No. 20-1374

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of key federal statutes. CAC therefore has a strong interest in ensuring that Section 504 of the Rehabilitation Act is understood, in accordance with its text and Congress's plan in passing it, to prohibit disparate impact discrimination on the basis of disability.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents are people living with HIV who need certain medications to manage that condition. They have prescription drug coverage through their employers, and their employers' health plans are administered by subsidiaries of CVS Health. Under those plans, Petitioners CVS Pharmacy and other CVS entities recently instituted a program that allows individuals to pay in-network prices for "specialty" medications only if they obtain those medications by mail or at a local CVS retail pharmacy, and not at a community pharmacy.

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

The medications that Respondents need to manage their HIV are considered "specialty medications" under these plans. These plans therefore deny Respondents the ability to consult with expert pharmacists at community pharmacies concerning their medications, J.A. 42-47 (Compl. ¶¶ 80-91), forcing them to bring medical questions to CVS customer service representatives who have no training in HIV/AIDS medication, *id.* at 42-43 (Compl. ¶ 85), or to pharmacists at CVS pharmacies, who provide no private consultation spaces nor "active consultation" concerning drug interactions, side effects, or health maintenance, *id.* at 18, 35 (Compl. ¶¶ 33, 69). The program also entails a "very real risk of delayed, lost or stolen shipments," *id.* at 46-47 (Compl. ¶ 90), creating the potential for serious health problems and additional invasion of privacy, *id.* at 37-38 (Compl. ¶¶ 73-74).

Respondents sued, alleging that Petitioners' pharmacy program violates Section 1557 of the Affordable Care Act (ACA), 42 U.S.C. § 18116(a), which incorporates by reference Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 974(a), and its enforcement mechanisms. Section 504 prohibits discrimination on the basis of "disability" by health programs that receive federal financial assistance. *Id.* Specifically, Respondents alleged that CVS's inclusion of critical HIV/AIDS medications in its in-network pricing program for specialty drugs "significantly, adversely, and disproportionately impacted" people with HIV or AIDS, threatening their "health and privacy," and thus constituted discrimination on the basis of disability. J.A. 100-03 (Compl. ¶¶ 145-47).

The district court dismissed Respondents' disparate impact claim. While the court concluded that "Section 504 protects persons with disabilities from both intentional and disparate-impact discrimination," Pet.

App. 35a, it held that Respondents had not "sufficiently alleged that enrollees with HIV/AIDS are disparately impacted by the [specialty medicine designation] relative to other enrollees" and had not demonstrated that the alleged disparate impact deprived them of "meaningful access" to health care. Pet. App. 36a-40a. The court below reversed. Like the district court, it recognized that Section 504 prohibits disparate impact discrimination, and it reasoned that Respondents had adequately alleged that they were denied meaningful access to an ACA-provided benefit, that is, access to "necessary counseling" and "medically appropriate" dispensation of prescription drugs. *Id.* at 14a. Petitioners then asked this Court to resolve the question of whether Section 504 provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.

The answer to that question is yes. The text and history of Section 504 make clear that the statute prohibits disparate impact discrimination on the basis of disability. To start, Section 504 "uses clear, effects-based language," Pet. Br. 45, prohibiting policies and conduct that cause someone to "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" because of her disability, 29 U.S.C. § 794(a). As Petitioners acknowledge, this type of language generally evinces a congressional plan to prohibit facially neutral policies and conduct that have a discriminatory impact. *See* Pet. Br. 46. Indeed, in focusing on the effects of discrimination rather than its source, Section 504 uses the passive voice, which this Court has explained "indicates that [a statute] does not require proof of intent." *Dean v. United States*, 556 U.S. 568, 572 (2009).

The Rehabilitation Act's history confirms the plain meaning of its text: that Congress passed Section 504

to prohibit policies and conduct that have a disparate impact on people with disabilities. As this Court has expressly recognized, when Congress passed the Rehabilitation Act in 1973, "[d]iscrimination against the handicapped was perceived by Congress to be most often the product *not* of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander*, 469 U.S. at 295 (emphasis added). The legislative record is rife with statements from members of Congress explaining that Section 504 would stamp out not merely intentional discrimination but also actions having a disparate impact on individuals with disabilities. Further, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act"—such as the "elimination of architectural barriers"—"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.

Finally, although Congress modeled Section 504 on Title VI of the Civil Rights Act of 1964, which this Court has since held prohibits only intentional discrimination, *see Guardians Ass'n v. Civ. Serv. Comm'n of New York*, 463 U.S. 582, 584 (1983), that holding in no way means that Section 504's scope is similarly limited. To start, this Court's decision in *Guardians* focused not on Title VI's text, but on the particular history of its drafting. Thus, it does not follow that Section 504 should be interpreted in the same way, given that both its text and history make clear that it should cover disparate impact discrimination.

Furthermore, this Court had not decided *Guardians* at the time Congress passed Section 504, and at that time, as Congress was aware, federal administrative agencies were using an *impact* standard to implement Title VI. *See, e.g.*, *Bryan v. Koch*, 627 F.2d 612, 621 (2d Cir. 1980) (Kearse, J., concurring) ("Shortly

after Title VI was enacted, no fewer than seven federal agencies carried out [Title VI's] mandate . . . by promulgating regulations that applied a broad 'disparate impact,' or 'effects,' test."). It was not until a full decade later that this Court held that Title VI prohibits only intentional discrimination. Thus, at the time Congress passed Section 504, it had no reason to think that its text, which plainly encompasses disparate impact discrimination, would be interpreted differently by the courts.

In sum, the historical record confirms what Section 504's text makes clear: Section 504 prohibits disparate impact discrimination against individuals with disabilities.

ARGUMENT

I. The Rehabilitation Act's Plain Text Prohibits Disparate Impact Discrimination.

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). This plain text broadly prohibits action by recipients of federal funding that results in discrimination against any individual with a disability because of that disability, regardless of whether the discrimination involves animus or a specific intent to discriminate.

Notably, nowhere does the plain text of Section 504 indicate that it prohibits only *intentional* discrimination against an individual with a disability or discrimination involving animus toward that individual. Indeed, the plain text of Section 504 does not focus on the discriminatory actor at all. Instead, Section 504

focuses on discriminatory effects, employing the passive voice to instruct that "[n]o otherwise qualified individual with a disability" shall "*be excluded* from the participation in, *be denied* the benefits of, or *be subjected* to discrimination" by recipients of federal funds. 29 U.S.C. § 794(a) (emphases added). As this Court has explained, "Congress's use of the passive voice . . . indicates that [a statute] does not require proof of intent." *Dean*, 556 U.S. at 572. This is because "[t]he passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Id.*

Petitioners' arguments to the contrary are ill-founded. Petitioners acknowledge that "when Congress intends to authorize disparate impact claims, Congress refers to the *effects* of an action." Pet. Br. 3; *see id.* at 10-11 (explaining that "disparate impact claims . . . look at a practice's *effect* on the protected group"). But they inexplicably assert that Section 504 does not include such effects language.

Significantly, a provision need not use the words "effects" or "results" to prohibit a practice's effect on a protected group. *Cf. Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (cautioning against reliance on "magic words or labels"); *F.A.A. v. Cooper*, 566 U.S. 284, 291 (2012) (an "unmistakable statutory expression of congressional intent" is required to waive sovereign immunity, but "Congress need not state its intent in any particular way"); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-54 (2013) (Congress need not "incant magic words in order to speak clearly" when designating a provision as jurisdictional).

Here, as just discussed, Section 504 does in fact focus on the potential *effects* of disability discrimination—"be[ing] excluded from the participation in, be[ing] denied the benefits of, or be[ing] subjected to

discrimination"—and the statute, as written in the passive voice, specifically prohibits those effects. 29 U.S.C. § 794(a).

To be sure, the statute prohibits those discriminatory effects when they occur "solely by reason of [an individual's] disability," *id*., but this language does not mean that the statute prohibits only intentional discrimination, as Petitioners suggest, *see* Pet. Br. 11. It merely indicates that, for Section 504 to apply, an individual's disability alone must be the cause of the discriminatory effects, regardless of whether the disability discrimination is intentional or unintentional.

After all, a facially neutral policy may prevent an individual with a disability from participating in a program "solely by reason of her or his disability." 29 U.S.C. § 794(a). And the excluded individual in that scenario would satisfy every requirement under Section 504's plain text and have a viable claim under that statute, even though the policy was not intentionally discriminatory. In fact, that is exactly the situation Respondents face here: they need specialty medications to manage their HIV, and they allege that CVS's facially neutral decision to include essential drugs for people with HIV within a program that provides in-network medications only by mail or at a local CVS pharmacy denies them the benefit of essential private counseling solely by reason of their disability. *See* Resp. Br. 4. Indeed, as Respondents also allege, individuals who do not have HIV may obtain essential medications from any pharmacy, including non-CVS pharmacies that provide pharmaceutical consultations in private. *Id.*

In sum, under the plain text of the law, Section 504 covers the disparate impact discrimination that Respondents face in this case. And the history of the law

is consistent with its text, as the next Section discusses.

II. The Rehabilitation Act's History Confirms that Congress Passed Section 504 to Prohibit Policies and Conduct that Have a Disparate Impact on People with Disabilities.

Section 504's history confirms what the statute's text makes clear—that it prohibits facially neutral policies that have a disparate impact on individuals with disabilities.

A. Congress Passed Section 504 to Prohibit Disparate Impact Discrimination.

As this Court has expressly recognized, when Congress passed the Rehabilitation Act in 1973, "[d]iscrimination against the handicapped was perceived by Congress to be most often the product *not* of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander*, 469 U.S. at 295 (emphasis added); *id.* at 296 (social barriers faced by individuals with disabilities often result from "apathetic attitudes rather than affirmative animus").

Indeed, it is well documented that the Congress that passed the Rehabilitation Act was concerned with the need to stamp out "thoughtless[]" and "neglect[ful]" conduct that may be free of animus but that nonetheless discriminates against individuals with disabilities. *Alexander*, 469 U.S. at 295; *see Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 859-60 (10th Cir. 2003) ("Congress sought with Section 504 . . . to remedy a broad, comprehensive concept of discrimination against individuals with disabilities, including disparate impact discrimination."); *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (pointing to "strong

evidence in the legislative history of the Act suggesting that it was designed to cover more than merely disparate treatment"); Mark E. Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 889-90 (1980) (descibring "congressional concern over neutral-standard . . . exclusionary barriers," including those that "stem from factors other than social bias").

As this Court has explained, when members of Congress debated the precursor to Section 504 in the House, they "described the treatment of the handicapped as one of the country's 'shameful oversights,' which caused the handicapped to live among society 'shunted aside, hidden, and ignored.'" *Alexander*, 469 U.S. at 295-96 (footnote omitted) (quoting 117 Cong. Rec. 45,974 (1971)). Likewise, when Senator Humphrey "introduced a companion measure in the Senate, [he] asserted that 'we can no longer tolerate the invisibility of the handicapped in America.'" *Id.* at 296 (quoting 118 Cong. Rec. 525-26 (1972)). Along the same lines, "Senator Cranston, the Acting Chairman of the Subcommittee that drafted § 504, described the Act as a response to 'previous societal neglect.'" *Id.* (footnote omitted) (quoting 119 Cong. Rec. 5880, 5883 (1973)); *see also id.* (citing 118 Cong. Rec. 526 (1972), in which Senator Humphrey's cosponsor Senator Percy "describ[ed] the legislation leading to the 1973 Act as a national commitment to eliminate the 'glaring neglect' of the handicapped"). In short, legislators were fully aware that much of the discrimination against people with disabilities was not the product of animus, but rather ignorance, neglect, and "mistaken, restrictive belief[s] as to the limitations of handicapped persons." *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1385 (10th Cir. 1981).

Legislators also emphasized the broad scope of Section 504's prohibition of discrimination, making clear that Congress's plan in passing the provision was not merely to prohibit intentional discrimination, but also to prohibit conduct and policies with discriminatory effects. For example, Senator Randolph, chairman of the Committee on Labor and Public Welfare's Subcommittee on the Handicapped, stated upon introducing one of Section 504's precursors that the bill would "prohibit[] *any kind* of discrimination against handicapped inviduals with respect to any program receiving Federal financial assistance." 118 Cong. Rec. 30,681 (1972) (emphasis added).

Section 504's sponsors made clear that these statements regarding Section 504's precursors also reflected Congress's plan for Section 504. Senator Humphrey stated in 1973 that the original bill he introduced would have amended Title VI of the Civil Rights Act to "specifically prohibit[] discrimination against an otherwise qualified handicapped . . . individual, *resulting in* that person being excluded from participation in, or denied the benefits of, any program or activity receiving Federal assistance." 119 Cong. Rec. 6145 (1973) (emphasis added). He explained that Section 504 was a continuation of that effort, as he declared that "the time has come to establish the right of physically and mentally handicapped persons to dignity and self-respect as equal contributing members of society, and to end the virtual isolation of millions of handicapped children and adults from society." *Id.* Likewise, Representative Vanik explained that same year that "[i]n December of 1971 I introduced a bill that incorporated the handicapped into the Civil Rights Act of 1964. . . . Senatory Humphrey who introduced my bill in the Senate, *incorporated the language and intent* of my bill into the Vocational Rehabilitation

Act last year in the Senate." 119 Cong. Rec. 7114 (1973) (emphasis added). He continued, "I am happy to say that my language remains in [Section 504] of today's bill." *Id.* Thus, Congress's plan to prohibit disparate impact discrimination through Section 504's precursors remained Congress's plan as it drafted Section 504's text and ultimately passed the Rehabilitation Act.

Significantly, as this Court has explained, "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." *Alexander*, 469 U.S. at 296-97. To illustrate this point, this Court observed that the "elimination of architectural barriers was one of the central aims of the Act, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped." *Id.* at 297 (citing S. Rep. No. 93-318, at 4 (1973)); *see also* 119 Cong. Rec. 5882-83 (1973) (statement of Sen. Cranston) (discussing the need to "creat[e] . . . a compliance mechanism to eliminate architectural and transportation barriers" for individuals with disabilities).

The Court similarly noted that "Senator Williams, the chairman of the Labor and Public Welfare Committee that reported out § 504, asserted that the handicapped were the victims of '[d]iscrimination in access to public transportation' and '[d]iscrimination because they do not have the simplest forms of special educational and rehabilitation services they need,'" *Alexander*, 469 U.S. at 297 (quoting 118 Cong. Rec. 3320 (1972)), again illustrating that some of Section 504's key objectives would not be accomplished if the law were understood to prohibit only intentional discrimination.

Finally, this Court also observed that "Sentator Humphrey, again in introducing the proposal that later became § 504, listed, among the instances of discrimination that the section would prohibit, the use of 'transportation and architectural barriers,' the '*discriminatory effect* of job qualification . . . procedures,' and the denial of 'special educational assistance' for handicapped children." *Id.* (emphasis added) (omission in original) (quoting 118 Cong. Rec. 3320 (1972)). This Court appropriately concluded in *Alexander* that "[t]hese statements 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.*; *cf. Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984) (holding that the expansive "application of § 504 to all programs receiving federal financial assistance fits the remedial purpose of the Rehabilitation Act 'to promote and expand employment opportunities' for the handicapped'" (quoting 29 U.S.C. § 701(8))).

To be sure, this Court suggested in *Alexander* that Section 504 might not prohibit "*all* action disparately affecting the handicapped," as such an interpretation "could lead to a wholly unwieldy administrative and adjudicative burden." 469 U.S. at 298 (emphasis added). The Court explained that "[a]ny interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives"—referring to Congress's plan to proscribe policies and conduct that have a disparate impact on individuals with disabilities—"and the desire to keep § 504 within manageable bounds." *Id.* at 299. Based on this analysis, this Court assumed without deciding that Section 504 "reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Id.* Section 504's text

and history have not changed since this Court made that well-reasoned assumption, and the time has come for this Court to adopt that conclusion as a holding.

B. Congress's Decision to Model Section 504 on Title VI Does Not Mean that Congress Planned for Section 504 to Prohibit Only Intentional Discrimination.

Section 504 "was patterned after Title VI of the Civil Rights Act of 1964," *Cmty. Television v. Gottfried*, 459 U.S. 498, 509 (1983), which, as this Court held in *Guardians*, prohibits only intentional discrimination, *Guardians*, 463 U.S. 582, 584 (1983). But "*Guardians* . . . does *not* support [P]etitioners' blanket proposition that federal law proscribes only intentaionl discrimination against the handicapped," *Alexander*, 469 U.S. at 294 (emphasis added); *id.* (explaining that "there are reasons to pause before too quickly expanding . . . *Guardians* to § 504"). This is because there are important distinctions between Title VI and Section 504. *See Consol. Rail. Corp.*, 465 U.S. at 631-34 (distinguishing the texts and legislative histories of Title VI and Section 504); *see also Alexander*, 469 U.S. at 293 n.7 ("[T]oo facile an assimilation of Title VI law to Sec. 504 must be resisted.").

As an initial matter, this Court's interpretation of Title VI's intent requirement rested on the legislative history of that provision, rather than the text it shares with Section 504. Each of the opinions concluding that Title VI prohibited only intentional discrimination relied explicitly on *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in which the Court held that Congress intended Title VI to "proscribe only those racial classifications that would violate the Equal Protection Clause." *Guardians*, 463 U.S. at 639

(Stevens, J., dissenting) (citing *Bakke*, 438 U.S. at 287); *id.* at 612 (O'Connor, J., concurring) ("I feel constrained by stare decisis to follow [*Bakke*'s] interpretation of the statute."); *id.* at 626 ("Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination.").

In *Bakke*, this Court examined Congress's "clear legislative intent" to "enact[] constitutional principles" when drafting the Civil Rights Act, and made no assessment of the text of Title VI. *Bakke*, 438 U.S. at 286-87. Indeed, the Court mentioned the text of Title VI only once, when acknowledging that "[t]he concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible of varying interpretations," making an examination of the Act's "voluminous legislative history" particularly appropriate. *Id.* at 284.

Moreover, when Congress drafted and passed Section 504 using Title VI as a model, this Court had not yet determined that Title VI prohibited only intentional discrimination. Indeed, it did not reach that conclusion until a full decade later, in 1983. *See Guardians*, 463 U.S. at 584. In other words, Congress's decision to model Section 504 on Title VI evinces no congressional plan to prohibit only intentional discrimination. To the contrary, when Congress adopted Section 504, it was "well aware of . . . the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination," *Alexander*, 469 U.S. at 294 n.11, including by at least seven federal agencies, *Bryan*, 627 F.2d at 621 (Kearse, J., concurring) (describing regulations that applied a broad "'disparate impact,' or 'effects,' test"). Courts around the country also used the disparate impact standard to evaluate claims under Title VI, and

Section 504's drafters surely assumed that the language they were borrowing from Title VI would prohibit disparate impact discrimination, as the lower courts had repeatedly held. *See, e.g.*, *Shannon v. U.S. Dep't of Hous. & Urb. Dev.*, 436 F.2d 809, 820 (3d Cir. 1970) (observing in Title VI case that it was "impermissible" under the statute to "remain blind to the very real effect" of racially neutral actions); *Galvan v. Levine*, 345 F. Supp. 67, 69, 73-74 (S.D.N.Y. 1972) (holding that a New York rule that had a "dramatic discriminatory impact upon Puerto Rican claimants" "violate[d] Title VI of the Civil Rights Act"); *Blackshear Residents Org. v. Hous. Auth. of City of Austin*, 347 F. Supp. 1138, 1145 (W.D. Tex. 1971) (ordering relief under Title VI "in light of the discriminatory effect produced by the Housing Authority's previous noncompliance").

Furthermore, when legislators amended the Rehabilitation Act to specify that the remedies, procedures, and rights under Title VI should apply to cases brought under Section 504, *see* Pub. L. No. 95-602, § 120(a), 92 Stat. 2982 (1978), agencies and courts were interpreting Title VI to prohibit both intentional and disparate impact discrimination. *See, e.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974) (upholding regulations implementing Title VI using the "effects" test); *Bryan*, 627 F.2d at 622 ("[W]ith the exception of cases involving school desegregation, it appears that no court has imposed the intent standard in a Title VI case."). And federal agencies had promulgated regulations applying disparate impact standards to discrimination claims under Section 504. *See*, *e.g.*, 42 Fed. Reg. 22,679 (May 4, 1977) ("A recipient may not . . . utilize criteria or methods of administration . . . that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap . . . ."); S. Rep.

No. 95-890, at 18, 19, 55 (1978) (referring without objection to the enforcement of the regulations promulgated under Section 504).

Thus, the drafters of Section 504 and its 1978 amendments borrowed Title VI's broad language at a time when that language was widely understood to prohibit disparate impact discrimination. Because Congress is presumably "aware of existing law when it passes legislation," *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 422 (2009) (citation omitted), the use of this language further confirms that Congress's plan in passing Section 504 was to prohibit disparate impact discrimination on the basis of disability.

* * *

In sum, the text and history of Section 504 make clear that Congress sought to prohibit disparate impact discrimination on the basis of disability. A determination to the contrary would run counter to the Rehabilitation Act's plain text and Congress's plan for the statute—a plan that, as this Court has acknowledged, included prohibiting discrimination against individuals with disabilities based on "thoughtlessness," "indifference," and "benign neglect," and not merely based on "invidious animus." *Alexander*, 469 U.S. at 295.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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