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; RICHARD ROE; JOHN DOE, FOUR, IN HIS PERSONAL CAPACITY AND AS THE AUTHORIZED REPRESENTATIVE OF JOHN DOE, THREE; JOHN DOE, FIVE; 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 *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF RESPONDENTS

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
VICTORIA WENGER
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

COTY MONTAG*
MAHOGANE D. REED
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street, NW
Suite 600
Washington, DC 20005
202-682-1300
cmontag@naacpldf.org

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* *Counsel of Record*

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights.

Throughout its history, LDF has advocated for disparate impact liability under various statutes as an essential tool for rooting out persistent discrimination and expanding equal opportunities. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015); *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). LDF has litigated numerous civil rights cases under the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.*, and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, among other statutes, under a disparate impact theory of discrimination. *See, e.g.*, Complaint, *Henderson v. Vision Prop. Mgmt., LLC*, No. 20-12649 (E.D. Mich. Sept. 29, 2020); Complaint, *Taylor v. City of Detroit*, No. 20-11860 (E.D. Mich. July 9, 2020); Complaint, *Pickett v. City of Cleveland*, No. 19-2911 (N.D. Ohio Dec. 18, 2019); Complaint, *MorningSide Cmty. Org. v. Sabree*, No. 16-8807-CH (Mich. Cir. Ct. July 13, 2016). LDF has also filed cases alleging discrimination against people with disabilities, including under Section 504 of the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*. *See, e.g.*, Complaint, *Houston Just. v. Abbott,* No. 5:21-00848 (W.D. Tex. Sept. 7. 2021); Complaint, *Fla. State Conf. of the NAACP v. Lee*, No. 4:21-00187-WS-MAF (N.D. Fla. May 5, 2021); Complaint, *People First of Ala. v. Merrill*, No. 2:20-00619-AKK (N.D. Ala. May 1, 2020).

LDF has a substantial interest in the outcome of this case, which will affect the viability of disparate impact claims premised on disability discrimination under two critical antidiscrimination statutes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1557 of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18116(a), prohibits discrimination based on race, color, national origin, sex, age, and disability in the provision of certain health programs and activities. The Act's core purpose is to advance equity and to reduce health disparities by protecting people who have been most vulnerable to discrimination in health care. To fulfill its mandate, the ACA incorporates and builds upon the antidiscrimination provisions of four other civil rights statutes, including Section 504.

This case asks whether Section 504 prohibits disparate impact discrimination against people with disabilities. Section 504 provides that no "otherwise qualified individual" shall "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" in a federally funded program or activity "solely by reason of her or his disability." 29 U.S.C. § 794(a). That prohibition applies to any recipient of federal financial assistance, such as states, cities, schools, airports, hospitals,

parks, and transportation districts. *Id.* § 794(b). If Section 504 prohibits disparate impact discrimination, then the ACA does as well.

Nearly forty years ago, this Court assumed that Section 504 reaches some conduct that has an unjustifiable discriminatory impact on people with disabilities. *Alexander v. Choate*, 469 U.S. 287, 299 (1985). It also set forth a "meaningful access" framework to determine when conduct that impacts persons with disabilities might be actionable. *Id.* at 299–301. For decades since, courts have relied on the framework set forth in *Choate* to authorize disparate impact claims under Section 504. In the decision below, the Ninth Circuit correctly relied on this well-established framework to conclude that Section 504 and the ACA prohibit disparate impact discrimination. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1210–12 (9th Cir. 2020).

The Ninth Circuit's decision should be affirmed for the reasons set out in Respondents' brief. *Amicus curiae* writes separately to emphasize that several of Petitioners' key textual arguments are inconsistent with this Court's prior decisions authorizing disparate impact liability.

Petitioners contend that courts have recognized disparate impact claims only when specific effects-based phrasing is present in the statutory text. But this Court has found that a variety of words and phrases, including a statute's simple prohibition against "discrimination," can create disparate impact liability. When a statute uses flexible language like "discriminate" or "discrimination," this Court has looked to statutory purpose and legislative history in determining whether the statute authorizes disparate impact claims.

Given that Section 504 contains the word "discrimination" and its statutory purpose and legislative history make clear that it is intended to prevent forms of discrimination that are intentional or unintentional, a decision by this Court affirming that the statute encompasses disparate impact claims would be consistent with prior decisions authorizing such claims in other antidiscrimination laws. In fact, disparate impact liability is necessary for Section 504 to fulfill its broad statutory purpose and congressional mandate to empower people with disabilities and ensure their full participation in society.

Disparate impact liability under Section 504 and the ACA is particularly important given the intersection between race and disability. Black people are more likely than other groups to have a disability and associated adverse health outcomes. They are also more likely to encounter unique forms of discrimination and specific barriers to full participation in our society because of their race. Disparate impact liability under these statutes will ensure that all people living with disabilities today and in the future are empowered to reveal and reverse both intentional and inadvertent outcomes of policies and practices.

ARGUMENT

I. THE TEXT OF SECTION 504 IS CONSISTENT WITH DISPARATE IMPACT LIABILITY.

Under most antidiscrimination statutes, there are two general theories of liability available to plaintiffs: disparate treatment and disparate impact. In a disparate treatment case, a plaintiff must establish that the defendant had a discriminatory intent or motive, even if discriminatory intent was not the

primary purpose of the challenged action. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988)). In a disparate impact case, a plaintiff challenges practices that have a disproportionately adverse effect on a protected group and are otherwise unjustified by a legitimate rationale. *Inclusive Cmtys.*, 576 U.S. at 524–25 (citing *Ricci*, 557 U.S. at 577).

Disparate impact liability recognizes that facially neutral policies and practices, even if established for non-discriminatory purposes, "may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 U.S. at 987; *see also United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (emphasizing the importance of disparate impact claims because "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme").

In addition, disparate impact liability serves a critical function in rooting out covert forms of intentional bias, which can be difficult for plaintiffs to identify and prove. *See, e.g.*, *Inclusive Cmtys.*, 576 U.S. at 540 (in addition to permitting plaintiffs to counteract implicit prejudice, disparate impact also serves a role in combating disguised animus that may escape easy classification). This is especially true given how easily discriminatory intent can be concealed. In *International Brotherhood of Teamsters v. United States*, this Court recognized that statistical evidence of disparate impact is often the "only available avenue of proof" to uncover clandestine and covert discrimination. 431 U.S. 324, 339 n.20 (1977) (citation omitted). In that way, disparate impact can serve as a "doctrinal surrogate" to eliminate acts of

intentional discrimination that may be impossible for plaintiffs to prove. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000).

The disparate impact standard of liability was first approved in the employment discrimination context in *Griggs*, 401 U.S. 424, and has been authorized in a variety of statutes, applying to practices related to housing, lending, and education, among others. Contrary to the position taken by Petitioners in this case, courts do not apply a rigid, inflexible standard to determine whether a statute encompasses claims of disparate impact. Instead, this Court and others have endorsed disparate impact claims through a variety of textual phrases, including the term "discrimination."

A. A Statute May Encompass Disparate Impact Claims in the Absence of Specific Phrasing.

To support their argument that Section 504 does not allow for disparate impact claims, Petitioners contend that courts authorize disparate impact liability only in narrow circumstances, when very specific effects-based language is present in the statutory text.[2] Pet. Br. 37–40. This is incorrect.

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[2] Petitioners also contend that disparate impact liability is foreclosed by the text of Section 504 for other reasons, including the language "solely by reason of her or his disability," Pet. Br. 16–17, "by reason of," *id.* at 16, and "otherwise qualified individual." *Id.* at 21–24. But, as Petitioners acknowledge, "by reason of" is functionally identical to the phrase "because of." *Id.* at 16. This Court has already rejected the argument that "because of" limits a statute to claims of intentional discrimination. *See, e.g.*, *Inclusive Cmtys.*, 576 U.S. at 535 (noting that Title VII and ADEA, like the FHA, use "because of" phrasing but that this did not stop the Court from finding those statutes impose disparate impact liability). Petitioners' other arguments with respect to

It is, of course, true that phrases that explicitly refer to the effects of an action on a protected class may support disparate impact liability.[3] In fact, this Court has repeatedly found that antidiscrimination statutes *must* be construed to encompass disparate impact claims when their text refers to the consequences of actions. *Inclusive Cmtys.*, 576 U.S. at 533; *Smith v. City of Jackson*, 544 U.S. 228, 235–36 (2005); *Griggs*, 401 U.S. at 429–30. In the employment discrimination context, the statutory prohibition against practices that "otherwise adversely affect" an employee, found in Title VII and in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a), permits claims of disparate impact because the phrase refers to the effects of the action on the employee rather than the motivation of the employer. *See Smith*, 544 U.S. at 236 (ADEA); *Griggs*, 401 U.S. at 432. (Title VII). Similarly, the language of a provision of the FHA, 42 U.S.C. § 3604(a) (Section 3604(a)), which prohibits actions that "otherwise make unavailable" or deny a dwelling to any person on the basis of race or other protected characteristics, encompasses disparate impact claims because the phrase refers to the consequences of an action rather than the actor's intent. *Inclusive Cmtys.*, 576 U.S. at 534.

But this Court has found the disparate impact theory embedded in a variety of statutory phrases and rejected, as recently as 2015, an attempt to suggest that the phrase "otherwise make unavailable" in

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these phrases are addressed in Respondents' Brief. Resp. Br. 10–22.

[3] Respondents argue that the language of Section 504 constitutes effects-based phrasing. Resp. Br. 10–13. Amicus do not take a position on what constitutes "effects-based phrasing," but contend that specific language is not required for this Court to find that a statute permits disparate impact claims and that the term "discrimination" can encompass disparate impact liability.

Section 3604(a) does not give rise to such a claim. In *Inclusive Communities*, the Texas Department of Housing and Community Affairs asserted that disparate impact claims were not cognizable under the FHA because the statute does not contain the phrase "otherwise adversely affect" like Title VII and the ADEA. Brief for the Petitioners at 19–20, *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015) (No. 13-1371), 2014 WL 6466935. According to Texas, the phrase "otherwise make unavailable" in Section 3604(a) does not "bear any resemblance to the disparate-impact liability provisions of Title VII or the ADEA." *Id.* at 25. That argument was soundly rejected by this Court. *Inclusive Cmtys.*, 576 U.S. at 520, 534 ("Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives."). This demonstrates that precise or exact language is *not* required to find that a statute allows for disparate impact claims.

Indeed, as described further below, this Court and others have recognized statutory provisions as encompassing disparate impact liability in the absence of phrases like "otherwise make unavailable" and "otherwise adversely affect," including when they contain the word "discrimination" and other indicia of broad application, like Section 504 and the ACA.

B. Statutory Text Referring to "Discrimination" Can Give Rise to Disparate Impact Claims.

Petitioners argue that the term "discrimination" in a statute cannot support a finding that the law encompasses disparate impact claims. Pet. Br. 15. Just the opposite is true: the terms "discriminate" or

"discrimination," found in a variety of statutes—including Section 504 and the ACA—have been endorsed by this Court and others as authorizing claims of discriminatory impact when supported by other sources of congressional intent.

As this Court has repeatedly recognized, the terms "discriminate" and "discrimination" are flexible, oftentimes ambiguous, and may be interpreted in various ways depending on the context. *See Guardians Ass'n v. Civ. Serv. Comm'n of New York*, 463 U.S. 582, 592 (1983) (noting that the word "discrimination" is "inherently" ambiguous); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) ("The concept of 'discrimination' . . . is susceptible of varying interpretations."); *see also CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 298 (2011) (Thomas, J., dissenting) ("'Discriminates,' standing alone, is a flexible word."). In *CSX Transportation, Inc.*, where the majority applied the dictionary definition of the term "discriminate," Justice Thomas noted that "[e]ven though 'discriminate' has a general legal meaning relating to differential treatment, its precise contours still depend on its context." 562 U.S. at 298.

This Court's recent ruling in *Inclusive Communities* regarding disparate impact liability under the FHA is instructive here. At issue in that case was Texas's allocation of low-income housing tax credits, which the plaintiff organization alleged had a disparate impact on Black residents in violation of Section 3604(a) and another provision of the FHA, 42 U.S.C. § 3605 (Section 3605). *Inclusive Cmtys.*, 576 U.S. at 533–34. As discussed, this Court found the "otherwise make unavailable" language of Section 3604(a) required the Court to recognize impact claims under that provision because the phrase refers to the consequences of actions, and allowing such claims is

consistent with the FHA's statutory purpose and history. *Id.* at 534, 539.

But this Court's analysis did not stop there. It also found that disparate impact claims are permitted under Section 3605, which prohibits discrimination in real estate-related transactions, because of the provision's inclusion of the word "discriminate," noting "[t]he Court has construed statutory language similar to [Section 3605] to include disparate-impact liability."[4] *Id.* at 534 (citing *Bd. of Educ. of City Sch. Dist. of New York v. Harris*, 444 U.S. 130, 140–41 (1979)).

In *Harris*, this Court considered the ineligibility provisions of the Emergency School Aid Act (ESAA), 20 U.S.C. § 1601, *et seq*. Pursuant to the statute, an educational agency is deemed ineligible for federal financial assistance if the agency has implemented a

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[4] Disparate impact claims have also been authorized in other statutory provisions that contain the word "discriminate," such as 42 U.S.C. § 3604(b), a provision of the FHA that prohibits discrimination in the provision of services or facilities related to a dwelling, among other things. *See, e.g.*, *Graoch Assocs. No. 33, L.P. v. Louisville/Jefferson Cnty. Metro Hum. Rels. Comm'n*, 508 F.3d 366, 371–73 (6th Cir. 2007); *see also Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460, 11466 (Feb. 15, 2013) (guidance from the United States Department of Housing and Urban Development noting that the word "discriminate" is a term that may encompass actions that have a discriminatory effect, and that the FHA's provisions using the term must be interpreted to authorize disparate impact claims). Similarly, the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq*., which prohibits credit discrimination and contains the word "discriminate," has been held by courts and interpreted by regulatory agencies to authorize disparate impact claims. *See, e.g.*, *Miller v. Am. Express Co.*, 688 F.2d 1235, 1237–39 (9th Cir. 1982); *see also* Consumer Fin. Prot. Bureau, Comment 6(a)-2 to Regulation B, 12 C.F.R. Part 1002 (interpreting ECOA to allow for disparate impact claims).

practice that "results in the disproportionate demotion or dismissal of . . . personnel from minority groups," or "otherwise engage[s] in discrimination . . . in the hiring, promotion, or assignment of employees." *Id*. at § 1605(d)(1)(B). The Court noted that the first prong of the statutory provision clearly authorized impact claims, but because the underlying issue in the case involved a challenge to employee assignment, it was required to determine if the second prong did as well. *Harris*, 444 U.S. at 138–39. The Court concluded that the wording of the second prong (containing the word "discrimination" without elaboration) was ambiguous, requiring it "to look closely at the structure and context of the statute and to review its legislative history." *Id*. at 140. After examining these sources of congressional intent, *id*. at 140–50, the Court was "impelled" to a conclusion that disparate impact claims are authorized under ESAA's ineligibility provision prohibiting "discrimination." *Id*. at 140–41.

Petitioners ignore this precedent in asserting that only specific phrases such as "otherwise adversely affect" authorize disparate impact claims and that the word "discrimination" presumptively forecloses such claims. Pet. Br. 15, 37–40. In fact, Petitioners cite ESAA and *Harris* in their brief, but only the first prong of the ineligibility provision, omitting any mention of the second prong, whose general prohibition on "discrimination" the Court found also authorized claims of disparate impact. *Id*. at 39.

As demonstrated by *Harris* and *Inclusive Communities*, this Court has not required specific statutory phrases to find that antidiscrimination laws allow for disparate impact liability and, when necessary, has analyzed factors like purpose and history to determine whether impact claims are permissible under the law. Because Section 504 and

the ACA contain the word "discrimination," which can authorize disparate impact claims depending on the context, it is necessary to examine additional sources of congressional intent related to Section 504 to determine whether plaintiffs may bring disparate impact discrimination claims under these statutes.

II. DISPARATE IMPACT LIABILITY UNDER SECTION 504 IS SUPPORTED BY ITS PURPOSE AND HISTORY.

Petitioners discount the relevance of additional sources of congressional intent—such as purpose and history—that bear on whether Section 504 permits disparate impact liability. Pet. Br. 24. But this Court's precedent reflects the importance of considering those sources in understanding Congress's intent behind broadly stated antidiscrimination statutes.

For example, this Court found the FHA's statutory purpose in eradicating housing discrimination was strong support for its holding in *Inclusive Communities* that disparate impact claims are authorized under the statute. 576 U.S. at 539. Similarly, Title VII and the ADEA share the objective of achieving equality of employment opportunities, which was key to this Court's decisions in *Griggs* and *Smith* that these statutes allow for impact claims. *Smith*, 544 U.S. at 233, 235 (acknowledging that its opinion in *Griggs* was based primarily on an analysis of the purposes of Title VII); *Griggs*, 401 U.S. at 429–30.

Legislative history is also relevant. In this Court's respective decisions finding that the FHA, ESAA, Title VII, and ADEA prohibit disparate impact discrimination, the history of the relevant statute's enactment was discussed at length and found to support a reading that the law encompasses claims of

unjustified disparate impact. *See, e.g.*, *Inclusive Cmtys.*, 576 U.S. at 528–30 (discussing the historical underpinnings that led to the passage of the FHA); *Harris*, 444 U.S. at 141–46 (discussing at length the relevant legislative history of ESAA that supported the Court's holding that the statute permitted impact claims); *Smith*, 544 U.S. at 232–33 (providing the relevant legislative history of the ADEA related to discriminatory impacts on older workers); *Griggs*, 401 U.S. at 434–36 (detailing the relevant legislative history of Title VII).

Because the term "discrimination" is ambiguous, this Court should examine additional sources of congressional intent in determining whether disparate impact claims are permissible under Section 504. As described below, both the purpose and history of Section 504 fully support a reading that disparate impact liability is authorized under the statute.

A. Disparate Impact Claims Are Necessary to Achieve Section 504's Statutory Purpose of Empowering People with Disabilities to Independently Participate in and Contribute to Society.

The Rehabilitation Act is intended "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. § 701(b)(1). The purpose of Section 504, as set forth in the text of the statute, is thus to empower people with disabilities to fully participate in programs receiving federal financial assistance, and to ensure that their disabilities do not inhibit their ability to benefit from such programs. *See Choate*, 469 U.S. at 304. Disparate impact claims under Section 504 are necessary to achieve this broad statutory purpose.

Fulfilling Section 504's purpose requires that people with disabilities can challenge unjustified actions that impact their ability to live independent lives, regardless of evidence of discriminatory intent. For example, in *American Council for the Blind v. Paulson*, the D.C. Circuit considered a challenge to the paper currency issued by the United States Treasury, which was alleged to be inadequate for the visually impaired. 525 F.3d 1256, 1261 (D.C. Cir. 2008). Plaintiffs did not allege that the Treasury had intentionally discriminated against them in designing the currency, but rather that the current format of the banknotes prevented them from determining the denomination, impeding their ability to use paper currency without assistance, "an essential ingredient of independent living." *Id*. In finding that plaintiffs had established a Section 504 disparate impact violation, the court emphasized the "centrality" of the Rehabilitation Act in empowering people with disabilities to engage in economic activity and noted the various ways that the inability to use paper currency could impact their daily lives, including preventing them from hiring a taxi or buying a cup of coffee. *Id*. at 1269. Persons with disabilities are regularly subject to these types of oversights that impede their full participation in the many programs and benefits afforded through our society. Allowing them to bring disparate impact claims under Section 504 is essential to fulfill the law's statutory purpose in empowering people with disabilities and promoting full inclusion in our society.

As recognized by disability rights law professor Mark C. Weber, allowing plaintiffs to bring disparate impact disability discrimination claims "correspond[s] to society's moral sense; it also takes into account the troublesome reality of proving intentional

discrimination." Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C.L. Rev. 1417, 1431 (2015). As in other contexts, by focusing on the effects of mistreatment, allowing for disability disparate impact claims eliminates the reliance on "unprovable acts of intentional discrimination hidden innocuously behind facially-neutral policies or practices." *Joe's Stone Crab, Inc.*, 220 F.3d at 1274. Disparate impact liability thus ensures that people with disabilities do not bear the burden of delineating between consequential oversights and intentional abuses when both result in the same need for remedy to achieve equity.

B. The History of Section 504 Demonstrates that Congress Intended the Statute to Encompass Disparate Impact Liability.

A finding that Section 504 encompasses disparate impact claims is also consistent with the statute's legislative history.

In enacting the Rehabilitation Act, Congress expressly found that "disability is a natural part of the human experience" and "in no way diminishes the right of individuals" to live independently, enjoy self-determination, make choices, contribute to society, pursue meaningful careers, and enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society. 29 U.S.C. § 701(a)(3). As this Court has recognized, Congress believed that discrimination against persons with disabilities was most often the product of "thoughtlessness and indifference" rather than "invidious animus." *Choate*, 469 U.S. at 295. The architects of Section 504 and prior bills repeatedly emphasized that antidiscrimination legislation in the disability context was intended to address the "societal

neglect" of persons with disabilities who had been subject to "oversights." *Id.* at 295–96 (citing, e.g., 119 Cong. Rec. 5880, 5883 (1973) (Senator Cranston describing Section 504 as a response to "previous societal neglect"); 118 Cong. Rec. 526 (1972) (statement of Section 504 cosponsor Senator Percy, describing the legislation leading to the Rehabilitation Act as a national commitment to eliminate the "glaring neglect" of persons with disabilities); 117 Cong. Rec. 45974 (1971) (statement by Representative Vanik in introducing the predecessor to Section 504, noting that discrimination against persons with disabilities was one of the country's "shameful oversights")). As Senator Humphrey noted in 1972, legislation addressing disability discrimination was intended to signal that "we can no longer tolerate the invisibility of [people with disabilities] in America . . ." *Id.* at 296 (citing 118 Cong. Rec. 525–526 (1972)). These statements primarily refer to the discriminatory effects of facially neutral policies rather than focusing on invidious intent, making clear that Congress recognized that the statute addressing disability discrimination would permit claims of disparate impact.

Accordingly, when promulgating Section 504, Congress specifically sought to address systems and structures that can have exclusionary effects on persons with disabilities absent any animus. For example, the statute was intended to apply to architectural barriers, *Choate,* 469 U.S. at 297 (citing S. Rep. No. 93-318, at 4 (1973)), which this Court described as "clearly" not erected with discriminatory intent. *Id.* Congress also made clear that Section 504 should apply when persons with disabilities faced barriers to public transportation, rehabilitation services, education, and employment opportunities.

Id. (citing 118 Cong. Rec. 3320 (1972)). If Section 504 did not encompass disparate impact liability, then it would not reach "much of the conduct Congress sought to alter." *Id.* at 296–97. The history of Section 504 provides ample support for a finding that it encompasses disparate impact liability.

III. DISPARATE IMPACT LIABILITY IS ESPECIALLY NECESSARY TO PROTECT PEOPLE FROM INTERSECTIONAL DISCRIMINATION BASED ON DISABILITY AND RACE.

Disparate impact liability is a crucial tool for protecting the millions of people with disabilities from the overt and covert discrimination that may impact their ability to fully participate in society. One quarter of the adult population in the United States lives with a disability.[5] But rates of disability vary across racial demographics. Indeed, the percentage of Black adults with disabilities exceeds the rate among white adults by roughly five percent.[6]

The disproportionate share of disabilities among Black people is consistent with this country's legacy of racial inequality. Racial segregation has contributed

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[5] *See Disability Impacts All of Us*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html (last visited Oct. 18, 2021).

[6] *Adults with Disabilities: Ethnicity and Race,* Ctrs. for Disease Control & Prevention (Sept. 16, 2020), https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html. The percentage of American Indians with disabilities also exceeds the rate among white adults with disabilities: three in ten American Indian/Alaska Native adults have a disability, whereas one in five white adults have a disability. *Id.* A large share of the Hispanic/Latinx population, one in six, also have disabilities. *Id.*

to toxic exposure and unhealthy living environments correlated to adverse health outcomes, including high rates of asthma, lead poisoning, and other disabling conditions disproportionately experienced within Black communities.[7]

"[D]isparities experienced by adults with disabilities may be compounded by disparities associated with race, ethnicity, and socioeconomic factors."[8] Inequity in access to resources, including healthcare, further amplifies the instance and persistence of disabilities among Black people. While Black people are 1.5 times more likely to have asthma, they are *five times* more likely to rely on emergency department treatment for asthma care.[9] Indeed, in addition to institutional barriers,[10] "conscious and

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[7] Catherine Jampel, *Intersections of Disability Justice, Racial Justice and Environmental Justice* 1, 9, Env't Socio. (Jan. 2018), (citing examples of air pollution, toxic waste, and lead paint exposure in predominantly Black neighborhoods from San Francisco to Baltimore, and noting that disability can result as a "product of the intersections of historical legacies of racism and classism, and the system of ableism can contribute to further harm . . .").

[8] Elizabeth Courtney-Long et al., *Socioeconomic Factors at the Intersection of Race and Ethnicity Influencing Health Risks for People with Disabilities*, J. Racial Ethnic Health Disparities (Apr. 2017), https://pubmed.ncbi.nlm.nih.gov/27059052/.

[9] *Asthma Disparities in America*, Asthma & Allergy Found. of Am., aafa.org/asthmadisparities (last visited Oct. 25, 2021).

[10] *See, e.g.*, David Williams & Tony Rucker, *Understanding and Addressing Racial Disparities in Health Care* 75, Health Care Fin. Rev. (Summer 2000), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194634/. ("[I]nstitutional discrimination is often at least as important as individual discrimination. In the case of racial disparities in medical care, other potential explanations include the geographic maldistribution of medical resources, racial differences in patient preferences, pathophysiology, economic status, insurance

unconscious biases and stereotypes among health care providers and public health practitioners about specific racial and ethnic groups, and people with disabilities, contribute to observable differences in the quality of health care and adverse health outcomes among individuals within those groups."[11] Not only are Black people more likely to have a disability and associated adverse health outcomes, but they are also likely to encounter unique forms of discrimination and specific barriers to full participation in our society. It is widely acknowledged that people of color with disabilities may experience complex forms of discrimination distinct from those experienced by people of color and, separately, people with disabilities.[12] Such discrimination causes harsher treatment of, and increased punishment for, people of color with disabilities. For example, in 2019, the United States Commission on Civil Rights found that students of color with disabilities are more often removed from classrooms for minor infractions than their white counterparts.[13]

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coverage, as well as in trust, knowledge, and familiarity with medical procedures.").

[11] Silvia Yee et al., *Compounded Disparities: Health Equity at the Intersection of Disability, Race, and Ethnicity* (2018), https://dredf.org/wp-content/uploads/2018/01/Compounded-Disparities-Intersection-of-Disabilities-Race-and-Ethnicity.pdf.

[12] *See* Alice Abrokwa, *"When They Enter, We All Enter": Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 Mich. J. Race & L. 15, 17–18 (2018); *see also id.* at 20 ("People who exist at the intersection of race and disability experience a multi-dimensional form of discrimination . . .").

[13] Carolyn Thompson, *Civil Rights Panel: Disabled Students of Color Punished More*, AP News (July 23, 2019), https://apnews.com/article/discrimination-education-politics-united-states-school-discipline-aa1d0514e886442382d09a086f923359.

Racial disparities in healthcare and disability distribution have been persistent, from the racially disparate rates at which people contract and are diagnosed with HIV[14] to the racially disparate effect of the COVID-19 pandemic on racial minorities in part because of their disabilities.[15] These disparities will continue to exist. In decades to come, the community of people in the United States with disabilities will become more diverse in racial and ethnic background, lived experience, and diagnosis. By 2040, the U.S. population will near "majority-minority" status.[16] People living with disabilities today and in the future must be empowered to reveal and reverse both intentional and inadvertent outcomes of policies and practices that impede their full access to society. That is exactly what disparate impact liability was designed to do: root out and remedy facially neutral laws or policies that have a discriminatory effect on protected classes. Disparate impact liability under Section 504 and the ACA is thus essential to the promise of an equitable society for all people, including persons with disabilities.

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[14] *See Health Disparities in HIV/AID, Viral Hepatitis, STDs, and TB*, Ctrs. for Disease Control & Prevention (Sept. 14, 2020), https://www.cdc.gov/nchhstp/healthdisparities/africanamericans.html (showing that in 2018, Black people "accounted for 42% of the 37,968 new HIV diagnoses in the United States and dependent areas").

[15] *See COVID-19, Health Equity Considerations and Racial and Ethnic Minority Groups*, Ctrs. for Disease Control & Prevention (Apr. 19, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.

[16] *See* William Frey, *The US Will Become 'Minority White' in 2045, Census Projects*, Brookings (Mar. 14, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Ninth Circuit.

Respectfully submitted,

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
VICTORIA WENGER
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

COTY MONTAG*
MAHOGANE D. REED
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW
Suite 600
Washington, DC 20005
202-682-1300
cmontag@naacpldf.org

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* *Counsel of Record*