No. 20-1374

IN THE

Supreme Court of the United States

CVS PHARMACY, INC., *et al.*,

Petitioners,

—v.—

JOHN DOE, ONE, *et al.*,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*. (IDEA).[1] Our attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. (ADA).

COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities. COPAA has previously filed as *amicus curiae* in the

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[1] Pursuant to Rule 37.6 of the of the Supreme Court Rules, *Amicus* states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amicus* and its members.

United States Supreme Court in *Fry v. Napoleon Community Schools,* 137 S. Ct. 743 (2017); *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City School Distric*t, 550 U.S. 516 (2006), as well as numerous cases in the United States Courts of Appeal.

COPAA members' clients include IDEA-eligible children who have strong anti-discrimination claims under ADA/Section 504 that are not available as claims under IDEA. Whether these children eventually gain employment, live independently, and become productive citizens depends not only on the right to secure the IDEA's guarantee of a FAPE, but also upon the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education. Accordingly, COPAA has a compelling interest in a disparate-impact cause of action for students alleging disability discrimination under Section 504.

Amicus requested consent to file this *Amicus Curiae* brief and written consent was provided by counsel of record for each party.

SUMMARY OF ARGUMENT

More than thirty-six years ago, this Court held that Section 504 of the Rehabilitation Act requires that individuals with disabilities be given "meaningful access" to the benefit offered by the grantee. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). This Court recognized that "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 297. This Court struck a balance in in *Choate*, in both giving effect to Section 504's statutory objectives while keeping Section 504 "within manageable bounds," by establishing the "meaningful access" test. *Id.* At 299-301. That test is now part of the foundation for the framework of disability law.

Petitioner asks this Court to reject *Choate's* meaningful access standard. Petitioner incorrectly asserts that "virtually all of the specific concerns that *Choate* mentioned" are resolved by other statutes, pointing to the Individuals with Disabilities Education Act, 20 U.S.C § 1400 *et seq*. as providing all the protection that school children with disabilities need. Pet. Brief at p. 27. This assertion is false.

There are material differences between Section 504 and IDEA. Section 504 protects a huge number of children who enjoy no rights under IDEA, and Section 504 also creates rights and remedies distinct from those established by IDEA.

Petitioner's proposed bar of disparate impact claims in the educational context will foreclose important aims of Congress' Section 504 protections. In the education context, Section 504 specifically targets and protects against non-intentional discrimination. The statute itself, the implementing regulations, and the legislative history all support the decision below holding that Section 504 reaches disparate impact claims.

ARGUMENT

I. FOR CHILDREN IN SCHOOL, SECTION 504 DIFFERS MATERIALLY FROM IDEA

A. IDEA and Section 504 Serve Different Purposes

While both the IDEA and Section 504 of the Rehabilitation Act may apply to children with disabilities in public school settings, they do not do the same things. On September 26, 1973, Congress enacted Section 504 of the Rehabilitation Act, codified at 29 U.S.C. § 701. It was the first federal civil right law directed at protecting people with disabilities, and paved the way for the passage of the laws now known as IDEA and ADA. Section 504 is an antidiscrimination statute which 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. Section 504 prohibits discriminatory conduct, policies, and programs.

Since 1975, the IDEA has offered federal funds to States in exchange for a commitment to furnish a FAPE "to children with certain disabilities, 20 U.S.C. §1412(a)(1)(A). IDEA establishes formal administrative procedures for resolving disputes between parents and schools concerning the provision of a FAPE." *Fry*, 137 S. Ct. at 746. The IDEA's main purpose is to "ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. §1400d(1)(a). To do so, it creates a comprehensive system of educational planning so that each student is provided with an Individualized Education Plan that

"is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Endrew F.,* 137 S. Ct. at 1002. In contrast, Section 504 is designed to "root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in . . . federally funded programs." *Fry*, 137 S. Ct. at 756. The statutes target different needs of students with disabilities and as *Fry* recognized, the other, non-IDEA, federal statutes protecting the interests of school children with disabilities, including Section 504, are of equal importance. 137 S. Ct. at 746.

As this Court recognized in *Fry*, *supra*, Section 504 and IDEA have "diverse means and ends." 137 S. Ct. at 755. Thus, "IDEA guarantees individually tailored educational services, while Title II [of the ADA] and §504 promise non-discriminatory access to public institutions." *Id.* at 756. The scope of Section 504 is much broader than that of IDEA. IDEA sets the "basic floor of opportunity," but Section 504 may require more. *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013) (determination that denial of real time transcription under IDEA was appropriate "does not automatically foreclose a [ADA] Title II claim grounded in the Title II effective communications regulation")); *A.F. v. Portland Pub. Sch. Dist.*, No. 3:19-cv-01827, 2020 U.S. Dist. LEXIS 61380, at *10-11 (D. Or. Apr. 7, 2020) (student seeking access under ADA/Section 504 to medically necessary services to treat autism as a reasonable accommodation not subject to IDEA's exhaustion requirement); *A.K.B. v. Indep. Sch. Dist.*, 2020 U.S. Dist. LEXIS 52688, at *14-15 (D. Minn. March 26, 2020) (student seeking damages for failure to accommodate asthma resulting in lifelong brain injury not required to exhaust

administrative remedies); *Georgia Advocacy Office v. Georgia*, No. 1:17-cv-03999, 2020 U.S. Dist. LEXIS 58721, at *27-28 (N.D. Ga. Mar. 19, 2020) (exhaustion not required because stigmatization and isolation in violation of ADA was gravamen of complaint).[2]

B. Section 504 Protects Many Students with Disabilities Not Covered by IDEA

By design and in practice, Section 504 protects far more individuals than IDEA does. Section 504 applies to all students, regardless of their age, and therefore applies to a wide range of post-secondary educational programs in addition to applying to 0-2 programs, pre-school and elementary and secondary education.

Section 504 also applies to a broader range of disabilities. While students who are eligible under IDEA are generally also eligible for protection by Section 504, the converse is not true. In fact, there are more than a million students who have disabilities who are served solely under Section 504.[3] Section 504 applies to any student who has a "physical or mental

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[2] For similar reasons, the Handicapped Children's Protection Act (HCPA) does not require exhaustion of claims arising under other civil rights laws that do not have FAPE as their gravamen, even for incidents causing harm to students with disabilities that occurred within the school setting. *See Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224, 228 (5th Cir. 2019) (although sexual harassment claim under Title IX requires denial of educational opportunity, plaintiff sought relief irrespective of IDEA's FAPE obligations and exhaustion not required); *F.H. v. Memphis City Sch.*, 764 F.3d 638, 644 (6th Cir. 2014) (student did not have to exhaust claims of physical, verbal and sexual abuse under Section 1983).

[3] The Civil Rights Data Collection for 2017-2018 reported 1,380,146 students in the fifty states, the District of Columbia, and Puerto Rico who were served solely under Section 504. https://ocrdata.ed.gov/estimations/2017-2018.

impairment that substantially limits one or more life activities of such an individual," or a "record of such an impairment," or who is regarded as having such an impairment." 29 U.S.C. § 705(9)(B); 42 U.S.C. § 12102(1). The definition applies regardless of whether the impairment can be ameliorated with mitigating measures, such as medication, assistive technology, and auxiliary aids or services. 29 U.S.C. § 705(9)(B); 42 U.S.C. § 12102(4)(E). Eligibility under Section 504 does not hinge on a student's educational needs.

By contrast to Section 504, IDEA includes a more particularized definition of "child with a disability" for the purposes of its protections. To be eligible under IDEA, a student must meet a two-pronged eligibility test: first, the student must have one of thirteen enumerated conditions, and, second, because of the disability, the student must need special education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8. "These apparently simple provisions are in fact among the most complex requirements of IDEA." Robert A. Garda, Jr. & Robert Stafford, *Who is Eligible Under the Individuals with Disabilities Education Improvement Ac*t, 35 J.L. & Educ. 291, 292 (2006). To be eligible for protections under the IDEA students ***must not only have a disability but must also*** (by virtue of same condition) ***need special education and related services***, delivered through an Individualized Education Program (IEP) created according to statutorily mandated procedures.

Many students may meet the first prong of the IDEA eligibility test (disability) but fail to meet the second prong because they do not require any special education. Such students are protected from discrimination by Section 504. As examples, students with medical conditions such as asthma, diabetes, juvenile rheumatoid arthritis, and life-threatening

food allergies may qualify as disabled under Section 504 and the ADA, even though their disabilities have no "adverse impact on educational performance" or no "need for special education" and thus no right to protections under the IDEA.

Further, a need for related services alone is not a basis for eligibility under IDEA. 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 304.34(a). The only exception is "if the related service required by the child is considered special education rather than a related service under State standards," as then the child would be a child with a disability under IDEA. 34 C.F.R. § 300.8(a)(2)(ii).

Thus, students with diabetes may require diabetes-related care during the school day without needing any special education. *See, e.g., M.F. v. N.Y. City Dep't of Educ.*, 18-Civ.6109 (NG)(SJB), 2019 U.S. Dist. LEXIS 102082 (E.D.N.Y. June 17, 2019) (certifying class in 504/ADA case seeking diabetes-related care in school). Courts have denied IDEA eligibility to a student with an emotional disability who did not require "any change in the form, content or delivery of instruction," *Susquehanna Twp. Sch. Dist. v. Christini*, 1:04-CV-0057, 2007 U.S. Dist. LEXIS 118156, at *29 (M.D. Pa. May 2, 2007).

Students with specific learning disabilities and other disabilities that affect their learning are not be eligible for IDEA services if accommodations and modifications provided by Section 504 enable them to make educational progress; they do not need special education to benefit from education. *See William V. v. Copperas Cove Indep. Sch. Dist.,* 774 Fed. Appx 253, 254 (5th Cir. 2019) (remanding case to determine whether student with dyslexia required special education or only needed related services or was

making progress under accommodations that he was receiving)*; C.M. v. Dep't of Educ.*, 476 Fed. App'x 674, 677 (9th Cir. 2012) (holding student with Central Auditory Processing Disorder and Attention Deficit Hyperactivity Disorder (ADHD) was not eligible under IDEA because she "was able to benefit from her general education classes without special education services" when receiving "adequate accommodations in the general classroom."). A student who uses a wheelchair is not eligible under IDEA unless the student requires special education to access his education. *See I.A. v. Seguin Indep. Sch. Dist.,* 881 F. Supp.2d 770, 773, 777 (W.D. Tex. 2012) (noting student with paraplegia who used a wheelchair had been found ineligible under IDEA and provided with a 504 plan and not an IEP).

Whether a particular student requires the education and related services required for IDEA eligibility may fluctuate over time. Students who have been found eligible under IDEA services may subsequently be found ineligible if they no longer require special education. For example, a student with Ehlers-Danlos Syndrome was found eligible for IDEA and given an IEP in kindergarten, but, upon re-evaluation in second grade, the school determined that he was no longer eligible for special education services. *Marshall Joint Sch. Dist. No. 2 v. C.D.,* 616 F.3d 632, 634 (7th Cir. 2010). The court noted that his symptoms were serious, including poor postural and trunk stability and chronic and intermittent pain. *Id.* at 634, 641. However, the court found that the student did not need any special education even though he had been receiving adaptive physical education because his educational needs could be met by a health plan in a regular gym class. *Id.* at 640. The student undisputedly needed continued physical and occupational therapy, but related services "do not

stand alone as services the school must provide apart from special education." *Id.* at 641.

Thus, the Petitioner's assertions regarding *Choate* and education are completely wrong for those students with disabilities protected by Section 504 who are not even eligible for IDEA's protections.

C. Section 504 and IDEA Target Different Issues

Section 504 addresses concerns beyond the special education that is the focus of IDEA. Courts must "attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA[4] and [Section 504] (most notably) on the other." *Fry*, 137 S. Ct. at 755. IDEA protects children and concerns only their schooling. *Id.* (citing 20 U.S.C. § 1412(a)(1)(A)). IDEA creates a comprehensive standard and procedural framework by which students with disabilities will be educated in a meaningful way. By contrast, ADA and Section 504 "cover people with disabilities of all ages and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs." *Id.* at 756. "In short, the IDEA guarantees individually tailored educational services, while [Section 504

[4] Congress used the concepts of Section 504 and its implementing regulations in crafting the ADA in 1990. Nancy Lee Jones, Section 504 of the Rehabilitation Act of 1973: Prohibiting Discrimination Against Individuals with Disabilities in Programs or Activities Receiving Federal Assistance, Congressional Research Service Report RL34041, The Library of Congress, at 1 (2009).

promises] non-discriminatory access to public institutions." *Id.*

D. Section 504 Provides Relief Not Available Under IDEA

By virtue of the very different goals and mechanisms of the two statutes, Congress created very different remedial schemes. To achieve elimination of discrimination, Section 504 includes the ability to pursue damages. Damages serve two purposes. Damages make victims of discrimination whole, and also act as a disincentive to discriminate. As such, IDEA and Section 504 and the ADA, another anti-discrimination statute, provide purposely distinct rights and scopes of remedy. *See, e.g., Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 24 (1st Cir. 2019) (refusal to allow use of service dog "involves the denial of non-discriminatory access to a public institution, irrespective of school district's FAPE obligation"); *E.F. v. Napoleon Cmty, Sch.*, 371 F. Supp. 3d 387, 406-07 (E.D. Mich. 2019) (no exhaustion required because ADA and not IDEA precluded denial of access to service dog and damages remedy).

In contrast, because the IDEA is focused on the individual educational experience and outcomes for students with disabilities, courts have long held that students suing under the IDEA are not eligible for damages and can only seek broad, equitable educationally-based relief to remedy the lost educational opportunity and benefit resulting from a school's denial of their right to a free and appropriate public education. The Petitioner's assertions regarding *Choate* and education do not apply to discrimination claims under Section 504. *Cf. id.* and Pet. Brief at 27.

E. In Light of These Differences, It Is Clear That This Court's Concerns in *Choate* Are Not Mooted By Subsequent Legislation in the Education Context

Petitioner dismisses concerns as raised in *Alexander v. Choate*, 469 U.S. 287, 297 (1985) about education-based discrimination going unremedied because "the Education for All Handicapped Children Act of 1975 and Individuals with Disabilities Education Act of 1990, 20 U.S.C. § 1400 *et seq*., address this issue in detail as well." Pet. Brief at 27. But *Choate* was decided in 1985, ten years after the Education for All Handicapped Children Act of 1975 (EAHCA) was enacted, so this Court was well aware at that time of the EAHCA and that it did not address all concerns about discrimination against students with disabilities involving education and schools.

II. SECTION 504 BARS NON-INTENTIONAL DISCRIMINATION, INCLUDING DISPARATE IMPACT CLAIMS

Congress enacted Section 504 "to guarantee the right of persons with a mental or physical handicap to participate in programs receiving Federal assistance." CRS RL34041 at 2 (quoting 118 Cong. Rec. 32310 (Sept. 26, 1972) (Remarks of Sen. Humphrey). Subsequent amendments have consistently emphasized the broad reach of this anti-discrimination mandate, and have understood that the remedial pathways of the law should encompass more than intentional and obvious animus claims.

In 1988, Congress amended Section 504 in response to the Supreme Court's narrow interpretation, in *Grove City College v. Bell*, 465 U.S. 555 (1984), of the phrase "program or activity" in another spending

clause statute. "The amendment clarified that discrimination is prohibited throughout the entire institution if any part of the institution receives federal financial assistance." Jones, *supra.*, n. 3.

The ADA Amendments Act of 2008, P.L. 119-325 (ADAAA), amended Section 504 to conform with the new definition of disability under the ADA. Pursuant to the ADAAA, courts must construe the definition of 'disability under Section 504 "in favor of broad coverage." ADAAA, § 3(4)(A). Pursuant to the ADAAA, the primary object of attention should be whether entities covered under Section 504 have complied with their obligations rather than whether the claimant's impairment meets the definition of a disability.

In *Choate*, the Supreme Court recognized the distinct nature of discrimination that Section 504 seeks to address. "Discrimination 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." 469 U.S. at 295. Thus, "much of the conduct that Congress sought to alter in passing [Section 504] would be difficult if not impossible to reach were the act construed to proscribe only conduct fueled by discriminatory intent." *Id.* at 296-297. Senator Humphrey, who introduced the proposal that became Section 504 stated that the Act prohibited "the discriminatory effect of job qualification procedures" and the "denial of 'special educational assistance'" for children. *Id.* at 297 (quoting 118 Cong. Rec. 3320, at 525-526 (1972)). "Those 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.*

The regulations implementing Section 504 provide that a federal funding recipient may not "directly or through contractual or other arrangements, utilize criteria or methods of administration (i) *that have the effect of* subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose *or effect* of subjecting qualified handicapped persons to discrimination on the basis of handicap, (iii) that have the purpose *or effect* of defeating or substantially impairing accomplishments of the objectives of the recipient's program with respect to handicapped persons." 28 C.F.R. § 41.51(b)(3) (emphasis added).

Programs that provide preschool, elementary, and secondary education must provide an appropriate education, defined as "the provision of regular or special education services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures" set forth in the regulations. 34 C.F.R. § 104.33(b)(1). In addition, a Section 504 funding recipient "shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person." 34 C.F.R. § 104.34(a). For postsecondary students, a funding recipient "shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or *have the effect of discriminating*, on the basis of handicap, against a qualified handicapped applicant or student." 34 C.F.R. § 104.44(1).

As one commentator has noted:

> These disparate impact, reasonable modifications, and integrated services regulations implementing . . . section 504 are based on the recognition that for persons with disabilities, what discriminates against them, what Congress was trying to change, is government activity that prevents them from achieving equality in the enjoyment of public spaces, public schools, public health services, public transportation, and the wealth of programs and facilities that modern government furnishes its citizens. That harm is no less real for being heedless. Applying an intent standard would prevent the disability discrimination law from achieving its most basic goals.

Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 Boston Coll. L. Rev. 1417, 1435-1436 (2015).

In *Choate*, this Court recognized that the regulations implementing Section 504 are consistent with its statutory aim of reaching discrimination resulting "by effect as well as by design." 469 U.S. at 297. That is why this "Court said that section 504 itself – not its regulations but what Congress sought to do and actually enacted – forbade non-intentional discrimination. Weber, 56 Boston Coll. L. Rev. at 1442.[5] This is particularly true in the educational

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[5] Thus, this Court, in *Choate*, refused to read Section 504 and Title VI of the Civil Rights Act of 1964 "*in pari materia* with respect to the effect/intent issue." 469 U.S. at 294 n.11. Additionally, the Court limited Title VI to intentional discrimination was "in response to factors peculiar to Title VI," such that Title VI precedent "would not seem to have any obvious or direct applicability to § 504." *Id.* Finally, when Congress passed Section 504 in 1973 it "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. In

context, where the likelihood of intentional and facial discrimination is rare: few if any individuals enter the education field to intentionally act against a student with disability. But Section 504 serves to protect students with disabilities from policies and practices that harm them in ways that their nondisabled peers are not impacted.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Dated: October 29, 2021

Respectfully submitted,

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refusing expressly to limit § 504 to intentional discrimination, Congress could be thought to have approved a disparate-impact standard for § 504." *Id.*

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