ACA has done the same since 2010, CVS has not identified any case that would support its claim that the sky will fall if these statutes continue to be interpreted as they always have been. *Choate*'s guardrails have proven to be prudent, successful, and consistent with the plain statutory language. Given the ease with which Congress could have altered those guardrails rather than carrying them forward in its subsequent enactments, setting them aside long after they have "effectively become part of the statutory scheme" would be particularly unwarranted. *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015). Nebulous and unfounded predictions of disaster are no reason to jettison decades of settled law.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

GERALD S. FLANAGAN
Counsel of Record
DANIEL L. STERNBERG
BENJAMIN R. POWELL
CONSUMER WATCHDOG
6330 San Vicente Blvd.
Suite 250
Los Angeles, CA 90048
(310) 392-0522
jerry@consumerwatchdog.org

ALAN M. MANSFIELD
WHATLEY KALLAS LLP
16870 W. Bernardo Drive
Suite 400
San Diego, CA 92127

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009

HENRY C. QUILLEN
WHATLEY KALLAS LLP
159 Middle Street
Suite 2C
Portsmouth, NH 03801

Attorneys for Respondents

October 2021